

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/STOP PRESS: MORTGAGE REPOSSESSIONS (PROTECTION OF TENANTS ETC) ACT 2010

## **LANDLORD AND TENANT (**

### **STOP PRESS:**

The Mortgage Repossessions (Protection of Tenants etc) Act 2010 makes provision so as to protect persons whose tenancies are not binding on mortgagees and to require mortgagees to give notice of the proposed execution of possession orders. The Act received the royal assent on 8 April 2010 and comes into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet.

Section 1 makes provision in respect of the power of the court to postpone the date for delivery of possession of a property where a mortgagee under a mortgage of land, which consists of or includes a dwelling-house, brings an action in which the mortgagee claims possession of the mortgaged property and there is an unauthorised tenancy of all or part of the property. By virtue of s 2, where a mortgagee under a mortgage of land, which consists of or includes a dwelling-house, obtains an order for possession of the mortgaged property, the order may be executed only if the mortgagee gives notice at the property of any prescribed step taken for the purpose of executing the order, and only after the end of a prescribed period beginning with the day on which such notice is given. Section 3 deals with interpretation. Section 4 deals with commencement, extent and the short title.

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## **1. RELATIONSHIP OF LANDLORD AND TENANT**

### **(1) CREATION OF TENANCY**

#### **1. General principles.**

The relationship of landlord and tenant arises as a rule<sup>1</sup> when one person ('the landlord') grants to another ('the tenant') a right to the exclusive possession of land<sup>2</sup> for a term less than that which the landlord has in the land<sup>3</sup>. The grant or demise must be either for a time which is subject to a definite limit originally, as in the case of a lease for a term of years certain, or for a time which, although originally indefinite, may be made subject to a definite limit by either party as of right by that party giving appropriate notice to the other, for example a tenancy from year to year<sup>4</sup>. The interest in the property which remains in the landlord is called the reversion, and, as a rule, there is incident to it the right to receive from the tenant payment of rent<sup>5</sup> for the use of the property.

The relationship of landlord and tenant was originally one of contract only, but from early times the contract conferred an estate in the land on the tenant without losing all its contractual characteristics<sup>6</sup>.

1 The relationship of landlord and tenant has also been created by statute: see PARA 5 post.

2 'Land' may include both corporeal hereditaments such as land, mines and buildings and incorporeal hereditaments such as easements, profits à prendre, franchises etc. See further PARA 17 post.

3 See PARA 99 et seq post.

4 A grant for an uncertain duration cannot create a lease: see *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL; and PARA 238 post.

5 As to the nature and the reservation of rent see PARA 242 et seq post. The rent need not be a monetary rent, although in modern times it usually is, and services are not regarded as rent for the purposes of the Rent Acts unless they have been quantified by the parties in monetary terms: *Barnes v Barratt* [1970] 2 QB 657, [1970] 2 All ER 483, CA (no quantification); *Montague v Browning* [1954] 2 All ER 601, [1954] 1 WLR 1039, CA (services quantified and equated to a monetary rent). Where a payment by the occupier is not specifically designated as rent, the court must consider all the circumstances of the case to determine whether the payment is in respect of rent: *Bostock v Bryant* (1990) 61 P & CR 23, [1990] 2 EGLR 101, CA (payment by occupier of gas and electricity bills held not to constitute the payment of rent). In order to create a tenancy, it is not essential that a rent should be reserved: *Knight's Case* (1588) 5 Co Rep 54b at 55a; 2 Platt's Law of Leases 82; *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (overruled on another point by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL); *Birrell v Casey* (1989) 58 P & CR 184, CA; *Skipton Building Society v Clayton* (1993) 66 P & CR 223, 25 HLR 596, CA. Consequently, where no rent is intended to be paid, there is no object in adopting the practice of reserving a peppercorn rent. The acceptance of the lease by the tenant is a sufficient consideration for the contract.

6 As to the origin and nature of leasehold tenure see REAL PROPERTY vol 39(2) (Reissue) PARA 100 et seq; and as to the application to leases of the contractual doctrines of frustration and repudiation see PARA 601 post.

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## 2. Tenancy by contract.

A contract of tenancy may be created by writing or orally by any words which express the intention of entering into legal relations and which grant exclusive possession for a fixed or periodic term<sup>1</sup>, or by conduct<sup>2</sup>. A legal estate for a term of years<sup>3</sup> may be created by a lease by deed for any term<sup>4</sup>, or by a written or oral tenancy agreement for a term not exceeding three years taking effect in possession at the best rent that can be reasonably obtained without taking a fine<sup>5</sup>. It is not necessary for the full establishment of the relationship of landlord and tenant that the tenant should have entered on the land<sup>6</sup>. Any other written or oral contract of tenancy of which specific performance may be ordered creates an agreement for a lease<sup>7</sup> and, in addition, if the tenant enters and pays rent at a yearly rate, creates by operation of law a legal estate, namely a yearly tenancy<sup>8</sup>.

1 Where the indicia of a tenancy are present, then, save in exceptional circumstances, the court will infer that a tenancy is created even if the parties do not intend that legal consequence: *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL. As to the requirement of the reservation of rent see PARA 1 note 5 ante; as to the intention to enter into legal relations see PARA 8 the text and note 1 post; and as to the grant of exclusive possession see PARA 6 post.

2 See PARAS 199, 209 post.

3 A term of years absolute is one of the two legal estates in land capable of subsisting or of being conveyed or created at law (see the Law of Property Act 1925 s 1(1); and REAL PROPERTY vol 39(2) (Reissue) PARAS 45, 100 et seq), and means a term of years, taking effect either in possession or in reversion whether or not at a rent, with or without impeachment for waste, subject or not to another legal estate, and either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created on or after 1 January 1926, a term of years which is not expressed to take effect in possession within 21 years after its creation where required by the 1925 Act to take effect within that period (s 205(1) (xxvii)). 'Term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year: s 205(1)(xxvii). As to commonhold see PARA 18 post.

4 See *ibid* ss 52(1), (2)(d), (g); and PARA 102 post (deed in general necessary for the creation of a legal estate); but exceptions to this rule exist in the case of a lease or tenancy agreement falling within s 54(2) (see the text to note 5 *infra*; and PARAS 101-102 post), or a tenancy arising by operation of law. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 14-15.

5 See *ibid* s 54(2); and PARAS 101-102 post.

6 See *ibid* s 149(2); and PARA 118 post.

7 See PARA 74 post.

8 See PARA 209 post.

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### 3. Attornment.

A person in occupation of property may establish the relationship of landlord and tenant between himself and another person by attornment, that is to say by acknowledging that he is tenant to that other person<sup>1</sup>. Where the occupier is a tenant and agrees to hold of a new landlord during the currency of the agreement without any change in the terms of the tenancy, this is a mere attornment<sup>2</sup>; but if it is more than a mere acknowledgment of a new landlord in that it contains new or different terms of tenancy, it is a lease or an agreement for a lease<sup>3</sup>. Attornment both estops the tenant from disputing the landlord's title<sup>4</sup> and is evidence of that title as against future occupiers even though not claiming through the tenant<sup>5</sup>.

Attornment was formerly necessary upon a grant of the reversion in order to establish the grantee's title, but not in the case of a devise<sup>6</sup>. Attornment is no longer necessary upon the grant of a reversion, but the tenant may safely pay rent to his original landlord until he receives notice of the grant<sup>7</sup>.

Attornment is also appropriate when an owner in occupation of property conveys the property to another under whom he becomes tenant, and an attornment clause can be inserted in mortgages by an occupying owner in order to give the mortgagee the remedies incident to the position of landlord<sup>8</sup>; but usually an attornment clause in a mortgage is of little value because the mortgagee may not in general exercise the remedy of distress unless the clause is registered as a bill of sale<sup>9</sup> and does not need an attornment clause in order to obtain summary judgment<sup>10</sup> for possession<sup>11</sup>.

1 See eg *Re Bowes, ex p Jackson* (1880) 14 ChD 725 at 739, CA.

2 *Cornish v Searell* (1828) 8 B & C 471 at 476 per Holroyd J ('the attornment is the act of the tenant's putting one person in the place of another as his landlord'); *Doe d Linsey v Edwards* (1836) 5 Ad & El 95; *Barry v Goodman* (1837) 2 M & W 768.

3 *Cornish v Searell* (1828) 8 B & C 471; *Doe d Frankis v Frankis* (1840) 11 Ad & El 792 (instrument stated the rent and when it was payable); *Cooper v Lands* (1866) 14 LT 287.

4 See PARA 4 post; and ESTOPPEL vol 16(2) (Reissue) PARAS 1031-1039. An attornment by a tenant to a person claiming by title paramount to that of the landlord suspends the original tenancy: see *Doe d Chawner v Boulter* (1837) 6 Ad & El 675.

5 *Doe d Linsey v Edwards* (1836) 5 Ad & El 95.

6 See *Doe d Wright v Smith* (1838) 8 Ad & El 255 at 260; and see PARA 552 post.

7 See the Law of Property Act 1925 s 151(1), cited in PARA 552 post. As to the person to whom rent is payable see PARA 262 post.

8 For a practical example of the working of such a clause see *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402, [1965] 3 All ER 673, CA (attornment clause in a legal charge of a garage which bound the chargor to obtain supplies of oil and petrol from the chargee enforced against a successor in title to the original chargor).

9 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1655; DISTRESS vol 13 (2007 Reissue) PARA 916; and MORTGAGE vol 77 (2010) PARA 343.

10 le under CPR Pt 24: see CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq.

11 See *Portman Building Society v Young* [1950] 2 All ER 443 at 444-445 (revsd on another point [1951] 1 All ER 191, CA); *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2032. Summary judgment is not available against a mortgagor in proceedings for possession of residential premises: see CPR 24.3(2)(a)(i).

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#### 4. Tenancy by estoppel.

A lease of land is created by estoppel when the grantor or landlord has no legal estate or interest in the land at the time of the grant<sup>1</sup>; and, although a title by estoppel, such as the landlord or grantor in this case possesses, is good only against the person estopped by his own deed, namely the tenant or the grantee, yet as against the person estopped it has all the elements of a real title<sup>2</sup>. It has been judicially stated that 'tenancy by estoppel' does not, however, describe an agreement which would not otherwise be a lease or tenancy<sup>3</sup> but which is treated as being one by virtue of an estoppel. The estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate; and the basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation. Thus on this analysis it is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way round<sup>4</sup>.

A tenant who holds under a lease by a deed between parties is estopped from disputing his landlord's title<sup>5</sup> both during and after the expiration of his term unless he has been evicted by title paramount<sup>6</sup>. The estoppel continues after the tenant has gone out of possession with respect to breaches of covenant committed during the lease<sup>7</sup>.



1 Bac Abr, Leases and Terms for Years (O); *Walton v Waterhouse* (1672) 2 Wms Saund 415c, notes; *Doe d Bristow v Pegge* (1785) 1 Term Rep 758n at 760n per Lord Mansfield CJ; *Cuthbertson v Irving* (1859) 4 H & N 742 at 757; affd (1860) 6 H & N 135; *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 101, [1951] 2 All ER 893 at 896-897, CA, per Sir Raymond Evershed MR.

2 *Davis v Bank of England* (1824) 2 Bing 393 at 407; *Bensley v Burden* (1830) 8 LJOS Ch 85; *Richards v Johnston* (1859) 4 H & N 660; *Richards v Jenkins* (1887) 18 QBD 451 at 456, CA; *Bank of England v Cutler* [1908] 2 KB 208 at 234, CA; and see *First National Bank plc v Thompson* [1996] Ch 231 at 237, [1996] 1 All ER 140 at 145, CA, per Millett LJ. See also *Bell v General Accident Fire & Life Assurance Corp Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA (the foundation of a tenancy by estoppel is that neither the landlord nor the tenant is allowed to deny the other's title); and *Newham London Borough Council v Phillips* [1998] 1 FLR 613, (1997) 30 HLR 859, CA.

As to the circumstances in which a tenancy by estoppel is good against a mortgagee see PARA 34 the text and note 4 post. Where a tenant under a periodic tenancy purports to grant a subtenancy for a term certain the duration of which would extend beyond the period for which the tenant can then be assured that his tenancy will last, the subtenancy is effective as a tenancy by estoppel only in respect of the subsequent period, that is to say for such period of the term certain as would extend beyond the earliest date at which the grantor's own periodic tenancy might be determined by notice to quit; as each date upon which that notice to quit may be given passes, so the tenancy by estoppel is 'fed' and becomes fully effective until the next such date. Cf the position where a tenant purports to sublet for a term certain which exceeds the duration of his own term certain: see PARA 107 post.

3 Eg an agreement which does not grant exclusive possession (a licence). A 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents: see *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 at 413, [1999] 3 All ER 481 at 485-486, HL, per Lord Hoffmann; and see eg *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; and PARA 6 et seq post. As to estoppel between licensor and licensee see ESTOPPEL vol 16(2) (Reissue) PARA 1040.

4 See *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 at 415-416, [1999] 3 All ER 481 at 488, HL, per Lord Hoffmann.

A tenancy by estoppel is, it seems, subject to the operation of the Rent Acts if, apart from the manner of its creation, its terms are such as to fall within those Acts (*Stratford v Syrett* [1958] 1 QB 107 at 112-113, 115, [1957] 3 All ER 363 at 365, 367, CA); but no estoppel as to the terms of any tenancy can operate so as to give a court jurisdiction under those Acts which it would not otherwise possess, or to oust its jurisdiction under those Acts (see PARA 813 post).

5 See ESTOPPEL vol 16(2) (Reissue) PARA 1031. As to the position of the landlord's assignee see ESTOPPEL vol 16(2) (Reissue) PARA 1036.

6 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA; and see *WG Clark (Properties) Ltd v Dupré Properties Ltd* [1992] Ch 297, [1992] 1 All ER 596; *Sadiq v Hussain* [1997] NPC 19, 73 P & CR D44, CA.

7 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA.

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## 5. Tenancy arising under or by reason of statute.

Although at common law the relationship of landlord and tenant is based on contract, there are now circumstances in which, by operation of statute<sup>1</sup>, that relationship is continued after the expiry of any contractual relationship<sup>2</sup>, other situations in which a landlord and a tenant are obliged by statute to enter into a new contractual relationship<sup>3</sup>, and others where the tenancy is prolonged<sup>4</sup> or is converted by statute into a different type of landlord and tenant

relationship<sup>5</sup>. In a few instances the relationship of landlord and tenant is thrust upon parties by statute where previously no contractual relationship had existed between them at all<sup>6</sup>, although some form of contractual relationship (whether that of landlord and tenant or that of licensor and licensee<sup>7</sup>) had existed between the occupier of the premises and some other person. The origins of any existing landlord and tenant relationship can, therefore, be traced to a contract, albeit between different persons, and the incidents of the tenancy will largely be defined by that contract<sup>8</sup>.

1 As to the general scope of legislative intervention in the field of landlord and tenant see PARA 45 et seq post.

2 In the case of statutory tenants under the Rent Act 1977 s 2 (as amended) (see PARA 831 post) and s 3 (see PARA 837 post) and statutory periodic tenants under the Housing Act 1988 s 5 (as amended) (see PARAS 1067-1071 post). As between the statutory tenant and his landlord the relationship of landlord and tenant subsists, but their contract is not continued by the statute, so that in contrast to a tenant at common law (or in equity) a statutory tenant has no estate in the demised premises, but has a purely personal right deriving from statute to retain possession of those premises until an order for possession is made by the court, that right to occupy being the right to occupy upon the terms of the former contract in so far as those terms are consistent with the statutory provisions: see the Rent Act 1977 s 3(1); *Roe v Russell* [1928] 2 KB 117 at 131, CA; *Carter v SU Carbuter Co* [1942] 2 KB 288 at 291, [1942] 2 All ER 228 at 231, CA; and PARAS 832, 837 post. In the case of a statutory periodic tenant, the tenancy arising by statute is deemed to have been granted by the person who was previously the landlord to the person who was previously the tenant: see the Housing Act 1988 s 5(3)(b). As to the terms of the statutory periodic tenancy see PARAS 1068-1070 post.

3 In the case of premises to which the provisions of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post), the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq post), the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post) and the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Chs I, II (ss 1-62) (as amended) (see PARA 1532 et seq post) apply.

4 In the case of (1) tenancies of agricultural holdings to which the Agricultural Holdings Act 1986 applies, where the tenancy is converted to or continued as a tenancy from year to year by the Agricultural Holdings Act 1986 ss 2, 3, with restrictions imposed on the efficacy of notices to quit (see AGRICULTURAL LAND vol 1 (2008) PARA 373 et seq); (2) restricted contracts entered into before 28 November 1980 where, by virtue of the Rent Act 1977 ss 102A-106 (as amended), the operation of any notice to quit is suspended if reference is made to a rent tribunal and that tribunal has power in certain circumstances to curtail the suspension or to confer suspension (see PARA 1002 et seq post); (3) restricted contracts entered into on or after 28 November 1980 where, by virtue of s 106A (as added), on the making of an order for possession of a dwelling house, the court may stay or suspend execution of the order or postpone the date of possession (see PARA 1008 post); (4) business tenancies which are continued by operation of the Landlord and Tenant Act 1954 s 24 (as amended) (see PARA 713 post); (5) long tenancies of certain residential premises, which are continued by s 3 (as amended) (see PARA 1209 post) or by the Local Government and Housing Act 1989 s 186(1), Sch 10 para 3 (see PARA 1248 post); in the latter case, such a tenancy may be terminated by a landlord's notice and replaced by an assured tenancy arising by virtue of Sch 10 para 9 (see PARA 1254 post).

5 Eg (1) the conversion of certain licences into tenancies under the Agricultural Holdings Act 1986 s 2 (see AGRICULTURAL LAND vol 1 (2008) PARA 327); (2) the conversion of copyhold into leasehold interests, the copyhold interests which corresponded in duration to leasehold interests or which were for a life or lives being converted into leasehold interests with effect from 1 January 1926 (Law of Property Act 1922 s 133(1), (3) (repealed); Law of Property Act 1925 s 149(6) (as amended); and see REAL PROPERTY vol 39(2) (Reissue) PARA 39); (3) a tenant's right of first refusal to purchase the landlord's interest under the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq post); and (4) the right of certain public and social housing sector tenants to purchase the freehold or to have a long lease under the Housing Act 1988 (see PARA 1795 et seq post).

6 Eg in the case of subtenants who are thrust upon their superior landlord as direct tenants by the operation of the Rent Act 1977 s 137 (as amended) (see PARAS 975-977 post). In such a case, however, there was a contract between the occupier of the premises (who had become the statutory tenant) and someone else (that is to say the former head tenant) in the first place.

7 As to the position of licensees of mobile homes and their statutory protection see PARA 1267 et seq post.

8 There may also be terms implied by common law or implied, modified or annulled by statute. The first place to look to see what are the terms of a tenancy is, however, always the most recent agreement made between the landlord and the tenant (or their predecessors in title), which sometimes may mean looking right back to the original agreement which set in motion the chain of events which launched any statutory process of

continuation or conversion. As to the abolition of the doctrine of privity of contract between landlords and tenants in relation to tenancies beginning on or after 1 January 1996 see the Landlord and Tenant (Covenants) Act 1995; and PARAS 554, 578 et seq post.

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## **(2) LEASES DISTINGUISHED FROM LICENCES TO OCCUPY LAND**

### **6. Nature of grant of exclusive possession.**

There can be no tenancy without the grant of exclusive possession. Exclusive possession enables the tenant to exclude strangers and to exclude also the landlord unless the landlord is exercising rights to enter the land granted to him under the tenancy agreement<sup>1</sup>. Where the agreement is made in writing, the court analyses the substance of the rights and obligations in the agreement in order to determine whether exclusive possession has been granted<sup>2</sup>. The terms of the true bargain may not, however, be wholly the same as that of the bargain appearing on the face of the agreement, even though the agreement as a whole is not a sham<sup>3</sup>.

Where the owner of land enters into separate agreements with a number of persons for them to share residential accommodation, there is a grant of a joint right to exclusive possession and thus a joint tenancy where the agreements are identical and interdependent<sup>4</sup>. Where, however, there are separate agreements entered into at different times and on different terms, there is no grant of a joint right of exclusive possession<sup>5</sup>.

A contract granting the right to erect and maintain advertising hoardings at specified sites has been held to create a licence and not a tenancy since there was no exclusive possession of any of the sites; the sites were undefined areas in which the hoardings and their concrete bases were to be placed<sup>6</sup>.

1 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *Vandersteen v Agius* (1992) 65 P & CR 266, CA. For examples of cases in which exclusive possession was not conferred on the grantee see PARA 12 post. A lodger does not have exclusive possession and accordingly cannot be a tenant: see PARA 16 post.

2 *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, [1971] 1 WLR 612, CA (proviso that the occupier should not interfere with the owner's right to possession and control of the premises held to be inconsistent with the grant of exclusive possession); *Manchester City Council v National Car Parks* [1982] 1 EGLR 94, (1982) 262 Estates Gazette 1297, CA (right to use a car park during limited hours of the day held not to grant exclusive possession); *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686, [2002] 2 P & CR 253, [2001] All ER (D) 249 (Oct) (agreement to manage a car park held to be a licence); *Dresden Estates Ltd v Collinson* (1987) 55 P & CR 47, [1987] 1 EGLR 45, CA (clause entitling the owner to require the occupier to transfer his occupation to other premises held to be inconsistent with the grant of exclusive possession); *Westminster City Council v Clarke* [1992] 2 AC 288, [1992] 1 All ER 695, HL (where, in discharge of a local authority's statutory duty to secure that accommodation was made available to a person with a priority need, a homeless person was provided with temporary accommodation in a hostel used by the local authority to accommodate homeless, single persons and he occupied a room there under a licence to occupy which did not confer exclusive possession of the room, he was not a secure tenant under the Housing Act 1985, since it was necessary that the local authority retain possession of all the rooms in the hostel in order to supervise and control the activities of the occupiers in the discharge of its responsibilities to the vulnerable persons accommodated there; and accordingly the terms of the licence negating exclusive possession were not inserted for the purposes of enabling the authority to avoid the creation of a secure tenancy). Cf *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, [1999] 3 All ER 481, HL (grant of right to exclusive possession of self contained flat at a weekly rent to homeless person amounts to lease, even though agreement expressly stated to be licence). See also *Joel v International Circus and Christmas Fair* (1920) 124 LT 459, CA; *Three D's Co Ltd v Burrow* as reported in (1949) 99 LJo 239, 564; *Facchini v Bryson* [1952] 1 TLR 1386, CA; *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513, [1957] 3 All ER 563, CA; *University of Reading v*

*Johnson-Houghton* [1985] 2 EGLR 113; *Wigan Borough Council v Green & Son (Wigan) Ltd* [1985] 2 EGLR 242, CA; *Crancour Ltd v Da Silva*, *Crancour Ltd v Merola* (1986) 18 HLR 265, CA; *Dellneed Ltd v Chin* (1986) 53 P & CR 172, [1987] 1 EGLR 75; *Essex Plan Ltd v Broadminster* (1988) 56 P & CR 353, [1988] 2 EGLR 73; *Camden London Borough Council v Shortlife Community Housing Ltd* (1992) 90 LGR 358, 25 HLR 330; *Hunts Refuse Disposal Ltd v Norfolk Environmental Waste Service Ltd* [1997] 1 EGLR 16, [1997] 03 EG 139, CA (licence giving an exclusive right to deposit waste in a quarry was not a grant of exclusive possession).

The court is not bound by the label used by the parties; the test is whether the agreement gives exclusive possession, ie the right to exclude the landlord as well as all others from the premises and it does not matter in principle that it is a very short-term agreement, though the duration may be a relevant indication: *Scottish Widows plc v Stewart* [2006] EWCA Civ 999, [2006] All ER (D) 191 (Jul).

3 *Aslan v Murphy (Nos 1 and 2)*, *Duke v Wynne* [1989] 3 All ER 130, [1990] 1 WLR 766, CA; *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, HL; *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779, CA; and see PARA 7 note 8 post.

4 *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, HL. Earlier decisions to the contrary in *Somma v Hazelhurst* [1978] 2 All ER 1011, [1978] 1 WLR 1014, CA; *Aldington Garages Ltd v Fielder* (1978) 37 P & CR 461, 7 HLR 51, CA; and *Sturolson & Co v Weniz* (1984) 272 Estates Gazette 326, CA, were disapproved in *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL. Where, however, two or more agreements create separate obligations to pay a share of the rent rather than a joint obligation to pay the whole rent, there will be no grant of a joint tenancy: *Mikeover Ltd v Brady* [1989] 3 All ER 618, 59 P & CR 218, CA; but see *Demuren v Seal Estates Ltd* (1978) 7 HLR 83, [1979] 1 EGLR 102, CA.

5 *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, HL; *Stribling v Wickham* (1989) 21 HLR 381, [1989] 2 EGLR 35, CA.

6 *Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304, [2006] 04 EG 168, [2005] All ER (D) 112 (Nov).

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## **7. General principles for determining whether agreement creates lease or licence.**

Save in exceptional circumstances<sup>1</sup>, an agreement creates the relationship of landlord and tenant and not that of licensor and licensee where the following three hallmarks are present:

- 1 (1) there is the grant of exclusive possession<sup>2</sup>;
- 2 (2) the grant is for a fixed or periodic term<sup>3</sup>;
- 3 (3) there is a stated rent<sup>4</sup>.

Where the agreement is made in writing, the question whether it creates a tenancy or a licence is determined by a consideration of the substantive terms of the agreement and not by the labels or terminology used<sup>5</sup>. The professed intentions of the parties are irrelevant in determining whether the agreement creates a tenancy or a licence<sup>6</sup>. Similarly, the effect of statutory security of tenure or other protection is irrelevant in determining whether an agreement creates a tenancy or a licence<sup>7</sup>. The court is, however, required to be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the occupier's claiming statutory protection<sup>8</sup>.

It has been judicially stated that where two substantial parties of equal bargaining power and with full legal advice have agreed that a contract does not create a tenancy, it is surprising and unedifying that one party should seek to argue otherwise<sup>9</sup>.

- 1 As to the circumstances which negative the presumption of a tenancy see PARA 8 post.
  - 2 As to the nature of the grant of exclusive possession see PARA 6 ante.
  - 3 As to the requirements of a fixed or periodic term see PARA 238 post. The grant of a term for an uncertain duration cannot create a lease: see *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL; and PARA 238 post.
  - 4 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL. As to the necessity of the reservation of a rent see PARA 1 note 5 ante. The principles applied in determining whether a grant creates a tenancy or a licence are the same irrespective of whether the premises are for residential or business purposes: see *London & Associated Investment Trust plc v Calow* (1986) 53 P & CR 340, [1986] 2 EGLR 80; but see *Dresden Estates Ltd v Collinson* (1987) 55 P & CR 47, [1987] 1 EGLR 45, CA. The observations in *Street v Mountford* supra were directed primarily to a case in which the three hallmarks were the factors of overriding importance and in which the landlord had deliberately set out to try to exclude Rent Act protection for the tenant and those observations cannot be applied indiscriminately, and particularly not in a case in which there are other, equally significant factors to be taken into account in addition to the three hallmarks: *Mehta v Royal Bank of Scotland plc* (1999) 32 HLR 45, [1999] 3 EGLR 153.
  - 5 'If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence': *Street v Mountford* [1985] AC 809 at 819, [1985] 2 All ER 289 at 294, HL, per Lord Templeman. 'The relationship is determined by the law and not by the label which the parties choose to put upon it': *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at 528, [1957] 3 All ER 563 at 570, CA, per Jenkins LJ. See also *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, [1971] 1 WLR 612, CA; *Marchant v Charters* [1977] 3 All ER 918, [1977] 1 WLR 1181, CA; *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, [2002] 1 All ER 46 (cooking facilities not necessary for premises to constitute a dwelling house of which occupants were tenants); *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406, [1999] 3 All ER 481, HL (grant of right to exclusive possession of self contained flat at a weekly rent to homeless person amounts to lease, even though agreement expressly stated to be licence).
- The Law Commission has recommended that, subject to a very limited number of exceptions, all agreements, whether tenancies or licences, which confer on an individual a right to occupy premises as a home should be 'occupation contracts': see *Renting Homes: The Final Report* (Law Com no 297) (May 2006).
- 6 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL, overruling *Murray Bull & Co Ltd v Murray* [1953] 1 QB 211, [1952] 2 All ER 1079.
  - 7 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, [1971] 1 WLR 612, CA.
  - 8 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, HL (two separate but identical agreements which each reserved to the 'licensor' the right to use the rooms together with the 'licensee' and to permit other persons to use the rooms together with the 'licensee' held to be a pretence to deprive the occupiers of the protection of the Rent Act 1977; occupiers held to be joint tenants); and see *Walsh v Griffith-Jones* [1978] 2 All ER 1002; *Hadjiloucas v Crean* [1987] 3 All ER 1008, [1988] 1 WLR 1006, CA; *Nicolaou v Pitt* (1989) 21 HLR 487, [1989] 1 EGLR 84, CA; *Gray v Brown* (1992) 25 HLR 144, [1993] 1 EGLR 119, CA. For the meaning of 'sham' see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528-529, CA, per Lord Denning MR. See also *Estavest Investments Ltd v Commercial Investments Ltd* (1987) 21 HLR 106, [1988] 2 EGLR 91, CA; *Gisbourne v Burton* [1989] QB 390, (1988) 57 P & CR 192, CA; *Hilton v Plustitle Ltd* [1988] 3 All ER 1051, [1989] 1 WLR 149, CA; *Skipton Building Society v Clayton* (1993) 66 P & CR 223, 25 HLR 596, CA.
  - 9 *Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304 at [28], [2006] 04 EG 168, [2005] All ER (D) 112 (Nov) per Jonathan Parker LJ; applied in *Scottish Widows plc v Stewart* [2006] EWCA Civ 999, [2006] All ER (D) 191 (Jul).

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## 8. Circumstances which negative the presumption of a tenancy.

If the parties do not intend to enter into legal relations at all, no tenancy can be created<sup>1</sup>. The circumstances which negative any intention to create a tenancy include a family arrangement or an act of friendship or generosity<sup>2</sup>. The surrounding circumstances may show that the right to exclusive possession is referable to a legal relationship other than a tenancy, such as occupancy under a contract or an intended contract for the sale of the land<sup>3</sup>, occupancy pursuant to a contract of employment<sup>4</sup>, or occupancy referable to the holding of an office<sup>5</sup>. The grant of a right to occupy pursuant to a statutory duty does not, however, negative the presumption of a tenancy<sup>6</sup>. Where a tenant holds over after the expiry of an existing tenancy, it is an open question whether it is right and proper to infer from all the circumstances, including any payment of rent, that the parties had agreed to enter into a new tenancy<sup>7</sup>.

1 'There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind': *Booker v Palmer* [1942] 2 All ER 674 at 677, CA (owner of cottage gave oral permission for person whose house had been destroyed by bombing to occupy the cottage rent-free for duration of war; occupier held to be licensee). See also *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *Brent London Borough Council v O'Bryan* (1992) 65 P & CR 258, [1993] 1 EGLR 59, CA.

2 *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA (owner of house allowed daughter of deceased tenant to remain in occupation making payments for her use of the house; no tenancy created); *Facchini v Bryson* [1952] 1 TLR 1386, CA (employer and his assistant entered into agreement which allowed the assistant to occupy a house for a weekly payment; assistant held to be a licensee); *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (father allowed his son to occupy father's house on payment of the father's building society loan; son held to be a licensee); *Cobb v Lane* [1952] 1 All ER 1199, CA (owner allowed her brother to occupy house rent-free; no intention to create legal relations); cf *Collier v Hollinshead* [1984] 2 EGLR 14, (1984) 272 Estates Gazette 941 (mother allowed son to continue in occupation of a farm with son paying an annual sum far below market rent; intention to create legal relations); *Nunn v Dalrymple* (1989) 21 HLR 569, CA (grant of right to occupy to daughter-in-law's parents upon payment of a rent; occupier held to be a tenant); *Ward v Warnke* (1990) 22 HLR 496, CA (owner of property allowed daughter and her boyfriend to occupy the same paying a rent; tenancy held to have been created). See also the cases cited in PARA 11 notes 10-11 post.

3 *Isaac v Hotel de Paris Ltd* [1960] 1 All ER 348, [1960] 1 WLR 239, PC (employee who managed a night-bar in hotel for his employer company was allowed to run the bar on his own account and to pay the outgoings pending subject to contract negotiations for the purchase of the shares in the company; employee held to be a licensee); *Sopwith v Stutchbury* (1983) 17 HLR 50, CA (persons let into occupation pending the grant of a tenancy and in the meantime they made periodic payments for their occupation; no tenancy created); *Sharp v McArthur and Sharp* (1986) 19 HLR 364, CA (owner of property who intended to sell it let the occupier into possession and charged him a rent pending the sale; occupier held to be a licensee); *Essex Plan Ltd v Broadminster* (1988) 56 P & CR 353, [1988] 2 EGLR 73 (company let into occupation under an agreement which conferred option on it to call for a long lease of the premises; company held to be a licensee); but see *Bretherton v Paton* (1986) 18 HLR 257, [1986] 1 EGLR 172, CA (person allowed into occupation with the ultimate intention that she should purchase the property; tenancy held to have been created); *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007, CA (prospective tenant allowed into occupation and paying rent held to be a tenant at will).

4 See PARA 15 post.

5 See *Street v Mountford* [1985] AC 809 at 827, [1985] 2 All ER 289 at 300, HL, per Lord Templeman.

6 *Family Housing Association v Jones* [1990] 1 All ER 385, [1990] 1 WLR 779, CA, overruling *Ogwr Borough Council v Dykes* [1989] 2 All ER 880, [1989] 1 WLR 295, CA as being inconsistent with *AG Securities v Vaughan*, *Antoniades v Villiers* [1990] 1 AC 417, [1988] 3 All ER 1058, HL; but see *Westminster City Council v Clarke* [1992] 2 AC 288, [1992] 1 All ER 695, HL.

7 *Longrigg, Burrough and Trounson v Smith* [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847, CA. The court considers with what intention any rent was received: *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA. If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for example, by reason of an existing or possible statutory right to remain, a new tenancy should not be inferred: *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA. See also *Morrison v Jacobs* [1945] KB 577, [1945] 2 All ER 430, CA; *Dealex Properties Ltd v Brooks* [1966] 1 QB 542, [1965] 1 All ER 1080,

CA; *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953; *Sector Properties Ltd v Meah* (1973) 229 Estates Gazette 1097, CA; *Lewis v MTC (Cars) Ltd* [1975] 1 All ER 874, [1975] 1 WLR 457, CA; *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207, [1985] 2 All ER 966, HL; *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368; *Westminster City Council v Basson* (1990) 62 P & CR 57, 23 HLR 225, CA; *Land v Sykes* [1992] 1 EGLR 1, CA; *Akiens v Salomon* (1992) 65 P & CR 364, sub nom *Salomon v Akiens* [1993] 1 EGLR 101, CA; *Tower Hamlets London Borough Council v Ayinde* (1994) 26 HLR 631, CA (local authority's acceptance of rent gave rise to inference that tenancy existed). An agreement between a local authority and a secure tenant who is in arrears to the effect that a possession order will not be executed provided the tenant observes the conditions of the agreement does not operate to create a new tenancy or licence since, as is demonstrated by the Housing Act s 85(2),(3)(a) (see PARA 1356 post) the original tenancy terminated by a possession order can be revived at any time until the original order is executed: see *Burrows v Brent London Borough Council* [1996] 4 All ER 577, [1996] 1 WLR 1448, HL, applied in *Brent London Borough Council v Knightley* [1997] 3 FCR 7, [1997] 2 FLR 1, CA, and followed in *Lambeth London Borough Council v Rogers* [2000] LGR 191, 32 HLR 361, CA.

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## 9. Creation of licence.

A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them<sup>1</sup>, or where exceptional circumstances exist which negative the presumption of the grant of a tenancy<sup>2</sup>. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement operates as a licence<sup>3</sup>, even though the agreement may employ words appropriate to a lease<sup>4</sup>.

Legislation may determine whether a tenancy or a licence exists. For example, under the immigration and asylum legislation a resident of an accommodation centre will not be treated as acquiring a tenancy of or other interest in any part of the centre, whether by virtue of an agreement between the resident and another person or otherwise<sup>5</sup>.

1 *Hancock v Austin* (1863) 14 CBNS 634; *London and North Western Rly Co v Buckmaster* (1874) LR 10 QB 70 (affd (1875) LR 10 QB 444, Ex Ch); *Wilson v Tavenor* [1901] 1 Ch 578 at 581; *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, HL; *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA; *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL. As to the distinction between a licence and a tenancy see PARA 7 ante; and as to the nature of the grant of exclusive possession see PARA 6 ante.

2 As to the circumstances which negative the presumption of a tenancy see PARA 8 ante.

3 *Wells v Kingston-upon-Hull Corpn* (1875) LR 10 CP 402 at 408; *Cory v Bristow* (1877) 2 App Cas 262 at 276, HL; *Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA (residential occupation in 'service hotel'); and see the cases cited in note 1 supra and PARA 6 note 2 ante.

4 See PARA 6 ante. As to sham devices and artificial transactions see PARA 7 note 8 ante.

5 See the Nationality, Immigration and Asylum Act 2002 s 32; and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM. At the date at which this title states the law, s 32 was not in force.

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## 10. Nature of licence.

A mere licence does not create any estate or interest in the property to which it relates<sup>1</sup>; it only makes an act lawful which otherwise would be unlawful<sup>2</sup>. A person cannot grant a licence to himself, nor to himself jointly with another<sup>3</sup>. A purely personal licence is not assignable<sup>4</sup>. A gratuitous licence is revocable by notice at any time<sup>5</sup>, and is revoked by the death of either party or by an assignment of the land over which the licence is granted<sup>6</sup>.

Where a licence is granted by contract, the resulting right to occupy land is usually described as a 'contractual licence', but it is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract<sup>7</sup>. A contractual licence may be revocable (and, if revocable, may be made revocable by a specified period of notice<sup>8</sup>) or may be irrevocable according to the express or implied terms of the contract between the parties<sup>9</sup>, and may be assignable or not assignable according to the terms of the contract<sup>10</sup>. Where the land the subject matter of the licence is owned jointly, the licence may be revoked by one co-owner only<sup>11</sup>. In order to establish a contractual licence there must be a promise which is intended to be binding and is either supported by consideration, or is intended to be acted upon and is in fact acted upon<sup>12</sup>. Thus, where a house was purchased by a father with the aid of a mortgage as a house for his son and daughter-in-law, and the father took the conveyance in his own name but promised that, if the son and daughter-in-law paid all the mortgage instalments, the house would be their property, the son and daughter-in-law were held to be contractual licensees and not tenants, but to be entitled to continue in occupation so long as they paid the instalments<sup>13</sup>. Similarly, where a married couple vacated their own house in which they had been protected by the Rent Acts and came to look after the wife's mother in return for an express promise that they should be permitted to reside for life in her home after her death, they were held to have a contractual licence so to reside<sup>14</sup>.

If the licensee under a revocable licence has brought property onto the land, he is entitled to notice of revocation<sup>15</sup> and to a reasonable time for removing his property and in which to make arrangements to carry on his business elsewhere<sup>16</sup>. Even if a notice specifies an unreasonably short time for the licensee to vacate the premises, it may nevertheless be effective in revoking the licence although it cannot be enforced until a reasonable time has elapsed<sup>17</sup>. If, after the revocation of a licence, the licensee quits the premises and then re-enters, his re-entry constitutes a trespass even though the revocation of the licence was wrongful<sup>18</sup>. If the revocation of the licence is a breach of contract, the licensee may recover damages for the breach<sup>19</sup>. Where there are mutually dependent licences, the grantor of one of the licences may not revoke the licence granted by him while retaining the benefit of the licence granted to him<sup>20</sup>. In the absence of any express or implied stipulation, a licensee may not be compelled to remove buildings erected under the licence<sup>21</sup>.

If by his own act it becomes impossible for the grantor of the licence to give facilities for its exercise, and the licence was given for valuable consideration, the grantor is liable to the licensee in damages for breach of contract<sup>22</sup>.

Since a licence does not create an interest in land, it is not binding upon a successor in title of the original grantor unless the circumstances are such as to give rise to a constructive trust<sup>23</sup>.

1 Nevertheless, the grantor owes a duty of care to the grantee: see PARA 475 post.

2 *Thomas v Sorrel* (1673) Vaugh 330 at 351; *Muskitt v Hill* (1839) 5 Bing NC 694 at 707; *Heap v Hartley* (1889) 42 ChD 461 at 468, CA. Consequently an agreement for a licence is not an agreement for an interest in land such as is now required to comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 79 post): see *Wells v Kingston-upon-Hull Corpn* (1875) LR 10 CP 402 at 409. A licence to occupy land does not give to the licensee or persons claiming through him the protection of the Rent Acts: see *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA; *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA. A person occupying residential premises under a licence cannot be an assured tenant under the Housing Act 1988: see PARAS 1019, 1035 post. As to the statutory protection of agricultural workers



occupying tied cottages as part of their remuneration see PARA 1134 et seq post; and as to the limited security of tenure given to occupiers of mobile homes see PARA 1267 et seq post.

Where a licence is granted which permits works to be done on land, the licence implies that the access which is needed in order to carry out those works will be granted: see *Europa 2000 Ltd v Keles* [2005] EWCA Civ 1748, [2005] All ER (D) 93 (Dec) (where, however, a factual dispute as to the type of access needed was resolved in favour of the licensor). Where the licence is coupled with the grant of a lease at a premium in contemplation of such works, failure to grant the necessary access will amount to a derogation from grant: *Europa 2000 Ltd v Keles* supra at [31], obiter, per Chadwick LJ.

3 *Harrison-Broadley v Smith* [1964] 1 All ER 867, [1964] 1 WLR 456, CA.

4 See *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193 at 197, CA (licence to seize goods); and CHOSER IN ACTION vol 13 (2009) PARA 97.

5 *R v Hornmon-on-the-Hill Inhabitants* (1816) 4 M & S 562. As to revocation of an equitable licence to occupy premises for life see *Williams v Staite* [1979] Ch 291, [1978] 2 All ER 928, CA.

6 *Coleman v Foster* (1865) 1 H & N 37; *Wallis v Harrison* (1838) 4 M & W 538; *Vaughan v Vaughan* [1953] 1 QB 762, [1953] 1 All ER 209, CA.

7 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* [1971] Ch 233, [1970] 3 All ER 326.

8 See *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638. Where there is an express contractual provision as to the notice required to terminate a licence, that provision must be complied with in accordance with its terms: *Wallshire Ltd v Advertising Sites Ltd* [1988] 2 EGLR 167, CA.

9 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173, [1947] 2 All ER 331, HL; *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556, [1955] 2 All ER 722. See also *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA (a woman who had been living with a man held to be entitled to a contractual licence to occupy the family home until the children of the relationship between the parties were over school age); cf *Horrocks v Forray* [1976] 1 All ER 737, [1976] 1 WLR 230, CA (no agreement between the deceased and his mistress was established, so that her right to occupy the house was a mere licence and revocable); *Chandler v Kerley* [1978] 2 All ER 942, [1978] 1 WLR 693, CA (no licence for woman to occupy house for life; contractual licence only terminable by reasonable notice). See also CONTRACT vol 9(1) (Reissue) PARA 979.

10 See eg *Clapman v Edwards* [1938] 2 All ER 507 (grant of underlease with right to advertise on walls not forming part of demised premises; right of licence not an easement; nothing in underlease to restrict exercise of right to purposes of undertenant's own business; right assignable).

11 *Annen v Rattee* (1985) 17 HLR 323, [1985] 1 EGLR 136, CA.

12 See *Foster v Robinson* [1951] 1 KB 149 at 156, [1950] 2 All ER 342 at 346, CA, per Evershed MR; *Errington v Errington and Woods* [1952] 1 KB 290 at 299, [1952] 1 All ER 149 at 155, CA, per Denning LJ; *Vaughan v Vaughan* [1953] 1 QB 762 at 766-767, [1953] 1 All ER 209 at 211, CA, per Evershed MR and at 768 and at 212 per Denning LJ (citing *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Plimmer v Wellington Corpn* (1884) 9 App Cas 699, PC). See also *Horrocks v Forray* [1976] 1 All ER 737, [1976] 1 WLR 230, CA; cf *Bendall v McWhirter* [1952] 2 QB 466, [1952] 1 All ER 1307, CA (right of deserted wife). As to statutory protection for a deserted spouse or civil partner see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq. In general, a licence to do an act which destroys or substantially alters an easement cannot be revoked after it has been acted upon: see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 132.

13 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (question whether the son and daughter-in-law would be entitled to a conveyance of the property when all the mortgage instalments were paid off left undecided), but Somervell LJ at 294 and 152 and Denning LJ at 295 and 153 expressed the view that the son and daughter-in-law would be so entitled. Cf *Hardwick v Johnson* [1978] 2 All ER 935, [1978] 1 WLR 683, CA (court imputed to the parties an intention to create a contractual licence).

14 *Piquet v Tyler* [1978] CLY 119 (unreported), CA. In *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169, [1962] 3 All ER 593, CA, it was held that a tenancy for life was created in circumstances where the promise had been made by a landlord, and not as part of a family arrangement.

15 Denial of the grant of the licence may be a notification of revocation: *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL.

16 *Cornish v Stubbs* (1870) LR 5 CP 334; *Mellor v Watkins* (1874) LR 9 QB 400; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437; *Canadian Pacific Rly Co v R* [1931] AC 414 at 432, PC, per Lord Russell of Killowen; *Governing Body of Henrietta Barnett School v Hampstead Garden Suburb Institute* (1995) 93 LGR 470.

17 *Minister of Health v Bellotti* [1944] KB 298, [1944] 1 All ER 238, CA (where the suggestion that the notice must specify a reasonable time contained in the judgment in *Canadian Pacific Rly Co v R* [1931] AC 414 at 433, PC, was said to be directed only to the special facts of that case). The Judicial Committee of the Privy Council approved the analysis of the Court of Appeal in *Minister of Health v Bellotti* supra in *Australian Blue Metal Ltd v Hughes* [1963] AC 74, [1962] 3 All ER 335, PC; and *Canadian Pacific Rly Co v R* supra was further distinguished as a decision which depended on the unusual circumstances of the case in *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL. However, in *Governing Body of Henrietta Barnett School v Hampstead Garden Suburb Institute* (1995) 93 LGR 470 at 508, *Canadian Pacific Rly Co v R* supra was said to be a persuasive authority where the same or similar facts apply; in that case a nine-month notice to a body conducting a public function but occupying land as a licensee was held to be invalid where that public body needed to give two years' notice of cessation of activity. In *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 197, [1947] 2 All ER 331 at 340, HL, Lord Porter expressed the provisional view that a licence is prima facie terminable at once after notice to determine has been given, but that the licensee must be given a time reasonable in the circumstances to vacate the premises, while Lord Uthwatt at 199 and 341 and Lord MacDermott at 206 and 345 were of opinion that in the circumstances of the case the notice given must be a reasonable notice. See also *Earl of Iveagh v Martin* [1961] 1 QB 232, [1960] 2 All ER 668. Cf *Australian Blue Metal Ltd v Hughes* supra (licence to extract magnesite held to be terminable at will), distinguishing *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* supra; and see *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638. The principle in *Minister of Health v Bellotti* supra applies only in the case of a simple revocable licence and has no application where there is an express contractual provision as to the required notice: *Wallshire Ltd v Advertising Sites Ltd* [1988] 2 EGLR 167, CA.

18 *Thompson v Park* [1944] KB 408, [1944] 2 All ER 477, CA.

19 *Smart v Jones* (1864) 15 CBNS 717; *Kerrison v Smith* [1897] 2 QB 445; cf *Wilson v Tavener* [1901] 1 Ch 578.

20 *Hopgood v Brown* [1955] 1 All ER 550, [1955] 1 WLR 213, CA (mutual drainage licences).

21 *Never-Stop Railway (Wembley) v British Empire Exhibition (1924) Inc* [1926] Ch 877.

22 *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, HL (grantor of a licence let the premises to a company which refused to permit the licensee to exercise his rights under the licence upon the premises); and see *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA (grantor of a licence for a fixed period forced to sell the premises on which the licence was to be exercised to a local authority, which demolished the premises; as at the date of the granting of the licence the grantor had been aware of the possibility of the compulsory acquisition of the premises within the period of the licence, the parties could not be held to have contracted on the basis of the continued existence of the premises, and the grantor was liable in damages to the licensee). Similarly, where an appellate court finds that a contractual licence existed, but by reason of the contrary finding of the trial court the licence has already been determined and the licensee has lost possession of the premises, the court will order compensation to be paid for the wrongful determination of the licence: *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA (£2,000 compensation). As to the effect of a contract becoming impossible of performance, and as to the application of the doctrine of impossibility of performance generally, see CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

23 *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (overruled on other grounds by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL); *IDC Group Ltd v Clark* [1992] 1 EGLR 187, [1992] 08 EG 108.

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## **11. Instances where grant conferring exclusive possession has been held to operate merely as a licence.**

The following are examples of cases where, notwithstanding the grant of exclusive possession, the occupier has been held to be a licensee only<sup>1</sup>. As a requisitioning authority<sup>2</sup> has no estate or interest in the requisitioned land, it cannot grant a lease, and any grant by the authority can take effect only as a licence<sup>3</sup>, so that an agreement permitting a farmer to occupy and use part of a Royal Air Force airfield as agricultural land was held to create merely a licence<sup>4</sup>. The right to occupy a filling station and garage, where the grantor's products only were to be sold and where a right of control was reserved to the grantor<sup>5</sup>, the right to occupy a room in an elderly persons' home, although the occupier was permitted to furnish the room himself<sup>6</sup>, and benevolent permission to live in a house without payment, where occupation lasted for 16 years<sup>7</sup>, have all been held to be situations where a licence was created. Similarly, a deserted wife, although enjoying certain statutory protection<sup>8</sup>, is to be regarded as the licensee and not the tenant of her husband.

Family arrangements may include an irrevocable grant of the right to exclusive possession, but the grantee may nevertheless be a licensee and not a tenant<sup>9</sup> so that he will not acquire title based on adverse possession<sup>10</sup>; and a person may be allowed temporary rights of exclusive possession to alleviate hardship or to express gratitude for services rendered in the past, and the grant may be construed as a licence, notwithstanding the fact that the occupier or a person claiming under him is thereby deprived of the protection of the Rent Acts<sup>11</sup>. Where, however, a purchaser is allowed into possession pending completion, he is normally regarded as a tenant at will and not a licensee<sup>12</sup> unless it has been expressly stipulated that he is to be a licensee<sup>13</sup>. An agricultural worker who occupies a tied cottage as part of his remuneration is a licensee<sup>14</sup> although he is now accorded some statutory protection<sup>15</sup>. A person who occupies an almshouse under a charitable trust is also a licensee<sup>16</sup>.

1 As to the principles which apply in determining whether an agreement creates a licence or a tenancy see PARA 7 ante; as to the circumstances which negative the presumption of a tenancy see PARA 8 ante; and as to the nature of the grant of exclusive possession see PARA 6 ante.

2 As to the powers of requisitioning conferred on government departments in connection with the 1939-45 war see WAR AND ARMED CONFLICT; and as to the power to make emergency regulations providing for or enabling, inter alia, the requisition or confiscation of property with or without compensation see the Civil Contingencies Act 2004 ss 20, 21, 22(3)(b).

3 *Southgate Borough Council v Watson* [1944] KB 541, [1944] 1 All ER 603, CA; *Minister of Health v Bellotti* [1944] KB 298, [1944] 1 All ER 238, CA; *Lewisham Metropolitan Borough and Town Clerk v Roberts* [1949] 2 KB 608, [1949] 1 All ER 815, CA; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148, [1949] 2 All ER 724; *Torbett v Faulkner* [1952] 2 TLR 659, CA; *Greene v Chelsea Borough Council* [1954] 2 QB 127 at 135, [1954] 2 All ER 318 at 322, CA.

4 *Finbow v Air Ministry* [1963] 2 All ER 647, [1963] 1 WLR 697.

5 *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 All ER 841, [1971] 1 WLR 612, CA.

6 *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 All ER 352n, [1968] 1 WLR 374, CA.

7 *Heslop v Burns* [1974] 3 All ER 406, [1974] 1 WLR 1241, CA.

8 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

9 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA; and see the cases cited in PARA 8 note 2 ante.

10 *Cobb v Lane* [1952] 1 All ER 1199, CA; and see *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA (agreement between a widow and her husband's former employer that she might live rent-free for the remainder of her life held to create a contractual licence, despite use of the words 'tenant at will'). For a further example of a licence arising in a domestic situation see *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA (cohabitee held to be entitled to a contractual licence to occupy the family home until the children were over school-leaving age).

11 *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA; *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA.

12 *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007, CA; and see PARA 8 the text and note 3 ante, PARA 200 post.

13 The Standard Conditions of Sale (4th Edn) condition 5.2 expressly provides that the purchaser is to occupy as licensee and not as tenant pending completion: see PARA 200 note 1 post; and SALE OF LAND.

14 *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA.

15 le under the Rent (Agriculture) Act 1976 (see PARA 1134 et seq post) or under an assured agricultural occupancy under the Housing Act 1988 (see PARAS 1183-1186 post).

16 *Gray v Taylor* [1998] 4 All ER 17, [1998] 1 WLR 1093, CA.

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## 12. Other instances of agreements creating licences.

The following examples are of transactions in which exclusive possession was not conferred upon the grantee, and accordingly no tenancy can have been created<sup>1</sup>; an agreement for standing room in a factory for lace machines, the owner of the factory supplying steam power and reserving the right to enter for the purpose of attending to the running gear<sup>2</sup>; the letting of bookstalls on a railway platform<sup>3</sup>; the letting of space for a stall in an exhibition<sup>4</sup>; permission to use a shed for particular purposes<sup>5</sup>; a right for directors of one company to use a boardroom on premises of another company<sup>6</sup>; an exclusive right to put pleasure boats on a canal<sup>7</sup>; a licence to search for and get copperas stone on certain land at a yearly rental, with a proviso for re-entry on non-payment of rent<sup>8</sup>; power to dig for fireclay<sup>9</sup>; liberty to fasten a coal-hulk to a mooring in a river<sup>10</sup>; liberty to lay and stack coals on land<sup>11</sup>; liberty to search and dig for coal<sup>12</sup>; an agreement giving permission to erect or affix advertisements<sup>13</sup>; a right for an owner of adjoining property to enter premises and build up windows in default of the owner of the premises so doing<sup>14</sup>; and a licence to erect and maintain advertising hoardings on specified sites<sup>15</sup>.

1 See PARA 7 ante. As to the nature of the grant of exclusive possession see PARA 6 ante.

2 *Hancock v Austin* (1863) 14 CBNS 634. However, an agreement to let 'all the room and power' in a mill, with warehouse room and supply of steam power, operated as a lease: *Marshall v Schofield & Co* (1882) 52 LQB 58, CA.

3 *Smith v Lambeth Assessment Committee* (1882) 10 QBD 327, CA. It was formerly considered that a licensee was not liable to be rated and, therefore, the question whether an occupier was a licensee or a tenant arose in rating cases (*Watkins v Milton-next-Gravesend Overseers* (1868) LR 3 QB 350; *London and North Western Rly Co v Buckmaster* (1875) LR 10 QB 444, Ex Ch; *Rochdale Canal Co v Brewster* [1894] 2 QB 852 at 897, CA; *Young & Co v Liverpool Assessment Committee* [1911] 2 KB 195); but it is now established that a licensee can have rateable occupation (see *Westminster City Council v Southern Rly Co* [1936] AC 511 at 533, [1936] 2 All ER 322 at 329, HL). As to the abolition of domestic rates see PARA 521 post.

4 *R v Morrish* (1863) 32 LJMC 245; *Rendell v Roman* (1893) 9 TLR 192; but see *Joel v International Circus and Christmas Fair* (1920) 124 LT 459, CA (such a letting held to create a tenancy). See also *Smith v Northside Developments Ltd* (1987) 55 P & CR 164, [1987] 2 EGLR 151, CA.

5 *Williams v Jones* (1864) 3 H & C 256; affd (1865) 3 H & C 602, Ex Ch.

6 *Municipal Freehold Land Co v Metropolitan and District Rlys Joint Committee* (1883) Cab & El 184.

7 *Hill v Tupper* (1863) 2 H & C 121.

- 8 *Ward v Day* (1863) 4 B & S 337 at 355; affd (1864) 5 B & S 359, Ex Ch.
- 9 *Carr v Benson* (1868) 3 Ch App 524 at 532.
- 10 *Watkins v Milton-next-Gravesend Overseers* (1868) LR 3 QB 350.
- 11 *Wood v Lake* (1751) Say 3.
- 12 *Chetham v Williamson* (1804) 4 East 469; *Doe d Hanley v Wood* (1819) 2 B & Ald 724 at 738; but see *Jones v Reynolds* (1836) 4 Ad & El 805 (agreement to take a lease of iron ore and to work the ironstone in specified proportions held not to be a licence).
- 13 *Wilson v Tavener* [1901] 1 Ch 578 (erection of hoarding); *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, HL (use of space for billposting); *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA (erection of electric sign); *Kewal Investments Ltd v Arthur Maiden Ltd* [1990] 1 EGLR 193 (advertising hoardings).
- 14 *Smith v Colbourne* [1914] 2 Ch 533, CA.
- 15 *Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304, [2006] 04 EG 168, [2005] All ER (D) 112 (Nov).

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### 13. Licence coupled with grant of interest.

A licence coupled with a grant of an interest in property is not revocable<sup>1</sup>. Such a licence is capable of assignment<sup>2</sup>, and covenants may be made to run with it<sup>3</sup>. A right to enter on land and enjoy a profit à prendre or other incorporeal hereditament is a licence coupled with an interest<sup>4</sup> and is irrevocable. Formerly it was necessary that the grant of the interest should be valid; thus, if the interest was an incorporeal hereditament, such as a right to make and use a watercourse, the grant was not valid unless made by deed, and the licence, unless so made, was, therefore, a mere licence and was revocable<sup>5</sup>; but since 1873<sup>6</sup> the court has been bound to give effect to equitable doctrines and it will restrain the revocation of a licence coupled with a grant which should be, but is not, made by deed<sup>7</sup>.

1 *Wood v Leadbitter* (1845) 13 M & W 838 at 845; *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440; *Vaughan v Hampson* (1875) 33 LT 15; *Wood v Manley* (1839) 11 Ad & El 34; *Feltham v Cartwright* (1839) 7 Scott 695; *Taylor v Waters* (1817) 7 Taunt 374.

2 *Muskett v Hill* (1839) 5 Bing NC 694.

3 *Norval v Pascoe* (1864) 34 LJ Ch 82. The common law rules continue to apply since the Landlord and Tenant (Covenants) Act 1995 (see PARA 578 et seq post) does not apply in this situation.

4 As to the distinction between profits à prendre and licences see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 266.

5 *Wood v Leadbitter* (1845) 13 M & W 838.

6 See the Supreme Court Act 1981 s 49; and EQUITY vol 16(2) (Reissue) PARAS 499-500. The Supreme Court Act 1981 is prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1; at the date at which this title states the law, that amendment was not in force.

7 *Lowe v Adams* [1901] 2 Ch 598; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, CA; and see *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 189-191, 194, [1947] 2 All ER 331 at 336-

337, 338, HL. This is part of the supportive role of equity; but equity will also create licences in circumstances in which at common law the occupier would be regarded as a trespasser: see PARA 14 post.

## UPDATE

### 13 Licence coupled with grant of interest

NOTE 6--Amendment in force on 1 October 2009: SI 2009/1604.

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### 14. Licences coupled with proprietary estoppel.

As developed from common law estoppel by representation<sup>1</sup>, proprietary estoppel has been described as follows. The owner of land, A, in some way leads or allows the claimant, B, to believe that he has or can expect some kind of right or interest over A's land. To A's knowledge, B acts to his detriment in that belief. A then refuses B the anticipated right or interest in circumstances that make that refusal unconscionable. In those circumstances, an equity arises in B's favour. This gives B the right to go to court and seek relief. The court has a very wide discretion as to how it will give effect to this equity<sup>2</sup>.

Equity thus recognises and enforces rights (sometimes referred to as 'equities of possession' or 'equitable licences') so as to restrict the revocation of licences to occupy or use premises which at common law would be regarded as revocable. The court will undertake a threefold inquiry based not on B's mistake but on an agreement between A and B or on A's encouragement of B's expectation<sup>3</sup>. The court will inquire:

- 4 (1) whether an equity in favour of B arises out of the conduct and relationship of the parties;
- 5 (2) what is the extent of the equity, if one is established; and
- 6 (3) what is the relief appropriate to satisfy the equity<sup>4</sup>.

The court considers whether the quality of the assurances giving rise to B's expectation and the extent of B's detrimental reliance on those assurances in combination make it unconscionable for A to go back on them<sup>5</sup>. Representations made in the course of subject to contract negotiations do not satisfy this test<sup>6</sup>; and a longstanding practice cannot be converted into a representation or assurance sufficient to found a proprietary estoppel merely because it might have been reasonable for the other party to incur expenditure on the basis that that practice was likely to continue into the future<sup>7</sup>.

It has been judicially suggested that in an extreme case, subsequent unconscionable behaviour by B may mean that an equitable licence will be revoked<sup>8</sup>.

Proprietary estoppel may be a cause of action but only where it involves the promise of an interest in land<sup>9</sup>.

1 As to common law estoppel by representation see ESTOPPEL vol 16(2) (Reissue) PARA 957. For a discussion of the development of proprietary estoppel see Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 42-53; Pawlowski *The Doctrine of Proprietary Estoppel* (Sweet and Maxwell, 1996); Spence *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing, 1999).

2 See *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 5.29, citing the definition of proprietary estoppel given by a joint working group of the Law Commission and HM Land Registry in *Land Registration for the Twenty-First Century, a Consultative Document* (Law Com no 254) (1998) PARA 3.34.

3 The basis of the development of this threefold test, which replaces the traditional 'five probanda' (see ESTOPPEL vol 16(2) (Reissue) PARA 1089) is the dissenting judgment of Lord Kingsdown in *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 ('if a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, take possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation': *Ramsden v Dyson and Thornton* supra at 170). It seems that under this analysis both parties may be mistaken as to the true situation: see *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897.

4 *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 875, CA, per Scarman LJ; and see eg *Parker v Parker* [2003] EWHC 1846 (Ch), [2003] All ER (D) 421 (Jul) (claimant's legal status was as licensee under licence terminable by not less than two years' notice). The court must look at the matter in the round: *Gillett v Holt* [2001] Ch 210 at 225, [2000] 2 All ER 289 at 301, CA, per Robert Walker LJ; and see *Wormall v Wyson* [2004] EWCA Civ 1643, [2005] 05 LS Gaz R 28, [2004] All ER (D) 398 (Nov) (defendant's expectation that she could remain at the property for as long as she wanted unreasonable in the circumstances). The claimant's expectation is normally the maximum extent of the relief given: *Watson v Goldsbrough* [1986] 1 EGLR 265, CA.

5 See eg *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Newman v Blanton* [2002] All ER (D) 107 (Jun); *Ottey v Grundy* [2002] All ER (D) 236 (Nov). As to detrimental reliance and unconscionability see further ESTOPPEL vol 16(2) (Reissue) PARAS 1068 et seq, 1091.

6 See eg *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355, [2002] All ER (D) 360 (Mar) (joint venture negotiations subject to contract; no prospect of establishing estoppel affecting relevant two areas of land); *James v Evans* [2000] 3 EGLR 1, [2000] All ER (D) 1014, CA (defendant submitting that claimant, the deceased's executor, estopped from claiming possession of hill farm on basis of proprietary estoppel coming into existence as a result of negotiations between himself and deceased which had led to his taking over responsibility for the flock of sheep; held that requirement to take over and care for flock had been made known to the defendant before he entered into negotiations for the tenancy and was an ordinary incident of granting of tenancy of a hill farm; defendant always aware that entire negotiation carried on 'subject to contract'; no proprietary estoppel).

7 *Keelwalk Properties Ltd v Waller, Keelwalk Properties Ltd v Griffith* [2002] EWCA Civ 1076, [2002] All ER (D) 467 (Jul).

8 See *Williams v Staite* [1979] Ch 291 at 298, [1978] 2 All ER 928 at 932, CA, per Lord Denning MR.

9 See ESTOPPEL vol 16(2) (Reissue) PARA 1089 the text and notes 18-19.

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## 15. Employee tenant or service occupancy.

An employee in occupation of premises belonging to his employer may be a tenant or a licensee<sup>1</sup>. Such a licensee is often referred to as a 'service occupier'. A service occupier is an employee who occupies his employer's premises in order to perform his duties as an employee<sup>2</sup>. An employee is a service occupier if it is essential to the performance of his duties that he should reside in a particular property or if there is an express term in his contract of employment that he should so reside and by doing so he can better perform his duties as an employee to a material degree<sup>3</sup>. If the employee does not occupy for the better performance of

his duties and there is a written agreement containing provisions which are consistent only with a tenancy, so that the substance of the agreement<sup>4</sup> is the creation of a tenancy, then the employee is a tenant even though the agreement purports expressly to negative the creation of a tenancy<sup>5</sup>.

Where, however, a person is merely permitted to occupy premises, whether as a privilege<sup>6</sup> or by way of remuneration or part payment for his services<sup>7</sup>, he occupies as tenant and not as employee<sup>8</sup>, unless he does not have exclusive possession of the premises<sup>9</sup>. The fact that a person is allowed, as part of his remuneration, to carry on his own business in the premises he is required to occupy does not by itself alter the character of his occupation into that of a tenant<sup>10</sup>. A person who, under the terms of his employment, had exclusive possession of premises as licensee and who continues to occupy those premises as a residence is protected by the provisions of the Protection from Eviction Act 1977 as if he had been or was the tenant of it<sup>11</sup>.

The expression 'service tenancy' is ambiguous and should be avoided<sup>12</sup>. The real antithesis is between those employees who occupy premises as licensees only on the one hand, and those who occupy as tenants of their employers on the other hand<sup>13</sup>. The relationships of employer and employee and of landlord and tenant may exist simultaneously between the same persons<sup>14</sup>, even though the employee occupies his employer's premises rent-free as part remuneration for his services<sup>15</sup>. If the employee occupies as a tenant, the ordinary principles of the law of landlord and tenant will apply, except that, if the premises are a dwelling house and the tenancy is a protected or statutory tenancy under the Rent Act 1977<sup>16</sup> or an assured tenancy under the Housing Act 1988<sup>17</sup>, the landlord will in certain circumstances be able to rely, as a ground for possession:

- 7 (1) under the Rent Act 1977, on the fact that he reasonably requires the dwelling house for occupation as a residence for another employee or prospective employee<sup>18</sup>; and
- 8 (2) under the Housing Act 1988, on the fact that the employee has ceased to be in the landlord's, or a previous landlord's, employment<sup>19</sup>.

Where a service occupancy exists, the employer is regarded as occupying the property vicariously through the employee<sup>20</sup>. An employee has neither estate nor interest in the premises which he occupies in that capacity<sup>21</sup>. Where an employee is entitled as part of his remuneration to occupy premises as a licensee, his right of occupation is a term of his contract of employment and ceases upon the cessation of that employment<sup>22</sup>, subject to the statutory provisions which apply in respect of agricultural workers<sup>23</sup>.

Where a service occupancy comes to an end and the former employee remains in occupation of accommodation owned by the former employer, the question whether the parties intend to enter into fresh legal relations arises. If they do so intend, then, save in exceptional circumstances, if the former employee has exclusive possession of the premises for a term and at a rent, he will become a tenant<sup>24</sup>.

1 As to the distinction between a tenant and a licensee see PARA 7 ante.

2 *Street v Mountford* [1985] AC 809 at 818, [1985] 2 All ER 289 at 294, HL; applied in *Carroll v Manek* (1999) 79 P & CR 173, [1999] All ER (D) 813.

3 *Norris v Checksfield* [1991] 4 All ER 327, [1991] 1 WLR 1241, CA; *South Glamorgan County Council v Griffiths* (1992) 24 HLR 334, [1992] 2 EGLR 232, CA. See also *Glasgow Corp'n v Johnstone* [1965] AC 609, [1965] 1 All ER 730, HL; *Langley v Appleby (Inspector of Taxes)* [1976] 3 All ER 391 (where the issue was whether the employee occupied in a beneficial capacity or in a representative capacity, and all the earlier cases on that subject are reviewed by Fox J). If occupying in a representative capacity, an employee would necessarily be a licensee only, but it does not follow that he is necessarily a tenant because he occupies beneficially. See also *Petersfield Case* (1874) 2 O'M & H 94 at 98 (where the example was given of a gamekeeper occupying a house



in the centre of his employer's premises for the purpose of discharging his duties as gamekeeper); *Bury St Edmunds Borough Case, Clark v St Mary, Bury St Edmunds, Overseers* (1856) 1 CBNS 23 (hall-keeper held to occupy a house adjoining the hall as an employee, whether it was necessary for him to reside or whether he was required to reside there); *R v Spurrell* (1856) LR 1 QB 72 (occupation must be subservient and necessary); *Fox v Dalby* (1874) LR 10 CP 285 at 295, 296 (army officer required by authorities to live over military stores for more efficient performance of duties even though residence was not absolutely necessary for performance). See also *R v Cheshunt Inhabitants* (1818) 1 B & Ald 473 at 476 per Lord Ellenborough CJ (where a person was held to occupy as an employee 'like the case of a coachman, who frequently occupies a room over the stables'); *R v Bardwell Inhabitants* (1823) 2 B & C 161 at 163 (occupation by shepherd as employee not as tenant); *Ramsbottom v Snelson* [1948] 1 KB 473, [1948] 1 All ER 201, DC (stockman required to live in a particular house in order to carry out his duties not a tenant); *Ford v Langford* [1949] 1 All ER 483, CA (gardener not a tenant); *Thompsons (Funeral Furnishers) Ltd v Phillips* [1945] 2 All ER 49, CA (chauffeur paying rent not a tenant). As to the condition and undertaking as to fitness for human habitation implied in relation to houses occupied by agricultural workers otherwise than as tenants see PARA 424 post.

4 See PARA 7 ante.

5 *Facchini v Bryson* [1952] 1 TLR 1386, CA; *British Transport Commission v Assessor for Invernessshire* 1952 SC 511 (references to the landlord or tenant or restrictions on the right to underlet or other expressions appropriate to a tenancy agreement may show that the employee was intended to be a tenant); and see *Leslie A Parsons & Sons Ltd v Griffiths* (1966) 110 Sol Jo 908, CA.

6 *Marsh v Estcourt* (1889) 24 QBD 147, DC; *Dover v Prosser* [1904] 1 KB 84, DC.

7 *Hughes v Chatham Overseers* (1843) 5 Man & G 54; *Smith v Seghill Overseers* (1875) LR 10 QB 422; *R v Spurrell* (1865) LR 1 QB 72; *Martin v West Derby Assessment Committee* (1883) 11 QBD 145, CA (policeman held to be the tenant of his quarters, which were some distance from the police station); cf *Bent v Roberts* (1877) 3 Ex D 66 (constable held to occupy as employee quarters which were structurally part of the police station). See also *R v Lynn* (1838) 8 Ad & El 379; *R v Bishopton Inhabitants* (1839) 9 Ad & El 824; *Wray v Taylor Bros & Co Ltd* (1913) 109 LT 120, CA; *Wall v Gibbs* [1920] WN 187.

8 *Doe d Hughes v Derry* (1840) 9 C & P 494 seems to be to the contrary effect, but in fact the occupation there seems to have been both for the convenience of service and as remuneration.

9 *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA.

10 *White v Bayley* (1861) 10 CBNS 227; *Mayhew v Suttle* (1854) 4 E & B 347, Ex Ch.

11 See the Protection from Eviction Act 1977 ss 1-3, 8(2) (as amended); and PARA 653 post. As to unlawful eviction and harassment generally see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609; and as to the special provisions relating to certain service personnel see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 22 (as amended); and PARA 1083 post. It is unlikely, however, that he will be required to be given a notice to quit under the Protection from Eviction Act 1977 s 5(1A) (as added) (see PARA 214 post); *Norris v Checksfield* [1991] 4 All ER 327, [1991] 1 WLR 1241, CA.

12 Sometimes 'service tenancy' is used as a synonym for a licence in contrast to a tenancy; elsewhere it is the phrase used to describe a tenancy (or licence) under which services are provided by the landlord to the tenant or occupier, as in the phrase 'service apartments'. Alternatively, the expression is sometimes used to describe those tenancies to which the provisions of the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 8 (see PARA 955 post) or the Housing Act 1988 s 7(4)-(6), Sch 2 Pt II, Ground 16 (as amended) (see PARA 1126 post) apply, in contrast to those tenancies where the fact that the landlord is or was the tenant's employer is merely coincidental to the existence of the tenancy.

13 See PARA 7 ante.

14 *Lord Selsey v Rhoades* (1824) 2 Sim & St 41 at 49 per Leach V-C; *Bury St Edmunds Borough Case, Clark v St Mary, Bury St Edmunds, Overseers* (1856) 1 CBNS 23 at 31 per Cresswell J.

15 *Hughes v Chatham Overseers* (1843) 5 Man & G 54 at 78 per Tindal CJ; *R v Spurrell* (1865) LR 1 QB 72.

16 As to the circumstances in which a tenancy is a protected or statutory tenancy under the Rent Act 1977 see PARA 818 et seq post.

17 As to the circumstances in which a tenancy is an assured tenancy under the Housing Act 1988 see PARA 1018 et seq post.

18 See the Rent Act 1977 Sch 15 Pt I, Case 8; and PARA 955 post.

19 See the Housing Act 1988 Sch 2 Pt II, Ground 16 (as amended); and PARA 1126 post.

20 *Bertie v Beaumont* (1812) 16 East 33; *R v Bishopton Inhabitants* (1839) 9 Ad & El 824; *R v Spurrell* (1865) LR 1 QB 72; *Dobson v Jones* (1844) 5 Man & G 112 at 120; *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL.

21 *R v South Newton, Wilts, Inhabitants* (1830) 10 B & C 838; *Lake v Campbell* (1862) 5 LT 582 at 584 per Williams J (where it was pointed out that the employee 'had no right to retain possession of the house after he had ceased to be in the defendant's service; therefore, after he had been requested to leave the house and remove his goods, he became a trespasser in not doing so, and the defendant had a right to remove the goods himself'). As to trespass generally see TORT.

22 See *Richardson v Koefod* [1969] 3 All ER 1264, [1969] 1 WLR 1812, CA; and see *Gough Bros v Ives* (31 January 1978, unreported), CA. The employee's right to occupy ceases even if his dismissal from his employment is unfair according to employment law: *Ivory v Palmer* [1975] ICR 340, CA. See also *Whitbread West Pennines Ltd v Reedy* [1988] ICR 807, (1988) 20 HLR 642, CA.

23 See PARA 1134 et seq post.

24 *Thompsons (Funeral Furnishers) Ltd v Phillips* [1945] 2 All ER 49, CA; *Royal Philanthropic Society v County* (1985) 18 HLR 83, [1985] 2 EGLR 109, CA; *Postcastle Properties Ltd v Perridge* (1985) 18 HLR 100, [1985] 2 EGLR 107, CA. As to the distinction between licences and tenancies generally see PARA 7 ante.

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## 16. Lodger's interest and rights.

A lodger<sup>1</sup> who has no separate apartment is only a licensee<sup>2</sup>. Even where he has a separate apartment, if the landlord retains the general control and dominion of the house<sup>3</sup> including the part occupied by the lodger, so as to prevent the lodger from having exclusive possession<sup>4</sup> he is, therefore, in the position of a licensee only; if, however, the landlord exercises no control over that part, the occupier is a tenant<sup>5</sup>. The occupier does not become a lodger merely by reason of the fact that the landlord resides on the premises and retains control of the passages and staircases and other parts used in common<sup>6</sup>.

In the absence of any agreement to the contrary, a lodger is entitled to the use of the general conveniences of the house in which he resides<sup>7</sup>. The proprietor of lodgings or of a boarding house is bound to take reasonable care of the goods of his lodger or guest<sup>8</sup>.

1 As to who is to be regarded as a lodger see the dicta of Blackburn J in *Allan v Liverpool Overseers* (1874) LR 9 QB 180 at 191-192, DC (approved and applied in *Appah v Parncliffe Investments Ltd* [1964] 1 All ER 838, [1964] 1 WLR 1064, CA and *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL); and see *Bradley v Baylis* (1881) 8 QBD 195 at 241, CA, per Cotton LJ; *Diggle v Guardian Hotels* (1965) 194 Estates Gazette 817, CA; *Aslan v Murphy (Nos 1 and 2)*, *Duke v Wynne* [1989] 3 All ER 130, [1990] 1 WLR 766, CA. See also *Monmouth Borough Council v Marlog* (1994) 27 HLR 30, [1994] 2 EGLR 68, CA (person sharing house with tenant held to be lodger or licensee but not subtenant). For the purposes of the law of distress, however, an undertenant in respect of whose premises the landlord retains general control may be regarded as a lodger, even where the undertenant has occupation of most of the house: *Phillips v Henson* (1877) 3 CPD 26.

As to discrimination on the grounds of sex, race or disability in providing accommodation in a hotel, boarding house or other similar establishment or in affording access to any benefits or facilities see DISCRIMINATION vol 13 (2007 Reissue) PARA 461.

2 *Wright v Stavert* (1860) 2 E & E 721.

3 *Ancketill v Baylis* (1882) 10 QBD 577; *Bradley v Baylis* (1881) 8 QBD 195, CA; *Kent v Fittall* [1906] 1 KB 60, CA; *Thompson v Ward* (1871) LR 6 CP 327 at 360; and see DISTRESS vol 13 (2007 Reissue) PARA 953. The landlord

retains a concurrent right of occupation for management: *Cory v Bristow* (1877) 2 App Cas 262 at 276, HL. A guest at an inn is in the same position: *Smith v St Michael, Cambridge, Overseers* (1860) 3 E & E 383 at 390. A tenant at will or on sufferance may create the relationship of landlord and lodger between himself and another: *Bensing v Ramsay* (1898) 62 JP 613, DC. Where the householder requires unrestricted access to the accommodation in order to provide attendance, such as cleaning the room or providing linen, the occupier will not normally be held to have exclusive possession and thus will be a licensee only: *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; *Crancour Ltd v Da Silvaesa, Crancour Ltd v Merola* (1986) 18 HLR 265, CA.

4 As to exclusive possession generally see PARA 6 ante. Even if the occupier is not a lodger, it does not necessarily follow that he is, therefore, a tenant: *Brooker Settled Estates Ltd v Ayers* (1987) 54 P & CR 165, [1987] 1 EGLR 50, CA.

5 See *Fenn v Graftan* (1836) 2 Bing NC 617; *Monks v Dykes* (1839) 4 M & W 567 at 569. As to the circumstances in which an agreement for the letting of lodgings is required to comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) see PARA 79 post.

6 *Kent v Fittall* [1906] 1 KB 60, CA; cf *Kent v Fittall (No 4)* [1911] 2 KB 1102, CA; *R v Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal, ex p Parikh* [1957] 1 All ER 352, [1957] 1 WLR 410, DC.

7 *Underwood v Burrows* (1835) 7 C & P 26.

8 *Scarborough v Cosgrove* [1905] 2 KB 805 at 811, 813, CA (following *Dansey v Richardson* (1854) 3 E & B 144 and questioning *Holder v Soulby* (1860) 8 CBNS 254); *Caldecutt v Piesse* (1932) 49 TLR 26; *Appah v Parncliffe Investments Ltd* [1964] 1 All ER 838, [1964] 1 WLR 1064, CA. It is the proprietor's duty to take reasonable care to keep the door of the premises shut to prevent the entry of thieves: *Paterson v Norris* (1914) 30 TLR 393; *Appah v Parncliffe Investments Ltd* supra. See also *Calye's Case* (1584) 8 Co Rep 32a; *Clench v D'Arenburg* (1883) Cab & El 42; and LICENSING AND GAMBLING vol 67 (2008) PARA 185. A landlord is, however, under no obligation to take care of his tenant's goods, so that the landlord of a lock-up shop is under no liability to protect his tenant's goods during the night: *Espir v Todd* (1883) Cab & El 154. As to evidence of an agreement that board and lodging are to be paid for see *Davies v Davies* (1839) 9 C & P 87; cf *Keys v Harwood* (1846) 2 CB 905.

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### **(3) SUBJECT MATTER AND PURPOSE OF TENANCY**

#### **(i) Subject Matter**

##### **17. Land; in general.**

A tenancy may be granted of land or any part of land. 'Land' generally includes mines and minerals and other strata under the surface, and buildings erected upon the surface; and all these are corporeal hereditaments<sup>1</sup>. Consequently tenancies may be granted of the surface of land, with the minerals and strata below and buildings above it, or of the surface alone<sup>2</sup>, or of the minerals and strata<sup>3</sup>, or of buildings or any part of a building<sup>4</sup>. Leases may also be granted of interests in land which involve the right to some use of or benefit from or privilege incident to land, but which do not involve exclusive possession, and are, therefore, called incorporeal hereditaments, such as easements<sup>5</sup>, profits à prendre<sup>6</sup>, manors<sup>7</sup> and franchises<sup>8</sup>. Offices<sup>9</sup> which concern the administration of justice and dignities and honours are incapable of being leased<sup>10</sup>. Agreements which confer the right of exclusive possession of goods for a limited time are sometimes called leases<sup>11</sup>, but the term 'lease' is properly restricted to corporeal and incorporeal hereditaments<sup>12</sup>.

1 Cf the Law of Property Act 1925 s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996, s 25(2), Sch 4) ('land' includes land of any tenure, and mines and minerals, whether or not held apart

from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land').

2 Thus the surface, vesture or herbage may be let: Co Litt 47a; *Masters v Green* (1888) 20 QBD 807, DC (lease of 'the exclusive right to feed the grass'). See also *Cattle v Gamble* (1838) 5 Bing NC 46; *Burt v Moore* (1793) 5 Term Rep 329.

3 See *Jegon v Vivian* (1865) LR 1 CP 9 (on appeal sub nom *Vivian v Jegon* (1868) LR 3 HL 285); *Great Western Rly Co v Smith* (1876) 2 ChD 235, CA; *Re Gladstone, Gladstone v Gladstone* [1900] 2 Ch 101, CA; and see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 290 et seq.

4 *Leader v Moody* (1875) LR 20 Eq 145 at 152 (boxes at a theatre).

5 *Newmarch v Brandling* (1818) 3 Swan 99 (use of waggon-way in colliery); and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 1 et seq. Leases could formerly be granted of tithes: see eg *Cox v Brain* (1810) 3 Taunt 95; and see the Ecclesiastical Leases Act 1765 s 1 (repealed). As to the commutation of tithes into tithe rentcharge and the extinguishment of tithe rentcharge see ECCLESIASTICAL LAW vol 14 paras 1212-1213.

6 Eg sporting rights (*Bird v Great Eastern Rly Co* (1865) 19 CBNS 268; *Bird v Higginson* (1837) 6 Ad & El 824, Ex Ch; *Gearns v Baker* (1875) 10 Ch App 355, CA; *West v Houghton* (1879) 4 CPD 197, DC; and see ANIMALS vol 2 (2008) PARA 767 et seq); a several fishery (*Duke of Somerset v Fogwell* (1826) 5 B & C 875; *Grove v Portal* [1902] 1 Ch 727); rights of common (*Sury v Brown* (1625) Lat 99); estovers (*Shep Touch* 222); tolls (*Bridgland v Shapter* (1839) 5 M & W 375; *Harris v Morrice* (1842) 10 M & W 260; *Shepherd v Horsman* (1852) 18 QB 316); and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 272.

7 *Gybson v Searl* (1607) Cro Jac 84, 176.

8 Eg fairs or markets (*Bridgland v Shapter* (1839) 5 M & W 375; and see MARKETS, FAIRS AND STREET TRADING vol 29(2) (Reissue) PARA 1022); or a ferry (*R v Nicholson* (1810) 12 East 330; *Peter v Kendal* (1827) 6 B & C 703; and see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 894).

9 le rights to hold an office or appointment, as opposed to physical premises.

10 *Reynel's Case* (1612) 9 Co Rep 95a; *Howard v Wood* (1679) 2 Lev 245.

11 Thus it has been said that there may be a lease of livestock (*Spencer's Case* (1583) 5 Co Rep 16a at 16b; *Tudgay v Sampson* (1874) 30 LT 262; *Holme v Brunskill* (1878) 3 QBD 495, CA); and agreements for the use of chattels, such as railway rolling stock, were styled leases (see *Sheffield Waggon Co v Stratton* (1878) 48 LQB 35, CA; *A-G v Great Eastern Rly Co* (1879) 11 ChD 449, CA (affd (1880) 5 App Cas 473, HL); *Lancashire Waggon Co Ltd v Nuttall* (1879) 40 LT 291 (affd 42 LT 465, CA)). In modern commercial parlance hiring agreements in respect of furniture, television sets, motor cars and other chattels are often styled 'leases', and cognate expressions used accordingly. These agreements are not true leases and the rules discussed in this title do not apply to them.

As to the letting of rooms in a mill with an agreement for supply of power see *Bentley Bros v Metcalfe & Co* [1906] 2 KB 548, CA; and as to the hire of chattels generally see BAILMENT vol 3(1) (2005 Reissue) PARA 50 et seq.

12 *Jones v IRC, Sweetmeat Automatic Delivery Co v IRC* [1895] 1 QB 484 at 493, DC; *Sheffield Waggon Co v Stratton* (1878) 48 LQB 35, CA.

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## 18. Commonhold units.

It is not possible to create a term of years absolute<sup>1</sup> in a residential commonhold unit<sup>2</sup> unless the term satisfies prescribed<sup>3</sup> conditions<sup>4</sup>. The conditions may relate to<sup>5</sup> length<sup>6</sup>, the circumstances in which the term is granted<sup>7</sup>, or any other matter<sup>8</sup>.

A term of years absolute in a residential commonhold unit or part only of a residential commonhold unit must not:

- 9 (1) be granted for a premium;
- 10 (2) be granted for a term longer than seven years<sup>9</sup>;
- 11 (3) be granted under an option or agreement if:
  - 1 (a) the person to take the new term of years absolute has an existing term of years absolute of the premises to be let;
  - 2 (b) the new term when added to the existing term will be more than seven years; and
  - 3 (c) the option or agreement was entered into before or at the same time as the existing term of years absolute;
- 2 (4) contain an option or agreement to renew the term of years absolute which confers on the lessee or on the lessor an option or agreement for renewal for a further term which, together with the original term, amounts to more than seven years;
- 13 (5) contain an option or agreement to extend the term beyond seven years; or
- 14 (6) contain a provision requiring the lessee to make payments to the commonhold association<sup>10</sup> in discharge of payments which are due, in accordance with the commonhold community statement, to be made by the unit-holder<sup>11</sup>.

A term of years absolute in a residential commonhold unit or part only of a residential commonhold unit may, however, be granted for a term of not more than 21 years to the holder of a lease which has been extinguished<sup>12</sup> if the term of years absolute:

- 15 (i) is granted of the same premises as are comprised in the extinguished lease;
- 16 (ii) is granted on the same terms as the extinguished lease, except to the extent necessary to comply with relevant statutory provisions<sup>13</sup> and excluding any terms that are spent;
- 17 (iii) is granted at the same rent as the rent payable under, and including the same provisions for rent review as were included in, the extinguished lease as at the date on which it was extinguished;
- 18 (iv) is granted for a term equivalent to the unexpired term of the lease immediately before it was extinguished or, if the unexpired term of the lease immediately before it was extinguished is more than 21 years, for a term of 21 years;
- 19 (v) takes effect immediately after the lease was extinguished; and
- 20 (vi) does not include any option or agreement which may create a term or an extension to a term which, together with the term of the term of years absolute, would amount to more than 21 years or which may result in the grant of a term of years absolute containing an option or agreement to extend the term<sup>14</sup>.

An instrument<sup>15</sup> or agreement is of no effect to the extent that it purports to create a term of years in contravention of the above prohibition<sup>16</sup>. However, where an instrument or agreement purports to create a term of years in contravention of that prohibition, a party to the instrument or agreement may apply to the court<sup>17</sup> for an order<sup>18</sup>:

- 21 (A) providing for the instrument or agreement to have effect as if it provided for the creation of a term of years of a specified kind<sup>19</sup>;
- 22 (B) providing for the return or payment of money<sup>20</sup>;
- 23 (C) making such other provision as the court thinks appropriate<sup>21</sup>.

An instrument or agreement which creates a term of years absolute in a commonhold unit which is not residential<sup>22</sup> has effect subject to any provision of the commonhold community statement<sup>23</sup>.

Regulations<sup>24</sup> may impose obligations on a tenant<sup>25</sup> of a commonhold unit<sup>26</sup> and enable a commonhold community statement to impose obligations on a tenant of a commonhold unit<sup>27</sup>. The regulations may, in particular, require a tenant of a commonhold unit to make payments to the commonhold association or a unit-holder in discharge of payments which are due in accordance with the commonhold community statement to be made by the unit-holder or are due in accordance with the commonhold community statement to be made by another tenant of the unit<sup>28</sup>. Regulations may also modify a rule of law about leasehold estates (whether deriving from the common law or from an enactment) in its application to a term of years in a commonhold unit<sup>29</sup>.

1    Ie a leasehold: see PARA 2 note 3 ante.

2    For the meaning of 'commonhold unit' see COMMONHOLD vol 13 (2009) PARA 330. A commonhold unit is residential if provision made in the commonhold community statement by virtue of the Commonhold and Leasehold Reform Act 2002 s 14(1) (see COMMONHOLD vol 13 (2009) PARA 311) requires it to be used only for residential purposes, or for residential and other incidental purposes: s 17(5). For the meaning of 'commonhold community statement' see COMMONHOLD vol 13 (2009) PARA 311.

3    For the purposes of *ibid* Pt 1 (ss 1-70), 'prescribed' means prescribed by regulations: s 64(1). As to the making of regulations under Pt 1 generally see COMMONHOLD vol 13 (2009) PARA 301.

4    *Ibid* s 17(1).

5    *Ibid* s 17(2).

6    *Ibid* s 17(2)(a). Residential commonhold units are not to be let for long unbroken periods as this would reproduce some of the difficulties associated with leasehold blocks which commonhold is meant to address.

7    *Ibid* s 17(2)(b).

8    *Ibid* s 17(2)(c). In the exercise of this power the Lord Chancellor has made the Commonhold Regulations 2004, SI 2004/1829, which came into force on 27 September 2004: see reg 1(1).

9    Ie subject to *ibid* reg 11(2): see heads (i)-(vi) in the text.

10   For the meaning of 'commonhold association' see COMMONHOLD vol 13 (2009) PARA 305.

11   Commonhold Regulations 2004, SI 2004/1829, reg 11(1). For the meaning of 'unit-holder' see COMMONHOLD vol 13 (2009) PARA 331.

12   Ie by virtue of the Commonhold and Leasehold Reform Act 2002 s 7(3)(d) or 9(3)(f): see COMMONHOLD vol 13 (2009) PARAS 322, 324.

13   Ie the provisions of the Commonhold and Leasehold Reform Act 2002 and of the Commonhold Regulations 2004, SI 2004/1829.

14   *Ibid* reg 11(2).

15   For these purposes, 'instrument' includes any document: Commonhold and Leasehold Reform Act 2002 s 69(1).

16   *Ibid* s 17(3). The prohibition referred to in the text is that contained in s 17(1) (see the text and notes 1-4 *supra*).

17   For these purposes, 'the court' means the High Court or a county court: *ibid* s 66(1).

18   *Ibid* s 17(4).

19   *Ibid* s 17(4)(a).

20 Ibid s 17(4)(b).

21 Ibid s 17(4)(c).

22 Ie a commonhold unit which is not residential within the meaning of ibid s 17: see note 2 supra.

23 Ibid s 18.

24 Regulations under ibid s 19: (1) may make provision generally or in relation to specified circumstances (s 19(5)(a)); and (2) may make different provision for different descriptions of commonhold land or commonhold unit (s 19(5)(b)). See also note 3 supra. For the meaning of 'commonhold land' see COMMONHOLD vol 13 (2009) PARA 302.

25 For the purposes of ibid s 19, a reference to a tenant includes a reference to a person who has home rights (within the meaning of the Family Law Act 1996 s 30(2) (as amended)) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285): Commonhold and Leasehold Reform Act 2002 s 61(a) (amended by the Civil Partnership Act 2004 s 82, Sch 9 Pt 2 para 24(1)-(3)).

26 Commonhold and Leasehold Reform Act 2002 s 19(1)(a).

27 Ibid s 19(1)(b). For the prescribed form of commonhold community statement which includes such obligations see the Commonhold Regulations 2004, SI 2004/1829, reg 15, Sch 3.

28 Commonhold and Leasehold Reform Act 2002 s 19(2). See also notes 3, 24 supra. In the application of s 19(2), (3) to a unit with joint unit-holders, a reference to a unit-holder is a reference to the joint unit-holders together: s 13(2)(c). For the meaning of 'joint unit-holder' see COMMONHOLD vol 13 (2009) PARA 331. Regulations made under s 19(1) (see the text and notes 24-27 supra) may, in particular, provide: (1) for the amount of payments under s 19(2) to be set against sums owed by the tenant (whether to the person by whom the payments were due to be made or to some other person) (s 19(3)(a)); and (2) for the amount of payments under s 19(2) to be recovered from the unit-holder or another tenant of the unit (s 19(3)(b)).

29 Ibid s 19(4). See also notes 3, 24 supra.

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## **(ii) Illegal or Immoral Purposes**

### **19. Lettings for an unlawful purpose.**

Where at a time of a letting the premises are to the landlord's knowledge intended to be used for an illegal purpose, the lease is wholly unenforceable and the landlord may not recover the rent or sue upon the tenant's covenants<sup>1</sup>. Formerly it was held that the same results followed where the known intended use was to be immoral, as opposed to illegal, but it is now doubtful whether this is so or, alternatively, what conduct would be held to be sufficiently immoral for the lease to be rendered unenforceable<sup>2</sup>. Where, by reason of illegality or immorality, a lease is unenforceable, then, although the landlord is not at first aware of the improper use, if he has the power of terminating the tenancy and omits to do so after this use has come to his knowledge, he may not afterwards enforce the tenant's obligation<sup>3</sup>.

A letting for the use of the demised premises for a purpose for which planning permission is necessary is not illegal if the parties contemplate that permission should be obtained, and the legality of the letting is not affected by the refusal of planning permission<sup>4</sup>; but, once planning permission for the use of the premises for the requisite purpose has been refused, the court will not order the grant of a new tenancy<sup>5</sup>, as to do so would be to compel the landlord to permit a breach of planning control<sup>6</sup>, and the court will not grant specific performance of an agreement

to let for an illegal or an immoral purpose<sup>7</sup>. There is, however, no term implied in a lease that the tenant will not use the demised premises for immoral purposes<sup>8</sup>.

1 See *Gas Light and Coke Co v Turner* (1840) 6 Bing NC 324, Ex Ch (use prohibited by statute); *Flight v Clarke* (1844) 13 M & W 155. If the rent is payable immediately, and the intended use is not prohibited until subsequently, the rent continues to be payable: *Gibbons v Chambers* (1885) Cab & El 577. As to illegal contracts generally see CONTRACT vol 9(1) (Reissue) PARA 839 et seq.

2 As to letting for immoral purposes see *Upfill v Wright* [1911] 1 KB 506 (claim for rent of premises let to the mistress of a man who the landlord's agent knew or supposed would provide the money for the rent); *Smith v White* (1866) LR 1 Eq 626 (tenant knowing of the intended assignee's intentions to use the premises as a brothel held unable to recover under a covenant of indemnity the amount paid by him to his landlord for dilapidations); *Girardy v Richardson* (1793) 1 Esp 13; *Crisp v Churchill* (1794) cited in 1 Bos & P at 340 (use and occupation); *Appleton v Campbell* (1826) 2 C & P 347 (board and lodging). It is difficult to see how *Upfill v Wright* supra could now be decided in the same way, in the light of the decision in and observations made in *Burfort Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891; and see *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA (where relief from forfeiture was considered); *Ropemaker Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50.

3 *Jennings v Throgmorton* (1825) Ry & M 251 (weekly tenancy). If the lease contains a covenant against illegal user, and the tenant is about to break it, the landlord should apply for an injunction, and not himself attempt to exclude the tenant from the premises: *Lilley v Bennett* (1888) 5 TLR 156.

4 *Best v Glenville* [1960] 3 All ER 478, [1960] 1 WLR 1198, CA.

5 He will not make an order under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) in respect of the renewal of a business tenancy: see PARA 720 et seq post.

6 *Turner and Bell (t/a Avro Luxury Coaches) v Searles (Stanford-le-Hope) Ltd* (1977) 33 P & CR 208, CA.

7 *Cowan v Milbourn* (1867) LR 2 Exch 230; *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692. Again, the present scope of immorality for the purpose of this rule is open to doubt: see note 2 supra. Cf *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA (no warranty given by landlord as to legality of use). See also *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488, CA.

8 *Burfort Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891.

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## 20. Effect of a letting for an unlawful purpose.

Where a lease has been granted but is unenforceable because it was made for an unlawful purpose, the tenant cannot be obliged to pay rent or perform his covenants but is entitled to remain in occupation until the expiry of the term granted by the lease unless the landlord can prove that the grant of the lease was induced by fraudulent misrepresentation on the tenant's part<sup>1</sup>. It seems, however, that the landlord might obtain an order for possession under the proviso for re-entry if the tenant committed a breach of covenant or if the tenant had successfully resisted a claim for rent on the ground that the lease was void<sup>2</sup>. Where a lease contains a covenant against illegal user but no proviso for re-entry and the landlord evicts the tenant for breach of the covenant, the tenant cannot obtain an injunction against the landlord<sup>3</sup>. If a tenant pays rent in ignorance of the fact that the letting is unenforceable, he may not recover the rent so paid unless he pleads and proves fraud on the landlord's part<sup>4</sup>. Where an agreement for a lease is not in itself illegal, an innocent party is not debarred by the other party's fraudulent intention from enforcing the agreement or lease if he so wishes<sup>5</sup>.



- 1 *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 (affd (1840) 6 Bing NC 324, Ex Ch); *Feret v Hill* (1854) 15 CB 207; *Hope v Walter* [1900] 1 Ch 257, CA; *Alexander v Rayson* [1936] 1 KB 169, CA; *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL.
- 2 *Gas Light and Coke Co v Turner* (1839) 5 Bing NC 666 at 677-678 per Tindal CJ.
- 3 *Litvinoff v Kent* (1918) 34 TLR 298; and see CIVIL PROCEDURE vol 11 (2009) PARA 467.
- 4 *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692.
- 5 *Mason v Clarke* [1955] AC 778 at 794, [1955] 1 All ER 914 at 920, HL, per Viscount Simonds and at 805 and 927 per Lord Reid.

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## 21. Supervening illegality.

By permitting the use of premises for certain purposes the landlord does not warrant that the premises may be used for those purposes<sup>1</sup> nor that it will continue to be legal so to use them<sup>2</sup>. If the rent is payable immediately and the intended use does not become prohibited until a subsequent time, the rent continues to be payable<sup>3</sup>. Where premises are let for the purpose of a business which can be conducted in a lawful manner, the landlord is entitled to assume that it will not be conducted in an unlawful manner<sup>4</sup>.

- 1 *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA (where the legal restriction upon the use of the premises stemmed from the user covenants in the headlease, but where express approval was given to the wider proposition that no warranty is given to a tenant or potential tenant). It is for the tenant, if he does not protect himself by an express warranty, to satisfy himself that the premises are fit for the purpose for which he wants to use them, whether that fitness depends upon the state of their structure or the state of the law or any other relevant circumstances: *Edler v Auerbach* [1950] 1 KB 359 at 374, [1949] 2 All ER 692 at 699, cited and approved in *Hill v Harris* supra at 614-615 and at 360. See also *Hart v Windsor* (1848) 12 M & W 68 at 87; *Bottomly v Bannister* [1932] 1 KB 458 at 468, CA; *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488, CA.
- 2 *Newby v Sharpe* (1878) 8 ChD 39, CA.
- 3 *Gibbons v Chambers* (1885) Cab & El 577; *Hewett v Quick Despatch Ltd* (1940) 67 Ll L Rep 130.
- 4 *Streatham Cinema Ltd v John McLauchlan Ltd* [1933] 2 KB 331 (premises let for use as a tote club).

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## 22. Use of premises as brothel.

It is an offence for the lessor or landlord of any premises or his agent:

- 24 (1) to let the whole or part of premises with the knowledge that it is to be used, in whole or in part, as a brothel<sup>1</sup>; or
- 25 (2) where the whole or part of the premises is used as a brothel, to be wilfully a party to that use continuing<sup>2</sup>.

It is an offence for the tenant or occupier, or person in charge, of any premises knowingly to permit the whole or part of the premises to be used as a brothel<sup>3</sup>. It will invariably be a breach of covenant against immoral user for the premises to be used for prostitution or as a brothel<sup>4</sup>; and in cases where the landlord relies upon that user as a breach of covenant entitling the landlord to forfeit the lease the court will be circumspect in granting relief from forfeiture<sup>5</sup>.

Where the tenant or occupier of any premises is convicted of knowingly permitting the whole or part of the premises to be used as a brothel<sup>6</sup>, the lessor or landlord may require the tenant to assign the lease or other contract under which the premises are held by him to some person approved by the lessor or landlord, whose approval may not be unreasonably withheld<sup>7</sup>. If the tenant fails to do so within three months, the lessor or landlord may determine the lease or contract, but without prejudice to the rights or remedies of any party thereto accrued before the date of the determination<sup>8</sup>; and, where the lease or contract is so determined, the court by which the tenant was convicted may make a summary order for delivery of possession of the premises to the lessor or landlord<sup>9</sup>.

Where the tenant or occupier of any premises is so convicted<sup>10</sup> and either:

- 26 (a) the lessor or landlord, after having the conviction brought to his notice, fails or failed to exercise his statutory rights<sup>11</sup> in relation to the lease or contract under which the premises are or were held by the person convicted; or
- 27 (b) the lessor or landlord, after exercising his statutory rights so as to determine that lease or contract, grants or granted a new lease or enters or entered into a new contract of tenancy of the premises to, with or for the benefit of the same person, without having all reasonable provisions to prevent the recurrence of the offence inserted in the new lease or contract,

then, if subsequently an offence is committed in respect of the premises during the subsistence of the lease or contract referred to in head (a) above or, where head (b) above applies, during the subsistence of the new lease or contract, the lessor or landlord is deemed to be a party to the offence unless he shows that he took all reasonable steps to prevent the recurrence of the offence<sup>12</sup>.

1 For the meaning of 'brothel' see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 218. Premises are to be treated, for the purposes of the Sexual Offences Act 1956 ss 33-35 (see the text and notes 2-12 infra), as a brothel if people resort to the premises for the purpose of lewd homosexual practices in circumstances in which resort to them for lewd heterosexual practices would have led to the premises being treated as a brothel for the purposes of ss 33-35: Sexual Offences Act 1967 s 6. For an example of a case in which forfeiture was sought by reason of the use of premises as a homosexual brothel see *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA.

2 Sexual Offences Act 1956 s 34. As to prosecution and penalties see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 220.

3 Ibid s 35(1). As to prosecution and penalties see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 220.

4 There is no implied covenant against illegal or immoral user, so that an express covenant is needed: see *Burfort Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891 (landlord forced to rely upon a covenant against causing a nuisance in order to seek to forfeit a lease of premises being used for prostitution). Where premises are sublet, however, the tenant may not be in breach of such a covenant unless he has knowledge of the immoral use by his subtenant: see *British Petroleum Pension Trust Ltd v Behrendt* (1985) 52 P & CR 117, 18 HLR 42, CA (cited in PARA 500 post).

5 See PARA 622 post.

6 le under the Sexual Offences Act 1956 s 35(1): see the text and note 3 supra.

7 Ibid s 35(2), Sch 1 paras 1, 4. Schedule 1 (as amended) has effect subject to the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt II (ss 14-25) (as amended) (see PARA 1073 et seq post), the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post), the Rent Act 1977 (see PARA 808 et seq post), the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARA 1011 et seq post) and the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post): Sexual Offences Act 1956 Sch 1 para 5 (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 5); Interpretation Act 1978 s 17(2)(a).

It is also an offence for the tenant or occupier of any premises knowingly to permit the whole or part of the premises to be used for the purposes of habitual prostitution (see the Sexual Offences Act 1956 s 36 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 221); but a conviction under s 36 does not enable the landlord to determine the lease under s 35(2).

As to the effect on the validity of a lease of a false representation by the tenant of his intention to carry on a lawful trade see *Feret v Hill* (1854) 15 CB 207; cf *Brash v Munro and Hall* (1903) 5 F (Ct of Sess) 1102. See also *Borthwick-Norton v Romney Warwick Estates Ltd* [1950] 1 All ER 798, CA (tenant who realised the fact that a subtenant was using premises as a brothel not entitled to relief against forfeiture); cf *Yates v Morris* [1951] 1 KB 77, [1950] 2 All ER 577, CA; *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch 1, [1981] 1 All ER 619; *Ropemakers Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50; *Ropemakers Properties Ltd v Noonhaven Ltd (No 2)* [1991] 1 EGLR 69.

8 Sexual Offences Act 1956 Sch 1 para 2. See also note 7 supra.

9 Ibid Sch 1 para 3. See also note 7 supra.

10 See note 6 supra.

11 For these purposes, references to the statutory rights of a lessor or landlord refer to his rights under the Sexual Offences Act 1956 Sch 1 (as amended) or under the Criminal Law Amendment Act 1912 s 5 (repealed).

12 Sexual Offences Act 1956 s 35(3).

## UPDATE

### 22 Use of premises as brothel

NOTE 7--Sexual Offences Act 1956 s 35(2) amended: Statute Law (Repeals) Act 2008.

NOTE 11--Reference to Criminal Law Amendment Act 1912 s 5 omitted: 1956 Act s 35(3) (amended by 2008 Act).

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## (4) CAPACITY TO GRANT AND ACCEPT TENANCIES

### (i) Capacity to grant Tenancies

#### 23. In general.

An owner absolutely entitled in fee simple who is an individual and is under no personal incapacity has, as incident to his right of disposition, power to grant tenancies to such persons and for such periods and on such terms and conditions as he pleases<sup>1</sup>, provided that in doing so

he does not discriminate against any potential tenant on the grounds of that person's sex<sup>2</sup>, race<sup>3</sup> or mental or physical disability<sup>4</sup>. Persons entitled to limited or defeasible or partial interests in property<sup>5</sup>, and persons under disability, trustees and corporations, may grant tenancies to the extent permitted by law in each particular case<sup>6</sup>.

1 As to the power to grant a term of years absolute in registered land by means of a registered disposition, and as to the principle that an unregistered disposition of an interest in registered land creates only an equitable interest, see LAND REGISTRATION; as to leases which require registration for completion see PARA 100 post; as to transactions at an undervalue, preferences and transactions defrauding creditors see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq; as to the rectification of leases see PARAS 155-158 post; and MISTAKE vol 77 (2010) PARA 57 et seq; and as to compensation for loss suffered by a person taking an underlease due to undisclosed land charges see the Law of Property Act 1969 s 25 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 617.

2 As to discrimination on the grounds of sex see PARA 48 post; and DISCRIMINATION vol 13 (2007 Reissue) PARA 337 et seq.

3 As to discrimination on the grounds of race see PARA 49 post; and DISCRIMINATION vol 13 (2007 Reissue) PARA 436 et seq.

4 As to disability discrimination see PARAS 50-51 post; and DISCRIMINATION vol 13 (2007 Reissue) PARA 507 et seq. An agreement relating to the lease of any property which comprises or includes a dwelling may not prohibit or restrict its occupation by, or the provision in it of accommodation for, persons with mental disorders: see the Leasehold Reform, Housing and Urban Development Act 1993 s 89; and PARA 50 post.

5 In general, where persons are so entitled, the land in question is settled land or is held on a trust of land. As to land in which a minor has a beneficial interest see PARA 25 post; and as to the powers of leasing of tenants for life, and persons having the powers of tenants for life in the case of settled land, and of trustees of land see PARAS 30-31 post.

6 See PARA 25 et seq post.

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## **24. The Crown.**

Subject to certain special provisions applying to particular types of lease<sup>1</sup>, the Crown Estate Commissioners<sup>2</sup> may lease any land of the Crown Estate for any purpose whatever for any term not exceeding 100 years<sup>3</sup>.

The Chancellor and Council of the Duchy of Lancaster<sup>4</sup> may lease land forming part of the possessions of the Duchy on such terms as they think fit; but no lease may be so granted unless the Chancellor and Council are satisfied that the consideration for the grant of the lease is in all the circumstances the best consideration in money or money's worth which can reasonably be obtained or that the lease is for public or charitable purposes<sup>5</sup>. Special powers of leasing also apply in relation to land of the Duchy of Cornwall<sup>6</sup>.

Crown private estates may be leased as freely as if they were owned by ordinary subjects<sup>7</sup>.

The following statutory provisions apply in relation to Crown land<sup>8</sup> as in relation to other land:

- 28 (1) specified provisions of the Landlord and Tenant Act 1985 relating to service charges, insurance and managing agents<sup>9</sup>;
- 29 (2) Part II of the Landlord and Tenant Act 1987<sup>10</sup>;
- 30 (3) Part IV of the 1987 Act<sup>11</sup>;

- 31 (4) specified provisions of the 1987 Act requiring information to be furnished to tenants<sup>12</sup>;
- 32 (5) the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 relating to management audit<sup>13</sup>;
- 33 (6) the statutory restriction on the termination of a tenancy for failure to pay a service charge etc<sup>14</sup>;
- 34 (7) the statutory right of a recognised tenants' association to appoint a surveyor<sup>15</sup>; and
- 35 (8) specified provisions<sup>16</sup> of the Commonhold and Leasehold Reform Act 2002<sup>17</sup>.

Other specified provisions of the Landlord and Tenant Act 1987<sup>18</sup> apply to a tenancy from the Crown<sup>19</sup> if there has ceased to be a Crown interest in the land subject to it<sup>20</sup>. Where there exists a Crown interest in any land subject to a tenancy from the Crown and the person holding that tenancy is himself the landlord under any other tenancy whose subject-matter comprises the whole or part of that land, those provisions apply to that other tenancy, and to any derivative sub-tenancy, notwithstanding the existence of that interest<sup>21</sup>.

1 See CROWN PROPERTY vol 12(1) (Reissue) PARA 245 (Crown foreshore); and ARMED FORCES vol 2(2) (Reissue) PARA 119 (land for military purposes etc). See also AGRICULTURAL LAND vol 1 (2008) PARAS 528, 564; and see PARAS 883, 1039, 1147, 1198, 1239 post.

As to the principle that the Crown is not bound by an Act unless expressly named in it see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 384. See also *Town Investments Ltd v Department of the Environment* [1976] 3 All ER 479, [1976] 1 WLR 1126, CA; revsd on another point [1978] AC 359, [1977] 1 All ER 813, HL.

2 As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

3 See CROWN PROPERTY vol 12(1) (Reissue) PARA 290.

4 As to the powers and authorities of the Chancellor and Council of the Duchy of Lancaster see CROWN PROPERTY vol 12(1) (Reissue) PARA 305.

5 Duchy of Lancaster Act 1988 s 1(1), (2); and see CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the Duchy of Lancaster see CROWN PROPERTY vol 12(1) (Reissue) PARA 300.

6 See CROWN PROPERTY vol 12(1) (Reissue) PARA 334 et seq. As to the Duchy of Cornwall see CROWN PROPERTY vol 12(1) (Reissue) PARA 318.

7 See CROWN PROPERTY vol 12(1) (Reissue) PARA 359.

8 Land is Crown land if there is or has at any time been an interest or estate in the land (1) comprised in the Crown Estate; (2) belonging to Her Majesty in right of the Duchy of Lancaster; (3) belonging to the Duchy of Cornwall; or (4) belonging to a government department or held on behalf of Her Majesty for the purposes of a government department: Commonhold and Leasehold Reform Act 2002 s 172(2).

9 Ie the Landlord and Tenant Act 1985 ss 18-30B, Schedule (as amended): see PARA 326 et seq post. No failure by the Crown to perform a duty imposed by or by virtue of any of ss 21-23A (as amended), or of any of Schedule paras 2-4A (as amended) makes the Crown criminally liable; but the High Court may declare any such failure without reasonable excuse to be unlawful: Commonhold and Leasehold Reform Act 2002 s 172(3).

10 Ie the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (appointment of manager by leasehold valuation tribunal): see PARA 399 et seq post.

11 Ie ibid Pt IV (ss 35-40) (as amended) (variation of leases): see PARAS 149-154 post.

12 Ie ibid ss 46-49 (as amended): see PARAS 53, 257, 621 post.

13 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch V (ss 76-84) (as amended): see PARA 404 et seq post.

14 Ie the Housing Act 1996 s 81 (as amended): see PARA 610 post.

15 Ie ibid s 84, Sch 4: see PARA 337 et seq post.

16 le in Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 5 (ss 158-172), the provisions relating to any of the provisions within heads (1)-(7) in the text, Sch 11 Pt 1 (see PARA 355 et seq post) and ss 164-171.

17 Ibid s 172(1). Any sum payable under any of the provisions mentioned in heads (1)-(8) in the text by the Chancellor of the Duchy of Lancaster may be raised and paid under the Duchy of Lancaster Act 1817 s 25 as an expense incurred in improvement of land belonging to Her Majesty in right of the Duchy; and any sum payable under any such provision by the Duke of Cornwall (or any other possessor for the time being of the Duchy of Cornwall) may be raised and paid under the Duchy of Cornwall Management Act 1863 s 8 as an expense incurred in permanently improving the possessions of the Duchy: Commonhold and Leasehold Reform Act 2002 s 172(4), (5).

18 le the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq post), Pt III (ss 25-34) (as amended) (see PARA 1783 et seq post), ss 42-42B (as amended) (see PARAS 352-353 post) and so much of Pt VII (ss 52-62) (as amended) as relates to those provisions.

19 For these purposes, 'tenancy from the Crown' means a tenancy of land in which there is, or has during the subsistence of the tenancy been, a Crown interest superior to the tenancy; and 'Crown interest' means (1) an interest comprised in the Crown Estate; (2) an interest belonging to Her Majesty in right of the Duchy of Lancaster; (3) an interest belonging to the Duchy of Cornwall; (4) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department: *ibid* s 56(4).

20 Ibid s 56(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 172(6)(a)). In so far as relating to the Landlord and Tenant Act 1987 ss 42A, 42B (as added) (see PARA 353 post), at the date at which this title states the law the amendments made by the Commonhold and Leasehold Reform Act 2002 s 172(6) were not in force.

21 Landlord and Tenant Act 1987 s 56(3) (amended by the Commonhold and Leasehold Reform Act 2002 s 172(6)(b)); and see note 20 *supra*.

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## **25. Persons under disability.**

A contract made by a person who at the time lacked the capacity to make it is binding upon him in every respect unless he can show that the other contracting party knew of the incapacity at the time<sup>1</sup> or knew of such facts and circumstances that he must be taken to have known of the incapacity<sup>2</sup>. A disposition made during a lucid interval by a person who is mentally incapable of contracting at other times is valid<sup>3</sup>, even if he is liable to be detained at the time<sup>4</sup>. Where a person's property and affairs have become subject to the jurisdiction of the Court of Protection<sup>5</sup>, he cannot deal with them in any way which is inconsistent with the court's powers<sup>6</sup>. Where a patient<sup>7</sup> is entitled to property, provision for making leases and tenancy agreements in relation to the property is made by statute<sup>8</sup>.

A lease may be set aside if it was granted upon inadequate consideration by a person of weak intellect, although not mentally disordered<sup>9</sup>, or by a person in a state of habitual intoxication<sup>10</sup>.

A minor is incapable of holding a legal estate in land<sup>11</sup> and cannot, therefore, grant a lease or tenancy to take effect in law. If a minor is beneficially interested in possession in land, the land, unless held on a trust of land<sup>12</sup>, is settled land<sup>13</sup>. The trustees where the land is held on a trust of land have all the powers of an absolute owner, and the personal representatives in whom the settled land is vested or the trustees of the settlement, as the case may be, have all the powers, including powers of leasing, conferred on tenants for life and trustees of settlements<sup>14</sup>.

A tenancy purported to be granted by a minor can at best operate to confer on the tenant an equitable interest which is liable to be overreached by a disposition made by the trustees in

whom the legal estate is vested<sup>15</sup>. Such a tenancy is void if it is necessarily to the minor's prejudice<sup>16</sup>, and at the most binds his equitable interest unless avoided by the minor on attaining his majority or shortly afterwards before confirming the tenancy by conduct or otherwise<sup>17</sup>.

An alien may acquire, hold and dispose of real property in the United Kingdom<sup>18</sup> in the same manner as a British citizen<sup>19</sup> and may, therefore, grant leases or tenancies of his property.

There is no limitation on the power of a person convicted of a criminal offence and sentenced to imprisonment to grant a lease or tenancy of his property<sup>20</sup>.

1 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA; and see the cases cited in MENTAL HEALTH vol 30(2) (Reissue) PARA 602. The test of contractual capacity is whether or not the person was capable of understanding the nature of the contract into which he was entering: *Boughton v Knight* (1873) LR 3 P & D 64 at 72; *Jenkis v Morris* (1880) 14 ChD 674, CA. As to mental disorder and legal incapacity generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 596 et seq.

2 *York Glass Co Ltd v Jubb* (1925) 134 LT 36 at 41, CA; and see MENTAL HEALTH vol 30(2) (Reissue) PARA 602.

3 *Beverley's Case* (1603) 4 Co Rep 123b at 125a; *A-G v Parnter* (1792) 3 Bro CC 441; *Selby v Jackson* (1844) 6 Beav 192; and see *Birkin v Wing* (1890) 63 LT 80. Cf *Creagh v Blood* (1845) 8 I Eq R 434.

4 See *Selby v Jackson* (1844) 6 Beav 192.

5 As to the Court of Protection see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

6 *Re Walker* [1905] 1 Ch 160, CA; *Re Marshall, Marshall v Whateley* [1920] 1 Ch 284. As to the effect of jurisdiction of the Court of Protection generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 605.

7 For the meaning of 'patient' see MENTAL HEALTH vol 30(2) (Reissue) PARA 681.

8 See MENTAL HEALTH vol 30(2) (Reissue) PARAS 683, 690; and for the special rules as to conveyances etc on behalf of persons suffering from mental disorder see MENTAL HEALTH vol 30(2) (Reissue) PARA 687.

9 *Gartside v Isherwood* (1783) 1 Bro CC 558; and see EQUITY vol 16(2) (Reissue) PARA 432.

10 *Say v Barwick* (1812) 1 Ves & B 195; and see CONTRACT vol 9(1) (Reissue) PARA 630; EQUITY vol 16(2) (Reissue) PARA 433.

11 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30.

12 See the Settled Land Act 1925 s 1(7) (as added); the Trusts of Land and Appointment of Trustees Act 1996 ss 4, 5(2); and SETTLEMENTS vol 42 (Reissue) PARA 678.

13 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 32.

14 As to the powers of a tenant for life to grant leases see PARA 30 post; as to the leasing powers of trustees of land see PARA 31 post; and as to the right of personal representatives in whom settled land is vested and settlement trustees to exercise those powers where a minor is entitled see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 33.

15 See the Law of Property Act 1925 s 2(1) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq.

16 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 49.

17 *Ashfeild v Ashfeild* (1627) W Jo 157; *Slator v Brady* (1863) 14 ICLR 61; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 49. It seems that, if the landlord acquires the legal estate after attaining his majority and does not avoid the tenancy, there may be a tenancy by estoppel: see PARA 4 ante.

18 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706 preamble art 1; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom.

19 See BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 9.

20 See the Criminal Justice Act 1948 ss 70(1), 83(2), (3), Sch 10 Pt I (repealed) (which repealed the Forfeiture Act 1870 ss 6-30).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(4) CAPACITY TO GRANT AND ACCEPT TENANCIES/(i) Capacity to grant Tenancies/26. Corporations and companies.

## 26. Corporations and companies.

A statutory corporation, including a company regulated by the Companies Act 1985<sup>1</sup>, has such powers of leasing as are conferred by its constitution or implied from the nature of its objects<sup>2</sup>. The requirements of the statute must be strictly complied with<sup>3</sup>. A corporation not created by statute has the same powers as an individual unless those powers are restricted by its constitution<sup>4</sup>. Formerly, a corporation generally could not dispose of its property except by deed sealed by the common seal of the corporation<sup>5</sup>, except in trivial matters of daily occurrence or matters of unimportance<sup>6</sup>. Now, however, subject to the provisions which require a lease for a term exceeding three years to be by deed if the legal estate is to pass<sup>7</sup>, any land of a company regulated by the Companies Act 1985 may be let or demised orally or by writing not by deed by a person acting under the company's authority, express or implied<sup>8</sup>; and any body corporate which is neither formed nor registered under that Act nor an existing company<sup>9</sup> may contract through the instrumentality of any person acting under its authority, express or implied, as if it were a private individual<sup>10</sup>.

The power of ecclesiastical corporations, aggregate and sole, to make leases is governed by statute as regards the property that may be let, the consents which are necessary, the term that may be granted and the provisions of the lease<sup>11</sup>.

1 As to the companies which are regulated by the Companies Act 1985 see COMPANIES vol 14 (2009) PARA 24 et seq.

2 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1256. As to the power of corporations to accept tenancies see PARA 41 post.

3 *Kent Coast Rly Co v London, Chatham and Dover Rly Co* (1868) 3 Ch App 656.

4 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1256.

5 *R v Chipping Norton Inhabitants* (1804) 5 East 239; *Roe d Dean and Chapter of Rochester v Pierce* (1808) 1 Camp 466; *AR Wright & Son Ltd v Romford Borough Council* [1957] 1 QB 431, [1956] 3 All ER 785; and see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1256-1257, 1271.

6 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1274.

7 See PARA 2 ante.

8 See the Companies Act 1985 ss 36(b), 36A (as substituted and amended); COMPANIES vol 14 (2009) PARAS 284-285; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1273. As to the execution on behalf of a company of a contract under seal see ss 36(a), 36A (as substituted and amended); and COMPANIES vol 14 (2009) PARA 287.

9 Ie within the meaning of *ibid* s 735(1): see COMPANIES vol 14 (2009) PARA 24.

10 See the Corporate Bodies' Contracts Act 1960 ss 1, 2 (as amended); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1272. As to the power of any corporation to lease its land for housing purposes see the Housing Act 1985 s 31; and HOUSING vol 22 (2006 Reissue) PARA 304.

11 See ECCLESIASTICAL LAW vol 14 paras 1153-1157.



Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(4) CAPACITY TO GRANT AND ACCEPT TENANCIES/(i) Capacity to grant Tenancies/27. Local and public authorities.

## **27. Local and public authorities.**

Local authorities<sup>1</sup>, and parish trustees acting with the consent of the parish meeting<sup>2</sup>, are in general authorised, with the consent of the Secretary of State<sup>3</sup> or, in Wales, of the National Assembly for Wales or the relevant Welsh minister<sup>4</sup>, to let any land which they may hold for any term; without such consent they may dispose of land only by the grant of a term not exceeding seven years or by the assignment of a term which at the date of the assignment has seven years or less to run, and, in the case of parish or community councils or parish trustees, for the best consideration that can reasonably be obtained<sup>5</sup>. A local education authority which wishes to let any land held by it is subject to the same restrictions<sup>6</sup>.

Green Belt land may be let only for purposes of recreation, agriculture, camping or other authorised purposes<sup>7</sup>; and restrictions are imposed on disposals by local authorities of land held for planning purposes<sup>8</sup> and disposals by development corporations<sup>9</sup>.

In general the consent of the Housing Corporation<sup>10</sup> or, in relation to Wales, of the Assembly or the relevant Welsh minister, is necessary to a lease of land by a registered housing association or of grant-aided land by an unregistered housing association<sup>11</sup>.

1    le non-metropolitan county councils, district councils, London borough councils, National Park authorities (see the Environment Act 1995 s 65, Sch 8 para 1(1), (2)) and parish or community councils: see generally LOCAL GOVERNMENT vol 69 (2009) PARA 22 et seq. As to land held by public bodies see also the Local Government, Planning and Land Act 1980 Pt X (ss 93-100) (as amended); and LOCAL GOVERNMENT vol 69 (2009) PARAS 525-526.

2    As to parish trustees generally see LOCAL GOVERNMENT vol 69 (2009) PARA 34.

3    le one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. The office of Secretary of State is a unified office, and generally in law each Secretary of State is capable of performing the functions of all or any of them: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355. In practice, at the date at which this title states the law it is the Secretary of State for Communities and Local Government who is largely responsible for housing, urban regeneration and local government matters. The Department for Communities and Local Government maintains an internet site on the World Wide Web, accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk).

4    The functions of the Secretary of State in relation to housing, urban regeneration, planning and local government matters, so far as exercisable in relation to Wales, have generally been transferred to the National Assembly for Wales: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended), which was made in pursuance of, inter alia, the Government of Wales Act 1998 s 22 (prospectively repealed by the Government of Wales Act 2006 s 163, Sch 12). Functions which have been so transferred include the functions of the Secretary of State under (1) the Landlord and Tenant Act 1927 s 20 (see PARA 281 post); (2) the Landlord and Tenant Act 1954 (see PARAS 701 et seq, 1196 et seq post) (except for the certification function in ss 57(1)-(6), 58 (as amended) (see PARAS 769-770 post); (3) the Leasehold Reform Act 1967 (see PARA 1389 et seq post); (4) the Caravan Sites Act 1968 (see PARA 1267 et seq post); (5) the Mobile Homes Act 1975 and the Mobile Homes Act 1983 (see PARA 1268 et seq post); (6) the Rent (Agriculture) Act 1976 (see PARA 1134 et seq post); (7) the Rent Act 1977 (see PARA 808 et seq post); (8) the Protection from Eviction Act 1977 (see PARAS 214-215, 653 post); (9) the Housing Act 1980 (see PARA 1009 post); (10) the Housing Act 1985 (with the exception of functions under s 5(1)(b) and the Treasury consent requirement under Sch 6A para 4(4) (as added)) (see PARA 1300 et seq post); (11) the Landlord and Tenant Act 1985 (see PARA 248 et seq post); (12) the Landlord and Tenant Act 1987 (see PARAS 149 et seq, 1744 et seq post); (13) the Housing Act 1988 (with exceptions not relevant to this title) (see PARA 1011 et seq post); (14) the Local Government and Housing Act 1989 (with exceptions not relevant to this title) (see PARA 1237 et seq post); (15) the Leasehold Reform, Housing and Urban Development Act 1993 (see PARA 1532 et seq post); (16) the Housing Act 1996 (with exceptions not relevant to this title) (see PARAS 54, 1285 et seq post). As to the National Assembly for Wales see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

The Government of Wales Act 2006, the majority of whose provisions are to come into force immediately after the ordinary election (under the Government of Wales Act 1998 s 3 (prospectively repealed)) held in 2007 (see the Government of Wales Act 2006 s 161(1)), provides for the formal separation of the legislative and executive branches of the devolved government in Wales. Part 1 (ss 1-44) makes provision about the legislature (which will continue to be called the National Assembly for Wales) and Pt 2 (ss 45-92) makes provision about the executive, to be known as the Welsh Assembly Government, which will consist of the First Minister or Prif Weinidog (see ss 46, 47), the Welsh Ministers, or Gweinidogion Cymru, appointed under s 48, the Counsel General to the Welsh Assembly Government or Cwnsler Cyffredinol i Lywodraeth Cynulliad Cymru (see s 49) (referred to as 'the Counsel General'), and the Deputy Welsh Ministers or Dirprwy Weinidogion Cymru (see s 50): s 45(1). In the 2006 Act and in any other enactment or instrument the First Minister and the Welsh Ministers appointed under s 48 are referred to collectively as the Welsh Ministers: s 45(2). Subject to s 162(1), Sch 11 para 31, the relevant Assembly functions are transferred to the Welsh Ministers immediately after the end of the initial period: Sch 11 para 30(1). 'The initial period' means the period beginning with the day of the poll at the 2007 election and ending with the day on which the first appointment is made under s 46: s 161(5). 'The relevant Assembly functions' means functions exercisable by the Assembly constituted by the Government of Wales Act 1998 (a) immediately before the end of the initial period, by virtue of an Order in Council under s 22 (prospectively repealed); (b) immediately before the end of that period, as a result of a designation made under the European Communities Act 1972 s 2(2) by virtue of the Government of Wales Act 1998 s 29(1) (prospectively repealed); (c) immediately before the end of that period, as a result of having been conferred or imposed on it by an enactment contained in an Act, other than an enactment contained in the Government of Wales Act 1998, or by a prerogative instrument; or (d) immediately before the end of that period, as a result of having been conferred or imposed on it by subordinate legislation (including subordinate legislation made under the Government of Wales Act 1998); and for these purposes a function is 'exercisable' at any time even if the enactment transferring, conferring or imposing it has not come into force at that time: Government of Wales Act 2006 Sch 11 para 30(2). Schedule 11 came into force on 25 July 2006: see s 161(2).

Her Majesty may by Order in Council: (i) provide for (A) the transfer of any of the relevant Assembly functions to the First Minister, or the Counsel General; (B) the transfer of any of the relevant Assembly functions, other than functions of making, confirming or approving subordinate legislation, to the Assembly Commission; (c) any of the relevant Assembly functions, other than functions of making, confirming or approving subordinate legislation, to be functions of the Assembly; (D) any relevant Assembly function that is a function of making, confirming or approving subordinate legislation in relation to any matter not to be transferred to the Welsh Ministers and, unless the Assembly already has power to pass Assembly Measures in relation to that matter, the amendment of Sch 5 Pt 1 to enable the Assembly to have instead power to pass Assembly Measures in relation to that matter either in the same terms as the relevant Assembly function, or in terms differing from those terms to such extent as appears appropriate (see Sch 11 para 31(1), (2)); (ii) direct that any function transferred by Sch 11 para 30 is to be exercisable by any one or more of the First Minister, the Counsel General, the Assembly Commission and the Assembly concurrently with the Welsh Ministers (Sch 11 para 31(3)(a)); (iii) direct that any function in relation to which provision is made by Sch 11 para 31(1) (see heads (A)-(C) supra) for it to be transferred to, or continue to be a function of, any person or body is to be exercisable by any other person or body specified in Sch 11 para 31(1) concurrently with that person or body (Sch 11 para 31(3)(b)); or (iv) direct that any function transferred by Sch 11 para 30, or transferred to the First Minister or the Counsel General by virtue of Sch 11 para 31(1), is to be exercisable by the Welsh Ministers, the First Minister or the Counsel General only with the agreement of, or after consultation with, the Assembly Commission (Sch 11 para 31(3)(c)). As to the exercise of these powers see further Sch 11 para 31(4)-(8); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Any provision of an Order in Council under the Government of Wales Act 1998 s 22 (eg the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672 (as amended)), whether included by virtue of the Government of Wales Act 1998 s 22 or any other enactment apart from s 155(2), which is in force immediately before the commencement of the repeal of s 22 by the Government of Wales Act 2006 continues to have effect after the commencement of that repeal as if it were a provision of an Order in Council under s 58: Sch 11 para 26(1).

5 See the Local Government Act 1972 ss 123(1), (2), (7), 127(1), (2), (5); and LOCAL GOVERNMENT vol 69 (2009) PARAS 515, 520. Special provisions apply in the case of open space land: see s 123(2A), (2B) (as added), s 127(3) (as substituted); and LOCAL GOVERNMENT vol 69 (2009) PARAS 515, 520.

6 See EDUCATION vol 15(2) (2006 Reissue) PARA 1361.

7 See the Green Belt (London and Home Counties) Act 1938 ss 5, 27; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 938.

8 See the Town and Country Planning Act 1990 s 233; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 948-951.

9 See the New Towns Act 1981 ss 17, 18 (as amended); and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1365-1366. As to the powers of disposal of the Commission for the New Towns (now part of English Partnerships) see ss 36, 37 (as amended); and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1384-1385.

10 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

11 See the Housing Associations Act 1985 s 9 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 43. As to the disposal of land by the relevant authority or the Housing Corporation see s 90 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 41; and for the meaning of 'the relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 5.

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## **28. Building societies etc.**

Subject to the provisions of the Building Societies Act 1986<sup>1</sup>, a building society has the powers conferred on it by its memorandum<sup>2</sup>. This may include a power to lease property held for the purpose of conducting its business<sup>3</sup>. A building society may also lease land as mortgagee in possession in accordance with the statutory powers conferred on such a mortgagee<sup>4</sup>.

Registered friendly societies, or branches, if their rules so provide, have powers of leasing land<sup>5</sup>. An incorporated friendly society may invest its funds in the purchase of land<sup>6</sup>; and it may acquire and hold land for the purpose of carrying on any of its activities or for the purpose of enabling a subsidiary of the society, or a body jointly controlled by it, to conduct its business<sup>7</sup>.

Registered industrial and provident societies, unless their rules otherwise direct, have powers of leasing land; and a credit union may lease land acquired for the purpose of conducting its business<sup>8</sup>.

All property belonging to a trade union, other than a special register body<sup>9</sup>, must be vested in trustees in trust for the union<sup>10</sup>; but a trade union is capable of making contracts and suing and being sued in its own name in proceedings relating to property<sup>11</sup>.

1 See generally FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856 et seq.

2 See the Building Societies Act 1986 s 5(5) (substituted by the Building Societies Act 1997 s 1(3)).

3 The specific statutory power to do so conferred by the Building Societies Act 1986 s 6 (as originally enacted) was removed by the Building Societies Act 1997 s 4.

4 See under the powers conferred by the Law of Property Act 1925 s 99 (as amended): see MORTGAGE vol 77 (2010) PARA 345 et seq.

5 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2189.

6 See the Friendly Societies Act 1992 s 14 (as amended); and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2136.

7 See *ibid* s 15; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2137.

8 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2494.

9 For the meaning of 'special register body' see EMPLOYMENT vol 40 (2009) PARA 854.

10 See the Trade Union and Labour Relations (Consolidation) Act 1992 ss 12(1), 117(3)(c); and EMPLOYMENT vol 40 (2009) PARA 874.

11 See *ibid* ss 10(1)(a), (b), 117(3)(a); and EMPLOYMENT vol 40 (2009) PARA 852.

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## **29. Universities and colleges.**

The Universities of Oxford, Cambridge and Durham and the colleges in those universities and the colleges of Winchester and Eton have statutory powers of leasing similar to those conferred on a tenant for life of settled land<sup>1</sup>. Other universities and colleges, as charities, have restricted powers of leasing land<sup>2</sup>.

1 See EDUCATION vol 15(2) (2006 Reissue) PARA 1379. As to the leasing powers conferred on a tenant for life see PARA 30 post.

2 See PARA 33 post.

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## **30. Tenant for life under strict settlement.**

A tenant for life<sup>1</sup> may lease the settled land or any part thereof<sup>2</sup>, or any easement, right or privilege of any kind over or in relation to the land, for any purpose whatever, whether involving waste or not, for any term not exceeding:

- 36 (1) in the case of a building lease<sup>3</sup>, 999 years;
- 37 (2) in the case of a mining lease<sup>4</sup>, 100 years;
- 38 (3) in the case of a forestry lease<sup>5</sup>, 999 years; and
- 39 (4) in the case of any other lease, 50 years<sup>6</sup>.

Every lease must<sup>7</sup>:

- 40 (a) be by deed, and must be made to take effect in possession not later than 12 months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease;
- 41 (b) reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid or to be laid out for the benefit of the settled land, and generally to the circumstances of the case;
- 42 (c) contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding 30 days<sup>8</sup>.

A lease at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste<sup>9</sup>, may be made:

- 43 (i) where the term does not exceed 21 years, without any notice of an intention to make the lease having been duly given<sup>10</sup> and notwithstanding that there are no trustees of the settlement; and
- 44 (ii) where the term does not extend beyond three years from the date of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent<sup>11</sup>.

Under a court order the tenant for life may grant any other lease, not otherwise authorised, which could validly have been granted by an absolute owner<sup>12</sup>.

A settlor may confer on the tenant for life powers of leasing additional to or larger than those conferred by the Settled Land Act 1925<sup>13</sup>. Powers of leasing conferred by the settlement on the trustees or other persons are exercisable by the tenant for life<sup>14</sup>.

A lease by a tenant for life or other limited owner which is not authorised by his powers of leasing is valid only during the subsistence of his interest<sup>15</sup>; but a lease by a tenant in tail, if made by deed, takes effect in equity as a disentailing assurance<sup>16</sup>. Every power of appointment over, or power to convey or charge land or any interest therein, whether created by a statute or other instrument or implied by law, and whenever created, not being a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him or by another person in his name and on his behalf, operates only in equity<sup>17</sup>. The extent of an express power of leasing must be governed by the settlor's intentions as gathered from the instrument creating the power<sup>18</sup>.

1 As to the tenant for life, and other persons having the powers of tenant for life, see SETTLEMENTS vol 42 (Reissue) PARA 761 et seq. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

A tenant for life, even though he may be entitled to have a vesting instrument executed in his favour, cannot, until such an instrument has been executed, create a legal estate in a tenant, and any purported lease by him will operate only in equity and as a contract for valuable consideration to grant the lease: see the Settled Land Act 1925 s 13 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 702. Any such purported lease should be protected by registration: see SETTLEMENTS vol 42 (Reissue) PARA 702.

2 The power so conferred may be exercised as regards the principal mansion house, if any, on the settled land, and the pleasure grounds, park and lands, if any, usually occupied therewith; but such power may not be exercised without the consent of the trustees of the settlement or an order of the court (1) if the settlement is a settlement which was made or came into operation before 1 January 1926 and the settlement did not expressly provide to the contrary; or (2) if the settlement is a settlement which was made or came into operation after that date and the settlement expressly provides that the power may not be exercised without that consent or order: *ibid* s 65(1).

3 As to the special provisions relating to building leases see *ibid* ss 44, 46 (as amended) and SETTLEMENTS vol 42 (Reissue) PARAS 842, 844.

4 As to the special provisions relating to mining leases see *ibid* ss 45-47, 50; and SETTLEMENTS vol 42 (Reissue) PARAS 843-844, 856.

5 As to the special provisions relating to forestry leases see *ibid* s 48; and SETTLEMENTS vol 42 (Reissue) PARA 845.

6 *Ibid* s 41.

7 *Ie* save as expressly provided by *ibid* ss 42(2)-(5), 43 et seq: see SETTLEMENTS.

8 *Ibid* s 42(1). As to the formalities relating to such leases see SETTLEMENTS vol 42 (Reissue) PARA 839.

9 As to the extent of a tenant's liability for waste see PARA 434 post.

10 *Ie* under the Settled Land Act 1925: see generally SETTLEMENTS.

11 Ibid s 42(5).

12 See *ibid* s 64 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 671. In the case of building or mining leases the court may also authorise generally or in a particular case the granting of leases for a longer term or on other conditions than those specified in the Settled Land Act 1925, if it is shown that such is the custom in the district, or that it is difficult in the district to make those leases except for those longer terms or on those other conditions: see s 46; and SETTLEMENTS vol 42 (Reissue) PARA 844.

13 See *ibid* ss 108(1), 109(1); and SETTLEMENTS vol 42 (Reissue) PARA 880. Particulars of such powers must appear in the vesting instrument: see s 5(1)(d); and SETTLEMENTS vol 42 (Reissue) PARA 690. As to the construction of express powers see POWERS vol 36(2) (Reissue) PARA 232 et seq.

14 See *ibid* s 108(2); and SETTLEMENTS vol 42 (Reissue) PARA 881.

15 *Bragg v Wiseman* (1614) 1 Brownl 22; *Sutton's Case* (1701) 12 Mod Rep 557; and see SETTLEMENTS vol 42 (Reissue) PARA 883. An unauthorised lease does not operate to give any interest in the land, and operates only by estoppel between the parties: *Yellowly v Gower* (1855) 11 Exch 274 at 294-295. Such a lease may, however, be validated under the Law of Property Act 1925 s 152: see PARA 145 post.

16 See the Fines and Recoveries Act 1833 ss 15, 40 (amended by the Statute Law Revision (No 2) Act 1888; the Statute Law (Repeals) Act 1969). If not made by deed, the lease is void as regards persons entitled after the estate tail (Co Litt 45b; *Andrew v Pearce* (1805) 1 Bos & PNR 158 at 162), but as against the issue in tail it is voidable only (Co Litt 45b; *Earl of Bedford's Case* (1586) 7 Co Rep 7b). As to entailed interests generally see REAL PROPERTY vol 39(2) (Reissue) PARA 117 et seq.

17 Law of Property Act 1925 s 1(7).

18 *Vivian v Jegon* (1868) LR 3 HL 285; and see POWERS vol 36(2) (Reissue) PARA 239.

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### 31. Trustees of land.

For the purpose of exercising their functions as trustees, the trustees of land<sup>1</sup> have in relation to the land subject to the trust all the powers of an absolute owner<sup>2</sup>. Where in the case of any land subject to a trust of land each of the beneficiaries interested in the land is a person of full age and capacity who is absolutely entitled to the land, the powers so conferred on the trustees include the power to convey the land to the beneficiaries even though they have not required the trustees to do so; and where land is conveyed by virtue of this provision:

- 45 (1) the beneficiaries must do whatever is necessary to secure that it vests in them, and
- 46 (2) if they fail to do so, the court may make an order requiring them to do so<sup>3</sup>.

The trustees of land have power to acquire land under the power conferred<sup>4</sup> by the Trustee Act 2000<sup>5</sup>.

In exercising these powers, trustees must have regard to the rights of the beneficiaries<sup>6</sup>; and the powers so conferred must not be exercised in contravention of, or of any order<sup>7</sup> made in pursuance of, any other enactment or any rule of law or equity<sup>8</sup>. Where any other enactment confers on trustees authority to act subject to any restriction, limitation or condition, trustees of land may not exercise the powers conferred by these provisions to do any act which they are prevented from doing under the other enactment by reason of the restriction, limitation or

condition<sup>9</sup>. Further, the duty of care under the Trustee Act 2000<sup>10</sup> applies to trustees of land when exercising these powers<sup>11</sup>.

Trustees of land have other miscellaneous powers to dispose of land<sup>12</sup>.

The legal estate in the land is vested in the trustees jointly<sup>13</sup> but a beneficiary may be entitled to occupy the land<sup>14</sup>.

1 As to trustees of land see SETTLEMENTS vol 42 (Reissue) PARA 900 et seq; TRUSTS vol 48 (2007 Reissue) PARA 601.

2 Trusts of Land and Appointment of Trustees Act 1996 s 6(1); and see TRUSTS vol 48 (2007 Reissue) PARA 1035.

3 Ibid s 6(2).

4 Ie by the Trustee Act 2000 s 8: see TRUSTS vol 48 (2007 Reissue) PARA 1034.

5 Trusts of Land and Appointment of Trustees Act 1996 s 6(3) (amended by the Trustee Act 2000 s 40(1), Sch 2 Pt II para 45(1)).

6 Trustee Act 2000 s 6(5).

7 The reference in the text to an order includes an order of any court or of the Charity Commissioners: Trusts of Land and Appointment of Trustees Act 1996 s 6(7).

8 Ibid s 6(6).

9 Ibid s 6(8).

10 Ie under the Trustee Act 2000 s 1: see TRUSTS vol 48 (2007 Reissue) PARA 949.

11 Trusts of Land and Appointment of Trustees Act 1996 s 6(9) (added by the Trustee Act 2000 Sch 2 Pt II para 45(3)).

12 See SETTLEMENTS vol 42 (Reissue) PARA 904.

13 See SETTLEMENTS vol 42 (Reissue) PARA 897; TRUSTS vol 48 (2007 Reissue) PARA 601. See also the Law of Property Act 1925 ss 1(6), 39(4), Sch 1 Pt IV para 1(3) (as amended) and REAL PROPERTY vol 39(2) (Reissue) PARAS 55, 58; s 36 (as amended); s 36 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 190 et seq.

14 See the Trusts of Land and Appointment of Trustees Act 1996 s 12; and TRUSTS vol 48 (2007 Reissue) PARA 739.

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## **32. Executors and administrators.**

Personal representatives have, as respects the real estate, all the functions conferred on them<sup>1</sup> by Part I of the Trusts of Land and Appointment of Trustees Act 1996<sup>2</sup>. An executor may grant a lease before probate<sup>3</sup>, but an administrator only after taking out letters of administration<sup>4</sup>. A lease must be made by all executors who have proved, but not by executors who have not proved, even if power has been reserved to them to prove<sup>5</sup>. The powers of personal representatives as such to lease cease when they assent to the legal estate vesting in beneficiaries or trustees<sup>6</sup>.

1 See the Trusts of Land and Appointment of Trustees Act 1996 Pt I (ss 1-18) (as amended): see s 18; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 438.

2 See the Administration of Estates Act 1925 s 39(1)(ii) (substituted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (2), Sch 3 para 6(1), (2), Sch 4); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 438.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 30.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 33.

5 See the Administration of Estates Act 1925 s 2(2) (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 443.

6 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 30. As to the necessity for an assent to the vesting of a legal estate to be in writing see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 564.

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### **33. Charities and ecclesiastical bodies.**

Trustees of a charity have statutory<sup>1</sup>, express and common law<sup>2</sup> powers of leasing. Subject to certain exceptions, however, no land held by or in trust for a charity may be leased without an order of the court or of the Charity Commissioners<sup>3</sup>. Statutory restrictions are also imposed on the leasing powers of colleges and ecclesiastical and eleemosynary corporations over corporate property<sup>4</sup>.

A diocesan board of finance<sup>5</sup> has power to lease any diocesan glebe land of the diocese on such terms as the Church Commissioners<sup>6</sup> may approve, being terms which they consider proper and advisable<sup>7</sup>; but there is a prohibition on incumbents of benefices or any sequestrators letting certain parts of parsonage houses<sup>8</sup>; and a diocesan board of finance may require the incumbents or the sequestrators of benefices belonging to the diocese to furnish it with particulars of certain leases<sup>9</sup>.

1 See CHARITIES vol 8 (2010) PARAS 401, 405, 408.

2 See CHARITIES vol 8 (2010) PARAS 402-403.

3 See the Charities Act 1993 s 36; and CHARITIES vol 8 (2010) PARA 395.

4 See CHARITIES vol 8 (2010) PARA 224 et seq.

5 As to diocesan boards of finance see ECCLESIASTICAL LAW vol 14 paras 517, 518.

6 As to the Church Commissioners see ECCLESIASTICAL LAW vol 14 para 361 et seq.

7 See the Endowments and Glebe Measure 1976 s 20(1) (as substituted); and ECCLESIASTICAL LAW.

8 See ibid s 29; and ECCLESIASTICAL LAW. As to leases of parsonage houses generally see ECCLESIASTICAL LAW vol 14 para 1157.

9 See ibid s 31; and ECCLESIASTICAL LAW. As to other leasing powers of ecclesiastical corporations see ECCLESIASTICAL LAW vol 14 paras 1155-1156.



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### **34. Mortgagors and mortgagees.**

A mortgagor of land, while in possession, or a mortgagee, while he is in possession or a receiver has been appointed, has statutory powers of making leases<sup>1</sup>; but such powers may be excluded or varied or extended by the mortgage deed or otherwise in writing<sup>2</sup> unless the mortgaged land is agricultural land<sup>3</sup>. A lease by a mortgagor not made under the statutory power is binding on the mortgagor, and if made before the mortgage, but not otherwise, is binding on the mortgagee<sup>4</sup>. A lease made by a mortgagor whose mortgage excludes the statutory power of leasing is deemed to be made in exercise of the mortgagor's common law right to make a lease which is binding on the mortgagor but not on the mortgagee; and the making of such a lease is not, therefore, a breach of the prohibition contained in the mortgage<sup>5</sup>. Where a mortgage excludes the common law power of leasing, but does not exclude the statutory power, the mortgagor is in breach of the prohibition contained in the mortgage if he fails to comply with the conditions imposed by statute in relation to the exercise of the statutory power of leasing<sup>6</sup>.

1 See the Law of Property Act 1925 s 99 (as amended); and MORTGAGE vol 77 (2010) PARA 345 et seq. The leases so authorised are (1) agricultural or occupation leases for any term not exceeding, in the case of a mortgage made on or after 1 January 1926, 50 years; and (2) building leases for any term not exceeding, in the case of a mortgage made on or after 1 January 1926, 999 years: s 99(3). The provisions of s 99 (as amended) referring to a lease are to be construed to extend and apply, so far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting: s 99(17).

2 See *ibid* s 99(13) (as amended), s 99(14); and MORTGAGE vol 77 (2010) PARA 347. An exclusion or restriction of a mortgagor's powers does not have effect in relation to a lease executed under the Landlord and Tenant Act 1954 s 36: see s 36(4); and PARA 756 note 6 post.

3 See the Law of Property Act 1925 s 99(13A), (13B) (as added); and MORTGAGE vol 77 (2010) PARA 347. See also *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325, following dicta in *Public Trustee v Lawrence* [1912] 1 Ch 789 at 793.

4 *Alchorne v Gomme* (1824) 2 Bing 54; *Moss v Gallimore* (1779) 1 Doug KB 279; *Keech v Hall* (1778) 1 Doug KB 21; and see MORTGAGE vol 77 (2010) PARA 296. Where the lease is void against the mortgagee, it is also void against a purchaser from the mortgagee: *Rust v Goodale* [1957] Ch 33, [1956] 3 All ER 373. If a mortgagor lets a tenant into possession before the mortgagor has acquired a legal estate in the property and the vesting of the legal estate and the execution of the mortgage deed both take place on the same day, the tenancy is not binding upon the mortgagee: *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL. See further ESTOPPEL vol 16(2) (Reissue) PARA 1033; MORTGAGE vol 77 (2010) PARA 294.

5 *Iron Trades Employers Insurance Association Ltd v Union Land and House Investors Ltd* [1937] Ch 313, [1937] 1 All ER 481; *Dudley and District Benefit Building Society v Emerson* [1949] Ch 707, [1949] 2 All ER 252, CA; *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA.

6 *Rhodes v Dalby* [1971] 2 All ER 1144, [1971] 1 WLR 1325.

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### 35. Administrators; receivers; trustees in bankruptcy.

The administrator of a company has power to grant leases<sup>1</sup>.

A receiver appointed by the court may grant a lease binding on the receiver and binding on the persons beneficially interested provided that the court's consent is obtained<sup>2</sup>; but, in order to pass the legal estate in the term the lease must be made in the name of the party who would have been able to demise if the receiver had not been appointed<sup>3</sup>. A receiver appointed out of court by a mortgagee<sup>4</sup> may exercise the statutory powers of leasing if the powers are delegated to him in writing by the mortgagee<sup>5</sup>.

A trustee in bankruptcy has the same power to grant leases as the bankrupt had before his bankruptcy<sup>6</sup>.

1 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 163.

2 *Re Liabilities (War Time Adjustment) Act 1941, Re Cripps* [1946] Ch 265, CA (court may give its sanction to letting even after letting has begun). As to leases by receivers generally see RECEIVERS vol 39(2) (Reissue) PARA 410.

3 See RECEIVERS vol 39(2) (Reissue) PARA 410.

4 See under the Law of Property Act 1925 s 101(1)(iii): see MORTGAGE vol 77 (2010) PARA 476.

5 See *ibid* s 99(19); and MORTGAGE vol 77 (2010) PARA 346; RECEIVERS vol 39(2) (Reissue) PARA 410.

6 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 456 et seq.

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### 36. The 'relevant authority'; housing associations.

The Housing Corporation<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister ('the relevant authority')<sup>2</sup> may:

- 47 (1) acquire land by agreement for the purpose of leasing it to a registered social landlord<sup>3</sup> or an unregistered self-build society or providing dwellings or hostels for letting; and the Housing Corporation may be authorised by the Secretary of State<sup>4</sup> to, and the Assembly or minister may, acquire land compulsorily for any such purpose<sup>5</sup>;
- 48 (2) dispose of land in respect of which it has not exercised its power to provide or improve dwellings or hostels and on which it has not carried out ancillary development to specified bodies<sup>6</sup>;
- 49 (3) dispose of land on which dwellings or hostels have been provided or improved to specified bodies<sup>7</sup>; and
- 50 (4) lease individual dwellings to persons for their own occupation<sup>8</sup>.

The general powers of local authorities to lease houses and land may be used to help provide housing associations with houses or land; but the powers of housing associations themselves to

acquire land or houses or to build or in other ways provide houses are derived from their constitutions rather than from express statutory provision<sup>9</sup>.

- 1 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.
- 2 As to the 'relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 5; and as to the exercise of functions in Wales see PARA 27 note 4 ante.
- 3 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.
- 4 As to the Secretary of State see PARA 27 note 3 ante.
- 5 See the Housing Associations Act 1985 s 88(1) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 39.
- 6 See ibid s 90(1)(as amended); and HOUSING vol 22 (2006 Reissue) PARA 41.
- 7 See ibid s 90(2) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 41.
- 8 See ibid s 90(3) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 41
- 9 See HOUSING vol 22 (2006 Reissue) PARA 11.

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## **(ii) Capacity to accept Tenancies**

### **37. In general.**

An individual who is under no personal incapacity which disables him from contracting or from holding land is able to accept a lease for such periods and on such terms as he pleases<sup>1</sup>. The rights of other persons to accept leases are limited by law<sup>2</sup>.

1 An alien is under no disability in this respect: cf para 25 ante; and see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. As to the continuance of the liability of an alien tenant for rent, even if he becomes an alien enemy, see PARA 274 post.

2 See PARA 38 et seq post.

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### **38. Persons under disability.**

A contract made by a person who at the time lacked the capacity to make it is binding upon him in every respect unless he can show that the other contracting party knew of the incapacity at the time<sup>1</sup> or knew of such facts and circumstances that he must be taken to have known of the incapacity<sup>2</sup>. A disposition made during a lucid interval by a person who is mentally incapable of contracting at other times is valid<sup>3</sup>, even if he is liable to be detained at the time<sup>4</sup>.

Where a person purports to convey a legal estate in land to a minor, or two or more minors, alone, the conveyance is not effective to pass the legal estate, but operates as a declaration that the land is held in trust for the minor or minors or, if he purports to convey it to the minor or minors in trust for any persons, for those persons<sup>5</sup>. Where a person purports to convey a legal estate in land to a minor or two or more minors, and another person who is, or other persons who are, of full age, the conveyance operates to vest the land in the other person or persons in trust for the minor or minors and the other person or persons or, if he purports to convey it to them in trust for any persons, for those persons<sup>6</sup>. Where a legal estate in land would, by reason of intestacy or in any other circumstances not dealt with above, vest in a person who is a minor if he were a person of full age, the land is held in trust for the minor<sup>7</sup>.

It has, however, been held in a county court that a minor is capable of succeeding to a statutory tenancy<sup>8</sup>.

1 *Imperial Loan Co v Stone* [1892] 1 QB 599, CA; and see the cases cited in MENTAL HEALTH vol 30(2) (Reissue) PARA 602. As to the test of contractual capacity see PARA 25 note 1 ante; and as to mental disorder and legal incapacity generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 596 et seq. As to the avoidance of agreements preventing the occupation of leasehold property by persons with mental disorders see the Leasehold Reform, Housing and Urban Development Act 1993 s 89; and PARA 50 post.

2 *York Glass Co Ltd v Jubb* (1925) 134 LT 36 at 41, CA; and see MENTAL HEALTH vol 30(2) (Reissue) PARA 602.

3 *Beverley's Case* (1603) 4 Co Rep 123b at 125a; *A-G v Parnter* (1792) 3 Bro CC 441; *Selby v Jackson* (1844) 6 Beav 192; and see *Birkin v Wing* (1890) 63 LT 80. Cf *Creagh v Blood* (1845) 8 I Eq R 434.

4 See *Selby v Jackson* (1844) 6 Beav 192.

5 Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 1(1). For transitional provisions see Sch 1 para 1(3).

6 Ibid Sch 1 para 1(2). For transitional provisions see Sch 1 para 1(3).

7 Ibid Sch 1 para 2.

8 See *Portman Registrars and Nominees v Mohammed Latif* [1987] CLY 2239, cited in PARA 842 post.

## UPDATE

### 38 Persons under disability

NOTES 5, 8--See *Alexander-David v Mayor and Burgesses of the London Borough of Hammersmith and Fulham* [2009] EWCA Civ 259, [2009] 3 All ER 1098 (purported grant of tenancy to minor made landlord local authority both lessor and trustee).

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### 39. Co-owners, trustees and personal representatives.

A lease or tenancy agreement may be granted to two or more persons who are beneficial joint tenants or beneficial tenants in common, but any legal estate vests in the grantees, or, if they are more than four in number, in the first four, as joint tenants to be held in trust<sup>1</sup>. Any person who accepts a lease or tenancy agreement as trustee is personally liable for the rent and under

the covenants but is entitled to be indemnified out of the trust property except in case of personal default<sup>2</sup>. Persons having the powers of a tenant for life may accept a lease of land convenient to be held with the settled land provided that no fine is paid out of capital money in respect of that lease<sup>3</sup>. Where an agreement for a lease is enforced against executors, the lease will be so framed as to except them from personal liability<sup>4</sup>.

A trustee cannot as a general rule, alone or jointly with others, take a lease of the trust property from himself or his co-trustees<sup>5</sup>; but a tenant for life or person having the powers of a tenant for life may take a lease of settled land from the trustees of the settlement<sup>6</sup>.

1 See the Law of Property Act 1925 ss 34(2), 36(1) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 190, 211. Although the legal estate continues to be vested in all survivors of the original joint tenants, for the purposes of security of tenure under the Rent Act 1977 those of them who remain in residence in the demised premises will be regarded as the statutory tenant: see *Lloyd v Sadler* [1978] QB 774, [1978] 2 All ER 529, CA; and PARA 831 post. It is not clear, however, what the situation is if all four trustee tenants vacate but other persons named in the agreement as tenants remain.

2 *Re Richardson, ex p Governors of St Thomas' Hospital* [1911] 2 KB 705 at 709, CA; and see TRUSTS vol 48 (2007 Reissue) PARAS 726, 904-905.

3 See the Settled Land Act 1925 s 53(1); and SETTLEMENTS vol 42 (Reissue) PARA 846.

4 *Phillips v Everard* (1831) 5 Sim 102; *Page v Broom* (1840) 3 Beav 36 at 48 (subsequent proceedings (1842) 6 Jur 308); *Stephens v Hotham* (1855) 1 K & J 571.

5 *Re Dumbell, ex p Hughes, ex p Lyon* (1802) 6 Ves 617 at 622. A personal representative or trustee who obtains in his name a renewal of a renewable lease which forms part of the testator's estate or the trust estate is taken to have done so for the benefit of that estate: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 45; TRUSTS vol 48 (2007 Reissue) PARA 695. A lease granted on the advice of a person standing in a fiduciary relationship to the landlord in favour of tenants, one of whom is the son of that person, and who have knowledge of the advice, may be set aside unless it is shown that the transaction was in all respects proper: *Grosvenor v Sherratt* (1860) 28 Beav 659. As to the relationships which give rise to a presumption that a transaction is tainted by undue influence see EQUITY vol 16(2) (Reissue) PARA 417 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq; and as to the principle that a trustee is in general disabled from purchasing trust property see EQUITY vol 16(2) (Reissue) PARA 857; TRUSTS vol 48 (2007 Reissue) PARA 938.

6 See the Settled Land Act 1925 s 68(1)(a); and SETTLEMENTS vol 42 (Reissue) PARA 878.

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#### **40. Unincorporated associations; charities.**

A lease may not be granted to an unincorporated association, as such a body has no legal entity. Thus, a lease may not be granted to the members of such an association from time to time, nor may a lease be granted to all the persons who at the time it was executed were members of the association, where no one has himself undertaken, or authorised anyone on his behalf to undertake, the obligations which are imposed upon a tenant<sup>1</sup>. The lease should in such cases be granted to trustees for the association.

No special rules apply in respect of leases to trustees for charitable purposes<sup>2</sup>.

1 *Jarrott v Ackerley* (1915) 113 LT 371. As to contracts with unincorporated associations generally see CONTRACT vol 9(1) (Reissue) PARAS 765-766; CLUBS vol 13 (2009) PARA 205.

2 See CHARITIES vol 8 (2010) PARAS 82-83.

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#### **41. Corporations and companies.**

A statutory corporation may accept leases to the extent authorised by its constitution and a corporation created otherwise than by statute may accept leases to any extent unless its powers are limited by its constitution or by statute<sup>1</sup>.

1 See COMPANIES vol 14 (2009) PARA 317; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1256.

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#### **42. Building societies etc.**

Subject to the provisions of the Building Societies Act 1986<sup>1</sup>, a building society has the powers conferred on it by its memorandum<sup>2</sup>. This may include the power to acquire and hold premises for the purposes of its business<sup>3</sup>.

A registered friendly society, or any branch of it, may, if its rules so provide, take any land on lease in the names of the trustees of the society or branch<sup>4</sup>; and an incorporated friendly society may acquire and hold land for the purpose of carrying on any of its activities or for the purpose of enabling a subsidiary of the society, or a body jointly controlled by it, to conduct its business and may dispose of, or otherwise deal with, any land so held by it<sup>5</sup>.

A registered industrial and provident society may, if its rules do not direct otherwise, take any land on lease in its own name; and a credit union may lease land acquired for the purpose of conducting its business<sup>6</sup>.

A trade union may take on lease land to any extent in the names of its trustees or, if it is incorporated<sup>7</sup>, in its own name.

1 See generally FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856 et seq.

2 See the Building Societies Act 1986 s 5(5) (substituted by the Building Societies Act 1997 s 1(3)).

3 The specific statutory power to do so conferred by the Building Societies Act 1986 s 6 (as originally enacted) was removed by the Building Societies Act 1997 s 4.

4 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2189.

5 See the Friendly Societies Act 1992 s 15; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2137.

6 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2494.

7 Only a trade union which is a special register body will be incorporated. For the meaning of 'special register body' see EMPLOYMENT vol 40 (2009) PARA 854. Where, as will usually be the case, the trade union is not incorporated, all property belonging to it must be vested in the trustees: see the Trade Union and Labour Relations (Consolidation) Act 1992 ss 12(1), 117(3)(c); and EMPLOYMENT vol 40 (2009) PARA 874.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(4) CAPACITY TO GRANT AND ACCEPT TENANCIES/(ii) Capacity to accept Tenancies/43. Local authorities.

#### **43. Local authorities.**

Local authorities may acquire land on lease by agreement whether that land is situated inside or outside their areas, provided that the land is acquired for the purposes of any of their statutory functions or the benefit, improvement or development of their areas<sup>1</sup>.

1 See LOCAL GOVERNMENT vol 69 (2009) PARA 509 (principal councils), PARA 516 (parish and community councils). As to compulsory acquisition of land see LOCAL GOVERNMENT vol 69 (2009) PARAS 510-511 (principal councils), PARA 517 (parish and community councils). Certain statutory repairing obligations do not apply to leases granted to local authorities: see PARA 419 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(4) CAPACITY TO GRANT AND ACCEPT TENANCIES/(ii) Capacity to accept Tenancies/44. The 'relevant authority'; housing associations.

#### **44. The 'relevant authority'; housing associations.**

The Housing Corporation<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister ('the relevant authority')<sup>2</sup> may acquire land by agreement for the purpose of leasing it to a registered social landlord<sup>3</sup> or an unregistered self-build society or providing dwellings or hostels for letting; and the Housing Corporation may be authorised by the Secretary of State<sup>4</sup> to, and the Assembly or minister may, acquire land compulsorily for any such purpose<sup>5</sup>.

The general powers of local authorities to lease houses and land may be used to help provide housing associations with houses or land; but the powers of housing associations themselves to acquire land or houses are derived from their constitutions rather than from express statutory provision<sup>6</sup>.

1 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

2 As to the 'relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 5; and as to the exercise of functions in relation to Wales see PARA 27 note 4 ante.

3 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

4 As to the Secretary of State see PARA 27 note 3 ante.

5 See the Housing Associations Act 1985 s 88(1) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 39. Certain statutory repairing obligations do not apply to leases granted to registered social landlords or co-operative housing associations: see PARA 419 post.

6 See HOUSING vol 22 (2006 Reissue) PARA 11.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(i) In general/45. Statutory codes; in general.

## **(5) LEGISLATIVE INTERVENTION**

### **(i) In general**

#### **45. Statutory codes; in general.**

The relationship of landlord and tenant and, less often, of licensor and licensee of land, has been the subject of extensive legislative intervention. A number of statutory codes now regulate that relationship to provide:

- 51 (1) security of tenure, to a greater or lesser extent, in both the private sector and the public or social housing sector, for residential tenants<sup>1</sup>;
- 52 (2) more restricted security of tenure for business tenants, tenants of agricultural holdings and tenants under farm business tenancies, together with provision for compensation in certain circumstances where the tenancy is not continued<sup>2</sup>;
- 53 (3) a degree of rent control for residential tenants and holders of restricted contracts in the private sector<sup>3</sup>;
- 54 (4) collective rights for residential tenants in the private sector with regard to service and administration charges and the management of premises<sup>4</sup>;
- 55 (5) individual and collective rights of leasehold enfranchisement and extension in both the private and the public or social housing sector<sup>5</sup>;
- 56 (6) collective rights of first refusal or of compulsory acquisition for the tenants of certain flats<sup>6</sup>.

Other statutory provisions govern such matters as the information to be given to certain tenants<sup>7</sup>, the extent to which the original landlord or the original tenant may remain liable under the covenants of the lease after assignment<sup>8</sup> and certain repairing obligations<sup>9</sup>.

The ordinary law of contract and the ordinary rules of law applying as between landlord and tenant continue to apply both in the private and the public or social housing sectors, subject to these special statutory modifications and additions. The law of landlord and tenant is, therefore, a topic of very uncertain definition and scope, and in respect of any problem which arises as between landlord and tenant it is at all times important to consider whether there are statutory provisions of general application which impinge upon the rights of landlord and tenant without being conventionally regarded as part of the law of landlord and tenant. For example, in all lettings the tenant's rights to use and develop the land which is demised are subject to the restrictions imposed on the use of land generally by the town and country planning legislation<sup>10</sup>.

1 See the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended); and PARA 1196 et seq post; the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended); and PARA 1237 et seq post; the Rent Act 1977; and PARAS 808 et seq, 985 et seq post; the Rent (Agriculture) Act 1976; and PARA 1134 et seq post; the Housing Act 1988 Pt I (ss 1-45) (as amended); and PARAS 1011 et seq, 1183 et seq post; the Housing Act 1985 Pt IV (ss 79-117) (as amended); and PARA 1300 et seq post. As to the more limited statutory protection afforded to



mobile home residents see PARA 1267 et seq post; and as to introductory tenancies which may be offered by local housing authorities or housing action trusts see PARA 1285 et seq post.

2 See PARA 701 et seq post.

3 See PARAS 891 et seq, 988 et seq, 1087 et seq, 1156 et seq post.

4 See PARAS 316 et seq, 367 et seq post.

5 See the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended); and PARA 1389 et seq post; the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended); and PARA 1552 et seq post; Pt I Ch II (ss 39-62) (as amended); and PARA 1671 et seq post; the Housing Act 1985 Pt V (ss 118-188) (as amended), the Housing Act 1996 ss 16-17 (as amended); and PARA 1795 et seq post.

6 See the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended); and PARA 1744 et seq post; Pt III (ss 25-34) (as amended); and PARA 1783 et seq post.

7 See PARAS 53, 257, 621 post.

8 See PARAS 289 et seq, 554 et seq post.

9 See PARA 416 et seq post.

10 See generally TOWN AND COUNTRY PLANNING.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(ii) Impact of the Human Rights Act 1998/46. The Human Rights Act 1998; in general.

## **(ii) Impact of the Human Rights Act 1998**

### **46. The Human Rights Act 1998; in general.**

Under the Human Rights Act 1998, it is unlawful for a public authority<sup>1</sup> to act<sup>2</sup> in a way which is incompatible with a Convention right<sup>3</sup>, unless:

- 57 (1) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
- 58 (2) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions<sup>4</sup>.

Neither House of Parliament is a public authority for these purposes<sup>5</sup>. However, the National Assembly for Wales<sup>6</sup> has no power, and the Welsh ministers, First Minister or Counsel General will have no power, to make, confirm or approve any subordinate legislation, or to do any other act, so far as the subordinate legislation or act is incompatible with any of the Convention rights<sup>7</sup>; but this does not:

- 59 (a) apply to an act which is not unlawful<sup>8</sup> by virtue of head (1) or head (2) above<sup>9</sup>; and
- 60 (b) enable a court or tribunal to award in respect of an act any damages which it could not award on finding the act unlawful<sup>10</sup> under the Human Rights Act 1998<sup>11</sup>.

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights<sup>12</sup>.

The following Convention rights are particularly relevant in the context of the law relating to landlord and tenant:

- 61 (i) in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law<sup>13</sup>;
- 62 (ii) everyone has the right to respect for his private and family life, his home and his correspondence<sup>14</sup>; there must be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society for, inter alia, the protection of the rights and freedoms of others<sup>15</sup>;
- 63 (iii) every natural or legal person is entitled to the peaceful enjoyment of his possessions and no one must be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law<sup>16</sup>;
- 64 (iv) the enjoyment of the Convention rights and freedoms must be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status<sup>17</sup>.

1 For these purposes, 'public authority' includes (1) a court or tribunal; and (2) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: Human Rights Act 1998 s 6(3). In s 6(3), however, 'Parliament' does not include the House of Lords in its judicial capacity: s 6(4) (prospectively repealed by the Constitutional Reform Act 2005 Sch 9 Pt I para 66(4), as from a day to be appointed under s 148; at the date at which this title states the law, no such day had been appointed). In relation to a particular act, a person is not a public authority by virtue only of the Human Rights Act 1998 s 6(3)(b) (see head (2) supra) if the nature of the act is private: s 6(5). As from a day to be appointed under the Constitutional Reform Act 2005 s 148, the jurisdiction of the House of Lords to hear appeals is transferred to the new Supreme Court established under Pt III (ss 23-60); at the date at which this title states the law, no such day had been appointed.

The Human Rights Act 1998 s 6(3)(b) (see head (2) supra) does not make a body, which has no responsibilities to the public, a public body merely because it performs acts on behalf of a public body which would constitute public functions if such acts were performed by that public body itself; the fact that a public body may be fulfilling its public duty through the act of renting by a private body does not automatically change into a public act what would otherwise be a private act. Housing associations as a class are not standard public authorities, and such an association constitutes a public authority only if it performs a particular function which is a public as opposed to a private act: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 [59]-[60], [63], [65]-[66], [2002] QB 48, [2001] 4 All ER 604, considering *Costello-Roberts v United Kingdom* (1993) 19 EHRR 112, [1993] ECHR 13134/87, ECtHR.

2 For these purposes, 'an act' includes a failure to act but does not include a failure to (1) introduce in, or lay before, Parliament a proposal for legislation; or (2) make any primary legislation or remedial order: Human Rights Act 1998 s 6(6).

3 See *ibid* s 6(1); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to Convention rights see s 1(3), Sch 1. See also COURTS vol 10 (Reissue) PARA 316.

4 *Ibid* s 6(2).

5 See note 1 supra.

6 As to the Assembly see PARA 27 note 4 ante.

7 Government of Wales Act 1998 s 107(1), (5) (prospectively repealed by the Government of Wales Act 2006 s 163, Sch 12); Government of Wales Act 2006 s 81(1), (5) (not in force at the date at which this title states the law). The Government of Wales Act 1998 s 107(1) does not, and the Government of Wales Act 2006 s 81(1) will not, however, enable a person (1) to bring any proceedings in a court or tribunal; or (2) to rely on any of the Convention rights in any such proceedings, in respect of an act unless he would be a victim for the purposes of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71

(1953) (Cmd 8969)) art 34 if proceedings were brought in the European Court of Human Rights in respect of that act: Government of Wales Act 1998 s 107(2) (as so repealed); Government of Wales Act 2006 s 81(2) (not in force at the date at which this title states the law). The Government of Wales Act 1998 s 107(2) does not apply to the Attorney General, the Assembly, the Advocate General for Scotland, the Advocate General for Northern Ireland or the Attorney General for Northern Ireland: s 107(3) (as so repealed; amended by the Justice (Northern Ireland) Act 2002 s 28(2), Sch 7 para 6, as from day to be appointed under s 87(1)). The Government of Wales Act 2006 s 81(2) is similarly disapplied: see s 81(3) (not in force at the date at which this title states the law).

8 le under the Human Rights Act 1998 s 6(1): see the text and notes 1-3 supra.

9 Government of Wales Act 1998 s 107(4)(a) (prospectively repealed: see note 7 supra); Government of Wales Act 2006 s 81(4)(a) (not in force at the date at which this title states the law).

10 See note 8 supra.

11 Government of Wales Act 1998 s 107(4)(b) (prospectively repealed: see note 7 supra); Government of Wales Act 2006 s 81(4)(b) (not in force at the date at which this title states the law).

12 See the Human Rights Act 1998 s 3; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

13 Ibid s 1(3), Sch 1 Pt I art 6(1) (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1)). The following hearings relevant to this title must in the first instance be listed by the court as hearings in private under CPR 39.2(3)(c) (see CIVIL PROCEDURE vol 11 (2009) PARA 6): (1) a claim by a landlord against one or more tenants or former tenants for the repossession of a dwelling house based on the non-payment of rent; (2) an application to suspend a warrant of execution or a warrant of possession or to stay execution where the court is being invited to consider the ability of a party to make payments to another party: see *Practice Direction--Miscellaneous Provisions relating to Hearings* PD 39 para 1.5(2), (3).

The provisions for service of documents in the Landlord and Tenant Act 1927 s 23, as applied to notice of the termination of a lease, do not breach the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1), despite the fact that there is no indication in those provisions that there has to be some attempted or actual delivery: *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320, cited in PARA 703 note 4 post. As to challenges to possession proceedings on the ground of a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1) see PARA 47 post.

The provisions of the Leasehold Reform Act 1967 which allow tenants to buy their freeholds (see PARA 1389 et seq post) do not infringe the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6 despite the fact that, once the statutory criteria are satisfied, there is no court before which a landlord can challenge a tenant's right of enfranchisement on the basis of the merits of the individual case: *James v United Kingdom* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECtHR.

14 Human Rights Act 1998 Sch 1 Pt I art 8(1) (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8(1)). The concept of 'home' for these purposes is not limited to premises which are lawfully occupied; it depends on the existence of sufficient and continuous links with the premises: see *Harrow London Borough Council v Qazi* [2003] UKHL 43 at [11], [29], [63], [66], [68], [70], [71], [95], [99], [147], [2004] 1 AC 983, [2003] 4 All ER 461, applying *Buckley v United Kingdom* (1996) 23 EHRR 101, [1996] ECHR 20348/92, ECtHR and EComHR. See also Application 66746/01 *Connors v United Kingdom* [2004] HLR 991, (2004) 16 BHRC 639, ECtHR at para 68; *Blecic v Croatia* [2004] ECHR 59532/00, ECtHR at para 52 (further proceedings before the Grand Chamber (2006) 20 BHRC 1, ECtHR).

The manner in which the courts have consistently interpreted the Landlord and Tenant Act 1985 s 11(1)(a) (repairing obligations: see PARA 416 post) is not incompatible with the Human Rights Act 1998 and the Convention right to respect for private and family life: *Lee v Leeds City Council*, *Ratcliffe v Sandwell Metropolitan Borough Council* [2002] EWCA Civ 06, [2002] 1 WLR 1488, [2002] LGR 305. Because of the public law context of, and duties imposed upon local authorities by, the homelessness regime in the Housing Act 1996 Pt VII (ss 175-218) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 278 et seq), the Human Rights Act 1998 Sch 1 Pt I art 8 does not require the procedural safeguards of the Protection from Eviction Act 1977 (see PARA 653 post) to be followed in a case involving a licence of accommodation secured by a local authority for a homeless person in discharge of its duty under the Housing Act 1996 s 188(1) (see HOUSING vol 22 (2006 Reissue) PARA 286): *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547, [2006] All ER (D) 256 (May). The Protection from Eviction Act 1977 s 2, however (see PARA 653 post), if read in a way that is compatible with the Human Rights Act 1998 Sch 1 Pt I art 8, applies to premises let to a tenant for mixed residential and business purposes, and the decisions in *Kay v Lambeth London Borough Council*, *Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20 (see PARA 47 post) and Application 66746/01 *Connors v United Kingdom* [2004] HLR 991, (2004) 16 BHRC 639, ECtHR support this purposive construction: *Pirabakaran v Patel* [2006] EWCA Civ 685, [2006] 23 EG 165 (CS), [2006] All ER (D) 380 (May),

distinguishing *National Trust for Places of Historic Interest or Natural Beauty v Knappe* [1997] 4 All ER 627, [1998] 1 WLR 230, CA.

As to challenges to possession proceedings on the ground of a breach of the Human Rights Act 1998 Sch 1 Pt I art 8 see PARA 47 post.

15 Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8(2), now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt I art 8(2). See also note 14 supra.

16 Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol I art 1 (Paris, 20 March 1952; TS 46 (1954); Cmd 9221), now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt II art 1. These provisions do not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties: Sch 1 Pt II art 1. See eg Application 44277/98 *Stretch v United Kingdom* [2004] LGR 401, [2003] All ER (D) 306 (Jun), ECtHR (applicant contracted to lease land from a local authority for a term of 22 years and, pursuant to the terms of the lease, erected at his own expense a number of buildings for light industrial use which he sublet for rent; the lease contained an option for renewal for a further 21 years but when the applicant gave notice to exercise the option, the authority took the view that its predecessor had unknowingly acted ultra vires in granting the option, which was therefore invalid; and this was upheld by the domestic courts. The European Court of Human Rights held that the applicant had to be regarded as having at least a legitimate expectation of exercising the option to renew and that might be regarded as attached to the property rights granted to him by the authority under the lease; further, the refusal to renew the lease amounted to an interference with the applicant's possessions because he was deprived in part of the consideration which he gave in entering into the agreement and that interference was not justified since the application of the doctrine of ultra vires, which provided an important safeguard against abuse of power by authorities acting beyond the competence given to them under domestic law, did not respect the principle of proportionality in that case).

The provisions of the Leasehold Reform Act 1967, which allow tenants to buy their freeholds (see PARA 1389 et seq post) do not infringe the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol I art 1: *James v United Kingdom* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECtHR.

17 Human Rights Act Sch 1 Pt I art 14 (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 14). It has been held that the statutory rules of succession to secure tenancies do not infringe the provisions of art 14 as read with art 8: see *R (on the application of Gangera) v Hounslow London Borough Council* [2003] EWHC 794 (Admin), [2003] HLR 1028, [2003] All ER (D) 200 (Apr), applied in *Hounslow London Borough Council v Adjei* [2004] EWHC 207 (Ch), [2004] 2 All ER 636, [2004] 2 FCR 465. See also *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617. See further PARA 1319 post. As to the legislation specifically prohibiting discrimination in the context of landlord and tenant law see PARA 48 et seq post.

## UPDATE

### 46 The Human Rights Act 1998; in general

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTES 14, 15--See *Central Bedfordshire Council (formerly Bedfordshire County Council) v Taylor* [2009] EWCA Civ 613, [2010] 1 All ER 516; and PARA 47 NOTE 8.

NOTE 14--*Desnousse*, cited, reported at [2006] QB 831.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(ii) Impact of the Human Rights Act 1998/47. The impact of the Human Rights Act 1998 on possession proceedings.

### 47. The impact of the Human Rights Act 1998 on possession proceedings.

Possession proceedings fall within the Convention right<sup>1</sup> to a fair and public hearing within a reasonable time by an independent and impartial tribunal<sup>2</sup>. It has been held that the prescribed method of service of the claim form and particulars of claim<sup>3</sup> does not contravene that right<sup>4</sup>. Although the fair trial guarantees of that right entitle a defendant to be heard, if he cannot show that his defence has a real prospect of success, or there is some other compelling reason why a trial should be conducted, there is no requirement that the procedural rules of a national court oblige the claimant in such a case to initiate further ancillary proceedings to strike out a defence or to enter summary judgment with all the concomitant expense and delay that would involve<sup>5</sup>. Moreover, although a breach of the Convention right may arise in relation to the enforcement of a judgment, which has to be regarded as part of the trial, that does not mean that enforcement involves a separate determination of civil rights and obligations which necessitate a further hearing. The right to possession is determined in compliance with the Convention right when the order for possession is made and the issue of the warrant of possession is simply a step which has to be taken to give effect to the order for possession. Such a step does not alter the legal status of the tenant or make any decision of any kind in relation to his rights<sup>6</sup>.

The coming into force of the Human Rights Act 1998<sup>7</sup> has facilitated challenges to possession proceedings on the ground that they infringe the Convention right to respect for private and family life and for a person's home and correspondence<sup>8</sup>; such proceedings have also sometimes been challenged on the additional ground that the differences in the security of tenure accorded to tenants, or to those occupying caravan sites under licence, infringe the occupiers' Convention right<sup>9</sup> not to be discriminated against<sup>10</sup>. The House of Lords has recently summarised the practical position where a local authority brings possession proceedings<sup>11</sup>. It is not necessary for the local authority to plead or prove in every case that domestic law complies with the Convention right<sup>12</sup> to respect for private and family life. Courts ought to proceed on the assumption that domestic law strikes a fair balance and is compatible with that Convention right<sup>13</sup>. If the court, following its usual procedures, is satisfied that the domestic law requirements for making a possession order have been met, the court ought to make a possession order unless the occupier shows that, highly exceptionally, he has a seriously arguable case on one of the following two grounds:

- 65 (1) that the law which requires the court to make a possession order is Convention-incompatible; and
- 66 (2) that the local authority's exercise of its power to seek a possession order is an unlawful act<sup>14</sup>.

Deciding whether the defendant has a seriously arguable case does not call for a full-blown trial but ought to be decided summarily. The procedural aim of the court is to decide that question as expeditiously as is consistent with the defendant having a fair opportunity to present his case. If the court considers the defence sought to be raised is not seriously arguable the court ought to proceed to make a possession order. Where a seriously arguable issue is raised, the court ought to decide the issue itself. Where, however, an issue arises on the application of the statutory provision<sup>15</sup> that, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights, the judge ought to consider whether it might be appropriate to refer the proceedings to the High Court<sup>16</sup>.

A defence which is based only on the occupier's personal circumstances ought, however, to be struck out. Where domestic law provides for personal circumstances to be taken into account, as in a case where the statutory test is whether it would be reasonable to make a possession order, then a fair opportunity must be given for the arguments in favour of the occupier to be presented; but if the requirements of the law have been established and the right to recover possession is unqualified, the only situations in which it would be open to the court to refrain from proceeding to summary judgment and making the possession order are as follows:

- 67 (a) if a seriously arguable point is raised that the law which enables the court to make the possession order is incompatible with the relevant Convention right<sup>17</sup>, the county court in the exercise of its jurisdiction under the Human Rights Act 1998 must deal with the argument in one or other of two ways, either by giving effect to the law, so far as it is possible for it to do so<sup>18</sup> in a way that is compatible with that right, or by adjourning the proceedings to enable the compatibility issue to be dealt with in the High Court;
- 68 (b) if the defendant wishes to challenge the decision of a public authority to recover possession as an improper exercise of its powers at common law on the ground that it is a decision that no reasonable person would consider justifiable, he ought to be permitted to do so provided that the point is seriously arguable<sup>19</sup>.

The House also considered the extent to which the domestic courts are bound to follow a domestic precedent which appears to be inconsistent with Strasbourg authority<sup>20</sup> and expressed the view that certainty is best achieved by adhering, even in the Convention context, to the rules of precedent. It is the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be inconsistent with Strasbourg authority, they may express their views and give leave to appeal, in that way discharging their duty under the Human Rights Act 1998<sup>21</sup>.

1    Ie the right under the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6(1) (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 6(1)): see PARA 46 ante at head (i) in the text.

2    See *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, sub nom *St Brice v Southwark London Borough Council* [2001] All ER (D) 209 (Jul). See also *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 04, [2002] LGR 468, [2002] All ER (D) 226 (Jan) (local authority's administrative decision to issue a notice to quit was subject to the judicial review jurisdiction of the High Court; thus, leaving aside the possible bite of the Convention, the legality of anything done or not done in the administration of the tenancies was without doubt subject to adjudication by a tribunal which fulfilled the requirements of the Human Rights Act 1998 Sch 1 Pt I art 6(1)); *R (on the application of McLellan) v Bracknell Forest Borough Council, Reigate and Banstead Borough Council v Benfield* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899 (decision of a review panel under an introductory tenancy scheme (see PARA 1298 post) involves a determination of the tenant's civil rights, and thus engages the Human Rights Act 1998 s Sch 1 Pt I art 6; the review panel in itself cannot have the degree of independence necessary to comply with Sch 1 Pt I art 6, but the decision-making procedure has to be considered as a whole and there is no reason why the review procedure cannot be operated fairly, and no reason why the remedy of judicial review does not provide an adequate safeguard to tenants, enabling them to challenge any unfairness and/or infringement of their Convention rights, particularly under Sch 1 Pt I art 8; the scheme is not, accordingly, incompatible with Sch 1 Pt I art 6); and see *R (on the application of McDonagh) v Salisbury District Council* [2001] EWHC Admin 567, (2001) Times, 15 August, [2001] All ER (D) 58 (Jul).

Certain possession proceedings are, however, to be listed in the first instance as hearings in private: see PARA 46 note 13 ante.

3    Ie under CPR Pt 6: see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

4    See *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 All ER 741, [2005] 1 WLR 2762.

5    See note 4 supra.

6    *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, sub nom *St Brice v Southwark London Borough Council* [2001] All ER (D) 209 (Jul).

7    Ie on 2 October 2000: see the Human Rights Act 1998 (Commencement No 2) Order 2000, SI 2000/1851, art 2. The Human Rights Act 1998 s 19 (statements of compatibility: see CONSTITUTIONAL LAW AND HUMAN RIGHTS) was brought into force on 24 November 1998 by the Human Rights Act 1998 (Commencement) Order 1998, SI 1998/2882.

8    Ie under the Human Rights Act 1998 Sch 1 Pt I art 8 (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8): see PARA 46 ante at head (ii) in the

text. As to the meaning of 'home' in this context see PARA 46 note 14 ante. For examples of cases in which a challenge has been mounted on these grounds see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48, [2001] 4 All ER 604 (unsuccessful challenge to possession order under the Housing Act 1988 s 21(4) (as amended) (see PARA 1107 post)); *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, sub nom *St Brice v Southwark London Borough Council* [2001] All ER (D) 209 (Jul) (unsuccessful challenge to procedure adopted under Housing Act 1985 leading to the court issuing a warrant of possession and arrangements for execution following non-compliance by the tenant with a suspended order for possession: see PARA 1356 post); *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 04, [2002] LGR 468, [2002] All ER (D) 226 (Jan) (unsuccessful challenge to possession proceedings brought by local housing authority under the Housing Act 1996 s 193 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 290); *R v (on the application of McLellan) v Bracknell Forest Borough Council, Reigate and Banstead Borough Council v Benfield* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899 (unsuccessful challenge to possession proceedings following decision to terminate an introductory tenancy: see PARA 1297 post); *Bromley London Borough Council v Smith* [2003] EWHC 1166 (QB), [2003] All ER (D) 361 (May) (unsuccessful challenge to possession proceedings brought by local housing authority under provisions of the Housing Act 1985 now replaced by the Housing Act 1996 s 193 (as amended)); *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [2003] 4 All ER 461 (unsuccessful challenge to possession proceedings brought by the local housing authority after termination of secure tenancy by one joint tenant: see PARA 1350 post); *R (on the application of Casey) v Crawley Borough Council* [2006] EWHC 301 (Admin), [2006] All ER (D) 11 (Mar) (unsuccessful challenge to local authority's proposed eviction of travelling family from site on which they were camping without authorisation; but cf Application 66746/01 *Connors v United Kingdom* [2004] HLR 991, (2004) 16 BHRC 639, ECtHR, where the European Court of Human Rights held that the eviction of a travelling family from a local authority site was not attended by the requisite procedural safeguards, ie the requirement to establish proper justification for the serious interference with their rights, and consequently could not be regarded as justified by a pressing social need or proportionate to the legitimate aim being pursued and that there had, accordingly, been a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8); *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20 (unsuccessful challenges to (1) possession proceedings brought by local authority against subtenants of a housing trust; and (2) possession proceedings brought by local authority against travellers who had set up an unauthorised encampment on a recreation ground). After a joint tenancy is terminated by notice to quit given by one of the tenants, the possession proceedings brought by the local housing authority do not violate the essence of the right to respect for the home under the Human Rights Act 1998 Sch 1 Pt I art 8 in circumstances where the authority's right to immediate possession is unqualified in domestic law and the premises, once recovered, will be available for letting to others who are in need of housing in the authority's area: *Harrow London Borough Council v Qazi* supra [77], [83], [84], [110], [152], applying Application 28027/95 *Ure v United Kingdom* (27 November 1996, unreported), EComHR; but as to the very exceptional circumstances in which the proceedings may be susceptible to challenge under the 1998 Act see *Kay v Lambeth London Borough Council, Leeds City Council v Price* supra; and the text and notes 11-19 infra.

9     Ie under the Human Rights Act 1998 Sch 1 Pt I art 14 (incorporating into domestic law the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 14): see PARA 46 ante at head (iv) in the text.

10     See eg *R v (on the application of McLellan) v Bracknell Forest Borough Council, Reigate and Banstead Borough Council v Benfield* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899 (no breach of the Human Rights Act 1998 Sch 1 Pt I art 6 or Sch 1 Pt I art 8, therefore no possible breach of Sch 1 Pt I art 14 since the latter right only operates within the ambit of another Convention right). See also *Isaacs v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1014 (Admin), [2002] All ER (D) 460 (May) (mobile homes). For general guidance on the approach to be taken when considering whether there has been a breach of the Human Rights Act 1998 Sch 1 Pt I art 14 see *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, [2005] 4 All ER 545 (not a landlord and tenant case), doubting the guidance given by the Court of Appeal in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271 at [20], [22], [23], [52], [85], [2002] 4 All ER 1136, [2003] 1 WLR 617.

11     See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20.

12     Ie the right to respect for the home under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8: see PARA 46 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

13     See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Bingham of Cornhill, with whom the majority concurred on this point.

14     Ie within the meaning of *ibid* s 6 (as amended): see PARA 46 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

15 le *ibid* s 3: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

16 See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Bingham of Cornhill, with whom the majority concurred on this point.

17 See note 12 *supra*.

18 le under the Human Rights Act 1998 s 3: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

19 See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Hope, Lord Scott, Lady Hale and Lord Brown (Lord Bingham of Cornhill, Lord Nicholls and Lord Walker dissenting).

20 Eg the decision in *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [2003] 4 All ER 461 which is apparently inconsistent with the decision in Application 66746/01 *Connors v United Kingdom* [2004] HLR 991, (2004) 16 BHRC 639, ECtHR.

21 *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL, [2006] 4 All ER 128, [2006] 2 FCR 20. 'Leapfrog' appeals might be appropriate: *Kay v Lambeth London Borough Council, Leeds City Council v Price* *supra*. As to such appeals (direct from the High Court to the House of Lords) see COURTS vol 10 (Reissue) PARA 361; CIVIL PROCEDURE vol 12 (2009) PARA 1718. As from a day to be appointed under the Constitutional Reform Act 2005 s 148, the jurisdiction of the House of Lords to hear appeals is transferred to the new Supreme Court established under Pt III (ss 23-60); at the date at which this title states the law, no such day had been appointed.

## UPDATE

### 47 The impact of the Human Rights Act 1998 on possession proceedings

NOTE 8--See *Central Bedfordshire Council (formerly Bedfordshire County Council) v Taylor* [2009] EWCA Civ 613, [2010] 1 All ER 516 (burden on occupier to demonstrate any grounds relied on as providing an art 8 defence).

NOTE 16--See *Doherty v Birmingham City Council* [2008] UKHL 57, [2009] AC 367, [2009] 1 All ER 653; applied in *Manchester City Council v Mushin* [2010] EWCA Civ 336, [2010] All ER (D) 289 (Mar).

NOTE 21--Appointed day is 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(iii) Discrimination Provisions/48. Sex discrimination.

## (iii) Discrimination Provisions

### 48. Sex discrimination.

It is unlawful for a person, in relation to premises in Great Britain<sup>1</sup> of which he has power to dispose<sup>2</sup>, to discriminate against a woman<sup>3</sup>:

- 69 (1) in the terms on which he offers her those premises; or
- 70 (2) by refusing her application for those premises; or
- 71 (3) in his treatment of her in relation to any list of persons in need of premises of that description<sup>4</sup>;



but this does not apply to a person who owns an estate or interest in the premises and wholly occupies them unless he uses the services of an estate agent<sup>5</sup> for the purposes of the disposal of the premises, or publishes or causes to be published an advertisement in connection with the disposal<sup>6</sup>.

It is also unlawful for a person, in relation to premises managed by him, to discriminate against a woman occupying the premises:

- 72 (a) in the way he affords her access to any benefits or facilities, or by refusing or deliberately omitting to afford her access to them; or
- 73 (b) by evicting her, or subjecting her to any other detriment<sup>7</sup>.

There are statutory exceptions for small dwellings<sup>8</sup> and voluntary bodies<sup>9</sup> and in respect of discrimination which:

- 74 (i) is rendered unlawful by any of the statutory provisions relating to sex discrimination in the employment field<sup>10</sup> or specified statutory provisions relating to sex discrimination in education<sup>11</sup>; or
- 75 (ii) would be so unlawful but for any specified statutory provision<sup>12</sup>; or
- 76 (iii) contravenes a term modified or included by virtue of an equality clause<sup>13</sup>.

Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises in Great Britain comprised in a tenancy<sup>14</sup>, it is unlawful for the landlord or other person to discriminate against a woman by withholding the licence or consent for disposal of the premises to her<sup>15</sup>; but this does not apply if:

- 77 (A) the person withholding a licence or consent, or a near relative of his ('the relevant occupier') resides, and intends to continue to reside, on the premises; and
- 78 (B) there is on the premises, in addition to the accommodation occupied by the relevant occupier, accommodation, not being storage accommodation or means of access, shared by the relevant occupier with other persons residing on the premises who are not members of his household; and
- 79 (C) the premises are small premises<sup>16</sup>.

The above provisions are to be read as applying equally to the treatment of men, and for that purpose have effect with such modifications as are requisite<sup>17</sup>.

There are a number of general exceptions to the sex discrimination legislation<sup>18</sup>.

1 The extended meaning of 'Great Britain' set out in the Sex Discrimination Act 1975 s 82(1) ('Great Britain' includes such of the territorial waters of the United Kingdom as are adjacent to Great Britain) is of limited application in the context of landlord and tenant law. For the meaning of 'Great Britain' generally see PARA 25 note 18 ante.

'Premises' is not defined for these purposes; but it is submitted that 'premises' should include land, houses, flats and business premises. Note that accommodation in a hotel is dealt with separately under s 29 (as amended): see DISCRIMINATION vol 13 (2007 Reissue) PARA 382.

2 'Dispose', in relation to premises, includes granting a right to occupy the premises, and any reference to acquiring premises is to be construed accordingly: *ibid* s 82(1).

3 For the meaning of 'discrimination' and related terms for these purposes see *ibid* ss 1(1), (4) (as substituted), s 5(1); and DISCRIMINATION vol 13 (2007 Reissue) PARA 344. 'Woman' includes a female of any age: ss 5(2), 82(1). Discrimination on the grounds of gender reassignment within the meaning of s 2A (as added) is not, however, included for these purposes. See further DISCRIMINATION vol 13 (2007 Reissue) PARA 348.

4 Ibid s 30(1). It has been conceded that a list of persons in need of accommodation includes a local authority housing list: see *Ealing London Borough Council v Race Relations Board* [1972] AC 342, [1972] 1 All ER 105, HL.

5 'Estate agent' means a person who, by way of profession or trade, provides services for the purpose of finding premises for persons seeking to acquire them or assisting in the disposal of premises: ibid s 82(1).

6 Ibid s 30(3).

7 Ibid s 30(2).

8 See ibid s 32; and DISCRIMINATION vol 13 (2007 Reissue) PARA 385.

9 See ibid s 34; and DISCRIMINATION vol 13 (2007 Reissue) PARA 383.

10 Ie by ibid Pt II (ss 6-20A) (as amended): see DISCRIMINATION vol 13 (2007 Reissue) PARA 382; EMPLOYMENT.

11 Ie by ibid s 22 (as amended) or s 23 (as amended): see DISCRIMINATION vol 13 (2007 Reissue) PARA 382; EDUCATION.

12 Ie but for ibid s 6(3) (repealed), s 7(1)(b), s 15(4), s 19 (as substituted), s 20 (as amended), ss 26-27 (as amended), s 28 (repealed) or Sch 4 paras 1, 2, 4: see DISCRIMINATION.

13 Ibid s 35(3). For the meaning of 'equality clause' see ss 8(1), 82(1) (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 424; EMPLOYMENT.

14 For these purposes 'tenancy' means a tenancy created by a lease or sublease, by an agreement for a lease or sublease or by a tenancy agreement or in pursuance of any enactment; and 'disposal', in relation to premises comprised in a tenancy, includes assignment or assignation of the tenancy and subletting or parting with possession of the premises or any part of the premises: ibid s 31(3). Section 31 applies to tenancies whenever they were created: see s 31(4).

15 Ibid s 31(1).

16 Ibid s 31(2). 'Small premises' means small premises as defined in s 32(2) (see DISCRIMINATION vol 13 (2007 Reissue) PARA 385): s 31(2).

17 Ibid s 2(1).

18 See ibid Pt V (ss 42A-52A) (as amended); and DISCRIMINATION.

## UPDATE

### 48 Sex discrimination

TEXT AND NOTES--Sex Discrimination Act 1975 ss 30, 31 amended: SI 2008/965.

TEXT AND NOTES 8-13--After 'in respect of discrimination' read 'or harassment': Sex Discrimination Act 1975 s 35(3) amended: SI 2008/963.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(iii) Discrimination Provisions/49. Racial discrimination.

### 49. Racial discrimination.

It is unlawful for a person, in relation to premises<sup>1</sup> in Great Britain<sup>2</sup> of which he has power to dispose<sup>3</sup>, to discriminate<sup>4</sup> within the meaning of the Race Relations Act 1976 against another:

- 80 (1) in the terms on which he offers him those premises; or
- 81 (2) by refusing his application for those premises; or
- 82 (3) in his treatment of him in relation to any list of persons in need of premises of that description<sup>5</sup>;

but this does not apply to discrimination, on grounds other than those of race or ethnic or national origins, by a person who owns an estate or interest in the premises and wholly occupies them unless he uses the services of an estate agent<sup>6</sup> for the purposes of the disposal of the premises, or publishes or causes to be published an advertisement in connection with the disposal<sup>7</sup>.

It is also unlawful for a person, in relation to premises managed by him, to discriminate against a person occupying the premises:

- 83 (a) in the way he affords him access to any benefits or facilities, or by refusing or deliberately omitting to afford him access to them; or
- 84 (b) by evicting him, or subjecting him to any other detriment<sup>8</sup>;

and it is unlawful for a person, in relation to such premises as are referred to above<sup>9</sup>, to subject to harassment<sup>10</sup> a person who applies for or, as the case may be, occupies such premises<sup>11</sup>.

There is a statutory exception for discrimination on grounds other than those of race or ethnic or national origins in respect of small dwellings<sup>12</sup>. There is also an exception in respect of:

- 85 (i) discrimination or harassment which is rendered unlawful by any provision relating to discrimination in the employment field<sup>13</sup> or specified statutory provisions relating to discrimination in education<sup>14</sup>; or
- 86 (ii) discrimination which would be rendered unlawful by any provision relating to discrimination in the employment field<sup>15</sup> but for any specified<sup>16</sup> statutory provision<sup>17</sup>.

Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises in Great Britain comprised in a tenancy<sup>18</sup>, it is unlawful for the landlord or other person to discriminate against a person by withholding the licence or consent for disposal of the premises to him or, in relation to such a licence or consent, to subject to harassment a person who applies for the licence or consent, or from whom the licence or consent is withheld<sup>19</sup>; but this does not apply to discrimination on grounds other than those of race or ethnic or national origins if:

- 87 (A) the person withholding a licence or consent, or a near relative of his ('the relevant occupier') resides, and intends to continue to reside, on the premises; and
- 88 (B) there is on the premises, in addition to the accommodation occupied by the relevant occupier, accommodation, not being storage accommodation or means of access, shared by the relevant occupier with other persons residing on the premises who are not members of his household; and
- 89 (C) the premises are small premises<sup>20</sup>.

There are a number of general exceptions to the race relations legislation<sup>21</sup>.

1 For these purposes, 'premises', unless the context otherwise requires, includes land of any description: Race Relations Act 1976 s 78(2).

2 The extended meaning of 'Great Britain' set out in *ibid* s 78(1) ('Great Britain' includes such of the territorial waters of the United Kingdom as are adjacent to Great Britain) is of limited application in the context of landlord and tenant law. For the meaning of 'Great Britain' generally see PARA 25 note 18 ante.

- 3 'Dispose', in relation to premises, includes granting the right to occupy the premises, and any reference to acquiring premises is to be construed accordingly: *ibid* s 78(1).
- 4 For the meaning of 'discrimination' and related terms see *ibid* s 1 (as amended), s 3(3); and *DISCRIMINATION* vol 13 (2007 Reissue) PARA 447.
- 5 *Ibid* s 21(1).
- 6 'Estate agent' means a person who, by way of profession or trade, provides services for the purpose of finding premises for persons seeking to acquire them or assisting in the disposal of premises: *ibid* s 78(1).
- 7 *Ibid* s 21(3) (amended by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 23(2)(b)).
- 8 Race Relations Act 1976 s 21(2).
- 9 *Ie* in *ibid* s 21(1) or (2).
- 10 For the meaning of 'harassment' see *ibid* s 3A (as added); and *DISCRIMINATION* vol 13 (2007 Reissue) PARA 444.
- 11 *Ibid* s 21(2A) (added by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 23(2)(a)).
- 12 See the Race Relations Act 1976 s 22 (as amended); and *DISCRIMINATION* vol 13 (2007 Reissue) PARA 464.
- 13 *Ie* by any provision of *ibid* Pt II (ss 4-15) (as amended): see *DISCRIMINATION* vol 13 (2007 Reissue) PARAS 446-454; *EMPLOYMENT*.
- 14 *Ie* by *ibid* s 17 (as amended) or s 18 (as amended): see *DISCRIMINATION* vol 13 (2007 Reissue) PARA 460; *EDUCATION*.
- 15 See note 12 *supra*.
- 16 *Ie* but for the Race Relations Act 1976 s 4(3) (as amended), s 4A(1)(b) (as added), s 5(1)(b), s 6 (as amended), s 7(4) (as amended), s 9 (as amended) and s 14(4): see *DISCRIMINATION*.
- 17 *Ibid* s 23(1) (amended by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 25(2)).
- 18 For these purposes, 'tenancy' means a tenancy created by a lease or sublease, by an agreement for a lease or sublease or by a tenancy agreement or in pursuance of any enactment; and 'disposal', in relation to premises comprised in a tenancy, includes assignment or assignation of the tenancy and subletting or parting with possession of the premises or any part of the premises: Race Relations Act 1976 s 24(4). Section 24 (as amended) applies to tenancies whenever they were created: see s 24(5).
- 19 *Ibid* s 24(1) (amended by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 26(2)(a)).
- 20 Race Relations Act 1976 s 24(2) (amended by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, reg 26(2)(b)). The Race Relations Act 1976 s 22(2) (meaning of 'small premises': see *DISCRIMINATION* vol 13 (2007 Reissue) PARA 464) applies for these purposes: see s 24(3).
- 21 See *ibid* Pt VI (ss 35-42) (as amended); and *DISCRIMINATION* vol 13 (2007 Reissue) PARAS 482-487.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(iii) Discrimination Provisions/50. Disability discrimination; in general.

## **50. Disability discrimination; in general.**

Any agreement made on or after 1 November 1993<sup>1</sup> relating to a lease<sup>2</sup> of any property which comprises or includes a dwelling<sup>3</sup>, whether contained in the instrument creating the lease or not and whether made before the creation of the lease or not, is void in so far as it would otherwise have the effect of prohibiting or imposing any restriction on:

- 90 (1) the occupation of the dwelling, or any part of the dwelling, by persons with mental disorders<sup>4</sup>; or
- 91 (2) the provision of accommodation within the dwelling for such persons<sup>5</sup>.

It is unlawful for a person with power to dispose<sup>6</sup> of any premises in the United Kingdom<sup>7</sup> to discriminate against a disabled person<sup>8</sup>:

- 92 (a) in the terms on which he offers to dispose of those premises to the disabled person;
- 93 (b) by refusing to dispose of those premises to the disabled person; or
- 94 (c) in his treatment of the disabled person in relation to any list of persons in need of premises of that description<sup>9</sup>;

but this does not apply to a person who owns an estate or interest in the premises and wholly occupies them unless, for the purpose of disposing of the premises, he uses the services of an estate agent<sup>10</sup> or publishes an advertisement<sup>11</sup> or causes an advertisement to be published<sup>12</sup>.

It is also unlawful for a person managing any premises to discriminate against a disabled person occupying those premises:

- 95 (i) in the way he permits the disabled person to make use of any benefits or facilities;
- 96 (ii) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or
- 97 (iii) by evicting the disabled person, or subjecting him to any other detriment<sup>13</sup>.

Regulations may make provision for these purposes as to who is to be treated as being, or as to who is to be treated as not being, a person who manages premises and as to who is to be treated as being, or as to who is to be treated as not being, a person occupying premises<sup>14</sup>.

It is unlawful for any person whose licence or consent is required for the disposal of any premises comprised in a tenancy<sup>15</sup> to discriminate against a disabled person by withholding his licence or consent for the disposal of the premises to the disabled person<sup>16</sup>.

There is a statutory exemption for small dwellings<sup>17</sup>.

It is similarly unlawful for any person whose licence or consent is required for the disposal of an interest in a commonhold unit in England and Wales<sup>18</sup> by the unit-holder<sup>19</sup> to discriminate against a disabled person by withholding his licence or consent for the disposal of the interest in favour of, or to, the disabled person<sup>20</sup>. Where it is not possible for an interest in a commonhold unit to be disposed of by the unit-holder unless some other person is a party to the disposal of the interest, it is unlawful for that other person to discriminate against a disabled person by deliberately not being a party to the disposal of the interest in favour of, or to, the disabled person<sup>21</sup>. Regulations may provide for these provisions not to apply, or to apply only, in cases of a prescribed description<sup>22</sup>.

The premises provisions of the Disability Discrimination Act 1995<sup>23</sup> do not operate where certain other provisions of that Act operate<sup>24</sup>.

Enforcement of these provisions is dealt with elsewhere in this work<sup>25</sup>.

1    le the date on which the Leasehold Reform, Housing and Urban Development Act 1993 s 89 came into force: see the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5(a).

2    For these purposes, 'lease' and 'tenancy' have the same meaning, and both expressions include, where the context so permits, a sublease or subtenancy and an agreement for a lease or tenancy or for a sublease or subtenancy but do not include a tenancy at will or at sufferance; and the expressions 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or the terms of a lease, are to be construed accordingly: Leasehold Reform, Housing and Urban Development Act 1993 s 101(1), (2).

Where two or more persons jointly constitute either the landlord or the tenant in relation to the lease of a flat, any reference to the landlord or to the tenant is, unless the context otherwise requires, a reference to both or all of the persons who jointly constitute the landlord or the tenant, as the case may require: s 101(4). 'Flat' means a separate set of premises, whether or not on the same floor (1) which forms part of a building; (2) which is constructed or adapted for use for the purpose of a dwelling; and (3) either the whole or a material part of which lies above or below some other part of the building: s 101(1). A storeroom on the sixth floor of a block of flats which was let to the tenant on a separate lease was held not to be part of his 'flat' on the second floor within the meaning of s 101(1) since there was no natural or physical relationship between the storeroom and the flat: see *Cadogan v McGirk* [1996] 4 All ER 643, [1996] 2 EGLR 75, CA.

Any lease which is reversionary on another lease is treated as if were a concurrent lease intermediate between that other lease and any interest superior to that other lease: Leasehold Reform, Housing and Urban Development Act 1993 s 101(8).

3    For these purposes, 'dwelling' means any building or part of a building occupied or intended to be occupied as a separate dwelling: *ibid* s 101(1).

4    le within the meaning of the Mental Health Act 1983: see MENTAL HEALTH vol 30(2) (Reissue) PARA 402.

5    Leasehold Reform, Housing and Urban Development Act 1993 s 89(1), (2).

6    For these purposes, 'dispose', in relation to premises, includes granting a right to occupy the premises, and, in relation to premises comprised in a tenancy, includes (1) assigning the tenancy; and (2) subletting or parting with possession of the premises or any part of the premises; and 'disposal' is to be construed accordingly: Disability Discrimination Act 1995 s 22(6). 'Tenancy' means a tenancy created (a) by a lease or sublease; (b) by an agreement for a lease or sublease; (c) by a tenancy agreement; or (d) in pursuance of any enactment: s 22(6).

7    See *ibid* s 22(8). For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

8    As to when a person discriminates against a disabled person for these purposes see *ibid* s 24 (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 599. For the meaning of 'disabled person' see s 1(2); and DISCRIMINATION vol 13 (2007 Reissue) PARA 511. In the case of an act which constitutes discrimination by virtue of s 55 (as amended) (victimisation: see DISCRIMINATION vol 13 (2007 Reissue) PARA 526), s 22 (as amended) also applies to discrimination against a person who is not disabled: s 22(7). Where, however, for a reason which relates to the disabled person's disability, a person with power to dispose of any premises ('the provider') treats a disabled person less favourably than he treats or would treat others to whom that reason does not or would not apply, that treatment is to be taken to be justified for the purposes of s 24(1) (as amended) in circumstances where (1) the provider grants a disabled person a right to occupy premises (whether by means of a formal tenancy agreement or otherwise); (2) the disabled person is required to provide a deposit which is refundable at the end of the period of occupation provided that the premises and contents are not damaged; (3) the provider refuses to refund some or all of the deposit because the premises or contents have been damaged for a reason which relates to the disabled person's disability, and the damage is above the level at which the provider would normally refund some or all of the deposit; and (4) it is reasonable in all the circumstances for the provider to refuse to refund some or all of the deposit: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 3.

9    Disability Discrimination Act 1995 s 22(1).

10   'Estate agent' means a person who, by way of profession or trade, provides services for the purpose of finding premises for persons seeking to acquire them or assisting in the disposal of premises: *ibid* s 22(6).

11   'Advertisement' includes every form of advertisement or notice, whether to the public or not: *ibid* s 22(6).

12   *Ibid* s 22(2).

13   *Ibid* s 22(3); and see *Manchester City Council v Romano*, *Manchester City Council v Samari* [2004] EWCA Civ 834, [2004] 4 All ER 21, [2005] 1 WLR 2775, cited in PARA 1358 post.

14 Disability Discrimination Act 1995 s 22(3A) (added by the Disability Discrimination Act 2005 s 19(1), Sch 1 Pt 1 paras 1, 16). A commonhold association which exercises functions in relation to any commonhold premises is to be treated as a person who manages the premises for these purposes: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 8(1).

15 Ie whenever created: see the Disability Discrimination Act 1995 s 22(5).

16 Ibid s 22(4).

17 See ibid s 23 (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 602.

18 See ibid s 22A(7) (s 22A added by the Disability Discrimination Act 2005 s 19(1), Sch 1 Pt 1 paras 1, 17). 'Commonhold unit' has the same meaning as in the Commonhold and Leasehold Reform Act 2002 Pt 1 (ss 1-70) (see COMMONHOLD vol 13 (2009) PARA 330); Disability Discrimination Act 1995 s 22A(5) (as so added).

19 'Unit-holder', in relation to a commonhold unit, has the same meaning as in the Commonhold and Leasehold Reform Act 2002 Pt 1 (see COMMONHOLD vol 13 (2009) PARA 331); Disability Discrimination Act 1995 s 22A(5) (as added: see note 18 supra).

20 Ibid s 22A(1) (as added: see note 18 supra). In the case of an act which constitutes discrimination by virtue of s 55 (as amended) (victimisation: see DISCRIMINATION vol 13 (2007 Reissue) PARA 526), s 22A (as added) also applies to discrimination against a person who is not disabled: s 22A(6) (as so added).

Regulations may make provision, for these purposes: (1) as to what is, or as to what is not, to be included within the meaning of 'dispose' (and 'disposal'); (2) as to what is, or as to what is not, to be included within the meaning of 'interest in a commonhold unit': s 22A(4) (as so added). 'Dispose', in relation to an interest in a commonhold unit, includes granting a right to occupy the unit, and 'disposal' is to be construed accordingly; and an 'interest in a commonhold unit' includes an interest in part only of a commonhold unit: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 8(2).

21 Ibid s 22A(2) (as added: see note 18 supra).

22 Ibid s 22A(3) (as added: see note 18 supra).

23 Ie ibid ss 22-24L (as amended); see the text and notes 6-22 supra; para 51 post; and DISCRIMINATION vol 13 (2007 Reissue) PARA 600 et seq.

24 Ibid ss 22-24L (as amended) do not apply: (1) in relation to the provision of premises by a provider of services where he provides the premises in providing services to members of the public; (2) in relation to the provision, in the course of a Part 2 relationship, of premises by the regulated party to the other party; (3) in relation to the provision of premises to a student or prospective student (a) by a responsible body within the meaning of Pt IV Ch 1 (ss 28A-28Q) (as added and amended) or Pt IV Ch 2 (ss 28R-31A) (as amended) (discrimination in relation to education: see DISCRIMINATION vol 13 (2007 Reissue) PARA 569); or (b) by an authority in discharging any functions mentioned in s 28F(1) (as added and amended) (duty of education authorities not to discriminate); or (4) to anything which is unlawful under s 21F (as added) (discrimination by private clubs etc) or which would be unlawful under that provision but for the operation of any provision in or made under the Disability Discrimination Act 1995: s 24M(1) (s 24M added by the Disability Discrimination Act 2005 s 19(1), Sch 1 Pt 1 paras 1, 20). Head (1) supra has effect subject to any prescribed exceptions; and in that head 'provider of services', and 'providing services', have the same meaning as in the Disability Discrimination Act 1995 s 19 (as amended) (see DISCRIMINATION vol 13 (2007 Reissue) PARA 583 et seq): s 24M(2), (3) (as so added). For the purposes of head (2) supra, 'Part 2 relationship' means a relationship during the course of which an act of discrimination against, or harassment of, one party to the relationship by the other party to it is unlawful under ss 4-15C (as amended) (see DISCRIMINATION vol 13 (2007 Reissue) PARA 529 et seq); and in relation to a Part 2 relationship, 'regulated party' means the party whose acts of discrimination, or harassment, are made unlawful by those provisions: s 24M(4) (as so added). In head (3) supra, 'student' includes pupil: s 24M(5) (as so added).

25 See ibid s 25 (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 644.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(iii) Discrimination Provisions/51. Disability discrimination; duties of controller of premises.

## 51. Disability discrimination; duties of controller of premises.

With effect from 4 December 2006<sup>1</sup>, it is unlawful for a controller of let premises<sup>2</sup> to discriminate against a disabled person<sup>3</sup> who is a person to whom the premises are let or who, although not a person to whom the premises are let, is lawfully under the letting an occupier of the premises<sup>4</sup>; but this does not apply if the premises are, or have at any time been, the only or principal home of an individual who is a person by whom they are let and since entering into the letting:

- 98 (1) the individual has not; and
- 99 (2) where he is not the sole person by whom the premises are let, no other person by whom they are let has,

used for the purpose of managing the premises the services of a person who, by profession or trade, manages let premises<sup>5</sup>. Nor does it apply if the premises are of a prescribed description<sup>6</sup> or where the exemption for small dwellings<sup>7</sup> applies<sup>8</sup>.

Where the above prohibition on discrimination applies and:

- 100 (a) a controller of let premises receives a request made by or on behalf of a person to whom the premises are let;
- 101 (b) it is reasonable<sup>9</sup> to regard the request as a request that the controller take steps in order to provide an auxiliary aid or service<sup>10</sup>; and
- 102 (c) either the first condition<sup>11</sup>, or the second condition<sup>12</sup>, is satisfied,

it is the duty of the controller to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to provide the auxiliary aid or service<sup>13</sup>.

Where that prohibition on discrimination applies, and either:

- 103 (i) a controller of let premises has a practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person<sup>14</sup> to enjoy the premises, or to make use of any benefit or facility which by reason of the letting is one of which he is entitled to make use; or
- 104 (ii) a term of the letting<sup>15</sup> has that effect,

and (in either case) the specified conditions<sup>16</sup> are satisfied, it is the duty of the controller to take such steps as it is reasonable<sup>17</sup>, in all the circumstances of the case, for him to have to take in order to change the practice, policy, procedure or term so as to stop it having that effect<sup>18</sup>.

Also with effect from that date, where a person has premises to let, and a disabled person is considering taking a letting of the premises, it is unlawful for a controller of the premises<sup>19</sup> to discriminate against the disabled person<sup>20</sup>; but this does not apply in relation to premises that are to let if the premises are, or have at any time been, the only or principal home of an individual who is a person who has them to let and neither the individual nor, where he is not the sole person who has the premises to let, any other person who has the premises to let, uses the services of an estate agent<sup>21</sup> for the purposes of letting the premises<sup>22</sup>. Nor does it apply if the premises are of a prescribed description<sup>23</sup> or where the exemption for small dwellings<sup>24</sup> applies<sup>25</sup>.

A person's failure to comply with a duty with regard to let premises or premises that are to let<sup>26</sup> is justified only if in his opinion a specified statutory condition<sup>27</sup> is satisfied and it is reasonable, in all the circumstances of the case, for him to hold that opinion<sup>28</sup>.



Regulations may make supplementary provision for the purposes of the above provisions<sup>29</sup>; and the premises provisions<sup>30</sup> do not operate where certain other statutory provisions operate<sup>31</sup>.

Enforcement of these provisions is dealt with elsewhere in this work<sup>32</sup>.

1    le the date on which the Disability Discrimination Act 2005 s 13 came into force: see the Disability Discrimination Act 2005 (Commencement No 2) Order 2005, SI 2005/2774, art 4(b).

2    For these purposes, and the purposes of the Disability Discrimination Act 1995 ss 24B-24F (as added), a person is a controller of let premises if he is (1) a person by whom the premises are let; or (2) a person who manages the premises: s 24A(3) (ss 24A-24M added by the Disability Discrimination Act 2005 s 13). 'Let' includes sublet; and premises are to be treated as let by a person to another where a person has granted another a contractual licence to occupy them: Disability Discrimination Act 1995 s 24A(4) (as so added). Section 24A (as added) applies only in relation to premises in the United Kingdom: s 24A(5) (as so added). For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

Premises which are a commonhold unit of which a person is a unit-holder are to be treated as premises which are let to that person for the purposes of ss 24A-24F (as added): see the Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 9(1). Where this applies: (a) a commonhold association which exercises functions in relation to the premises is to be treated as a person who manages the premises; (b) for the purposes of the Disability Discrimination Act 1995 ss 24D, 24E (as added), any reference to a term of the letting is to be treated as including a reference to a term of the commonhold community statement and any other term applicable by virtue of the transfer of the unit to the unit-holder; (c) for the purposes of ss 24C(4), 24D(1) (as added), any benefit or facility which, by reason of the letting, is one of which a relevant disabled person is entitled to make use, is to be treated as including any benefit or facility which by reason of any term referred to in head (b) supra is one of which a relevant disabled person is entitled to make use; (d) a person who is lawfully an occupier of the unit, although not a unit-holder nor a person lawfully occupying the unit under a letting of it, is to be treated as a person who, although not a person to whom the premises are let, is lawfully under a letting an occupier of them: reg 9(2).

3    For these purposes, a controller of let premises discriminates against a disabled person if (1) he fails to comply with a duty under the Disability Discrimination Act 1995 s 24C or s 24D (each as added) imposed on him by reference to the disabled person; and (2) he cannot show that failure to comply with the duty is justified (see s 24K (as added); and note 27 infra): s 24A(2) (as added: see note 2 supra).

4    Ibid s 24A(1) (as added: see note 2 supra).

5    Ibid s 24B(1) (as added: see note 2 supra).

6    Ibid s 24B(2) (as added: see note 2 supra).

7    le where the conditions mentioned in ibid s 23(2) are satisfied: see s 24B(3) (as added: see note 2 supra). For the purposes of s 23 (as amended) 'the relevant occupier' means, in a case falling within s 24A(1) (as added), a controller of the let premises, or a near relative of his; and 'near relative' has here the same meaning as in s 23 (as amended) (exemption for small dwellings: see DISCRIMINATION vol 13 (2007 Reissue) PARA 604): s 24B(4) (as so added).

8    Ibid s 24B(3) (as added: see note 2 supra).

9    For the purposes of ibid ss 24C, 24D (as added: see note 2 supra) it is never reasonable for a controller of let premises to have to take steps consisting of, or including, the removal or alteration of a physical feature: s 24E(1) (as added: see note 2 supra). For these purposes and the purposes of s 24J(5) (as added) (see note 20 infra), the following are to be treated as physical features: (1) any feature arising from the design or construction of the premises; (2) any feature of any approach to, exit from, or access to the premises; (3) any fixtures in or on the premises; (4) any other physical element or quality of any land comprised in the premises; but any furniture, furnishings, materials, equipment or other chattels in or on the premises are not to be treated as physical features: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 4(1)-(3). The following are not to be treated as alterations of physical features: (a) the replacement or provision of any signs or notices; (b) the replacement of any taps or door handles; (c) the replacement, provision or adaptation of any door bell, or door entry system; (d) changes to the colour of any surface (such as, eg, a wall or door): reg 4(4).

See also notes 10, 17 infra.

10   The following are to be treated as auxiliary aids or services for these purposes, and for the purposes of the Disability Discrimination Act 1995 s 24J(1), (2) (as added) (see note 20 infra): (1) the removal, replacement or provision of any furniture, furnishings, materials, equipment or other chattels; (2) the replacement or provision of any signs or notices; (3) the replacement of any taps or door handles; (4) the replacement,

provision or adaptation of any door bell, or door entry system; (5) changes to the colour of any surface (such as, eg, a wall or door); but head (1) supra does not include the provision of any item which would be a fixture when installed: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 5(1), (2). It is reasonable to regard a request for a matter falling within head (1) supra as a request for the controller of premises to take steps in order to provide an auxiliary aid or service; and the 'controller of premises' means, in relation to the Disability Discrimination Act 1995 s 24C (as added), the controller of let premises and, in relation to s 24J(1), (2) (as added), the controller of premises that are to let: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 5(3), (4).

11 The first condition is that (1) the auxiliary aid or service would enable a relevant disabled person to enjoy, or facilitate such a person's enjoyment of, the premises, but would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the premises are let nor an occupier of them; and (2) it would, were the auxiliary aid or service not to be provided, be impossible or unreasonably difficult for the relevant disabled person concerned to enjoy the premises: Disability Discrimination Act s 24C(3) (as added: see note 2 supra). For the meaning of 'relevant disabled person' see note 14 infra.

12 The second condition is that (1) the auxiliary aid or service would enable a relevant disabled person to make use, or facilitate such a person's making use, of any benefit or facility which by reason of the letting is one of which he is entitled to make use, but would be of little or no practical use to the relevant disabled person concerned if he were neither a person to whom the premises are let nor an occupier of them; and (2) it would, were the auxiliary aid or service not to be provided, be impossible or unreasonably difficult for the relevant disabled person concerned to make use of any benefit or facility which by reason of the letting is one of which he is entitled to make use: ibid s 24C(4) (as added: see note 2 supra). For the meaning of 'relevant disabled person' see note 14 infra.

13 Ibid s 24C(1), (2) (as added: see note 2 supra). Sections 24C, 24D (as added) impose duties only for the purpose of determining whether a person has, for the purposes of s 24A (as added), discriminated against another; and accordingly a breach of any such duty is not actionable as such: s 24E(2) (as so added).

14 For the purposes of ibid ss 24C, 24D (as added), 'relevant disabled person', in relation to let premises, means a particular disabled person who is a person to whom the premises are let or who, although not a person to whom the premises are let, is lawfully under the letting an occupier of the premises: s 24E(3) (as added: see note 2 supra).

15 For the purposes of ibid ss 24C, 24D (as added), the terms of a letting of premises include the terms of any agreement which relates to the letting of the premises: s 24E(4) (as added: see note 2 supra).

16 Those conditions are: (1) that the practice, policy, procedure or term would not have that effect if the relevant disabled person concerned did not have a disability; (2) that the controller receives a request made by or on behalf of a person to whom the premises are let; and (3) that it is reasonable to regard the request as a request that the controller take steps in order to change the practice, policy, procedure or term so as to stop it having that effect: ibid s 24D(2) (as added: see note 2 supra).

17 Where under the terms of any lease or other binding obligation a controller of let premises is required to obtain the consent of any person to change a term of a letting and but for that requirement, it would be reasonable for the controller of let premises to change the term in order to comply with a duty under ibid s 24D(3) (as added), it is reasonable for the controller of let premises to have to request that consent, but it is not reasonable for him to have to change the term of the letting before that consent is obtained; and for these purposes 'binding obligation' means any legally binding obligation in relation to premises, whether arising from an agreement or otherwise: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 6(1), (2). Subject to that, where (1) a controller of let premises is subject to a duty under the Disability Discrimination Act 1995 s 24D(3) (as added) in relation to a term of the letting of a dwelling house; (2) the duty has arisen because a term of the letting prohibits the person to whom the premises are let from making alterations or improvements to the premises; (3) the terms of the letting contain no exception to that prohibition for alterations or improvements to be made with the consent of the controller of let premises; (4) the person to whom the premises are let has requested permission to make an improvement to the premises; (5) if the improvement in question were excluded from the prohibition, the term would no longer have the effect of making it impossible or unreasonably difficult for a relevant disabled person to enjoy the premises or make use of any benefit or facility which by reason of the letting is one of which he is entitled to make use; and (6) it would be reasonable in all the circumstances for the person to whom the premises are let to make the improvement in question, it is reasonable for the controller of let premises to have to take steps to change the term referred to in head (2) supra, so far as it relates to the improvement in question, so that it becomes a term which permits the making of that improvement, subject to the imposition of reasonable conditions by the controller of let premises: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 7(1)-(4).

See also note 9 supra.

18 Disability Discrimination Act 1995 s 24D(1), (3). See also note 13 supra.

19 For these purposes and the purposes of *ibid* ss 24H, 24J (as added), a person is a controller of premises that are to let if he is (1) a person who has the premises to let; or (2) a person who manages the premises: s 24G(3) (as added: see note 2 *supra*). 'Let' includes sublet; premises are to be treated as to let by a person to another where a person proposes to grant another a contractual licence to occupy them; and references to a person considering taking a letting of premises are to be construed accordingly: s 24G(4) (as so added). Section 24G (as added) applies only in relation to premises in the United Kingdom: s 24G(5) (as so added).

20 *Ibid* s 24G(1) (as added: see note 2 *supra*). For these purposes, a controller of premises that are to let discriminates against a disabled person if (1) he fails to comply with a duty under s 24J (as added) imposed on him by reference to the disabled person; and (2) he cannot show that failure to comply with the duty is justified (see s 24K (as added): s 24G(2) (as so added)).

Where: (a) a controller of premises that are to let receives a request made by or on behalf of a relevant disabled person; (b) it is reasonable to regard the request as a request that the controller take steps in order to provide an auxiliary aid or service; (c) the auxiliary aid or service would enable the relevant disabled person to become, or facilitate his becoming, a person to whom the premises are let, but would be of little or no practical use to him if he were not considering taking a letting of the premises; and (d) it would, were the auxiliary aid or service not to be provided, be impossible or unreasonably difficult for the relevant disabled person to become a person to whom the premises are let, it is the duty of the controller to take such steps as it is reasonable, in all the circumstances of the case, for the controller to have to take in order to provide the auxiliary aid or service (but see s 24J(5) (as added): s 24J(1), (2) (as added: see note 2 *supra*)).

Where (i) a controller of premises that are to let has a practice, policy or procedure which has the effect of making it impossible, or unreasonably difficult, for a relevant disabled person to become a person to whom the premises are let; (ii) the practice, policy or procedure would not have that effect if the relevant disabled person did not have a disability; (iii) the controller receives a request made by or on behalf of the relevant disabled person; and (iv) it is reasonable to regard the request as a request that the controller take steps in order to change the practice, policy or procedure so as to stop it having that effect, it is the duty of the controller to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change the practice, policy or procedure so as to stop it having that effect (but see s 24J(5) (as added)): s 24J(3), (4) (as so added). For these purposes, it is never reasonable for a controller of premises that are to let to have to take steps consisting of, or including, the removal or alteration of a physical feature (s 24J(5) (as so added)); and 'relevant disabled person', in relation to premises that are to let, means a particular disabled person who is considering taking a letting of the premises (s 24J(6) (as so added)). Section 24J (as so added) imposes duties only for the purpose of determining whether a person has, for the purposes of s 24G (as added), discriminated against another; and accordingly a breach of any such duty is not actionable as such: s 24J(7) (as so added).

21 *Ie* within the meaning given by *ibid* s 22(6): see PARA 50 note 10 *ante*.

22 *Ibid* s 24H(1) (as added: see note 2 *supra*).

23 *Ibid* s 24H(2) (as added: see note 2 *supra*).

24 *Ie* where the conditions mentioned in *ibid* s 23(2) are satisfied: see s 24H(3) (as added: see note 2 *supra*). For the purposes of s 23 (as amended) 'the relevant occupier' means, in a case falling within s 24G(1) (as added), a controller of the let premises, or a near relative of his; and 'near relative' has here the same meaning as in s 23 (as amended) (see DISCRIMINATION vol 13 (2007 Reissue) PARA 602): s 24H(4) (as so added).

25 *Ibid* s 24H(3) (as added: see note 2 *supra*).

26 *Ie* a duty for the purposes of *ibid* s 24A(2) (as added) and s 24G(2) (as added): see the text and notes 3, 20 *supra*.

27 The conditions are (1) that it is necessary to refrain from complying with the duty in order not to endanger the health or safety of any person (which may include that of the disabled person concerned); (2) that the disabled person concerned is incapable of entering into an enforceable agreement, or of giving informed consent, and for that reason the failure is reasonable: *ibid* s 24K(2) (as added: see note 2 *supra*). Regulations may (a) make provision, for these purposes, as to circumstances in which it is, or as to circumstances in which it is not, reasonable for a person to hold the opinion mentioned in head (2) *supra*; (b) amend or omit a condition specified in head (2) *supra* or make provision for it not to apply in prescribed circumstances; (c) make provision, for these purposes, as to circumstances (other than any for the time being mentioned in s 24K(2) (as added)) in which a failure is to be taken to be justified: s 24K(3) (as added: see note 2 *supra*). The condition specified in head (2) *supra* does not apply where another person is acting for a disabled person by virtue of: (i) a power of attorney; (ii) functions conferred by or under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended and prospectively repealed) (see MENTAL HEALTH); or (iii) powers exercisable in relation to the disabled person's property or affairs in consequence of the appointment, under the law of Scotland, of a guardian, tutor or judicial factor: Disability Discrimination (Premises) Regulations 2006, SI 2006/887, reg 2.

28 Disability Discrimination Act 1995 s 24K(1) (as added: see note 2 *supra*).

29 le for the purposes of *ibid* s 24(3A), (3B) (as added) (see DISCRIMINATION vol 13 (2007 Reissue) PARA 599) and ss 24A-24K (as added) (see the text and notes 1-28 *supra*): s 24L(1) (as added: see note 2 *supra*). As to the provision that may be made see s 24L(1)(a)-(n), (2), (3) (as so added); and as the exercise of these powers see the Disability Discrimination (Premises) Regulations 2006, SI 2006/887; notes 2, 9, 10, 17, 27 *supra*; and PARA 50 notes 18, 14, 20 *ante*.

30 le *ibid* ss 22-24L (as amended); see PARA 50 *ante*; the text and notes 1-29 *supra*; and DISCRIMINATION vol 13 (2007 Reissue) PARAS 599-610.

31 See *ibid* s 24M (as added); and PARA 50 note 24 *ante*.

32 See *ibid* s 25 (as amended); and DISCRIMINATION vol 13 (2007 Reissue) PARA 644.

## UPDATE

### 51 Disability discrimination; duties of controller of premises

NOTE 27--SI 2006/887 reg 2 amended: SI 2007/1898.

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### (iv) Information about Landlord to be given to Tenants of Dwellings

#### 52. Disclosure of landlord's identity.

If the tenant<sup>1</sup> of premises occupied as a dwelling<sup>2</sup> makes a written request for the landlord's<sup>3</sup> name and address<sup>4</sup> to:

- 105 (1) any person who demands, or the last person who received, rent payable under the tenancy; or
- 106 (2) any other person for the time being acting as agent for the landlord, in relation to the tenancy,

that person must supply the tenant with a written statement of the landlord's name and address within the period of 21 days beginning with the day on which he receives the request<sup>5</sup>. A person who without reasonable excuse fails to comply with this requirement commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>6</sup>.

Where a tenant is so supplied<sup>7</sup> with the name and address of his landlord and the landlord is a body corporate, he may make a further written request to the landlord for the name and address of every director and of the secretary of the landlord<sup>8</sup>. Such a request is duly made to the landlord if it is made to an agent of the landlord or a person who demands the rent of the premises concerned; and any such agent or person to whom such a request is so made must forward it to the landlord as soon as may be<sup>9</sup>. The landlord must supply the tenant with a written statement of the information so requested within the period of 21 days beginning with the day on which he receives the request<sup>10</sup>. A landlord who without reasonable excuse fails to comply with such a request<sup>11</sup>, and a person who without reasonable excuse fails to comply with

a requirement so imposed<sup>12</sup> on him, commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>13</sup>.

1 For these purposes, 'tenant' includes a statutory tenant: Landlord and Tenant Act 1985 s 1(3)(a). 'Statutory tenant' and 'statutory tenancy' mean a statutory tenant or statutory tenancy within the meaning of the Rent Act 1977 (see PARA 831 et seq post) or the Rent (Agriculture) Act 1976 (see PARA 1146 et seq post): Landlord and Tenant Act 1985 s 37(a). 'Lease' and 'tenancy' have the same meaning (s 36(1)); and both expressions include a sublease or subtenancy and an agreement for a lease or tenancy or sublease or subtenancy (s 36(2)). The expressions 'lessor' and 'lessee' and 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly: s 36(3). In relation to a statutory tenant, 'landlord' means the person who, apart from the statutory tenancy, would be entitled to possession of the premises: s 37(b). For the meaning of 'landlord' for the purposes of ss 1, 2 see also note 3 infra.

2 For these purposes, 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it: *ibid* s 38; and see *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389, [2006] All ER (D) 290 (Oct).

3 For these purposes, 'landlord' means the immediate landlord: Landlord and Tenant Act 1985 s 1(3)(b).

4 For these purposes, 'address' means a person's place of abode or place of business or, in the case of a company, its registered office: *ibid* s 38.

5 *Ibid* s 1(1). Sections 1, 2 do not, however, apply to a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Landlord and Tenant Act 1985 s 32(1) (amended by the Housing Act 1996 s 93(2)).

6 Landlord and Tenant Act 1985 s 1(2). The 'standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37 (as amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this title states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164 (as amended); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

Proceedings for an offence under any provision of the Landlord and Tenant Act 1985 may be brought by a local housing authority: s 34. For these purposes, 'local housing authority' has the meaning given by the Housing Act 1985 s 1 (as amended) (see PARA 1311 note 4 post): Landlord and Tenant Act 1985 s 38.

Where an offence under the Landlord and Tenant Act 1985 which has been committed by a body corporate is proved (1) to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in any such capacity; or (2) to be attributable to any neglect on the part of such an officer or person, he, as well as the body corporate, is guilty of an offence and liable to be proceeded against and punished accordingly: s 33(1). Where the affairs of a body corporate are managed by its members s 33(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 33(2).

7 *Ie* under *ibid* s 1: see the text and notes 1-6 supra.

8 *Ibid* s 2(1). Section 2 does not, however, apply to a business tenancy: see note 5 supra.

9 *Ibid* s 2(3). See also note 8 supra.

10 *Ibid* s 2(2). See also note 8 supra.

11 *Ie* a request under *ibid* s 2.

12 *Ie* imposed by *ibid* s 2(3).

13 *Ibid* s 2(4). See also note 8 supra.

PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(5) LEGISLATIVE INTERVENTION/(iv) Information about Landlord to be given to Tenants of Dwellings/53. Notification by landlord of address for service of notices.

### 53. Notification by landlord of address for service of notices.

A landlord<sup>1</sup> of any premises which consist of or include a dwelling<sup>2</sup> and are not held under a tenancy to which Part II of the Landlord and Tenant Act 1954<sup>3</sup> applies must by notice<sup>4</sup> furnish the tenant with an address in England and Wales at which notices, including notices in proceedings<sup>5</sup>, may be served on him by the tenant<sup>6</sup>. Where a landlord of any such premises fails so to furnish an address, any rent, service charge<sup>7</sup> or administration charge<sup>8</sup> otherwise due from the tenant to the landlord is treated for all purposes as not being due from the tenant to the landlord at any time before the landlord does so supply an address<sup>9</sup>; but any such rent, service charge or administration charge is not to be so treated in relation to any time when, by virtue of an order of any court<sup>10</sup> or tribunal, there is in force an appointment of a receiver or manager<sup>11</sup> whose functions include the receiving of rent, service charges or, as the case may be, administration charges from the tenant<sup>12</sup>.

1 For these purposes, 'landlord' means the immediate landlord or, in relation to a statutory tenant, the person who, apart from the statutory tenancy, would be entitled to possession of the premises subject to the tenancy: Landlord and Tenant Act 1987 s 60(1). 'Lease' and 'tenancy' have the same meaning and both expressions include a sublease or subtenancy and an agreement for a lease or tenancy or for a sublease or subtenancy (ss 59(1), 60(1)); and the expressions 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or the terms of a lease are to be construed accordingly (ss 59(2), 60(1)). 'Tenancy' includes a statutory tenancy; and 'statutory tenancy' and 'statutory tenant' mean a statutory tenancy or statutory tenant within the meaning of the Rent Act 1977 (see PARA 831 et seq post) or the Rent (Agriculture) Act 1976 (see PARA 1146 et seq post): Landlord and Tenant Act 1987 s 60(1). Where the premises are managed by an RTM company, references to the landlord include the RTM company, and references to a tenant include a person who is landlord under a lease of the whole or any part of the premises: Commonhold and Leasehold Reform Act 2002 s 102, Sch 7 para 12(1)-(3). For the meaning of 'RTM company' see PARA 374 post.

2 For these purposes, 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it: Landlord and Tenant Act 1987 s 60(1).

3 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

4 Any notice required or authorised to be served under the Landlord and Tenant Act 1987 must be in writing and may be sent by post: s 54(1). In the Law of Property Act 1925 s 196 (as amended) (regulations respecting notices) any reference in s 196(3), (4) (as amended) (see PARA 621 post) to the last-known place of abode or business of the person to be served has effect, in its application to a notice to be served by a tenant on a landlord of premises to which the Landlord and Tenant Act 1987 Pt VI (ss 46-50) (as amended) (see the text and notes 5-12 infra; and PARA 257 post) applies as if that reference included a reference to (1) the address last furnished to the tenant by the landlord in accordance with s 48 (as amended); or (2) if no address has been furnished in accordance with s 48 (as amended), the address last furnished to the tenant by the landlord in accordance with s 47 (as amended) (see PARA 257 post): s 49.

A landlord may give two different addresses for service of notices where this will not be confusing for the tenant: *Marath v MacGillivray* (1996) 28 HLR 484, [1996] NPC 11, CA. The address of the landlord's agent is sufficient: *Drew-Morgan v Hamid-Zadeh* (1999) 32 HLR 316, [1999] 2 EGLR 13, CA.

5 For these purposes, 'notices in proceedings' means notices or other documents served in, or in connection with, any legal proceedings: Landlord and Tenant Act 1987 s 60(1).

6 Ibid ss 46(1), 48(1). Section 48 (as amended) applies to tenancies created or in existence before 1 February 1988 (ie the date on which s 48 came into force: see s 62(2); the Landlord and Tenant Act 1987 (Commencement No 1) Order 1987, SI 1987/2177, art 2(c)); and *Hussain v Singh* [1993] 2 EGLR 70, [1993] 31 EG 75, CA.

The Landlord and Tenant Act 1987 Pt VI (as amended) applies to an agricultural holding if it includes a dwelling: *Dallhold Estates (UK) Pty Ltd v Linsey Trading Properties Inc* (1992) 65 P & CR 374, [1992] 1 EGLR 88; revsd on other grounds sub nom *Lindsey Trading Properties Inc v Dallhold Estates (UK) Pty Ltd* (1993) 70 P & CR 332, [1994] 1 EGLR 93, CA.

7 For these purposes, 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 post); Landlord and Tenant Act 1987 s 46(2).

8 For these purposes, 'administration charge' has the meaning given by the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 1 (see PARA 355 post); Landlord and Tenant Act 1987 s 46(3) (added by the Commonhold and Leasehold Reform Act 2002 Sch 11 Pt 2 paras 7, 9).

9 Landlord and Tenant Act 1987 s 48(2) (amended by the Commonhold and Leasehold Reform Act 2002 Sch 11 Pt 2 paras 7, 11(1), (2)). See *Rogan v Woodfield Building Services Ltd* (1994) 27 HLR 78, [1995] 1 EGLR 72, CA (rent to be treated as not due because of failure to comply with the Landlord and Tenant Act 1987 s 48(1) is not forever irrecoverable; such a contention is contrary to the clear words of s 48(2) (now as amended)).

10 For these purposes, 'the court' means the High Court or a county court: Landlord and Tenant Act 1987 s 60(1). A county court has jurisdiction to hear and determine any question arising under any provision of Pt I (ss 1-20) (as amended) (see PARA 1744 et seq post), Pt III (ss 25-34) (as amended) (see PARA 1783 et seq post), s 42 (as amended) (see PARA 352 post), ss 46, 47 (as amended) (see PARA 257 post) and s 48, other than a question falling within the jurisdiction of a leasehold valuation tribunal by virtue of s 13(1) (as substituted) (see PARA 1776 post) or s 31(1) (as amended) (see PARA 1789 post): s 52(1), (2) (amended by the Housing Act 1996 ss 86(6), 92(1), Sch 6 Pt IV para 6; the Commonhold and Leasehold Reform Act 2002 s 163(1), (8)). Where any proceedings under any of those provisions are being taken in a county court, the county court has jurisdiction to hear and determine any other proceedings joined with those proceedings, notwithstanding that the other proceedings would otherwise be outside the court's jurisdiction: Landlord and Tenant Act 1987 s 52(3).

11 As to the appointment of a receiver or manager to receive the rent or, as the case may be, service charge or administration charge see PARA 399 et seq post.

12 Landlord and Tenant Act 1987 s 48(3) (amended by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 11 Pt 2 paras 7, 11(1), (3)(a), (b), Sch 13 paras 8, 11).

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## **(v) Other Relevant Legislation**

### **54. Financial assistance for provision of landlord and tenant law advice or for certain legal proceedings.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may give financial assistance to any person in relation to the provision by that person of general advice about:

- 107 (1) any aspect of the law of landlord and tenant, so far as relating to residential tenancies; or
- 108 (2) the provisions of the Leasehold Reform, Housing and Urban Development Act 1993<sup>3</sup> relating to estate management schemes in connection with enfranchisement<sup>4</sup>.

Such financial assistance may be given in such form and on such terms as the Secretary of State or the Assembly or minister considers appropriate<sup>5</sup>; and the terms on which it may be given may, in particular, include provision as to the circumstances in which the assistance must be repaid or otherwise made good to the Secretary of State or the Assembly or minister and the manner in which that is to be done<sup>6</sup>.

The Lord Chancellor may give financial assistance to a person in relation to the provision by that person of general advice about an aspect of the law of commonhold land, so far as relating to residential matters<sup>7</sup>. Such financial assistance may be given in such form and on such terms as the Lord Chancellor thinks appropriate<sup>8</sup> and the terms may, in particular, require repayment in specified circumstances<sup>9</sup>.

The Secretary of State or, in relation to Wales, the Assembly or the relevant Welsh minister may give assistance in connection with legal proceedings relating to the right to buy<sup>10</sup>.

As from a day to be appointed<sup>11</sup>, the Commission for Equality and Human Rights<sup>12</sup> may assist an individual who is or may become party to legal proceedings:

- 109 (a) if the proceedings relate or may relate, wholly or partly, to a provision of the equality enactments<sup>13</sup> and the individual alleges that he has been the victim of behaviour contrary to a provision of the equality enactments<sup>14</sup>;
- 110 (b) if and in so far as the proceedings concern or may concern the question of a landlord's reasonableness in relation to consent to the making of an improvement to a dwelling where the improvement would be likely to facilitate the enjoyment of the premises by the tenant or another lawful occupier having regard to a disability<sup>15</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 I.e. the provisions of the Leasehold Reform, Housing and Urban Development Act Pt I Ch IV (ss 69-75) (as amended): see PARA 1734 et seq post.

4 Housing Act 1996 s 94(1).

5 Ibid s 94(2).

6 Ibid s 94(3).

7 Commonhold and Leasehold Reform Act 2002 s 62(1). As to leases of commonhold land see PARA 18 ante.

8 Ibid s 62(2).

9 Ibid s 62(3).

10 See the Housing Act 1985 s 170 (as amended); and PARA 1911 post.

11 I.e. under the Equality Act 2006 s 93. At the date at which this title states the law, no such date had been appointed.

12 I.e. the Commission for Equality and Human Rights established under the Equality Act 2006 with effect from 18 April 2006: see *ibid* s 1; and the Equality Act 2006 (Commencement No 1) Order 2006, SI 2006/1082, art 2(a). As to that Commission see DISCRIMINATION vol 13 (2007 Reissue) PARA 305 et seq.

13 For the meaning of 'the equality enactments' for these purposes see LEGAL AID vol 65 (2008) PARA 11; and as to the discrimination provisions so far as they affect the law of landlord and tenant see PARAS 48-51 ante.

14 Equality Act 2006 s 28(1); and see LEGAL AID vol 65 (2008) PARA 11.

15 Ibid s 28(2). See further LEGAL AID vol 65 (2008) PARA 11; and DISCRIMINATION vol 13 (2007 Reissue) PARA 334 et seq.

## UPDATE

### **54 Financial assistance for provision of landlord and tenant law advice or for certain legal proceedings**



TEXT AND NOTE 4--1996 Act s 94(1) amended: Housing and Regeneration Act 2008 s 312(1).

TEXT AND NOTE 7--2002 Act s 62(1) amended: 2008 Act s 319(1).

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## **55. Selective licensing of private landlords.**

Part 3 of the Housing Act 2004<sup>1</sup> provides for houses<sup>2</sup> to be licensed by local housing authorities<sup>3</sup> where:

- 111 (1) they are houses to which that Part applies<sup>4</sup>; and
- 112 (2) they are required to be licensed<sup>5</sup> under that Part<sup>6</sup>.

Part 3 of the 2004 Act applies to a house if:

- 113 (a) it is in an area that is for the time being designated<sup>7</sup> as subject to selective licensing; and
- 114 (b) the whole of it is occupied either under a single tenancy or licence<sup>8</sup> that is not an exempt tenancy or licence<sup>9</sup>, or under two or more tenancies or licences in respect of different dwellings contained in it, none of which is an exempt tenancy or licence<sup>10</sup>.

These provisions are discussed in detail elsewhere in this work<sup>11</sup>.

1    Ie the Housing Act 2004 Pt 3 (ss 79-100). Whereas Pt 2 (ss 55-78) (see HOUSING vol 22 (2006 Reissue) PARA 468 et seq) introduces a mandatory licensing scheme for certain houses in multiple occupation, Pt 3 provides a power for selective licensing aimed at dealing with particular problems in a particular area.

2    For these purposes, 'house' means a building or part of a building consisting of one or more dwellings; and references to a house include (where the context permits) any yard, garden, outhouses and appurtenances belonging to, or usually enjoyed with, it (or any part of it): *ibid* s 99. 'Dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling: s 99.

3    For the meaning of 'local housing authority' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 200 note 1.

4    See the Housing Act 2004 s 79(2); and the text and notes 7-10 *infra*.

5    See *ibid* s 85(1); and HOUSING vol 22 (2006 Reissue) PARA 503.

6    *Ibid* s 79(1).

7    Ie under *ibid* s 80: see HOUSING vol 22 (2006 Reissue) PARA 499.

8    As to the meanings of 'tenancy' and 'licence' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 211 note 6.

9    Ie under the Housing Act 2004 s 79(3) or s 79(4): see HOUSING vol 22 (2006 Reissue) PARA 498.

10   *Ibid* s 79(2).

11 See HOUSING vol 22 (2006 Reissue) PARA 498 et seq.

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## **(6) JURISDICTION AND PROCEDURE**

### **(i) High Court and County Courts**

#### **56. Jurisdiction.**

Regardless of domicile, in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the member state of the European Union in which the property is situated have exclusive jurisdiction; but in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the member state in which the defendant is domiciled also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same member state<sup>1</sup>.

Subject to exceptions not relevant to the law of landlord and tenant<sup>2</sup>, a county court has jurisdiction to hear and determine any claim founded on contract or tort<sup>3</sup>. It also has jurisdiction to hear and determine a claim for the recovery of a sum recoverable by virtue of any enactment for the time being in force, if it is not provided by that or any other enactment that such sums are only to be recoverable in the High Court or are only to be recoverable summarily<sup>4</sup>. Where a claim exceeds the county court limit<sup>5</sup>, the claimant may abandon the excess so as to give the court jurisdiction<sup>6</sup>; and in other cases the parties may agree to give the court jurisdiction<sup>7</sup>.

A county court has jurisdiction to hear and determine any claim for the recovery of land<sup>8</sup> and any claim in which the title to any hereditament comes in question<sup>9</sup>. It also has all the jurisdiction of the High Court to hear and determine proceedings for the specific performance, or for the rectification, delivery up or cancellation, of any agreement for the sale, purchase or lease of any property, where, in the case of a sale or purchase, the purchase money, or in the case of a lease, the value of the property, does not exceed the county court limit<sup>10</sup>.

In general, a claim for money in which county courts have jurisdiction may only be commenced in the High Court if the financial value of the claim is more than £15,000<sup>11</sup>; and proceedings which include a claim for damages in respect of personal injuries may only be commenced in the High Court if the financial value of the claim is £50,000 or more<sup>12</sup>.

Various statutory provisions confer exclusive jurisdiction on the county court in landlord and tenant matters<sup>13</sup>. With regard to other matters provision is made for the High Court and the county court to exercise concurrent jurisdiction<sup>14</sup>. Jurisdiction in specific matters is discussed in this title in the context in which it arises.

1 EC Council Regulation 44/2001 (OJ L12, 16.01.2001, p 01), art 22(1). As to the 'Brussels I' regulation see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 65.

2 See the County Courts Act 1984 s 15(2) (as amended); and COURTS vol 10 (Reissue) PARA 712.

3 See *ibid* s 15(1) (as amended); and COURTS vol 10 (Reissue) PARA 712.

4 See *ibid* s 16 (as amended); and COURTS vol 10 (Reissue) PARA 713.

5 The county court limit in claims involving land is generally £30,000: see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(3)-(6); and COURTS vol 10 (Reissue) PARA 721. However, in claims under the Law of Property Act 1925 s 146 (as amended) (see PARA 619 post) and s 147 (as amended) (see PARA 450 post), the Landlord and Tenant Act 1954 s 63(2) (as amended) (see PARA 722 post), the County Courts Act 1984 ss 15, 16 (as amended) (see the text and notes 1-3 supra), s 21 (as amended) (see the text and notes 8-9 infra), s 139 (as amended) (see PARA 628 post) and the Housing Act 1988 s 40 (as amended) (see PARA 1128 post), the county court has jurisdiction whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings: see the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(a), (d), (l), (o) (as amended); and COURTS vol 10 (Reissue) PARAS 710 note 14, 721.

Subject to the provisions for transfer of the proceedings (or of the counterclaim) to the High Court, the county court has unlimited jurisdiction in respect of a counterclaim: see the County Courts Act 1984 s 41 (as amended) s 42 (as substituted); and CIVIL PROCEDURE vol 11 (2009) PARA 69.

6 See the County Courts Act 1984 s 17; and COURTS vol 10 (Reissue) PARA 710.

7 See *ibid* s 18 (as amended); and COURTS vol 10 (Reissue) PARA 710.

8 See *ibid* s 21(1) (as amended); and COURTS vol 10 (Reissue) PARA 715.

9 See *ibid* s 21(2) (as amended); and COURTS vol 10 (Reissue) PARA 715.

10 See *ibid* s 23(d); and COURTS vol 10 (Reissue) PARA 719.

11 See the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 4A (as added); and COURTS vol 10 (Reissue) PARA 579.

12 See *ibid* art 5 (as amended); and COURTS vol 10 (Reissue) PARA 579.

13 See eg the Law of Property Act 1925 s 147 (as amended); and PARA 450 post; the Housing Act 1980 s 86 (as substituted); and PARA 838 post; the Landlord and Tenant Act 1985 s 15; and PARA 420 post.

14 See eg the Landlord and Tenant Act 1954 s 63 (as amended); and PARA 722 post.

## UPDATE

### 56 Jurisdiction

TEXT AND NOTE 11--Proceedings may now not be started in the High Court unless the value of the claim is more than £25,000: SI 1991/724 art 4A (as substituted).

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### 57. Procedure; in general.

Except where the county court does not have jurisdiction<sup>1</sup>, landlord and tenant claims<sup>2</sup> should normally be brought in the county court; only exceptional circumstances justify starting a claim in the High Court<sup>3</sup>. If a claimant starts a claim in the High Court and the court decides that it should have been started in the county court, the court will normally either strike the claim out or transfer it to the county court on its own initiative. This is likely to result in delay and the court will normally disallow the costs of starting the claim in the High Court and of any transfer<sup>4</sup>. Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if:

- 115 (1) there are complicated disputes of fact; or  
 116 (2) there are points of law of general importance<sup>5</sup>.

The value of the property and the amount of any financial claim may be relevant circumstances, but these factors alone will not normally justify starting the claim in the High Court<sup>6</sup>. A landlord and tenant claim started in the High Court must be brought in the Chancery Division<sup>7</sup>.

The details of the procedure for claims under specific statutory provisions are set out in this title in the contexts in which they arise<sup>8</sup>. The procedure for possession claims is set out in a later part of the title<sup>9</sup>.

There are pre-action protocols<sup>10</sup> relating to housing disrepair claims<sup>11</sup> and residential possession claims by social landlords which are based solely on claims for rent arrears<sup>12</sup>.

1 As to the jurisdiction of the county court see PARA 56 ante.

2 'Landlord and tenant claim' means a claim under (1) the Landlord and Tenant Act 1927; (2) the Leasehold Property (Repairs) Act 1938; (3) the Landlord and Tenant Act 1954; (4) the Landlord and Tenant Act 1985; or (5) the Landlord and Tenant Act 1987: CPR 56.1(1). A practice direction may set out special provisions with regard to any particular category of landlord and tenant claim: CPR 56.1(2). As to the procedure for starting claims see generally CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

3 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.2. The claim must be started in the county court for the district in which the land is situated unless CPR 56.2(2) applies or an enactment provides otherwise: CPR 56.2(1). The claim may be started in the High Court if the claimant files with his claim form a certificate stating the reasons for bringing the claim in that court verified by a statement of truth in accordance with CPR 22.1(1): CPR 56.2(2). As to statements of truth see CIVIL PROCEDURE vol 11 (2009) PARA 613 et seq. For the meaning of 'filing' see PARA 660 note 20 post.

4 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.3.

5 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.4; and see CPR 56.2(3).

6 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.5.

7 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.6.

8 See eg para 723 et seq post (claims under the Landlord and Tenant Act 1954 s 24 (as amended) or s 29(2) (as amended)); paras 794, 796, 798-799, 805 post (claims under the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended)).

9 See PARA 656 et seq post.

10 As to pre-action protocols generally see CIVIL PROCEDURE vol 11 (2009) PARA 107 et seq.

11 See PARA 467 post.

12 See PARA 657 post.

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## **(ii) Leasehold Valuation Tribunals**

### **58. Jurisdiction of leasehold valuation tribunals.**

Any jurisdiction conferred on a leasehold valuation tribunal by or under any enactment is exercisable by a rent assessment committee constituted in accordance with the relevant provisions<sup>1</sup> of the Rent Act 1977<sup>2</sup>. When so constituted for exercising any such jurisdiction a rent assessment committee is known as a leasehold valuation tribunal<sup>3</sup>.

Exclusive jurisdiction is conferred on a leasehold valuation tribunal in relation to a number of landlord and tenant matters<sup>4</sup>. That jurisdiction is discussed in this title in the contexts in which it arises.

Where in any proceedings before a court there falls for determination a question falling within the jurisdiction of a leasehold valuation tribunal, the court:

- 117 (1) may by order transfer to a leasehold valuation tribunal so much of the proceedings as relate to the determination of that question; and
- 118 (2) may then dispose of all or any remaining proceedings, or adjourn the disposal of all or any remaining proceedings pending the determination of that question by the leasehold valuation tribunal, as it thinks fit<sup>5</sup>.

When the leasehold valuation tribunal has determined the question, the court may give effect to the determination in an order of the court<sup>6</sup>. Rules of court may prescribe the procedure to be followed in a court in connection with or in consequence of such a transfer<sup>7</sup>.

1 le in accordance with the Rent Act 1977 s 65, Sch 10 (as amended): see PARA 910 post.

2 Commonhold and Leasehold Reform Act 2002 s 173(1).

3 Ibid s 173(2). Rent assessment committees, residential property tribunals and leasehold valuation tribunals have now been brought together under one umbrella service, known as the Residential Property Tribunal Service. As to residential property tribunals see HOUSING vol 22 (2006 Reissue) PARAS 187-188.

4 See eg para 149 et seq post (variation of leases under the Landlord and Tenant Act 1987 Pt IV (ss 35-40) (as amended)); para 1530 post (determination of price payable for a house and premises under the Leasehold Reform Act 1967 s 21(1)(a) (as amended)); para 1506 post (variation of estate charges under the Commonhold and Leasehold Reform Act 2002 s 159).

5 Ibid s 174, Sch 12 para 3(1).

6 Ibid Sch 12 para 3(2).

7 Ibid Sch 12 para 3(3). If a question is ordered to be transferred to a leasehold valuation tribunal for determination under the Landlord and Tenant Act 1985 s 31C (repealed subject to transitional provisions) the court will: (1) send notice of the transfer to all parties to the claim; and (2) send to the leasehold valuation tribunal: (a) copies certified by the district judge of all entries in the records of the court relating to the question; (b) the order of transfer; and (c) all documents filed in the claim relating to the question: see *Practice Direction--Landlord And Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 6.1.

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## 59. Procedure; in general.

The appropriate national authority<sup>1</sup> may make regulations<sup>2</sup> about the procedure of leasehold valuation tribunals ('procedure regulations')<sup>3</sup>. Procedure regulations may:

- 119 (1) include provision:
- 3
- 4. (a) about the form of applications to leasehold valuation tribunals;
  - 5. (b) about the particulars that must be contained in such applications<sup>4</sup>;
  - 6. (c) requiring the service of notices of such applications<sup>5</sup>; and
  - 7. (d) for securing consistency where numerous applications are or may be brought in respect of the same or substantially the same matters<sup>6</sup>;
- 4
- 120 (2) include provision for the holding of a pre-trial review on the application of a party to proceedings or on the motion of a leasehold valuation tribunal<sup>7</sup>;
  - 121 (3) provide for the exercise of the functions of a leasehold valuation tribunal in relation to, or at, a pre-trial review by a single member of the panel<sup>8</sup> who is qualified<sup>9</sup> to exercise them<sup>10</sup>;
  - 122 (4) prescribe the procedure to be followed in a leasehold valuation tribunal consequent on a transfer<sup>11</sup> by a court<sup>12</sup>;
  - 123 (5) include provision enabling persons to be joined as parties to proceedings<sup>13</sup>;
  - 124 (6) include provision empowering leasehold valuation tribunals to dismiss applications or transferred proceedings, in whole or in part, on the ground that they are:
- 5
- 8. (a) frivolous or vexatious; or
  - 9. (b) otherwise an abuse of process<sup>14</sup>;
- 6
- 125 (7) include provision for the determination of applications or transferred proceedings without an oral hearing<sup>15</sup>;
  - 126 (8) provide for determinations without an oral hearing by a single member of the panel<sup>16</sup>;
  - 127 (9) include provision requiring the payment of fees in respect of an application or transfer of proceedings to, or oral hearing by, a leasehold valuation tribunal in specified cases<sup>17</sup>;
  - 128 (10) empower a leasehold valuation tribunal to require a party to proceedings to reimburse any other party to the proceedings the whole or part of any fees paid by him<sup>18</sup>;
  - 129 (11) provide for the reduction or waiver of fees by reference to the financial resources of the party by whom they are to be paid or met<sup>19</sup>;
  - 130 (12) provide for decisions of leasehold valuation tribunals to be enforceable, with the permission of a county court, in the same way as orders of such a court<sup>20</sup>.

1 'The appropriate national authority' means the Secretary of State, as respects England, and the National Assembly for Wales, as respects Wales: Commonhold and Leasehold Reform Act 2002 s 179(1). As to references to the Assembly see PARA 27 note 4 ante.

2 Regulations under *ibid* s 174, Sch 12 (see heads (1)-(12) in the text) may make different provision for different areas: s 178(2). Regulations under any provision of Pt 2 (ss 71-179) (as amended): (1) may include incidental, supplementary, consequential and transitional provision; (2) may make provision generally or only in relation to specified cases; and (3) may make different provision for different purposes: s 178(1). Any power to make such regulations is exercisable by statutory instrument: s 178(3). Regulations may not be made by the Secretary of State under Sch 12 para 9(3)(b) (see note 17 *infra*) or Sch 12 para 10(3)(b) (see PARA 71 *post*) unless a draft of the instrument containing them has been laid before and approved by a resolution of each House of Parliament: s 178(4). Otherwise, regulations made under Sch 12 are subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 178(5).

In the exercise of the power to make such regulations, the Secretary of State has made the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099 (as amended), which came fully into force on 31 October 2003 and apply in relation to any application made, or proceedings transferred from a court, to a leasehold valuation tribunal in respect of premises in England on or after (a) in the case of an application under the Leasehold Reform Act 1967 s 21 (as amended) (see PARA 1530 *post*), 31 October 2003; (b) in the case of an

application under the Commonhold and Leasehold Reform Act 2002 s 168(4) (see PARA 613 post), 28 February 2005; and (c) in any other case, 30 September 2003: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 1 (amended by SI 2004/3098). The National Assembly for Wales has made the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681 (as amended), which came into force on 31 March 2004 and apply in relation to any application made, or proceedings transferred from a court, to a leasehold valuation tribunal in respect of premises in Wales on or after (i) in the case of an application under the Commonhold and Leasehold Reform Act 2002 s 168(4) (see PARA 613 post), 31 May 2005; (ii) in any other case, 31 March 2004: see the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2 (amended by SI 2005/1356). See further PARA 60 et seq post.

3 Commonhold and Leasehold Reform Act 2002 Sch 12 para 1.

4 See PARA 60 post.

5 See PARAS 60, 63 post.

6 Commonhold and Leasehold Reform Act 2002 Sch 12 para 2; and see PARA 61 post.

7 Ibid Sch 12 para 5(1); and see PARA 65 post.

8 Ie as provided for in the Rent Act 1977 s 65, Sch 10 (as amended): see PARA 910 post.

9 A member is qualified to exercise the functions specified in head (3) in the text if he was appointed to that panel by the Lord Chancellor: Commonhold and Leasehold Reform Act 2002 Sch 12 para 5(3).

10 Ibid Sch 12 para 5(2); and see PARAS 65, 67 post.

11 Ie a transfer under ibid Sch 12 para 3: see PARA 58 ante.

12 Ibid Sch 12 para 3(4); and see PARA 60 et seq post.

13 Ibid Sch 12 para 6; and see PARA 60 note 15 post.

14 Ibid Sch 12 para 7; and see PARA 64 post.

15 Ibid Sch 12 para 8(1); and see PARA 66 post.

16 Ibid Sch 12 para 8(2); and see PARA 66 post.

17 Ibid Sch 12 para 9(1); and see PARA 69 post. The specified cases are cases under (1) the Landlord and Tenant Act 1985 (service charges and choice of insurers: see PARA 325 et seq post); (2) the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (see PARA 399 et seq post); (3) Pt IV (ss 35-40) (as amended) (see PARAS 149-154 post); (4) the Commonhold and Leasehold Reform Act 2002 s 168(4) (see PARA 613 post); or (5) s 158, Sch 11 (see PARA 355 et seq post): see Sch 12 para 9(1). The fees payable are to be such as are specified in or determined in accordance with procedure regulations; but the fee (or, where fees are payable in respect of both an application or transfer and an oral hearing, the aggregate of the fees) payable by a person in respect of any proceedings must not exceed (a) £500; or (b) such other amount as may be specified in procedure regulations: Sch 12 para 9(3).

18 Ibid Sch 12 para 9(2); and see PARA 69 post.

19 Ibid Sch 12 para 9(4); and see PARA 69 post. If they do so they may apply, subject to such modifications as may be specified in the regulations, any other statutory means-testing regime as it has effect from time to time: Sch 12 para 9(5).

20 Ibid Sch 12 para 11; and see PARA 70 post.

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## **60. Particulars of applications; notice of application by the tribunal.**

The particulars to be included with an application<sup>1</sup> are:

- 131 (1) the name and address of the applicant<sup>2</sup>;
- 132 (2) the name and address of the respondent<sup>3</sup>;
- 133 (3) the name and address of any landlord or tenant of the premises to which the application relates;
- 134 (4) the address of the premises to which the application relates; and
- 135 (5) a statement that the applicant believes that the facts stated in the application are true<sup>4</sup>.

In specified cases, additional particulars and documents must be included<sup>5</sup>.

Any of the prescribed requirements may be dispensed with or relaxed if the tribunal<sup>6</sup> is satisfied that:

- 136 (a) the particulars and documents included with an application are sufficient to enable the application to be determined; and
- 137 (b) no prejudice will, or is likely to, be caused to any party to the application<sup>7</sup>.

On receipt of an application:

- 138 (i) other than an application made under Part IV of the Landlord and Tenant Act 1987<sup>8</sup>, the tribunal must send a copy of the application and each of the documents accompanying it to each person named in it as a respondent<sup>9</sup>;
- 139 (ii) relating to service charges, administration charges and estate charges<sup>10</sup>, the tribunal must give notice of the application to the secretary of any recognised tenants' association<sup>11</sup> mentioned in the particulars included in the application and to any person, whose name and address the tribunal has, who the tribunal considers is likely to be significantly affected by the application<sup>12</sup>;
- 140 (iii) the tribunal may give notice to any other person it considers appropriate<sup>13</sup>.

Any notice given under head (ii) or head (iii) above must include a statement that any person may make a request to the tribunal<sup>14</sup> to be joined as a party to the proceedings with details as to how such a request can be made<sup>15</sup>. Any notice so given may be given by local advertisement<sup>16</sup>.

1 For these purposes, 'application' means, other than for the purposes of reg 1 (see PARA 59 note 2 ante), reg 20 (see PARA 72 post) and reg 25 (revocation and saving provisions) of the relevant regulations, (1) an application to a tribunal of a description specified in Sch 1 to those regulations; or (2) a transferred application; and 'transferred application' means so much of proceedings before a court as relate to a question falling within the jurisdiction of a tribunal as have been transferred to the tribunal for determination by order of the court: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 2(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2(1).

A fee is payable for specified applications: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3; and see eg paras 345 note 13, 351 note 2 post. As to waiver and reduction of fees see PARA 69 post.

2 For these purposes, 'applicant' means (1) the person making an application to a tribunal; or (2) the person who is the claimant or applicant in proceedings before a court which are transferred by order of the court to a tribunal: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 2(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2(1).

3 For these purposes, 'respondent' means (1) the person against whom an applicant seeks an order or determination from a tribunal; or (2) the person who is the defendant or respondent in proceedings before a



court which are transferred by order of the court to a tribunal: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 2(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2(1).

4 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(1).

5 See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2)-(7A), Schs 1, 2 (as amended); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2)-(7A), Schs 1, 2 (as amended). These requirements are set out in notes to the appropriate paragraphs in this title in the contexts in which they arise: see eg paras 149 note 3, 383 note 18, 613 note 15, 1506 note 6, 1726 note 5 post.

6 For these purposes, 'tribunal' means a leasehold valuation tribunal: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 2(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2(1).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

8 Is an application under the Landlord and Tenant Act 1987 Pt IV (ss 35-40) (as amended): see PARAS 149-154 post. The applicant is responsible for giving notice of such applications: see PARA 149 note 4 post.

9 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(1).

10 Is an application of a description specified in Sch 1 para 2 to the relevant regulations.

11 For these purposes, 'recognised tenants' association' has the same meaning as in the Landlord and Tenant Act 1985 s 29 (as amended) (see PARA 327 post): Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 2(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 2(1).

12 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(2).

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(3).

14 Is under reg 6 of the relevant regulations: see note 15 infra.

15 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(4).

Any person may make a request to the tribunal to be joined as a party to the proceedings and any such request may be made without notice and must specify whether the person making the request wishes to be treated as an applicant or a respondent to the application: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 6(1), (2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 6(1), (2). The tribunal may grant or refuse such a request and must, as soon as possible after reaching its decision on the request, notify the person making it of the decision and the reasons for it and send a copy of the notification to the applicant and the respondent: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 6(3), (4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 6(3), (4). Any person whose request is granted is to be treated as an applicant or respondent, as the case may be, for the purposes of regs 8-18, 20 and 24 of the relevant regulations (see PARA 61 et seq post); and in those regulations, any reference to an applicant or a respondent is to be construed as including a person treated as such under these provisions and any reference to a party is to be construed as including any such person: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 6(5), (6); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 6(5), (6).

16 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(5). 'Local advertisement' means publication of the notice in two newspapers (at least one of which should be a freely distributed newspaper) circulating in the locality in which the premises to which the application relates is situated: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 5(6); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 5(6).

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## **61. Representative applications and other provisions for securing consistency.**

Where it appears to a tribunal<sup>1</sup> that numerous applications<sup>2</sup>;

- 141 (1) have been made in respect of the same or substantially the same matters; or
- 142 (2) include some matters which are the same or substantially the same,

the tribunal may propose to determine only one of those applications ('the representative application') as representative of all of the applications on those matters which are the same or substantially the same ('the common matters'), and must give notice of the proposal to the parties to all such applications<sup>3</sup>. Such a notice must:

- 143 (a) specify the common matters;
- 144 (b) specify the application which the tribunal proposes to determine as the representative application;
- 145 (c) explain that the tribunal's decision on the common matters in the representative application will apply to the common matters in any application made by a person to whom notice has been so given;
- 146 (d) invite objections to the tribunal's proposal to determine the representative application; and
- 147 (e) specify the address to which objections may be sent and the date, being not less than 21 days after the date that the notice was sent, by which the objections must be received by the tribunal<sup>4</sup>.

Where no objection is received on or before the date specified in the notice:

- 148 (i) the tribunal must determine the representative application<sup>5</sup>;
- 149 (ii) the tribunal need not determine the matters mentioned in head (1) above in any other application made by a person to whom such a notice has been given; and
- 150 (iii) the decision of the tribunal in respect of the representative application must be recorded as the decision of the tribunal in respect of the common matters in any such other application<sup>6</sup>.

Where an objection is received on or before the date specified in the notice, heads (i) to (iii) above apply only to those applications in respect of which no objection was made and the application in respect of which an objection was made may be determined together with the representative application<sup>7</sup>.

<sup>1</sup> For the meaning of 'tribunal' see PARA 60 note 6 ante.

<sup>2</sup> For the meaning of 'application' see PARA 60 note 1 ante.

<sup>3</sup> Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 8(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 8(1).

4 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 8(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 8(2).

5 le in accordance with the relevant regulations: see PARA 62 et seq post.

6 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 8(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 8(3).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 8(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 8(4).

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## **62. Subsequent applications.**

If, after a representative application<sup>1</sup> has been determined, a subsequent application is made which includes any of the common matters on which the tribunal<sup>2</sup> has made a decision in its determination of the representative application, and the applicant<sup>3</sup> is a person to whom a notice of the proposal to determine only the representative application<sup>4</sup> was given, the tribunal must give notice to the parties to the subsequent application of:

- 151 (1) the matters which, in the opinion of the tribunal, are the common matters in the subsequent application and the representative application;
- 152 (2) the decision recorded in respect of the common matters in the representative application;
- 153 (3) the date on which notice of the proposal to determine only the representative application<sup>5</sup> was given to the applicant;
- 154 (4) the tribunal's proposal to record the tribunal's decision on the common matters in the subsequent application in identical terms to the decision in the representative application;
- 155 (5) the address to which objections to the tribunal's proposal may be sent and the date, being not less than 21 days after the date that the notice was sent, by which such objections must be received by the tribunal; and
- 156 (6) a statement that any objection must include the grounds on which it is made and, in particular, whether it is alleged that the notice mentioned in head (3) above was not received by the person making the objection<sup>6</sup>.

Where no objection is received on or before the date specified in the notice, the tribunal need not determine the matters mentioned in head (1) above and the decision of the tribunal in respect of the common matters in the representative application must be recorded as the decision of the tribunal in respect of the common matters in the subsequent application<sup>7</sup>.

Where an objection is received to the tribunal's proposal on or before the date specified in the notice, the tribunal must consider the objection when determining the subsequent application and if it dismisses the objection, it may record the decision mentioned in head (2) above as the decision of the tribunal in the subsequent application<sup>8</sup>.

If, after a representative application has been determined, a subsequent application is made which includes any of the common matters on which the tribunal has made a decision in its determination of the representative application, and the applicant is not a person to whom a notice of the proposal to determine only the representative application<sup>9</sup> was given, the tribunal must give notice to the parties to the subsequent application of:

- 157 (a) the matters which, in the opinion of the tribunal, are the common matters in the subsequent application and the representative application;
- 158 (b) the decision recorded in respect of those common matters in the representative application;
- 159 (c) the tribunal's proposal to record its decision on the common matters in the subsequent application in identical terms to the decision in the representative application; and
- 160 (d) the address to which objections to the tribunal's proposal may be sent and the date, being not less than 21 days after the date that the notice was sent, by which such objections must be received by the tribunal<sup>10</sup>.

Where no objection is received on or before the date specified in the notice, the tribunal need not determine the matters mentioned in head (a) above and the decision of the tribunal in respect of the common matters in the representative application must be recorded as the decision of the tribunal in respect of the common matters in the subsequent application<sup>11</sup>. Where an objection is received to the tribunal's proposal on or before the date specified in the notice the tribunal must determine<sup>12</sup> the application<sup>13</sup>.

1 For the meaning of 'representative application' see PARA 61 ante.

2 For the meaning of 'tribunal' see PARA 60 note 6 ante.

3 For the meaning of 'applicant' see PARA 60 note 2 ante.

4 Is a notice under reg 8(1) of the relevant regulations: see PARA 61 ante.

5 See note 4 supra.

6 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 9(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 9(1).

In a particular case, the tribunal may extend any period prescribed by the relevant regulations, or prescribed by a notice given under them, within which anything is required or authorised to be done: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 24(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 24(1). A party may make a request to the tribunal to extend any such period but must do so before that period expires: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 24(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 24(2).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 9(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 9(2).

8 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 9(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 9(3).

9 See note 4 supra.

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 10(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 10(1); and see note 6 supra.

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 10(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 10(2).

12 Is in accordance with the regulations set out in PARA 63 et seq post.

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 10(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 10(3).

## UPDATE

## 62 Subsequent applications

NOTE 6--A failure to apply for an extension within the time limit does not preclude the court from granting the extension: *Grosvenor Estate Belgravia v Adams* [2008] RVR 173.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/63. Information, notices and documents.

## 63. Information, notices and documents.

A leasehold valuation tribunal may serve a notice requiring any party to proceedings before it to give to the tribunal any information which the tribunal may reasonably require<sup>1</sup>. The information must be given to the tribunal within such period, not being less than 14 days, from the service of the notice as is specified in the notice<sup>2</sup>. A person commits an offence if he fails, without reasonable excuse, to comply with a notice so served on him<sup>3</sup> and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>4</sup>.

Where any notice or other document is required<sup>5</sup> to be given or sent to a person by the tribunal<sup>6</sup>, it is sufficient compliance with the requirement if:

- 161 (1) it is delivered or sent by pre-paid post to that person at his usual or last known address;
- 162 (2) it is sent to that person by fax or other means of electronic communication which produces a text of the document;
- 163 (3) where that person has appointed an agent or representative to act on his behalf, it is delivered or sent by pre-paid post to the agent or representative at the address of the agent or representative supplied to the tribunal or it is sent to the agent or representative by fax or other means of electronic communication which produces a text of the document<sup>7</sup>;

but a notice or other document may be sent by fax or other means of electronic communication only if that person or his agent has given his consent<sup>8</sup>. A notice or other document sent by such means is regarded as sent when the text of it is received in legible form<sup>9</sup>.

Where an intended recipient:

- 164 (a) cannot be found after all diligent inquiries have been made;
- 165 (b) has died and has no personal representative; or
- 166 (c) is out of the United Kingdom<sup>10</sup>,

or for any other reason a notice or other document cannot readily be given or sent in accordance with the relevant regulations, the tribunal may either dispense with the giving or sending of the notice or other document or may give directions for substituted service in such other form, whether by advertisement in a newspaper or otherwise, or such other manner as the tribunal thinks fit<sup>11</sup>.

Before the date of the hearing, the tribunal must take all reasonable steps to ensure that each of the parties is given:

- 167 (i) a copy of any document relevant to the proceedings, or sufficient extracts from or particulars of the document, which has been received from any other party, other than a document already in his possession or one of which he has previously been supplied with a copy; and
- 168 (ii) a copy of any document which embodies the results of any relevant inquiries made by or for the tribunal for the purposes of the proceedings<sup>12</sup>.

At a hearing, if a party has not previously received a relevant document or a copy of, or sufficient extracts from or particulars of, a relevant document, then unless:

- 169 (A) that person consents to the continuation of the hearing; or
- 170 (B) the tribunal considers that that person has a sufficient opportunity to deal with the matters to which the document relates without an adjournment of the hearing,

the tribunal must adjourn the hearing for a period which it considers will give that person a sufficient opportunity to deal with those matters<sup>13</sup>.

1 Commonhold and Leasehold Reform Act 2002 s 174, Sch 12 para 4(1).

2 Ibid Sch 12 para 4(2). As to the extension of time see PARA 62 note 6 ante.

3 Ibid Sch 12 para 4(3).

4 Ibid Sch 12 para 4(4). Where a tribunal serves a notice requiring information to be given under Sch 12 para 4, the notice must contain a statement to the effect that any person who fails without reasonable excuse to comply with the notice commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 22; Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 22. As to the standard scale see PARA 52 note 6 ante.

5 Ie under the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099 (as amended), or the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681 (as amended): see PARA 59 et seq ante, PARA 64 et seq post.

6 For the meaning of 'tribunal' see PARA 60 note 6 ante.

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 23(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 23(1).

8 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 23(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 23(2).

9 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 23(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 23(3).

10 For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 23(4), (5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 23(4), (5).

12 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 16(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 16(1).

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 16(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 16(2).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/64. Dismissal of frivolous etc applications.

#### **64. Dismissal of frivolous etc applications.**

Where either:

- 171 (1) it appears to a tribunal<sup>1</sup> that an application<sup>2</sup> is frivolous or vexatious or otherwise an abuse of process of the tribunal; or
- 172 (2) the respondent<sup>3</sup> to an application makes a request to the tribunal to dismiss an application as frivolous or vexatious or otherwise an abuse of the process of the tribunal,

the tribunal may dismiss the application, in whole or in part<sup>4</sup>; but before so dismissing an application, the tribunal must give notice to the applicant<sup>5</sup>. Any such notice must state:

- 173 (a) that the tribunal is minded to dismiss the application;
- 174 (b) the grounds on which it is minded to dismiss the application;
- 175 (c) the date, being not less than 21 days after the date that the notice was sent, before which the applicant may request to appear before and be heard by the tribunal on the question whether the application should be dismissed<sup>6</sup>.

An application may not be dismissed unless:

- 176 (i) the applicant makes no request to the tribunal before the date mentioned in head (c) above; or
- 177 (ii) where the applicant makes such a request, the tribunal has heard the applicant and the respondent, or such of them as attend the hearing, on the question of the dismissal of the application<sup>7</sup>.

<sup>1</sup> For the meaning of 'tribunal' see PARA 60 note 6 ante.

<sup>2</sup> For the meaning of 'application' see PARA 60 note 1 ante.

<sup>3</sup> For the meaning of 'respondent' see PARA 60 note 3 ante.

<sup>4</sup> Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 11(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 11(1).

<sup>5</sup> Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 11(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 11(2). For the meaning of 'applicant' see PARA 60 note 2 ante. As to the manner of giving notice see PARA 63 ante.

<sup>6</sup> Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 11(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 11(3). As to the extension of time see PARA 62 note 6 ante.

<sup>7</sup> Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 11(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 11(4).

PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/65. Pre-trial review.

## **65. Pre-trial review.**

The tribunal<sup>1</sup> may, whether on its own initiative or at the request of a party, hold a pre-trial review in respect of an application<sup>2</sup>. The tribunal must give the parties not less than 14 days' notice, or such shorter notice as the parties agree to, of the date, time and place of the pre-trial review<sup>3</sup>.

At the pre-trial review the tribunal must:

- 178 (1) give any direction that appears to the tribunal necessary or desirable for securing the just, expeditious and economical disposal of proceedings;
- 179 (2) endeavour to secure that the parties make all such admissions and agreements as ought reasonably to be made by them in relation to the proceedings; and
- 180 (3) record in any order made at the pre-trial review any such admission or agreement or any refusal to make such admission or agreement<sup>4</sup>.

The functions of the tribunal in relation to, or at, a pre-trial review may be exercised by any single member of the panel<sup>5</sup> who is qualified to exercise them<sup>6</sup>.

The tribunal may postpone or adjourn a pre-trial review either on its own initiative or at the request of a party<sup>7</sup>.

1 For the meaning of 'tribunal' see PARA 60 note 6 ante.

2 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 12(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 12(1). For the meaning of 'application' see PARA 60 note 1 ante.

3 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 12(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 12(2).

4 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 12(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 12(3).

5 ie any single member of the panel provided for in the Rent Act 1977 s 65, Sch 10 (as amended): see PARA 910 post.

6 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 12(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 12(4).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 15(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 15(1).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/66. Determination without a hearing.

## **66. Determination without a hearing.**



A tribunal<sup>1</sup> may determine an application<sup>2</sup> without an oral hearing, in accordance with the following provisions, if:

- 181 (1) it has given to both the applicant<sup>3</sup> and the respondent<sup>4</sup> not less than 28 days' notice in writing of its intention to proceed without an oral hearing; and
- 182 (2) neither the applicant nor the respondent has made a request to the tribunal to be heard;

but this is without prejudice to the applicant's or the respondent's right<sup>5</sup> to make a subsequent request to be heard or to the tribunal's right<sup>6</sup> to give subsequent notice that it intends to determine the application at a hearing<sup>7</sup>.

The tribunal must:

- 183 (a) notify the parties that the application is to be determined without an oral hearing;
- 184 (b) invite written representations on the application;
- 185 (c) set time limits for sending any written representations to the tribunal; and
- 186 (d) set out how the tribunal intends to determine the matter without an oral hearing<sup>8</sup>.

At any time before the application is determined:

- 187 (i) the applicant or the respondent may make a request to the tribunal to be heard; or
- 188 (ii) the tribunal may give notice to the parties that it intends to determine the application at a hearing<sup>9</sup> in accordance with the relevant regulation<sup>10</sup>.

Where a request is made or a notice is given under head (i) or head (ii) above, the application must be determined at a hearing<sup>11</sup>.

The functions of the tribunal in relation to an application to be determined without an oral hearing may be exercised by a single member of the panel<sup>12</sup> if he was appointed to that panel by the Lord Chancellor<sup>13</sup>.

1 For the meaning of 'tribunal' see PARA 60 note 6 ante.

2 For the meaning of 'application' see PARA 60 note 1 ante.

3 For the meaning of 'applicant' see PARA 60 note 2 ante.

4 For the meaning of 'respondent' see PARA 60 note 3 ante.

5 Ie under head (i) in the text.

6 Ie under head (ii) in the text.

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 13(1) (amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 13(1) (amended by SI 2005/1356). As to the extension of time see PARA 62 note 6 ante.

8 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 13(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 13(2).

9 As to hearings see PARA 67 post.

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 13(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 13(3).

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 13(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 13(4).

12 le any single member of the panel provided for in the Rent Act 1977 s 65, Sch 10 (as amended): see PARA 910 post.

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 13(5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 13(5).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/67. Hearings.

## 67. Hearings.

A hearing must<sup>1</sup> be on the date and at the time and place appointed by the tribunal<sup>2</sup>; and the tribunal must give notice to the parties of the appointed date, time and place of the hearing<sup>3</sup>. Such notice must normally be given not less than 21 days, or such shorter period as the parties may agree, before the appointed date<sup>4</sup>, but in exceptional circumstances the tribunal may, without the agreement of the parties, give less than 21 days' notice of the appointed date, time and place of the hearing. Any such notice must be given as soon as possible before the appointed date and the notice must specify what the exceptional circumstances are<sup>5</sup>.

The tribunal may arrange that an application is to be heard together with one or more other applications<sup>6</sup>.

A hearing must be in public unless, in the particular circumstances of the case, the tribunal decides that a hearing or part of a hearing is to be held in private<sup>7</sup>.

At the hearing:

- 189 (1) the tribunal must determine the procedure, subject to the relevant regulations, and the order in which the persons appearing before it are to be heard;
- 190 (2) a person appearing before the tribunal may do so either in person or by a representative authorised by him, whether or not that representative is a barrister or a solicitor; and
- 191 (3) a person appearing before the tribunal may give evidence on his own behalf, call witnesses, and cross-examine any witnesses called by any other person appearing<sup>8</sup>.

If a party does not appear at a hearing, the tribunal may proceed with the hearing if it is satisfied that notice has been given to that party in accordance with the relevant regulations<sup>9</sup>.

The tribunal may postpone or adjourn a hearing either on its own initiative or at the request of a party<sup>10</sup>. Where a postponement or adjournment has been requested the tribunal may not postpone or adjourn the hearing except where it considers it is reasonable to do so having regard to:

- 192 (a) the grounds for the request;
- 193 (b) the time at which the request is made; and
- 194 (c) the convenience of the other parties<sup>11</sup>.

The tribunal must give reasonable notice of any postponed or adjourned hearing to the parties<sup>12</sup>.

A member of the Council on Tribunals<sup>13</sup>, who is acting in that capacity, may attend any hearings held, whether in public or private, in accordance with the relevant regulations<sup>14</sup>.

1     le subject to regs 8(3), 9(2) and 10(2) of the relevant regulations: see PARAS 61-62 ante.

2     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(1). For the meaning of 'tribunal' see PARA 60 note 6 ante.

3     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(2). As to the giving of notice see PARA 63 ante.

4     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(3). As to the extension of time see PARA 62 note 6 ante.

5     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(4).

6     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(5).

7     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(6); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(6).

8     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(7); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(7).

9     Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 14(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 14(8).

10    Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 15(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 15(1).

11    Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 15(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 15(2).

12    Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 15(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 15(3).

13    As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 55 et seq.

14    Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 21(a); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 21(a).

## **UPDATE**

### **67 Hearings**

TEXT AND NOTES 13, 14--SI 2003/2099 reg 21 substituted: SI 2008/2683.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/68. Inspections.

## 68. Inspections.

A tribunal<sup>1</sup> may inspect:

- 195 (1) the house, premises or area which is the subject of the application<sup>2</sup>; or
- 196 (2) any comparable house, premises or area to which its attention is directed<sup>3</sup>.

The making of, and attendance at, an inspection is subject to any necessary consent being obtained<sup>4</sup>. Subject to that, the tribunal must give the parties an opportunity to attend an inspection<sup>5</sup>.

Where an inspection is to be made, the tribunal must give notice to the parties<sup>6</sup>. Such a notice must state the date, time and place of the inspection and must be given not less than 14 days before that date<sup>7</sup>.

A member of the Council on Tribunals<sup>8</sup>, who is acting in that capacity, may attend any inspection for which the necessary consent has been obtained<sup>9</sup>.

Where an inspection is made after the close of a hearing, the tribunal may reopen the hearing on account of any matter arising from the inspection<sup>10</sup>. The tribunal must give reasonable notice of the date, time and place of the reopened hearing to the parties<sup>11</sup>.

Any of the requirements for notice set out above may be dispensed with or relaxed:

- 197 (a) with the consent of the parties; or
- 198 (b) if the tribunal is satisfied that the parties have received sufficient notice<sup>12</sup>.

1 For the meaning of 'tribunal' see PARA 60 note 6 ante.

2 For the meaning of 'application' see PARA 60 note 1 ante.

3 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(1).

4 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(3).

5 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(2).

6 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(4) (substituted by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(4) (substituted by SI 2005/1356).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(5) (substituted by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(5) (substituted by SI 2005/1356). As to the extension of time see PARA 62 note 6 ante.

8 As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 55 et seq.

9 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 21(b); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 21(b).

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(8).

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(9); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(9).

12 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 17(10); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 17(10).

## UPDATE

### 68 Inspections

TEXT AND NOTES 8, 9--SI 2003/2099 reg 21 substituted: SI 2008/2683.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/69. Fees.

### 69. Fees.

Where a court, by order, transfers to a tribunal<sup>1</sup> so much of any proceedings as relate to the determination of a question falling within the jurisdiction of the tribunal by virtue of a specified statutory provision<sup>2</sup>, the fee payable to the tribunal is the fee which would have been payable for an application<sup>3</sup> less the total amount of any fees paid by the applicant<sup>4</sup> to the court in respect of the proceedings on or before the date of that order<sup>5</sup>. Where the total amount of any fees paid to the court on or before the date of the order is equal to or more than the fee payable, no further fee is payable to the tribunal under this provision<sup>6</sup>.

A fee of £150 is payable for a hearing<sup>7</sup>. Where part of an application or transferred proceedings<sup>8</sup> is or will be determined at, or in accordance with, a hearing of a representative application<sup>9</sup> and part is to be determined at a separate hearing, the fee for the part which is to be heard separately is £150 less the total amount of any fees paid<sup>10</sup> by the applicant for that part of the application or transferred proceedings which is to be determined at, or in accordance with, the representative application<sup>11</sup>.

Any fee payable under the above provisions is due within 14 days of a written request for payment by the tribunal and must be sent to the address specified in that request<sup>12</sup>.

Subject to the following provisions, the applicant<sup>13</sup> is liable to pay any fee payable to a tribunal under the relevant fees regulations<sup>14</sup>.

Where an application is made or transferred proceedings are brought by more than one person, any fee payable for the application or transferred proceedings must be apportioned equally between those persons and each person is liable to pay one portion<sup>15</sup>; and where an application is made or transferred proceedings are brought by the tenant or the landlord of premises and the tenant or landlord is more than one person, those persons together are to be treated as one person for these purposes<sup>16</sup>.

Where two or more applications are heard together, other than applications which are heard with a representative application, any fee payable for the hearing must be apportioned equally between the applications and the applicant in each application is liable to pay one portion<sup>17</sup>.

Any fee payable for the hearing of a representative application and any application heard with the representative application must be apportioned equally between:

- 199 (1) the representative application;
- 200 (2) all other applications which, at the time of the request for payment of the fee, are to be determined in whole or in part in accordance with the representative application; and
- 201 (3) any application heard with the representative application,

and the applicant in each application is liable to pay one portion of the fee<sup>18</sup>.

The amount payable by any person in respect of a fee must be calculated in accordance with the above provisions and by reference to the persons who are applicants on the date the application is made or the date of the request for payment issued by the tribunal<sup>19</sup>.

A person is not, however, liable to pay any fee due under the relevant fees regulations where on the relevant date<sup>20</sup> he or his partner<sup>21</sup> is in receipt of:

- 202 (a) either income support or housing benefit;
- 203 (b) an income-based jobseeker's allowance;
- 204 (c) a specified tax credit<sup>22</sup>;
- 205 (d) guarantee credit under the State Pensions Credit Act 2002; or
- 206 (e) a certificate which has been issued under the Funding Code<sup>23</sup> and which has not been revoked or discharged and which is in respect of the proceedings before the tribunal the whole or part of which have been transferred from the county court for determination by a tribunal<sup>24</sup>.

Where a person is not liable to pay a fee by virtue of heads (a) to (e) above, the following provisions apply:

- 207 (i) where more than one person is the applicant<sup>25</sup> and at least one of those persons is liable to pay a fee, the fee must be reduced rateably in accordance with the number of persons who would have been liable but for those heads; and
- 208 (ii) where more than one person is the applicant and at least one person is liable to pay a portion of a fee, that portion must be reduced rateably in accordance with the number of persons who would have been liable but for those heads<sup>26</sup>.

In relation to any proceedings in respect of which a fee is payable, a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings<sup>27</sup>; but it may not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in heads (a) to (e) above<sup>28</sup>.

In any case where a fee which is payable<sup>29</sup> is not paid in accordance with the relevant fees regulations, the tribunal may not proceed further with the application to which the fee relates until the fee is paid<sup>30</sup>. Where a fee remains unpaid for a period of one month from the date on which it becomes due, the application<sup>31</sup> must be treated as withdrawn unless the tribunal is satisfied that there are reasonable grounds not to do so<sup>32</sup>.

1 For these purposes, 'tribunal' means a leasehold valuation tribunal: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 1(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 1(3).

2 ie by virtue of a provision falling within reg 3(1) or (3) of the relevant fees regulations. The specified statutory provisions are: (1) the Landlord and Tenant Act 1985 s 27A (as added) (determination of liability to pay a service charge: see PARA 351 post); (2) s 30A (as added), Schedule para 8(2)(b) (as substituted) (right to challenge the insurance premium: see PARA 365 post); (3) the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 3 (variation of lease because of administration charge: see PARA 357 post); (4) Sch 11 para 5 (determination of liability to pay an administration charge: see PARA 358 post); (5) the Landlord and Tenant Act 1985 s 20ZA (as substituted) (determination to dispense with consultation requirements see PARA 345 post); (6) Sch 11 para 8(2)(a) (as substituted and amended) (determination as to suitability of insurer: see PARA 365 post); (7) the Landlord and Tenant Act 1987 s 24 (as amended) (appointment of managers: see PARA 401 post); and (8) Pt IV (ss 35-40) (as amended) (variation of leases: see PARAS 149-154 post); Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(1), (3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(1), (3).

3 For these purposes, 'application' means an application made to the tribunal under any of the provisions listed in note 2 supra: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 1(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 1(3).

4 For these purposes, 'applicant' means (1) the person making an application to a tribunal; or (2) the person who is the claimant or applicant in proceedings before a court which are transferred by order of the court to a tribunal: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 1(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 1(3).

5 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 4(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 4(1).

6 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 4(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 4(2).

7 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5(1). For these purposes, 'hearing' means a hearing before a tribunal to determine one or more of the following; (1) an application; (2) transferred proceedings; or (3) a representative application, but, for the purposes of the payment of a fee for a hearing, does not include (a) a pre-trial review (see PARA 65 ante); or (b) a hearing to consider dismissing an application as frivolous or vexatious (see PARA 64 ante); and 'representative application' means an application dealt with as a representative application under reg 8 of the relevant procedure regulations (see PARA 61 ante): Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 1(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 1(3).

8 For these purposes, 'transferred proceedings' means proceedings which a court has transferred to a tribunal for determination: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 1(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 1(3).

9 See PARA 61 ante.

10 In accordance with reg 7(5) of the relevant fees regulations: see the text to note 18 infra.

11 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5(2).

12 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 6(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 6(2).

13 For these purposes, 'applicant' includes any person whose request to be joined as a party to the proceedings and treated as an applicant has been granted by the tribunal (see PARA 60 note 15 ante): Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(7); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(7).

14 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(1). This is subject to the provisions set out in the text and notes 15-28 infra: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(1).

15 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(2).

16 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(3).

17 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(4); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(4).

18 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(5); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(5).

19 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 7(6); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 7(6).

20 For these purposes, 'relevant date' means (1) in the case of a fee payable for an application, the date of the application; (2) in the case of a fee payable where an application is transferred from a court, the date of the court order transferring proceedings to the tribunal; (3) in the case of a fee payable for a hearing, the date of

the request for payment: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(4)(c); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(4)(c).

21 'Partner', in relation to a person, means (1) that person's spouse; (2) a person of the opposite sex who is living with that person as husband or wife; and (3) a person of the same sex living with that person in a relationship which has the characteristics of the relationship between husband and wife: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(4)(b); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(4)(b). Presumably this includes a civil partner.

22 Is a working tax credit under the Tax Credits Act 2002 Pt 1 (ss 1-48), where (1) either there is a disability element or severe disability element (or both) to the tax credit received by the person or his partner or the person or his partner is also in receipt of child tax credit; and (2) the gross annual income taken into account for the calculation of the working tax credit is £14,213 or less: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(2).

23 As to the Funding Code see LEGAL AID vol 65 (2008) PARAS 39-40.

24 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(1).

25 For these purposes 'applicant' includes any person, whose request to be joined as a party to the proceedings and treated as an applicant (see PARA 60 note 15 ante) has been granted by the tribunal: Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(4)(a); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(4)(a).

26 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 8(3); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 8(3).

27 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 9(1); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 9(1).

28 Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 9(2); Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 9(2).

29 Is under reg 4 or reg 5 of the relevant fees regulations: see the text and notes 1-28 supra.

30 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 7(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 7(1).

31 For the meaning of 'application' for these purposes see PARA 60 note 1 ante.

32 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 7(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 7(2).

## **UPDATE**

### **69 Fees**

NOTE 21--In relation to Wales, head (1) includes a civil partner: SI 2004/683 reg 8(4)(b) (amended by SI 2005/3302).

NOTE 24--SI 2003/2098 reg 8(1), SI 2004/683 reg 8(1) amended: SI 2008/1879.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/70. Decisions.

### **70. Decisions.**



A member of the Council on Tribunals<sup>1</sup>, who is acting in that capacity, may be present during, but may not take part in, a tribunal's<sup>2</sup> deliberations in respect of an application<sup>3</sup>.

The following provisions apply to a decision on the determination of an application by a tribunal or a single member, in the case of an application determined<sup>4</sup> without an oral hearing<sup>5</sup>. If a hearing was held, the decision may be given orally at the end of the hearing<sup>6</sup>; but a decision must, in every case, be recorded in a document as soon as possible after the decision has been made<sup>7</sup>. A decision so given or recorded need not record the reasons for the decision<sup>8</sup>; but where the above-mentioned document does not record the reasons for the decision, they must be recorded in a separate document as soon as possible after the decision has been recorded<sup>9</sup>. A document recording a decision, or the reasons for a decision, must be signed and dated by an appropriate person<sup>10</sup>. An appropriate person may, by means of a certificate signed and dated by him, correct any clerical mistakes in a document or any errors arising in it from an accidental slip or omission<sup>11</sup>. A copy of any document recording a decision, or the reasons for a decision, and a copy of any correction so certified, must be sent to each party<sup>12</sup>.

Any decision of the tribunal may, with the permission of the county court, be enforced in the same way as orders of such a court<sup>13</sup>.

1 As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 55 et seq.

2 For the meaning of 'tribunal' see PARA 60 note 6 ante.

3 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 21(c); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 21(c). For the meaning of 'application' see PARA 60 note 1 ante.

4 As mentioned in reg 13(5) of the relevant regulations: see PARA 66 ante.

5 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(1).

6 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(2).

7 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(3).

8 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(4).

9 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(5).

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(6); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(6). For these purposes, 'appropriate person' means (1) where an application was determined by a single member without an oral hearing, the single member or, in the event of his absence or incapacity, another member of the tribunal who was appointed by the Lord Chancellor; (2) in any other case the chairman of the tribunal or, in the event of his absence or incapacity, another member of the tribunal: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(8).

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(7); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(7).

12 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 18(9); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 18(9).

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 19; Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 19. See generally CIVIL PROCEDURE vol 12 (2009) PARA 1223 et seq.

## UPDATE

## 70 Decisions

TEXT AND NOTES 1-3--SI 2003/2099 reg 21 substituted: SI 2008/2683.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/71. Costs.

### 71. Costs.

A leasehold valuation tribunal may determine that a party to proceedings must pay the costs incurred by another party in connection with the proceedings in any circumstances where:

- 209 (1) he has made an application to the leasehold valuation tribunal which is dismissed as frivolous or vexatious or otherwise an abuse of process in accordance with the relevant procedure regulations<sup>1</sup>; or
- 210 (2) he has, in the opinion of the tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings<sup>2</sup>.

The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under these provisions must not, however exceed £500 or such other amount as may be specified in procedure regulations<sup>3</sup>.

A person must not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under these provisions or in accordance with provision made by any other enactment<sup>4</sup>.

1 He in accordance with the regulations set out in PARA 64 ante.

2 Commonhold and Leasehold Reform Act 2002 s 174, Sch 12 para 10(1), (2).

3 Ibid Sch 12 para 10(3).

4 Ibid Sch 12 para 10(4). It has been judicially stated that the application of Sch 12 para 10(4) is to be limited by its context and the title of Sch 12 to the procedure of leasehold valuation tribunals and the enforcement of their determinations, and that properly construed, it does not prevent the recovery of costs incurred before leasehold valuation tribunals which are otherwise recoverable by way of service charge: see *Canary Riverside Pte v Schilling* (LRX/65/2005, 16 December 2005, unreported), Lands Tribunal, per Judge Michael Rich QC; and see *Staghold Ltd v Takeda* [2005] 3 EGLR 45, Central London county court.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/1. RELATIONSHIP OF LANDLORD AND TENANT/(6) JURISDICTION AND PROCEDURE/(ii) Leasehold Valuation Tribunals/72. Appeals.

### 72. Appeals.

A party to proceedings before a leasehold valuation tribunal may appeal to the Lands Tribunal from a decision of the leasehold valuation tribunal<sup>1</sup>; but the appeal may be made only with the permission of either the leasehold valuation tribunal or the Lands Tribunal<sup>2</sup> and it must be made within the time specified by rules<sup>3</sup> under the Lands Tribunal Act 1949<sup>4</sup>.

On the appeal the Lands Tribunal may exercise any power which was available to the leasehold valuation tribunal<sup>5</sup>. A decision of the Lands Tribunal on the appeal may be enforced in the same way as a decision of the leasehold valuation tribunal<sup>6</sup>.

The Lands Tribunal may not order a party to the appeal to pay costs incurred by another party in connection with the appeal unless he has, in the opinion of the Lands Tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal<sup>7</sup>. In such a case the amount he may be ordered to pay must not exceed the maximum amount which a party to proceedings before a leasehold valuation tribunal may be ordered<sup>8</sup> to pay<sup>9</sup>.

No appeal lies from a decision of a leasehold valuation tribunal to the High Court by virtue of the relevant provision<sup>10</sup> of the Tribunals and Inquiries Act 1992<sup>11</sup>; and no case may be stated for the opinion of the High Court in respect of such a decision by virtue of that provision<sup>12</sup>. Judicial review of a decision of a leasehold valuation tribunal may be available but ought to be granted only in exceptional circumstances on the narrow grounds of jurisdictional error or procedural irregularity<sup>13</sup>.

Appeals from the Lands Tribunal on a point of law by a person aggrieved by its decision lie to the court<sup>14</sup> but a leasehold valuation tribunal is not a person aggrieved for those purposes<sup>15</sup>.

The procedure on the hearing of appeals is discussed elsewhere in this work<sup>16</sup>.

1 Commonhold and Leasehold Reform Act 2002 s 175(1).

2 Ibid s 175(2). Where a party makes an application to a leasehold valuation tribunal for permission to appeal to the Lands Tribunal, the application must be made to the tribunal within the period of 21 days starting with the date on which the document which records the reasons for the decision (see PARA 70 ante) was sent to that party and a copy of the application must be served by the tribunal on every other party: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 20; Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 20.

An application to the Lands Tribunal for permission to appeal may only be made if permission has been refused by the leasehold valuation tribunal: see the Lands Tribunal Rules 1996, SI 1996/1022, r 5C(1) (r 5C added by SI 1997/1965; amended by SI 2003/2945; SI 2006/880). The application must be made within 14 days from the date on which the decision to refuse permission was sent to the applicant: Lands Tribunal Rules 1996, SI 1996/1022, r 5C(2) (as added and amended). The application for permission must contain (1) the name and address of the applicant; (2) the name and address of every respondent; (3) the grounds of appeal against the decision in respect of which permission to appeal is sought; (4) where the applicant is represented, the name, address and profession of the representative; and (5) the signature of the applicant or his representative and the date the application was signed (r 5C(3) (as added and amended)); and must be accompanied by (a) a copy of the decision against which permission to appeal is being sought; (b) a copy of the decision of the tribunal refusing permission to appeal; (c) the fee payable to the Lands Tribunal in respect of the proposed appeal (r 5C(4) (as added and amended)). The applicant must deliver or send the application for permission to appeal to the Lands Tribunal together with sufficient copies for service upon each respondent: r 5C(5) (as added and amended). Upon receiving an application for permission to appeal the registrar must (i) serve a copy of the application on each respondent; (ii) inform the applicant of the date on which this was done; and (iii) enter details of the application in the register of appeals: r 5C(6) (as added and amended). The registrar must, when serving a copy of the application, notify each respondent of the time limit, specified by the Lands Tribunal, within which any written representations relating to the application must be made to that tribunal: r 5C(7) (as added and amended).

The Lands Tribunal must determine an application for permission without a hearing unless it considers that there are special circumstances which make a hearing necessary or desirable; and the registrar must serve on the applicant and each respondent a notice recording the decision of that tribunal on the application for permission: see r 5D(1), (2) (added by SI 1997/1965; amended by SI 2003/2945). If the Lands Tribunal refuses permission to appeal the registrar must refund to the applicant the fee paid in respect of the appeal: Lands Tribunal Rules 1996, SI 1996/1022, r 5E (as so added and amended). If it grants permission to appeal it may do so on such conditions as it thinks fit: r 5F(1) (as so added and amended). The registrar must note in the register

of appeals that the appeal is proceeding unless the applicant notifies him, within 14 days of the date of service of the notice recording the decision to grant permission, that he does not wish to proceed with the appeal: r 5F(2) (as so added and amended). He must serve notice on each respondent that the appeal is proceeding with details of the number of the appeal entered on the register which is to constitute the title of the appeal: r 5F(3) (as so added).

3 The rules under the Lands Tribunal Act 1949 s 3(6) (as amended): see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 723.

4 Commonhold and Leasehold Reform Act 2002 s 175(3).

5 Ibid s 175(4).

6 Ibid s 175(5). As to enforcement of the decisions of a leasehold valuation tribunal see PARA 70 ante.

7 Ibid s 175(6).

8 The under or by virtue of ibid s 174, Sch 12 para 10(3): see PARA 71 ante.

9 Ibid s 175(7).

10 The by virtue of the Tribunals and Inquiries Act 1992 s 11(1) (as amended).

11 Commonhold and Leasehold Reform Act 2002 s 175(8).

12 Ibid s 175(9).

13 *R (on the application of Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650, [2006] 1 EGLR 7, applying *R (on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 2 All ER 160, [2003] 1 WLR 475.

14 The the High Court or the Court of Appeal: see the Lands Tribunal Act 1949 s 3(4) (amended by the Civil Procedure (Modification of Enactments) Order 2000, SI 2000/941, art 2); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 751. The Lands Tribunal Act 1949 s 3(4) (as amended) does not apply to a decision by the Lands Tribunal to refuse permission to appeal from a decision of a leasehold valuation tribunal, and it does not preclude an application for judicial review: *R (on the application of Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2005] EWCA Civ 1305, [2006] 3 All ER 650, [2006] 1 EGLR 7.

Valuation is a question of fact and in the absence of any error of law there can be no further appeal to a senior court: see eg *South v Trustees of the Phillimore Kensington Estate* [2001] EWCA Civ 991, [2001] All ER (D) 166 (Jun).

15 Commonhold and Leasehold Reform Act 2002 s 175(10).

16 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 751 (appeals to the Lands Tribunal); CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq (appeals to the High Court and Court of Appeal).

## UPDATE

### 72 Appeals

TEXT AND NOTES--The Lands Tribunal has been abolished and its functions have been transferred to the Upper Tribunal: Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009, SI 2009/1307, art 2 (see COMPULSORY ACQUISITION vol 18 (2009) PARA 720 et seq). Lands Tribunal Act 1949 s 3(4) repealed, Commonhold and Leasehold Reform Act 2002 s 175; SI 1996/1022 r 5C; and SI 2003/2099 reg 20 amended: SI 2009/1307.

TEXT AND NOTES 7-9--As to the making of an order by the Upper Tribunal in respect of costs against a party to an appeal against the decision of a leasehold valuation tribunal, see SI 1996/1022 r 52(1A) (added by SI 2010/43).

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## 2. AGREEMENTS FOR LEASES

### (1) DISTINCTION BETWEEN A LEASE AND AN AGREEMENT FOR LEASE

#### 73. Leases.

An instrument in proper form by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the tenant, either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently, is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the tenant<sup>1</sup>.

An instrument is usually construed as a lease if it contains words of present demise<sup>2</sup>. Even where the instrument is called an 'agreement', and contains a stipulation for the subsequent granting of a formal lease<sup>3</sup>, it may be construed as a lease if the essential terms<sup>4</sup> are fixed, especially if possession is to be taken under it<sup>5</sup> and if the covenants which would be inserted in the lease are to be binding at once<sup>6</sup>.

In general, where there is a conflict between a lease and a prior agreement, the rights of the parties are governed by the lease<sup>7</sup>.

1 See the Law of Property Act 1925 s 149(2); and PARA 118 post. As to the form of leases see PARAS 100-103 post; as to the operation of an invalid lease as an agreement see PARA 117 post; and as to the essential terms of a lease see note 4 infra. A lease is not ordinarily regarded as an incumbrance within a recital by the vendor of seisin in unincumbered possession in fee simple: see *District Bank Ltd v Webb* [1958] 1 All ER 126, [1958] 1 WLR 148.

2 As the effect of the instrument is to be gathered from the language as a whole, words of present demise are not essential to a lease (*Wright v Trezevant* (1828) Mood & M 231); but, when they are inserted, they form the best indication of the parties' intention. there can be no claim for a breach of the landlord's undertaking to put the tenant into possession until the tenant is entitled to possession: see PARA 118 post. The words 'demise' or 'let' are the most usual words of present demise (see *Barry v Nugent* (1782) 3 Doug KB 179 ('doth demise'); *Baxter d Abrahall v Browne* (1775) 2 Wm BI 973 ('set and let')); but other words are effectual if they import an immediate letting (*Maldon's Case* (1584) Cro Eliz 33 ('you shall have a lease'); cf *Doe d Jackson v Ashburner* (1793) 5 Term Rep 163 ('shall enjoy')); and notwithstanding that they are expressed in the form of a covenant (*Harrington v Wise* (1596) Cro Eliz 486 (covenant that the landlord 'doth let'); *Tisdale v Essex* (1616) Hob 34; *Drake v Munday* (1631) Cro Car 207). A lease for three years or less is often made in the form 'agrees to let', but these words may operate by way of demise (*Poole v Bentley* (1810) 12 East 168; *Staniforth v Fox* (1831) 7 Bing 590; *Doe d Pearson v Ries* (1832) 8 Bing 178; *Doe d Phillip v Benjamin* (1839) 9 Ad & El 644 at 651; *Alderman v Neate* (1839) 4 M & W 704; *Tarte v Darby* (1846) 15 M & W 601; *Furness v Bond* (1888) 4 TLR 457; and see *Doe d Green and Colcombe v Fidler* (1795) Peake Add Cas 33), although such a lease may be styled an agreement or 'tenancy agreement'.

3 See *Doe d Pearson v Ries* (1832) 8 Bing 178; *Pinero v Judson* (1829) 6 Bing 206; *Warman v Faithfull* (1834) 5 B & Ald 1042. See also *Maldon's Case* (1584) Cro Eliz 33; *Harrington v Wise* (1596) Cro Eliz 486.

4 I.e the rent and mode of payment, the commencement and duration of the term, and the covenants: see *Chapman v Towner* (1840) 6 M & W 100. The stipulation for a formal lease may specify the covenants to be contained in it (*Pinero v Judson* (1829) 6 Bing 206; *Warman v Faithfull* (1834) 5 B & Ald 1042), or may define them by reference to another lease (*Wilson v Chisholm* (1831) 4 C & P 474; *Doe d Pearson v Ries* (1832) 8 Bing 178; *Hancock v Caffyn* (1832) 8 Bing 358), or may provide for 'usual covenants' (*Barry v Nugent* (1782) 3 Doug KB 179; *Chapman v Bluck* (1838) 4 Bing NC 187; *Doe d Phillip v Benjamin* (1839) 9 Ad & El 644; *Curling v Mills* (1843) 6 Man & G 173; but see *Morgan d Dowding v Bissell* (1810) 3 Taunt 65), or for usual covenants and other specified covenants (*Doe d Walker v Groves* (1812) 15 East 244; *Hamerton v Stead* (1824) 3 B & C 478). In such cases, provided the other terms are ascertained, the covenants are sufficiently ascertained for the instrument to operate as a lease, but not where the covenants are so referred to that further inquiry is necessary to

ascertain them, as where they are to be covenants usual in a particular district (*Morgan d Dowding v Bissell* supra; *Chapman v Towner* (1840) 6 M & W 100), or in leases of a particular class (*Doe d Morgan v Powell* (1844) 7 Man & G 980 (mining lease)). As to usual covenants see PARA 83 post; and as to the contents of a prescribed clauses lease see PARA 126 post. For cases where an instrument is construed as an agreement, not as a lease, see PARA 75 post.

5 The circumstance that the tenant is to have immediate possession under the agreement is a strong indication that it is a present demise: *Doe d Pearson v Ries* (1832) 8 Bing 178; *Hancock v Caffyn* (1832) 8 Bing 358; *Doe d Morgan v Powell* (1844) 7 Man & G 980 at 991; *Jones v Reynolds* (1841) 1 QB 506 at 516. So, too, is the fact that he is already in possession: *Doe d Phillip v Benjamin* (1839) 9 Ad & El 644; *Lovelock v Franklyn* (1846) 8 QB 371. It favours the construction of the agreement as a lease if the term is to commence before the execution of the formal lease: *Alderman v Neate* (1839) 4 M & W 704; and see *Doe d Walker v Groves* (1812) 15 East 244.

6 A provision in the agreement that the rent is to be paid and the covenants observed until the execution of the lease tells strongly in favour of its being a present demise (*Pinero v Judson* (1829) 6 Bing 206; *Wilson v Chisholm* (1831) 4 C & P 474; *Hancock v Caffyn* (1832) 8 Bing 358; *Doe d Bailey v Foster* (1846) 3 CB 215 at 226 per Tindal CJ); and, as payment of rent would, if the agreement is executory, create a yearly tenancy, the argument for construing it as a lease is strengthened if the covenants are unsuitable to a yearly tenancy (*Pinery v Judson* supra).

7 See *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860.

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#### **74. Leases which are not effective to create a legal estate.**

A lease cannot create a legal estate unless either it is by deed<sup>1</sup> or it takes effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term, at the best rent that can reasonably be obtained without a fine<sup>2</sup>. A lease which does not create a legal estate may be enforced by the parties to it as if it were an agreement for a lease and subject to the same limitations as are applicable to an agreement<sup>3</sup>.

1 It is an instrument which satisfies the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended): see PARA 111 post; and DEEDS AND OTHER INSTRUMENTS. In order to be fully effective, most leases granted for a term of more than seven years now require registration: see PARA 120 post; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 827.

2 See the Law of Property Act 1925 ss 52(1), (2)(d), 54; and PARAS 101-102 post.

3 *Parker v Taswell* (1858) 2 De G & J 559; and see PARA 117 post.

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#### **75. Agreements for leases; tenancy agreements.**

An instrument which only binds one party to create and the other to accept a lease in the future is an agreement for a lease. Moreover, an instrument is construed as an agreement for a lease and not as a lease, notwithstanding that it contains words of present demise, if the

provisions to be inserted in the lease are not finally ascertained<sup>1</sup>; or if from other indications it appears that it was not intended to take effect as a lease<sup>2</sup>, as, for example, where it is expressly provided that it is not to operate as a lease<sup>3</sup>; or where it is in the form of an agreement to grant a lease, and there are no indications that it is to operate as a lease<sup>4</sup>; or where the landlord is not yet in a position to demise<sup>5</sup>; or where certain things have to be done by the landlord before the lease is granted, such as the completion<sup>6</sup> or repair<sup>7</sup> or improvement<sup>8</sup> of the premises, or by the tenant, such as the obtaining of sureties<sup>9</sup>; or where possession<sup>10</sup>, or the commencement of the rent<sup>11</sup>, is postponed until a future date in order to allow the preparation of the lease. In all cases the question whether an agreement operates as a present demise, or only as an agreement for a lease, depends upon the intention of the parties<sup>12</sup>; and, even though it is only an agreement for a lease, if the tenant occupies under it, he is liable under the agreed covenants in respect of the time of his occupation<sup>13</sup>.

The distinction between a lease (creating a legal estate) on the one hand and an agreement for a lease (creating no legal estate) on the other hand has been obscured by the popular use of the word 'lease' to connote only a document which constitutes a deed and 'agreement' to connote other instruments; but an agreement for a lease can be (and by a corporate body often is) made by deed, whereas a lease properly so called need be made by deed only if the Law of Property Act 1925 so requires<sup>14</sup>. Where a demise is made by an oral agreement or by an informal instrument, the resulting lease is often described as a 'tenancy agreement'. This is especially the case in respect of periodic tenancies of residential premises or agricultural holdings<sup>15</sup>.

1 Eg where the rent is to be subsequently ascertained (*Morgan d Dowding v Bissell* (1810) 3 Taunt 65; *John v Jenkins* (1832) 1 Cr & M 227; cf *M'Creesh v M'Geough* (1873) IR 7 CL 236), or where, in an agreement for a mining lease, the mode of working the minerals is not sufficiently defined (*Jones v Reynolds* (1841) 1 QB 506; *Doe d Morgan v Powell* (1844) 7 Man & G 980), or the terms of the lease are in other respects left indefinite (*Doe d Bromfield v Smith* (1805) 6 East 530). As to uncertainty in the commencement or duration of the term see *Dunk v Hunter* (1822) 5 B & Ald 322; *Clayton v Burtenshaw* (1826) 5 B & C 41; *Gore v Lloyd* (1844) 12 M & W 463 at 476; *Doe d Wood v Clarke* (1845) 7 QB 211; and as to the lives not being ascertained in an agreement for a lease for lives see *Pentland v Stokes* (1812) 2 Ball & B 68; and PARAS 240-241 post.

2 *Gore v Lloyd* (1844) 12 M & W 463 at 478 per Alderson B. Specific performance will be ordered of a further instrument required to carry out the intention of the parties: *Fenner v Hepburn* (1843) 2 Y & C Ch Cas 159.

3 *Perring v Brook* (1835) 7 C & P 360; *Brook v Biggs* (1836) 2 Bing NC 572 at 574; *Anderson v Midland Rly Co* (1861) 3 E & E 614.

4 *Hegan v Johnson* (1809) 2 Taunt 148; *Phillips v Hartley* (1827) 3 C & P 121; *Rawson v Eicke* (1837) 7 Ad & El 451; *Bicknell v Hood* (1839) 5 M & W 104; *Brashier v Jackson* (1840) 6 M & W 549; *Doe d Bailey v Foster* (1846) 3 CB 215 (all cases where the landlord agreed that he would 'by indenture demise', or agreed 'to grant a lease', or 'to make and execute a valid lease'); cf *Regnart v Porter* (1831) 7 Bing 451.

5 Eg where the landlord is not at the time of the agreement entitled to grant a lease (*Doe d Coore v Clare* (1788) 2 Term Rep 739; *Doe d Pearson v Ries* (1832) 8 Bing 178; *Hayward v Haswell* (1837) 6 Ad & El 265), or where he has not acquired the necessary land (*Doe d Jackson v Ashburner* (1793) 5 Term Rep 163 at 168; and see *Doe d Walker v Groves* (1812) 15 East 244 at 247), or where a necessary licence or consent has not been obtained (*Doe d Bailey v Foster* (1846) 3 CB 215; *Rollason v Leon* (1861) 7 H & N 73).

6 *Regnart v Porter* (1831) 7 Bing 451.

7 *Hamerton v Stead* (1824) 3 B & C 478; *Rawson v Eicke* (1837) 7 Ad & El 451; *Doe d Wood v Clarke* (1845) 7 QB 211.

8 *Gore v Lloyd* (1844) 12 M & W 463.

9 *John v Jenkins* (1832) 1 Cr & M 227.

10 *Tempest v Rawling* (1810) 13 East 18.

11 *Goodtitle d Estwick v Way* (1787) 1 Term Rep 735; cf *Poole v Bentley* (1810) 12 East 168 at 170 per Lord Ellenborough CJ.

12 *Sidebotham v Holland* [1895] 1 QB 378, CA.

13 *Pistor v Cater* (1842) 9 M & W 315, 320; and see *Adams v Clutterbuck* (1883) 10 QBD 403 at 406; and PARA 210 post. As to the position where there is an entry under an agreement for a lease followed by payment of rent see PARAS 78, 117, 210 post.

14 See PARA 74 ante, PARAS 101-102 post.

15 The Agricultural Holdings Act 1986 uses the term 'contract of tenancy' in preference to 'lease': see s 1(1), (5); and AGRICULTURAL LAND vol 1 (2008) PARA 323, 325.

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## 76. Enforcement of agreements for lease.

If a question as to the rights and liabilities of the parties to an agreement for a lease, or to a lease which is not effective to create a legal estate, arises in a court which has jurisdiction to order specific performance, and if the agreement between the parties is one of which specific performance will be ordered<sup>1</sup>, then the parties are treated as having the same rights and as being subject to the same liabilities as if a valid lease had been granted. Consequently, the landlord is entitled to distrain and the tenant is entitled as against the grantor to hold the premises for the agreed term<sup>2</sup>; and covenants may run with the reversion notwithstanding that there has been no lease by deed<sup>3</sup>. For example, where an enforceable contract has been made<sup>4</sup> for granting a lease for life<sup>5</sup>, or for years<sup>6</sup>, or (as it appears) of any incorporeal hereditaments<sup>7</sup>, both the landlord and the tenant under it are respectively entitled to enjoy and enforce the same rights in respect of the property agreed to be demised as if the lease contracted for had been duly granted<sup>8</sup>.

1 See PARA 95 post; and SPECIFIC PERFORMANCE.

2 *Walsh v Lonsdale* (1882) 21 ChD 9, CA; *Lowther v Heaver* (1889) 41 ChD 248 at 264, CA; *Allhusen v Brooking* (1884) 26 ChD 559; *Re Maughan, ex p Monkhouse* (1885) 14 QBD 956; *Crump v Temple* (1890) 7 TLR 120; *Slough Picture Hall Co Ltd v Wade, Wilson v Neville Reid & Co Ltd* (1916) 32 TLR 542 at 545; *Gray v Spyer* [1922] 2 Ch 22 at 31, 34, CA; and see DISTRESS vol 13 (2007 Reissue) PARA 908. If the landlord re-enters under a court order, he ceases to be entitled to the benefit of the doctrine: *Murgatroyd v Old Silkstone and Dodsworth Coal and Iron Co, ex p Charlesworth* (1895) 44 WR 198.

3 *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 613.

4 As to the formalities required for an enforceable contract see PARA 79 post.

5 *Zimble v Abrahams* [1903] 1 KB 577, CA. Such a lease now takes effect, however, as a lease for 90 years determinable by the landlord after the tenant's death by one month's notice in writing: see the Law of Property Act 1925 s 149(6) (as amended); and PARA 240 post.

6 See *Parker v Taswell* (1858) 2 De G & J 559; *Bond v Rosling* (1861) 1 B & S 371; *Rollason v Leon* (1861) 7 H & N 73; *Tidey v Mollett* (1864) 16 CBNS 298.

7 *Lowe v Adams* [1901] 2 Ch 598 at 600.

8 *Walsh v Lonsdale* (1882) 21 ChD 9, CA; *Furness v Bond* (1888) 4 TLR 457; *Lowther v Heaver* (1889) 41 ChD 248 at 264, CA; *Crump v Temple* (1890) 7 TLR 120; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 617; and see *James Jones & Sons Ltd v Earl of Tankerville* [1909] 2 Ch 440 (specific performance of contract to cut and carry away timber); *Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17, [1974] 1 WLR 113.



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## 77. Limitations on the enforcement of agreements for lease.

In consequence of the equitable doctrine that an agreement for a lease may be enforced as though a valid lease had been granted<sup>1</sup>, questions whether an instrument is a lease or an agreement for a lease do not often arise<sup>2</sup>. The equitable doctrine does not, however, apply where:

- 211 (1) the question arises in a court which has no jurisdiction to order specific performance, for example in a county court in the case of a contract which by reason of the value of the property is not within the equitable jurisdiction of the county court<sup>3</sup>;
- 212 (2) the circumstances are such that specific performance would not be ordered, as, for example, where the tenant has committed breaches of covenant and the landlord's power of re-entry has become exercisable<sup>4</sup>, or where the right to enforce the agreement has become barred<sup>5</sup>, or where the tenant has not fulfilled conditions which are to be performed before a lease is granted<sup>6</sup>.

Moreover, the doctrine does not affect the interests of persons who for valuable consideration and without notice of the agreement acquire any legal estate or interest in the land affected<sup>7</sup>.

An agreement for a lease, and a lease which fails to vest a legal term in the tenant, create an estate contract which is registrable<sup>8</sup>. If the estate contract is registered, a purchaser for value of a legal estate is affected with notice of it; but, if it is not registered before a purchaser for value acquires a legal estate, he is not affected with notice<sup>9</sup>.

1 See PARA 76 ante; and EQUITY vol 16(2) (Reissue) PARA 562.

2 See PARA 209 post.

3 An agreement for a lease of property is not treated as a lease in a claim in the county court where the value of the property exceeds the county court jurisdiction limit: see *Foster v Reeves* [1892] 2 QB 255, CA; *Cornish v Brook Green Laundry Ltd* [1959] 1 QB 394 at 411-412, [1959] 1 All ER 373 at 384-385, CA. The present limit is £30,000 unless all the parties consent: County Courts Act 1984 ss 23(d), 24 (as amended); County Courts Jurisdiction Order 1981, SI 1981/1123, art 2, Table (amended, but without affecting this limit, by SI 1991/724; SI 1991/2684). A defendant may, however, maintain an equitable defence to a possession claim in the county court, whatever the value of the property: see *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169, [1962] 3 All ER 593, CA (where no counterclaim for specific performance was made); *Rushton v Smith* [1976] QB 480, [1975] 2 All ER 905, CA. See further COURTS vol 10 (Reissue) PARA 719. Subject to the provisions for transfer of the proceedings (or of the counterclaim) to the High Court, the county court has unlimited jurisdiction in respect of a counterclaim: see the County Courts Act 1984 s 41 (as amended) s 42 (as substituted); and CIVIL PROCEDURE vol 11 (2009) PARA 69.

4 *Coatsworth v Johnson* (1886) 55 LJQB 220, CA; *Swain v Ayres* (1888) 21 QBD 289, CA.

5 *Ariff v Rai Jadunath Majumdar Bahadur* (1931) 47 TLR 238.

6 *IRC v Earl of Derby* [1914] 3 KB 1186; *Cornish v Brook Green Laundry Ltd* [1959] 1 QB 394, [1959] 1 All ER 373, CA.

7 *Synge v Synge* [1894] 1 QB 466, CA.

8 See the Land Charges Act 1972 s 2(1), (4) Class C(iv); and LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632. Where the title is registered, the contract should be protected by notice on the register: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq. An option to renew in a lease is likewise registrable: see *Phillips v Mobil Oil Co Ltd* [1989] 3 All ER 97, [1989] 1 WLR 888, CA. An estate contract is not overreached on sale under a trust of land: see the Law of Property Act 1925 s 2(3)(iv); and REAL PROPERTY vol 39(2) (Reissue) PARA 249. If a landlord agrees to grant a lease, or grants an option to purchase the reversion, the other party to the agreement is under no duty to register the agreement or option as an estate contract, and failure to register is no ground for reducing the damages for breach of contract by the landlord if he sells to a third person: *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Hollington Bros Ltd v Rhodes* [1951] 2 All ER 578n. As to options to purchase see PARA 135 post.

9 See the Land Charges Act 1972 s 4(6) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 643. See also *Sharp v Coates* [1949] 1 KB 285, [1948] 2 All ER 871, CA; *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415. As to registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995. In the case of registered land, however, the rights of a person in actual occupation are protected even though unregistered: see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962.

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## **78. Rights of tenants in possession.**

A tenant under an agreement for a lease or under a lease which is not effective to create a legal estate has an equitable interest under his agreement with the landlord<sup>1</sup>, and, in addition, if he goes into possession and pays rent on a yearly basis, acquires a legal tenancy from year to year on the same terms and conditions as are contained in his agreement so far as those terms and conditions are applicable to a yearly tenancy<sup>2</sup>. The tenancy so acquired expires without any notice to quit upon the expiration of the intended term<sup>3</sup>.

1 *Parker v Taswell* (1858) 2 De G & J 559. Apart from the doctrine of *Walsh v Lonsdale* (1882) 21 ChD 9, CA (see PARA 76 ante), the landlord may not distrain until a legal tenancy has arisen: see *Dunk v Hunter* (1882) 5 B & Ald 322.

2 *Mann v Lovejoy* (1826) Ry & M 355; *Richardson v Gifford* (1834) 1 Ad & El 52; and see *Joel v Montgomery and Taylor Ltd* [1967] Ch 272, [1966] 3 All ER 763 (having gone into possession and paid rent up to a future date, the defendant held to be a tenant and not a licensee; the National Conditions of Sale (17th Edn) condition 7 (purchaser in occupation before completion to be licensee) was inapplicable). As to what terms are applicable to a yearly tenancy see PARA 210 post. Such a tenancy is determinable by six months' notice: see *Morgan v Dowding v Bissell* (1810) 3 Taunt 65. Where the tenant enters and pays rent upon a weekly, monthly or other periodic basis, it seems that he acquires only a weekly, monthly or other periodic tenancy, regardless of the intended term of the invalid lease: see *Adler v Blackman* [1953] 1 QB 146, [1952] 2 All ER 945, CA (a case of holding over, as opposed to entry).

3 *Doe d Tilt v Stratton* (1828) 4 Bing 446; and see the other cases cited in PARA 210 note 2 post.

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## **(2) AGREEMENTS FOR LEASES**

### **(i) Formal Requirements**

## 79. Contract must be made in writing.

A contract made on or after 27 September 1989 for the sale or other disposition<sup>1</sup> of an interest in land<sup>2</sup> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each<sup>3</sup>. The terms may be incorporated in a document either by being set out in it or by reference to some other document<sup>4</sup>; and the document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them but not necessarily the same one, must be signed by or on behalf of each party to the contract<sup>5</sup>.

The above provisions do not, however, apply in relation to a contract:

- 213 (1) to grant a short lease<sup>6</sup>;
- 214 (2) made in the course of a public auction; or
- 215 (3) regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract<sup>7</sup>;

and nothing in those provisions applies in relation to contracts made before 27 September 1989<sup>8</sup>.

Most agreements for lease will now be by way of formal contract since an exchange of letters will rarely satisfy the above requirements. If, however, all of the agreed terms are set out in a single letter or that letter expressly incorporates the stipulations of earlier identified letters and either that letter is signed by both parties or copies are signed by each party and exchanged, a contract will be created, provided that it appears, as a matter of construction, that the parties intended to be bound<sup>9</sup>.

1 For these purposes, 'disposition' includes a conveyance and also a devise, bequest or an appointment of property contained in a will; and 'conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will: Law of Property (Miscellaneous Provisions) Act 1989 s 2(6) (applying the Law of Property Act 1925 s 205(1)(ii)).

2 For these purposes, 'interest in land' means any estate, interest or charge in or over land: Law of Property (Miscellaneous Provisions) Act 1989 s 2(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

3 Law of Property (Miscellaneous Provisions) Act 1989 ss 2(1), 5(3), (4)(a). Section 2 (as amended) is of relevance only to executory contracts and has no application to contracts which have been completed: see *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, [1992] 2 EGLR 80, CA.

4 Law of Property (Miscellaneous Provisions) Act 1989 s 2(2). The contract of sale must refer to the other document; it is insufficient simply for the other document to refer to the contract of sale (*Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853); although a promise which does not comply with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) may be enforceable as a collateral contract (*Record v Bell* supra; and see *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, [1992] 2 EGLR 80, CA); and it will sufficiently satisfy those requirements to incorporate a named set of conditions of sale by reference (*B Ltd v T Ltd* [1991] NPC 47).

5 Law of Property (Miscellaneous Provisions) Act 1989 s 2(3). A contract for the grant of a lease cannot be made by an exchange of letters unless all the terms are contained in one letter and agreed to by both parties; and, if, where contracts are exchanged, there is a discrepancy between the two documents, it would appear that no valid contract is created unless and until one of the documents is rectified so as to correspond with the other: see further PARA 80 post. Terms implied by law need not, however, be expressly agreed. An oral variation is ineffective unless it takes effect as a collateral contract independent of the contract of sale: see *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. In relation to an option it is sufficient that the grant of the option satisfies the statutory formalities: *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600. It does not matter, therefore, that the notice exercising the option is signed only by the person entitled to the benefit of the option.

6 le such a lease as is mentioned in the Law of Property Act 1925 s 54(2): see PARA 101 post.

7 Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 317(1), (2)). Nothing in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) affects the creation of resulting, implied or constructive trusts: s 2(5).

8 Ibid ss 2(7), 5(3), (4)(a).

9 As to contracts by correspondence generally see CONTRACT vol 9(1) (Reissue) PARA 668.

## UPDATE

### 79 Contract must be made in writing

NOTE 3--However, it has been held that the doctrine of proprietary estoppel may be used to give effect to a contract which is not in writing: see *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA; and SALE OF LAND vol 42 (Reissue) PARA 29.

TEXT AND NOTE 7--Now, head (3) regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan, or a regulated sale and rent back agreement: Law of Property (Miscellaneous Provisions) Act 1989 s 2(5) (amended by SI 2006/2383, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes)).

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### 80. Rectified contracts.

Where a contract for the sale or other disposition<sup>1</sup> of an interest in land<sup>2</sup> satisfies the statutory conditions as to formalities<sup>3</sup> by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract comes into being, or is deemed to have come into being, at such time as may be specified in the order<sup>4</sup>.

1 For the meaning of 'disposition' see PARA 79 note 1 ante.

2 For the meaning of 'interest in land' see PARA 79 note 2 ante.

3 le the conditions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

4 Ibid s 2(4). As to the contracts to which s 2 (as amended) does not apply see PARA 79 ante; and as to rectification see PARAS 155-158 post; and MISTAKE vol 77 (2010) PARA 57 et seq.

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## (ii) Essential Terms of a Concluded Agreement

### 81. In general.

The statutory requirements as to the form of the contract<sup>1</sup> do not affect what are the terms which the parties must have expressly agreed and recorded<sup>2</sup> in order to create a contract. All essential terms<sup>3</sup> must be agreed; and a term is implied in the agreement for lease<sup>4</sup> that the lease, when granted, will contain the usual covenants<sup>5</sup>. An agreement for a lease must not contravene the legislation prohibiting sex, racial and disability discrimination<sup>6</sup>; and it will be void in so far as it:

- 216 (1) purports to exclude or modify the right of any person to be, or do any thing as, a member of an RTM company<sup>7</sup>;
- 217 (2) provides for the termination or surrender of the lease if the tenant becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing; or
- 218 (3) provides for the imposition of any penalty or disability if the tenant becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing<sup>8</sup>.

It will also be void to the extent that:

- 219 (a) it would otherwise have effect to exclude, modify or otherwise frustrate the operation of any provision of the Landlord and Tenant (Covenants) Act 1995; or
- 220 (b) it provides for the termination or surrender of the tenancy, or the imposition on the tenant of any penalty, disability or liability, in the event of the operation of any provision of the 1995 Act; or
- 221 (c) it provides for any of the matters referred to in head (b) above and does so, whether expressly or otherwise, in connection with, or in consequence of, the operation of any provision of that Act<sup>9</sup>.

An agreement for a lease, even though signed by the intended landlord, will not bind him if he does not sign with the intention of contracting or if he does not deliver the agreement to the intended tenant<sup>10</sup>.

A tenant who accepts a tenancy agreement which does not create a legal estate<sup>11</sup> should register the agreement by notice on the register<sup>12</sup> or as an estate contract under the Land Charges Act 1972<sup>13</sup>, otherwise the agreement will not be binding on a purchaser for value of the legal estate<sup>14</sup>.

1    Ie the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

2    See *ibid* s 2(1), (2); and PARA 79 ante.

3    See PARA 82 post.

4    Cf 'implied terms' in the lease itself which regulate the rights of the landlord and the tenant throughout the term notwithstanding that the lease is silent about them.

5    As to the usual covenants see PARA 83 post.

6    See PARA 48 et seq ante.

7    As to RTM companies see PARA 374 post.

8    See the Commonhold and Leasehold Reform Act 2002 s 106; and PARA 375 post.

9 See the Landlord and Tenant (Covenants) Act 1995 s 25(1); and PARA 579 post.

10 *Pattle v Hornibrook* [1897] 1 Ch 25; *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66, [2004] 4 All ER 238. As to the formalities applicable to leases see PARA 111 post; and as to alterations and additions to documents generally see PARA 112 post.

11 See PARA 74 ante.

12 Where the title to land is registered, an agreement for lease may be protected either as an interest overriding a registered disposition (in the case of a person in actual occupation of the land) (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 962) or by the entry of a notice on the register (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995) but is not a legal estate capable of registration (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 823).

13 le under the Land Charges Act 1972 s 2(1), (4), Class C(iv): see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632.

14 *Sharp v Coates* [1949] 1 KB 285, [1948] 2 All ER 871, CA; and see PARA 77 ante. As to the registration of options to purchase see PARA 135 post.

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## 82. Essential terms of agreement.

The essential terms of an agreement for a lease are:

- 222 (1) the identification of the landlord and tenant<sup>1</sup>;
- 223 (2) the premises to be leased<sup>2</sup>;
- 224 (3) the commencement and duration of the term<sup>3</sup>; and
- 225 (4) the rent or other consideration to be paid<sup>4</sup>.

If these matters are ascertained to be offered and accepted, it is sufficient<sup>5</sup>. If any other terms are mentioned by one party, these must also be unconditionally accepted by the other party in order that there may be a concluded contract<sup>6</sup>. As long as such necessary terms have not been agreed to, or any additional term has been mentioned on one side and not unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract<sup>7</sup>. New terms may be added to an offer<sup>8</sup>, or the offer may be withdrawn at any time, as long as it has not been accepted<sup>9</sup>. As long as an offer remains open, the other party may, however, withdraw any term which he has sought to introduce and accept the offer unconditionally<sup>10</sup>. In an agreement for a lease certain terms are avoided or restricted by statute<sup>11</sup>, or are deemed by statute to be included in the agreement<sup>12</sup>.

1 Where the tenant deceives the landlord as to the tenant's identity and that identity is a vital element, the lease is void: see *Sowler v Potter* [1940] 1 KB 271, [1939] 4 All ER 478; but see *Solle v Butcher* [1950] 1 KB 671 at 691, [1949] 2 All ER 1107 at 1119, CA per Denning LJ. As to mistake as to person see CONTRACT vol 9(1) (Reissue) PARAS 704-706.

2 See *Lancaster v De Trafford* (1862) 31 LJ Ch 554.

3 The court will not imply a term that the lease is to commence at a reasonable time or at the date of the agreement: *Marshall v Berridge* (1881) 19 ChD 233, CA; *Harvey v Pratt* [1965] 2 All ER 786, [1965] 1 WLR 1025, CA; but cf *Liverpool City Council v Walton Group plc* [2002] 1 EGLR 149, [2001] All ER (D) 359 (Jul) (agreement which included contract to grant a 999 year lease was not void for uncertainty by containing no commencement

date; either the agreement was to be interpreted as providing for the commencement date to be the date of execution of the lease or the uncertainty in respect of two dates only six weeks apart could be resolved by the tenant electing for the earlier date).

4 These were the terms which were essential for a memorandum in writing to satisfy the Law of Property Act 1925 s 40 (repealed) in relation to agreements made before 27 September 1989 and they are equally the essential terms of a contract made on or after that date. Where the agreement is entered into before 19 June 2006, the lease will not be a prescribed clauses lease for the purposes of the Land Registration Rules 2003, SI 2003/1417, r 58A (as added): see r 58A(4)(c)(i) (as added); and PARA 100 post. Where the lease is to be a prescribed clauses lease, the agreement ought presumably to include the wording particulars specified in Sch 1A (as added) (see PARA 126 post) which will be required in the lease. For the meaning of 'prescribed clauses lease' see PARA 100 post.

5 There must be an offer capable of acceptance. Thus, where a local authority wrote to the unauthorised occupier of premises informing her that the authority 'had agreed to the monthly letting of the premises ... on the terms laid down by the valuers', it was held that 'acceptance' of the letter did not create a tenancy because the letter amounted to no more than an expression of willingness to make an offer to let the premises on a monthly basis when the valuers had decided what the appropriate terms were to be: *Brent London Borough Council v O'Bryan* (1992) 65 P & CR 258, [1993] 1 EGLR 59, CA.

6 See *Rossiter v Miller* (1878) 3 App Cas 1124 at 1151, HL where, for the purpose of the same distinction, Lord Blackburn use the terms 'cardinal' and 'essential': 'Though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation'. The terms mentioned in heads (1)-(4) in the text are essential to any contract for a lease, and are the cardinal terms, as that expression is used in the above passage. Other terms proposed by either party are essential to the particular agreement: see CONTRACT vol 9(1) (Reissue) PARAS 667-675. All such other terms must be recorded in the contract: see PARA 79 ante.

7 *Lucas v James* (1849) 7 Hare 410; *Forster v Rowland* (1861) 7 H & N 103; *Clarke v Fuller* (1864) 16 CBNS 24; *Cayley v Walpole* (1870) 39 LJ Ch 609; *Nesham v Selby* (1872) 7 Ch App 406; *Crossley v Maycock* (1874) LR 18 Eq 180; *Stanley v Dowdeswell* (1874) LR 10 CP 102; *Cartwright v Miller* (1877) 36 LT 398 (acceptance accompanied by suggestion as to covenants to be inserted in the lease; no concluded contract); *Wilcox v Redhead* (1880) 49 LJ Ch 539; *Moritz v Knowles* (1899) 43 Sol Jo 529, CA. In *Cayley v Walpole* (1870) 39 LJ Ch 609 the correspondence showed a concluded agreement; and see *Wood v Scarth* (1855) 2 K & J 33; *Cavaleiro v Puget* (1865) 4 F & F 537. In *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA, an agreement for a lease to contain 'such other covenants and conditions as shall be reasonably required' was held to be sufficiently certain to be a concluded contract. See also *Trustees of National Deposit Friendly Society v Beatties of London Ltd* [1985] 2 EGLR 59. If the acceptance is conditional, the condition must be satisfied: *White v M'Mahon* (1886) 18 LR Ir 460. If an offer to let is made alternatively, the acceptance of either alternative concludes the contract: *Lever v Koffler* [1901] 1 Ch 543. A concluded contract is not affected by the tenant's objecting to a usual term in the draft lease: *Blakeney v Hardie* (1874) 8 IR Eq 381. As to usual covenants see PARA 83 post.

8 *Honeyman v Marryat* (1855) 21 Beav 14.

9 *Warner v Willington* (1856) 3 Drew 523. An offer may be withdrawn without express notice being given to the other party, if matters are brought to his notice which are inconsistent with the continuance of the offer: *Cartwright v Hoogstoel* (1911) 105 LT 628.

10 See *Joliffe v Blumberg* (1870) 18 WR 784 (after draft lease approved by tenant, alterations made by the landlord but not insisted upon).

11 See eg the Landlord and Tenant Act 1954 s 38 (as amended); and PARA 709 post; and the Rent Act 1977 Pt IX (ss 119-128) (as amended); and PARA 925 et seq post. Cf *Ailion v Spiekermann* [1976] Ch 158, [1976] 1 All ER 497 (severance of illegal term).

12 See eg the Family Law Act 1996 Sch 4 para 3 (as amended). Those provisions apply only if and so far as a contrary intention is not expressed in the agreement: Sch 4 para 3(4).

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### 83. Usual covenants.

An agreement for a lease should specify the covenants and provisos which are to be inserted in the lease<sup>1</sup>. If it does not do so, the parties may require the insertion in it of the usual and proper covenants and provisos whether or not it is agreed that the lease is to contain those covenants and provisos<sup>2</sup>. What they are is in each case a question of fact to be decided upon an examination of the leading books of precedents<sup>3</sup>, or upon the evidence of conveyancers and others familiar with the practice generally, or with the practice in the particular district<sup>4</sup>, or on the particular estate, having regard to the nature of the property, the place where it is situated, and the purpose for which the premises are to be used<sup>5</sup>. There is always room for differences of opinion as to what the usual covenants are; and, therefore, a defendant to a claim for specific performance of an agreement for a lease is entitled to an opportunity to object to a claimant's proposals, even though he has not entered an appearance. It is ultimately for the judge to decide what covenants should be included<sup>6</sup>.

The covenants and provisos which may be regarded as usual in all cases are<sup>7</sup>:

- 226 (1) covenants by the tenant to pay rent, to pay taxes (except such as are ultimately charged by statute on the landlord)<sup>8</sup>, to keep and deliver up the premises in repair<sup>9</sup> and to allow the landlord to enter and view the state of repair<sup>10</sup>;
- 227 (2) the usual qualified covenant by the landlord for quiet enjoyment<sup>11</sup>; and
- 228 (3) a proviso for re-entry on non-payment of rent<sup>12</sup>.

1 The agreement may be for a lease, subject to such clauses as the landlord chooses to insert (*Plunkett v Dease* (1846) 10 1 Eq R 124), or subject to conditions to be settled by a third person (*Gourlay v Duke of Somerset* (1815) 19 Ves 429), or subject to such covenants as are reasonably required by the landlord (*Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA). As to clauses to be inserted in renewal of leases see *Ricketts v Bell* (1847) 1 De G & Sm 335; *Vance v Earl of Ranfurley* (1850) 11 Ch R 321.

2 *Church v Brown* (1808) 15 Ves 258 at 271; *Propert v Parker* (1832) 3 My & K 280; *Blakesley v Whieldon* (1841) 1 Hare 176 at 181. If the agreement is silent as to covenants, it may be that the landlord is not entitled to limit his liability under the implied covenant for quiet enjoyment by inserting the usual express limited covenant: *Colhoun v Trustees of Foyle College* [1898] 1 IR 233, CA. As to the covenant for quiet enjoyment see PARA 508 et seq post; and as to the distinction between usual covenants and implied covenants see PARA 81 ante.

3 *Hampshire v Wickens* (1878) 7 ChD 555 at 561; *Flexman v Corbett* [1930] 1 Ch 672.

4 *Hodgkinson v Crowe* (1875) LR 19 Eq 591; *Hart v Hart* (1881) 18 ChD 670 at 695; *Flexman v Corbett* [1930] 1 Ch 672. As the practice changes, so may the usual covenants change (*Hampshire v Wickens* (1878) 7 ChD 555 at 561 per Jessel MR), and the view as to what are usual covenants may require reconsideration in the light of the existing practice (*Flexman v Corbett* supra at 677 (residential houses in London)).

5 *Flexman v Corbett* [1930] 1 Ch 672 at 679 ('usual' in this connection held to mean 'occurring in ordinary use'); and see *Church v Brown* (1808) 15 Ves 258 at 267; *Bennett v Womack* (1828) 7 B & C 627; *Brookes v Drysdale* (1877) 3 CPD 52; *Hampshire v Wickens* (1878) 7 ChD 555; *Chester v Buckingham Travel Ltd* [1981] 1 All ER 386, [1981] 1 WLR 96. If the lease is to contain 'proper covenants', those covenants only are to be inserted which will secure the full effect of the contract: *Jones v Jones* (1803) 12 Ves 186 at 189; *Blakesley v Whieldon* (1841) 1 Hare 176. The question what are usual and proper covenants may be determined on an application under the Law of Property Act 1925 s 49 (as amended): see *Re Anderton and Milner's Contract* (1890) 45 ChD 476; and SALE OF LAND vol 42 (Reissue) PARA 220 et seq.

6 *Charalambous v Ktori* [1972] 3 All ER 701, [1972] 1 WLR 951; and see *Chester v Buckingham Travel Ltd* [1981] 1 All ER 386 at 389, [1981] 1 WLR 96 at 99.

7 See *Hampshire v Wickens* (1878) 7 ChD 555 at 561; *Flexman v Corbett* [1930] 1 Ch 672 at 677.

8 See *Bennett v Womack* (1828) 7 B & C 627 (where there was to be a 'net rent' with usual covenants); *Parish v Sleeman* (1860) 1 De GF & J 326 at 332 (rent 'free of all outgoings'); *Canadian Pacific Rly Co v Toronto Corp'n* [1905] AC 33, PC; *Taylor d Atkyns v Horde* (1757) 1 Burr 60 at 125.



9 *Doe d Dymoke v Withers* (1831) 2 B & Ad 896 at 903; *Sharp v Milligan* (1857) 23 Beav 419 at 422; cf *Burrel v Harrison* (1691) 2 Vern 231.

10 In a mining lease, reservation of liberty for the landlord and his agents to examine the workings is a usual covenant: *Blakesley v Whieldon* (1841) 1 Hare 176.

11 See *Colhoun v Trustees of Foyle College* [1898] 1 IR 233, CA and note 2 supra; *Hall v City of London Brewery Co* (1862) 2 B & S 737. As to an implied covenant for quiet enjoyment see PARA 511 post.

12 *Hodgkinson v Crowe* (1875) 10 Ch App 622 at 626. In the absence of an express proviso for re-entry or condition entitling a landlord to forfeit an oral tenancy for non-payment of rent, none is to be implied (*Precious v Harrison* [1989] NPC 17, CA) albeit such a proviso is a usual term.

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#### 84. Unusual covenants.

A covenant or proviso which tends to abridge or qualify the estate vested by the lease in the tenant is not allowed to be inserted as a usual covenant<sup>1</sup>; and on this ground it has been held that a covenant against assigning or underletting without consent<sup>2</sup>, and a proviso for re-entry on bankruptcy<sup>3</sup> or on breach of covenant generally<sup>4</sup>, are not usual.

The following covenants and provisos have also been held to be unusual<sup>5</sup>:

- 229 (1) a covenant by the tenant to rebuild and repair<sup>6</sup>;
- 230 (2) an exception, from the covenant to repair, of damage by fire or tempest<sup>7</sup>;
- 231 (3) a covenant by the tenant to insure<sup>8</sup>, or not to carry on a particular trade<sup>9</sup>;
- 232 (4) a condition that assignments or underleases are to be registered with the landlord's solicitor and a fee paid to him<sup>10</sup>; and
- 233 (5) a covenant by the landlord to rebuild in case of destruction by fire or tempest, with a condition that on default the rent should cease<sup>11</sup>.

1 *Church v Brown* (1808) 15 Ves 258 at 264; *Blakesley v Whieldon* (1841) 1 Hare 176 at 180; *Hodgkinson v Crowe* (1875) LR 19 Eq 591 at 625. Originally, however, it was a disputed point whether the covenant against assignment was 'usual' or not: *Morgan v Slaughter* (1793) 1 Esp 8; *Folkingham v Croft* (1796) 3 Anst 700; *Vere v Loveden* (1806) 12 Ves 179; *Browne v Raban* (1808) 15 Ves 528; *Blakesley v Whieldon* supra at 181. The covenant will be inserted where the lease is in substitution for one containing a restriction on assignment: *Bell v Barchard* (1852) 16 Beav 8. The fact that the landlord agrees not to withhold his consent to an assignment or sublease save for strong and good reasons does not entitle him to insist on the lease containing a covenant against assignment or subletting without consent: *De Soysa v De Pless Pol* [1912] AC 194, PC.

2 *Henderson v Hay* (1792) 3 Bro CC 632; *Church v Brown* (1808) 15 Ves 258; *Hampshire v Wickens* (1878) 7 ChD 555; *Re Lander and Bagley's Contract* [1892] 3 Ch 41; *Bishop v Taylor & Co* (1891) 60 LQB 556, DC; *Chester v Buckingham Travel Ltd* [1981] 1 All ER 386 at 393, [1981] 1 WLR 96 at 104. It makes no difference that the agreement does not mention 'assigns' of the tenant: *Buckland v Papillon* (1866) LR 1 Eq 477 at 482; affd 2 Ch App 67 at 71. Similarly, in a lease to contain 'proper covenants' a covenant against assigning or underletting will not be inserted (*Eadie v Addison* (1882) 52 LJ Ch 80); but covenants 'reasonably required by the landlord' will include some restriction against subletting, although not an absolute bar (*Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 3 All ER 30, CA). See also note 1 supra.

3 *Hodgkinson v Crowe* (1875) LR 19 Eq 591; *Hyde v Warden* (1877) 3 Ex D 72 at 82, CA.

4 *Hodgkinson v Crowe* (1875) 10 Ch App 622. The view that this has not been altered by the Law of Property Act 1925 s 146 (as amended), notwithstanding that the danger of actual forfeiture has been thereby substantially diminished (see *Re Anderton and Milner's Contract* (1890) 45 ChD 476), is a matter which may well require reconsideration in the light of modern evidence (*Flexman v Corbett* [1930] 1 Ch 672 at 682). See

also *Chester v Buckingham Travel Ltd* [1981] 1 All ER 386 at 394, [1981] 1 WLR 96 at 105. The rule applies to leases of special property, such as mining leases (*Hodgkinson v Crowe* (1875) 10 Ch App 622) and public house leases (*Re Lander and Bagley's Contract* [1892] 3 Ch 41) as well as to ordinary leases. Formerly it was held that a proviso for re-entry on bankruptcy (*Haines v Burnett* (1859) 27 Beav 500) was a usual proviso in a lease of a public house; and, although a proviso for re-entry if any other business than a licensed victualler's is carried on is not 'usual' on the grant of a lease, it may be treated as usual for the purpose of assignment (*Bennett v Womack* (1828) 7 B & C 627).

5 For these purposes, 'unusual' is used in a technical sense, by way of contrast with what are in law usual covenants: see PARA 83 ante. The types of covenant which are unusual in this technical sense are in practice often found in leases. Moreover, as the answer to the question of what is or is not usual may vary with changes in conveyancing practice, a decision that a covenant was unusual many years ago does not necessarily mean that it would be held to be unusual in modern conveyancing practice: see PARA 83 ante.

6 *Doe d Dymoke v Withers* (1831) 2 B & Ad 896 at 903.

7 *Sharp v Milligan* (1857) 23 Beav 419; *Kendall v Hill* (1860) 6 Jur NS 968; but in *Doe d Ellis and Medwin v Sandham* (1787) 1 Term Rep 705 a covenant to repair with such an exception was found as a fact to be usual. Cf *Crosse v Morgan* (1889) 60 LT 703 (the words 'or other casualty' were rejected as being uncertain, although the exception of damage by fire or tempest was admitted by the landlord).

8 See *Cosser v Collinge* (1832) 3 My & K 283.

9 *Proper v Parker* (1832) 3 My & K 280; *Van v Corpe* (1834) 3 My & K 269; *Re Davis and Cavey* (1888) 40 ChD 601. The covenant is certainly not usual in a neighbourhood where trade is usually carried on: *Wilbraham v Livesey* (1854) 18 Beav 206 at 210. In *Doe d Marquis of Bute v Guest* (1846) 15 M & W 160 a stipulation in the agreement that the premises should not be used except for a specified manufactory, and that usual covenants should be inserted, did not authorise the insertion of an affirmative covenant by the tenant that he would carry on the manufactory.

10 *Brookes v Drysdale* (1877) 3 CPD 52.

11 *Doe d Ellis and Medwin v Sandham* (1787) 1 Term Rep 705; see *Medwin v Sandham* (1789) 3 Swan 685. As to covenants in leases of special kinds of property see eg paras 543-546 post (public house leases); MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 336-345 (mining leases).

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### (iii) Building Agreements

#### 85. Building agreement.

An agreement for a building lease<sup>1</sup> usually gives the builder the right to enter upon the land for the purpose of executing specified works, but no interest except a tenancy at will is immediately vested in him<sup>2</sup>. A nominal rent is reserved during the period required for building; otherwise the builder may become liable for the rent and subject to the covenants, so far as applicable, which are to be reserved by or contained in the lease when granted. The builder becomes entitled to have a lease granted to himself or his nominee on the completion of the works, or some specified part of them<sup>3</sup>, in accordance with the agreement; and the form of the lease is often scheduled to the agreement<sup>4</sup>.

1 'Building lease' means a lease for building purposes or for purposes connected with them; and 'building purposes' includes the erecting and improving of, the adding to, and the repairing of, buildings (Law of Property Act 1925 s 205(1)(iii)), although, for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended), 'building lease' is given a special meaning (see s 4(1)(d); and PARA 1405 note 2 post).

2 *Marquis of Camden v Batterbury* (1859) 5 CBNS 808 at 816 (affd (1860) 7 CBNS 864, Ex Ch); *Lady Holland v Kensington Vestry* (1867) LR 2 CP 565. In *Quicke v Chapman* [1903] 1 Ch 659 at 668, CA, Collins MR spoke of the builder as having 'at the most a kind of licence, coupled with an interest in the land, which could not ripen into ownership until he had actually completed the building upon the land'. In effect, however, he obtains exclusive possession during the building, so as to become tenant at will, and the agreement usually purports to create such a tenancy. The builder has power to enter into a restrictive covenant which will be binding on persons taking the land with notice of it: see *Abbey v Gutters* (1911) 55 Sol Jo 364.

3 Eg when the houses are roofed in: see *Lowther v Heaver* (1889) 41 ChD 248, CA. See further BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 70 (extension of time for completion), PARAS 133-134 (certificates of completion).

4 As to building leases see PARA 110 post. A building lease granted under the Settled Land Act 1925 s 41 may contain an option to purchase: see s 51; and SETTLEMENTS vol 42 (Reissue) PARA 871. As to the power to grant building leases under that Act see PARA 30 ante; and SETTLEMENTS vol 42 (Reissue) PARA 842. A building lease made by a tenant for life need not require the works to be begun at any particular time: *Re Grosvenor Settled Estates, Duke of Westminster v McKenna* [1933] Ch 97. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

A covenant to make an open space around houses imposes a continuing obligation to keep it open: *Herbert v Maclean* (1860) 12 I Ch R 84. As to the landlord's obligations under a covenant to make roads and sewers see *Mason v Cole* (1849) 4 Exch 375.

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## 86. Liability for rent.

Under the usual form of agreement for a building lease<sup>1</sup>, because the rent is made payable under the agreement, and the agreement excludes the creation of a tenancy from year to year, such a tenancy is not implied from payment of the rent. Hence the assignment of the agreement does not transfer a tenancy to the assignee so as to render him liable for the rent; the liability for the rent is imposed only on the builder<sup>2</sup>.

1 Ie that which is outlined in PARA 85 ante.

2 *Marquis of Camden v Batterbury* (1859) 5 CBNS 808 at 816; on appeal (1860) 7 CBNS 864, Ex Ch. It is usual for the agreement to be drafted in such a way as to make it non-assignable, thereby avoiding any problem as to the liability for the rent by the assignee. The problem is in any event more academic than real, since any assignee of the agreement will hope to take up the lease and, if he does so, will thereby become tenant. Either he will have had to ensure that the rent was paid in order to get the lease, or by taking up the lease he is likely to have assumed liability to pay it, as often the lease reserves a rent as from the date of the agreement, with credit for such sums as have been paid under the agreement. As to the assignment of building agreements generally see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 55 et seq.

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## (iv) Agents

## 87. Agreements by agents.

An agreement for lease may be entered into by an agent, but he must be properly authorised for that purpose<sup>1</sup>. An estate agent's general authority is only to get offers and communicate them to his principal, and without special authority he cannot bind his principal by a contract<sup>2</sup>. The general authority of a steward or land agent is similarly limited, and he may not contract to grant leases of farms<sup>3</sup>; but a land agent specially empowered to manage and superintend estates may enter into an agreement for a usual and customary lease according to the nature and locality of the property<sup>4</sup>. An owner ratifies an unauthorised agreement if he lets the tenant into possession under it<sup>5</sup>. A land or estate agent must exercise reasonable care in ascertaining the fitness of a proposed tenant<sup>6</sup>.

1 His authority need not be in writing: *Coles v Trecothick* (1804) 9 Ves 234 at 250; *Callaghan v Pepper* (1840) 2 I Eq R 399. The principal's death terminates the agent's authority: see *Carr v Livingston* (1865) 35 Beav 41. As to an agent taking a lease from his principal see *Lord Selsey v Rhoades* (1827) 1 Bli NS 1; *Molony v Kernart* (1842) 2 Dr & War 31 at 38. Cf *Rossiter v Walsh* (1843) 4 Dr & War 485; and see *Taylor v Salmon* (1838) 4 My & Cr 134. See also AGENCY vol 1 (2008) PARAS 188-189. In *Helsham v Langley* (1841) 1 Y & C Ch Cas 175, the court refused specific performance of an agreement which was not in accordance with the principal's intentions; but cf *Walsh v Griffiths-Jones* [1978] 2 All ER 1002 (county court), where it was held that, where a landowner held out an estate agent as having full authority to enter into a contractual agreement relating to his property, the landowner was bound by whatever agreement the estate agent made, even though he had been expressly denied any authority to create a tenancy.

2 See the cases cited in AGENCY vol 1 (2008) PARA 41. Consequently an agent has no authority to let an intending tenant into possession: *Slack v Crewe* (1860) 2 F & F 59.

3 *Collen v Gardner* (1856) 21 Beav 540; *Mortal v Lyons* (1858) 8 I Ch R 112 at 117; and see *Ridgway v Wharton* (1854) 3 De GM & G 677 at 688.

4 *Peers v Sneyd* (1853) 17 Beav 151; and see *Firman v Lord Ormonde* (1829) Beat 347. Unusual terms require the owner's sanction: see *Turner v Hutchinson* (1860) 2 F & F 185; *Re Pearson and l'Anson* [1899] 2 QB 618. As to unusual covenants see PARA 84 ante.

5 *Powell v Smith* (1872) LR 14 Eq 85. As to ratification see AGENCY vol 1 (2008) PARA 57 et seq.

6 *Heys v Tindall* (1861) 1 B & S 296 at 298. As to an agent's ordinary duty to use care and skill see *Faruk v Wyse* [1988] 2 EGLR 26; and AGENCY vol 1 (2008) PARA 78 et seq; and as to an estate agent's right to commission see *Brian Cooper & Co v Fairview Estates (Investments) Ltd* [1987] 1 EGLR 18, CA; and AGENCY vol 1 (2008) PARA 103.

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## 88. Prohibition of certain practices by agents.

Any person who:

- 234 (1) demands or accepts payment of any sum of money in consideration of:
- 7
10. (a) registering, or undertaking to register, the name or requirements of any person seeking a tenancy of a house<sup>1</sup>; or
11. (b) supplying, or undertaking to supply, to any person addresses or other particulars of houses to let; or

235 (2) issues any advertisement, list or other document describing any house as being to let without the authority of the owner<sup>2</sup> of the house or his agent,

is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>. An agent may, however, lawfully demand payment for finding a suitable house for his client, provided that the payment becomes due only when a suitable house is found<sup>4</sup>; and a person is not guilty of such an offence by reason of his demanding or accepting:

- 236 (i) payment from the owner of a house of any remuneration payable to him as agent for that owner<sup>5</sup>; or
- 237 (ii) payment of any remuneration, being a solicitor<sup>6</sup>, in respect of business done by him as such<sup>7</sup>; or
- 238 (iii) any payment in consideration of the display in a shop, or of the publication in a newspaper<sup>8</sup>, of any advertisement or notice, or by reason of such display or publication of an advertisement received for the purpose in the ordinary course of business<sup>9</sup>.

An agent who, on behalf of his principal, the landlord, contravenes certain of the prohibitions in relation to the demand and receipt of premiums contained in the Rent Act 1977 is himself liable<sup>10</sup>.

1 For these purposes, 'house' includes any part of a building which is occupied or intended to be occupied as a dwelling: Accommodation Agencies Act 1953 s 1(6).

2 For these purposes, 'owner', in relation to a house, means the person having the power to grant a lease of the house: *ibid* s 1(6).

3 *Ibid* s 1(1), (5) (s 1(1) amended by the Expiring Laws Act 1969 s 1). As to the standard scale see PARA 52 note 6 ante. Until a day to be appointed, a person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding three months, whether in addition to or as an alternative to such a fine: see the Accommodation Agencies Act 1953 s 1(5) (prospectively amended by the Criminal Justice Act 2003 s 332, Sch 37 Pt 9, as from a day to be appointed under s 336(3); at the date at which this title states the law, no such day had been appointed).

4 *Saunders v Soper* [1975] AC 239, [1974] 3 All ER 1025, HL (overruling *Crouch and Lees v Haridas* [1972] 1 QB 158, [1971] 3 All ER 172, CA, and distinguishing *McInnes v Clarke* [1955] 1 All ER 346, [1955] 1 WLR 102, DC). See further AGENCY vol 1 (2008) PARA 282.

5 Accommodation Agencies Act 1953 s 1(2).

6 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

7 Accommodation Agencies Act 1953 s 1(3). The reference to the business of a solicitor includes a reference to the business of a recognised body: Solicitors' Incorporated Practices Order 1991, SI 1991/2684, art 4(I), Sch 1.

8 For these purposes, 'newspaper' includes any periodical or magazine: Accommodation Agencies Act 1953 s 1(6).

9 *Ibid* s 1(4).

10 See PARA 925 et seq post. As to the liability of agents see particularly para 931 note 1 post.

## UPDATE

### 88 Prohibition of certain practices by agents

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3: see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions): see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

NOTES 6, 7--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

TEXT AND NOTE 6--Now refers to a solicitor or authorised person, meaning a person (other than a solicitor) who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which is a reserved legal activity (within the meaning of that Act) (see LEGAL PROFESSIONS vol 65 (2008) PARA 512): Accommodation Agencies Act 1953 s 1(3), (6) (s 1(3) amended, definition in s 1(6) added, by Legal Services Act 2007 Sch 21 para 22).

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## **(v) Title**

### **89. Investigation of landlord's title.**

In practice, the landlord will often deduce title<sup>1</sup>. Where the title is registered, a prospective tenant is now able to obtain a copy of the landlord's title on making an application in the prescribed form to the Land Registry and on payment of the appropriate fee<sup>2</sup>. There are, however, various statutory exceptions to the general principle<sup>3</sup> that any person may inspect and make copies of, or of any part of, the register of title and of any document kept by the Chief Land Registrar which is referred to therein<sup>4</sup>.

At common law an intending tenant who agreed to take a lease of land<sup>5</sup> was entitled to call for and investigate the title of the intending landlord<sup>6</sup>; but this right is now limited by statute in relation to unregistered land unless the grant of the lease will trigger compulsory first registration of title<sup>7</sup>. If, where an intending tenant is entitled to call upon his intending landlord to show some title, the title proves to be defective at the time when the lease ought to be granted<sup>8</sup>, the landlord may not obtain specific performance<sup>9</sup> and is liable in damages<sup>10</sup>, including damages for the loss of the intending tenant's bargain<sup>11</sup>. If the landlord refuses to produce his title where he is legally bound to do so, the tenant may rescind the agreement and recover his deposit<sup>12</sup>. A tenant may now obtain rescission of an agreement for a lease, on the grounds of innocent misrepresentation, after the lease has been executed<sup>13</sup>. By agreeing to let, the landlord does not undertake that the land may be used for any purpose without restriction<sup>14</sup>.

Unless, however:

- 239 (1) the contract is to grant a term of years the grant of which will be an event<sup>15</sup> triggering compulsory first registration of title<sup>16</sup>; or
- 240 (2) the term of years to be granted is to be derived out of registered land<sup>17</sup>,

or the agreement contains a stipulation to the contrary<sup>18</sup>, an intending tenant is not entitled to call for the title to the freehold under a contract to grant a term of years to be derived out of

freehold or leasehold land<sup>19</sup>; and, on a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intending tenant has no right to call for the title to that reversion<sup>20</sup>. At common law a tenant being entitled to investigate title was deemed to have notice of any matter of which he would have received notice on that investigation<sup>21</sup>, but, after 31 December 1925, where the tenant is precluded by statute<sup>22</sup> from investigating title, the tenant is not deemed to be affected with notice of any matter or thing of which, if he had contracted that such title should be furnished, he might have had notice<sup>23</sup>. Registration of any matter under the Land Charges Act 1972, in the case of unregistered land<sup>24</sup>, or under the Land Registration Act 2002, in the case of registered land<sup>25</sup>, or in any local land charges register<sup>26</sup>, constitutes actual notice, however, and all tenants are, therefore, bound by it.

A landlord who is himself a leaseholder is bound in the absence of a stipulation to the contrary to show title to the lease which is vested in him<sup>27</sup>. As he is not precluded by statute from doing so, an undertenant who neglects to investigate the title of his immediate landlord has constructive notice of his immediate landlord's title and any restrictions contained in the lease vested in the immediate landlord<sup>28</sup>. In the absence of express agreement to the contrary, where an intending tenant is entitled to investigate his landlord's title, he may where the title is unregistered require only 15 years as the period of commencement of title<sup>29</sup>; and a purchaser<sup>30</sup> is not deemed to be, or ever to have been, affected with notice of any matter or thing of which, if he had investigated the title or made inquiries in regard to matters prior to that period, he might have had notice, unless he actually makes such investigation or inquiries<sup>31</sup>.

The statutory provisions which, in the absence of agreement to the contrary, preclude an intending tenant from investigating title, do not prevent the intending tenant from showing otherwise that the title to the freehold or leasehold reversion is bad<sup>32</sup>. An intending tenant should generally insist that the landlord's title be investigated and that the appropriate searches be made<sup>33</sup>. Where the tenant stipulates that the landlord is to deliver an abstract, the tenant is entitled to have the abstract verified and to be given an acknowledgment or covenant for production of the deeds which are necessary for the tenant to deduce title subsequently<sup>34</sup>.

1 The Standard Conditions of Sale (4th Edition) condition 8.2.4 provides that if the term of the new lease will exceed seven years, the seller is to deduce a title which will enable the buyer to register the lease at the Land Registry with an absolute title. As to the investigation of title on the sale or assignment of leasehold property see SALE OF LAND vol 42 (Reissue) PARAS 98 et seq, 140. In the case of a lease granted under the right to buy, the landlord must furnish a certificate as to his title: see the Housing Act 1985 s 154 (as amended); and PARA 1912 post.

2 See the Land Registration Act 2002 s 66(1), (2)(b); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1095.

3 See *ibid* s 66(1), (2)(b).

4 See *ibid* s 66(2)(a); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1095.

5 The description of the property demised will be construed in the light of circumstances subsisting when the lease or agreement is made (see PARA 162 the text and note 4 post), and, apart from express contractual stipulation, the tenant takes the property in the state in which it is (see PARA 276 post). For these reasons, and by reason also of the prospective assumption of liability for repair, inspection of the property should be made, and will normally have been made before contract.

6 *Stranks v St John* (1867) LR 2 CP 376 at 380; *Keech v Hall* (1778) 1 Doug KB 21; *Fildes v Hooker* (1817) 2 Mer 424 at 427; *Purvis v Rayer* (1821) 9 Price 488, Ex Ch; *Molloy v Sterne* (1838) 1 Dr & Wal 585; *Marchioness of Londonderry v Baker* (1860) 3 LT 546.

7 See the text and notes 15-23 *infra*; and SALE OF LAND vol 42 (Reissue) PARA 140.

8 *De Medina v Norman* (1842) 9 M & W 820.

9 *Baskcomb v Phillips* (1859) 29 LJ Ch 380; *Reeves v Greenwich Tanning Co Ltd* (1864) 2 Hem & M 54. The agreement may, however, be conditional on the landlord's ability to grant the lease: *Abbot v Blair* (1860) 2 LT 756.

10 *Stranks v St John* (1867) LR 2 CP 376; *Hoare v Chambers* (1895) 11 TLR 185; *Temple v Brown* (1815) 6 Taunt 60.

11 The Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 5(3), (4)(a) (abolition of the rule in *Bain v Fothergill* (1874) LR 7 HL 158 in relation to contracts made on or after 27 September 1989) allows the intending tenant so to claim. See further PARA 94 post.

12 *Roper v Coombes* (1827) 6 B & C 534.

13 Where a person has entered into a contract after a misrepresentation has been made to him and the contract has been performed, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he is so entitled to rescind notwithstanding that performance: see the Misrepresentation Act 1967 s 1; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 704. As to setting aside leases on the ground of mistake see MISTAKE vol 77 (2010) PARA 56.

14 *Jackson v Cobbin* (1841) 8 M & W 790; *Erskine v Adeane* (1873) 8 Ch App 756. As to the general restriction on the change of use of land see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 222.

15 Ie within the Land Registration Act 2002 s 4(1): see LAND REGISTRATION vol 26 (2004 Reissue) PARA 827.

16 See the Law of Property Act 1925 s 44(4A) (added by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (2)).

17 See the Law of Property Act 1925 s 44(12) (added by the Land Registration Act 2002 s Sch 11, PARA 2(1), (4)).

18 See the Law of Property Act 1925 s 44(11).

19 See *ibid* s 44(2); and SALE OF LAND vol 42 (Reissue) PARA 140. For the meaning of 'land' see PARA 17 note 1 ante. This applies equally to a lease of an easement: *Jones v Watts* (1890) 43 ChD 574, CA.

20 See the Law of Property Act 1925 s 44(4); and SALE OF LAND vol 42 (Reissue) PARA 140; *Gosling v Woolf* [1893] 1 QB 39 (the reversion referred to is the reversion to the lease out of which the sublease is to be derived).

21 *Patman v Harland* (1881) 17 ChD 353; *Mogridge v Clapp* [1892] 3 Ch 382, CA; cf *Imray v Oakshette* [1897] 2 QB 218 at 225, CA.

22 Ie by the Law of Property Act 1925 s 44(2)-(4): see the text and notes 15-19 supra; and SALE OF LAND vol 42 (Reissue) PARA 140.

23 See *ibid* s 44(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 2(1), (3)); and EQUITY vol 16(2) (Reissue) PARA 583. The onus of proving that a tenant had notice of a restrictive covenant lies on the person attempting to enforce the covenant: *Shears v Wells* [1936] 1 All ER 832.

24 See the Law of Property Act 1925 s 198 (as amended) (which must, however, be disregarded in certain circumstances: see the Law of Property Act 1969 ss 24, 25 (as amended)). See further EQUITY vol 16(2) (Reissue) PARAS 576-583; LAND CHARGES vol 26 (2004 Reissue) PARAS 616-617.

25 *White v Bijou Mansions Ltd* [1937] Ch 610 at 619-622, [1937] 3 All ER 269 at 272-275 per Simonds J; *affd* on other points [1938] Ch 351, [1938] 1 All ER 546, CA. See LAND REGISTRATION vol 26 (2004 Reissue) PARAS 859, 995-996.

26 See the Law of Property Act 1925 s 198(1) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 616.

27 See *Gosling v Woolf* [1893] 1 QB 39.

28 See *Patman v Harland* (1881) 17 ChD 353. As to the need for inspection of the head lease see PARA 91 post.

29 See the Law of Property Act 1925 s 44(1) (as amended); and SALE OF LAND vol 42 (Reissue) PARAS 139-140.

30 For these purposes, 'purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in *ibid* Pt I (ss 1-39) (as amended) and elsewhere where so expressly provided 'purchaser' only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal



estate includes a charge by way of legal mortgage; and, where the context so requires, 'purchaser' includes an intending purchaser; 'purchase' has a meaning corresponding with that of 'purchaser'; and 'valuable consideration' includes marriage and formation of a civil partnership but does not include a nominal consideration in money: s 205(1)(xxi) (definition amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 7).

31 Law of Property Act 1925 s 44(8).

32 *Jones v Watts* (1890) 43 ChD 574, CA. If the objection to title is specific and litigation results, the tenant may require the production of documents which are in the landlord's possession: *Jones v Watts* supra.

33 Where a title has been accepted without investigation, the tenant has been refused relief from forfeiture: *Imray v Oakshette* [1897] 2 QB 218, CA; *Matthews v Smallwood* [1910] 1 Ch 777. The tenant may now, however, obtain rescission in these circumstances, although the court has a discretion to award damages instead: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

34 *Re Pursell and Deakin's Contract* [1893] WN 152.

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## **90. Consents necessary.**

If the property to be demised is held under a lease which contains a covenant against underletting without consent, the head landlord's written consent must be obtained by the intending underlandlord before the date when the underlease is to be granted<sup>1</sup>. If this is not done, the intending undertenant may rescind the agreement<sup>2</sup>.

1 See PARA 481 post. See also PARA 547 note 2 post. As to a vendor's general duty under an agreement for sale to obtain any necessary licence or consent see CONTRACT vol 9(1) (Reissue) PARA 908. If liquidated damages are fixed by the agreement in case the licence is refused, this does not give the underlandlord the option of not applying for the licence: *Long v Bowring* (1864) 33 Beav 585.

2 *Forrer v Nash* (1865) 35 Beav 167. If the undertenant has been in occupation, he is under no liability to restore the premises to their original condition: *Fawkner and Rogers v Booth* (1893) 10 TLR 83, CA.

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## **91. Need for inspection of head lease.**

An intending undertenant should examine the lease of his intending landlord in order to ascertain that the term of the underlease may be validly granted, and that the lease contains no unduly onerous covenants. If the sub-term is, in fact, longer than the original term, the undertenant may not, after the underlease has been granted, obtain compensation<sup>1</sup> unless the agreement for the underlease so provides<sup>2</sup>. After an agreement for an underlease has been entered into, then, whether he has had a chance of inspecting the head lease or not, the undertenant may not refuse to accept the underlease on the ground of the existence of any ordinary covenants<sup>3</sup>, for, in the absence of any term in the agreement to the contrary, and in the absence of any evidence that he has in fact been made acquainted with the actual terms of

the lease, the agreement must be read as an agreement for an underlease containing the usual covenants<sup>4</sup>. He may, however, refuse to accept the underlease on the ground of the existence of unusual and onerous covenants, unless the agreement otherwise provides or he has been made acquainted with them<sup>5</sup>.

1 *Besley v Besley* (1878) 9 ChD 103; *Clayton v Leech* (1889) 41 ChD 103, CA (where it was pointed out that *Palmer v Johnson* (1884) 13 QBD 351, CA went too far in treating *Besley v Besley* supra as erroneous). As to underleases see PARAS 107-109 post.

2 *Palmer v Johnson* (1884) 13 QBD 351, CA. A tenant subject to covenants which give a right of re-entry for breach under a lease which includes other premises may not compel specific performance of an agreement to purchase, even though he offers to indemnify the purchaser: *Warren v Richardson* (1830) You 1; *Leathem v Allen* (1850) 11 Ch R 683.

3 *Flight v Barton* (1832) 3 My & K 282. For these purposes, 'usual covenants' means ordinary covenants, not merely 'usual covenants' in the strict technical sense: see PARA 83 ante. Cf *Bennett v Womack* (1828) 7 B & C 627.

4 *Melzak v Lilienfeld* [1926] Ch 480 at 492.

5 *Hyde v Warden* (1877) 3 Ex D 72 at 80, CA; *Melzak v Lilienfeld* [1926] Ch 480. The same rule applies between vendor and purchaser of leasehold property: *Reeve v Berridge* (1888) 20 QBD 523, CA; *Re White and Smith's Contract* [1896] 1 Ch 637; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666 at 669; *Molyneux v Hawtrey* [1903] 2 KB 487, CA; *Allen v Smith* [1924] 2 Ch 308; *Melzak v Lilienfeld* supra; and see SALE OF LAND vol 42 (Reissue) PARA 60. If the agreement for the underlease provides for the insertion of a particular restrictive covenant, this amounts to a representation that the undertenant is entitled to grant a lease with that restriction only, and he is not at liberty to insist on the insertion of a wider covenant contained in the head lease: *Van v Corpe* (1834) 3 My & K 269 at 277. Although an underlandlord may not be able to obtain specific performance of an agreement for the underlease by reason of the covenants in the head lease debarring him from granting the underlease in accordance with the agreement, if he is ready to grant the underlease, and the undertenant refuses to accept it, he has a claim for breach of the agreement; and the undertenant, if his enjoyment is interfered with, should have a remedy on the covenant for quiet enjoyment: *Hayward v Parke* (1855) 16 CB 295; and see PARA 508 et seq post.

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## **92. Agreement for underlease to contain like covenants to those of lease.**

Where the agreement for an underlease provides that the underlease is to contain the like provisions in all respects as are contained in the head lease, the provisions of the head lease are to be taken as models for those in the underlease, and must be introduced in it with the proper alterations of names and other matters. Consequently, a provision against assigning without the consent of the head landlord becomes in the underlease a provision against assigning without the consent of the intermediate landlord<sup>1</sup>; but the frame of the agreement may indicate that certain covenants, such as the covenant against assignment without consent, are to be introduced without modification, and the consent of the head landlord will be required<sup>2</sup>. Where a tenant grants an underlease containing a covenant by the undertenant to deliver up the premises and all landlord's fixtures at the end of the sub-term, this does not amount to a representation that he will be at liberty to remove trade fixtures; and thus, if the head lease contains a covenant for delivery up of trade fixtures, and the head landlord enforces that covenant by preventing the undertenant from removing them, the undertenant has no remedy<sup>3</sup>.

1 *Williamson v Williamson* (1874) 9 Ch App 729.

2 *Haywood v Silber* (1885) 30 ChD 404, CA. In the absence of any such provision in the underlease, the undertenant is not bound by the stipulations in the head lease: *Williamson v Williamson* (1874) 9 Ch App 729 at 732; *Slough Picture Hall Co Ltd v Wade, Wilson v Neville, Reid & Co Ltd* (1916) 32 TLR 542 at 544; *Mackusick v Carmichael* [1917] 2 KB 581.

3 *Porter v Drew* (1880) 5 CPD 143.

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## **(vi) Liability to Tax**

### **93. Capital gains tax, VAT and stamp duty land tax.**

The making of an agreement for a lease may attract capital gains tax<sup>1</sup> and may constitute a supply for the purposes of VAT<sup>2</sup>.

For the purposes of stamp duty land tax, where an agreement for a lease is entered into, and the agreement is substantially performed<sup>3</sup> without having been completed<sup>4</sup>, the agreement is treated as if it were the grant of a lease<sup>5</sup> in accordance with the agreement ('the notional lease'), beginning with the date of substantial performance and the effective date of the transaction is that date<sup>6</sup>. Where a person assigns his interest as lessee under an agreement for a lease, then if the assignment occurs without the agreement having been substantially performed, the relevant statutory provisions<sup>7</sup> have effect as if the contract were with the assignee and not the assignor, and the consideration given by the assignee for entering into the contract included any consideration given by him for the assignment<sup>8</sup>. If the assignment occurs after the agreement has been substantially performed the assignment is a separate land transaction<sup>9</sup> and the effective date of that transaction is the date of the assignment<sup>10</sup>.

1 See CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 338 et seq.

2 See PARA 125 post; and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 et seq. As to exempt supplies see the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II, Group 1 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156.

3 For these purposes, a contract is 'substantially performed' when (1) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract; or (2) a substantial amount of the consideration is paid or provided: Finance Act 2003 s 44(5) (amended by the Finance Act 2004 s 296, Sch 39 Pt 2 para 15(1), (2)); definition applied by the Finance Act 2003 ss 44(9A), 120, Sch 17A para 12A(5) (as added: see note 6 infra). 'Possession' includes receipt of rents and profits or the right to receive them, and it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character: s 44(6) (as so applied; amended by the Finance Act 2004 s Sch 39 Pt 2 para 15(1), (3)). For the purposes of head (2) supra a substantial amount of the consideration is paid or provided: (a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided; (b) if the only consideration is rent, when the first payment of rent is made; (c) if the consideration includes both rent and other consideration, when (i) the whole or substantially the whole of the consideration other than rent is paid or provided; or (ii) the first payment of rent is made: Finance Act 2003 s 44(7) (as so applied).

4 For these purposes, references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract: *ibid* s 44(10) (definition applied by Sch 17A para 12A(5) (as added: see note 5 infra).

5 For these purposes, 'lease' means (1) an interest or right in or over land for a term of years (whether fixed or periodic); or (2) a tenancy at will or other interest or right in or over land terminable by notice at any time: *ibid* Sch 17A para 1 (as added: see note 6 *infra*).

6 See *ibid* ss 44(9A), 120, Sch 17A para 12A(1), (2) (s 44(9A), Sch 17A paras 1, 12A, 12B added by the Finance Act 2004 s 296, Sch 39 Pt 1 paras 1, 3, Pt 2 para 22; for transitional provisions see Sch 39 Pt 1 para 13(3), (6)).

If the agreement is (to any extent) afterwards rescinded or annulled, or is for any other reason not carried into effect, the tax paid by virtue of this provision must (to that extent) be repaid by the Commissioners for HM Revenue and Customs; and repayment must be claimed by amendment of the land transaction return made in respect of the agreement: Finance Act 2003 Sch 17A para 12A(4) (as so added; amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50). Where a lease is subsequently granted in pursuance of the agreement the notional lease is treated as if it were surrendered at that time, and the lease itself is treated for the purposes of the Finance Act 2003 Sch 17A para 9 (as added) (see PARA 252 *post*) (rent for overlap period in case of grant of further lease) as if it were granted in consideration of that surrender: Sch 17A para 12A(3) (as so added). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

7 *Ie* *ibid* s 44 (as amended): see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

8 *Ibid* Sch 17A para 12B(1), (2) (as added: see note 6 *supra*).

9 For the meaning of 'land transaction' see *ibid* s 43 (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

10 *Ibid* Sch 17A para 12B(3) (as added: see note 6 *supra*). Where there are successive assignments, Sch 17A para 12B (as added) has effect in relation to each of them: Sch 17A para 12B(4) (as so added).

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## **(vii) Remedies for Breach of Contract**

### **94. Damages at law.**

Either party to a valid and enforceable agreement for lease may recover damages at law for breach of contract<sup>1</sup>. Where the landlord cannot fulfil his obligations because of a defect in title, the tenant may recover damages for loss of bargain, as well as the expenses and liabilities which he has necessarily incurred<sup>2</sup>.

Where a tenant refuses to accept a lease, the landlord may recover damages<sup>3</sup>. Damages may be awarded for delay in completion<sup>4</sup>. Where negotiations for a lease prove unsuccessful, a landlord may in certain circumstances recover expenses incurred in carrying out alterations requested and agreed to be paid for by a prospective tenant<sup>5</sup>.

1 See DAMAGES vol 12(1) (Reissue) PARA 801 *et seq*. The claimant must prove readiness to perform the contract on his part: see *Collins v Willmott* (1864) 11 LT 340. In practice it suffices if the claimant purchaser pleads that he is ready and willing to complete: *Lovelock v Franklyn and Cox* (1846) 8 QB 371. The general rule at common law is that damages for breach of contract are calculated on the basis that the injured party should be put in the position in which he would have been if the contract had been performed. The remedy is the award of damages to compensate the victim for his loss, not to transfer to the victim, if he has suffered no loss, the benefit which the wrongdoer has gained by his breach of contract: *Surrey County Council v Bredero Homes Ltd* [1993] 3 All ER 705, [1993] 1 WLR 1361, CA. Damages in lieu of an injunction may, however, be based on a share of the benefit made by the wrongdoer: *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, explained in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394, [1988] 1 WLR 1406, CA and *Surrey County Council v Bredero Homes Ltd* *supra*. The damages must not be too remote: see DAMAGES vol 12(1) (Reissue) PARAS 941-949, 1059.

The authorities do not provide for any absolute rule as to the time for assessment of damages. The normal date of assessment is the date of the breach; but, if this would give rise to injustice, the court may substitute some other date: see *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897 (date of hearing); *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA (where, although it was accepted that the assessment should be at the date of judgment, the date for valuing the property was moved back by one year to take account of the plaintiff's delay in pursuing his claim); *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL (date for assessment was the date on which the remedy of specific performance became aborted because of the exercise of the power of sale by the vendor's mortgagee); *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA (date of assessment was date on which the plaintiff-purchasers elected to pursue remedy for damages in lieu of specific performance); *Forster v Silvermere Golf and Equestrian Centre Ltd* (1981) 42 P & CR 255 (nearest date to date of hearing to which evidence had been directed); *Suleman v Shahsavari* [1989] 2 All ER 460, [1988] 1 WLR 1181 (date of judgment). It is also possible to claim damages for misrepresentation: see the Misrepresentation Act 1967 s 2; *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528; *Sharneyford Supplies Ltd v Edge* [1987] Ch 305 at 323, [1987] 1 All ER 588 at 598, CA; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801. As to setting aside leases on the ground of mistake see MISTAKE vol 77 (2010) PARA 56.

2 Law of Property (Miscellaneous Provisions) Act 1989 ss 3, 5(3), (4)(a), abolishing the rule in *Bain v Fothergill* (1874) LR 7 HL 158. Loss of bargain is assessed by reference to the difference between the contract price and the true value of the property as at the date of assessment: see eg *Beard v Porter* [1948] 1 KB 321, [1947] 2 All ER 407 (vendor failed to give vacant possession in accordance with the contract). A resale of the property will be accepted as prima facie evidence of its market value: *Engell v Fitch* (1869) LR 4 QB 659, Ex Ch. Loss of profits may, in addition, be recoverable if the damages fall within the second limb of the rule in *Hadley v Baxendale* (1854) 9 Exch 341: see *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753 and *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583. Damages are not intended to put the purchaser in a better position than he would have been in if the contract had been completed; consequently he may not recover his conveyancing expenses in addition to his general damages: *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405 at 412. Such expenses are recoverable, however, if the purchaser elects to claim reliance loss rather than loss of bargain: *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225; *Anglia Television Ltd v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA; *CCC Films (London) Ltd v Impact Quadrant Films Ltd* [1985] QB 16, [1984] 3 All ER 298. The claimant is entitled to recover wasted expenditure as damages only if he could have recouped his expenses if the contract had been performed; the burden of proof is on the defendant to show that the claimant's expenditure would not have been recouped: *CCC Films (London) Ltd v Impact Quadrant Films Ltd* supra. See also *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535 per Brightman J (damages for wasted expenditure could include expenditure incurred prior to execution of the contract as well as expenditure incurred in reliance on the contract).

3 *Oldershaw v Holt* (1840) 12 Ad & El 590; *Marshall v Mackintosh* (1898) 46 WR 580; *Foster v Wheeler* (1888) 38 ChD 130, CA. The landlord may claim loss of bargain damages which will consist of the difference between the contract price and the true value of the property at the date of assessment, plus the expenses of any resale, but less the deposit, if any: *Noble v Edwardes, Edwardes v Noble* (1877) 5 ChD 378 at 393; *Keck v Faber* (1915) 60 Sol Jo 253. A resale of the property within a reasonable time will be accepted as prima facie evidence of its market value: *Keck v Faber* supra.

4 *Raineri v Miles* [1981] AC 1050, [1980] 2 All ER 145, HL; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (claim for damages maintained notwithstanding the completion of the contract); *Wadsworth v Lydall* [1981] 2 All ER 401, [1981] 1 WLR 598, CA (cost of bridging loan to complete a linked transaction); *Cochrane (Decorators) Ltd v Sarabandi* (1983) 133 NLJ 558 (loss of business profits). Breach of a contract to complete on a particular day is not discharged by compliance with a notice to complete: *Raineri v Miles* supra.

5 It seems that the liability to bear the expenses lies with the party through whose fault the negotiations for the lease have broken down; and, if neither party is in default, the prospective tenant ought to pay all the costs that have been wasted: see *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA; cf *Jennings and Chapman Ltd v Woodman, Matthews & Co* [1952] 2 TLR 409.

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## 95. Specific performance.

On the refusal or omission of either party to an agreement for a lease to perform the agreement on his part, the other is usually entitled to bring a claim for specific performance<sup>1</sup>.

Since this is an equitable remedy<sup>2</sup>, the court has a discretion whether to grant it, and it will not be ordered if the agreement is uncertain in any material respect<sup>3</sup>, or if it involves hardship<sup>4</sup>, as, for example, where it would entail the ejectment of tenants in possession<sup>5</sup>; nor will it be ordered if the performance can have no beneficial result, as, for example, where the agreed term has already expired<sup>6</sup>, or where, if the claimant is the tenant, it appears that he will be unable, through insolvency, to perform the covenants of the lease<sup>7</sup>; nor where the granting of the lease will involve forfeiture<sup>8</sup> or will enable the claimant to take advantage of his own breach of contract<sup>9</sup>; nor will specific performance generally be ordered if it involves the performance of work the execution of which the court cannot superintend<sup>10</sup>. Lack of mutuality does not of itself deprive the court of jurisdiction to order specific performance of an agreement for a lease, but it is a matter that should be taken into account in the exercise of the court's discretion<sup>11</sup>.

Before an agreement is enforced, every condition precedent must have been fulfilled<sup>12</sup>; and a tenant who has gone into possession under the agreement loses his right to specific performance if he commits breaches of the covenants which would be inserted in the lease, so that the landlord, if the lease had been granted, would have a right of re-entry<sup>13</sup>. A defect in title may prevent a landlord from obtaining specific performance<sup>14</sup>; but, if the landlord cannot make a title to the whole of the property, the tenant is entitled to a lease of so much as the landlord can demise, with an abatement of rent<sup>15</sup>. The remedy of specific performance must be claimed promptly<sup>16</sup>; but delay on the landlord's part may be excused where the tenant has been in possession<sup>17</sup>, and probably also where the claim is by the tenant<sup>18</sup>. Where the remedy of specific performance may prejudice the rights of third parties in relation to the relevant property, the remedy may not be granted<sup>19</sup>.

1 See the Supreme Court Act 1981 s 50 (the Supreme Court Act 1981 prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed); the County Courts Act 1984 ss 23(d), 24(2)(g) (as amended); and SPECIFIC PERFORMANCE. 'The remedy of specific performance, although expressed as a discretionary one, is by now granted in accordance with well-established principles. One of those principles is that a contract for the grant of an interest in land will normally be specifically enforced': *AMEC Properties Ltd v Planning Research & Systems plc* [1992] BCLC 1149 at 1157, [1992] 1 EGLR 70 at 72, CA, per Mann LJ. An agreement for a lease usually imposes obligations which form sufficient consideration. See also *Palmer v Hamilton* (1793) 2 Ridg Parl Rep 535 at 549; *Moore v Crofton* (1846) 9 I Eq R 344. For a recent example where specific performance was granted see *Kilmartin SCI (Hulton House) Ltd v Safeway Stores* [2006] EWHC 60 (Ch), [2006] 09 EG 184, [2006] All ER (D) 205 (Jan).

2 See EQUITY vol 16(2) (Reissue) PARA 410; and *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667 (writ claiming specific performance issued at a time where at law there was no breach of contract).

3 *Price v Assheton* (1835) 1 Y & C Ex 441; *Price v Griffith* (1851) 1 De GM & G 80; *Jeffrey v Stephens* (1860) 8 WR 427; *Oxford Corp'n v Crow* [1893] 3 Ch 535. In the following cases the objection of uncertainty was not sustained: *Powell v Lovegrove* (1856) 8 De GM & G 357; *Parker v Taswell* (1858) 2 De G & J 559; *Oxford v Provand* (1868) LR 2 PC 135. An agreement under which the landlord is to put the house in decorative repair is not uncertain (*Samuda v Lawford* (1862) 4 Giff 42, distinguishing *Taylor v Portington* (1855) 7 De GM & G 328 (drawing room to be 'handsomely decorated according to present style'; too uncertain for specific performance)); nor is an agreement under which the tenant is 'to do all repairs, painting, papering, decorating etc' uncertain (*Dear v Verity* (1869) 38 LJ Ch 486); nor an agreement to take a house when 'complete and fit for habitation' (*Faulkner v Llewellyn* (1863) 11 WR 1055; affd 12 WR 193, CA). An agreement by the tenant to do certain specified 'and other' works at a stated expense is not uncertain if the specified works in effect will cost the stated sum: *Baumann v James* (1868) 3 Ch App 508, CA. Cf *Thellusson v Lord Rendlesham* (1846) 11 Jur 29; *Gardner v Fooks* (1867) 15 WR 388. Extrinsic evidence of the meaning of terms used in letters is admissible: see *Skinner v M'Douall* (1848) 2 De G & Sm 265 and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 198-199.

4 The agreement must be 'certain, fair and just in all its parts': *Buxton v Lister* (1746) 3 Atk 383 at 386 per Lord Hardwicke LC; *Lord Walpole v Lord Orford* (1797) 3 Ves 402 at 420. Hence, if the covenants of the lease will involve the tenant in expenses which he did not anticipate, and if this result is due to the landlord's default, specific performance will not be ordered (*Tildesley v Clarkson* (1862) 30 Beav 419); but it is otherwise where the landlord is not in default, as, for example, where the tenant knowingly agrees to take a house in defective repair (*Cook v Waugh* (1860) 2 Giff 201; affg 2 LT 784). A tenant who has taken possession and insisted on repairs being done cannot refuse to accept an underlease because it contains covenants taken from the head

lease of which he was unaware: *Nash v Cochrane* (1839) 3 Jur 973. A mistake as to the legal effect of an agreement does not prevent specific performance: *Powell v Smith* (1872) LR 14 Eq 85 (landlord understood that the effect of the lease being determinable at seven or 14 years was to give him the option to determine it). To constitute a defence, hardship must have existed at the date of the contract; specific performance will not be refused on grounds of hardship because of events which have happened since the contract was made: see *Adams v Weare* (1784) 1 Bro CC 567; *Francis v Cowcliffe Ltd* (1977) 33 P & CR 368 (order for specific performance of covenant in an existing lease to 'provide and maintain a lift'). See also *Nicholas v Ingram* [1958] NZLR 972.

5 *Deverell v Milne* (1918) 34 TLR 576.

6 *Walters v Northern Coal Mining Co* (1855) 5 De GM & G 629 at 638; *De Brassac v Martyn* (1863) 11 WR 1020; *Western v Perrin* (1814) 3 Ves & B 197; *Nesbitt v Meyer* (1818) 1 Swan 223; cf *Callaghan v Pepper* (1840) 2 I Eq R 399. An agreement for a yearly tenancy will, however, be specifically enforced in a proper case (*Lever v Koffler* [1901] 1 Ch 543; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 616; *Deverell v Milne* (1918) 34 TLR 576); and the court may grant specific performance of an agreement to grant a lease or licence for a period of very short duration (*Verrall v Great Yarmouth Borough Council* [1981] QB 202, [1980] 1 All ER 839, CA). Where under an agreement for a lease the tenant was let into possession and the agreement was specifically enforceable, a claim for rent made before the expiry of the term was held to be maintainable although tried after the expiry of the term: *Gilbey v Cossey* (1912) 106 LT 607, DC.

7 *Neale v Mackenzie* (1837) 1 Keen 474 at 485; and see *Buckland v Hall* (1803) 8 Ves 92. The trustee in bankruptcy is, however, entitled to a grant of the lease on entering into personal covenants: *Powell v Lloyd* (1828) 2 Y & J 372, Ex Ch.

8 *Peacock v Penson* (1848) 11 Beav 355; and see *Paxton v Newton* (1854) 2 Sm & G 437 at 440; cf *Helling v Lumley* (1858) 3 De G & J 493; *Warmington v Miller* [1973] QB 877, [1973] 2 All ER 372, CA (distinguished in *Rose v Stavrou* [1999] All ER (D) 589, (1999) Times, 23 June, cited in PARA 499 post).

9 *Alghussein Establishment v Eton College* [1991] 1 All ER 267, [1988] 1 WLR 587, HL.

10 See SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 806. As to building agreements see PARA 98 post. The Landlord and Tenant Act 1985 s 17 (specific performance of landlord's repairing obligations: see PARA 465 post) has no application to claims for specific performance of an agreement to grant a lease. See, however, *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513 (covenant by the landlord to employ a resident porter for the purposes of effecting duties clearly defined by the terms of the lease was the subject of specific performance; the difficulty faced by the court in supervising execution was not a conclusive deterrent to ordering specific performance); and see PARAS 171, 454 note 4, 461, 464 post.

11 *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA. As to lack of mutuality see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 809.

12 *Abbot v Blair* (1860) 8 WR 672; *Modlen v Snowball* (1861) 4 De GF & J 143; *Williams v Brisco* (1882) 22 ChD 441, CA; *IRC v Earl of Derby* [1914] 3 KB 1186. The tenant may resist performance on the ground of non-execution of repairs notwithstanding that he has taken possession, unless he is barred by acquiescence: *Lanmare v Dixon* (1873) LR 6 HL 414; and see *Jones v Joseph* (1918) 87 LJB 510, DC.

13 *Hill v Barclay* (1811) 18 Ves 56 at 63; *Tunno v Lewis* (1831) 1 LJ Ch 177; *Gregory v Wilson* (1852) 9 Hare 683; *Pain v Coombs* (1857) 3 Sm & G 449 at 467; *Carrington Manufacturing Co Ltd v Saldin* (1925) 133 LT 432; and similarly, as to an intending undertenant who has committed acts which would be a forfeiture of the head lease (*Lewis v Bond* (1853) 18 Beav 85). In such a case the tenant is not entitled to relief under the Law of Property Act 1925 s 146 (as amended): *Swain v Ayres* (1888) 21 QBD 289, CA. As to relief against forfeiture see PARA 619 et seq post. An apprehended breach is not an answer to a claim for specific performance: *Williams v Cheney* (1796) 3 Ves 59.

14 See PARA 89 ante.

15 *McKenzie v Hesketh* (1877) 7 ChD 675; *Burrow v Scammell* (1881) 19 ChD 175.

16 See EQUITY vol 16(2) (Reissue) PARA 917; *Huxham v Llewellyn* (1873) 28 LT 577; subsequent proceedings 21 WR 766; cf *Garrett v Earl of Besborough* (1839) 2 Dr & Wal 441; *Ariff v Rai Jadunath Majumdar Bahadur* (1931) 47 TLR 238. As to leases for lives see *Lord Ormond v Anderson* (1813) 2 Ball & B 363 at 370; and PARAS 240-241 post.

17 *Shepherd v Walker* (1875) LR 20 Eq 659.

18 See *Molloy v Egan* (1845) 7 I Eq R 590; *Burke v Smyth* (1846) 3 Jo & Lat 193; *Cartan v Bury* (1860) 10 I Ch R 387; *Norris v Jackson* (1862) 3 Giff 396; contra *Davenport v Walker* (1876) 34 LT 168; *Powis v Lord Dynevor*

(1877) 35 LT 940. A right of renewal may be lost by delay or acquiescence (see *Baynham v Guy's Hospital* (1796) 3 Ves 295; *City of London v Mitford* (1807) 14 Ves 41; *Walker v Jeffreys* (1842) 1 Hare 341; *Earl Mountnorris v White* (1814) 2 Dow 459, HL; *Drew v Earl of Norbury* (1846) 3 Jo & Lat 267; *Morgan v Gurley* (1851) 11 Ch R 482); and so may a landlord's right to compel renewal (see *Pilson v Spratt* (1889) 25 LR Ir 5).

19 See *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA (court refused to order specific performance of an agreement for an equitable charge on the defendant's beneficial interest in the matrimonial home where such an order would have prejudiced the defendant's wife by enabling the claimant to apply for an order for sale pursuant to the Law of Property Act 1925 s 30 (now repealed) and thereby deprive her of her home and only asset); cf *Midland Bank plc v Pike* [1988] 2 All ER 434.

## UPDATE

### 95 Specific performance

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604. See also *FBO 2000 (Antigua) Ltd v Bird* [2008] UKPC 51, [2009] 2 P & CR 241, [2008] All ER (D) 175 (Nov).

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### 96. Damages in lieu of specific performance.

Where an agreement for a lease is such that specific performance could be ordered, the court may give damages either in lieu of, or in addition to, specific performance<sup>1</sup>. Conversely, where specific performance could not be ordered, the court may give damages for breach of contract<sup>2</sup> only when the contract is enforceable at law<sup>3</sup>.

1 See EQUITY vol 16(2) (Reissue) PARA 410 note 4; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 959 et seq; and as to damages see *M'Nulty v Hamill* (1815) Beat 544. See also *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL (injured party who had sought specific performance could claim damages at common law for breach of contract if the order for specific performance proved abortive; date for assessment of damages that on which the remedy of specific performance became aborted), overruling *Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319, [1976] 1 All ER 881, CA and adopting *McKenna v Richey* [1950] VLR 360. It was further held in *Johnson v Agnew* supra that, although damages might be awarded in some cases under the Chancery Amendment Act 1858 s 2 (repealed: see now the Supreme Court Act 1981 s 50 (as prospectively amended: see PARA 95 note 1 ante); and EQUITY vol 16(2) (Reissue) PARA 410 note 4), where they could not be reserved at common law, the Act did not warrant the assessment of damages otherwise than on a common law basis.

2 Each division of the High Court may give all the remedies to which the parties are entitled: *Tamplin v James* (1880) 15 ChD 215 at 222, CA; *Elmore v Pirrie* (1887) 57 LT 333.

3 *Rock Portland Cement Co Ltd v Wilson* (1882) 52 LJ Ch 214; *Re Northumberland Avenue Hotel Co Ltd, Sully's Case* (1885) 54 LT 76 (on appeal (1886) 33 ChD 16, CA).

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### 97. Rescission.



Where there has been a breach of an agreement for a lease, the party who is not in breach may claim rescission of the agreement; but such a claim is not inconsistent with a claim for damages<sup>1</sup>. Rescission may also be allowed where an innocent representation has been made by one party inducing the other party to enter into the agreement<sup>2</sup>.

1 See *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, overruling on this point *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584. 'Rescission' for these purposes means the acceptance of a repudiatory breach and should be distinguished from 'rescission ab initio' which may arise eg in cases of mistake, fraud or lack of consent: see *Johnson v Agnew* supra at 392-393 and at 889 per Lord Wilberforce.

2 Such rescission is 'rescission ab initio': see note 1 supra. See also EQUITY vol 16(2) (Reissue) PARA 414; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 814 et seq. As to setting aside a lease, or agreement for a lease, based on a mistake see MISTAKE vol 77 (2010) PARA 56.

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## 98. Remedies for breach of building agreement.

Specific performance of a building agreement will not be ordered except under special circumstances<sup>1</sup>; but, if the contract includes the granting of a lease, specific performance may be ordered of the agreement for a lease and damages awarded for breach of the building agreement<sup>2</sup>.

The agreement usually empowers the landlord to determine the tenant's rights on failure to comply with the tenant's obligations to build, and may provide that, if the landlord re-enters, he is to take the material and plant brought upon the land for the purpose of the works<sup>3</sup> as liquidated damages, but in the absence of such a provision he is not restricted to his remedy by forfeiture<sup>4</sup>. The landlord is also entitled to damages for breach of the agreement<sup>5</sup>.

Such damages may be assessed either by reference to the difference in value of the claimant's land had the covenant been fulfilled and its value after the actual breach<sup>6</sup> or by reference to the cost to the claimant of doing the work<sup>7</sup>. The choice of the appropriate method of assessment depends, inter alia, upon whether the claimant has done or will do the work<sup>8</sup> and is not determined by whether the claimant chooses to sue for specific performance or to sue for damages only. The only discernible fundamental principle of universal application is that the court strives, so far as is possible by means of a monetary award, to place the claimant in the position which he would have occupied if he had not suffered the wrong complained of, be that wrong a tort or a breach of contract<sup>9</sup>.

1 *Wolverhampton Corpn v Emmons* [1901] 1 KB 515, CA. This applies especially where no plans have been approved: *Brace v Wehnert* (1858) 25 Beav 348. See PARA 95 ante; and SPECIFIC PERFORMANCE. As to modifying plans to suit statutory requirements see *Cubitt v Smith* (1864) 11 LT 298.

2 *Kay v Johnson* (1864) 2 Hem & M 118; *Soames v Edge* (1860) John 669. For this purpose, however, the agreement must specify with sufficient clearness the work to be done: *Wood v Silcock* (1884) 50 LT 251.

3 As to the effect of an agreement that the plant and material is to become the landlord's property see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 121. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 421; FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1649.

4 There is no relief in equity against forfeiture for non-completion of the buildings if not occasioned by the landlord's default (*Croft v Goldsmid* (1857) 24 Beav 312), and the landlord does not necessarily waive the

forfeiture by allowing the tenant to proceed with the works (*Doe d Lord Kensington v Brindley* (1826) 12 Moore CP 37); but the tenant may be entitled to relief under the Law of Property Act 1925 s 146 (as amended) (see PARA 619 post).

5 *Marshall v Mackintosh* (1898) 46 WR 580; *Oldershaw v Holt* (1840) 12 Ad & El 590 (action for damages brought after ejectment and reletting); *Re Garrud, ex p Hewitt* (1881) 16 ChD 522 at 529, CA.

6 It is usually referred to as the diminution in value; but in this context this measure of damages is more accurately described as 'the last anticipated increase in value'.

7 See *Tito v Waddell (No 2)* [1977] Ch 106, [1977] 3 All ER 129; *Radford v De Froberville* [1978] 1 All ER 33, sub nom *Radford v De Froberville (Lange, third party)* [1977] 1 WLR 1262; both approved and applied in *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433 at 446, CA. In the light of these decisions *Wigsell v School for Indigent Blind* (1880) 8 QBD 357, DC can no longer be said to establish any general rule for the assessment of such damages. As to the measure of damages for breach of contract for defective building works see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, [1995] 3 All ER 268, HL, applied in *Birse Construction Ltd v Eastern Telegraph Co Ltd* [2004] EWHC 2512 (TCC), [2004] 47 EG 164 (CS), [2004] All ER (D) 92 (Nov); and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 172.

8 See *Radford v De Froberville* [1978] 1 All ER 33, sub nom *Radford v De Froberville (Lange, third party)* [1977] 1 WLR 1262; *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433 at 446, CA.

9 *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928 at 938, [1980] 1 WLR 433 at 456, CA, per Donaldson LJ.

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### 3. LEASES AND UNDERLEASES

#### (1) REQUISITES FOR DEMISE BY LEASE

##### 99. In general.

The only general requirement as to the form of a lease<sup>1</sup> is that for the purposes of creating a legal estate it must, except in certain circumstances, be made by deed<sup>2</sup>. The rigour of this requirement may, however, be mitigated by equity; and a lease which is invalid because it is not made by deed may nevertheless be construed as an agreement for a lease which may be specifically enforceable<sup>3</sup>. The former doctrine of *interesse termini*, which required a tenant to perfect his title by entry, has been abolished<sup>4</sup>.

Many grants of a term of years absolute are required to be completed by registration if a legal estate is to be created; and a prescribed clauses lease<sup>5</sup> must comply with the requirements set out in the Land Registration Rules 2003<sup>6</sup> as to form and content<sup>7</sup>.

1 It is as opposed to an agreement for lease: see PARA 73 et seq ante.

2 See the Law of Property Act 1925 s 52(1), (2)(d); and PARA 102 post. As to the exceptions to this rule see PARA 101 post.

3 See PARA 117 post.

4 See PARA 118 post.

5 For the meaning of 'prescribed clauses lease' see PARA 100 post.

6 In the Land Registration Rules 2003, SI 2003/1417, r 58A, Sch 1A (as added): see PARA 100 post.

7 See PARA 100 post.

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### 100. Prescribed clauses leases.

In the case of a registered estate<sup>1</sup> in land<sup>2</sup>, the following dispositions are required to be completed by registration, namely the grant of a term of years absolute<sup>3</sup>:

- 241 (1) for a term of more than seven years<sup>4</sup> from the date of the grant;
- 242 (2) to take effect in possession after the end of the period of three months beginning with the date of the grant;
- 243 (3) under which the right to possession is discontinuous;
- 244 (4) in pursuance of the right to buy under Part V of the Housing Act 1985<sup>5</sup>; or
- 245 (5) in circumstances<sup>6</sup> where there is a disposal by a landlord which leads to a person no longer being a secure tenant<sup>7</sup>.

Such a grant does not operate at law until the relevant registration requirements are met<sup>8</sup>.

A lease which is:

- 246 (a) within heads (1) to (5) above;;
- 247 (b) granted on or after 19 June 2006;
- 248 (c) not granted in a form expressly required:

9

- 12. (i) by an agreement entered into before 19 June 2006;
- 13. (ii) by an order of the court;
- 14. (iii) by or under an enactment; or
- 15. (iv) by a necessary consent or licence for the grant of the lease given before 19 June 2006; and

10

- 249 (d) not a lease by virtue of a variation of a lease which is a deemed surrender and regrant,

is a 'prescribed clauses lease'<sup>9</sup>. A prescribed clauses lease must begin with the required wording<sup>10</sup> or that wording must appear immediately after any front sheet<sup>11</sup>. If, however, it appears to the registrar that a lease is not a prescribed clauses lease, then this requirement does not apply to that lease<sup>12</sup>.

1 'Registered estate' means a legal estate the title to which is entered in the register of title, other than a registered charge: Land Registration Act 2002 s 132(1).

2 For these purposes, 'land' includes (1) buildings and other structures; (2) land covered with water; and (3) mines and minerals, whether or not held with the surface; and 'mines and minerals' includes any strata or seam of minerals or substances in or under any land, and powers of working and getting any such minerals or substances: *ibid* s 132(1).

3 For the meaning of 'term of years absolute' see PARA 2 note 3 ante (definition applied by *ibid* s 132(1)).

4 The Lord Chancellor may by order substitute for the term specified in head (1) in the text such shorter term as he thinks fit: see *ibid* s 118(1)(d); and see LAND REGISTRATION vol 26 (2004 Reissue) PARA 826 note 6. At the date at which this title states the law, no such order had been made.

5 *Ie* under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.

6 *Ie* in circumstances where *ibid* s 171A (as added) applies: see PARA 1900 et seq post.

7 Land Registration Act 2002 s 27(2)(b).

8 *Ibid* s 27(1). As to the relevant registration requirements see LAND REGISTRATION vol 26 (2004 Reissue) PARA 916.

9 See the Land Registration Rules 2003, SI 2003/1417, r 58A(4) (r 58A added by SI 2005/1982). Subject to the Land Registration Rules 2003, SI 2003/1417, r 58A(3) (as so added) (see note 12 *infra*), where a person applies for completion of a lease by registration and claims that the lease is not a prescribed clauses lease because the lease falls within head (c) or head (d) of the definition of prescribed clauses lease in r 58A(4) (as so added), he must lodge with his application a certificate by a conveyancer to that effect or other evidence to satisfy the registrar as to his claim: r 58A(2) (as so added).

10 'Required wording' means the wording in *ibid* Sch 1A clauses LR1-LR14 (as added) completed in accordance with the instructions in that Schedule and as appropriate for the particular lease: r 58A(4) (as added: see note 9 *supra*). See further PARA 127 post.

11 *Ibid* r 58A(1) (as added: see note 9 *supra*). 'Front sheet' means a front cover sheet, or a contents sheet if it is at the lease's beginning, or a front cover sheet and contents sheet where the contents sheet is immediately after the front cover sheet, and a 'contents sheet' means a contents sheet or index sheet (in each case, however described) or both: r 58A(4) (as so added).

12 *Ibid* r 58A(3) (as added: see note 9 *supra*). Nor, so far as appropriate, do r 58A(2) (as added) (see note 9 *supra*) and r 72A(3) (as added) (see PARA 120 post) apply to that lease: r 58A(3) (as so added).

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### **101. Leases for three years or less.**

A lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term, at the best rent which can be reasonably obtained without taking a fine, may be made either orally<sup>1</sup>, or by writing under hand only<sup>2</sup>. For this purpose the term is taken as not exceeding three years if at the time of the agreement it may last for less than that period, although it may also last for more<sup>3</sup>. Reversionary leases conferring no immediate right to possession are altogether excluded from the ambit of the statutory exception even if the term agreed is for three years or less<sup>4</sup>.

1 An oral lease may be made by any words showing the intent to give exclusive possession for the term: see *Maldon's Case* (1584) Cro Eliz 33; and PARA 2 ante. A person cannot grant a lease to himself (*Rye v Rye* [1962] AC 496, [1962] 1 All ER 146, HL); but it is possible for a nominee of a person to grant a lease to his principal (*Ingram v IRC* [2000] 1 AC 293, [1999] 1 All ER 297, HL).

2 Law of Property Act 1925 s 54(2). Section 54(2) excepts such leases from the requirement of writing imposed by s 54(1): see PARA 102 post. The Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) does not apply in relation to a contract to grant such a lease as is mentioned in the Law of Property Act 1925 s 54(2): see the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(a); and PARA 79 ante at head (1) in the text. A letter setting out the terms of a proposed tenancy with a date to commence in 25 days' time did not confer an immediate right to possession and so was not effective to create a legal estate under the

Law of Property Act 1925 s 54(2) at the date of the letter: *Long v Tower Hamlets London Borough Council* [1998] Ch 197, [1996] 2 All ER 683.

3 The Law of Property Act 1925 s 54(1) applies only where the tenancy, if good, must of necessity last more than three years (*Re Knight, ex p Voisey* (1882) 21 ChD 442 at 458, CA) or where it is for a period of more than three years, although determinable within that time (*Kushner v Law Society* [1952] 1 KB 264, [1952] 1 All ER 404, DC). The Law of Property Act 1925 s 54(1) does not, however, apply where the tenant has an option to extend the term beyond three years: see *Hand v Hall* (1877) 2 Ex D 355, CA.

4 *Long v Tower Hamlets London Borough Council* [1998] Ch 197, [1996] 2 All ER 683, not following *Rawlins v Turner* (1699) 1 Ld Raym 736; *Foster v Reeves* [1892] 2 QB 255, CA, and *Ryley v Hicks* (1725) 1 Stra 651 on the ground that the statutory wording of the Law of Property Act 1925 s 54(2) crucially differs from its statutory antecedents.

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## 102. Leases for over three years.

All leases of land<sup>1</sup>, or of any interest in land, for a term exceeding three years must be made by deed; otherwise they are void for the purpose of conveying or creating a legal estate<sup>2</sup>. With the exception of leases for a term of three years or less<sup>3</sup>, all leases made orally and not put into writing and signed by the parties so creating them, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only<sup>4</sup>.

1 For the meaning of 'land' see PARA 17 note 1 ante.

2 Law of Property Act 1925 ss 52(1), (2)(d), 205(1)(ii); and see *City Permanent Building Society v Miller* [1952] Ch 840 at 848, [1952] 2 All ER 621 at 625, CA, per Evershed MR. Where the subject matter of a lease is situated in Scotland or abroad, the demise must be in the form required by the law of the place where the land is situated and not by the law of the place where judicial proceedings are taken to enforce the obligation, so that execution by deed is not necessary if this is not required by the law of the place where the land is situated: see eg *Adams v Clutterbuck* (1883) 10 QBD 403. See generally CONFLICT OF LAWS vol 8(3) (Reissue) PARA 399 et seq.

3 See PARA 101 ante.

4 Law of Property Act 1925 s 54(1). A void lease may, however, take effect as an agreement for a lease: see PARA 117 post. As to the formal requirements for executing deeds see PARA 111 post.

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## 103. Leases of incorporeal hereditaments.

Where an incorporeal hereditament, such as a right of common or sporting right<sup>1</sup>, is appurtenant to a corporeal hereditament, it passes under a demise of the corporeal hereditament, however made; therefore, where a lease of such a corporeal hereditament can be made orally, it is effectual as regards the incorporeal hereditament<sup>2</sup>. Where, however, an incorporeal hereditament is demised by itself, or together with land to which it is not

appurtenant, then, in order validly to demise the incorporeal hereditament at law, the lease must be made by deed<sup>3</sup>. Where the incorporeal hereditament is demised with land to which it is not appurtenant by a lease not made by deed, and the lease would be valid as to the land alone, it is not made void as to the land by the inclusion of the incorporeal hereditament<sup>4</sup>, although, if the rent reserved is an entire rent, the landlord may not be able to recover any part of it at law<sup>5</sup>.

Where a registered estate<sup>6</sup> is a franchise or manor, the grant of a lease is required to be completed by registration<sup>7</sup>; and such a grant does not operate at law until the relevant registration requirements are met<sup>8</sup>.

1 As to incorporeal hereditaments generally see PARA 61 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 81.

2 *Beaudely v Brook* (1607) Cro Jac 189 at 190; *Skull v Glenister* (1864) 16 CBNS 81. Cf *Bridgland v Shapter* (1839) 5 M & W 375; and see *Duke of Somerset v Fogwell* (1826) 5 B & C 875 at 883.

3 See the Law of Property Act 1925 ss 52(1), 201, 205(1)(ix); *Hewlins v Shippam* (1826) 5 B & C 221 at 229; *Wood v Leadbitter* (1845) 13 M & W 838 at 842; *Saunders v Owen* (1699) 2 Salk 467. As to shooting rights see *Bird v Higginson* (1835) 2 Ad & El 696; affd (1837) 6 Ad & El 824, Ex Ch; and ANIMALS vol 2 (2008) PARA 768. See also *Duke of Somerset v Fogwell* (1826) 5 B & C 875 at 882 (several fishery); *Mayfield v Robinson* (1845) 7 QB 486 (a ferry); *Swadling v Piers* (1621) Cro Jac 613 (tithes); *Partridge v Ball* (1697) 1 Ld Raym 136; *Gardiner v Williamson* (1831) 2 B & Ad 336 at 338; *Bridgland v Shapter* (1839) 5 M & W 375 at 380 (tolls); *Duke of Somerset v Fogwell* supra at 883 (lease of warren without the land); *Mason v Clarke* [1955] AC 778 at 798, [1955] 1 All ER 914 at 923, HL (right of rabbiting); and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 4. If a particular statute requires the lease to be in writing, it need not also be by deed by virtue of the Law of Property Act 1925 s 52 (as amended): *Shepherd v Horsman* (1852) 18 QB 316; *Markham v Stanford* (1863) 14 CBNS 376. As to leases of ferries see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 895; and as to leases of fisheries see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 810. A lease of an incorporeal hereditament not made by deed may operate as a valid lease in equity: see PARA 117 post.

4 *R v Hockworth Inhabitants* (1837) 7 Ad & El 492.

5 *Gardiner v Williamson* (1831) 2 B & Ad 336 (distress for rent unlawful); *Bird v Higginson* (1835) 2 Ad & El 696; considered in *R v Hockworth Inhabitants* (1837) 7 Ad & El 492. Cf *Doe d Griffiths v Lloyd* (1800) 3 Esp 78 (where premises were let at an entire rent, and a part of the premises could not be legally demised, the whole demise held to be void).

6 For the meaning of 'registered estate' see PARA 100 note 1 ante.

7 Land Registration Act 2002 s 27(2)(c).

8 Ibid s 27(1). As to the relevant registration requirements see LAND REGISTRATION vol 26 (2004 Reissue) PARA 917.

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## **(2) CONCURRENT AND FUTURE LEASES**

### **104. Concurrent leases by deed.**

After a lease has been granted, another lease of the same premises, known as a concurrent lease or in more modern usage a lease of the reversion, is sometimes granted, for a term beginning before the expiration of the earlier lease and ending before or after the earlier lease<sup>1</sup>. Provided it is made by deed, a concurrent lease operates as a grant of the reversion upon the earlier term<sup>2</sup> and entitles the tenant of the concurrent lease to the benefit of the rents and

covenants of the earlier lease<sup>3</sup> so that the landlord may not during the subsistence of the concurrent lease recover rent from the first tenant<sup>4</sup>. The first tenant does not, however, become a subtenant of the tenant who holds under the concurrent lease so that, upon the determination of the concurrent lease, the first tenancy continues and the first tenant again holds directly from the landlord. If, however, the first lease is prematurely determined by surrender or otherwise, the lessee of the reversion ('the concurrent tenant') is immediately entitled to possession under his lease by virtue of the estoppel arising under that deed<sup>5</sup>. The above principles are partly embodied in statute, except in relation to leases granted on or after 1 January 1996<sup>6</sup>. The rule of law that a legal term may be created to take effect in reversion expectant on a longer term is also embodied in statute<sup>7</sup>. Concurrent leases by deed take effect as legal estates<sup>8</sup>.

1 A concurrent lease whose term ends after that of the first lease is sometimes inaccurately referred to as a 'reversionary lease': but it will be a reversionary or future lease as well as a concurrent lease only if its own term is limited to commence at a future date: see PARA 105 post.

2 Shep Touch (8th Edn) 275; *Palmer v Thorpe* (1589) Cro Eliz 152; *Wordsley Brewery Co v Halford* (1903) 90 LT 89.

3 4 Bac Abr, Leases and Terms for Years (N); *Neale v Mackenzie* (1836) 1 M & W 747 at 759-762, Ex Ch.

4 *Harmer v Bean* (1853) 3 Car & Kir 307 (rent). Equally he may not recover covenanted sums such as service charge contributions: *Adelphi (Estates) Ltd v Christie* [1984] 1 EGLR 19, (1984) 269 Estates Gazette 221, CA.

5 *Neale v Mackenzie* (1836) 1 M & W 747 at 762, Ex Ch.

6 See the Law of Property Act 1925 s 141; and PARAS 554, 567-570 post. Section 141 does not apply to tenancies which are 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995 and the applicable statutory provision is now s 3 (as amended): see PARA 580 post. As to such tenancies see PARA 578 post.

7 See *Re Moore and Hulm's Contract* [1912] 2 Ch 105; the Law of Property Act 1925 s 149(5); and REAL PROPERTY VOL 39(2) (Reissue) PARA 85.

8 'Term of years absolute' includes a term of years whether taking effect in possession or reversion: see *ibid* s 205(1)(xxvii) (cited in PARA 2 note 3 ante). As to the requirement of a deed see s 54(1); and PARA 102 ante.

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### 105. Oral concurrent leases.

Formerly, where a concurrent lease not made by deed was made for a term exceeding the residue of the term granted by the original lease, the concurrent lease was void as to that residue. If the oral concurrent lease was for a term less than the residue of the term granted by the original lease, it was wholly void<sup>1</sup>; but now that there is no need to perfect the tenant's title by entry<sup>2</sup>, there appears to be no reason why a legal concurrent lease for a term of three years or less may not be granted orally or by writing which is not a deed<sup>3</sup>; and, in view of the equitable doctrine that an agreement for a lease may be enforced as though a valid lease had been granted<sup>4</sup>, a concurrent lease in writing but not by deed which satisfies the statutory requirements for an agreement for lease<sup>5</sup> would be effectual, although this would not usually be good conveyancing practice<sup>6</sup>.

In modern conveyancing practice the grant of a concurrent lease is often used as a method of financing, that is to say the sale of the stream of income provided by the rent payable under the first lease in return for a capital sum.

1 *Neale v Mackenzie* (1836) 1 M & W 747; *Doe d Thomas v Jenkins* (1832) 1 LjKB 190.

2 See PARA 118 post.

3 See the Law of Property Act 1925 s 54(2); and PARA 101 ante. The concurrent lease takes effect in possession because it entitles the tenant of the concurrent lease to receive rent. See also *Plummer and John v David* [1920] 1 KB 326.

4 See *Walsh v Lonsdale* (1882) 21 ChD 9, CA; and PARA 76 ante, PARA 117 post.

5 See the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

6 It is strongly recommended that concurrent leases should always be granted by deed since otherwise, if the term exceeds three years, the validity of the transaction is always open to dispute and in any event the lease will suffer from the fragility of an equitable estate.

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## 106. Future leases.

A term, at a rent or granted in consideration of a fine, limited to take effect more than 21 years from the date of the instrument purporting to create it<sup>1</sup> is void, as is any contract to create such a term, except when the term takes effect in equity under a settlement or is created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes<sup>2</sup>. This does not, however, invalidate a contract to grant, at a date more than 21 years after the date of the contract, a lease which, when granted, will commence not more than 21 years after the date of the grant of that lease<sup>3</sup>. Where the future lease is to take effect on the termination of a present lease, the reversion and the right to distrain for the rent due under the present lease remain in the landlord<sup>4</sup>.

In the case of a registered estate<sup>5</sup> in land<sup>6</sup>, the grant of a term of years absolute<sup>7</sup> to take effect in possession after the end of the period of three months beginning with the date of the grant is required to be completed by registration and such a grant does not operate at law until the relevant registration requirements are met<sup>8</sup>.

1 See a future lease. A future lease, or a reversionary lease, is a lease to take effect from a future date; cf a concurrent lease, or a lease of a reversion. As to concurrent leases see PARAS 104-105 ante. Many leases are both reversionary and concurrent.

2 Law of Property Act 1925 s 149(3). In *Northchurch Estates Ltd v Daniels* [1947] Ch 117, [1946] 2 All ER 524 it was held that the Law of Property Act 1925 s 149(3) did not apply to a perpetually renewable lease having regard to the provisions of the Law of Property Act 1922 s 145, Sch 15 para 7(1) (see PARAS 541-542 post). A contract for the renewal of a lease or underlease for a term exceeding 60 years from the termination of the lease or underlease is, subject to the express provisions of the Law of Property Act 1925 s 149 (as amended), void: see PARA 140 post. See also *Cottage Holiday Associates Ltd v Customs and Excise Comrs* [1983] QB 735, [1983] 2 WLR 861 (time-share lease held to be granted for a single discontinuous term).

3 *Re Strand and Savoy Properties Ltd, DP Development Co Ltd v Cumbrae Properties Ltd* [1960] Ch 582, [1960] 2 All ER 327; and see *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA; and PARA 237 post.



4 *Smith v Day* (1837) 2 M & W 684; *Lewis v Baker* [1905] 1 Ch 46; cf *Terroni and Necchi v Corsini* [1931] 1 Ch 515. Where the present lease and the reversionary lease were vested in the same person, the estate under the present lease and the *interesse termini* (which existed before 1 January 1926) under the reversionary lease remained distinct. The two leases were not merged together so as to entitle the tenant to the same rights as though he had a lease for the aggregate period: see *Lord Liangattock v Watney, Combe, Reid & Co Ltd* [1910] AC 394, HL; *Knight v City of London Brewery Co* [1912] 1 KB 10 (cases under the Licensing Act 1904 (repealed)). Whether, as a result of the changes made by the Law of Property Act 1925, the two terms may now be treated as added together or merged is undecided, but it would seem that by the abolition of the doctrine of *interesse termini* (see PARA 118 post) there is now no objection to that merger, and in *Re 38, 39 and 40 Windmill Street, St Pancras, London* [1950] Ch 308, [1950] 1 All ER 59, a term of seven years, granted as a reversionary term but since come into possession, was added to a previous term of five years so as to constitute a tenancy granted for a term of more than seven years for the purposes of the War Damage Act 1943 s 123 (repealed). See also *Toyota (GB) Ltd v Legal & General Assurance (Pensions Management) Ltd* (1989) 59 P & CR 435, [1989] 2 EGLR 123, CA (cited in PARA 310 note 2 post). As to the aggregation of terms for the purposes of the Leasehold Reform Act 1967 see s 3 (as amended) and PARA 1400 post; and as to the aggregation of terms for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) see PARA 1558 post.

5 For the meaning of 'registered estate' see PARA 100 note 1 ante.

6 For the meaning of 'land' for these purposes see PARA 100 note 2 ante.

7 For the meaning of 'term of years absolute' see PARA 2 note 3 ante; and as to the application of this definition see PARA 100 note 3 ante.

8 See the Land Registration Act 1925 s 27(1), (2)(b)(ii); and PARA 100 ante. Such a lease granted on or after 19 June 2006 may be a prescribed clauses lease: see PARA 100 ante.

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### **(3) UNDERLEASES**

#### **107. Underlease for the whole term.**

In the absence of agreement restricting his right, the tenant of property may underlet it for any period less than the residue of his own term<sup>1</sup>. An underlease by deed for a term equal to<sup>2</sup>, or greater than, the residue of the tenant's own term operates as an assignment of his term, and not as an underlease<sup>3</sup>. Consequently, in such a case, no reversion remains in the underlandlord, and he cannot distrain for rent reserved by the underlease<sup>4</sup>, although he may sue for it as rent covenanted to be paid<sup>5</sup>. He himself ceases by reason of the assignment to be the tenant under the lease<sup>6</sup>.

If the underlease is not made by deed, it cannot operate as an actual assignment for want of a deed<sup>7</sup>. If it is for a period not less than the term remaining under the lease, it operates as an assignment by operation of law<sup>8</sup>. By the underlease the underlandlord divests himself of the entirety of his interest in the demised premises<sup>9</sup>; but it seems that he may sue for rent on the contract created by the underlease<sup>10</sup>.

A tenancy from year to year or other periodic tenancy is regarded, for the purpose of this doctrine, as a tenancy continuing until it is in fact determined, and the tenant may grant an underlease from year to year or for a term of years. So long as the original tenancy lasts, it is potentially longer than the underlease, and the underlandlord has a reversion by virtue of which he may distrain for the rent reserved by the underlease<sup>11</sup>.

1 Unless the undertenant is protected by the Landlord and Tenant Act 1954 (as to Pt I (ss 1-22) (as amended) see PARA 1209 post and as to continuation by Pt II (ss 23-46) (as amended) see PARA 713 post), the underlease comes to an end with the head lease, and the undertenant does not, in the absence of fresh agreement, become tenant to the head landlord (see *Simkin v Ashurst* (1834) 1 Cr M & R 261), or to the new tenant (see *Freeman v Jury* (1826) Mood & M 19); but, if the underlandlord continues to hold as tenant, the yearly subtenancy also continues (see *Pearce v Shard* (1828) 6 LJOSKB 354; *Hayes v Fitz-Gibbon* (1870) IR 4 CL 500).

2 *Parmenter v Webber* (1818) 8 Taunt 593; *Beardman v Wilson* (1868) LR 4 CP 57; *Hallen v Spaeth* [1923] AC 684 at 687, PC.

3 *Hicks v Downing (alias Smith v Baker)* (1696) 1 Ld Raym 99; *Pluck v Digges* (1831) 5 Bli NS 31, HL; *Thorn v Woollcombe* (1832) 3 B & Ad 586 at 595; *Fawcett v Hall* (1833) Alc & N 248 at 259n; *Wollaston v Hakewill* (1841) 3 Man & G 297 at 323; *Bryant v Hancock & Co Ltd* [1898] 1 QB 716 at 719, CA; *Grosvenor Estates Belgravia v Cochran* [1993] 10 EG 141, CA. A sublease by a tenant at will determines the tenancy at will (*Birch v Wright* (1786) 1 Term Rep 378 at 382; cf *Day v Day* (1871) LR 3 PC 751 at 760), and thus it cannot operate as an assignment; but it creates a tenancy by estoppel as between the parties to the sublease (see *Doe d Goody v Carter* (1847) 9 QB 863 at 865). A tenant at sufferance may not create any interest binding on the landlord: see *Thunder d Weaver v Belcher* (1803) 3 East 449 at 451. As to the consequences of assignment of leases in relation to tenancies beginning on or after 1 January 1996 see PARA 578 et seq post.

4 *Parmenter v Webber* (1818) 8 Taunt 593; *Preece v Corrie* (1828) 5 Bing 24; *Pascoe v Pascoe* (1837) 3 Bing NC 898; *Lewis v Baker* [1905] 1 Ch 46. The rent is not a rent seck within the Landlord and Tenant Act 1730 s 5 so as to attach to it the power of distress given by that statute: -- *v Cooper* (1768) 2 Wils 375; *Langford v Selmes* (1857) 3 K & J 220; *Lewis v Baker* [1905] 1 Ch 46; cf *Pluck v Digges* (1831) 5 Bli NS 31, HL. There is no reversion by estoppel (see ESTOPPEL vol 16(2) (Reissue) PARA 1029 et seq), nor does payment of the sum reserved as rent operate as an attornment so as to give a power of distress (*Hazeldine v Heaton* (1883) Cab & El 40). Cf *Milmo v Carreras* [1946] KB 306, [1946] 1 All ER 288, CA (cited in notes 5, 9, 10 infra), where the underlease was not by deed. See DISTRESS vol 13 (2007 Reissue) PARA 912.

5 See *Milmo v Carreras* [1946] KB 306 at 310, [1946] 1 All ER 288 at 290, CA, where Lord Greene MR did not dissent from the view to this effect expressed in certain old authorities, some of which, however, also take the erroneous view that a reversion remains in the underlandlord. Of the old authorities reference may be made to *Baker v Gostling* (1834) 1 Bing NC 19 at 27; *Clarke v Coughlan* (1841) 3 ILR 427 at 431; *Cremen v Johnson* (1846) 9 I Eq R 143 at 145, 147; *Pennefather v Stephens* (1847) 11 I Eq R 61 at 62; and see *Loyd v Langford* (1677) 2 Mod Rep 174; *Newcomb v Harvey* (1690) Carth 161; *Williams v Hayward* (1859) 1 E & E 1040; cf *Smith v Mapleback* (1786) 1 Term Rep 441.

6 Thus, in the absence of any direct covenant having been given by him to the landlord, the assignee is not liable to the landlord for rent accruing due or breaches of covenant occurring after the assignment: see *Beardman v Wilson* (1868) LR 4 CP 57.

7 See the Law of Property Act 1925 s 52(1); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14.

8 *Parc (Battersea) Ltd (in administrative receivership) v Hutchinson* [1999] 2 EGLR 33, [1999] All ER (D) 297. As to assignment by operation of law see the Law of Property Act 1925 ss 52(2)(g), 53(1)(a); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 15.

9 *Milmo v Carreras* [1946] KB 306 at 313, [1946] 1 All ER 288 at 292, CA, per Lord Greene MR.

10 See *Milmo v Carreras* [1946] KB 306 at 310, [1946] 1 All ER 288 at 290, CA, per Lord Greene MR. There seems no reason why effect should not be given to the contract, although the reasons for so holding given in older cases formerly cited for this proposition, such as *Preece v Corrie* (1828) 5 Bing 24 and *Pollock v Stacy* (1847) 9 QB 1033 (explained but doubted in *Beardman v Wilson* (1868) LR 4 CP 57), cannot, it is thought, now be supported.

11 *Mackay v Mackreth* (1785) 4 Doug KB 213; *Curtis v Wheeler* (1830) Mood & M 493; *Pike v Eyre* (1829) 9 B & C 909; *Oxley v James* (1844) 13 M & W 209 at 214. The principle applies to other periodic tenancies (*Peirse v Sharr and Claughton* (1828) 2 Man & Ry KB 418) and, it seems, to underleases granted by tenants of business premises subject to the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) because those tenancies can continue indefinitely (see *William Skelton & Son Ltd v Harrison and Pinder Ltd* [1975] QB 361 at 367, [1975] 1 All ER 182 at 187). The same results would seem logically to follow from the continuation of a long tenancy of a residential property at a low rent by the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post); but it may be that these principles should be applied only in respect of transactions effected by the tenant during the period of the statutory continuation of his business or long residential tenancy.

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### **108. Undertenant's liability to landlord.**

Where the underlease does not operate as an assignment, there is neither privity of contract nor privity of estate between the head landlord and the undertenant<sup>1</sup>; and so the undertenant is not personally liable for the rent reserved by<sup>2</sup>, or on the covenants contained in, the head lease<sup>3</sup>. Unless, however, the undertenant is protected from distress by statute<sup>4</sup>, his goods upon the demised premises are liable to distress for the rent reserved by the head lease<sup>5</sup>; and, if the head lease contains a proviso for re-entry on breach of covenant, he is liable to be evicted for such a breach<sup>6</sup>. Moreover, it is the undertenant's duty to inform himself of the covenants which are contained in the lease under which the underlandlord holds; and he is bound in equity to observe such of those covenants as are of a negative character<sup>7</sup>, on the ground that he takes with notice, and he is liable to be restrained by injunction from committing a breach of them<sup>8</sup>. The tenant, although personally liable on the covenant, will not be included in the injunction unless he has caused or facilitated the breach, as, for example, where he is prohibited by the lease from underletting<sup>9</sup>, or where he has represented to the undertenant that the act complained of might be done<sup>10</sup>.

1 *Berney v Moore* (1791) 2 Ridg Parl Rep 310 at 331. Further, the undertenant has no equity to enforce the provisions of the underlease against the head landlord: *Taylor v Gillott* (1875) LR 20 Eq 682. See, however, *Peachy v Young* [1929] 1 Ch 449 (undertenant might be liable under the terms of the head lease, even though there was no privity of estate between him and the head landlord, if he was a person entitled under the Law of Property Act 1925 s 39, Sch 1 Pt II paras 3, 6(d) (as amended) (see REAL PROPERTY vol 39(2) (Reissue) PARA 52) to require a legal estate to be conveyed to or otherwise vested in him, and he had not under the combined effect of Sch 1 Pt II para 7(m) (as added) (see REAL PROPERTY vol 39(2) (Reissue) PARA 53) disclaimed the vesting of the estate).

As to the abolition of the doctrine of privity of contract in respect of assignments of leases in relation to tenancies beginning on or after 1 January 1996 see the Landlord and Tenant (Covenants) Act 1995; and PARA 578 et seq post.

2 See *Holford v Hatch* (1779) 1 Doug KB 183.

3 *Berney v Moore* (1791) 2 Ridg Parl Rep 310 at 323, 331; *Slough Picture Hall Co Ltd v Wade, Wilson v Neville, Reid & Co Ltd* (1916) 32 TLR 542 at 544. Originally it was thought that the undertenant might be liable upon the underlandlord's insolvency (*Goddard v Keate* (1682) 1 Vern 87) but this is not so. On the same principle, the undertenant may not normally enforce covenants in the head lease against the head landlord: *South of England Dairies Ltd v Baker* [1906] 2 Ch 631; but see *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA.

4 Ie by the Law of Distress Amendment Act 1908: see DISTRESS vol 13 (2007 Reissue) PARA 951 et seq. Where the head landlord, whose tenant is in arrear with his rent, serves upon the undertenant, under the provisions of that Act (see DISTRESS vol 13 (2007 Reissue) PARA 960), a notice stating the amount of the rent due and requiring him to pay the rent to the head landlord until the arrears are paid, the giving of the notice operates to transfer to the head landlord the right to recover, receive and give a discharge for the undertenant's rent: see *Jarvis v Hammings* [1912] 1 Ch 462; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 149; and DISTRESS vol 13 (2007 Reissue) PARA 952.

5 An undertenant's liability is the same in this respect as that of a stranger whose goods are on the demised premises at the time when a distress is levied: see DISTRESS vol 13 (2007 Reissue) PARA 952. If the undertenant pays the head rent under threat of distress, he may deduct this from his own rent (see DISTRESS vol 13 (2007 Reissue) PARAS 984, 1080); but he may not claim contribution from an undertenant of another part of the premises demised by the head lease, as the undertenants are not subject to a common demand (*Hunter v Hunt* (1845) 1 CB 300; and see *Johnson v Wild* (1890) 44 ChD 146; contra *Webber v Smith* (1689) 2 Vern 103; *Allison*

*v Jenkins* [1904] 1 IR 341 (where contribution was based on salvage)). Cf *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA.

6 See *Spencer v Marriott* (1823) 1 B & C 457. As to relief of an undertenant against forfeiture see PARA 627 post; as to cases where the undertenant has a remedy against his immediate landlord for breach of the covenant for quiet enjoyment see PARA 91 note 5 ante, PARA 512 post; and as to cases where, after the grant of a lease, a concurrent lease is granted see PARA 104 the text and notes 3-4 ante.

7 *Cosser v Collinge* (1832) 3 My & K 283 at 287; and see *Lewis v Bond* (1853) 18 Beav 85.

8 See *Wilson v Hart* (1866) 1 Ch App 463; *Tritton v Bankart* (1887) 56 LT 306; cf *Hall v Ewin* (1887) 37 ChD 74, CA; and see *Abbey v Gutters* (1911) 55 Sol Jo 364. The rule applies to the case of an underlease to a tenant from year to year (*Tritton v Bankart* supra); and, since the undertenant is supposed to examine the title to the lease under which the underlandlord holds, as well as the lease itself, he is also affected with notice of, and is bound in equity by, negative covenants contained in an assignment of the lease, although not contained in the lease itself (*Clements v Welles* (1865) LR 1 Eq 200). These rules are subject to the statutory restrictions on notice (see PARA 89 ante) and to the effect of registration of restrictive covenants (see PARA 89 ante).

9 *Moses v Taylor* (1862) 11 WR 81.

10 *Tritton v Bankart* (1887) 56 LT 306.

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### **109. Covenant to observe covenants in head lease and as to indemnity.**

On the granting of an underlease, the obligations of the head lease in respect of the payment of rent, and the observance of the covenants in respect of any of the property in the head lease which is not comprised in the underlease, are usually imposed by express covenant on the underlandlord, while the undertenant covenants for payment of his own rent and enters into covenants in respect of the sub-demised property corresponding to those in the head lease; and on either side the covenants may be accompanied by an express covenant of indemnity<sup>1</sup>.

Where the underlandlord gives a covenant of indemnity against non-payment of the head rent, payment by the undertenant of his own rent is not a condition precedent to a claim by him on the covenant of indemnity<sup>2</sup>.

The question of indemnity is important with reference to the covenant to repair. An independent covenant to repair in the underlease, following the terms of the corresponding covenant in the head lease, is not by itself construed as a covenant of indemnity, and the underlandlord cannot recover under it the costs which he has incurred by reason of the undertenant's default, such as costs of defending a claim for possession and procuring relief against forfeiture<sup>3</sup>. This result is due to the fact that the operation of the two covenants is different, the measure of damages under each depending on the date of commencement of the head term and sub-term respectively<sup>4</sup>. If, however, the underlease does not contain an independent covenant to repair, but binds the undertenant to perform the covenant in the head lease, a contract of indemnity is implied, and the underlandlord may recover the costs of a claim which he has reasonably defended<sup>5</sup>. It seems that in any case he may recover the expenses of repairs which have been properly effected by him to avoid a forfeiture<sup>6</sup>; and he may recover substantial damages for breach of the undertenant's covenant to repair, notwithstanding that the head landlord has re-entered for non-payment of the head rent<sup>7</sup>. If the underlandlord and the undertenant are liable to the head landlord for the same debt, albeit under different instruments, the undertenant's liability is primary so that, if the underlandlord pays the debt, he is entitled to be reimbursed by the undertenant<sup>8</sup>.

1 See *Ebbetts v Conquest* [1895] 2 Ch 377 at 382, CA. A mortgagee by sub-demise, who has gone into possession, may be liable to the mortgagor for forfeiture of the lease: *Perry v Walker* (1855) 24 LJ Ch 319. If an undertenant has caused a forfeiture both of his own and of the head lease, he is not entitled to the benefit of a waiver of the forfeiture of the head lease: *Hillier v Parkinson* (1831) 9 LJOS Ch 156. Where an underlandlord covenants to observe covenants in the head lease, including a covenant to repair, and to keep the tenant indemnified against the same, this is not merely a covenant of indemnity, but a covenant requiring the underlandlord to perform his repairing obligations which is enforceable by the undertenant in a claim for damages: *Ayling v Wade* [1961] 2 QB 228, [1961] 2 All ER 399, CA. As to the position of sureties when the Landlord and Tenant (Covenants) Act 1995 does not apply see PARA 568 post; and as to the scope of liability under an indemnity see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1264-1265.

2 *Briant v Pilcher* (1855) 16 CB 354.

3 *Penley v Watts* (1841) 7 M & W 601; *Walker v Hatton* (1842) 10 M & W 249; *Logan v Hall* (1847) 4 CB 598 at 624; *Clare v Dobson* [1911] 1 KB 35; cf *Short v Kalloway* (1839) 11 Ad & El 28. *Neale v Wyllie* (1824) 3 B & C 533 contra is overruled: see *Clare v Dobson* supra at 42.

4 *Walker v Hatton* (1842) 10 M & W 249.

5 *Hornby v Cardwell* (1881) 8 QBD 329, CA.

6 *Colley v Streeton* (1823) 2 B & C 273.

7 *Davies v Underwood* (1857) 2 H & N 570; cf *Clow v Brogden* (1840) 2 Man & G 39.

8 *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd (British Telecommunications plc, third party)* (1991) 63 P & CR 143, [1991] 2 EGLR 46, CA (the head lease having expired, the head landlord sued the underlandlord for arrears of service charge accruing due before the expiry; although the undertenant covenanted to pay the underlandlord the service charge payable to the head landlord, as the undertenant's underlease continued under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post), the right to sue the undertenant under the covenant had arguably passed to the head landlord pursuant to the Law of Property Act 1925 s 141 (see PARA 570 post); it was held that, as the underlandlord had been compelled by law to discharge the undertenant's debt due to the head landlord, the underlandlord was entitled to reimbursement from the undertenant).

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## **(4) BUILDING LEASES**

### **110. Rights and liabilities under building lease.**

On the completion of such part of the works as entitles the builder to call for a lease, his rights and liabilities become the same as if a lease had been granted. Consequently he ceases to hold on the terms of the building agreement and holds on the terms of the lease to which he is entitled<sup>1</sup>. If he is entitled to have separate leases granted of different plots as the houses on them are built, the same rule applies to each plot; and, on the completion or part completion of the house in accordance with the agreement, he holds that house as though the lease had been granted<sup>2</sup>. Thus, he is not subject to a stipulation in the agreement, for example a power of re-entry on discontinuance of the works for a specified time, which is not to be introduced into the lease<sup>3</sup>. As the grant of the lease might operate as an implied grant of light over adjoining land retained by the landlord, this implication requires to be excluded by the agreement. The builder himself has, however, no estate in adjoining land comprised in the agreement but not yet leased which would enable him to grant an easement of light over it expressly; and as against him no such grant will be implied<sup>4</sup>.

1 *Lowther v Heaver* (1889) 41 ChD 248, CA; and see *Strong v Stringer* (1889) 61 LT 470. Cf *Banister v Osborne* (1796) Peake Add Cas 76. As to building agreements see PARAS 85-86 ante.

2 *Lowther v Heaver* (1889) 41 ChD 248, CA. An assignee of a particular house is entitled to have a lease of it granted without assuming the builder's liabilities under the agreement generally: *Wilkinson v Clements* (1872) 8 Ch App 96. See also *Rogers v Tudor* (1860) 2 LT 303; cf contra *Anon* (1822) 1 LJOs Ch 25.

3 *Lowther v Heaver* (1889) 41 ChD 248, CA.

4 *Quicke v Chapman* [1903] 1 Ch 659, CA. As to rights of light see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 222 et seq.

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## **(5) COMPLETION**

### **(i) In general**

#### **111. Formalities.**

A deed which is executed and delivered as an escrow cannot take effect as a deed pending the performance of the condition subject to which it was so delivered<sup>1</sup>; but, once a deed is delivered as an escrow, it may not be recalled<sup>2</sup>. A document that has been validly executed as a deed requires delivery to take effect and execution of a deed does not demonstrate an intention to deliver the deed in escrow<sup>3</sup>. The unilateral action of the landlord in delivering the lease in escrow followed by the fulfillment of the escrow condition is not, however, to be treated as having bound the tenant before he executed the lease<sup>4</sup>. The landlord is not entitled to insist on witnessing by himself or his agent the execution of the counterpart by the tenant<sup>5</sup>.

The execution of the lease by the landlord is a condition precedent to the tenant's becoming liable on the covenant<sup>6</sup> unless the circumstances show that the tenant has assumed liability<sup>7</sup>. If, however, a lease purports to be granted by a tenant for life and remainderman 'according to their respective estates and interests' and the tenant has entered, the tenant for life may sue on the covenants notwithstanding that he alone has executed the lease<sup>8</sup>.

Any rule of law which:

- 250 (1) restricts the substances on which a deed may be written;
- 251 (2) requires a seal for the valid execution of an instrument as a deed by an individual<sup>9</sup>; or
- 252 (3) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished with effect from 31 July 1990<sup>10</sup>.

An instrument is not, however, a deed unless:

- 253 (a) it makes it clear on its face that it is intended to be a deed by the person signing it<sup>11</sup> or, as the case may be, by the parties to it, whether by describing itself

- as a deed or expressing itself to be executed or signed as a deed or otherwise<sup>12</sup>;  
and  
254 (b) it is validly executed as a deed:  
11  
16. (i) by that person or a person authorised to execute it in the name or on behalf of  
that person; or  
17. (ii) by one or more of those parties or a person authorised to execute it in the  
name or on behalf of one or more of those parties<sup>13</sup>;  
12

and an instrument is validly executed as a deed by an individual if, and only if:

- 255 (A) it is signed by him in the presence of a witness who attests the signature, or  
at his direction and in his presence and the presence of two witnesses who each  
attest the signature; and  
256 (B) it is delivered as a deed<sup>14</sup>.

The grant of a lease may attract capital gains tax<sup>15</sup> and may constitute a supply for the  
purposes of VAT<sup>16</sup>; and the lease is also chargeable to stamp duty land tax<sup>17</sup>.

Prescribed clauses leases<sup>18</sup> and the grant of a lease out of a registered estate which is a  
franchise or manor are not completed until they have been registered<sup>19</sup>.

1 As to escrows generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 37 et seq.

2 *Beesly v Hallwood Estates Ltd* [1961] Ch 105, [1961] 1 All ER 90, CA; and see *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609, [1969] 2 All ER 941, CA; *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Kingston v Ambrian Investment Co Ltd* [1975] 1 All ER 120, [1975] 1 WLR 161, CA; *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA (burden of establishing that the deed was delivered as an escrow is on the party so alleging; in the absence of evidence of the intention with which the deed was delivered it is, therefore, presumed to have been delivered unconditionally). See also *Benray Investments Ltd v Venner Time Switches Ltd* [1985] 1 EGLR 39. It does not appear to be necessary that the other party to the deed should concur to the delivery in escrow: *Glessing v Green* [1975] 2 All ER 696, [1975] 1 WLR 863, CA; *Benray Investment Ltd v Venner Time Switches Ltd* supra.

3 *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA; *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66, [2004] 4 All ER 238.

4 See *Dymont v Boyden* [2004] EWCA Civ 1586, [2005] 1 WLR 792, [2005] 1 BCLC 163. Cf *Alan Estates Ltd v WG Stores Ltd* [1982] Ch 511, [1981] 3 All ER 481, CA (where a lease has been delivered in escrow, it takes effect from the date of delivery of the deed as an escrow); and see *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA.

5 *Borradale v Smart* (1857) 5 WR 270; cf *Essex v Daniell* (1875) LR 10 CP 538. As to the purchaser's rights relating to execution see the Law of Property Act 1925 s 75; and SALE OF LAND vol 42 (Reissue) PARA 305.

6 *Cardwell v Lucas* (1836) 2 M & W 111; *Toler v Slater* (1867) LR 3 QB 42; *Cooch v Goodman* (1842) 2 QB 580 at 598.

7 *Babington v O'Connor* (1887) 20 LR Ir 246.

8 *How v Greek* (1864) 3 H & C 391. Such a lease could take effect only in equity: see PARA 76 ante.

9 For these purposes, the references to the execution of a deed by an individual do not include execution by a corporation sole: Law of Property (Miscellaneous Provisions) Act 1989 s 1(10). As to corporations sole see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1111-1112; and as to the execution of deeds by a corporation aggregate see the Law of Property Act 1925 ss 74 (as amended), 74A (as added); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 41; COMPANIES vol 14 (2009) PARA 287; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1265. See also *Bolton Metropolitan Borough Council v Torkington* [2003] EWCA Civ 1634, [2004] Ch 66, [2004] 4 All ER 238.

10 Law of Property (Miscellaneous Provisions) Act 1989 ss 1(1), (11), 5(1), (2)(a); Law of Property (Miscellaneous Provisions) Act 1989 (Commencement) Order 1990, SI 1990/1175, art 2. As to the common law requirements which applied to instruments executed before 31 July 1990 see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq. Where an instrument under seal that constitutes a deed is required for the purposes of an Act passed before 31 July 1990, the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended) has effect as to signing, sealing or delivery of an instrument by an individual in place of any provision of that Act as to signing, sealing or delivery: Law of Property (Miscellaneous Provisions) Act 1989 ss 1(7), 5(1)(2) (a). The reference in s 1(7) to signing, sealing or delivery by an individual does not include signing, sealing or delivery by a corporation sole: s 1(10). Nothing in s 1(1)(b), (2), (3) (as amended), s 1(7) or (8) applies in relation to deeds required or authorised to be made under (1) the seal of the county palatine of Lancaster; (2) the seal of the Duchy of Lancaster; or (3) the seal of the Duchy of Cornwall (s 1(9)); and nothing in s 1 (as so amended) applies in relation to instruments delivered as deeds before 31 July 1990 (ss 1(11), 5(1), (2)(a)).

11 For the purposes of ibid s 1(2), (3) (as amended) (see heads (a)-(b), (A)-(B) in the text), 'sign', in relation to an instrument, includes (1) an individual signing the name of the person or party on whose behalf he executes the instrument; and (2) making one's mark on the instrument, and 'signature' is to be construed accordingly: s 1(4) (s 1(2), (3), (4), (5), (6) amended, and s 1(2A), (4A) added, by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906, arts 7(3), (4), 8, 9, 10(1), (2), Sch 1 paras 13-15, Sch 2).

12 For the purposes of head (a) in the text, an instrument is not to be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal: Law of Property (Miscellaneous Provisions) Act 1989 s 1(2A) (as added: see note 11 supra).

13 Ibid s 1(2) (as amended: see note 11 supra).

14 Ibid s 1(3) (as amended: see note 11 supra). Section 1(3) (as so amended) applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual: s 1(4A) (as added: see note 11 supra).

Where a solicitor, duly certificated notary public or licensed conveyancer, or an agent or employee of a solicitor, duly certificated notary public or licensed conveyancer, in the course of or in connection with a transaction, purports to deliver an instrument as a deed on behalf of a party to the instrument, it is conclusively presumed in favour of a purchaser that he is authorised so to deliver the instrument: s 1(5) (as amended (see note 11 supra); also amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 20(1)). For these purposes (1) 'purchaser' has the same meaning as in the Law of Property Act 1925 (see PARA 89 note 30 ante); (2) 'duly certificated notary public' has the same meaning as it has in the Solicitors Act 1974 by virtue of s 87 (as amended) (see LEGAL PROFESSIONS vol 66 (2009) PARA 1412); and (3) 'interest in land' means any estate, interest or charge in or over land or in or over the proceeds of sale of land: Law of Property (Miscellaneous Provisions) Act 1989 s 1(6) (as amended (see note 11 supra); also amended by the Courts and Legal Services Act 1990 Sch 17 para 20(2)).

Attestation was generally unnecessary before 31 July 1990: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 36.

15 See CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 338 et seq.

16 See PARA 125 post.

17 See PARA 124 post; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

18 For the meaning of 'prescribed clauses lease' see PARA 100 ante.

19 See PARAS 100, 103 ante.

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## 112. Alterations and additions.

A material alteration made after execution to a deed or document without the consent of all the parties to it prevents the person who is responsible for the alteration from enforcing the deed



or document<sup>1</sup>. A lease by deed under which the tenant has entered but which has been rendered void by a material alteration may be used to show the terms of his occupation<sup>2</sup>. An addition which expresses only what the law would imply is not necessarily treated as an alteration<sup>3</sup>. A memorandum added to a deed before execution<sup>4</sup> or added after signature but before delivery<sup>5</sup> is part of the deed. Such a memorandum may vary the term stated in the lease<sup>6</sup>; and a variation from a yearly term to a term of one year will be treated as expunging covenants applicable only to the cancelled tenancy, unless, perhaps, the lease does continue beyond one year<sup>7</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 81-88, 158-163. An alteration made with the consent of all parties binds them all: *Rudd v Bowles* [1912] 2 Ch 60.

2 *Hutchins v Scott* (1837) 2 M & W 809.

3 *Doe d Walters v Houghton* (1827) 1 Man & Ry KB 208. Thus in modern conveyancing it is common to stipulate that a memorandum of the amount of the rent agreed or determined upon a rent review shall be indorsed upon the lease and counterpart and signed appropriately.

4 *Griffin v Stanhope* (1617) Cro Jac 454 at 456.

5 *Lyburn v Warrington* (1816) 1 Stark 162; cf *Frogley v Earl of Lovelace* (1859) John 333 (where this was overlooked); and see PARA 114 note 4 post.

6 *Weak d Taylor v Escott* (1821) 9 Price 595; cf *Cowne v Garment* (1834) 1 Bing NC 318 (memorandum in the margin signed by the tenant advancing the date of commencement of the term admissible to show amount of rent due to the landlord).

7 *Strickland v Maxwell* (1834) 2 Cr & M 539.

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### **113. Apportionment of outgoings.**

In the absence of agreement to the contrary the landlord should bear and pay the due proportion of the outgoings in respect of the demised premises for the period up to the commencement of the lease or tenancy agreement<sup>1</sup>. An ingoing tenant is not responsible for any gas or electricity charges payable in respect of a period prior to his occupation<sup>2</sup>. Water and sewerage charges are similarly payable only in respect of his period of occupation<sup>3</sup>.

1 As to the abolition of rates in respect of domestic properties see PARA 521 post; and as to when the landlord may be liable to pay council tax see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

2 See the Gas Act 1986 s 8B, Sch 2B para 8 (as substituted); the Electricity Act 1989 s 24, Sch 6 para 3 (as substituted); and FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 859; FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1104.

3 See WATER AND WATERWAYS vol 100 (2009) PARA 422.

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PARAS 1386-2000)/3. LEASES AND UNDERLEASES/(5) COMPLETION/(i) In general/114. Duplicate and counterpart.

#### 114. Duplicate and counterpart.

In order that each party may have access to the actual words of a lease, it is usual for two copies to be executed<sup>1</sup>. If each copy is executed by both landlord and tenant, the lease is said to be executed in duplicate, and each part is as efficacious as the other<sup>2</sup>. This is often done in the case of a lease not granted by deed.

Where the lease is by deed, it is usual for one copy ('the lease') to be executed by the landlord alone and handed to the tenant, and for the other ('the counterpart') to be executed by the tenant alone and handed to the landlord<sup>3</sup>. A deed is, however, binding on its maker even though the parts have not been exchanged, so long as it is signed and delivered<sup>4</sup>. The counterpart executed by the tenant is primary evidence of the lease as against the tenant and persons claiming through him<sup>5</sup>, and as against strangers<sup>6</sup>; and as against all persons it is presumptive evidence of the execution of a lease<sup>7</sup>. If no counterpart has been executed, or if the counterpart cannot be found, the landlord is entitled to inspect and take a copy of the lease in the tenant's possession<sup>8</sup>. The lease is regarded as the principal instrument and, in case of discrepancy between the lease and the counterpart, the provisions of the lease prevail, provided that the lease is consistent with itself; but, if it is inconsistent, it may be corrected by reference to the counterpart<sup>9</sup>.

1 As to the formalities of execution before 31 July 1990 see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 27-56; and as to the formalities of deeds executed after that date see the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended); and PARA 111 ante. As to the special provisions relating to the execution of deeds by a corporation aggregate see the Law of Property Act 1925 s 74 (as amended), s 74A (as added); DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 41; COMPANIES vol 14 (2009) PARA 287; CORPORATIONS vol 9(2) (2006 Reissue) PARA 1265; and *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA (disapproving, obiter, the dictum of Buckley J in *D'Silva v Lister House Development Ltd* supra as to the effect of the Law of Property Act 1925 s 74 (as amended)).

2 See *Colling v Treweek* (1827) 6 B & C 394 at 398; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 4.

3 During the continuance of the term the lease belongs to the tenant, and the counterpart to the landlord: *Hall v Ball* (1841) 3 Man & G 242 at 253. After the term has come to an end, whether by effluxion of time, surrender or forfeiture, the tenant is entitled to retain the lease if it contains covenants by the landlord which have not been performed (*Hall v Ball* supra), and also, apparently, whether there are such covenants or not (*Elworthy v Sandford* (1864) 3 H & C 330; *Knight v Williams* [1901] 1 Ch 256).

As to registration of the lease at HM Land Registry see PARA 120 post; and as to the charge to stamp duty land tax see PARA 124 post; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

4 See *Xenos v Wickham* (1866) LR 2 HL 296; *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 619, [1969] 2 All ER 941 at 944, CA, per Lord Denning MR ('delivery' equated with an act done so as to evince an intention to be bound, as opposed to the handing over of one part of the deed to the other party to it). See also *Beesly v Hallwood Estates Ltd* [1961] Ch 105, [1961] 1 All ER 90, CA; *Longman v Viscount Chelsea* (1989) 58 P & CR 189, [1989] 2 EGLR 242, CA (where several of the leading authorities were considered). Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10); and PARA 111 ante.

5 *Doe d West v Davis* (1806) 7 East 363 at 364; *Pearse v Morrice* (1832) 3 B & Ad 396; *Munn v Godbold* (1825) 3 Bing 292 at 294.

6 *Doe d Earl of Egremont v Pulman* (1842) 3 QB 622; *Homes v Pearce* (1858) 1 F & F 283.

7 *Hughes v Clark* (1851) 10 CB 905; *Houghton v Koenig* (1856) 18 CB 235; and see *Burleigh v Stibbs* (1793) 5 Term Rep 465.

8 *Doe d -- v Slight* (1832) 1 Dowl 163; *Elworthy v Sandford* (1864) 34 LJ Ex 42 at 44 per Martin B. Formerly this was not allowed: *Woodcock v Worthington* (1827) 2 Y & J 4; *Lord Portmore v Goring* (1827) 4 Bing 152. Similarly, an occupier against whom a claim for possession on forfeiture is brought, and who has no copy of the lease, is entitled to an order for inspection of the counterpart and to take a copy: *Doe d Child v Roe* (1852) 1 E & B 279 (where, however, the report treats the landlord as holding the lease). As to the obligation to produce documents for inspection generally see CIVIL PROCEDURE vol 11 (2009) PARA 538 et seq.

9 *Shep Touch* (8th Edn) 52; *Burchell v Clark* (1876) 2 CPD 88 at 93, 97, CA; *Matthews v Smallwood* [1910] 1 Ch 777; *Trusthouse Forte Albany Hotels Ltd v Daejan Investments Ltd (No 2)* [1989] 2 EGLR 113, CA. Where a tenant has been in receipt of rent from undertenants, and can produce the counterpart, this may be admitted in evidence without accounting for the absence of the lease: *Doe d Manton v Austin* (1832) 2 Moo & S 107.

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### **115. When a counterpart is essential.**

Powers of leasing, whether arising under statute or contained in a settlement, usually require that a counterpart of the lease shall be executed by the tenant. In the case of statutory powers it is generally also provided that the execution of the lease is to be sufficient evidence of the execution of the counterpart<sup>1</sup>. Where the power does not contain such a provision, then, as the execution of the counterpart is essential to the validity of the lease, a memorandum of the execution should be indorsed on the lease and signed by the landlord<sup>2</sup>. The lease and the counterpart need not be executed at the same time<sup>3</sup>. It is normal practice to complete the grant of a lease by exchanging the lease and counterpart<sup>4</sup>.

1 See the Law of Property Act 1925 s 99(8); and MORTGAGE vol 77 (2010) PARA 350; the Settled Land Act 1925 s 42(2); and SETTLEMENTS vol 42 (Reissue) PARA 839; and the Universities and College Estates Act 1925 s 7(2).

2 Sugden on Powers (8th Edn) 826-827.

3 *Fryer v Coombs* (1840) 11 Ad & El 403.

4 See *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; and PARA 111 ante.

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### **116. Merger of contract in lease.**

Where an executory contract has been carried out by deed, the contract is merged in the deed, so far as the deed covers the subject matter of the contract<sup>1</sup>. Accordingly, where an agreement for lease has been completed by the grant of a lease, the agreement remains in force only so far as it includes matters which are not comprised in the lease<sup>2</sup>. Thus, if an agreement provides for compensation for errors or misstatements not expressly limited to matters discovered before completion, a claim may be brought on the agreement in respect of matters discovered after the execution of the deed which carried the agreement into effect<sup>3</sup>.

1 *Leggott v Barrett* (1880) 15 ChD 306 at 309, 311, CA.

2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 187.

3 *Palmer v Johnson* (1884) 13 QBD 351, CA; applied in *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757.

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### 117. Operation of invalid lease as an agreement.

A lease for a term exceeding three years or at a rent less than the best rent that can be reasonably obtained without a fine<sup>1</sup>, if created otherwise than by deed, is construed as an agreement for a lease<sup>2</sup>; and specific performance of the agreement will be ordered, provided that it satisfies the formal requirements relating to the making of contracts for the sale or other disposition of an interest in land<sup>3</sup>, and that it is in other respects capable of this remedy<sup>4</sup>. The right to specific performance is sufficient to give the parties respectively rights equivalent to the legal rights, and place them under obligations equivalent to the legal obligations, of landlord and tenant<sup>5</sup>. In equity the lease is deemed to have been effectively granted, and for practical purposes the parties are in the same position as if the lease were valid at law<sup>6</sup>.

Where this equitable doctrine does not apply, and specific performance is not available, the effect of entry under the invalid lease, if followed by payment of rent, is to create, by implication of law, a legal tenancy from year to year upon the terms of the instrument so far as applicable to such a tenancy<sup>7</sup>.

A lease of an incorporeal hereditament by an instrument not made by deed is subject to the same considerations, and operates as a valid lease in equity, provided that the tenant has entered into enjoyment under it and that specific performance would be ordered<sup>8</sup>. Otherwise, if the tenant has entered into enjoyment and has thus received the consideration for his bargain, he is bound by the stipulations of the instrument so far as they apply to the period of his enjoyment<sup>9</sup>.

1 For cases on the meaning of 'fine' see PARA 485 note 5 post.

2 *Bond v Rosling* (1861) 1 B & S 371; *Tidey v Mollett* (1864) 16 CBNS 298; *Hayne v Cummings* (1864) 16 CBNS 421.

3 It is provided it satisfies the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); see PARA 79 ante.

4 *Parker v Taswell* (1858) 2 De G & J 559; *Zimble v Abrahams* [1903] 1 KB 577, CA. The grant of specific performance in the latter case is explicable only if the agreement is construed as an agreement to grant a lease for life: see *Lace v Chantler* [1944] KB 368 at 372; sub nom *Lace v Chandler* [1944] 1 All ER 305 at 307, CA, per Lord Greene MR. See also PARAS 76, 95 ante. For cases where specific performance of an agreement for a lease will not be granted see PARA 77 ante; and SPECIFIC PERFORMANCE. Entry into possession may give rise to a yearly periodic tenancy upon the terms of the valid lease in so far as they are applicable to, and not inconsistent with, a yearly tenancy: see PARA 208 et seq post.

5 *Walsh v Lonsdale* (1882) 21 ChD 9 at 14, CA; cf *Drury v Macnamara* (1855) 5 E & B 612 (which probably would not now be followed); and see PARA 76 ante.

6 See PARA 76 ante. The result is that to a considerable extent the statutory requirement of a deed (see PARA 102 ante) has been nullified (see *Furness v Bond* (1888) 4 TLR 457) but, as regards persons other than the

landlord and tenant, the want of a legal estate in the tenant by reason of the invalidity of the demise might be important.

7 *Clayton v Blakey* (1798) 8 Term Rep 3; and see the cases cited in PARA 209 et seq post.

8 *Lowe v Adams* [1901] 2 Ch 598; *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL.

9 *Thomas v Fredricks* (1847) 10 QB 775; *Adams v Clutterbuck* (1883) 10 QBD 403. Cf *Wilkinson v Torkington* (1837) 2 Y & C Ex 726 (recovery of rent).

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### **118. No need for actual entry.**

Before 1 January 1926, in order to secure the full legal benefit of the lease, the tenant had to perfect his title by entry, and until then he had no estate in the land but only a right known as *interesse termini*<sup>1</sup>. The doctrine of *interesse termini* was abolished by statute<sup>2</sup>, and as from 1 January 1926 all terms of years absolute<sup>3</sup>, whether the interest is created before, on or after that date, are capable of taking effect at law or in equity, according to the grantor's estate, interest or powers, from the date fixed for the commencement of the term, without actual entry<sup>4</sup>.

1 Littleton on Tenures s 58; Co Litt 46b, 270a; *Copeland v Stephens* (1818) 1 B & Ald 593 at 605; *Doe d Rawlings v Walker* (1826) 5 B & C 111 at 118; *Hyde v Warden* (1877) 3 Ex D 72 at 84, CA; *Gillard v Cheshire Lines Committee* (1884) 32 WR 943, CA; *Joyner v Weeks* [1891] 2 QB 31 at 47, CA. The doctrine did not apply to a lease for life or lives: Co Litt 270b; *Ecclesiastical Comrs for England v Treemer* [1893] 1 Ch 166 at 171.

2 Law of Property Act 1925 s 149(1). Nothing in s 149(1) prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions or, as respects terms or interests created before 1 January 1926, operates to vary any statutory or other obligations imposed in respect of such terms or interests: s 149(4).

3 For the meaning of 'term of years absolute' see PARA 2 note 3 ante.

4 Law of Property Act 1925 s 149(2). Accordingly there is no longer need of the decisions that the rule against perpetuities did not apply to invalidate a future lease: see eg *Mann, Crossman and Paulin v Registrar of Land Registry* [1918] 1 Ch 202; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1030.

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## **(ii) Registration**

### **119. Registration with superior landlord.**

Leases often contain a covenant by the tenant, on any assignment or subletting of the demised premises, or any part of them, to give notice of the assignment or underlease to the landlord or his solicitor, with particulars of the assignee or undertenant, and to produce the instrument of assignment or underlease and pay a fee for registration of it<sup>1</sup>. The covenant may be framed so

as to apply to assignments only; but a covenant to register every assignment or underlease of the demised premises or any part of them extends to a sub-underlease of part of the premises<sup>2</sup>.

1 The covenant is not a 'usual covenant' (*Brookes v Drysdale* (1877) 3 CPD 52; and see PARA 83 ante), but there is no objection to it in regard to validity. It is not affected by the provisions of the Law of Property Act 1925 s 144 (see PARA 485 post), with reference to exacting a fine for licence to assign.

2 *Portman v J Lyons & Co Ltd* [1937] Ch 584, [1936] 3 All ER 819.

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## 120. Registration of title.

In the case of unregistered land, the following are events which trigger the requirement for compulsory first registration of title:

- 257 (1) the grant out of a qualifying estate<sup>1</sup> of an estate in land (except to a person as mortgagee<sup>2</sup>):
  - 13 18. (a) for a term of years absolute<sup>3</sup> of more than seven years<sup>4</sup> from the date of the grant; and
  - 19. (b) for valuable or other consideration<sup>5</sup>, by way of gift<sup>6</sup> or in pursuance of an order of any court;
- 14 258 (2) the grant out of a qualifying estate of an estate in land for a term of years absolute to take effect in possession after the end of the period of three months beginning with the date of the grant;
- 259 (3) the grant of a lease in pursuance of the right to buy under the Housing Act 1985<sup>7</sup> out of an unregistered legal estate in land;
- 260 (4) the grant of a lease out of an unregistered legal estate in land in circumstances<sup>8</sup> where there is a disposal by a landlord which leads to a person no longer being a secure tenant<sup>9</sup>.

In the case of registered land, prescribed clauses leases<sup>10</sup> and the grant of a lease where the registered estate is a franchise or manor require registration for legal completion<sup>11</sup>. On completion of a prescribed clauses lease by registration the registrar must, where appropriate, make entries in the relevant individual register<sup>12</sup>.

1 For these purposes, a qualifying estate is an unregistered legal estate which is (1) a freehold estate in land; or (2) a leasehold estate in land for a term which, at the time of the grant, has more than seven years to run: Land Registration Act 2002 s 4(2). The Lord Chancellor may by order substitute for the term of seven years such shorter term as he thinks fit: see s 118(1)(b); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 826 note 6. For these purposes, 'land' does not include mines and minerals held apart from the surface: *ibid* s 4(9).

2 See *ibid* s 4(5).

3 As to the meaning of 'term of years absolute' see PARA 100 note 3 ante.

4 The Lord Chancellor may by order substitute for the term of seven years such shorter term as he thinks fit: see the Land Registration Act 2002 s 118(1)(b); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 826 note 6.

5 For these purposes, if the estate granted has a negative value, it is to be regarded as granted for valuable or other consideration: *ibid* s 4(6).

6 For these purposes, references to grant by way of gift include grant for the purpose of (1) constituting a trust under which the settlor does not retain the whole of the beneficial interest; or (2) uniting the bare legal title and the beneficial interest in property held under a trust under which the settlor did not, on constitution, retain the whole of the beneficial interest: *ibid* s 4(7).

7 *le* in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 *et seq post*.

8 *le* in circumstances where *ibid* s 171A (as added) applies: see PARA 1900 *et seq post*.

9 See the Land Registration Act 2002 s 4(1)(c)-(f). As to compulsory first registration of title see LAND REGISTRATION vol 26 (2004 Reissue) PARA 827 *et seq*.

10 For the meaning of 'prescribed clauses lease' see PARA 100 *ante*.

11 See PARA 100 *ante*.

12 See the Land Registration Rules 2003, SI 2003/1417, r 72A (added by SI 2005/1982); and LAND REGISTRATION. As to registrable dispositions see further LAND REGISTRATION vol 26 (2004 Reissue) PARA 911 *et seq*.

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### **(iii) Costs of Leases**

#### **121. Payment of costs.**

It was formerly the custom for the tenant to pay the landlord's costs of preparing the lease; but it is now provided that, notwithstanding any custom to the contrary, a party to a lease<sup>1</sup> is under no obligation to pay the whole or any part of any other party's solicitor's<sup>2</sup> costs<sup>3</sup> of the lease, unless the parties agree otherwise in writing<sup>4</sup>. Therefore, if the landlord requires a counterpart, he must pay the costs of this himself, unless the tenant has agreed to pay the costs of both lease and counterpart<sup>5</sup>.

1 For these purposes, 'lease' includes an underlease and an agreement for a lease or underlease or for a tenancy or subtenancy: Costs of Leases Act 1958 s 2(a).

2 For these purposes, the reference to a solicitor includes a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 *et seq*): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

3 For these purposes, 'costs' includes fees, charges, disbursements (including stamp duty), expenses and remuneration: Costs of Leases Act 1958 s 2(b).

4 *Ibid* s 1. On an application for a new lease under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 *et seq post*), the court may order that there be no provision in the new lease that the tenant should pay a proportion of the landlord's solicitors' costs, even though the previous lease (made before the Costs of Leases Act 1958) contained such a provision: *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 All ER 315, [1984] 1 WLR 696, CA; *Lewis and Peat Ltd v Regis Property Co Ltd* (1970) 215 Estates Gazette 24. In some circumstances, to require a tenant to pay the landlord's costs may possibly amount to requiring the payment of a premium for the purposes of the Rent Acts: see *Southampton City Council v Silk Estates (Developments) Ltd* (1967) 203 Estates Gazette 727 (magistrates' court). As to the prohibition of certain premiums for those purposes see PARA 925 *et seq post*. See also (1968) 65 Law Society's Gazette 79, 212. As to the circumstances in which VAT payable on the landlord's solicitor's costs may be recoverable by the tenant see [1992] NLJ 1625.

- 5 See *Re Negus* [1895] 1 Ch 73 at 81; *Re Gray* [1901] 1 Ch 239 at 244; *Jennings v Major* (1837) 8 C & P 61.

## UPDATE

### 121 Payment of costs

NOTE 2--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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### 122. Tenant's liability.

Where, notwithstanding the statutory provisions as to the costs of leases<sup>1</sup>, the tenant agrees to pay the landlord's costs, the costs for which the tenant is liable are restricted to those which are properly incident to the preparation and execution of the lease by the landlord, including fees of conveyancing counsel when properly employed<sup>2</sup>, of surveyors in respect of the preparation of a plan to be placed on the lease<sup>3</sup>, and of an inventory of fixtures properly appended<sup>4</sup>. The landlord is not entitled to the costs of an agreement, or of preliminary negotiations<sup>5</sup>, or of any matters antecedent to instructions for the lease, such as, in the case of a mining lease, the fees of a mining expert who has been consulted on behalf of the intending landlord<sup>6</sup>, or in other leases the fees of surveyors incurred by the landlord in negotiating the lease<sup>7</sup>; nor, in the absence of agreement, is he entitled to charge against the tenant the costs of third parties whose concurrence is necessary for the grant of the lease<sup>8</sup>. An agreement which has the effect that a party is to pay the whole or part of the costs of an arbitration in any event is only valid if made after the dispute in question has arisen; thus under a covenant by the landlord to renew the lease at the tenant's cost at a rent to be determined by reference to arbitration, the tenant would no longer be liable to pay the costs of the arbitration<sup>9</sup>. Under such a covenant the costs incident to the devolution of title to the reversion are payable by the landlord<sup>10</sup>; but the costs occasioned by the state of the tenant's title are payable by the tenant<sup>11</sup>.

1 Ie the Costs of Leases Act 1958: see PARA 121 ante.

2 *Re Gray* [1901] 1 Ch 239 at 244.

3 *Re Fletcher and Dyson* [1903] 2 Ch 688 at 694.

4 *Re Thomas* (1844) 8 Beav 145.

5 The Council of the Law Society ruled on 10 June 1955 that a tenant is not liable to bear the landlord's solicitors' negotiating fee, no custom to that effect having become established: see the Law Society's Digest 1954, 1st Supplement 1956, pp 18-19.

6 *Re Gray* [1901] 1 Ch 239.

7 *Re Fletcher and Dyson* [1903] 2 Ch 688.

8 See note 7 supra.



9 See the Arbitration Act 1996 s 60; and ARBITRATION vol 2 (2008) PARA 1270; reversing *Fitzsimmons v Lord Mostyn* [1904] AC 46, HL.

10 *Wortham v Lord Dacre* (1856) 2 K & J 437.

11 *Barrett v Pearson* (1812) 2 Ball & B 189.

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### 123. Recovery.

Where the tenant is liable to pay the landlord's costs and the landlord pays his own solicitor, the landlord may recover the money so paid from the tenant as money paid by the landlord to the tenant's use<sup>1</sup>. The tenant becomes directly liable to the landlord's solicitor if he instructs or authorises him to prepare the lease<sup>2</sup>. Where negotiations break down, it is a question of fact whether or not the solicitor was employed by the landlord or the prospective tenant or by both<sup>3</sup>. A tenant who is liable to pay the charges of the landlord's solicitor may have the bill assessed<sup>4</sup>.

1 *Grissell v Robinson* (1836) 3 Bing NC 10; *Baker v Meryweather* (1849) 2 Car & Kir 737; *Re Gray* [1901] 1 Ch 239.

2 *Webb v Rhodes* (1837) 3 Bing NC 732; *Smith v Clegg* (1858) 27 LJ Ex 300.

3 *Forster v Rowland* (1861) 7 H & N 103; *Wilkinson v Grant* (1856) 18 CB 319; *Leach v Bevan* (1904) Times, 6 February; *Smith v Clegg* (1858) 27 LJ Ex 300. A landlord may be able to recover his solicitors' costs by a claim in restitution against the prospective tenant: see the judgment of Denning LJ in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428, [1953] 2 All ER 1330, CA.

4 See the Solicitors Act 1974 s 71(1), (2); *Re Newman* (1867) 2 Ch App 707; and see LEGAL PROFESSIONS vol 66 (2009) PARA 971. The Solicitors Act 1974 s 71 refers to the bill being 'taxed'; but 'taxation' is now known as detailed assessment: see CIVIL PROCEDURE vol 12 (2009) PARA 1779.

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### (iv) Stamp Duty Land Tax and VAT on Grant of Lease

#### 124. Stamp duty land tax; treatment of leases.

Except for a tenancy at will<sup>1</sup>, a tenancy is a chargeable interest for the purposes of stamp duty land tax<sup>2</sup>. A licence to use or occupy land is not, however, a chargeable interest<sup>3</sup>.

Stamp duty land tax is charged on any acquisition of a chargeable interest (a 'land transaction') whether or not there is any instrument effecting the transaction<sup>4</sup>. Stamp duty land tax, which was introduced by the Finance Act 2003, is considered in detail elsewhere in this work<sup>5</sup>, but the particular rules with relation to the treatment of leases are set out below.

In the application of the statutory provisions relating to stamp duty land tax<sup>6</sup> to a lease<sup>7</sup> for a fixed term, no account is to be taken of any contingency as a result of which the lease may

determine before the end of the fixed term, or any right of either party to determine the lease or renew it<sup>9</sup>.

For the purposes of those provisions, except for the provision relating to notifiable transactions<sup>9</sup>, a lease for a fixed term and thereafter until determined, or a lease for a fixed term that may continue beyond the fixed term by operation of law, is treated:

- 261 (1) in the first instance as if it were a lease for the original fixed term and no longer;
- 262 (2) if the lease continues after the end of that term, as if it were a lease for a fixed term one year longer than the original fixed term;
- 263 (3) if the lease continues after the end of the term resulting from the application of head (2) above, as if it were a lease for a fixed term two years longer than the original fixed term,

and so on<sup>10</sup>. Where the effect of this provision in relation to the continuation of the lease after the end of a fixed term is that additional tax is payable in respect of a transaction or that tax is payable in respect of a transaction where none was payable before:

- 264 (a) the purchaser must deliver a return or further return in respect of that transaction before the end of the period of 30 days after the end of that term;
- 265 (b) the return must include a self-assessment of the amount of tax chargeable in respect of the transaction on the basis of the information contained in the return;
- 266 (c) the tax so chargeable is to be calculated by reference to the rates in force at the effective date of the transaction; and
- 267 (d) the return must be accompanied by payment of the tax or additional tax payable<sup>11</sup>.

For the purposes of those provisions, except for the provision relating to notifiable transactions<sup>12</sup>:

- 268 (i) a lease for an indefinite term<sup>13</sup> is treated in the first instance as if it were a lease for a fixed term of a year;
- 269 (ii) if the lease continues after the end of the term resulting from the application of head (i) above, it is treated as if it were a lease for a fixed term of two years;
- 270 (iii) if the lease continues after the end of the term resulting from the application of head (iii) above, it is treated as if it were a lease for a fixed term of three years,

and so on<sup>14</sup>; and no account is to be taken for those purposes of any other statutory provision in England and Wales or Northern Ireland deeming a lease for an indefinite period to be a lease for a different term<sup>15</sup>. Where the effect of this provision in relation to the continuation of the lease after the end of a deemed fixed term is that additional tax is payable in respect of a transaction or that tax is payable in respect of a transaction where none was payable before:

- 271 (A) the purchaser must deliver a return or further return in respect of that transaction before the end of the period of 30 days after the end of that term;
- 272 (B) the return must include a self-assessment of the amount of tax chargeable in respect of the transaction on the basis of the information contained in the return;
- 273 (C) the tax so chargeable is to be calculated by reference to the rates in force at the effective date of the transaction; and
- 274 (D) the return must be accompanied by payment of the tax or additional tax payable<sup>16</sup>.

Where successive leases are granted or treated as granted, whether at the same time or at different times, of the same or substantially the same premises, and those grants are linked transactions, those provisions apply as if the series of leases were a single lease granted at the time of the grant of the first lease in the series for a term equal to the aggregate of the terms of all the leases and in consideration of the rent payable under all of the leases<sup>17</sup>. The grant of later leases in the series is accordingly disregarded for the purposes of those provisions except for the provision<sup>18</sup> relating to a return or further return in consequence of a later linked transaction<sup>19</sup>.

Particular provision is made as to the treatment of rent<sup>20</sup> and rent increases for the purposes of stamp duty land tax<sup>21</sup>. Where a lease is varied so as to reduce the amount of the rent, the variation is treated for the purposes of stamp duty land tax as an acquisition of a chargeable interest by the lessee<sup>22</sup>.

In the case of the grant of a lease, certain tenant's obligations do not count as chargeable consideration for the purposes of stamp duty land tax<sup>23</sup>. Nor does a payment made in discharge of such an obligation count as chargeable consideration<sup>24</sup>.

A reverse premium<sup>25</sup> does not count as chargeable consideration in the case of the grant of a lease<sup>26</sup>. Where, however, under arrangements made in connection with the grant of a lease, the lessee, or any person connected with him or acting on his behalf, pays a deposit, or makes a loan, to any person, and the repayment of all or part of the deposit or loan is contingent on anything done or omitted to be done by the lessee or on the death of the lessee, the amount of the deposit or loan (disregarding any repayment) is to be taken for the purposes of stamp duty land tax to be consideration other than rent given for the grant of the lease<sup>27</sup>.

1 As to tenancies at will see PARA 198 post.

2 See the Finance Act 2003 s 48(1), (2)(c)(i).

3 See *ibid* s 48(2)(b).

4 See *ibid* ss 42(1), (2)(a), 43(1).

5 See STAMP DUTIES AND STAMP DUTY RESERVE TAX.

6 *Ie* for the purposes of *ibid* Pt 4 (ss 42-124) (as amended): see further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

7 For the meaning of 'lease' for these purposes see PARA 93 note 5 ante.

8 Finance Act 2003 s 120, Sch 17A para 2 (s 120, Sch 17A added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22).

9 *Ie* the Finance Act 2003 s 77 (as amended): see STAMP DUTIES AND STAMP DUTY RESERVE TAX. For the purposes of s 77 (as amended), a lease to which Sch 17A para 4 (as added) applies is a lease for whatever is its fixed term: Sch 17A para 3(5) (as added: see note 6 *supra*).

10 *Ibid* Sch 17A para 3(1), (2) (as added: see note 8 *supra*).

11 *Ibid* Sch 17A para 3(3) (as added: see note 8 *supra*). The provisions of Sch 10 (as amended) (returns, inquiries, assessments and other matters: see STAMP DUTIES AND STAMP DUTY RESERVE TAX) apply to a return under Sch 17A para 3 (as added) as they apply to a return under s 76 (general requirement to deliver land transaction return: see STAMP DUTIES AND STAMP DUTY RESERVE TAX), with the adaptation that references to the effective date of the transaction are to be read as references to the day on which the lease becomes treated as being for a longer fixed term: Sch 17A para 3(4) (as so added).

12 *Ie* the Finance Act 2003 s 77 (as amended): see STAMP DUTIES AND STAMP DUTY RESERVE TAX. For the purposes of s 77 (as amended), a lease for an indefinite term is a lease for a term of less than seven years: Sch 17A para 4(4A) (as added: see note 8 *supra*).

13 References in *ibid* Sch 17A para 4 (as added) to a lease for an indefinite period include (1) a periodic tenancy or other interest or right terminable by a period of notice; (2) a tenancy at will in England and Wales or

Northern Ireland; or (3) any other interest or right terminable by notice at any time: Sch 17A para 4(5) (as added: see note 8 supra).

14 Ibid Sch 17A para 4(1) (as added: see note 8 supra).

15 Ibid Sch 17A para 4(2) (as added: see note 8 supra).

16 Ibid Sch 17A para 4(3) (as added: see note 8 supra). The provisions of Sch 10 (as amended) (returns, inquiries, assessments and other matters: see STAMP DUTIES AND STAMP DUTY RESERVE TAX) apply to a return under Sch 17A para 4 (as added) as they apply to a return under s 76 (general requirement to deliver land transaction return: see STAMP DUTIES AND STAMP DUTY RESERVE TAX), with the adaptation that references to the effective date of the transaction are to be read as references to the day on which the lease becomes treated as being for a longer fixed term: Sch 17A para 4(4) (as so added).

17 Ibid Sch 17A para 5(1), (2) (as added: see note 8 supra).

18 Ie ibid s 81A (as added): see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

19 Ibid Sch 17A para 5(3) (as added: see note 8 supra).

20 For these purposes, a single sum expressed to be payable in respect of rent, or expressed to be payable in respect of rent and other matters but not apportioned, must be treated as entirely rent; but this is without prejudice to the application of ibid Sch 4 para 4 (chargeable consideration; just and reasonable apportionment: see STAMP DUTIES AND STAMP DUTY RESERVE TAX) where separate sums are expressed to be payable in respect of rent and other matters: Sch 17A para 6(1), (2) (as added: see note 8 supra).

21 See ibid Sch 17A paras 7-9, 13-15 (as added); paras 148, 252, 293 post; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

22 See ibid Sch 17A para 15A (as added); para 148 post; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

23 Those obligations are listed in Sch 17A para 10(1) (as added (see note 8 supra); amended by the Stamp Duty Land Tax (Amendment to the Finance Act 2003) Regulations 2006, SI 2006/875, regs 2, 4) as follows:

- 1 (1) any undertaking by the tenant to repair, maintain or insure the demised premises;
- 2 (2) any undertaking by the tenant to pay any amount in respect of services, repairs, maintenance or insurance or the landlord's costs of management;
- 3 (3) any other obligation undertaken by the tenant that is not such as to affect the rent that a tenant would be prepared to pay in the open market;
- 4 (4) any guarantee of the payment of rent or the performance of any other obligation of the tenant under the lease;
- 5 (5) any penal rent, or increased rent in the nature of a penal rent, payable in respect of the breach of any obligation of the tenant under the lease;
- 6 (6) any liability of the tenant for costs under the Leasehold Reform Act 1967 s 14(2) or the Leasehold Reform, Housing and Urban Development Act 1993 s 60 (costs to be borne by person exercising statutory right to be granted lease: see PARAS 1471, 1724 post);
- 7 (7) any other obligation of the tenant to bear the landlord's reasonable costs or expenses of or incidental to the grant of a lease;
- 8 (8) any obligation under the lease to transfer to the landlord, on the termination of the lease, payment entitlements granted to the tenant under the single payment scheme (ie, the scheme of income support for farmers in pursuance of EC Council Regulation 1782/2003 (OJ L270, 21.10.2003, p 01) in respect of land subject to the lease (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 753 et seq).

24 Finance Act 2003 Sch 17A para 10(2) (as added: see note 8 supra).

25 In relation to the grant of a lease, a 'reverse premium' means a premium moving from the landlord to the tenant: ibid Sch 17A para 18(2)(a) (as added: see note 8 supra).

26 Ibid Sch 17A para 17A para 18(1) (as added: see note 8 supra).

27 Ibid Sch 17A para 18A(1) (added by the Finance (No 2) Act 2005 s 49, Sch 10 Pt 1 paras 1, 14). This does not apply in relation to a deposit if the amount that would otherwise fall within this provision in relation to the grant of the lease is not more than twice the relevant maximum rent: Finance Act 2003 Sch 17A para 18A(3) (as so added). The relevant maximum rent is (1) in relation to the grant of a lease, the highest amount of rent payable in respect of any consecutive 12-month period in the first five years of the term; (2) in relation to the assignment of a lease, the highest amount of rent payable in respect of any consecutive 12-month period in the first five years of the term remaining outstanding as at the date of the assignment, the highest amount of rent being determined (in either case) in the same way as the highest amount of rent mentioned in Sch 17A para 7(3) (as added): Sch 17A para 18A(4) (as so added). Tax is not chargeable by virtue of this provision: (a) merely because of Sch 5 para 9(2) (as amended) (which excludes the 0% band in the Tables in s 55(2) (as amended) in cases where the relevant rental figure exceeds £600 a year); or (b) merely because of Sch 6 para 5(4)(b), 6(6)(b), 9(4)(b) or 10(6)(b) (which make similar provision in relation to land which is wholly or partly residential property and is wholly or partly situated in a disadvantaged area): Sch 17A para 18A(5) (as so added). The Income and Corporation Taxes Act 1988 s 839 (as amended) (connected persons: see INCOME TAXATION vol 23(2) (Reissue) PARA 1258) has effect for the purposes of this provision: Finance Act 2003 Sch 17A para 18A(6) (as so added).

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## **125. VAT on the grant of a lease.**

Subject to specified exceptions<sup>1</sup>, the grant of any interest in or right over land or of any licence to occupy land is an exempt supply for the purposes of VAT<sup>2</sup>. The landlord may, however, elect to waive the exemption in certain circumstances before, on or after the grant of the interest<sup>3</sup>; and in some circumstances the landlord granting a tenancy is liable to a deemed charge to VAT if the exemption is not so waived<sup>4</sup>.

In cases where the landlord has not elected to waive exemption, a payment for the lifting of a restrictive covenant is consideration for an exempt supply<sup>5</sup>. If a landlord pays a tenant an inducement sum to take on a lease (a 'reverse premium') the payment is generally outside the scope of VAT<sup>6</sup>.

VAT is payable by the person making the supply unless there is an agreement that the tax should be paid by the other party<sup>7</sup>.

1 As to the exceptions see the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II, Group 1 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 at heads (10)-(13) in the text. As to supplies which are zero-rated see s 30, Sch 8 Pt II, Group 5 (as substituted and amended) (construction of buildings etc: see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 179); Sch 8 Pt II, Group 6 (as substituted and amended) (protected buildings: see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 181).

2 See ibid Sch 9 Pt II, Group 1 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156. A right of occupation is an essential and fundamental element of a transaction of leasing or letting for the purposes of this exemption under EU law: see *Abbey National plc v Revenue and Customs Comrs* [2006] EWCA Civ 886, [2006] 27 EG 235 (CS), [2006] All ER (D) 336 (Jun). As to VAT generally see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 1 et seq; as to the time of supply see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 35; and as to exemption from VAT see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 155 et seq.

3 See the Value Added Tax Act 1994 s 51, Sch 10 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 157.

4 See Sch 10 paras 1, 5, 6 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARAS 34, 157.

5 See Customs and Excise Business Brief 17/94 [1994] STI 1158; and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 note 2.

6 See Customs and Excise Public Notice 742 *Land and Property* (March 2002) PARA 10.1; Customs' Business Brief 12/2005; Case C-409/98 *Customs and Excise Comrs v Mirror Group plc* [2002] QB 546, [2001] ECR I-7175, ECJ; *Trinity Mirror plc (formerly Mirror Group plc) v Customs and Excise Comrs* [2003] EWHC 480, [2003] STC 518, [2003] All ER (D) 297 (Jan). Cf *Neville Russell (a firm) v Customs and Excise Comrs* [1987] VATTR 194. See further VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 note 2.

7 *Gleneagles Hotel plc v Customs and Excise Comrs* [1986] VATTR 196, [1987] 2 CMLR 269. As to adjustments of contracts on changes in tax see the Value Added Tax Act 1994 s 89 (as amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 107.

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## (6) CONTENTS OF LEASE

### (i) In general

#### 126. Contents of prescribed clauses leases.

A prescribed clauses lease<sup>1</sup> must begin with the prescribed wording<sup>2</sup>, or that wording must appear immediately after any front sheet<sup>3</sup>. The prescribed wording must be set out in the prescribed manner, with side headings appearing as headings if preferred and with the omission of vertical or horizontal lines<sup>4</sup>. That wording requires that the following information is given:

- 275 (1) the date of the lease<sup>5</sup>;
- 276 (2) title number or numbers<sup>6</sup>;
- 277 (3) the full names, addresses and company's registered number, if any, of the landlord and tenant and of any other parties, specifying their capacity<sup>7</sup>;
- 278 (4) in relation to the property, either a full description of the land being leased or a reference to the clause, schedule or paragraph of a schedule in the lease in which the land being leased is more fully described, together with a statement that in the case of a conflict between this clause and the remainder of the lease then, for the purposes of registration, this clause will prevail<sup>8</sup>;
- 279 (5) if the lease:
  - 15 20. (a) includes a statement prescribed under the rules about dispositions in favour of a charity<sup>9</sup>, dispositions by a charity<sup>10</sup> or leases under the Leasehold Reform, Housing and Urban Development Act 1993<sup>11</sup>, the relevant statement or a reference to the clause, schedule or paragraph of a schedule in the lease which contains the statement<sup>12</sup>;
  - 21. (b) is made under, or by reference to, provisions of the Leasehold Reform Act 1967<sup>13</sup>, the Housing Act 1985<sup>14</sup>, the Housing Act 1988<sup>15</sup> or the Housing Act 1996<sup>16</sup>, a statement so stating<sup>17</sup>;
- 16 280 (6) the term for which the property is leased<sup>18</sup>;
- 281 (7) the premium<sup>19</sup>;
- 282 (8) a statement either:
  - 17 22. (a) that the lease does not contain a provision that prohibits or restricts dispositions; or
  - 23. (b) that the lease contains a provision that prohibits or restricts dispositions<sup>20</sup>;

18

283 (9) in relation to rights of acquisition:

19

24. (a) the tenant's contractual rights to renew the lease, to acquire the reversion or another lease of the property, or to acquire an interest in other land<sup>21</sup>;

25. (b) the tenant's covenant to, or offer to, surrender the lease<sup>22</sup>;

26. (c) the landlord's contractual rights to acquire the lease<sup>23</sup>,

20

284 either including the relevant provisions or referring to the clause, schedule or paragraph of a schedule in the lease which contains the provisions<sup>24</sup>;

285 (10) restrictive covenants given in the lease by the landlord in respect of land other than the property, inserting the relevant provisions or referring to the clause, schedule or paragraph of a schedule in the lease which contains the provisions<sup>25</sup>;

286 (11) a reference to the clause, schedule or paragraph of a schedule in the lease which sets out the easements<sup>26</sup>:

21

27. (a) granted by the lease for the benefit of the property<sup>27</sup>;

28. (b) granted or reserved by the lease over the property for the benefit of other property<sup>28</sup>;

22

287 (12) a reference to the clause, schedule or paragraph of a schedule in the lease which sets out an estate rentcharge burdening the property<sup>29</sup>;

288 (13) an application for the standard form of restriction<sup>30</sup>, set out in full together with the title against which it is to be entered<sup>31</sup>; but this may be omitted or deleted if appropriate<sup>32</sup>;

289 (14) where there is more than one person comprising the tenant, the appropriate declaration of trust<sup>33</sup>.

1 For the meaning of 'prescribed clauses leases' see PARA 100 ante.

2 Ie the wording set out in the Land Registration Rules 2003, SI 2003/1417, r 58A(4), Sch 1A cls LR1-LR14 (as added): see heads (1)-(14) in the text.

3 See *ibid* r 58A(1) (as added); and PARA 100 ante. For the meaning of 'front sheet' see PARA 100 note 11 ante.

4 *Ibid* r 58A(4), Sch 1A notes (Sch 1A added by SI 2005/1982).

5 Land Registration Rules 2003, SI 2003/1417, Sch 1A cl LR1 (as added: see note 4 supra).

6 *Ibid* Sch 1A cl LR2 (as added: see note 4 supra). The relevant title numbers are (1) the landlord's title number(s), ie the title number(s) out of which the lease is granted (to be left blank if not registered); and (2) other title numbers, ie existing title number(s) against which entries of matters referred to in Sch 1A cls LR9, LR10, LR11 and LR13 (as added) (see heads (9)-(11), (13) in the text) are to be made: Sch 1A cls LR2.1, LR2.2 (as so added).

7 *Ibid* Sch 1A cl LR3 (as added: see note 4 supra). For Scottish companies an SC prefix must be used and for limited liability partnerships an OC prefix. For foreign companies territory in which they are incorporated must be given. The capacity of other parties may be eg as management company, guarantor, etc: see Sch 1A cl LR3 (as so added).

8 *Ibid* Sch 1A cl LR4 (as added: see note 4 supra). Where there is a letting of part of a registered title, a plan must be attached to the lease and any floor levels must be specified: see Sch 1A cl LR4 (as so added).

9 Ie a statement prescribed under *ibid* r 179. See further CHARITIES vol 8 (2010) PARA 397; LAND REGISTRATION vol 26 (2004 Reissue) PARA 889.

10 Ie a statement prescribed under *ibid* r 180. See further CHARITIES vol 8 (2010) PARA 397; LAND REGISTRATION vol 26 (2004 Reissue) PARA 889.

- 11    le a statement prescribed under *ibid* r 196: see PARAS 1647, 1714 post.
- 12    *Ibid* Sch 1A cl LR 5.1 (as added: see note 4 *supra*).
- 13    See PARA 1389 et seq post.
- 14    See PARAS 1300 et seq, 1795 et seq post; and HOUSING.
- 15    See PARA 1011 et seq post; and HOUSING.
- 16    See PARA 1804 et seq post; and HOUSING.
- 17    Land Registration Rules 2003, SI 2003/1417, Sch 1A cl LR 5.2 (as added: see note 4 *supra*).
- 18    *Ibid* Sch 1A cl LR 6 (as added: see note 4 *supra*). Only one of the following three statement is to be used, as appropriate and as duly completed, ie (1) 'From and including, To and including'; or (2) 'The term as specified in this lease at clause/schedule/paragraph'; or (3) 'The term is as follows': Sch 1A cl LR 6 (as so added). The information so provided, or referred to, will be used as part of the particulars to identify the lease under r 6 (as amended) (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 814): Sch 1A cl LR 6 note (as so added).
- 19    *Ibid* Sch 1A cl LR 7 (as added: see note 4 *supra*). The total premium must be specified, inclusive of any VAT where payable: Sch 1A cl LR 7 (as so added).
- 20    *Ibid* Sch 1A LR 8 (as added: see note 4 *supra*). The wording of the provision is not to be set out in this clause: Sch 1A LR 8 (as so added).
- 21    *Ibid* Sch 1A cl LR 9.1. (as added: see note 4 *supra*).
- 22    *Ibid* Sch 1A cl LR 9.2. (as added: see note 4 *supra*).
- 23    *Ibid* Sch 1A cl LR 9.3. (as added: see note 4 *supra*).
- 24    *Ibid* Sch 1A cl LR 9 (as added: see note 4 *supra*).
- 25    *Ibid* Sch 1A cl LR 10 (as added: see note 4 *supra*).
- 26    *Ibid* Sch 1A cl LR 11 (as added: see note 4 *supra*).
- 27    *Ibid* Sch 1A cl LR 11.1 (as added: see note 4 *supra*).
- 28    *Ibid* Sch 1A cl LR 11.2 (as added: see note 4 *supra*).
- 29    *Ibid* Sch 1A cl LR 12 (as added: see note 4 *supra*).
- 30    Standard forms of restriction are set out in *ibid* r 91, Sch 4 (as amended): see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1009.
- 31    *Ibid* Sch 1A cl LR 13 (as added: see note 4 *supra*). Schedule 1A cl LR 13 (as so added) may be used to apply for more than one standard form of restriction by using it to apply for each of them, stating who is applying against which title and setting out the full text of the restriction applied for: Sch 1A cl LR 13 (as so added). The prescribed wording of the clause is 'The Parties to this lease apply to enter the following standard form of restriction [against the title of the Property] or [against title number ]': Sch 1A cl LR 13 (as so added).
- 32    See *ibid* Sch 1A notes (as added: see note 4 *supra*).
- 33    *Ibid* Sch 1A cl LR 14 (as added: see note 4 *supra*). The prescribed forms of wording, to be completed as necessary, are (1) 'The Tenant is more than one person. They are to hold the Property on trust for themselves as joint tenants'; or (2) 'The Tenant is more than one person. They are to hold the Property on trust for themselves as tenants in common in equal shares'; or (3) 'The Tenant is more than one person. They are to hold the Property on trust': Sch 1A cl LR 14 (as so added). If the tenant is one person, all the alternative statements are to be omitted or deleted; and if the tenant is more than one person, this clause must be completed by omitting or deleting all inapplicable alternative statements: Sch 1A cl LR 14 (as so added).

## UPDATE

### 126 Contents of prescribed clauses leases



NOTE 7--SI 2003/1417 Sch 1A cl LR3 amended: SI 2008/1919.

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### **127. Usual contents of a lease.**

The usual contents of a lease by deed are:

- 290 (1) the date;
- 291 (2) the parties' names and descriptions;
- 292 (3) the consideration;
- 293 (4) the operative words;
- 294 (5) the parcels or description of the property demised<sup>1</sup>;
- 295 (6) the exceptions and reservations;
- 296 (7) the habendum, that is to say the commencement and duration of the term;
- 297 (8) the reddendum, that is say the amount of rent, and the person to whom, the time at which and the manner in which it is to be paid<sup>2</sup>;
- 298 (9) the tenant's covenants;
- 299 (10) the landlord's covenants; and
- 300 (11) the provisos and conditions.

In case of contradiction between the habendum and the reddendum the habendum prevails<sup>3</sup>.

The matters before the habendum are called the 'premises'<sup>4</sup>. They may also include recitals but recitals are not usual in a lease<sup>5</sup>. If any reference is necessary to a power under which the lease is granted, this is usually inserted in the operative words.

1 In the case of a prescribed clauses lease, the description given at the beginning in compliance with the Land Registration Rules 2003, SI 2003/1417, r 58A(4), Sch 1A cl LR 4 (as added) prevails, for the purposes of registration, over any conflicting description elsewhere in the lease: see PARA 126 ante at head (4) in the text. For the meaning of 'prescribed clauses lease' see PARA 100 ante.

2 Note that the amount of rent is not included in the prescribed wording set out in *ibid* Sch 1A (as added): see PARA 126 ante.

3 *Matthews v Smallwood* [1910] 1 Ch 777 at 784.

4 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 242-245. A word which has been omitted by mistake may be supplied if other words cannot otherwise be given their proper meaning: see *Wight v Dicksons* (1813) 1 Dow 141 at 147, HL. Because of the difficulty of enforcing covenants and because of the possibility, since the Rent Acts, of a statutory tenancy arising, it is crucial for the landlord that the identity of all tenants is given in cases covered by those Acts: see *Hanstown Properties Ltd v Green* [1978] 1 EGLR 185, (1977) 246 Estates Gazette 917, CA.

5 As to the effect of recitals see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217 et seq; ESTOPPEL vol 16(2) (Reissue) PARA 1015.

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PARAS 1386-2000)/3. LEASES AND UNDERLEASES/(6) CONTENTS OF LEASE/(i) In general/128. Date.

### **128. Date.**

A lease by deed takes effect from the date of delivery<sup>1</sup>. Prima facie the date which it bears is the date of delivery; but evidence is admissible to show that it was in fact delivered on a different date<sup>2</sup>. The date of the lease is not necessarily the date of the commencement of the term granted<sup>3</sup>. A lease granted so as to commence at a future date is usually called a future lease or a reversionary lease<sup>4</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 60, 193; 1486 and Co Litt 46b.

2 *Steele v Mart* (1825) 4 B & C 272 at 279, 280. See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 193.

3 However, the term of the lease cannot commence prior to the execution and date of delivery of the deed: see *Roberts v Church Comrs for England* [1972] 1 QB 278, [1973] 3 All ER 703, CA; and PARA 235 post.

4 See PARA 106 ante (where the term 'lease of the reversion' is also discussed).

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### **129. Consideration.**

Where the only consideration for the lease consists of the rent and the tenant's covenants, it is usual, though not necessary, to insert a reference to these in the premises. Where there is an additional consideration, such as a fine or premium, it is proper to mention this in the premises<sup>1</sup>.

1 If a lease prepared in pursuance of an agreement for a lease is tendered to the tenant for execution, he is not bound to execute it unless the consideration is truly stated: *Vonhollen v Knowles* (1844) 12 M & W 602. The landlord has a lien on the land for unpaid premium: see *Shepherd v Beetham* (1877) 6 ChD 597.

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### **130. Demise.**

The relationship of landlord and tenant is one of contract<sup>1</sup>, but a lease also operates as a conveyance. The usual word for this purpose is 'demise' or 'let', but neither those words nor any formal words of conveyance are necessary. Provided that the instrument shows the parties' intent that the one is to divest himself of the possession and the other is to come into the possession for a determinate time<sup>2</sup>, either immediately or in the future, it operates as a lease<sup>3</sup>. A periodic tenancy is for these purposes regarded as of determinate duration; but stipulations

which purport to restrict the rights of the parties to determine a periodic tenancy until the happening of a particular event are void if such stipulations are repugnant to the nature of the periodic tenancy which has been granted<sup>4</sup>.

The instrument takes effect as a lease<sup>5</sup> whether it is in the ordinary form of a demise, or in the form of a covenant<sup>6</sup> or agreement<sup>7</sup>, or in the form of an offer to let or take on certain terms and an acceptance appearing on correspondence<sup>8</sup>. A prescribed clauses lease<sup>9</sup>, however, requires completion by registration<sup>10</sup>.

1 See PARA 1 ante.

2 A lease may terminate by effluxion of time or by notice to quit (see PARAS 213, 239 post) or break clause (see PARAS 141-143 post) in relation to a term certain and normally includes a proviso for re-entry (see PARAS 133, 603 post). A lease of uncertain maximum duration is void: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL; *Lace v Chantler* [1944] KB 368, sub nom *Lace v Chandler* [1944] 1 All ER 305, CA (lease for duration of war). See also *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1, [1973] 2 All ER 720 (a term in a weekly tenancy that the tenancy was determinable only by the tenants held to be repugnant to the nature of such a tenancy and accordingly void); *Birrell v Carey* (1989) 58 P & CR 184, CA (agreement granting exclusive occupation 'for so long as the company is trading' insufficiently certain to constitute a leasehold interest); and see PARA 238 post.

3 *Morgan d Dowding v Bissell* (1810) 3 Taunt 65 at 67; *Wilkinson v Hall* (1837) 3 Bing NC 508 at 533; *Duxbury v Sandiford* (1898) 80 LT 552, CA; and see the cases cited in PARA 73 note 4 ante. If exclusive possession is to be given, an instrument, even though in form a licence, may operate as a lease: see *Doe d Pritchard v Dodd* (1833) 5 B & Ad 689 at 692; *Hall v Seabright* (1669) 1 Mod Rep 14; *Doe d Hanley v Wood* (1819) 2 B & Ald 724 at 739; and see PARAS 6, 11 ante.

4 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL, overruling *Re Midland Rly Co's Agreement*, *Charles Clay & Sons Ltd v British Railways Board* [1971] Ch 725, [1971] 1 All ER 1007, CA and *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA. See also *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1, [1973] 2 All ER 720 (cited in note 2 supra).

5 In relation to leases which may be granted by parol (see PARA 101 ante) the words used operate as if they were the instrument.

6 *Whitlock v Horton* (1605) Cro Jac 91; *Tisdale v Essex* (1616) Hob 34; *Drake v Munday* (1631) Cro Car 207; *Richards v Sely* (1676) 2 Mod Rep 79; *Right d Basset v Thomas* (1763) 3 Burr 1441 at 1446; *Fenny v Child* (1814) 2 M & S 255 at 257.

7 See *Lovelock v Franklyn* (1846) 8 QB 371. An agreement which is in effect an undertaking that tenants are to be found, and a guarantee of a sum equal to the proposed rents, does not create a tenancy: *Taylor v Jackson* (1846) 2 Car & Kir 22.

8 *Chapman v Bluck* (1838) 4 Bing NC 187; and see *Jones v Reynolds* (1841) 1 QB 506. Unless the contract is for a short lease, the correspondence must satisfy the statutory formalities: see PARA 79 ante.

9 For the meaning of 'prescribed clauses lease' see PARA 100 ante.

10 See PARA 100 ante.

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### 131. Standard form tenancy agreements.

Many landlords use standard form tenancy agreements. The standard terms used in such agreements may be potentially unfair for the purposes of the Unfair Terms in Consumer Contracts Regulations 1999<sup>1</sup>, which apply in relation to unfair terms in contracts concluded

between a seller or a supplier and a consumer<sup>2</sup>. A contractual term which has not been individually negotiated is regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer<sup>3</sup>. The unfairness of a contractual term must be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent<sup>4</sup>. In so far as it is in plain intelligible language, the assessment of fairness of a term does not, however, relate:

- 301 (1) to the definition of the main subject matter of the contract; or
- 302 (2) to the adequacy of the price or remuneration, as against the goods or services supplied in exchange<sup>5</sup>.

The Court of Appeal has ruled that the 1999 regulations apply to contracts for the disposal of an interest in or rights of occupation over land, and apply to public authorities such as local housing authorities as 'sellers or suppliers' and the persons to whom they offer accommodation as 'consumers'<sup>6</sup>.

The Office of Fair Trading has issued guidance as to the basis on which enforcement action may be taken and offering suggestions for achieving fairness<sup>7</sup>. The guidance assumes that, in general, landlords can be considered 'suppliers' and private tenants 'consumers' for the purposes of the 1999 Regulations. In the event of a dispute as to whether an individual small landlord is a supplier, it will be for a court to decide whether the regulations apply in that case<sup>8</sup>.

1 The Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083 (as amended): see CONTRACT vol 9(1) (Reissue) PARA 790 et seq.

2 See *ibid* reg 4(1).

3 See *ibid* reg 5(1).

4 See *ibid* reg 6(1).

5 See *ibid* reg 6(2). Terms falling within heads (1)-(2) in the text are often referred to as 'core terms'. Terms in a tenancy agreement stating the rent, the details of the property, and the length of the tenancy are likely to be considered core terms: see *Guidance on Unfair Terms in Tenancy Agreements* OFT no 356 (September 2005) PARA 2.3.

6 See *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55, [2005] QB 37, [2004] LGR 696 (a case concerned with a local housing authority's policy in providing housing to persons to whom it owed the duty imposed by the Housing Act 1996 s 193(2) (see HOUSING vol 22 (2006 Reissue) PARA 290)).

7 See *Guidance on Unfair Terms in Tenancy Agreements* OFT no 356 (September 2005); accessible at the date at which this title states the law at [www.oft.gov.uk](http://www.oft.gov.uk).

8 See *Guidance on Unfair Terms in Tenancy Agreements* OFT no 356 (September 2005) PARA 1.4. For an example of a case where a term in an underlease was challenged before a leasehold valuation tribunal on the basis of unfairness, and for a discussion of the possible application of the 1999 regulations, see *Canary Riverside Pte v Schilling* (LRX/65/2005, 16 December 2005, unreported), Lands Tribunal.

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## (ii) Covenants, Conditions and Provisos

### 132. Covenants.

A covenant<sup>1</sup> is an agreement by deed whereby one or more of the parties to the deed stipulates for the truth of certain facts, or is bound to do or not to do a specified thing<sup>2</sup>. 'Covenant' will, however, be construed to cover a stipulation in an agreement under hand if otherwise it would have no effect, as, for example, where a document refers to the 'covenants' contained in a lease which is not by deed<sup>3</sup> and the word is used in this broad sense in both general and legal parlance to describe the contractual obligations of landlord and tenant, and also by statute<sup>4</sup>.

A covenant may be express or implied. An express covenant is an agreement which is framed in express terms, or is inferred on the construction of the entire instrument<sup>5</sup>. An implied covenant, or covenant in law, is one which the law implies either from the nature of the transaction or from the use of certain technical words<sup>6</sup>. There is a variety of circumstances in which the court will supply what is not expressed in a lease<sup>7</sup>, but in general no covenant ought to be implied unless there is such a necessary implication that the court can have no doubt what covenant or undertaking it ought to write into the agreement<sup>8</sup>. An express covenant in a lease excludes an implied covenant dealing with the same subject<sup>9</sup>.

Covenants by a tenant commonly provide for payment of rent<sup>10</sup> and rates and taxes<sup>11</sup>, maintenance<sup>12</sup>, insurance<sup>13</sup>, restrictions on user<sup>14</sup> and on assigning and subletting<sup>15</sup>, and the yielding up of the premises on the determination of the lease<sup>16</sup>.

Covenants by a landlord commonly provide for quiet enjoyment<sup>17</sup>, and for payment of rates and taxes, and for the maintenance of the premises, so far as these obligations are to be borne by him. If an agreement for a lease does not specify what covenants are to be inserted in the lease, the parties may require the insertion of the usual covenants<sup>18</sup>.

1 As to covenants for repair and covenants against alteration or improvement without consent see PARA 436 et seq post.

2 2 Bl Com (14th Edn) 304; Shep Touch (8th Edn) 160; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 247 et seq.

3 *Hayne v Cummings* (1864) 16 CBNS 421.

4 See eg the Landlord and Tenant Act 1985 s 11 (as amended) (repairing obligations in short leases); and PARAS 416-417 post.

5 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 249.

6 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 250 et seq.

7 See *Liverpool City Council v Irwin* [1977] AC 239 at 253, [1976] 2 All ER 39 at 43, HL, per Lord Wilberforce, where four categories of implication are discussed, the categories being described as 'shades on a continuous spectrum'.

8 See *R v Paddington and St Marylebone Rent Tribunal, ex p Bedrock Investments Ltd* [1947] KB 984 at 990, [1947] 2 All ER 15 at 17 per Lord Goddard CJ (the grant of a right to use a bathroom did not imply a covenant by the landlord to supply hot water); *R v Croydon and District Rent Tribunal, ex p Langford Property Co Ltd* [1948] 1 KB 60, DC (no term implied to provide hot water for radiators); *Penn v Catenex Co Ltd* [1958] 2 QB 210, [1958] 1 All ER 712, CA (no covenant by the landlord implied to supply power to a refrigerator fitted in the premises demised and depending for power on a central plant outside those premises). In *Karaggianis v Malltown Pty Ltd* (1979) 21 SASR 381, S Aust SC, there was implied into a lease of restaurant premises on the sixth floor of a building an obligation by the landlord to provide lifts and escalators in substantially the same state and substantially to the same extent as at the date of execution of the lease. In *Barrett v Lounova* (1982) Ltd [1990] 1 QB 348, [1989] 1 All ER 351, CA, exceptionally, an external repairing covenant was implied on behalf of the landlord to give business efficacy to the contract (there was an express covenant by the tenant to keep the interior in good repair). As to the circumstances in which covenants are implied see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 250.

9 *Dennett v Atherton* (1872) LR 7 QB 316, Ex Ch; *Stephens v Junior Army and Navy Stores Ltd* [1914] 2 Ch 516, CA; and see the cases cited in PARA 511 note 7 post.

10 See PARA 249 post.

11 See PARA 524 post.

12 See PARA 436 post.

13 See PARA 532 post.

14 See PARA 497 post.

15 See PARA 481 post.

16 See PARA 650 post.

17 See PARA 508 post.

18 As to what are usual covenants see PARA 83 ante.

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### **133. Conditions or provisos.**

The terms 'condition' and 'proviso' are now virtually synonymous. Strictly speaking, a condition in a lease is a quality annexed to an estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event<sup>1</sup>. In more modern usage it is a stipulation upon the breach of which, or a stipulation that upon the happening of a particular event, the term may be determined before the appointed period<sup>2</sup>. A condition may be express or implied. The words 'provided always' or 'upon condition' are suitable for introducing an express condition, but no precise form of words is necessary; it is sufficient if the words used were intended to have the effect of creating a condition, and a clause may operate as a condition even though it also includes words of covenant<sup>3</sup>. If the clause constitutes only an agreement on the part of the tenant to do or not to do a specific act, it will not be construed as a condition, but as a covenant<sup>4</sup>. The conditions in a lease commonly include a power of re-entry on non-payment of rent or breach of covenant<sup>5</sup>.

In certain circumstances, it is possible for a stipulation in a lease to have the dual character of a covenant and a condition<sup>6</sup>.

The word 'condition' has, however, acquired a number of other meanings outside the law of landlord and tenant and the word 'proviso' is the more commonly used term in modern conveyancing. A proviso is merely a stipulation which cuts down upon the effect of the main operative part of the instrument which precedes it. Traditionally it commences with words such as 'provided and it is agreed that ...' and often it enables one party to take a step by which that party may readjust the obligations owed by the landlord and the tenant one to the other<sup>7</sup>, for example a proviso for re-entry on non-payment of rent or breach of covenant<sup>8</sup> or an option to renew<sup>9</sup> the lease or to determine the lease<sup>10</sup> or an option for the tenant to purchase the reversion<sup>11</sup>, all of which are conditions properly so called.

A rent review clause is also a stipulation which is sometimes expressed as a proviso<sup>12</sup>. The term 'proviso' is also sometimes used merely to express a qualification or exception to an otherwise

wider provision, as, for example, where a repairing covenant is qualified by the exception of liability arising by reason of fair wear and tear<sup>13</sup>.

1 2 Bac Abr, Conditions; Shep Touch (8th Edn) 117; *Taylor v Martindale* (1842) 1 Y & C Ch Cas 658 at 662; *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC; and see CONTRACT vol 9(1) (Reissue) PARA 962.

2 *Taylor v Martindale* (1842) 1 Y & C Ch Cas 658 at 662.

3 *Doe d Henniker v Watt* (1828) 8 B & C 308 at 315, where it was 'stipulated and conditioned' that the tenant should not assign the premises otherwise than to his wife and children. This was a condition for the breach of which the landlord was entitled to maintain ejectment: see Co Litt 203b; *Earl of Pembroke v Barkley* (1601) Gouldsb 130; *Harrington v Wise* (1596) Cro Eliz 486. A distinction was, however, formerly made between conditions for breach of which a penalty is attached and conditions where there is no penalty. The former are sufficiently protected by the penalty and may be construed as covenants only; the latter would be futile unless enforceable by re-entry: *Simpson v Titterell* (1591) Cro Eliz 242. The conditions must not be illegal or repugnant to the grant: 4 Bac Abr, Leases and Terms of Years (T2). See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 252.

4 *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC; *Doe d Willson v Phillips* (1814) 2 Bing 13 (agreement to give up part of the premises on landlord's requisition); *Shaw v Coffin* (1863) 14 CBNS 372 (agreement not to sublet without consent); *Crawley v Price* (1875) LR 10 QB 302.

5 See PARA 603 post. As to what are usual covenants see PARA 83 ante.

6 See *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC.

7 Such a proviso is, therefore, a unilateral stipulation in the sense that that word is used by Diplock LJ in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 108-111, [1968] 1 WLR 74 at 82-84, CA. Whether stipulations of this type are expressed as 'options' or 'provisos' will usually be entirely a matter of drafting technique or fashion and not of substantive significance.

8 See PARA 603 et seq post.

9 See PARAS 139-140 post.

10 See PARAS 141-143 post.

11 See PARAS 135-138 post.

12 The use of the wording of a proviso as opposed to the use of the form of words usually associated with a covenant is not determinative; and many true 'provisos' will be expressed as a covenant by A to do something upon B's triggering that obligation on the part of A as, for example, by serving a notice. As to rent review see PARA 292 et seq post.

13 As to the effect of such a proviso see PARA 442 post.

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### 134. Remedies for breach of covenant or condition.

On the happening of an event specified in a condition subject to which the term was created, the landlord, whether or not the lease contains a proviso for re-entry, may exercise his right of determining the lease, subject to the court's powers to relieve against forfeiture<sup>1</sup>. A proviso for re-entry on breach of covenant operates as a condition; and, therefore, if a lease contains such a proviso, but not otherwise, the remedy of forfeiture is available to the landlord on the breach by the tenant of any of the covenants in it<sup>2</sup>.

Alternatively, a breach of covenant may be remedied by a claim for damages, or, in certain cases, by an injunction or a claim for specific performance<sup>3</sup>. The governing purpose of awarding damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed<sup>4</sup>. Generally, the measure of damages in the case of a breach of the tenant's covenants is the injury to the value of the reversion<sup>5</sup>; but in some cases the landlord is entitled to the cost of restoring the demised premises to the state in which they would have been if the covenant had been observed<sup>6</sup>. Where the landlord has broken his covenant, the measure of damages is generally the difference between the value of the lease with the covenant performed and its value with the covenant broken<sup>7</sup>.

The grant of an injunction to restrain a breach of covenant is discretionary<sup>8</sup>; and the court will consider (inter alia) whether the breach produces injury to the party seeking the injunction<sup>9</sup>, and will decline to enforce an oppressive covenant by injunction<sup>10</sup>. As a general rule, however, the court will grant an injunction to restrain a breach of a negative covenant without proof of damage being necessary<sup>11</sup>, provided that the words of the covenant are clear<sup>12</sup>. An interim injunction will be granted in an appropriate case, the deciding factor being the balance of convenience between the parties<sup>13</sup>.

Thus, in a proper case the court will restrain the breach of a covenant not to carry on any business, trade or dealings<sup>14</sup>, or a particular trade<sup>15</sup> or trades<sup>16</sup>, or any trade other than a specified trade<sup>17</sup>, or not to sell any goods other than such as shall have been purchased from the landlord<sup>18</sup>. The court will also restrain the breach of a covenant not to alter the demised premises without the consent of the landlord<sup>19</sup>, or not to affix or permit any outward mark or show of business on the demised premises<sup>20</sup>, or not to permit or suffer anything to be done to the annoyance or damage of the landlord's adjoining premises<sup>21</sup>, or not to assign without the landlord's consent<sup>22</sup>. A tenant may also be restrained from committing a breach of a farming covenant<sup>23</sup>.

The landlord is not precluded from obtaining an injunction by the inclusion in the lease of a power of re-entry<sup>24</sup>.

A decree for specific performance of a covenant is also discretionary, and will not be granted where damages would be an adequate remedy, or the performance of the covenant could not be supervised by the court<sup>25</sup>. In general, therefore, specific performance will not be ordered of a covenant to repair<sup>26</sup>, nor of a covenant to provide an employee to perform certain duties<sup>27</sup>, nor of a covenant to build<sup>28</sup>, unless what is to be done is clearly defined and damages would not be an adequate remedy<sup>29</sup>. Nor will specific performance be ordered of a covenant to keep a shop open for trading or to carry on a business<sup>30</sup>. An order for the specific performance of a covenant to repair may, however, in an appropriate case be made against a landlord where there has been a plain breach of the covenant to repair and there is no doubt as to what is required to be done to remedy the breach<sup>31</sup>.

Remedies are also available for breach of particular covenants<sup>32</sup>.

1 See PARA 604 post.

2 See PARA 603 post.

3 See eg *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97 (specific performance ordered against a landlord who had failed to perform his repairing obligations); *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860 (specific performance of a tenant's repairing obligations ordered in the exceptional circumstances of a lease that contained no provision for forfeiture or re-entry and no right of access to enable the landlord to carry out the repair). As to the remedy of specific performance in respect of repairing covenants see also the Landlord and Tenant Act 1985 s 17; and PARA 465 post; and see *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, [1968] 3 All ER 545 (interim injunction granted to restrain noise nuisance by the tenant); *Britel Corp NV v Orbach* (1997) 29 HLR 883, CA (court, in granting a tenant an injunction to compel the landlord to enforce covenant in another tenant's lease, has power to impose condition that landlord conduct the proceedings against the second tenant in the name of the management company). As to a landlord's cause of action see *Twogates Properties Ltd v Birmingham Midshires*



*Building Society* (1997) 75 P & CR 386, [1997] 2 BCLC 558, CA (no justification in allowing landlord to sue on a cause of action vested in tenant).

4 See DAMAGES vol 12(1) (Reissue) PARA 941.

5 *Whitham v Kershaw* (1886) 16 QBD 613, CA; *Espir v Basil Street Hotel Ltd* [1936] 3 All ER 91, CA. As to damages for breach of a covenant to repair see PARA 454 et seq post.

6 *Eyre v Rea* [1947] KB 567, [1947] 1 All ER 415, as explained in *Duke of Westminster v Swinton* [1948] 1 KB 524, [1948] 1 All ER 248.

7 *Barnes v City of London Real Property Co* [1918] 2 Ch 18. The diminution in value is not, however, necessarily the measure of damages: see *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *Wallace v Manchester City Council* [1998] 3 EGLR 38, [1998] All ER (D) 322, CA; applied in *Shine v English Churches Housing Group* [2004] EWCA Civ 434, [2004] HLR 727, [2004] All ER (D) 125 (Apr) (award in favour of secure weekly tenant reduced as rent lower than if paying on open market) and *Earle v Charalambous* [2006] EWCA Civ 1090, [2006] All ER (D) 430 (Jul).

8 A court has no jurisdiction to grant an injunction restraining a tenant beyond the term of the tenancy: *Medina Housing Association Ltd v Case* [2002] EWCA Civ 2001, [2003] 1 All ER 1084, [2003] HLR 536. See generally CIVIL PROCEDURE vol 11 (2009) PARAS 448, 460.

9 *Doherty v Allman* (1878) 3 App Cas 709, HL.

10 *Talbot v Ford* (1842) 13 Sim 173.

11 *Doherty v Allman* (1878) 3 App Cas 709, HL; *Kehoe v Marquess of Lansdowne* [1893] AC 451, HL.

12 *Murray v Dunn* [1907] AC 283, HL.

13 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, HL.

14 *Johnstone v Hall* (1856) 2 K & J 414; and see CIVIL PROCEDURE vol 11 (2009) PARA 455. As to the distinction between 'trade' and 'business' see PARA 501 post; and as to the general principles governing covenants in restraint of trade and the extent to which they are enforceable by the courts see COMPETITION vol 18 (2009) PARA 377 et seq.

15 *Parker v Whyte* (1863) 1 Hem & M 167 (auctioneer); *Holloway Bros Ltd v Hill* [1902] 2 Ch 612 (tailor); and see *Treacher & Co Ltd v Treacher* [1874] WN 4 (covenant not to carry on a specified trade, retail).

16 *Chapman v Mason and Liniline Co* (1910) 103 LT 390 (covenant not to carry on any dangerous trade or occupation).

17 *Clements v Welles* (1865) LR 1 Eq 200; and see *Brigg v Thornton* [1904] 1 Ch 386, CA.

18 *Courage & Co Ltd v Carpenter* [1910] 1 Ch 262; *Earl of Zetland v Hislop* (1882) 7 App Cas 427, HL (cited in PARA 503 note 2 post). As to covenants affecting the use of licensed premises generally see PARA 543 et seq post.

19 *Haigh v Waterman* (1867) 16 LT 375; *De Nichols v Abels* [1869] WN 14; *Brocklesby v Munn* [1870] WN 42; and see PARA 469 notes 6, 8 post.

20 *Evans v Davis* (1878) 10 ChD 747; *Moore v Ullcoats Mining Co Ltd* [1908] 1 Ch 575.

21 *Collins v Slade* (1874) 23 WR 199 (premises used as a place of public entertainment); *Tod-Heatly v Benham* (1888) 40 ChD 80, CA (hospital); *Wood v Cooper* [1894] 3 Ch 671 (trellis screen); *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, [1968] 3 All ER 545 (music in a restaurant).

22 *McEacharn v Colton* [1902] AC 104, PC.

23 *Lord Grey de Wilton v Saxon* (1801) 6 Ves 106; *Fleming v Snook* (1842) 5 Beav 250; *Lybbe v Hart* (1885) 29 ChD 8, CA; *Chapman v Smith* [1907] 2 Ch 97; and see AGRICULTURAL LAND vol 1 (2008) PARA 362.

24 *Barret v Blagrove* (1800) 5 Ves 555; and see CIVIL PROCEDURE vol 11 (2009) PARA 455.

25 See generally SPECIFIC PERFORMANCE.

26 *Hill v Barclay* (1810) 16 Ves 402.

27 *Barnes v City of London Real Property Co* [1918] 2 Ch 18; but cf *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513; and PARA 171 post.

28 *Molyneux v Richard* [1906] 1 Ch 34.

29 *Carpenters Estates Ltd v Davies* [1940] Ch 160, [1940] 1 All ER 13.

30 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL; *Braddon Towers Ltd v International Stores Ltd* (1979) reported in [1987] 1 EGLR 209; *FW Woolworth plc v Charwood Alliance Properties Ltd* [1987] 1 EGLR 53.

31 See *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97; the Landlord and Tenant Act 1985 s 17; and PARA 454 post.

32 See PARA 454 post (repairing covenants); paras 518-519 post (covenant for quiet enjoyment); para 534 post (covenant for insurance); para 497 post (covenant as to user); para 539 post (covenant for renewal); para 494 post (covenant against assignment); para 650 post (covenant to deliver up possession). As to the extent to which assignees of the lease or the reversion are bound by covenants see PARA 554 et seq post.

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### **(iii) Options**

#### **A. OPTION TO PURCHASE**

##### **135. Nature of option to purchase.**

A lease may confer upon the tenant an option to purchase the landlord's interest in the demised premises<sup>1</sup>. The option usually takes the form of a covenant by the landlord that, if the tenant within a specified period gives to the landlord written notice of a specified length of his desire to purchase the fee simple or other interest of the landlord in the premises, the landlord will on payment of a specified purchase price, and of any arrears of rent, convey the demised premises to the tenant<sup>2</sup>. Such an option is collateral to, independent of, and not incident to, the relation of landlord and tenant<sup>3</sup>. It is not, therefore, one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the original lease<sup>4</sup> or ordered to be included in a new business lease granted pursuant to an order of the court<sup>5</sup>; and, when the parties agree that a lease is to be extended, unless it is clearly shown that it was their intention that the option to purchase should continue throughout the extended period, it will not be deemed to be one of the terms of the extended tenancy<sup>6</sup>. An option to purchase may, however, be so worded that the benefit of it passes on an assignment of the property comprised in and demised by the lease notwithstanding the omission of any reference in the assignment to the option<sup>7</sup>. It has not yet been determined whether, in the absence of such wording in the option and of any reference to it in the assignment, the benefit of an option to purchase passes on an assignment of the lease<sup>8</sup>.

The rule against perpetuities does not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary, whether directly or indirectly, on the term of a lease if:

303 (1) the option is exercisable only by the lessee or his successors in title; and

304 (2) it ceases to be exercisable at or before the expiration of one year following the determination of the lease<sup>9</sup>.

If these conditions are not satisfied, the rule against perpetuities does apply and the perpetuity period is 21 years<sup>10</sup>. Where a disposition inter vivos would fall to be treated as void for remoteness if the rights and duties thereunder were capable of transmission to persons other than the original parties and had been so transmitted, it is treated as void as between the person by whom it was made and the person to whom or in whose favour it was made or any successor of his; and no remedy lies in contract or otherwise for giving effect to it or making restitution for its lack of effect<sup>11</sup>.

Subject to the rule against perpetuities, an option may be phrased so as to be binding on the landlord's successors in title. If the option is not phrased so as to be binding on the landlord's successors in title, it does not run with the land and may be enforced only against the landlord and his personal representatives<sup>12</sup>.

An option to purchase, or to renew, is registrable as an estate contract<sup>13</sup>. If the land is registered land, the option may be enforceable against a purchaser of the reversion, even though it has not been protected by entry of notice or otherwise upon the registers, as an interest overriding first registration or a registered disposition<sup>14</sup>.

A tenant who remains in occupation of the demised premises pending the exercise by him of an option to purchase does so as tenant and not solely as potential purchaser so that he is obliged to pay rent<sup>15</sup> unless, as is often the case, on the particular wording of the option clause the exercise of the option itself operates as a surrender of the tenancy<sup>16</sup>.

1 In addition, where the tenancy is a long tenancy at a low rent, the Leasehold Reform Act 1967 confers on certain tenants the right to acquire the freehold: see PARA 1389 et seq post. As to the right to collective enfranchisement exercisable by certain tenants of flats see PARA 1532 et seq post; and as to the right to buy exercisable by secure tenants see PARA 1795 et seq post.

2 The absence of a specified purchase price and of detailed provisions for fixing the purchase price may not prevent a valid exercise of the option: see *Grimes (AP) Ltd v Grayshott Motor Co Ltd* [1967] EGD 82. Cf *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426 (option for renewal of lease); *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803 (right of pre-emption); *Brown v Gould* [1972] Ch 53 at 58, [1971] 2 All ER 1505 at 1509, dicta of Megarry J; and see further SALE OF LAND. For methods of valuing the interest to be purchased see *Grimes (AP) Ltd v Grayshott Motor Co Ltd* supra; cf *Re Nagel's Lease, Allen v Little Abbey School (Newbury) Ltd* [1974] 3 All ER 34, [1974] 1 WLR 1077. Unless there are indications to the contrary, the court will infer that the price is to be determined by reference to the open market value of the premises subject to the existing lease. As to the enforcing by a local authority of an option to purchase where the contract granting the option was not a reasonable bargain see *Re Staines UDC's Agreement, Triggs v Staines UDC* [1969] 1 Ch 10, [1968] 2 All ER 1. For a case where the lessees' right of first refusal was not triggered see *McLachlan v Mercury Geotherm Ltd (in receivership)* [2006] UKPC 27, [2006] All ER (D) 318 (May).

3 *Woodall v Clifton* [1905] 2 Ch 257 at 279, CA, per Romer LJ; *Sherwood v Tucker* [1924] 2 Ch 440, CA. An option is a right of property in the widest sense of the expression and is in principle capable of assignment: *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708 (where *Griffith v Pehon* [1958] Ch 205, [1957] 3 All ER 75, CA and *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549 (affd [1961] Ch 105, [1961] 1 All ER 90, CA) were considered). See further SALE OF LAND.

4 *Re Leeds and Batley Breweries Ltd and Bradbury's Lease, Bradbury v Grimble & Co* [1920] 2 Ch 548. In this respect such an option differs from an option to renew, the exercise of which is not limited to a particular period, for such an option to renew is exercisable so long as the relationship of landlord and tenant continues: see PARA 140 post. An option to purchase the freehold 'at any time' may be construed restrictively to mean 'at any time during the contractual term'; and, therefore, a statutory tenant may not be able to exercise such an option: *Longmuir v Kew* [1960] 3 All ER 26, [1960] 1 WLR 862.

5 Pursuant to the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 752 post.

6 *Sherwood v Tuckey* [1924] 2 Ch 440, CA. In such an agreement the word 'lease' prima facie refers to the relationship of landlord and tenant, as a document cannot be extended; but, in the case of an agreement to execute a new lease, the word 'lease' prima facie refers to the document creating the relationship, so that an option to purchase contained in the old document will be incorporated in the new lease: *Batchelor v Murphy* [1925] Ch 220, CA (affd [1926] AC 63 HL); *Hill v Hill* [1947] Ch 231, [1947] 1 All ER 54, CA.

7 *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA (definition of 'lessee' in lease included assigns; option assignable to assignee of the lease); *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA. In the former case, as the parties were in doubt whether the benefit of the option had passed with the property on the assignment, the original tenant purported to assign it expressly by a subsequent deed to the assignee of the lease, and the Court of Appeal decided that, if (contrary to its decision) the assignment of the lease was not effectual to pass the option, it would remain vested in the original tenant, who would be competent to assign it to the assignee of the lease.

8 The point was left open in *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708, where it was suggested that where, in a lease conferring on the tenant an option to purchase, 'the tenant' is expressly defined as including his executors, administrators and assigns, the description may limit the possible assignees to persons who are assignees of the term, but that in the absence of that description the option is assignable to anyone.

9 Perpetuities and Accumulations Act 1964 s 9(1). Section 9(1) applies in relation to an agreement for a lease as it applies in relation to a lease; and 'lessee' is to be construed accordingly: s 9(1).

10 See *ibid* s 9(2); and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1037. Section 9(2) does not, however, apply to a right of pre-emption conferred on a public or local authority in respect of land used or to be used for religious purposes where the right becomes exercisable only if the land ceases to be used for those purposes: s 9(2) proviso.

11 See *ibid* s 10; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1036-1037.

12 *Woodall v Clifton* [1905] 2 Ch 257, CA; *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 84, CA; and see *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881.

13 *le* under the Land Charges Act 1972 s 2(1), (4), Class C(iv) (see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632), although there is no duty on the tenant so to register it (*Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549; *affd* on another point [1961] Ch 105, [1961] 1 All ER 90, CA). The failure of the tenant so to register does not determine the original landlord's contractual liability. The tenant may sue the original landlord for damages if the assignee of the reversion refuses to sell the property when called upon to do so: *Wright v Dean* *supra*. Once an option is registered, a later potential purchaser from the grantor is sufficiently warned by that registration; additional registration of the contract of sale resulting from the exercise of the option is not required: *Armstrong & Holmes Ltd v Holmes* [1994] 1 All ER 826, [1993] 1 WLR 1482.

14 See *Webb v Pollmount Ltd* [1966] Ch 584, [1966] 1 All ER 481; and LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962.

15 *Dockerill v Fitzpatrick* [1989] 1 EGLR 1 at 2, CA, where the general rule is stated by Glidewell J but without apparent reference to the authorities cited in PARAS 136-138 *post*.

16 See PARAS 136 the text and notes 7-8, 138 the text and note 1 *post*.

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### 136. Conditions precedent to exercise of option.

Any matters which by the terms of the option are made conditions precedent to its exercise must be strictly observed<sup>1</sup>. Thus, the notice must be given within the specified period<sup>2</sup>; and, if payment of the purchase money at the expiration of the notice is made a condition precedent, the payment must be duly made<sup>3</sup>. It is not essential that the tenant is to have performed all the stipulations of the lease, unless that performance is made a condition precedent<sup>4</sup>. If performance of the covenants is made a condition precedent, the tenant satisfies the condition if there are no subsisting breaches of covenant<sup>5</sup> at the operative date<sup>6</sup>.

Provided that at the time when the option is exercised the lease is still current, that is to say it has not already been determined for breach of covenant, the exercise of the option creates the relationship of vendor and purchaser. Whether the exercise of the option operates to determine or merely suspend the parties' rights as landlord and tenant, or creates new legal rights co-existent therewith, depends on the parties' intentions<sup>7</sup>. Thus, where the option provides for interest on the purchase money to be paid as from the date of the exercise of the option or some other date, the intention to determine the lease at that date may be inferred<sup>8</sup>.

1 This rule is applicable to options of all sorts, including options to renew and determine leases (see PARA 139 et seq post): see *Finch v Underwood* (1876) 2 Ch D 310; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA; *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA. See also, however, *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL, cited in PARA 142 the text and note 4 post.

2 In the case of an option time is of the essence of the contract: *Lord Ranelagh v Melton* (1864) 2 Drew & Sm 278; and see the general observations of the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council*, *Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL, where rent review clauses were distinguished as not being options at all, so that in respect of those clauses time was not of the essence (see PARA 295 post). See also *Riddell v Durnford* (1893) 37 Sol Jo 267 (six calendar months' previous written notice held to mean at least six months' notice expiring before the date of purchase). The landlord may, however, by his conduct waive the delay: *Pegg v Wisden* (1852) 16 Beav 239. For other examples of judicial construction of provisions as to time see *Wheatley v Burrell Enterprises Ltd* [1963] EGD 393, CA; *Page v Mallow Investments Ltd* (1974) 29 P & CR 168; *Afford v Till* (1989) 60 P & CR 21, [1990] 2 EGLR 44, CA (tenant held able to exercise option to purchase by service of a notice, even though he had failed to comply with the conditions for the exercise of the option after service of an earlier notice, there being no provision, or grounds for implying such a provision, limiting the tenant to a single attempt at exercising the option); *E Alton & Co Ltd v Orchard Development Holdings Ltd* [1998] JPL 1138, CA (condition requiring submission of planning application and payment of relevant fee not complied with in time; option to purchase lapsed).

It is not necessary for a solicitor's letter referring to the option and purporting to exercise it to make specific reference to the notice period required: see *Taylor v Crotty* [2006] All ER (D) 32 (Oct), CA.

3 *Lord Ranelagh v Melton* (1864) 2 Drew & Sm 278; *Weston v Collins* (1865) 34 LJ Ch 353; *Dawson v Dawson* (1837) 8 Sim 346; *Brooke v Garrod* (1857) 3 K & J 608 (affd 2 De G & J 62) (option of purchase in a will); *Afford v Till* (1989) 60 P & CR 21, [1990] 2 EGLR 44, CA (payment of deposit required within three months after giving of notice). It is otherwise if payment is not a condition precedent: *Mills v Haywood* (1877) 6 ChD 196; *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA.

4 Thus, the option may be exercised notwithstanding that there has been a breach by the tenant of a covenant to insure: *Green v Low* (1856) 22 Beav 625. Where the option is subject to a condition that the tenant in the meantime is to have 'duly' paid his rent, 'duly' does not mean punctually; and, if all rent is paid up to the exercise of the option, delay in payment is immaterial: *Starkey v Barton* [1909] 1 Ch 284. If performance of the covenants is made a condition precedent, the condition will be construed strictly: see *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA; *Bairstow Eves (Securities) Ltd v Ripley* (1992) 65 P & CR 220, [1992] 2 EGLR 47, CA (covenant to paint internally and externally in last 12 months before end of term not complied with by painting 20 and 17 months before end of term).

5 A subsisting breach is one in respect of which the landlord has a cause of action based upon a breach, whether for forfeiture or damages or both: *Bass Holdings Ltd v Morton Music Ltd* [1988] Ch 493 at 511 at 517, [1987] 2 All ER 1001 at 1005, CA, per Kerr LJ and at 528 and 1013 per Nicholls LJ. A breach which is not subsisting is spent; but spent breaches do not destroy the tenant's right to exercise the option, whether the spent breaches were of positive or negative covenants: *Bass Holdings Ltd v Morton Music Ltd* supra. If breaches are otherwise to be regarded as spent, they will not be treated as subsisting breaches merely because a right to claim nominal damages is not yet statute-barred; but, if only nominal damages are recoverable for the breach, this does not exclude the breach from being taken into account as a subsisting breach: *Bairstow Eves (Securities) Ltd v Ripley* (1992) 65 P & CR 220 at 226, CA, per Scott LJ. Where, however, the tenant was required to have 'reasonably performed and observed' the covenants up to the operative date, the word 'reasonably' gives the court a discretion and then the tenant's past conduct may be considered: *Bassett v Whiteley* (1982) 45 P & CR 87, CA.

6 *Bass Holdings Ltd v Morton Music Ltd* [1988] Ch 493 at 511, [1987] 2 All ER 1001, CA.

7 *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA; *Doe d Gray v Stanion* (1836) 1 M & W 695; *Raffety v Schofield* [1897] 1 Ch 937; *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Watney v Boardley* [1975] 2 All ER 644, [1975] 1 WLR 857; cf *Dockerell v Fitzpatrick* [1989] 1

EGLR 1, CA (tenant who remained in occupation of land after exercise of option to purchase held entitled, pending conveyance, to occupy only as tenant and not as potential purchaser and thus remained liable to pay rent until completion).

8 *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA; *Turner v Watts* (1927) 44 TLR 105 (affd (1928) 97 LJB 403, CA).

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### 137. How and by whom option exercisable.

The terms of the option usually require that it is to be exercised in writing; but this requirement, even where not expressed, is implied, as it is the intention that the resulting contract is to be binding on both parties<sup>1</sup>. An option may be exercised by service of a notice signed by the grantee only notwithstanding the statutory requirements<sup>2</sup> requiring a contract for the sale or other disposition of an interest in land to be signed by or on behalf of each party to the contract<sup>3</sup>. If the option is given to the tenant and his assigns, it is exercisable only by the person in whom the term is vested, and consequently cannot be exercised by an equitable assignee of the term<sup>4</sup>. On the tenant's death the benefit of the option passes with the lease to his personal representative<sup>5</sup>. Where the lease is granted by trustees, notice must be given to all the trustees or their survivors<sup>6</sup>. An option granted to an intending assignee of a lease made by deed to which the intending assignee is not a party may be enforced by the intending assignee<sup>7</sup>.

If the circumstances show that the parties must have contemplated that the postal service might be used as a means of communicating on all subjects connected with the option agreement, the option is validly exercised as soon as a notice of acceptance is posted<sup>8</sup>; but the mere posting of such a notice is not sufficient if the terms of the agreement indicate that acceptance must actually be communicated to the offeror<sup>9</sup>.

1 *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421 at 434. The parties may waive this requirement: see *Beatson v Nicholson* (1842) 6 Jur 620. Notwithstanding the obvious or evident error in a tenant's notice, the notice is valid if when read in its context it is sufficiently clear to leave a reasonable recipient in no reasonable doubt as to its terms: see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; and see eg *Peaceform Ltd v Cussens* [2006] All ER (D) 174 (Oct), where this test was not satisfied because the expiry date of the notice period was neither clearly defined, nor clear from the context.

2 The Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

3 *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600 (it was sufficient that the original grant of the option did comply with the necessary formal requirements).

4 *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 1 Ch 86 (although the landlord may waive strict compliance with the terms of the option; revsd on facts [1899] 2 Ch 261, CA); *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA.

5 *Re Adams and Kensington Vestry* (1884) 27 ChD 394, CA.

6 *Sutcliffe v Wardle* (1890) 63 LT 329. As to the grant of an option of purchase by personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 438 et seq; and as to companies and corporations see *Clay v Rufford* (1852) 5 De G & Sm 768; *Re Female Orphan Asylum* (1867) 17 LT 59. It was held that, where the landlord had died, the notice might be served on his minor heir: *Woods v Hyde* (1862) 31 LJ Ch 295.

7 *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59.

8 *Bruner v Moore* [1904] 1 Ch 305.

9 *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA.

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### **138. Effect of exercise of option.**

Where the option is duly exercised, a contract arises for the sale and purchase of the demised premises and the usual consequences of such a contract follow<sup>1</sup>. The tenant is not, on the exercise of the option, entitled to the benefit of the landlord's insurance policy; but, where the option is exercised on the understanding that the landlord will rebuild premises which have been damaged by fire, and the landlord defaults on that understanding, the landlord is not entitled to specific performance<sup>2</sup>. The exercise of an option to purchase all the estate, interest and title vested in the landlord at the date of the lease does not entitle the tenant to demand that the landlord is to redeem a mortgage made before the grant of the lease<sup>3</sup>. The landlord must, however, discharge incumbrances incurred after the date of the lease even when the tenant has agreed to accept the landlord's title<sup>4</sup>.

1 *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA (relationship of landlord and tenant ceased on expiration of notice exercising the option; no rent payable thereafter); *Watney v Boardley* [1975] 2 All ER 644, [1975] 1 WLR 857. It is a question of the construction of the contract in each case to decide whether the exercise of the option puts an end to the relationship of landlord and tenant as soon as the option is exercised (or on the contractual completion date as in *Watney v Boardley* supra), or whether the relationship of vendor and purchaser co-exists with that of landlord and tenant so that the relationship of landlord and tenant may survive the determination of the contract to purchase. Cf *Dockerill v Fitzpatrick* [1989] 1 EGLR 1, CA (cited in PARA 135 note 15 ante). As to conversion see EQUITY vol 16(2) (Reissue) PARAS 713-717; and as to valuation on the exercise of an option to purchase the freehold see *Little Hayes Nursing Homes Ltd v Marshall* (1993) 66 P & CR 90.

2 *London Holeproof Hosiery Co Ltd v Padmore* (1928) 44 TLR 499, CA.

3 *Fowler v Willis* [1922] 2 Ch 514.

4 *Re Crosby's Contract, Crosby v Houghton* [1949] 1 All ER 830 (a provision that the tenant should 'accept without objection the title of the landlord' held to refer to the landlord's title at the date of the grant of the lease and not at the date of the exercise of the option).

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## **B. OPTION TO RENEW LEASE**

### **139. Option for further lease.**

A lease which creates a tenancy for a term of years may confer on the tenant an option to take a lease for a further time<sup>1</sup>. Such an option constitutes an offer which the landlord is contractually precluded from withdrawing so long as the option remains exercisable<sup>2</sup>; and it

may be possible to exercise the option by conduct<sup>3</sup>. The option may be so phrased that the tenant is entitled to a fresh lease containing all the terms, including the option to renew, contained in his original lease, in which case the lease is perpetually renewable<sup>4</sup>. Unlike an option to purchase, an option to renew is never affected by the rule against perpetuities, even though the new lease is not to be in terms similar to those of the original one<sup>5</sup>. An option to renew runs with the land and with the reversion, and so both the landlord's and the tenant's successors in title are bound<sup>6</sup>. It is an interest in land capable of assignment<sup>7</sup>; and, on the tenant's bankruptcy, the option vests in his trustee in bankruptcy<sup>8</sup>. A covenant to pay a sum if the tenant does not exercise an option to renew does not run with the land and cannot be enforced against the landlord's assignee<sup>9</sup>. An option to renew, like an option to purchase is, however, registrable as an estate contract under the Land Charges Act 1972<sup>10</sup>.

1 *Moss v Barton* (1866) LR 1 Eq 474; *Austin v Newham* [1906] 2 KB 167, DC. Similarly a lease for a fixed term may contain an option for a further yearly tenancy with the same covenants (*Brown v Trumper* (1858) 26 Beav 11; *Jones v Nixon* (1862) 1 H & C 48), and vice versa (*Hersey v Giblett* (1854) 18 Beav 174 (term held to run from the commencement of the yearly tenancy)); but the right to the lease may be lost by delay (*Nunn v Truscott* (1849) 3 De G & Sm 304). If the tenant continues in possession by himself or his undertenant after the original term without exercising his option, he is liable for the rent in a claim for use and occupation: *Christy v Tancred* (1840) 7 M & W 127; *Waring v King* (1841) 8 M & W 571. If the lease does not state by whom the option is to be exercisable, it is exercisable by the tenant only: *Lewis v Stephenson* (1898) 67 LJQB 296. As to the right to acquire an extended lease, where the tenancy is a long tenancy at a low rent, under the Leasehold Reform Act 1967 see PARA 1389 et seq post; and as to the right to acquire a new lease under the Leasehold Reform, Housing and Urban Development Act 1993 see PARA 1671 et seq post. Some modern leases also contain 'put' options whereby the landlord is able to require the tenant to take up a new lease. As to options generally see CONTRACT vol 9(1) (Reissue) PARA 640.

2 *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549 (affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA); *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd, United Dominion Trust (Commercial) Ltd v Eagle Aviation Ltd* [1968] 1 All ER 104, [1968] 1 WLR 74, CA ('put' option relating to aircraft). For an analysis of options and a review of case law thereon see *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd, United Dominion Trust (Commercial) Ltd v Eagle Aviation Ltd* supra at 105-108 and at 78-82 per Lord Denning MR. 'The commonest contracts of this kind [ie 'unilateral' or 'if' contracts] in English law are options for good consideration to buy or to sell or to grant or to take a lease. ... A unilateral contract does not give rise to any immediate obligation on the part of either party to do or to refrain from putting it out of his power to perform his undertaking in the future. This apart, a unilateral contract may never give rise to any obligation on the part of the promisor; it will only do so on the occurrence of the event specified in the contract, viz the doing (or refraining from doing) by the promisee of a particular thing': *United Dominion Trust (Commercial) Ltd v Eagle Aircraft Services Ltd, United Dominion Trust (Commercial) Ltd v Eagle Aviation Ltd* at 109 and at 83 per Diplock LJ. Cf the observations of Hoffmann J in *Spiro v Glencrown Properties Ltd* [1991] Ch 537 at 544, [1991] 1 All ER 600 at 605-606 ('An option is not strictly speaking either an offer or a conditional contract. It does not have all the incidents of the standard form of either of these concepts. To that extent it is a relationship sui generis. But there are ways in which it resembles each of them. Each analogy is in the proper context a valid way of characterising the situation created by an option').

3 *Gardner v Blaxill* [1960] 2 All ER 457, [1960] 1 WLR 752 (an option to continue for an extension of seven or 14 years should be construed as an option to extend for a term of 14 years with a break after seven years).

4 *Hare v Burges* (1857) 4 K & J 45; *Parkus v Greenwood* [1950] Ch 644, [1950] 1 All ER 436, CA (covenant to renew 'including this clause'); and see *Hughes v Hughes, Dickson & Co* [1923] 1 IR 121, Ir CA; *Re Hopkins's Lease, Caerphilly Concrete Products Ltd v Owen* [1972] 1 All ER 248, [1972] 1 WLR 372, CA. The court leans against construing a lease as perpetually renewable: see *Marjorie Burnett Ltd v Barclay* (1980) 125 Sol Jo 199. As to covenants for perpetual renewal see PARAS 540-542 post.

5 *Woodall v Clifton* [1905] 2 Ch 257 at 263, CA, per Warrington J; *Rider v Ford* [1923] 1 Ch 541; *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA.

6 *Isteed v Stoneley* (1580) 1 And 82; *Earl Brook v Bulkeley* (1754) 2 Ves Sen 498; *Roe d Bamford v Hayley* (1810) 12 East 464; *Lewis v Stephenson* (1898) 67 LJQB 296; *Woodall v Clifton* [1905] 2 Ch 257, CA; *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA. See, however, *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, [1996] 4 LRC 417, PC (lessee precluded from asserting option to renew an original lease, and the legal estate that flowed from that right, against a squatter who had continued in adverse possession of the property for the prescribed period). As to the passing of the benefit and burdens of covenants, and the benefit of tenant's covenants running with the reversion, see PARA 554 et seq post.



7 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 423, HL.

8 *Buckland v Papillon* (1866) 2 Ch App 67.

9 *Re Hunter's Lease, Giles v Hutchings* [1942] Ch 124, [1942] 1 All ER 27.

10 See PARA 77 the text and notes 8-9 ante; and see *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549; affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA; followed in *Phillips v Mobil Oil Co Ltd* [1989] 3 All ER 97, [1989] 1 WLR 888, CA; *Markfaith Investments Ltd v Chiap Hua Flashlights Ltd* [1991] 2 AC 43, [1990] 2 WLR 1451, PC (purchaser of the reversion took free of the option, even though the contract for sale was expressed to be subject to the lease containing the option). Cf *Webb v Pollmount Ltd* [1966] Ch 584, [1966] 1 All ER 481; *Lyus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044 (sale expressly subject to an existing estate contract held to give rise to a constructive trust binding on the purchaser); and see PARA 135 notes 13-14 ante. See further LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632; LAND REGISTRATION. A landlord may, however, be estopped from relying on the failure to register: see *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897; but cf *Beesly v Hallwood Estates* [1960] 2 All ER 314, [1960] 1 WLR 549 (affd [1961] Ch 105, [1961] 1 All ER 90, CA); and see *Lloyd's Bank plc v Carrick* [1996] 4 All ER 630 at 641, 73 P & CR 314 at 325, CA, per Morritt LJ; and ESTOPPEL vol 16(2) (Reissue) PARA 960.

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#### 140. Exercise of option.

A tenant who wishes to exercise an option to renew must conform with the conditions in the lease as to its exercise<sup>1</sup>, and those conditions will be strictly construed<sup>2</sup>. In general the option must be exercised by a notice given at or before the stated time before the termination of the lease<sup>3</sup>. If the tenant purports to exercise the option by a notice given before such a stated time, he must do so at a reasonable time before that stated time<sup>4</sup>. If no time is stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists, even though the original term has expired<sup>5</sup>; but a landlord who has power to determine the tenancy at the end of some period prior to that at which the exercise of the option takes effect may lawfully do so at that time, notwithstanding that the tenant has given notice of his intention to exercise the option<sup>6</sup>.

If the option does not state the terms of renewal, the new lease will be for the same period and on the same terms as the original lease, so far as those terms arise out of the relationship of landlord and tenant<sup>7</sup>, but more often the clause which contains the option will specify machinery and/or a formula for the determination of the new rent (and, rarely, the new terms) for the new lease. The absence of any specified machinery for settling the new rent is not fatal if there is a formula to determine the new rent which the court can apply<sup>8</sup>.

In most cases, a contract for the renewal of a lease for a term exceeding 60 years from the termination of the lease is void<sup>9</sup>. Covenants to renew are collateral to the relationship of landlord and tenant and will not be incorporated in the new lease unless it is clearly shown that that was the parties' intention<sup>10</sup>.

1 Thus, an option to take a lease at a specified rent is not validly exercised by a notice demanding a lease at some lower rent: *Mauray v Durley Chine (Investments) Ltd* [1953] 2 QB 433, [1953] 2 All ER 458, CA. See also *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642 (option to renew at 'the commercial yearly rack rent' not rendered unenforceable merely because the maximum rent lawfully recoverable was controlled by statute).

2 If the option is exercisable only on condition that the tenant has performed the covenants of the lease, any subsisting breach of covenant at the operative date will prevent its exercise, even though trivial and the

landlord has been silent as to the breach: *Bass Holdings Ltd v Morton Music Ltd* [1988] Ch 493 at 511, [1987] 2 All ER 1001, CA; *Bairstow Eves (Securities) Ltd v Ripley* (1992) 65 P & CR 220, [1992] 2 EGLR 47, CA; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA; *West Country Cleaners (Falmouth) v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA. Cf *Gardner v Blaxill* [1960] 2 All ER 457, [1960] 1 WLR 752. See further PARA 539 post. For the meaning of 'subsisting breach of covenant' see PARA 136 note 5 ante.

3 In *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600 it was held that an option to renew required by the terms of the lease to be exercised by service of notice on the landlord could be validly exercised by service of notice signed by the grantee only without its having to be countersigned by the grantor notwithstanding the statutory requirement that a contract for the sale or other disposition of an interest in land must be signed by or on behalf of each party to the contract: see PARA 79 ante. It is sufficient that the original grant of the option satisfies the necessary statutory formalities.

4 *Biondi v Kirklington and Piccadilly Estates Ltd* [1947] 2 All ER 59; *Multon v Cordell* [1986] 1 EGLR 44 (in the case of a term of 35 years a request to renew was to be given three months before the expiry of the term, which would have been Christmas 1983; a request made in January 1981 was held not to be made at a reasonable time).

5 *Moss v Barton* (1866) LR 1 Eq 474; *Rider v Ford* [1923] 1 Ch 541.

6 *Stewart v Massett* (1924) 132 LT 301.

7 *Lewis v Stephenson* (1898) 67 LJQB 296 (following the dictum of Lord Abinger CB in *Price v Assheton* (1834) 1 Y & C Ex 82 at 92, the tenant was held to be entitled to a renewal for the same period); but see *Austin v Newham* [1906] 2 KB 167 (the tenant had a tenancy for 12 months and an option for a lease; he was held to be entitled to a lease for a further period of at least a year, if not a lease for his life).

8 *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505; *Lear v Blizard* [1983] 3 All ER 662 (tenant's option to renew provided for the rent under the new lease to be agreed between the parties or, in default of agreement, determined by an arbitrator; the rent determined by the arbitrator was held to be a fair rent for the particular landlord and the particular tenant, account being taken of all considerations which would affect the mind of either party to negotiations between them; no consideration whether option void for uncertainty); *ARC Ltd v Schofield* [1990] 2 EGLR 52 (option to renew 'at such rent as may be agreed between the landlords and the tenant, being a fair and reasonable market rent at that time' held to require determination of a 'rent at which the demised premises might reasonably be expected to be let in the open market' on the material date; no consideration of whether option void for uncertainty). Cf *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426 (option to renew 'at such rental as may be agreed' held to be void for uncertainty); doubted in *Corson v Rhuddlan Borough Council* (1989) 59 P & CR 185, [1990] 1 EGLR 255, CA (option to renew at 'a rental to be agreed [but not to exceed £1,150 per annum]' upheld, it being open to the court to imply a term that the rent was to be a fair rent with a specified upper limit).

If the machinery which the parties have provided for determining the rent payable fails, the court may substitute its own machinery: *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL. See also *Booker Industries Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 43 ALR 68 (similar result).

In *Rothwell v Wakeling* (1974) 29 P & CR 234 the words of an option to renew were held to mean that the tenant was entitled to a new lease at the same rent as in the previous lease. In *National Westminster Bank Ltd v BSC Footwear Ltd* (1980) 42 P & CR 90, [1981] 1 EGLR 89, CA, and *Bracknell Development Corp v Greenlees Lennards Ltd* (1981) 260 Estates Gazette 500, an option to renew 'at the then prevailing market rent' was held to require the determination of a single rent payable for the whole of the new term and did not empower the arbitrator to determine a rent subject to periodic review. See also *Plummer v Tibsco Ltd* [2002] EWCA Civ 102 [2002] 1 EGLR 29, [2002] 12 EG 137 (tenant compromised rights under original option to renew by entering new lease on different terms).

9 Law of Property Act 1922 s 145, Sch 15 para 7(2). A qualifying tenant of a flat has, however, the right to acquire a new lease for a term expiring 90 years after the term date of the existing lease: see the Leasehold Reform, Housing and Urban Development Act 1993 s 56; and PARA 1703 post.

10 *Lewis v Stephenson* (1898) 67 LJQB 296; and see *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd* [1969] 3 All ER 1441, [1970] 1 WLR 52. As to business leases renewable under the Landlord and Tenant 1954 Pt II (ss 23-46) (as amended) see PARA 701 et seq post.

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## C. OPTION TO DETERMINE LEASE

### 141. By whom option exercisable.

A lease for a term of years may contain an option for the parties<sup>1</sup> or one of them to determine the lease at a stated time or times, or on the happening of stated events, before the expiration of the term<sup>2</sup>. Usually such an option is expressly made exercisable by the tenant only; and, if the lease is silent as to the person who is to exercise it, it may be exercised only by the tenant<sup>3</sup>.

If the lease has been assigned, the option is exercisable by the person in whom the term is for the time being legally vested<sup>4</sup>. The option may not, therefore, be exercised by an equitable assignee<sup>5</sup>, or by a beneficiary of the person in whom the term is legally vested<sup>6</sup>, unless the beneficiary was duly authorised for that purpose<sup>7</sup>.

In the case of a lease to two or more joint tenants with a proviso enabling the tenants to determine the lease by notice in writing, a notice by one of the tenants without evidence of authority from the others is not sufficient<sup>8</sup>.

An option to determine the lease may be made personal to the original tenant and in such cases the right is not assignable<sup>9</sup>.

1 A lease which is determinable 'if the parties think fit' may be determined only by the consent of both parties: *Fowell v Tranter* (1864) 3 H & C 458; *Colton v Lingham* (1815) 1 Stark 39.

2 If the option is exercisable by the landlord, and the tenant sells and assigns the lease with a stipulation that the purchase money is to be returned if the landlord determines the lease and the assignee 'leaves the house', the money is returnable if the tenancy is legally determined, notwithstanding that the assignee in fact remains in the house as a member of the family of the new tenant: *Lucas v Rideout* (1868) LR 3 HL 153.

3 *Dann v Spurrier* (1803) 3 Bos & P 399, overruling on this point *Goodright d Hall v Richardson* (1789) 3 Term Rep 462; and see *Dann v Spurrier* (1802) 7 Ves 231 at 236; *Doe d Webb v Dixon* (1807) 9 East 15; *Price v Dyer* (1810) 17 Ves 356 at 363; *Fallon v Robins* (1865) 16 I Ch R 422; cf *Powell v Smith* (1872) LR 14 Eq 85. A lease for three, six or nine years is a lease for nine years determinable by the tenant at the end of three or six years: *Goodright d Hall v Richardson* supra; cf *Ferguson v Cornish* (1760) 2 Burr 1032; and see 3 Term Rep 463 note (a). See also *Lemmerbell Ltd v Britannia LAS Direct Ltd* [1998] 3 EGLR 67, [1998] 48 EG 188, CA (lease permitted exercise of option by tenant's successors in title; notice given by party erroneously described as such was invalid).

4 Consequently, if he cannot be found, neither the original tenant nor a previous assignee may determine the lease: *Seaward v Drew* (1898) 67 LJQB 322. It appears (for the report is scanty) that it was held in *Phippos v Callegari* (1910) 54 Sol Jo 635 that, if a tenant for a term of 21 years, determinable at the end of seven or 14 years at his option, sublets the premises for a term exceeding 14 years, he ceases to be entitled to give a valid notice determining his own lease; but it may be that the result of such a transaction is merely to expose the tenant to a claim by the subtenant to restrain the tenant from exercising the option, as to do so would derogate from the tenant's grant of the sub-term, or to a claim for damages for that derogation where the option had already been exercised. It is unclear what the effect of the grant of the sub-term is as between landlord and tenant in those circumstances: see *Bampton Property Group Ltd v Receiver for the Metropolitan Police District* (1972) 223 Estates Gazette 2135, CA, where *Phippos v Callegari* supra was considered although the report does not indicate this.

5 *Seaward v Drew* (1898) 67 LJQB 322.

6 *Stait v Fenner* [1912] 2 Ch 504.

7 *Jones v Phipps* (1868) LR 3 QB 567; and see *Brown v Peto* [1900] 1 QB 346, as reported in 16 TLR 131 at 132 per Bigham J; *Re Knight and Hubbard's Underlease, Hubbard v Highton* [1923] 1 Ch 130. As to service of a notice by an agent of the landlord see *Townsend's Carriers Ltd v Pfizer Ltd* (1977) 33 P & CR 361.

8 *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478 at 490, [1992] 1 All ER 1 at 9, HL, per Lord Bridge of Harwich; and see *Re Viola's Indenture of Lease, Humphrey v Stenbury* [1909] 1 Ch 244, distinguishing *Doe d Aslin v Summersett* (1830) 1 B & Ad 135.

9 *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* [2001] Ch 733, [1997] 1 EGLR 39, CA. However, the option remains exercisable until assignment of the legal estate, so that in the absence of registration of the assignment (or, in the case of unregistered land, the execution of the deed of assignment and the consequent conveyance of the legal estate) a notice to terminate may be served by the original tenant: *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd* supra.

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## 142. Conditions of option.

As the exercise of the option by the tenant nullifies the covenant to pay rent during the residue of the term, and may relieve him from liability under repairing covenants<sup>1</sup>, the requirements of the proviso conferring the option must be strictly observed<sup>2</sup>; but this is subject to the general rule now applicable to the validity of notices served by a landlord or tenant<sup>3</sup>, so that a notice exercising the option will be valid provided that, when it is construed objectively in its context, it would unambiguously inform a reasonable recipient how and when it is to operate<sup>4</sup>. If the terms of the option require that the tenant is to have paid all arrears of rent and performed the covenants on his part, the payment and performance are a condition precedent to the exercise of the option<sup>5</sup>, and must be fulfilled at the date of the determination of the term for the exercise of the option to be effective<sup>6</sup>. Where the option is to determine the lease for building or other purposes, there is no right to determine the lease if the landlord has no intention of using the land for those purposes<sup>7</sup>. The period when the lease may be determined is to be reckoned from the commencement of the term, not from the date of the lease<sup>8</sup>.

Where the break clause provides that the tenant can give notice of termination on a specified date if it has 'materially complied' with all its obligations, the test of material compliance is an objective one and materiality is to be assessed by reference to the ability of the landlord to relet or sell the property without delay or additional expenditure. Where the provision is absolute then any breach precludes an exercise of the break clause, but there is no justification for attributing to the parties an intention that the insertion of the word 'material' was intended to permit only breaches which were trivial or trifling<sup>9</sup>. A minor mistake in a notice seeking to operate a break clause will not render it ineffective to terminate the tenancy<sup>10</sup>.

1 *Dickinson v St Aubyn* [1944] KB 454, [1944] 1 All ER 370, CA (tenant who covenanted to paint in 'the last quarter of the said term' of seven years held not to be liable to paint on determination of the lease at the end of five years).

2 *Cadby v Martinez* (1840) 11 Ad & El 720 (notice given for Midsummer instead of Michaelmas). If, however, the meaning of a notice would be quite clear to a reasonable person reading it, the notice is valid, even if it contains a clerical error: *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573, [1976] 1 WLR 442. A break notice may be read together with a covering letter and if, from those documents, the notice is clear and no reasonable tenant would be misled, the notice is valid: *Keith Bayley Rogers & Co (a firm) v Cubes Ltd* (1975) 31 P & CR 412; *Germax Securities Ltd v Spiegel* (1978) 37 P & CR 204, CA. If the notice determining the lease is to be in writing, oral notice is not sufficient: *Legg d Scot v Benion* (1738) Willes 43. The notice may be in the form of a notice to quit (see PARA 221 post) referring to the determinable nature of the lease (*Giddens v Dodd* (1856) 3 Drew 485); or, in the case of a landlord's notice relating to business premises, in the form prescribed under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 post) (*Scholl Manufacturing Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41, [1966] 3 All ER 16, CA). See further the text and note 4 infra.

3 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; note 4 infra; and PARA 222 post.

4 *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL, applying the test suggested in *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573, [1976] 1 WLR 442, and

followed in *Garston v Scottish Widows Fund and Life Assurance Society* [1998] 3 All ER 596, [1998] 1 WLR 1583, CA; and *York v Casey* (1998) 31 HLR 209, [1998] 2 EGLR 25, CA (statutory notices); cf *Keepers and Governors of John Lyon Grammar School v Secchi* (1999) 32 HLR 820, [1999] 3 EGLR 49, CA. Subject to that, the date specified in the lease as the date by which the option to determine is to be exercised is of the essence of the contract: see *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 929, [1977] 2 All ER 62 at 71-72, HL, per Lord Diplock.

5 *Porter v Shephard* (1796) 6 Term Rep 665; *Grey v Friar* (1854) 4 HL Cas 565; *Stait v Fenner* [1912] 2 Ch 504; *Burch v Farrows Bank Ltd* [1917] 1 Ch 606; *Simons v Associated Furnishers Ltd* [1931] 1 Ch 379. In the last two cases it was held that the conditions did not cease to be conditions precedent by reason of the landlord's right to sue for breaches of covenant prior to the determination being preserved; and, even though in the absence of such a proviso it has been held that the landlord has a right to sue for those breaches (*Blore v Giulini* [1903] 1 KB 356), it is still open to doubt whether, if the effect of the determination is to render the lease void, any such right continues in the absence of such a proviso (*Burch v Farrows Bank Ltd* supra at 611). See also *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA; *Bass Holdings Ltd v Morton Music Ltd* [1988] Ch 493 at 511, [1987] 2 All ER 1001, CA; and the cases referred to in PARAS 136, 140 ante, PARA 515 post.

6 *Stait v Fenner* [1912] 2 Ch 504; *Burch v Farrows Bank Ltd* [1917] 1 Ch 606; *Simons v Associated Furnishers Ltd* [1931] 1 Ch 379; cf *Kirklington v Wood* [1917] 1 KB 332 (tenant, having exercised the option to determine without having performed the covenant to repair and gone out of possession, held liable to pay damages for the breach of the covenant).

7 *Southend-on-Sea Estates Co Ltd v IRC* [1914] 1 KB 515, CA; affd sub nom *IRC v Southend-on-Sea Estates Co Ltd* [1915] AC 428, HL. As a rule, however, the court has no concern with the motive which underlies the exercise of the option to determine: *Batty v Vincent and City of London Real Property Co Ltd* (1921) 90 LJ Ch 302; *Re Knight and Hubbard's Underlease, Hubbard v Highton* [1923] 1 Ch 130 at 139. Where the landlord has power to determine at the end of 14 years if he requires the premises for his business, he is entitled to determine although he requires only part of the premises at some time not precisely defined after the 14 years: *Parkinson v Barclays Bank Ltd* [1951] 1 KB 368, [1950] 2 All ER 936, CA. For cases relating to the landlord's intention to demolish or reconstruct premises, arising under the Landlord and Tenant Act 1954 s 30(1)(f) see PARAS 741-744 post; and as to notices exercising options to determine leases of land to which the Agricultural Holdings Act 1986 applies see s 25(1), (2); and AGRICULTURAL LAND vol 1 (2008) PARA 373 et seq.

8 *Bird v Baker* (1858) 1 E & E 12. See also *Trane (UK) Ltd v Provident Mutual Life Assurance* [1995] 1 EGLR 33, [1995] 03 EG 122.

9 See *Fitzroy House Epworth Street (No 1) Ltd v The Financial Times Ltd* [2006] EWCA Civ 329, [2006] 2 All ER 776, [2006] 1 WLR 2207. Cf *Legal and General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] 18 EG 151 (CS), [2006] All ER (D) 279 (Apr) (break clause enabled tenant to determine the lease on a specified date by giving not less than six months' prior notice, subject to certain conditions; after service of notice the dispute was settled on terms; held that this compromise agreement included recognition of the validity of the break notice and the landlord could not claim that a precondition had not been satisfied).

10 See *Peer Freeholds Ltd v Clean Wash International Ltd* [2005] EWHC 179 (Ch), [2005] 1 EGLR 47, [2005] All ER (D) 280 (Feb), applying *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL; and see PARA 221 note 8 post. Cf *Proctor & Gamble Technical Centres Ltd v Brixton Estates plc* [2002] EWHC 2835 (Ch), [2003] 2 EGLR 24, [2002] All ER (D) 305 (Dec) (notice purportedly served under break clause wrongly identified tenant; held that the notice was ineffective to determine the lease). See further PARA 222 note 1 post.

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### 143. Release of option.

If the option is contained in a lease made by deed, it may be released at law only by an instrument by deed<sup>1</sup>; but in equity the form of release is immaterial if it is made for value<sup>2</sup>. Under a power to surrender and deliver up the premises at stated periods a formal surrender is

not required<sup>3</sup>; and, although the notice of surrender is required to be in writing, the surrender may be proved by the tenant's oral admission<sup>4</sup>.

- 1 *Goodright d Nicholls v Mark* (1815) 4 M & S 30.
- 2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 151.
- 3 *Carleton v Herbert* (1866) 14 WR 772.
- 4 *Slatterie v Pooley* (1840) 6 M & W 664; *Martin v Doherty* (1880) 6 LR Ir 194.

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## **(7) VALIDATION OF DEFECTIVE LEASES**

### **144. Validation of defective leases in equity.**

In favour of a purchaser for value, equity will relieve against the defective execution of a power, although not against its non-execution<sup>1</sup>. For this purpose a lessee is a purchaser for value<sup>2</sup>. Consequently, where a lease is void at law through failure to comply with a mere formality required by the power, equity will relieve against the defect and will enforce the granting of a valid lease<sup>3</sup>. Upon the same principle a contract by a tenant for life to grant a lease under a power conferred by the settlement may be enforced after his death against the remainderman<sup>4</sup> or may be properly carried out by trustees<sup>5</sup>.

- 1 *Shannon v Bradstreet* (1803) 1 Sch & Lef 52 at 62; cf *Ellard v Lord Llandaff* (1810) 1 Ball & B 241. As to execution and attestation it is sufficient if the lease is by deed attested by two witnesses, notwithstanding that further or other formalities are required by the terms of the power: see the Law of Property Act 1925 s 159(1); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 48. Equity will not relieve against the defective execution of a power which is originally in its nature legal, such as a statutory power: *Earl of Darlington v Pulteney* (1775) 1 Cowp 260 at 267.
- 2 *Campbell v Leach* (1775) Amb 740 at 748; *Long v Rankin* (1822) Sugden on Powers (8th Edn) 895 at 900, HL, per Abbott CJ; *Re King's Leasehold Estates, ex p East of London Rly Co* (1873) LR 16 Eq 521 at 525; *Shepherd v Beetham* (1877) 6 ChD 597 (as to premium); cf *Donnell v Church and Clark* (1842) 4 I Eq R 630. A lessee at a rack rent is not perhaps entitled to the interposition of equity unless he has expended money on the estate or there are other special circumstances which would make it unjust to deprive him of the lease: see *Sugden on Powers* (8th Edn) 567.
- 3 *Doe d Collins v Weller* (1798) 7 Term Rep 478 at 480; *Clark v Smith* (1842) 9 Cl & Fin 126 at 141, HL. Where, however, a necessary consent has not been obtained, the court will not enforce an agreement for a lease under the power: *Lawrenson v Butler* (1802) 1 Sch & Lef 13.
- 4 *Shannon v Bradstreet* (1803) 1 Sch & Lef 52; *Dowell v Dew* (1843) 12 LJ Ch 164. It is assumed that the contract was binding on the tenant for life: *Morgan v Milman* (1853) 3 De GM & G 24; *Kennan v Murphy* (1879) 6 LR Ir 108 (on appeal (1880) 8 LR Ir 285, Ir CA). An equitable ground for enforcing it is not available against the remainderman (*Shannon v Bradstreet* supra at 72; and see *Blore v Sutton* (1817) 3 Mer 237; *Lowry v Lord Dufferin* (1839) 1 I Eq R 281; *Morgan v Milman* supra at 33), unless he has brought himself within the equity by acquiescence (*Stiles v Cowper* (1748) 3 Atk 692).
- 5 *Davis v Harford* (1882) 22 ChD 128.

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#### **145. Statutory validation of defective exercise of power.**

Where, in the intended exercise of any power of leasing, whether conferred by an Act of Parliament or any other instrument, a lease<sup>1</sup> (an 'invalid lease'), not being a lease of land held on charitable, ecclesiastical or public trusts, is granted, which by reason of any failure to comply with the terms of the power is invalid, then:

305 (1) as against the person entitled after the determination of the interest of the grantor to the reversion<sup>2</sup>; or

306 (2) as against any other person who, subject to any lease properly granted under the power, would have been entitled to the land comprised in the lease,

the lease, if it was made in good faith and the lessee<sup>3</sup> has entered thereunder, takes effect in equity as a contract<sup>4</sup> for the grant, at the request of the lessee, of a valid lease under the power, of like effect as the invalid lease, subject to such variations as may be necessary in order to comply with the terms of the power<sup>5</sup>. A lessee under an invalid lease is not, however, by virtue of any such implied contract, entitled to obtain a variation of the lease if the other persons who would have been bound by the contract are willing and able to confirm the lease without variation<sup>6</sup>.

Where a lease granted in the intended exercise of such a power is invalid by reason of the grantor not having power to grant the lease at the date thereof, but the grantor's interest in the land comprised therein continues after the time when he might, in the exercise of the power, have properly granted a lease in the like terms, the lease takes effect as a valid lease in like manner as if it had been granted at that time<sup>7</sup>.

Where, during the continuance of the possession taken under an invalid lease, the person for the time being entitled, subject to such possession, to the land comprised therein or to the rents and profits thereof, is able to confirm the lease without variation, the lessee or other person who would have been bound by the lease had it been valid is bound, at the request of the person so able to confirm the lease, to accept a confirmation<sup>8</sup> thereof, and thereupon the lease has effect and is deemed to have had effect as a valid lease from the grant thereof<sup>9</sup>.

Where a receipt or memorandum in writing confirming an invalid lease is, upon or before the acceptance of rent thereunder, signed by or on behalf of the person accepting the rent, the acceptance is deemed, as against that person, to be a confirmation of the lease<sup>10</sup>.

Where a valid power of leasing is vested in or may be exercised by a person who grants a lease which, by reason of the determination of the grantor's interest or otherwise, cannot have effect and continuance according to terms thereof independently of the power, the lease is deemed<sup>11</sup> to have been granted in the intended exercise of the power although the power is not referred to in the lease<sup>12</sup>. If, however, the lease is granted by a stranger to the power<sup>13</sup>, or if the grantor has deprived himself of the power<sup>14</sup>, the lease is not deemed to be granted in the intended exercise of the power.

Not every defect in a lease granted in intended exercise of a power may be cured. Where a lease was invalid on the technical ground that it did not take effect in possession within 12 months after its date<sup>15</sup>, the lessee was not entitled to claim that the lease took effect in equity in the absence of evidence that the lease reserved the best rent and was a proper lease in all other respects<sup>16</sup>.

1 For these purposes, 'lease' includes an underlease or other tenancy: Law of Property Act 1925 s 154.

2 The grantor will be estopped from denying the validity of the lease: see PARA 4 ante.

3 For these purposes, 'lessee' includes an underlessee and a person deriving title under a lessee or underlessee: Law of Property Act 1925 s 205(1)(xxiii).

4 As to the registration of the contract as an estate contract see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632; and as to the effect of non-registration see LAND CHARGES vol 26 2004 Reissue) PARA 643.

5 Law of Property Act 1925 s 152(1), (7). Section 152 applies to leases whenever created (s 154); and takes effect without prejudice to the provisions in the Law of Property Act 1925 for the grant of leases in the name and on behalf of the estate owner of the land affected (s 152(8)). As to the saving of rights of lessees and lessors see PARA 146 post.

Section 152 replaces provisions formerly contained in the Leases Act 1849 ss 2, 4-7 (repealed) and the Leases Act 1850 ss 2, 3 (repealed).

6 Law of Property Act 1925 s 152(1) proviso.

7 Ibid s 152(2). Cf para 4 ante; and see ESTOPPEL vol 16(2) (Reissue) PARA 1030.

8 Such confirmation may be by a memorandum in writing signed by or on behalf of the persons respectively confirming and accepting the confirmation of the lease: ibid s 152(3).

9 Ibid s 152(3).

10 Ibid s 152(4); and see *Re North London Rly Co (City Branch), ex p Cooper* (1865) as reported in 34 LJ Ch 373 at 378.

11 Ie for the purposes of the Law of Property Act 1925 s 152.

12 Ibid s 152(6).

13 *Re North London Rly Co (City Branch), ex p Cooper* (1865) as reported in 34 LJ Ch 373 at 377-378.

14 *Iron Trades Employers Insurance Association Ltd v Onion Land and House Investors Ltd* [1937] Ch 313, [1937] 1 All ER 481.

15 See the Settled Land Act 1925 s 42(1); and PARA 30 ante.

16 *Kisch v Hawes Bros Ltd* [1935] Ch 102; but, in so far as *Kisch v Hawes Bros Ltd* supra held that a denial in a pleading of the landlord's title effected a forfeiture of the term, the decision is overruled by *Warner v Sampson* [1959] 1 QB 297, [1959] 1 All ER 120, CA. Cf *Davies v Hall* [1954] 2 All ER 330 at 334, [1954] 1 WLR 855 at 860-861, CA. The Law of Property Act 1925 s 152 does not assist a lease which is of a different nature from that authorised by the power (*Hallet to Martin* (1883) 24 ChD 624), or where the lease is in the form intended by the parties (*Gas Light and Coke Co v Towse* (1887) 35 ChD 519 at 539). Nor does it enable matters of substance to be cured (*Re Newell and Nevill's Contract* [1900] 1 Ch 90 at 94), or a lease which is invalid because part of the premises cannot be demised to be turned into a valid lease without this part (*Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169 at 194; *Brown v Peto* [1900] 1 QB 346 at 355 (affd [1900] 2 QB 653, CA); *King v Bird* [1909] 1 KB 837).

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#### **146. Saving of rights of lessees and lessors.**

The statutory provisions relating to the validation of leases<sup>1</sup> do not affect prejudicially:



- 307 (1) any right of action or other right or remedy to which, but for those provisions or any enactment replaced by those provisions<sup>2</sup>, the lessee<sup>3</sup> named in an invalid lease<sup>4</sup> would or might have been entitled under any covenant on the grantor's part for title or quiet enjoyment contained therein or implied thereby; or
- 308 (2) any right of re-entry or other right or remedy to which, but for those provisions or any enactment replaced thereby, the grantor or other person for the time being entitled to the reversion expectant on the termination of the lease would or might have been entitled by reason of any breach of the covenants, conditions or provisions contained in the lease and binding on the lessee<sup>5</sup>.

1 le the Law of Property Act 1925 s 152(1)-(4): see PARA 145 ante.

2 See PARA 145 note 5 ante.

3 For the meaning of 'lessee' see PARA 145 note 3 ante.

4 For the meaning of 'invalid lease' see PARA 145 ante; and for the meaning of 'lease' see PARA 145 note 1 ante.

5 Law of Property Act 1925 s 152(5).

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## **(8) VARIATION OF LEASES**

### **(i) In general**

#### **147. Variation of leases.**

Application may be made:

- 309 (1) for the variation of the provisions of a lease of a flat<sup>1</sup>;
- 310 (2) for the variation of insurance provisions of a lease of a dwelling house other than a flat<sup>2</sup>;

and the court also has power to modify certain covenants in leases<sup>3</sup>.

Where premises are subject to a compulsory rights order, the court has power, on reference being duly made, to determine whether any of the terms and conditions of the tenancy, other than a tenancy in relation to which the Agricultural Holdings Act 1986 applies or a farm business tenancy, should be varied in consequence of any change in the state of the premises while they are subject to the order<sup>4</sup>.

1 See PARA 149 et seq post.

2 See PARA 154 post.

3 See PARA 472 post.

4 See the Opencast Coal Act 1958 s 37, Sch 7 para 12 (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 448.

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#### **148. Stamp duty land tax and variation of leases.**

Where a lease is varied so as to increase the amount of the rent, the variation is treated for the purposes of stamp duty land tax as if it were the grant of a lease in consideration of the additional rent made payable by it<sup>1</sup>. This does not apply to an increase of rent in pursuance of a provision contained in the lease<sup>2</sup>; but if, after the end of the fifth year of the term of a lease:

- 311 (1) the amount of rent payable increases, or is increased, in accordance with the provisions of the lease; and
- 312 (2) the rent payable as a result ('the new rent') is such that the increase falls to be regarded as abnormal<sup>3</sup>,

the increase in rent is treated as if it were the grant of a lease in consideration of the excess rent<sup>4</sup>. The deemed grant is treated as:

- 313 (a) made on the date on which the increased rent first became payable; and
- 314 (b) for a term equal to the unexpired part of the original lease,

and as linked with the grant of the original lease and with any other transaction with which that transaction is linked<sup>5</sup>.

Where a lease is varied so as to reduce the amount of the rent, the variation is treated for the purposes of stamp duty land tax as an acquisition of a chargeable interest by the lessee<sup>6</sup>; and where it is varied so as to reduce the term, the variation is treated for those purposes as an acquisition of a chargeable interest by the lessor<sup>7</sup>. Where any consideration in money or money's worth, other than an increase in rent, is given by the lessee for any variation of a lease, other than a variation of the amount of the rent or of the term of the lease, the variation is treated for those purposes as an acquisition of a chargeable interest by the lessee<sup>8</sup>.

<sup>1</sup> See the Finance Act 2003 s 120, Sch 17A para 13(1) (s 120, Sch 17A added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22).

<sup>2</sup> Finance Act 2003 Sch 17A para 13(2) (as added: see note 1 supra).

<sup>3</sup> As to when an increase is regarded as abnormal see *ibid* Sch 17A para 15 (as added); and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

<sup>4</sup> *Ibid* Sch 17A para 14(1), (2) (as added: see note 1 supra). The excess rent is the difference between the new rent and the rent previously taxed: Sch 17A para 14(3) (as so added). The rent previously taxed is (1) where the provisions of Sch 17A para 14 (as so added) have not previously applied to a rent increase under the lease, the rent that is assumed to be payable after the fifth year of the term of the lease (in accordance with Sch 17A para 7(3) (as added) (see PARA 252 post); (2) where the provisions of Sch 17A para 14 (as added) have previously so applied, the rent payable as a result of the last increase in relation to which those provisions applied: Sch 17A para 14(4) (as so added). The assumption in Sch 17A para 7(3) (as added) that the rent does not change after the end of the fifth year of the term of a lease does not apply for these purposes or for the purposes of Sch 17A para 15 (as added) except for the purpose of determining the rent previously taxed: Sch 17A para 14(6) (as so added).

<sup>5</sup> *Ibid* Sch 17A para 14(5) (as added: see note 1 supra).

6 Ibid Sch 17A para 15A(1) (as added: see note 1 supra).

7 Ibid Sch 17A para 15A(2) (as added: see note 1 supra).

8 Ibid Sch 17A para 15A(1A) (added by the Finance (No 2) Act 2005, s 49, Sch 10, Pt 1, PARAS 1, 13(a)). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

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## **(ii) Variation of Leases on Application to a Leasehold Valuation Tribunal**

### **A. FLATS**

#### **149. Application by party to lease for variation.**

Any party to a long lease<sup>1</sup> of a flat<sup>2</sup> may make an application to a leasehold valuation tribunal<sup>3</sup> for an order varying the lease in such manner as is specified in the application<sup>4</sup>. The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely:

- 315 (1) the repair or maintenance of:  
23
  - 29. (a) the flat in question; or
  - 30. (b) the building containing the flat; or
  - 31. (c) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;
- 24
  - 316 (2) the insurance of the building containing the flat or of any such land or building as is mentioned in head (1)(c) above;
  - 317 (3) the repair or maintenance of any installations, whether they are in the same building as the flat or not, which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation<sup>5</sup>;
  - 318 (4) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation, whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat;
  - 319 (5) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party<sup>6</sup>;
  - 320 (6) the computation of a service charge payable<sup>7</sup> under the lease;
  - 321 (7) such other matters as may be prescribed by regulations made by the Secretary of State<sup>8</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minster<sup>9</sup>.

1 Where the premises are managed by an RTM company (see PARA 367 et seq post), the Landlord and Tenant Act 1987 ss 35, 36, 38 and 39 (as amended) (see the text and notes 2-9 infra; and PARA 150 et seq post)

have effect as if references to a party to a long lease (apart from those in s 38(8) (as amended)) included the RTM company: Commonhold and Leasehold Reform Act 2002 s 102, Sch 7 para 10. For these purposes, 'long lease' means (1) a lease granted for a term certain exceeding 21 years, whether or not it is, or may become, terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture; (2) a lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, other than a lease by sub-demise from one which is not a long lease; or (3) a lease granted in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post), including a lease granted in pursuance of that Part as it has effect by virtue of the Housing Act 1996 s 17 (as amended) (the right to acquire: see PARA 1804 et seq post): Landlord and Tenant Act 1987 ss 59(3), 60(1) (s 59(3) amended by the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 4, Schedule para 5). For the purposes of the Landlord and Tenant Act 1987 Pt IV (ss 35-40) (as amended), however (see the text and notes 2-10 infra; and PARAS 150-154 post), a long lease is not regarded as a long lease of a flat if (a) the demised premises consist of or include three or more flats contained in the same building; or (b) the lease constitutes a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Landlord and Tenant Act 1987 s 36(6) (substituted by the Housing Act 1988 s 119, Sch 13 para 5). For the meaning of 'lease' and references to letting see PARA 53 note 1 ante; for the meaning of 'tenant' see PARA 53 note 1 ante; and for the meaning of 'flat' see note 2 infra. As to covenants for perpetual renewal see PARAS 540-542 post.

2 For these purposes, 'flat' means a separate set of premises, whether or not on the same floor, which (1) forms part of a building; (2) is divided horizontally from some other part of that building; and (3) is constructed or adapted for use for the purposes of a dwelling: Landlord and Tenant Act 1987 s 60(1).

3 A fee is payable on the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(3)(d), (4), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(3)(d), (4), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by: (1) the names and addresses of any person served with a notice in accordance with reg 4 of the relevant regulations (see note 4 infra); (2) a draft of the variation sought; and (3) a copy of the lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(7), Sch 1 para 6, Sch 2 para 6(1)-(3) (amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(7), Sch 1 para 6, Sch 2 para 6(1)-(3). (amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

4 Landlord and Tenant Act 1987 s 35(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 163(1), (2)(a)). Procedure regulations under s 174, Sch 12 must make provision (1) for requiring notice of any application under the Landlord and Tenant Act 1987 Pt IV (ss 35-40) (as amended) to be served by the person making the application, and by any respondent to the application, on any person who the applicant or, as the case may be, the respondent knows or has reason to believe is likely to be affected by any variation specified in the application; and (2) for enabling persons served with any such notice to be joined as parties to the proceedings: s 35(5) (amended by the Commonhold and Leasehold Reform Act 2002 s 163(1), (2)(b)).

The applicant must give notice of such an application to the respondent and to any person who the applicant knows, or has reason to believe, is likely to be affected by any variation specified in the application; and on receipt of that notice the respondent must give notice of the application to any person not already so notified who the respondent knows, or has reason to believe, is likely to be affected by any variation specified in the application: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 4(1), (2); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 4(1), (2). For the meanings of 'applicant' and 'respondent' see PARA 60 notes 2-3 ante.

5 For the purposes of heads (3)-(4) in the text, the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include (1) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and (2) other factors relating to the condition of any such common parts: Landlord and Tenant Act 1987 s 35(3). 'Common parts', in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it: s 60(1).

6 For the purposes of head (5) in the text, the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date: *ibid* s 35(3A) (added by the Commonhold and Leasehold Reform Act 2002 s 162(1), (4)). For these purposes, 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 post): Landlord and Tenant Act 1987 ss 35(8), 60(1).

7 For the purposes of head (7) in the text, a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if (1) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and (2) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any

such expenditure; and (3) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in heads (1), (2) *supra* would either exceed or be less than the whole of any such expenditure: *ibid* s 35(4) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 86). For the meaning of 'landlord' see PARA 53 note 1 *ante*.

8 As to the Secretary of State see PARA 27 note 3 *ante*.

9 Landlord and Tenant Act 1987 s 35(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 162(1)-(3)). As to the transfer of functions of the Secretary of State under the Landlord and Tenant Act 1987 so far as exercisable in relation to Wales see PARA 27 note 4 *ante*.

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### **150. Application by respondent for variation of other leases.**

Where an application ('the original application') is made for the variation of a lease<sup>1</sup> by any party to a lease, any other party to the lease<sup>2</sup> may make an application to the tribunal<sup>3</sup> asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each such one or more other leases as are specified in the application<sup>4</sup>.

Any lease so specified:

- 322 (1) must be a long lease<sup>5</sup> of a flat<sup>6</sup> under which the landlord<sup>7</sup> is the same person as the landlord under the lease specified in the original application; but
- 323 (2) need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease<sup>8</sup>.

The grounds on which the application may be so made are:

- 324 (a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
- 325 (b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making such an application, or in the interests of the other persons who are parties to the lease specified in that application, to have all of the leases in question, that is to say the ones specified in that application together with the one specified in the original application, varied to the same effect<sup>9</sup>.

1 Is an application under the Landlord and Tenant Act 1987 s 35 (as amended): see PARA 149 *ante*. For the meaning of 'lease' and references to letting see PARA 53 note 1 *ante*.

2 Is including, where the premises are managed by an RTM company (see PARA 367 *et seq post*), that company: see PARA 149 note 1 *ante*.

3 As to the fee payable and the procedure on the application see PARA 149 notes 3-4 *ante*.

4 Landlord and Tenant Act 1987 s 36(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 163(1), (3)).

5 For the meaning of 'long lease' see PARA 149 note 1 *ante*.

- 6 For the meaning of 'flat' see PARA 149 note 2 ante.
- 7 For the meaning of 'landlord' see PARA 53 note 1 ante.
- 8 Landlord and Tenant Act 1987 s 36(2).
- 9 Ibid s 36(3).

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### **151. Application by majority of parties for variation of leases.**

An application may be made<sup>1</sup> to a leasehold valuation tribunal<sup>2</sup> in respect of two or more leases<sup>3</sup> for an order varying each of those leases in such manner as is specified in the application<sup>4</sup>. Those leases must, however, be long leases<sup>5</sup> of flats<sup>6</sup> under which the landlord<sup>7</sup> is the same person; but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms<sup>8</sup>.

The grounds on which such an application may be made are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect<sup>9</sup>.

Such an application in respect of any leases may be made by the landlord or any of the tenants<sup>10</sup> under the leases<sup>11</sup>; but any such application may only be made if:

- 326 (1) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
- 327 (2) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10% of the total number of the parties concerned and at least 75% of that number consent to it<sup>12</sup>.

- 1 The subject to the Landlord and Tenant Act 1987 s 37(2)-(6): see the text and notes 5-12 infra.
- 2 As to the fee payable and the procedure on the application see PARA 149 notes 3-4 ante.
- 3 For the meaning of 'lease' see PARA 53 note 1 ante.
- 4 Landlord and Tenant Act 1987 s 37(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 163(1), (4)).
- 5 For the meaning of 'long lease' see PARA 149 note 1 ante.
- 6 For the meaning of 'flat' see PARA 149 note 2 ante.
- 7 For the meaning of 'landlord' see PARA 53 note 1 ante.
- 8 Landlord and Tenant Act 1987 s 37(2).
- 9 Ibid s 37(3).
- 10 For the meaning of 'tenant' see PARA 53 note 1 ante.
- 11 Landlord and Tenant Act 1987 s 37(4).

12 Ibid s 37(5). For these purposes (1) in the case of each lease in respect of which the application is made, the tenant under the lease must constitute one of the parties concerned, so that, in determining the total number of the parties concerned, a person who is the tenant under a number of such leases is regarded as constituting a corresponding number of the parties concerned; and (2) the landlord must also constitute one of the parties concerned: s 37(6).

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## **152. Orders by the court varying leases.**

If:

- 328 (1) on an application by a party to a lease for variation of that lease<sup>1</sup>, the grounds on which the application was made are established to the satisfaction of the tribunal<sup>2</sup>, the tribunal may<sup>3</sup> make an order varying the lease specified in the application in such manner as is specified in the order<sup>4</sup>;
- 329 (2) an application by a respondent for variation of other leases<sup>5</sup> was made in connection with that application and the specified grounds<sup>6</sup> are established to the satisfaction of the tribunal with respect to the specified leases<sup>7</sup>, the tribunal may<sup>8</sup> also make an order varying each of those leases in such manner as is specified in the order<sup>9</sup>;
- 330 (3) on an application by a majority of the parties for variation of leases<sup>10</sup>, the specified grounds<sup>11</sup> are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may<sup>12</sup> make an order varying each of those leases in such manner as is specified in the order<sup>13</sup>.

The variation specified in an order under heads (1) or (2) above may be either the variation specified in the relevant application<sup>14</sup> or such other variation as the tribunal thinks fit<sup>15</sup>.

If the grounds referred to in head (2) or head (3) above, as the case may be, are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under those heads extends to those leases only<sup>16</sup>.

The tribunal may not, however, make an order under the above provisions effecting any variation of a lease if it appears to the tribunal:

- 331 (a) that the variation would be likely substantially to prejudice any respondent to the application or any person who is not a party to the application, and that an award of compensation<sup>17</sup> would not afford him adequate compensation; or
- 332 (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected<sup>18</sup>.

The tribunal may not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under the above provisions effecting any variation of the lease:

- 333 (i) which terminates any existing right of the landlord<sup>19</sup> under its terms to nominate an insurer for insurance purposes; or

- 334 (ii) which requires the landlord to nominate a number of insurers from which the tenant<sup>20</sup> would be entitled to select an insurer for those purposes; or
- 335 (iii) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer<sup>21</sup>.

The tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified<sup>22</sup>.

The tribunal may by order direct that a memorandum of any variation of a lease effected by an order under the above provisions is to be indorsed on such documents as are specified in the order<sup>23</sup>.

Where the tribunal makes an order under the above provisions varying a lease, the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation<sup>24</sup>.

1    Ie an application under the Landlord and Tenant Act 1987 s 35 (as amended): see PARA 149 ante. For the meaning of 'lease' see PARA 53 note 1 ante.

2    Ie the leasehold valuation tribunal. As to such tribunals see PARA 58 et seq ante.

3    Ie subject to the Landlord and Tenant Act 1987 s 38(6), (7) (as amended): see the text and notes 17-21 infra.

4    Ibid s 38(1) (s 38(1)-(10) amended by the Commonhold and Leasehold Reform Act 2002, ss 163(1), (5), 180, Sch 14).

5    Ie an application under the Landlord and Tenant Act 1987 s 36 (as amended): see PARA 150 ante.

6    Ie the grounds set out in ibid s 36(3): see PARA 150 ante at heads (a)-(b) in the text.

7    Ie the leases specified in the application under ibid s 36 (as amended).

8    See note 3 supra.

9    Landlord and Tenant Act 1987 s 38(2) (as amended: see note 4 supra).

10   Ie an application under ibid s 37 (as amended): see PARA 151 ante.

11   Ie the grounds set out in ibid s 37(3): see PARA 151 ante.

12   See note 3 supra.

13   Landlord and Tenant Act 1987 s 38(3) (as amended: see note 4 supra).

14   Ie the relevant application under ibid s 35 (as amended) or s 36 (as amended), as the case may be.

15   Ibid s 38(4) (as amended: see note 4 supra).

16   Ibid s 38(5) (as amended: see note 4 supra).

17   Ie an award under ibid s 38(10) (as amended): see the text and note 24 infra.

18   Ibid s 38(6) (as amended: see note 4 supra).

19   For the meaning of 'landlord' see PARA 53 note 1 ante.

20   For the meaning of 'tenant' see PARA 53 note 1 ante.

21   Landlord and Tenant Act 1987 s 38(7) (as amended: see note 4 supra).



22 Ibid s 38(8) (as amended: see note 4 supra). See also PARA 149 note 1 ante. Accordingly any reference in Pt IV (ss 35-40) (as amended) (see PARA 149 et seq ante; the text and notes 1-21 supra, 23-24 infra; and PARAS 153-154 post), however expressed, to an order which effects any variation of a lease or to any variation effected by an order includes a reference to an order which directs the parties to a lease to effect a variation of it or, as the case may be, a reference to any variation effected in pursuance of such an order: s 38(8).

23 Ibid s 38(9) (as amended: see note 4 supra). An application to register the variation of a lease which has been completed by registration must be accompanied by the instrument (if any) effecting the variation and evidence to satisfy the registrar that the variation has effect at law: Land Registration Rules 2003, SI 2003/1417, r 78. As to leases which must be completed by registration see PARAS 100, 103 ante.

A person who applies for the entry of a notice in the register must apply for the entry of an agreed notice where the application is for a notice of any variation of a lease effected by or under an order under the Landlord and Tenant Act 1987 s 38 (as amended) (including any variation as modified by an order under se 39(4) (as amended) (see PARA 153 post): see the Land Registration Rules 2003, SI 2003/1417, r 80(d). As to agreed notices see LAND REGISTRATION vol 26 (2004 Reissue) PARA 999; and as to cancellation of such notices see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1000.

24 Landlord and Tenant Act 1987 s 38(10) (as amended: see note 4 supra).

## **UPDATE**

### **152 Orders by the court varying leases**

NOTE 23--SI 2003/1474 r 78 revoked: SI 2008/1919.

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### **153. Effect of orders varying leases; applications by third parties.**

Any variation of a lease effected by an order of a leasehold valuation tribunal<sup>1</sup> is binding not only on the parties to the lease<sup>2</sup> for the time being but also on other persons, including any predecessors in title of those parties, whether or not they were parties to the proceedings in which the order was made or were served<sup>3</sup> with a notice of the application<sup>4</sup>.

Any variation effected by any such order is binding<sup>5</sup> on any surety who has guaranteed the performance of any obligation varied by the order; and the surety is accordingly taken to have guaranteed the performance of that obligation as so varied<sup>6</sup>.

Where any such order has been made and a person was required<sup>7</sup> to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may:

- 336 (1) bring a claim for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;
- 337 (2) apply to a leasehold valuation tribunal for the cancellation or modification of the variation in question<sup>8</sup>.

On an application under head (2) above with respect to any variation of a lease, the tribunal may:

- 338 (a) by order cancel that variation or modify it in such manner as is specified in the order; or
- 339 (b) make an order for compensation<sup>9</sup> in favour of the person making the application,

as it thinks fit<sup>10</sup>.

Where a variation is cancelled or modified under head (a) above:

- 340 (i) the cancellation or modification takes effect as from the date of the making of the order under head (a) above or as from such later date as may be specified in the order; and
- 341 (ii) the tribunal may by order direct that a memorandum of the cancellation or modification shall be indorsed on such documents as are specified in the order<sup>11</sup>.

1    le any variation effected by an order under the Landlord and Tenant Act 1987 s 38 (as amended): see PARA 152 ante. For the meaning of 'lease' see PARA 53 note 1 ante.

2    le including, where the premises are managed by an RTM company (see PARA 367 et seq post), that company: see PARA 149 note 1 ante.

3    le by virtue of the Landlord and Tenant Act 1987 s 35(5) (as amended): see PARA 149 note 4 ante.

4    Ibid s 39(1). As to variations effected by an order see also PARA 152 note 22 ante.

5    le without prejudice to ibid s 39(1).

6    Ibid s 39(2).

7    See note 3 supra.

8    Landlord and Tenant Act 1987 s 39(3) (s 39(3)-(5) amended by the Commonhold and Leasehold Reform Act 2002 s 163(1), (6)). As to the fee payable and the procedure on the application see PARA 149 notes 3-4 ante.

9    le such an order as is mentioned in the Landlord and Tenant Act 1987 s 38(10) (as amended): see PARA 152 ante.

10   Ibid s 39(4) (as amended: see note 8 supra).

11   Ibid s 39(5) (as amended: see note 8 supra).

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## ***B. DWELLINGS OTHER THAN FLATS***

### **154. Application for variation of insurance provisions.**

Any party to a long lease<sup>1</sup> of a dwelling may make an application to a leasehold valuation tribunal<sup>2</sup> for an order varying the lease, in such manner as is specified in the application, on the grounds that the lease fails to make satisfactory provision with respect to any matter relating to the insurance of the dwelling, including the recovery of the costs of such insurance<sup>3</sup>.

Such an application may not, however, be made<sup>4</sup> by a person who is a tenant<sup>5</sup> under a long lease of a dwelling if, by virtue of that lease and one or more other long leases of dwellings, he is also a tenant from the same landlord of at least two other dwellings<sup>6</sup>.

1 For the meaning of 'long lease' see PARA 149 note 1 ante. For these purposes, however, a long lease is not regarded as a long lease of a dwelling if (1) the demised premises consist of three or more dwellings; or (2) the lease constitutes a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Landlord and Tenant Act 1987 s 40(4) (substituted by the Housing Act 1988 s 119, Sch 13 para 6). 'Dwelling' means a dwelling other than a flat: Landlord and Tenant Act 1987 s 40(5). For the meaning of 'lease' see PARA 53 note 1 ante; for the meaning of 'dwelling' see PARA 53 note 2 ante; for the meaning of 'tenancy' see PARA 53 note 1 ante; and for the meaning of 'flat' see PARA 149 note 2 ante.

2 As to the fee payable and the procedure on the application see PARA 149 notes 3-4 ante.

3 Landlord and Tenant Act 1987 s 40(1) (amended by the Commonhold and Leasehold Reform Act 2002, s 163(1), (7)). As to orders varying the lease see also PARA 152 note 22 ante.

The Landlord and Tenant Act 1987 s 36 (as amended) (see PARA 150 ante) and s 38 (as amended) (see PARA 152 ante) apply to an application under s 40(1) (as amended) subject to the specified modifications: s 40(2), (3). The modifications so specified (see s 40(3)) are:

9 (1) in s 36(1) (as amended) the reference to s 35 (as amended) is to be read as a reference to s 40(1) (as amended) and in s 36(2) any reference to a flat is to be read as a reference to a dwelling; and

10 (2) in s 38 (as amended) any reference to an application under s 35 (as amended) is to be read as a reference to an application under s 40(1) (as amended) and any reference to an application under s 36 (as amended) is to be read as a reference to an application under s 36 (as amended) as applied by s 40(2).

4 le without prejudice to ibid s 40(4) (as substituted: see note 1 supra).

5 For the meaning of 'tenant' see PARA 53 note 1 ante.

6 Landlord and Tenant Act 1987 s 40(4A) (substituted by the Housing Act 1988 Sch 13 para 6). For these purposes, any tenant of a dwelling who is a body corporate is treated as a tenant of any other dwelling held from the same landlord which is let under a long lease to an associated company as defined in the Landlord and Tenant Act 1987 s 20(1) (as amended) (see PARA 1748 note 8 post): s 40(4B) (substituted by the Housing Act 1988 Sch 13 para 6).

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## (9) RECTIFICATION OF LEASES

### 155. Rectification of leases; in general.

Where a transaction has been completed by the execution of a deed or other instrument, but the instrument does not express what the parties had agreed, it may be rectified if proof of their agreement can be produced<sup>1</sup>. Rectification is an equitable remedy and thus the court has a discretion as to whether or not it ought to be granted<sup>2</sup>.

There must be strong evidence that, by mistake, the instrument does not reflect the true intentions of the parties<sup>3</sup>; to allege that a lease signed by the parties is erroneous is a serious allegation requiring a high degree of probability<sup>4</sup>. The intention of the parties may be established by written evidence, by their actions<sup>5</sup> or by oral evidence<sup>6</sup>, even though the instrument itself must comply with statutory requirements as to writing<sup>7</sup>, so that a lease which

is required to be made by deed<sup>8</sup> may be rectified to reflect an oral agreement which preceded it<sup>9</sup>. An 'entire agreement' clause is not an automatic bar to rectification<sup>10</sup>.

Rectification is normally available only where there is a common mistake by all the parties<sup>11</sup> but in certain circumstances it may be ordered where there is a unilateral mistake<sup>12</sup>. The right to rectify passes to an assignee of the reversion but does not bind a bona fide purchaser for value without notice<sup>13</sup>.

- 1 *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136, CA; and see MISTAKE vol 77 (2010) PARA 57 et seq.
- 2 *Whiteside v Whiteside* [1950] Ch 65 at 71, [1949] 2 All ER 913 at 916, CA, per Sir Raymond Evershed MR.
- 3 *Racal Group Services v Ashmore* [1995] STC 1151, 68 TC 86, CA.
- 4 See *Hornal v Neuberger Products Ltd* [1957] 1 QB 247 at 258, [1956] 3 All ER 970 at 973-974, CA, per Denning LJ (not a landlord and tenant case).
- 5 See eg *Dormer v Sherman* (1966) 110 Sol Jo 171, 197 Estates Gazette 1069, CA.
- 6 *Murray v Parker* (1854) 19 Beav 305 at 308.
- 7 *Re Boulter, ex p National Provincial Bank of England* (1876) 4 ChD 241; *Johnson v Bragge* [1901] 1 Ch 28, 70 LJ Ch 41; *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, 93 LJPC 46, PC.
- 8 See PARA 102 ante. As to the exceptions to the rule that a lease must be made by deed see PARA 101 ante.
- 9 *Cowen v Truefitt Ltd* [1899] 2 Ch 309, 68 LJ Ch 563, CA.
- 10 *JJ Huber (Investments) Ltd v Private DIY Co Ltd* [1995] NPC 102, [1995] EGCS 112 per Cooke J.
- 11 See PARA 156 post.
- 12 See PARA 157 post.
- 13 See PARA 158 post.

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## 156. Rectification on the grounds of common mistake.

Subject to the exceptions regarding unilateral mistake<sup>1</sup>, rectification<sup>2</sup> of a lease will not be granted unless there is a mistake that is common to all the parties<sup>3</sup>. There must be:

- 342 (1) a continuing common intention, whether or not amounting to an agreement, in respect of a particular matter in the lease to be rectified;
- 343 (2) an outward expression of accord (which may be written evidence or an oral agreement)<sup>4</sup>;
- 344 (3) an intention such as is described in head (1) above at the time of the execution of the lease sought to be rectified; and
- 345 (4) a mutual mistake<sup>5</sup>, which must be about the effect of that lease<sup>6</sup>, whereby the lease does not reflect that common intention;

and the lease must, if rectified, be capable of carrying out that agreed common intention<sup>7</sup>. An outward expression of accord may not, however, be a strict legal requirement for rectification in a case where the party resisting rectification has in fact admitted that his true state of belief when he entered into the transaction was the same as that of the other party and there was therefore a continuing common intention which, by mistake, has not been given effect in the relevant legal document<sup>8</sup>. The relevant common intention is the intention of the parties at the time the lease was executed; if, under a mistake of law, the parties have intentionally executed the instrument in a particular form, it will not be rectified so as to incorporate provisions which they would have inserted had they known the law<sup>9</sup>. The standard of proof required to establish the common intention of the parties is the civil standard of balance of probability<sup>10</sup>; the evidence must, however, be sufficient to contradict the inherent probability that the written instrument truly represents the parties' intentions because it is a document signed by them<sup>11</sup>.

A common error as to parcels may be amended by rectification of the lease or conveyance<sup>12</sup>; and the provisions of Part I of the Landlord and Tenant Act 1987 which confer a collective right of first refusal on tenants<sup>13</sup> do not prevent rectification of a transfer<sup>14</sup>. Other circumstances in which an order for rectification of a lease on the grounds of common mistake has been granted include:

- 346 (a) where by mutual mistake no rent review provisions were included in an underlease<sup>15</sup>;
- 347 (b) where there was good evidence that the parties had a common continuing intention to include a break clause in a new lease, but no break clause was in fact included<sup>16</sup>;
- 348 (c) where a tenancy agreement mistakenly described a premium as 'rent'<sup>17</sup>;
- 349 (d) where a lease mistakenly omitted a guarantee clause<sup>18</sup>;
- 350 (e) where a lease referred to rent reviews at the end of the seventh and fourteenth years of the term whereas the common intention of the parties was that the reviews should be every fifth year of the term<sup>19</sup>;
- 351 (f) where a lease, underlease and subunderlease were granted contemporaneously as part of a development scheme, and because of a common mistake over dates in the subunderlease, the rent increases at review which had been intended to be passed on in agreed proportions to the lessee and the underlessee were not passed on to the lessee until six years and nine months later<sup>20</sup>.

Circumstances in which an order for rectification has been refused include:

- 352 (i) where the order was sought on summary judgment and the case was not suitable for such judgment<sup>21</sup>;
- 353 (ii) where, even though a rent review clause in a lease was described by the court as an 'inelegant compromise' between the parties, there was no evidence of mistake<sup>22</sup>;
- 354 (iii) where one party misunderstood the consequence of the parties' common intention that both the lease and the underlease would expire on the same date<sup>23</sup>.

Heads (a) to (f) and (i) to (iii) above are by way of illustration only and do not purport to constitute exhaustive lists.

1 See PARA 157 post.

2 As to rectification generally see PARA 155 ante; and MISTAKE vol 77 (2010) PARA 57 et seq.

3 *Murray v Parker* (1854) 19 Beav 305; *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74; and see *W Higgins Ltd v Northampton Corp* [1927] 1 Ch 128, 90 JP 82. See also *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733 (business tenancy; tenant was not entitled to have the lease rectified by the inclusion of an express permission to reside on the premises, for there was no common intention to insert such a provision in the lease); *Hazell, Watson & Viney Ltd v Malvermi* [1953] 2 All ER 58, [1953] 1 WLR 782 (landlord's solicitor deliberately inserted clause prohibiting residential use so that the tenancy would not fall within the Rent Restriction Acts; no common intention that premises were to be used as a dwelling house).

4 The agreement need not therefore comply with the statutory formalities now set out in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 79 ante): see *Cowen v Truefitt Ltd* [1899] 2 Ch 309, 68 LJ Ch 563, CA; *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA.

5 Clear evidence of a mistake is essential: see eg *Lansdown Estates Group Ltd v TNT Roadfreight (UK) Ltd* [1989] 2 EGLR 120.

6 A mistaken belief as to the relation of the lease to the contents of another document is not sufficient: *London Regional Transport v Wimpey Group Services Ltd* (1986) 53 P & CR 356, [1986] 2 EGLR 41.

7 These principles are summarised in a number of judgments: see eg *Lansdown Estates Group Ltd v TNT Roadfreight (UK) Ltd* [1989] 2 EGLR 120; *Regent Inns plc v Easybrand Ltd* [2006] All ER (D) 414 (Mar). For an example of their application in practice see eg *Cowen v Truefitt Ltd* [1899] 2 Ch 309, 68 LJ Ch 563, CA (rooms on the second floor of Nos 13 and 14, Old Bond Street, were demised, together with free ingress and egress for the lessee 'through the staircase and passages of No 13' to and from the demised premises; there was no staircase in No 13 leading to the demised premises, but there was a staircase in No 14 and it was held that there had been a common mistake, the intention of the parties being that the lessee should have the use of the staircase of No 14; the court ordered the lease to be rectified by the substitution of the staircase of 'No 14' for that of 'No 13'). See also eg *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, cited in note 14 infra.

Where there is evidence of an accord between the parties for a compensatory rent throughout the term, but the lease does not reflect this and there is no common intention or agreement as to how the compensation should be assessed, the court may, when ordering rectification, include machinery so as to provide for such assessment in the rent review clause: see *Kings Reach Investments Ltd v Reed Publishing Holdings Ltd* (21 June 1984, unreported), CA.

8 See *Munt v Beasley* [2006] EWCA Civ 370, [2006] All ER (D) 29 (Apr), applying *JIS (1974) Ltd v MCE International Nominees Ltd* [2003] EWCA Civ 721, [2003] 24 LS Gaz R 36, [2003] All ER (D) 155 (Apr).

9 *Lord Irnham v Child* (1781) 1 Bro CC 92; and see *Pullen v Ready* (1743) 2 Atk 587 at 591.

10 *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch), [2006] 06 EG 171 (CS), [2006] All ER (D) 247 (Jan).

11 *Thomas Bates and Son v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077 at 1091, [1981] 1 WLR 505 at 521, CA, per Brightman LJ; *Racal Group Services v Ashmore* [1995] STC 1151, 68 TC 86, CA; *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch) at [62], [2006] 06 EG 171 (CS), [2006] All ER (D) 247 (Jan); and see *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119; *Hussain v Bahadir* [2005] All ER (D) 208 (Nov); *Oceanic Village Ltd v Shirayama Shokusan Co Ltd* [1999] EGCS 83, [1999] All ER (D) 545.

12 See eg *Beale v Kyte* [1907] 1 Ch 564, questioning *Bloomer v Spittle* (1872) LR 13 Eq 427; and see note 7 supra. See also *Munt v Beasley* [2006] EWCA Civ 370, [2006] All ER (D) 29 (Apr); *Brennan v Kettell (Royal Bank of Scotland, Pt 20 defendants)* [2003] EWCA Civ 1186, [2004] 2 P & CR 47, [2003] All ER (D) 447 (Jul); *Allied Dunbar Pension Services Ltd v Baker* [2001] All ER (D) 46 (Aug).

13 Ie the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq post.

14 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 (the claimant vendor was the freehold owner of a block of 39 flats; it had granted 99-year leases at ground rents of all the flats except Nos 11 and 18 and intended to sell the block subject to the retention of those two flats which it initially proposed to let on shorthold tenancies, but with a view to granting long leases at premiums in the future. The defendant purchaser agreed to purchase the block, correctly understanding that the aggregate ground rents were £4,875 on the assumption that all 39 flats were let on the same long leasehold terms. The vendor's solicitor confirmed by letter to the purchaser's solicitor that the vendor was not intending to sell flats 11 and 18 and that in the interim the vendor was to be treated as any other tenant of the block. Long leases of the two flats were never granted and the transfer of the freehold by the vendor failed to reserve any rights to the two flats for the benefit of the vendor. On becoming aware of that omission, the vendor issued proceedings, claiming that there had been a mistake, which was common to the parties and contrary to their common intention; the trial judge ordered rectification of the transfer so as to provide for the grant to the vendor of

leases in respect of the two flats; and on appeal this decision was upheld on the grounds that the transfer did not give effect to the clear, common, continuing intention of the parties: it was in the form intended by the purchaser, but the equitable remedy enabled the court to change that form to give effect to the true intention of the parties).

15 *Hussain v Bahadir* [2005] All ER (D) 208 (Nov).

16 *Tilfen Land Ltd v London Logistics Ltd* [2005] EWHC 1456 (Ch), [2005] All ER (D) 312 (Jun).

17 *Toronto-Dominion Bank v Obeiroi* [2002] EWHC 3216 (Ch), [2004] STC 1197, 75 TC 244.

18 *Ioannou v Constantinou* [2001] All ER (D) 373 (Nov). See also *WG Mitchell (Gleneagles) Ltd v Jemstock One Ltd* [2006] All ER (D) 105 (Oct) (parties had formed a common intention as to guarantee of minimum rent; agreement for grant of an underlease mistakenly omitted the relevant guarantee; rectification ordered).

19 *Boots the Chemist Ltd v Street* [1983] 2 EGLR 51, (1983) 268 Estates Gazette 817.

20 *Co-operative Insurance Society Ltd v Centremoor Ltd* [1983] 2 EGLR 52, (1983) 268 Estates Gazette 1027, CA.

21 *Regent Inns plc v Easybrand Ltd* [2006] All ER (D) 414 (Mar).

22 *Cadogan v Escada AG* [2006] EWHC 78 (Ch), [2006] 05 EG 272 (CS), [2006] All ER (D) 143 (Jan).

23 *Allied Dunbar Pension Services Ltd v Baker* [2001] All ER (D) 46 (Aug) (effect of a simultaneous expiry of the leases would be an assignment of the underlease rather than a demise, but as there was clear evidence of both parties' intention that the underlease would expire on the date stated in the lease, the misunderstanding was irrelevant and rectification could not be granted).

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### 157. Rectification where there is unilateral mistake.

A unilateral mistake, whether of fact<sup>1</sup> or of law, in a deed or other instrument of conveyance is not in general a ground for setting aside the instrument<sup>2</sup>. The position is similar to cases of innocent misrepresentation<sup>3</sup>. In the case of a defect in title being overlooked by mistake, the remedy, as between vendor and purchaser, is on the vendor's covenants<sup>4</sup>; but there is an exception in the case of a conveyance to the purchaser of property which was already his own, in which case the purchase money is recoverable<sup>5</sup>.

There are, however, two situations in which rectification<sup>6</sup> may be granted of a lease which does not reflect the intentions of one party. The first such situation is where there is fraud by the party who is not mistaken<sup>7</sup>. The court will not act on the footing of fraud unless fraud is pleaded with the utmost particularity<sup>8</sup>; and fraud is unlikely in commercial leases with the parties bargaining at arm's length.

The second such situation is where one party knows that the lease contains a mistake in his favour but does nothing to correct it and behaves unconscionably in seeking to take advantage of the other party as a result<sup>9</sup>. For rectification to be available under this head, three conditions must be satisfied:

- 355 (1) there must be a mistake by the party seeking relief in executing a deed which did not give effect to that party's subjective intention and belief at the time of execution;

- 356 (2) there must be no mistake by the party against whom relief is sought, that party intending the result achieved by the deed or merely accepting that deed by execution;
- 357 (3) there must be an awareness by the party against whom relief is sought of the other party's mistake at the time of executing the deed plus an element of unconscionable behaviour, by inducing execution or by standing by and allowing it<sup>10</sup>.

Lack of diligence on the part of one party or his agents, which led them to be unaware of the other party's mistake, is not enough; in the absence of misrepresentation, neither party or his agents owes or owe the other party any relevant duty of care. Conversely, it does not matter that the mistake was caused by the negligence of the mistaken party or his adviser, since in almost all cases where rectification of a legal document is sought, the claimant's legal adviser has been negligent in failing to detect the mistake in the document. That mistake, even if negligent, is not a reason for refusing relief; rather, it is the premise on which relief is granted. The jurisdiction to rectify on the ground of unilateral mistake is one to be exercised cautiously, and clear evidence is required before an order is made. That is consistent with the basis of the jurisdiction being misconduct on the part of the defendant; the standard of proof has to reflect the gravity of the charge<sup>11</sup>.

A mere unilateral mistake on the part of one party which is unknown to the other party will not entitle the mistaken party to an order for rectification<sup>12</sup>.

1 *Brownlie v Campbell* (1880) 5 App Cas 925 at 937, HL, per Lord Selborne LC; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392.

2 See eg *Fowler v Scottish Equitable Life Insurance Society and Ritchie* (1858) 28 LJ Ch 225.

3 See EQUITY vol 16(2) (Reissue) PARA 414; and see eg *Witney Golf Club Ltd v Parker* [2006] All ER (D) 174 (Apr), where rectification of a deed of variation was refused.

4 See *Clayton v Leech* (1889) 41 ChD 103, CA; *Debenham v Sawbridge* [1901] 2 Ch 98 at 109.

5 *Bingham v Bingham* (1748) 1 Ves Sen 126 at 127; Belt's Sup 79; and see *Cooper v Phibbs* (1867) LR 2 HL 149 at 164; *Jones v Clifford* (1876) 3 ChD 779 at 791; but see *Stewart v Stewart* (1839) 6 Cl & Fin 911 at 968, HL.

6 As to rectification generally see PARA 155 ante; and MISTAKE vol 77 (2010) PARA 57 et seq.

7 See *Ball v Storie* (1823) 1 Sim & St 210 at 219.

8 *Blay v Pollard* [1930] 1 KB 628, CA.

9 See eg *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA (lease prepared by landlords who by an oversight omitted to include provision for the fixing of rent by arbitration in default of agreement on a rent review and the rent review clause merely stated that the rent for the rent review periods was to be 'such rents as shall have been agreed between the lessor and the lessee'. It had not been agreed by the parties that the reference to arbitration should be omitted, and the tenants although aware of the omission at the time they executed the new lease did not bring it to the landlords' attention; rectification was granted); *Central & Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60, (1982) 266 Estates Gazette 900 (lease created a term of 20 years at £3,500 per annum with no provision for rent review; evidence that in the course of negotiations leading up to the grant it was contemplated that the rent was to be £3,500 for the first five years but would be subject to variation thereafter; judge was satisfied from documentary evidence and from the inherent probabilities that by the time the lease was executed the defendant lessees were fully aware that the plaintiffs intended that the lease should contain a rent review clause and that the omission was due to the plaintiff's mistake; held that it would be against conscience to allow the defendant lessees, who must be taken to have suppressed their recognition of the mistake, to take advantage of the omission; rectification ordered so as to include provision for rent review, subject to the defendants having the opportunity of surrendering the lease at the end of the fifth year on giving not less than three months' notice in writing).



10 See *Kemp v Neptune Concrete Ltd* [1988] 2 EGLR 87, [1988] 48 EG 71, CA, where the authorities are reviewed. In that case, there was a prior agreement for a six-year term with three-year rent reviews and the parties' solicitors drafted and considered a draft lease on this basis. After the tenant had been let into possession but before any lease had been executed the parties agreed to extend the term to 12 years; no alteration was, however, made to the rent review clause so that the lease only provided for one review at three years in the 12-year term. It was held that the first and third conditions (see heads (1) and (3) in the text) were not satisfied; the existence of a mistake by the landlord when executing the deed had not been shown, although an ex post facto intention might have been formed; also, the findings at trial as to the state of mind of the tenant's solicitor did not establish unconscionable behaviour justifying equitable relief even if it were permissible to impute it to his principal. See also *Taylor Barnard Ltd v Tozer* [1984] 1 EGLR 21, (1983) 269 Estates Gazette 225 (clear agreement that lease should include a right of pre-emption in favour of the tenants but the lease as drafted by the landlord's solicitor contained no such right; the tenant's solicitor drafted an option to purchase the freehold which was accepted by the landlord's solicitor and incorporated into the lease; tenants not aware of mistake and no concealment on their part; rectification refused); *Witney Golf Club Ltd v Parker* [2006] All ER (D) 174 (Apr) (proposed variation to a lease; landlords' solicitor confirmed to the tenant's solicitor that the landlords had approved the draft deed of variation, subject to two minor alterations, and the deed of variation that was executed included a proposed 'simpler formula' for calculating additional rent that had been included in a draft of the deed sent to the tenant's solicitor; tenant applied for a declaration that the additional rent was to be calculated by reference to the terms of the deed of variation and the landlords counterclaimed for rectification, submitting that the tenant had wilfully shut its eyes to their mistake and had wilfully failed to make such inquiries as a reasonable and honest person would make; held that it would place an unrealistic burden on any party to an arm's length and commercial transaction to say that the tenant should have reverted to the defendants for confirmation of their approval of the 'simpler formula' after it had been told that they had approved the draft deed of variation; the counterclaim for rectification was dismissed).

For a successful claim under heads (1)-(3) in the text see eg *Templiss Properties Ltd v Hyams* [1999] EGCS 60, [1999] NLD 41, [1999] All ER (D) 404 (landlord granted a lease of shop premises for a term of 15 years, subject to the tenant's break option exercisable after five years in the event of his not obtaining planning permission for his intended use of the premises; lease as executed provided that the initial rent of £12,000 was inclusive of business rates, which were to be borne by the landlord, and for five-yearly rent reviews; but the landlord contended that the actual agreement between the parties was that the rent should be £12,000 a year exclusive of business rates, arguing that the inconsistency between the lease and the agreement resulted from a mistake on the part of the landlord and its agents and that the defendant or his solicitor knew of the mistake and acted unconscionably in taking advantage of it; held that on the evidence before the court, the rent agreed was £12,000 exclusive of business rates; the tenant knew that the draft lease did not so provide, but took advantage of the error; rectification was ordered). See also *Brimican Investments Ltd v Blue Circle Heating Ltd* [1995] NPC 18, [1995] EGCS 18 (rent review clause rectified to reflect common intention that rent reviews should be upwards only).

11 *Templiss Properties Ltd v Hyams* [1999] EGCS 60, [1999] NLD 41, [1999] All ER (D) 404. Negligent preparation of the lease by the claimant may, however, mean that he may be refused his costs if successful: see eg *Murray v Parker* (1854) 19 Beav 305.

12 *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/3. LEASES AND UNDERLEASES/(9) RECTIFICATION OF LEASES/158. Nature of the remedy; effect on third parties.

### **158. Nature of the remedy; effect on third parties.**

Rectification<sup>1</sup> will not be ordered where some other remedy is available<sup>2</sup>. Thus the court may construe a clause in a lease which contains an obvious mistake in such a way as to arrive at a sensible meaning, without formal rectification<sup>3</sup>. This ability is, however, limited to obvious clerical blunders and grammatical mistakes<sup>4</sup>. If all the parties voluntarily rectify the instrument, the court will not order rectification. Where an order is made for the grant of a new business tenancy under the Landlord and Tenant Act 1954<sup>5</sup>, and the old tenancy agreement was intended to include premises which were misdescribed or in part omitted from the parcels clause, evidence will be admitted to show the true extent of the old demise, even without a formal claim for rectification<sup>6</sup>.

A claim for rectification passes<sup>7</sup> to an assignee of the reversion<sup>8</sup>; but a purchaser for value without notice is not affected by a tenant's claim for rectification which is an equitable remedy only<sup>9</sup>.

Rectification may not be ordered if there is undue delay or acquiescence once the mistake comes to light<sup>10</sup>. If it is ordered, the party seeking rectification may have to submit to terms<sup>11</sup>.

Where rectification is ordered, a copy of the court's order may be indorsed on the rectified instrument, which then operates accordingly<sup>12</sup>. The order has retrospective force<sup>13</sup>.

Rectification may be obtained in arbitral proceedings without the necessity for court action. An arbitrator appointed under a rent review clause in a usual form will not have express power to order rectification. An arbitration clause in a lease which provided that any dispute arising 'with respect to the construction or effect of the rights, duties or obligations of the parties' under the lease was to be determined by a single arbitrator was, however, held to confer jurisdiction to determine questions as to rectification as, in so doing, the arbitrator would be determining the rights, duties and obligations of the parties and their effect<sup>14</sup>. Where no such express power is conferred, the Arbitration Act 1996 confers on an arbitrator the same powers as a court to order the rectification, setting aside or cancellation of a deed or document<sup>15</sup>; but this is subject to any agreement to the contrary by the parties<sup>16</sup>.

1 As to rectification generally see PARA 155 ante; and MISTAKE vol 77 (2010) PARA 57 et seq.

2 See *Whiteside v Whiteside* [1950] Ch 65, [1949] 2 All ER 913, CA; *Walker Property Investments (Brighton) Ltd v Walker* (1947) 177 LT 204.

3 See eg *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2005] All ER (D) 262 (Dec), where the court replaced the word 'tenant' in a break clause in a lease with the word 'landlord' so as to ensure that the clause made sense, holding that the correction was the sort of mistake that everyone made frequently, such as using the word 'plaintiff' (or 'claimant') for 'defendant'. As to break clauses see PARAS 141-143 ante.

4 See eg *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111 (1981) 263 Estates Gazette 61, CA, where the court declined to correct a reference in a lease to payment of rent on '14 August' to read '1 August', even though other quarterly payments were due on 1 November, 1 February and 1 May and rent reviews fell due on 1 August every seven years, holding that the provision was 'eccentric' but not ambiguous or a mistake.

5 Ie under the Landlord and Tenant Act 1954 s 29 (as substituted): see PARA 720 post.

6 See *IS Mills (Yardley) Ltd v Curdworth Investments Ltd* (1975) 119 Sol Jo 302, CA (evidence showed that, although the lease referred to a shop only, it was intended to relate to the shop and rear store room); but see also *G Orlik (Meat Products) Ltd v Hastings and Thanet Building Society* (1974) 29 P & CR 126, CA. See further PARA 749 post.

7 Ie under the Law of Property Act 1925 s 63(1): see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 240.

8 *Boots the Chemist Ltd v Street* [1983] 2 EGLR 51, (1983) 268 Estates Gazette 817.

9 *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 EGLR 119. But see *Equity & Law Life Assurance Society Ltd v Coltness Group Ltd* [1983] 2 EGLR 118, (1983) 267 Estates Gazette 949 (rectification of rent review memorandum decreed against successor in title to the tenant because successor not a purchaser for value).

10 As to delay and acquiescence as a bar to equitable relief see generally EQUITY vol 16(2) (Reissue) PARA 909 et seq.

11 See eg *Central & Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60, (1982) 266 Estates Gazette 900, cited in PARA 157 note 9 ante (rectification to include five-yearly rent reviews on terms that the tenant should have the opportunity of surrendering the term at the first review date).

12 *White v White* (1872) LR 15 Eq 247; *Hanley v Pearson* (1879) 13 ChD 545, 41 LT 673.

13 *Earl of Malmesbury v Countess of Malmesbury* (1862) 31 Beav 407 at 418 per Sir John Romilly MR; *Craddock Bros Ltd v Hunt* [1923] 2 Ch 136, CA.

14 See *Macepark (Whittlebury) Ltd v Sargeant* [2002] All ER (D) 279 (Jul) per Jacobs J.

15 See the Arbitration Act 1996 s 48(5)(c); and ARBITRATION vol 2 (2008) PARA 1259.

16 See *ibid* s 48(2); and ARBITRATION vol 2 (2008) PARA 1259.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/4. DEMISED PREMISES/(1) PARCELS/159. Description in the case of registered land.

## 4. DEMISED PREMISES

### (1) PARCELS

#### 159. Description in the case of registered land.

Where a lease is of the entirety of land comprised in a registered title, the title number is a sufficient description of the property concerned. The property register will contain a description of the registered estate including reference to a plan based on the Ordnance Survey map and known as the title plan<sup>1</sup>. In the case of a lease of part of land comprised in a registered title, the description of the property will include the title number out of which it is granted.

A prescribed clauses lease<sup>2</sup> must, in the prescribed wording with which it begins<sup>3</sup>, give in relation to the property either a full description of the land being leased or a reference to the clause, schedule or paragraph of a schedule in the lease in which the land being leased is more fully described, together with a statement that in the case of a conflict between that clause and the remainder of the lease then, for the purposes of registration, that clause will prevail<sup>4</sup>.

Where there is a letting of part of a registered title, a plan must be attached to the lease and any floor levels must be specified<sup>5</sup>.

1 See the Land Registration Rules 2003, SI 2003/1417, rr 5, 6; and LAND REGISTRATION vol 26 (2004 Reissue) PARA 814.

2 For the meaning of 'prescribed clauses lease' see PARA 100 ante.

3 See PARA 126 ante.

4 See PARA 126 ante at head (4) in the text.

5 See PARA 126 note 8 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/4. DEMISED PREMISES/(1) PARCELS/160. Description in the case of unregistered land.

#### 160. Description in the case of unregistered land.

The parcels in a lease describe and delimit the demised property<sup>1</sup>. This may be done either by giving a name or some denoting mark to the property as, for example, where a house in a town

is described by the street and number, in which case extrinsic evidence may be necessary in order to ascertain what is intended by the description<sup>2</sup>, or by giving measurements or boundaries<sup>3</sup>, or by reference to a plan<sup>4</sup>, in which case, extrinsic evidence to identify the property may still be required, although the identification is assisted by these descriptions<sup>5</sup>. Where the property is described in more than one of these ways, it is possible that part of the description may be inconsistent with the rest, in which case it becomes necessary to determine which part is to be accepted, and which is to be rejected as a false description<sup>6</sup>, or the instrument may have to be rectified<sup>7</sup>.

Where the grant of the lease is an event that will trigger the requirement of first registration<sup>8</sup>, the application must be accompanied by sufficient details so that the land can be identified clearly on the Ordnance Survey map<sup>9</sup>. In practice such details are normally contained in the lease.

A single instrument may create two separate demises<sup>10</sup>.

1 As to parcels generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 226 et seq; and as to descriptions where a title is registered see PARA 159 ante.

2 Extrinsic evidence is admissible to identify the demised premises wherever there is doubt or difficulty as to the meaning of the description of the parcels; but the court will not admit evidence which contradicts the written document signed by the parties, except where there is a claim for rectification: *Bisney v Swanston* (1972) 225 Estates Gazette 2299, CA, applying *Magee v Lavell* (1874) LR 9 CP 107; and see *Paddock v Fradley* (1830) 1 Cr & J 90; *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA.

3 Boundaries and abutments are not necessarily construed strictly, unless the description by abutments, if correct, would increase the value of the property, and would be an inducement to the tenant to take it: *Roberts v Karr* (1809) 1 Taunt 495. Where measurements are qualified by the words 'more or less', and the abutments also are given, the abutments, if supported by the actual occupation, will show the extent of the property: *Neale d Leroux v Parkin* (1794) 1 Esp 228 at 230. Words such as 'more or less' (*Cross v Eglin* (1831) 2 B & Ad 106 at 110) or 'thereabouts' (*Davis v Shepherd* (1866) 1 Ch App 410 at 416, 418) authorise only variations which bear a very small proportion to the amount named (*Day v Fynn* (1601) Owen 133; *Neale d Leroux v Parkin* supra; *Davis v Shepherd* supra). A doubt as to what is intended to be comprised in the parcels may be removed by reference to a recital: *Doe d White v Osborne* (1840) 4 Jur 941, also reported 9 LJCP 313 at 318.

4 A plan may be relied on though not referred to expressly in the parcels; *Leachman v L & K Richardson Ltd* [1969] 3 All ER 20, [1969] 1 WLR 1129. As to the effect of a plan see *Truckell v Stock* [1957] 1 All ER 74, [1957] 1 WLR 161, CA. As to a plan 'for the purposes of identification only' see *Wiggington and Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436, [1978] 1 WLR 1462, CA; *Scott v Martin* [1987] 2 All ER 813, [1987] 1 WLR 841, CA; *Hatfield v Moss* [1988] 2 EGLR 58, CA. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 229. As to the description of boundaries see BOUNDARIES vol 4(1) (2002 Reissue) PARAS 904-908.

5 As to evidence of boundaries see BOUNDARIES 4(1) (2002 Reissue) PARAS 904-908.

6 As to inaccurate descriptions see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 226 et seq; and as to rectifying mistakes in the parcels see *Mortimer v Shortall* (1842) 2 Dr & War 363; *Paget v Marshall* (1884) 28 ChD 255; and MISTAKE vol 77 (2010) PARA 57 et seq. A purchaser for value without notice is not affected by a tenant's claim to rectification which is an equitable remedy only: *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089.

7 A claim to rectification has been held to be an overriding interest within the Land Registration Act 1925 s 70(1)(g) (repealed; as to interests overriding first registration or registered dispositions under the Land Registration Act 2002 see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962); see *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392. Where it is the landlord who has the claim, it passes automatically to the assignee on an assignment of the reversionary interest pursuant to the Law of Property Act 1925 s 63(1): *Boots the Chemist Ltd v Street* (1983) 268 Estates Gazette 817. As to rectification see further PARAS 155-158 ante.

8 See PARA 120 ante.

9 See the Land Registration Rules 2003, SI 2003/1417, r 24(1)(a); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 832.

10 *Moss v Mobil Oil Co Ltd* [1988] 1 EGLR 71, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/4. DEMISED PREMISES/(1) PARCELS/161. Meanings of specific words.

### 161. Meanings of specific words.

When used in a lease or other assurance, 'land' includes, if there is nothing to restrict its technical meaning, all kinds of land, whether arable, meadow or otherwise<sup>1</sup>, and also everything on or under the soil, all buildings erected on it<sup>2</sup> and all mines and minerals<sup>3</sup> beneath it<sup>4</sup> and the airspace above it to such height as is necessary for the ordinary use and enjoyment of it and the structures on it<sup>5</sup>. A lease of woods includes not only the trees, but the land on which they grow<sup>6</sup>. Words which are appropriate for granting part of the profits of the land do not carry the land itself, for example a grant to dig turfs<sup>7</sup>, or a grant of water, which ordinarily gives only the fishery in the water<sup>8</sup>. Where the soil under the water is intended to pass, the expression 'land covered with water' should be used. A grant of all the profits of land is, however, equivalent to a grant of the land itself<sup>9</sup>.

By a lease of a 'house' outbuildings occupied with and necessary for the convenient occupation of the house will pass<sup>10</sup>, and also a courtyard, garden and orchard<sup>11</sup>. 'Messuage' has the same meaning as 'house'<sup>12</sup>. In the expression 'house and premises', 'premises' refers only to matters intimately connected with the house<sup>13</sup>. The words 'with the appurtenances' do not extend the demise so as to include land or buildings which are used with the demised property, but are not parcel of it<sup>14</sup>; nor do they include a part of the building which has been separated from it and has not been occupied with it for many years previous to the demise<sup>15</sup>. The words 'lands appertaining to' or 'lands belonging to' are more easily extended to land usually occupied with the demised premises<sup>16</sup>.

'Tenements' and 'hereditaments' mean respectively whatever can be the subject of tenure and whatever is capable of devolving upon death, whether as real property or as personal property, to personal representatives<sup>17</sup>; but they are used in a general sense to include both the corporeal things, such as houses and land, and the rights which rise out of them<sup>18</sup>. Where these rights extend to the exclusive possession of the thing which is the subject of property, they are called corporeal hereditaments, a term which is used to denote both the thing itself and the right of property in the thing; and, where they fall short of this, as, for example, in the case of profits à prendre, they are called incorporeal hereditaments<sup>19</sup>.

1 Co Litt 4a; Shep Touch (8th Edn) 91; *Cooke v Yates* (1827) 4 Bing 90. If a particular kind of land is mentioned, such as meadow or marsh land, only that kind will pass: Co Litt 5a.

2 Cf the Law of Property Act 1925 ss 62(2), 205(1)(ix); *Newcomen v Coulson* (1877) 5 ChD 133 at 142, CA.

3 Mines of gold and silver belong, however, to the Crown (see CROWN PROPERTY vol 12(1) (Reissue) PARA 218), as also does the property in petroleum in its natural strata (see the Petroleum Act 1998 s 2; and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1634).

4 *Newcomen v Coulson* (1877) 5 ChD 133, CA. An inclosed piece of land is technically a 'close', and this term carries the soil and what lies beneath it: see *Cox v Glue* (1848) 5 CB 533 at 551. 'Farm' includes the farmhouse, farm buildings and land used with it (Shep Touch (8th Edn) 93), and also woodlands (*Goodtitle d Paul v Paul* (1760) 2 Burr 1089; *Portman v Mill* (1839) 3 Jur 356). 'Farming buildings' in a will includes farmhouses: *Cooke v Cholmondeley* (1858) 4 Drew 326.

5 *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343; *Baron Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479, [1977] 2 All ER 902; and see *Grigsby v Melville* [1973] 3 All ER 455, [1974] 1 WLR 80, CA; *Straudley Investments Ltd v Barpress Ltd* [1987] 1 EGLR 69, CA (landlord not entitled to erect fire escape on roof of demised premises); *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* [1987] 2 EGLR 173 (invasion of airspace by overhanging

tower cranes held to be a trespass); *Davies v Yadegar* (1990) 22 HLR 232, [1990] 1 EGLR 71, CA (loft conversion by tenant of top-floor flat involving protrusion into air space above roof level held not to be a trespass); *Haines v Florensa* (1989) 59 P & CR 200, [1990] 1 EGLR 73, CA (airspace above roof of top-floor flat held to form part of demised property). For a critique of the maxim *cujus est solum ejus est usque ad coelum et ad inferos* (he who owns the soil owns everything above the surface and everything beneath it) see *Railways Comr v Valuer-General* [1974] AC 328 at 351, [1973] 3 All ER 268 at 277, PC. Unless the lease expresses a contrary intention, certain general words are imported by statute into it, if made after 31 December 1881, to the effect that the lease is deemed to include all rights, privileges, easements etc appertaining or reputed to appertain to the land or enjoyed with it: see the Law of Property Act 1925 s 62(1), (2), (4), (6). A lease is a conveyance within the meaning of that Act: see s 205(1)(ii). See further PARA 165 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236. The tenant's right to receive services, such as a supply of hot water, does not, however, pass by virtue of the general words: *Regis Property Co Ltd v Redman* [1956] 2 QB 612 at 627, 632, [1956] 2 All ER 335 at 344, 347, CA.

6 Co Litt 4b. As to a grant of control of an adjoining plantation see *Nicholson v Rose* (1859) 4 De G & J 10.

7 Co Litt 4b.

8 Co Litt 4b. Accordingly, a grant of a 'warren for conies' passes only a franchise to be exercised over the soil, even though a grant of a 'warren' in the grantor's own ground may carry the soil (*Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 236, 255; Co Litt 5b; Shep Touch (8th Edn) 89); but a several fishery raises a presumption of ownership of the soil (see AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 813); and apparently a lease of a several fishery in a river will, in the absence of contrary indication, carry the bed of the river (*R v Old Alresford Inhabitants* (1786) 1 Term Rep 358; and see *Ecroyd v Coulthard* [1897] 2 Ch 554 at 565; affd [1898] 2 Ch 358, CA).

9 Co Litt 4b.

10 See *Doe d Clements v Collins* (1788) 2 Term Rep 498 at 502; *Steele v Midland Rly Co* (1866) 1 Ch App 275 at 289. This is also the case by virtue of the Law of Property Act 1925 ss 62(2), 205(1)(ii). As to a covenant giving the tenant the use of a pump while it remains in an adjoining yard see *Rhoda v Ballard* (1806) 7 East 116.

11 Co Litt 5b, 56b; Shep Touch (8th Edn) 93, 94; *Bettisworth's Case* (1591) 2 Co Rep 31b; notes to *Smith v Martin* (1672) 2 Wms Saund 394. See also *Carden v Tuck* (1588) Cro Eliz 89 (devise of a messuage without saying 'with the appurtenances'); and the cases on the meaning of 'house' cited in COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 626. For the meaning of 'curtilage' see eg *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2001] QB 59, 80 P & CR 516, CA; and the other cases cited in TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 223 note 13.

12 *Doe d Clements v Collins* (1788) 2 Term Rep 498.

13 It will not, therefore, include an adjoining meadow: *Minton v Geiger* (1873) 28 LT 449. See further DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 226. For the meaning of 'mines' and 'minerals' see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 5, 12 respectively. 'Premises' may include a cave: *Gardiner v Sevenoaks RDC* [1950] 2 All ER 84, DC.

14 *Bettisworth's Case* (1591) 2 Co Rep 31b; *Bryan v Wetherhead* (1625) Cro Car 17; *Maitland v Mackinnon* (1862) 1 H & C 607 at 614 (where, however, it was suggested that there might be cases where those words would add to the parcels). See also *Trim v Sturminster RDC* [1938] 2 KB 508, [1938] 2 All ER 168, CA; *Owens v Thomas Scott & Sons (Bakers) Ltd and Wastall* [1939] 3 All ER 663; *Methuen-Campbell v Walters* [1979] QB 525, [1979] 1 All ER 606, CA (paddock not an appurtenance to house and premises within the meaning of the Leasehold Reform Act 1967 s 2(3) (now as amended)); *William Hill (Southern) Ltd v Cabras Ltd* (1986) 54 P & CR 42, [1987] 1 EGLR 37, CA (a right to maintain trade signs held to have been granted to the tenant by virtue of the demise 'together with the appurtenances thereto'). Where there is a demise of a house and of upper floors in an adjoining house without the staircase, the staircase does not pass under 'appurtenances' because it is afterwards required: *Chappell v Mason* (1894) 10 TLR 404, CA; *Wilmote v Carn* (1603) Cro Eliz 918. As to the same words in a will see WILLS vol 50 (2005 Reissue) PARA 577; *Hearn v Allen* (1627) Cro Car 57; *Doe d Lempriere v Martin* (1777) 2 Wm Bl 1148; *Buck d Whalley v Nurton* (1797) 1 Bos & P 53; *Evans v Angell* (1858) 26 Beav 202 at 205.

15 *Kerslake v White* (1819) 2 Stark 508.

16 See *Ongley v Chambers* (1824) 1 Bing 483; *Doe d Gore v Langton* (1831) 2 B & Ad 680; *Evans v Angell* (1858) 26 Beav 202.

17 See Co Litt 6a ('hereditament is the largest word of all in that kind'); cf *Re Gosselin, Gosselin v Gosselin* [1906] 1 Ch 120. The definition in the Law of Property Act 1925 s 205(1)(ix) (as amended) ('hereditament'

means any real property which on an intestacy occurring before 1 January 1926 might have devolved upon an heir) is narrower.

18 As to tenements see Co Litt 19b; *Earl Beauchamp v Winn* (1873) LR 6 HL 223 at 241.

19 See further REAL PROPERTY vol 39(2) (Reissue) PARA 81.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/4. DEMISED PREMISES/(1) PARCELS/162. Parcels may depend on the circumstances of the property.

## **162. Parcels may depend on the circumstances of the property.**

In the case of a prescribed clauses lease<sup>1</sup>, where there is a letting of part of a registered title, a plan must be attached to the lease and any floor levels must be specified<sup>2</sup>. Otherwise, whether any particular property is included in the lease may depend upon the wording of the lease as applied to the circumstances of the property<sup>3</sup>, evidence being admissible to show the state and condition of the property at the time the lease was granted; and, even if prima facie particular property would be included, this will not be so if the circumstances show a contrary intention<sup>4</sup>. Where the lease comprises part only of a building, whether it be of a floor or a room or an office, it will prima facie include both sides of any external wall there may be and fixtures attached to it, unless there is an exception or reservation or something in the context of the lease to exclude them<sup>5</sup>, and will include all that space between the floor of the demised part to at least as far as the joists of the underside of the floor above it<sup>6</sup>. The demise of a whole building will prima facie include the roof and air space above the building, even if this is not mentioned in the demise<sup>7</sup>.

1 For the meaning of 'prescribed clauses lease' see PARA 100 ante.

2 See PARA 159 ante.

3 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 226.

4 *Doe d Freeland v Burt* (1787) 1 Term Rep 701 at 703-704 (cellar held not to be included in the demise). In general the lease is construed with reference to the circumstances existing at the time of execution but, where it is clear that it had reference to previous circumstances, such as those existing at the time of the agreement for the lease, the earlier circumstances would apparently determine the construction: see *Crisp v Price* (1814) 5 Taunt 548; *Mappin Bros v Liberty & Co Ltd* [1903] 1 Ch 118 at 127. Cf *Broomfield v Williams* [1897] 1 Ch 602 at 616, CA.

5 *Carlisle Café Co v Muse Bros & Co* (1897) 67 LJ Ch 53; *Hope Bros Ltd v Cowan* [1913] 2 Ch 312; *Goldfoot v Welch* [1914] 1 Ch 213; *Phelps v City of London Corp'n* [1916] 2 Ch 255 at 263; *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA; *Graystone Property Investments Ltd (formerly Fortgain Nominees Ltd) v Margulies* (1983) 47 P & CR 472, CA. The tenant may use the walls in a reasonable way only (*Carlisle Café Co v Muse Bros & Co* supra), and he is not entitled to fix to the walls something, eg a sign, which trespasses upon the property of an adjoining owner (*Gifford v Dent* (1926) 71 Sol Jo 83; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343 (trespass on airspace above demised premises by overhanging sign)).

6 *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257; *Graystone Property Investments Ltd (formerly Fortgain Nominees Ltd) v Margulies* (1983) 47 P & CR 472, CA; *Hatfield v Moss* [1988] 2 EGLR 58, CA. In *Cockburn v Smith* [1924] 2 KB 119, CA the demise of a top-floor flat did not include any part of the common roof of the block where the parcels described the demise as a 'suite of rooms'. Part of the common roof of a terrace of buildings may, however, form part of the demise of one of the buildings within the terrace, even though the parcels do not expressly refer to the roof: *Tennant Radiant Heat Ltd v Warrington Development Corp'n* [1988] 1 EGLR 41, CA.

7 *Straudley Investments Ltd v Barpress Ltd* [1987] 1 EGLR 69, CA (lease of building held to include roof and airspace above it as part of the demised property despite the absence of any express reference thereto in the parcels).

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### **163. Additions and improvements.**

Where a building which is demised is altered or extended, any addition to it (as opposed to a fixture annexed<sup>1</sup> to it) will accede to the realty, and so become part of the parcels. Ordinarily the covenants on the tenant's part in relation to repair are expressly worded so as to apply to any such additions. Unless it is specifically agreed that any additions made by, or paid for by, the tenant are to be disregarded on the determination of the rent for the demised premises, on a rent review the rent falls to be determined for the whole parcels, including any improvements made by, or paid for by, the tenant<sup>2</sup>; but, where the premises are business premises, special rules apply both as to the assessment of the new rent upon renewal of the lease pursuant to any court order<sup>3</sup> and as to compensation at the expiry of the term<sup>4</sup>.

1 For the special rules as to fixtures see PARA 172 et seq post.

2 *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL; and see PARA 308 post.

3 See PARAS 753-755 post.

4 See PARA 758 et seq post.

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### **164. Roads.**

Where the premises are referred to as bounded by a public road, and the soil of the road is vested in the landlord, the lease will prima facie include the soil from the edge of the premises to the middle of the road<sup>1</sup>. If there is a small quantity of uninclosed land between the highway and the demised premises, this also, if vested in the landlord, will be presumed to be included in the demise<sup>2</sup>, but the presumption may be rebutted<sup>3</sup>.

1 *Haynes v King* [1893] 3 Ch 439 at 448; and see *Tidswell v Whitworth* (1867) LR 2 CP 326 at 333; *Hodges v Lawrance* (1854) 18 JP 347; BOUNDARIES vol 4(1) (2002 Reissue) PARA 920; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 232; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 218. The rule applies to streets in a town as well as to highways in the country: *Re White's Charities, Charity Comrs v London Corp'n* [1898] 1 Ch 659 at 664; *City of London Land Tax Comrs v Central London Rly Co* [1913] AC 364, HL; but see *Mappin Bros v Liberty & Co Ltd* [1903] 1 Ch 118 at 128; *Beckett v Leeds Corp'n* (1872) 7 Ch App 421, CA; *Solloway v Hampshire County Council* (1981) 79 LGR 449, cited in *Russell v Barnet London Borough Council* (1985) 83 LGR 152 at 162. Similarly, where the premises are described as bounded by a river, they include half the bed of the river: *Dwyer v Rich* (1871) IR 6 CL 144, Ex Ch.

2 *Doe d Pring v Pearsey* (1827) 7 B & C 304 at 307; and see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 219.



3 See HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 219.

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### 165. Easements.

A lease of land, or of land and buildings, made after 31 December 1881 includes, without express mention, all easements appertaining or reputed to appertain to the demised property or any part of it, or at the time of the lease occupied or enjoyed with it or with any part of it or reputed or known as part or parcel of or appurtenant to the demised property or any part of it, so far as a contrary intention is not expressed in the lease<sup>1</sup>.

There will also pass to the tenant of one of two tenements both belonging to the landlord all those continuous and apparent quasi-easements which are required for the reasonable enjoyment of the demised tenement and which, at the date of the lease, are used for its benefit over the other tenement. If the landlord intends to reserve to himself any such right over the demised tenement, he must do so expressly in the lease, except in the case of a continuous easement of necessity, such as a necessary right of way<sup>2</sup>.

1 Law of Property Act 1925 s 62(1), (2), (4), (6). 'Conveyance' in that Act includes a lease: see s 205(1)(ii) (cited in PARA 79 note 1 ante). An agreement for a lease for term exceeding three years is not a conveyance within the meaning of s 205 (as amended) (*Borman v Griffith* [1930] 1 Ch 493); but an agreement under hand for a term not exceeding three years is a conveyance within the meaning of the Law of Property Act 1925 s 205 (as amended) because, by virtue of ss 52(2)(d), 54(2), the agreement is effective to create a legal estate (*Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA). For an example of a contrary intention in a lease see *William Hill (Southern) Ltd v Cabras Ltd* (1986) 54 P & CR 42, [1987] 1 EGLR 37, CA. See also EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 57.

2 *Wheeldon v Burrows* (1879) 12 ChD 31, CA; and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 64.

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### 166. Game, sporting rights and livestock.

Unless otherwise provided by the lease, the right to game passes to the tenant<sup>1</sup>, but, subject to the restriction as to ground game<sup>2</sup>, the landlord may reserve the right to himself<sup>3</sup>.

A sporting lease authorises the tenant to enter upon land for the purpose of killing game or fishing, and to carry away the game which he kills or the fish which he catches, and is in effect a licence coupled with a profit à prendre<sup>4</sup>. In order to create an effective legal right the lease must be by deed<sup>5</sup>.

During a lease of livestock, their progeny belongs to the tenant unless there is an express stipulation to the contrary<sup>6</sup>.

1 *Pochin v Smith* (1887) 52 JP 4, DC; and see generally ANIMALS vol 2 (2008) PARA 764 et seq.

2 See the Ground Game Act 1880 s 3; and ANIMALS vol 2 (2008) PARA 765.

3 As to the respective rights of the landlord and the tenant see ANIMALS vol 2 (2008) PARA 763 et seq.

4 See ANIMALS vol 2 (2008) PARA 768; EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 254 et seq. As to the reservation of sporting rights operating as a regrant see PARA 168 post.

5 The right, albeit not granted by deed, may be enforceable in equity: *Mason v Clarke* [1955] AC 778 at 799, [1955] 1 All ER 914 at 923, HL, per Lord Morton of Henryton.

6 *Wood v Ash and Foster* (1586) Owen 139; *Tucker v Farm and General Investment Trust Ltd* [1966] 2 QB 421, [1966] 2 All ER 508, CA. See also ANIMALS vol 2 (2008) PARA 709.

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## (2) EXCEPTIONS AND RESERVATIONS

### 167. Nature of exceptions.

An exception is always of part of the thing granted and refers, therefore, to an object in being<sup>1</sup>. Thus, there may be a grant of a house except certain rooms, or of a farm except certain fields, or of land except the timber growing on it<sup>2</sup> or the minerals underneath it<sup>3</sup>. All these are true exceptions; they withdraw a physical part from that which is first mentioned as passing<sup>4</sup>, the result being that the thing excepted is not part of the parcels<sup>5</sup>.

1 Co Litt 47a; *Shep Touch* (8th Edn) 79; *Mason v Clarke* [1954] 1 QB 460, [1954] 1 All ER 189, CA; revsd on other grounds [1955] AC 778, [1955] 1 All ER 14, HL; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 237-239; EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 59 note 1.

2 As to the exception of timber and trees from a lease see PARA 191 post.

3 An exception of 'all mosses and turbaries' has been held to except all places in which turf, or matter in the course of becoming turf, is found (*Quinn v Shields* (1877) IR 11 CL 254), and an exception of all waters and watercourses has been held to except a well (*Whelan v Leonard* [1917] 2 IR 323, Ir CA). As to minerals vested in the Crown and other bodies see PARA 161 note 3 ante.

4 An exception of the whole of what has been granted is, however, repugnant and void, eg a lease of all the landlord's land in a certain place, except specified land which is in fact all that he has there: *Dorrell v Collins* (1582) Cro Eliz 6. Similarly, the exception is void if it is of something specifically mentioned in the parcels, even though not the whole of them (*Horneby v Clifton* (1567) 3 Dyer 264b; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 238; cf *Miller v Pratt* (1606) 3 Dyer 264b note (40)), unless the thing has been mentioned merely as assisting in the description of the whole, and not by way of grant (*Ellis v Lord Primate* (1865) 16 I Ch R 184, CA; *Cochrane v M'Cleary* (1869) IR 4 CL 165, Ex Ch). Where the terms of the lease prevent an apparent exception from operating as such, it may operate as a redemise of the part purporting to be excepted: *Moroney v Macnamara* (1872) 20 WR 905. As to uncertainty in an exception see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 178, 238. Premises excepted out of an exception pass as part of the premises demised: *Leigh v Shaw* (1594) Cro Eliz 372. As to whether premises are to be treated as demised or reserved see *Hebbert v Thomas* (1835) 1 Cr M & R 861.

5 *Cooper v Stuart* (1889) 14 App Cas 286 at 289-290, PC; and see *Fancy v Scott* (1828) 6 LJOSKB 305. The exception is construed most strongly against the landlord and in favour of the tenant: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 178. An exception of 'bogs and turf-mosses' excepts the soil: *Boyle v Opherts* (1841) 4 I Eq R 241.

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### 168. Nature of reservations.

If used in its strict legal sense, 'reservation' refers to the payment of rent or rendering of other services by the tenant<sup>1</sup>. The term may, however, be used in a wide sense as meaning any benefit in respect of the subject matter of the grant which is kept by the grantor for himself. Thus, it may imply a keeping back of a physical part of the thing, in which case it is equivalent to an exception; and, accordingly, where the context requires it, 'reserving' is construed as making an exception<sup>2</sup>.

'Reserving' may also imply that the grantor is keeping for himself some right of user or of taking the profits of the land, and in conveyancing practice the words 'except and reserving' usually introduce the creation in favour of the landlord of an easement, or of a profit à prendre, such as the free running of water and soil coming from adjacent buildings<sup>3</sup>, the right to make and maintain sewers under the demised premises<sup>4</sup>, rights of way and other easements over the demised premises<sup>5</sup>, or sporting rights<sup>6</sup>. In this case the clause operates as the regrant of an incorporeal hereditament by the grantee to the grantor<sup>7</sup>. To give the regrant legal validity the instrument had formerly to be executed by the grantee, and in the case of a lease this requirement was satisfied by the tenant's execution of the counterpart<sup>8</sup>. A reservation of a legal estate<sup>9</sup> made on or after 1 January 1926 operates at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person, whether being the grantor or not, for whose benefit the reservation is made<sup>10</sup>. A conveyance of a legal estate expressed to be made subject to another legal estate not in existence immediately before the date of the conveyance operates as a reservation unless a contrary intention appears<sup>11</sup>. The reservation may operate in favour of a person who is not a party to the deed<sup>12</sup>. There may be a reservation out of an oral demise<sup>13</sup>.

A reservation of sporting rights in favour of the landlord and his assigns, where the rights are exercisable concurrently with the tenant, is not available for the landlord's licensees<sup>14</sup>; but it is otherwise where the landlord excepts a part of the premises with right of access to it, and the landlord may authorise licensees to use the excepted part<sup>15</sup>.

1 *Mason v Clarke* [1954] 1 QB 460 at 466, [1954] 1 All ER 189 at 191, CA, per Denning LJ; overruled on another point [1955] AC 778, [1955] 1 All ER 914, HL.

2 Co Litt 143a; *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 745; but 'reservation' will not be construed as meaning 'exception' if effect can be given to the instrument by construing it in its technical sense: *Doe d Douglas v Lock* supra at 745-746; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 239. A landlord is entitled to agree with a tenant that the tenant should not be entitled to a prescriptive right of light, but only in relation to land owned by the landlord: *Paragon Finance plc v City of London Real Property* [2002] 1 EGLR 97, [2001] All ER (D) 205 (Jul).

3 Such a reservation extends to water and soil coming from the adjacent premises, whether it first arises there or not, but does not ordinarily extend beyond water in its natural condition, and such matters as are the product of the ordinary use of land for habitation: *Chadwick v Marsden* (1867) LR 2 Exch 285 at 289.

4 *Lee v Stevenson* (1858) EB & E 512. Where the right of passage of gas, water and other pipes is reserved, the right must be exercised in such a way as not to cause any unnecessary or avoidable inconvenience, annoyance, disturbance or injury to the person through whose property the right is to be exercised: *Taylor v British Legal Life Assurance Co Ltd* [1925] Ch 395; revsd without affecting this point (1925) 94 LJ Ch 284, CA. In *Trailfinders Ltd v Razuki* [1988] 2 EGLR 46 a reservation of free passage of (inter alia) electric current did not entitle the landlord to enter and lay computer cables.

5 A regrant securing a right of way to the landlord may disappear through merger with the reversion (*Lord Dynevor v Tennant* (1886) 33 ChD 420, CA; affd (1888) 13 App Cas 279, HL); and see *Doe d Earl Egremont v Williams and Hole* (1848) 11 QB 688 (reservation of a watercourse). As to watercourses see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 197 et seq; and WATER AND WATERWAYS vol 101 (2009) PARAS 602-603; as to the landlord's liability to maintain a culvert which he has reserved see *Anderson v Cleland* [1910] 2 IR 334, Ir CA; as to the reservation of power to the landlord to alter a road see *Butt v Imperial Gas Light and Coke Co* (1866) 2 Ch App 158; and as to the reservation of power to the landlord to interfere with and obstruct the tenant's right of access see *Overcom Properties v Stockleigh Hall Residents Management Ltd* (1988) 58 P & CR 1, [1989] 1 EGLR 75.

6 See *Wickham v Hawker* (1840) 7 M & W 63 at 67; ANIMALS vol 2 (2008) PARAS 765-766; and AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 812.

7 *Mason v Clarke* [1955] AC 778 at 786, [1955] 1 All ER 914 at 916, HL, per Viscount Simonds; *Doe d Douglas v Lock* (1835) 2 Ad & El 705 at 743 ('What relates to the privilege of hawking, hunting, fishing, and fowling, is not either a reservation or exception in point of law; and it is only a privilege or right granted to the lessor, though words of reservation and exception are used'). For this purpose an easement and a profit à prendre are on the same footing: *Wickham v Hawker* (1840) 7 M & W 63; *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940 at 967, Ex Ch (a right of way 'is neither parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception and the latter to a reservation'). See also ANIMALS vol 2 (2008) PARAS 765-766; EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 59; and AGRICULTURE AND FISHERIES vol 1(2) (2007 Reissue) PARA 812. Sir E Coke's definition of a reservation (Co Litt 47a), that it is 'always of a thing not in esse, but newly created or reserved out of the land or tenement demised' suits the reservation of an easement as much as the reservation of a rent: see *Houstoun v Marquis of Sligo* (1886) 55 LT 614, HL.

8 *Durham and Sunderland Rly Co v Walker* (1842) 2 QB 940 at 967, 968, Ex Ch. Even without execution by the grantee, the grant could operate as evidence of an agreement to regrant the easement or profit à prendre: *May v Belleville* [1905] 2 Ch 605; and see *Thellusson v Liddard* [1900] 2 Ch 635 at 645. See also note 7 supra.

9 For these purposes, 'legal estate' includes an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute: Law of Property Act 1925 s 1(2)(a), (4). For the meaning of 'term of years absolute' see PARA 2 note 3 ante.

10 Ibid s 65(1), (3). The reservation continues to operate by way of regrant even if there is not in terms any purported regrant by the grantee: see *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 All ER 772, [1975] 1 WLR 468, CA, applying *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA.

11 Law of Property Act 1925 s 65(2).

12 See *Wickham v Hawker* (1840) 7 M & W 63; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61. Where a lease of a farm is subject to the use of a golf course, with liberty for the golf club to keep the course free from long grass, the question of what is long grass is to be determined from the golfer's point of view: *Woodward v Heywood* (1910) 27 TLR 123.

13 *Bridgland v Shapter* (1839) 5 M & W 375.

14 *Reynolds v Moore* [1898] 2 IR 641; and see ANIMALS vol 2 (2008) PARA 763 et seq.

15 *Mitcalfe v Westaway* (1864) 17 CBNS 658.

## UPDATE

### 168 Nature of reservations

NOTE 2--See also *RHJ Ltd v FT Patten (Holdings) Ltd* [2008] EWCA Civ 151, [2008] 2 WLR 1096.

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### (3) FLATS

#### 169. In general.

The ordinary principles which regulate the relationship of landlord and tenant apply to the letting of flats so far as concerns the premises actually demised<sup>1</sup>. There is no implied warranty at common law that an unfurnished flat is in a reasonably fit state for human habitation<sup>2</sup>. In the absence of express stipulation the landlord is under no liability to repair the premises actually demised<sup>3</sup>, except where such an obligation is implied or arises by virtue of the housing legislation; for example, a landlord has a statutory obligation to keep a dwelling fit for human habitation in certain cases<sup>4</sup>, and repairing obligations are imposed upon landlords in respect of leases of dwelling houses (including flats) of less than seven years' duration<sup>5</sup>. The landlord's statutory implied obligation<sup>6</sup> to repair the exterior of a flat applies to anything which, in the ordinary sense of words, would be regarded as part of the structure, or of the exterior, of the particular dwelling house, regarded as a separate part of the building<sup>7</sup>, and it is, therefore, irrelevant to the scope of the landlord's implied covenant that the external walls of a flat have been excluded from the demise<sup>8</sup>. Furthermore, the principle that a landlord is under an implied obligation to his tenant to take reasonable care over the repair and maintenance of premises within a building which are retained by the landlord, where the repair or maintenance of them is necessary for the safety or proper enjoyment of that part of the building which has been demised<sup>9</sup>, has been held to impose upon the landlord of a high-rise block of flats the obligation to take reasonable care to maintain and repair the lifts and staircases and the rubbish chutes serving the demised flat, and to maintain adequate lighting on the stairs and access ways to it<sup>10</sup>.

Modern leases of flats often contain an express covenant by the landlord to carry out repairs and maintenance to the whole building and to provide specified services to the tenant, and a covenant by the tenant to reimburse the landlord a due proportion of the landlord's expenditure, the resulting service charge being sometimes reserved as an additional rent<sup>11</sup> and sometimes merely a covenanted sum<sup>12</sup>.

Certain tenants have the following statutory rights in specified circumstances:

- 358 (1) the right of first refusal to buy the landlord's interest<sup>13</sup>;
- 359 (2) the right to apply for the appointment of a manager<sup>14</sup>;
- 360 (3) the right to acquire compulsorily the landlord's interest<sup>15</sup>;
- 361 (4) the right to apply for a variation of the terms of a long lease<sup>16</sup>;
- 362 (5) the right to collective enfranchisement<sup>17</sup>;
- 363 (6) the right to acquire a new lease<sup>18</sup>; and
- 364 (7) the right to buy or, in transitional cases, the right to acquire on rent to mortgage terms<sup>19</sup>.

1 For legal purposes a flat is a separate house: *Grant v Langston* [1900] AC 383 at 392, HL; and see *Yorkshire Insurance Co v Clayton* (1881) 8 QBD 421 at 424, CA. As to liability for income tax see INCOME TAXATION vol 23(1) (Reissue) PARA 45 et seq. A flat may be part of a house for the purpose of the Housing Acts: *Re Bainbridge, South Shields (D'Arcy Street) Compulsory Purchase Order 1937* [1939] 1 KB 500, [1939] 1 All ER 419; *Re Butler Camberwell (Wingfield Mews) (No 2) Clearance Order 1936* [1939] 1 KB 570, [1939] 1 All ER 590, CA.

2 *Cruse v Mount* [1933] Ch 278; *Sleafer v Lambeth Borough Council* [1960] 1 QB 43, [1959] 3 All ER 783, CA; *Tennant Radiant Heat Ltd v Warrington Development Corpn* [1988] 1 EGLR 41, CA. Cf the implied condition as to fitness for human habitation on a letting of furnished premises: see PARA 426 post. See also the Defective Premises Act 1972 s 1; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 77.

- 3 See *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA; *Colebeck v Girdlers Co* (1876) 1 QBD 234; and PARA 413 post.
- 4 See the Landlord and Tenant Act 1985 s 8(1); and PARA 424 post.
- 5 See *ibid* s 11 (as amended); and PARAS 416-418 post.
- 6 See under *ibid* s 11(1)(a): see PARA 416 post.
- 7 *Campden Hill Towers Ltd v Gardner* [1977] QB 823, [1977] 1 All ER 739, CA.
- 8 *Campden Hill Towers Ltd v Gardner* [1977] QB 823 at 834, [1977] 1 All ER 739 at 745, CA (the statutory obligation applies to the outside wall or walls of the flat; the outside of inner party walls of the flat; the outer sides of horizontal divisions between that flat and flats above and below; and the structural framework and beams directly supporting floors, ceilings and walls of the flat). The implied obligation may apply to the roof of a top-floor flat: *Douglas-Scott v Scorgie* [1984] 1 All ER 1086, [1984] 1 WLR 716, CA. It would seem, however, that floorboards are outside the ambit of the obligation (*Irvine v Moran* (1990) 24 HLR 1, [1991] 1 EGLR 261) but a concession to the contrary was made in *Staves v Leeds City Council* (1990) 23 HLR 107, [1992] 2 EGLR 37, CA. See further PARA 416 post.
- 9 See *Cockburn v Smith* [1924] 2 KB 119, CA (demise of top-floor flat held not to include the roof above it); and PARA 413 post.
- 10 *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL.
- 11 See PARA 319 et seq post. The provisions of the Landlord and Tenant Act 1985 may make part of that service charge or additional rent irrecoverable, as illustrated by *Campden Hill Towers Ltd v Gardner* [1977] QB 823, [1977] 1 All ER 739, CA; or in respect of regulated tenancies the recoverability of that service charge or rent will depend upon the position as to registration of rent (see PARA 897 post). Housing benefit under the Social Security Contributions and Benefits Act 1992 s 130 (as amended) may also be affected: see HOUSING vol 22 (2006 Reissue) PARA 142.
- 12 As to the difference see PARA 319 post.
- 13 See PARA 1744 et seq post.
- 14 See PARA 399 et seq post.
- 15 See PARA 1783 et seq post.
- 16 See PARA 149 et seq ante.
- 17 See PARA 1552 et seq post.
- 18 See PARA 1671 et seq post.
- 19 See PARA 1795 et seq post.

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## **170. Parts of buildings used in common.**

As regards parts of the building which are necessary for the convenience of all the tenants and which the landlord is assumed to retain in his own possession and control, the landlord's liability for injuries suffered as a result of the non-repair of those parts depends upon the common law rules of nuisance and negligence, and the provisions of the Occupiers' Liability Act 1957 and the Defective Premises Act 1972<sup>1</sup>.

In the absence of express agreement, a tenant of a flat has no right to exhibit a name plate in the common entrance hall<sup>2</sup>

1 See PARAS 474-476 post.

2 *Frederick Berry Ltd v Royal Bank of Scotland* [1949] 1 KB 619, [1949] 1 All ER 706.

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### **171. Landlord's covenants as to employees.**

A covenant by the landlord to employ a resident porter<sup>1</sup> for the purposes of carrying out duties clearly defined by the terms of the lease may be the subject of specific performance<sup>2</sup>.

1 Whether the obligation is one requiring the employment of a resident porter is clearly a matter of construction: see *Barnes v City of London Real Property Co* [1918] 2 Ch 18 (covenant by the landlord that the premises should be cleaned by the housekeeper held not to impose upon the landlord the obligation to provide a resident housekeeper); *Hupfield v Bourne* (1974) 28 P & CR 77 (covenant by the landlord of a luxury block of flats to employ 'such person or persons as shall be reasonably necessary for the due performance of his covenants and for the proper management of the block' held to oblige the landlord to provide the services of a resident porter); *Russell v Laimond Properties Ltd* (1983) 269 Estates Gazette 947 (landlord unable to recover the costs of employing a resident porter in reliance upon a covenant to provide maintenance staff).

2 *Posner v Scott-Lewis* [1987] Ch 25, [1986] 3 All ER 513, distinguishing *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, CA (specific performance of an obligation to provide a resident porter refused because of the difficulty of supervision by the court in its execution). The difficulty faced by the court in supervising the execution of the obligation appears no longer to be a conclusive deterrent to ordering specific performance: see *CH Giles & Co Ltd v Morris* [1972] 1 All ER 960, [1972] 1 WLR 307; *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 724, [1973] 1 All ER 90 at 102, HL; *Tito v Waddell (No 2)* [1977] Ch 106 at 321, [1977] 3 All ER 129 at 307; *Posner v Scott-Lewis* supra; para 95 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 806.

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## **(4) FIXTURES**

### **(i) What are Fixtures**

#### **172. Classification of objects brought onto the land.**

An object brought onto the land may be:

- 365 (1) a chattel;
- 366 (2) a fixture; or
- 367 (3) part and parcel of the land itself<sup>1</sup>.

Unlike objects falling within head (1) above, objects falling within head (2) or head (3) above are treated as, and become, part of the land<sup>2</sup>.

Fixtures (that is, former chattels that had become part of the land) were usually distinguished from chattels (that is, property that remained chattels and had not become part of the land); but because of the confusion sometimes surrounding the terminology, the House of Lords has now stated a preference for the threefold classification set out in heads (1) to (3) above rather than the traditional twofold distinction between chattels and fixtures<sup>3</sup>. The consequence of this new threefold classification is that 'fixture' now has a more limited technical meaning<sup>4</sup>.

1 See *Elitestone Ltd v Morris* [1997] 2 All ER 513 at 518, [1997] 1 WLR 687 at 691, HL, per Lord Lloyd of Berwick, approving Woodfall *Landlord and Tenant* release 36 (1994) vol 1, p 13/83, PARA 13.131; applied in *Wessex Reserve Forces and Cadets Association v White* [2005] EWHC 983 (QB), [2005] 3 EGLR 127, [2005] All ER (D) 310 (May); affd [2005] EWCA Civ 1744, [2006] 1 EGLR 56, [2005] All ER (D) 18 (Dec), (a Portakabin, a garden shed and sectional concrete buildings were both part of the land and, as items erected by the tenant, tenant's fixtures; a stone shed which had probably been on the land before the lease commenced was part of the land and not a tenant's fixture).

2 ie unless and until they are severed lawfully and removed from the land: see PARAS 178-186 post. A houseboat attached to land at several points by various ropes, cables and service connections, all of which may be undone, does not possess a sufficient degree of annexation so as to require recognition of it as part of the land: *Chelsea Yacht and Boat Club Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1941, CA.

3 *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL, per curiam. Lord Lloyd of Berwick gave (at 517-518 and 691) two reasons for the 'better' threefold classification. First, the legal meaning of 'fixtures' does not bear the same meaning as it does in everyday life where one thinks of the term 'fixture' as being something fixed to a building. While a fixture may be understood as something affixed to the freehold as accessory to the house (*Boswell v Crucible Steel Co* [1925] 1 KB 119 at 123, CA, per Atkin LJ (plate glass windows forming part of the wall could not be landlord's fixtures as they were made part of the house when it was constructed)), a house itself has been described as a fixture once built into the land (*Billing v Pill* [1954] 1 QB 70 at 75, [1953] 2 All ER 1061 at 1063, DC, per Lord Goddard CJ). Second, and perhaps more significantly, the traditional distinction has led to the category of 'tenant's fixtures' (a term used to cover both trade fixtures and ornamental fixtures: see PARAS 179-180 post) which are fixtures in the full sense of the word in its traditional meaning, since they form part of the realty, but which may nevertheless be removed by a tenant in the course of or at the end of his tenancy. Such fixtures can be confused with chattels that never become fixtures at all.

4 The extensive caselaw discussed in PARAS 173-186 post must be read in the context of the traditional twofold classification.

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### 173. Ownership of fixtures.

In accordance with the general rule of law that anything fixed to the freehold becomes part of the freehold<sup>1</sup>, chattels affixed to premises at the date of a lease by a landlord, or some prior owner or tenant, pass under the demise<sup>2</sup> unless expressly or impliedly excluded<sup>3</sup>. Chattels so affixed, and chattels affixed subsequent to the commencement of the lease, must be delivered up to the landlord on the determination of the tenancy, unless the tenant is entitled to remove them by virtue of some special rule of law, statute or agreement, in accordance with the rule of law that whatever has once become part of the inheritance cannot be severed by a limited owner, whether he is owner for life or for years, without the commission of waste<sup>4</sup>.

Two questions usually arise for consideration with regard to chattels attached to land or other premises:



- 368 (1) whether the attachment is such that they are to be regarded as forming part of the premises, whether permanently or as fixtures; and
- 369 (2) if they are fixtures, whether they can be removed by some person other than the owner of the freehold by virtue of some special rule of law, statute<sup>5</sup> or agreement.

For the purposes of distinction, items which the tenant may not remove (and which have become part of the land) are usually referred to as 'landlord's fixtures'<sup>6</sup>. This term includes fixtures attached to the premises at the date of the demise, those fixed by the landlord during the term, and also those fixed by the tenant which he is not entitled to remove<sup>7</sup>. Those removable by the tenant are usually referred to as 'tenant's fixtures' and, while attached to the premises, form part of the realty<sup>8</sup>. If the fixtures are not removed by the tenant, they pass to the landlord, and a subsequent tenant takes no interest in them other than as part of the premises demised to him<sup>9</sup>. In practice, the theoretical distinction between items which are removable by the tenant because they have never become fixtures (and remain chattels belonging to the tenant) and items which have become fixtures but so removable as 'tenant's fixtures' has often become blurred<sup>10</sup>.

1 *Bain v Brand* (1876) 1 App Cas 762 at 767, HL, per Lord Cairns LC; *Wake v Hall* (1880) 7 QBD 295 at 301, CA, per Lord Selborne LC; *Elwes v Maw* (1802) 3 East 38 at 51; *Buckland v Butterfield* (1820) 2 Brod & Bing 54 at 58. As to the rule *quicquid plantatur solo, solo cedit* (whatever is affixed to the soil belongs to the soil) see *Wake v Hall* (1883) 8 App Cas 195 at 203, HL, per Lord Blackburn. Similar principles apply to articles fixed to the freehold by a licensee, and, in the absence of any express or implied stipulation, a licensee cannot be compelled to remove them at the termination of his licence: *Never-Stop Railway (Wembley) Ltd v British Empire Exhibition (1924) Inc* [1926] Ch 877.

2 See *Colegrave v Dias Santos* (1823) 2 B & C 76; *Longstaff v Meagoe* (1834) 2 Ad & El 167. The tenant does not, by accepting the lease, come under an implied contract to pay for fixtures: *Goff v Harris* (1843) 5 Man & G 573.

3 Thus the express mention of certain fixtures may show an intention to exclude others: *Hare v Horton* (1833) 5 B & Ad 715. Cf *Simmons v Midford* [1969] 2 Ch 415, [1969] 2 All ER 1269 (a drain laid under servient land held not to adhere to the freehold of that land but to remain in the ownership of the dominant tenement). See also *Montague v Long* (1972) 116 Sol Jo 712 (bridge built under licence by an adjacent owner with a right of way over the licensor's land held to be affixed to the soil).

4 See note 1 *supra*.

5 A tenant of an agricultural holding has a statutory right on giving due notice to the landlord to remove fixtures and buildings: see AGRICULTURAL LAND vol 1 (2008) PARA 336.

6 *Boswell v Crucible Steel Co* [1925] 1 KB 119, CA. This expression has been said to be an inaccurate one (*Elliott v Bishop* (1854) 10 Exch 496 at 508), but it is generally useful for the purposes of distinction. See, however, PARA 172 ante. The term 'fixtures' is sometimes used as meaning only articles affixed to the freehold which are removable at the will of the person who affixed them (*Hallen v Runder* (1834) 1 Cr M & R 266; *Elliott v Bishop* (1854) 10 Exch 496 at 508; *Re Gawan, ex p Barclay* (1855) 5 De GM & G 403 at 410; *Re de Falbe, Ward v Taylor* [1901] 1 Ch 523 at 538, CA), but this seems an unnecessarily limited application of the word. It is a term which in any event is not properly applicable to articles forming part of the construction of premises, and it should be applied only to articles affixed to the freehold as accessories: *Boswell v Crucible Steel Co* [1925] 1 KB 119, CA. Plate-glass windows forming one side of a building are not fixtures (*Boswell v Crucible Steel Co supra*), and it is doubtful whether doors and windows of premises are properly described as fixtures, although they have been so referred to on occasions (Co Litt 53a; *Climie v Wood* (1869) LR 4 Exch 328 at 329, Ex Ch; *Herlakenden's Case* (1589) 4 Co Rep 62a at 64a). Cf para 177 note 3 post.

7 As to the time at which fixtures must be removed see PARA 182 post.

8 *Bain v Brand* (1876) 1 App Cas 762 at 770, 772, HL; *Minshall v Lloyd* (1837) 2 M & W 450 at 459; *Gibson v Hammersmith and City Rly Co* (1863) 2 Drew & Sm 603 at 609; *Horwich v Symond* (1914) 110 LT 1016; affd (1915) 84 LJB 1083, CA. It has been said that in cases where the right of removal exists, the chattel has never become part of the freehold (*Re Sir Edward Hulse, Beattie v Hulse* [1905] 1 Ch 406 at 411), but in the light of the cases cited *supra* this is conceived to be erroneous, although it is true that articles so lightly attached as not

to be regarded as fixtures never lose their chattel character. As to the distinction between tenant's fixtures and improvements see *New Zealand Government Property Corp'n v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA (cited in PARA 755 note 4 post).

9 *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260.

10 See *Spyer v Phillipson* [1931] 2 Ch 183, CA (panelling held to be removable as being a 'tenant's fixture'), purportedly following *Leigh v Taylor* [1902] AC 157, HL (tapestries affixed to walls held never to have become fixtures).

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#### **174. Test to determine what are fixtures.**

Whether an object that has been brought onto the land has been affixed to the premises so as to become a fixture (or a permanent part of the land)<sup>1</sup> is a question of fact which principally depends first on the mode and extent of the annexation, and especially on whether the object can easily be removed without injury to itself or to the premises; and secondly on the purpose of the annexation, that is to say, whether it was for the permanent and substantial improvement of the premises or merely for a temporary purpose or for the more complete enjoyment and use of the object as a chattel<sup>2</sup>. The mode of annexation is, therefore, only one of the circumstances to be considered, and may not be the most important consideration<sup>3</sup>.

An object which is attached to the premises only by its own weight<sup>4</sup> will not in general be regarded as a fixture (or part and parcel of the land), unless circumstances show that it was intended to become part of the premises, and the onus of proving that there was such an intention rests on the party asserting that the object has become a fixture or part of the land<sup>5</sup>. If, however, an object is to some extent attached to the premises, it will be considered to be a fixture or part of the land unless the circumstances show that it was intended all along to remain a chattel, and in such a case the onus is on the party asserting that it is still a chattel<sup>6</sup>.

1 For the modern threefold classification of things brought onto the land see PARA 172 ante.

2 *Hellawell v Eastwood* (1851) 6 Exch 295 at 312 per Parke B; *Holland v Hodgson* (1872) LR 7 CP 328 at 334, Ex Ch; and see *Billing v Pill* [1954] 1 QB 70 at 75, [1953] 2 All ER 1061 at 1063, DC, per Lord Goddard LCJ. For examples of the application of the rule in *Hellawell v Eastwood* supra see *Parsons v Hind* (1866) 14 WR 860 (hydraulic press fixed by bricks and mortar to a factory floor held not to be a fixture); *Chamberlayne v Collins* (1894) 70 LT 217, CA (switchback railway held not to be a fixture).

3 *Leigh v Taylor* [1902] AC 157 at 162, HL, per Lord Macnaghten. The court will consider all the facts of the case and decide what must have been the intention of the person by whom the object was affixed: *Re Sir Edward Hulse, Beattie v Hulse* [1905] 1 Ch 406 at 411; and see *Wake v Hall* (1883) 8 App Cas 195, HL. The facts which may be relied upon to show the intention of the annexation are those which exist at the time and are patent, and do not include the existence of a hire-purchase agreement with a third person relating to the object: *Hobson v Gorringe* [1897] 1 Ch 182 at 193, CA. An agreement between the parties interested in the land that an article is not to be a fixture does not, however, prevent its in fact becoming a fixture, even though the agreement may give a right to remove it: *Hobson v Gorringe* supra; and see *Wood v Hewett* (1846) 8 QB 913.

4 Eg cisterns resting on the ground (*Mather v Fraser* (1856) 2 K & J 536 at 559) or a barn placed upon pattens and blocks of timber lying on the ground (*Culling v Tufnal* (1694) Bull NP 34); and it is immaterial that those chattels may sink into the ground (*Wood v Hewett* (1846) 8 QB 913 at 919; *Huntley v Russell* (1849) 13 QB 572 at 577 note (a)) or are operated by machinery, such as an electric motor, which is attached to the land (*Hulme v Brigham* [1943] KB 152, [1943] 1 All ER 204).

5 *Holland v Hodgson* (1872) LR 7 CP 328 at 335, Ex Ch. If, therefore, a chattel rests by its own weight on foundations or in a place prepared for it in the ground, it is prima facie not a fixture: see *R v Londonthorpe*

*Inhabitants* (1795) 6 Term Rep 377; *R v Otley, Suffolk, Inhabitants* (1830) 1 B & Ad 161; *Wansbrough v Maton* (1836) 4 Ad & El 884 (all cases relating to wooden windmills or barns resting on brick foundations); *Wiltshire v Cottrell* (1853) 1 E & B 674 at 688 (granary with a tile roof on a wooden foundation); *Horn v Baker* (1808) 9 East 215 at 222, 238 (brewers' vats resting on brickwork and timber, or on wooden frames); *Chidley v Churchwardens of West Ham* (1874) 32 LT 486 (vats in a distillery, attached only by communicating pipes to the walls, or to the piers on which they stood); *Re Richards, ex p Astbury, ex p Lloyds Banking Co* (1869) 4 Ch App 630 at 638 (weighing-machine placed in a hole dug in the earth and lined with brickwork). See also *Billing v Pill* [1954] 1 QB 70, [1953] 2 All ER 1061, DC (temporary army hut bolted to concrete foundations held not to be a fixture); cf *Webb v Frank Bevis Ltd* [1940] 1 All ER 247, CA (removable corrugated iron shed held to be a fixture, but removable by the tenant as a trade fixture: see PARA 179 post). A houseboat attached to land at several points by various ropes, cables and service connections, all of which may be undone, does not possess a sufficient degree of annexation so as to require recognition of it as part of the land: *Chelsea Yacht and Boat Club Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1941, CA. Conversely, a structure that can only be enjoyed in situ, and cannot be removed in whole or in sections to another site, becomes part of the land: see *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL.

6 *Holland v Hodgson* (1872) LR 7 CP 328 at 335, Ex Ch.

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### 175. Mode of annexation.

Mere juxtaposition is not in general enough to make an article brought onto the land a fixture (or part of the land)<sup>1</sup>; there must ordinarily be some attachment to the land or building<sup>2</sup>. Attachment is not essential, however, if the intention is to make the article a part of the land, as where blocks of stone are used without mortar or cement to form a stone wall<sup>3</sup>, or where sculptured figures or vases are part of the architectural scheme of a house<sup>4</sup>, or where movable dog grates are substituted for fixed grates<sup>5</sup>; and such articles become fixtures or part of the land although resting only by their own weight. Further, an article will be treated as a fixture or part of the land if it is essential to the use of the land or building, even though it is temporarily removed from it<sup>6</sup>, or exists as a mere chattel<sup>7</sup>.

If the article cannot be removed without great damage to the land or building, there is a strong presumption that it was intended to form part of the realty<sup>8</sup>. This applies also where the article, even though removable by digging, has become in fact a part of the land, such as an advertisement hoarding fixed to the soil in a substantial manner<sup>9</sup>. The attachment is often such that, although the article is firmly affixed, it can be removed without great damage to the land or building, and therefore may not be a fixture, as, for example, where a greenhouse is fastened by mortar on walls built to support it<sup>10</sup>, or a gas-engine is fastened by bolts and screws to iron plates embedded in concrete<sup>11</sup>, or a boiler is fixed in brickwork<sup>12</sup> or is bolted to a wooden framework embedded in mortar laid on brickwork<sup>13</sup>, or looms in a cotton mill are fastened by nails through the loom feet to wooden plugs<sup>14</sup>, or to beams<sup>15</sup>, in the floor, or machinery is fastened to buildings by bolts and nuts<sup>16</sup>, or a threshing machine is fixed by bolts and screws to posts let into the ground<sup>17</sup>, or machinery is fastened by bolts and nuts to concrete beds and worked by power transmitted from an engine by shafts, wheels, and gearing<sup>18</sup>. Whether or not an article has become a fixture or part of the land is ultimately a question of intention<sup>19</sup>, and therefore in one case tip-up seats screwed to the floor of a hall used as a cinema were held to be part of the land because they were intended to be used as part of the permanent equipment of the building<sup>20</sup>, whereas in another case similar seats were held not to be fixtures as they were there for a temporary purpose only<sup>21</sup>.

1 For the modern threefold classification of things brought onto the land see PARA 172 ante.

2 *Bain v Brand* (1876) 1 App Cas 762 at 772, HL; *Turner v Cameron* (1870) LR 5 QB 306 at 311. Tramlines fastened to sleepers merely laid upon the ground are not fixtures, notwithstanding that they have sunk into the ground by the pressure of the waggons passing over them (*Duke of Beaufort v Bates* (1862) 3 De GF & J 381); nor are straightening plates laid on the ground in an iron foundry and partly penetrating the ground (*Metropolitan Counties etc Society v Brown* (1859) 26 Beav 454 at 461); but railways laid in ballast are fixtures (*Turner v Cameron* (1870) LR 5 QB 306; *Re Armytage, ex p Moore and Robinson's Banking Co* (1880) 14 ChD 379); and so are straightening plates let into the floor of a foundry so as to become part of the permanent floor (*Re Richards, ex p Astbury, ex p Lloyds Banking Co* (1869) 4 Ch App 630 at 638). Similarly, a flagstone let into the ground is a fixture: *Re Richards, ex p Astbury, ex p Lloyds Banking Co* supra.

3 *Holland v Hodgson* (1872) LR 7 CP 328 at 335, Ex Ch. Similarly, large chambers and towers used for the preparation of sulphuric acid, resting on but not fixed to foundations prepared for them, have been held to be integral parts of one composite building permanently annexed to the freehold: *Pole-Carew v Western Counties and General Manure Co Ltd* [1920] 2 Ch 97, CA.

4 *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 at 396; cf *Berkley v Poulett* [1977] 1 EGLR 86, (1976) 241 Estates Gazette 911, CA.

5 *Monti v Barnes* [1901] 1 KB 205, CA.

6 Eg a millstone taken away for repair: *Liford's Case* (1614) 11 Co Rep 46b at 50a, 50b; *Place v Fagg* (1829) 4 Man & Ry KB 277; *Mather v Fraser* (1856) 2 K & J 536 at 551; *Moody v Steggles* (1879) 12 ChD 261 at 267; and see *D'Eyncourt v Gregory* (1866) LR 3 Eq 382.

7 Eg the keys of a house: *Liford's Case* (1614) 11 Co Rep 46b; *Elliott v Bishop* (1854) 10 Exch 496 at 509 (on appeal (1855) 11 Exch 113 at 119, Ex Ch); *Moody v Steggles* (1879) 12 ChD 261 at 267. As to an inn signboard see *Re Thomas, ex p Baroness Willoughby d'Eresby* (1881) 44 LT 781, CA; *Moody v Steggles* supra.

8 *Wake v Hall* (1883) 8 App Cas 195 at 204, HL. As to unfinished buildings see *Smith v Render* (1857) 27 LJ Ex 83. Possibly the tenant might remove an uncompleted building if the materials were provided by himself, but not if provided by the landlord: *Smith v Render* supra. See also *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL (bungalow constructed in such a way as to make removal without destruction impossible held to be part of the land).

9 *Provincial Bill Posting Co v Low Moor Iron Co* [1909] 2 KB 344, CA.

10 *Buckland v Butterfield* (1820) 2 Brod & Bing 54; *Jenkins v Gething* (1862) 2 John & H 520; *Mears v Callender* [1901] 2 Ch 388; and see *West v Blakeway* (1841) 2 Man & G 729.

11 *Hobson v Gorringe* [1897] 1 Ch 182, CA; *Crossley Bros Ltd v Lee* [1908] 1 KB 86, DC; and, similarly, where an engine and steam hammer are fastened by screws to stone fixed in the ground (*Metropolitan Counties etc Society v Brown* (1859) 26 Beav 454 at 458), or a crane is screwed to blocks of stone cramped together and laid on a prepared bed of mortar, and is supported by guys (*Re Armytage, ex p Moore and Robinson's Banking Co* (1880) 14 ChD 379).

12 *Metropolitan Counties etc Society v Brown* (1859) 26 Beav 454 at 459; *Climie v Wood* (1868) LR 3 Exch 257 (affd (1869) LR 4 Exch 328, Ex Ch); *Gough v Wood & Co* [1894] 1 QB 713, CA. As to stills set in brickwork and let into the ground see *Horn v Baker* (1808) 9 East 215 at 222, 238. In *Climie v Wood* (1868) LR 3 Exch 257 there was also an engine screwed to thick planks lying on the ground, and both engine and boiler were held to be fixtures, but apparently the engine by itself would not have been a fixture.

13 *Cross v Barnes* (1877) 46 LJQB 479.

14 *Boyd v Shorrock* (1867) LR 5 Eq 72. The position is different where the looms are not fixed at all, but are merely steadied by the legs being let into 'loom feet' or cylinders dropped into holes in the floor: *Hutchinson v Kay* (1857) 23 Beav 413.

15 *Holland v Hodgson* (1872) LR 7 CP 328, Ex Ch.

16 *Walmsley v Milne* (1859) 7 CBNS 115; *Longbottom v Berry* (1869) LR 5 QB 123; and see *Mather v Fraser* (1856) 2 K & J 536 (mode of attachment of the steam engines, boilers and mill gear fastened in the mill not stated).

17 *Wiltshear v Cottrell* (1853) 1 E & B 674; and see *Holland v Hodgson* (1872) LR 7 CP 328, Ex Ch.

18 *Reynolds v Ashby & Son* [1904] AC 466, HL.

19 See PARA 174 ante.

20 *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74. See also *New Zealand Government Corpn v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA.

21 *Lyon & Co v London City and Midland Bank* [1903] 2 KB 135; approved on its particular facts in *Reynolds v Ashby & Son* [1904] AC 466 at 474, HL.

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### 176. Purpose of annexation.

Although the immediate reason for fastening an article, such as a loom, may be only to steady it and make it more convenient for use, the article will be deemed to be a fixture if it is intended that it is to remain on the premises for the remainder of the term as a means of more effectually enjoying the use of the premises<sup>1</sup>. If there is such an intention, the article will be treated as permanently attached to the premises even though it is capable of being moved from one part of the premises and fastened in another<sup>2</sup>. Hence articles and machinery necessary for the use of land as agricultural land<sup>3</sup>, or of premises as a factory<sup>4</sup>, and attached to it in the manner already described, may be fixtures notwithstanding that they could be removed without substantial damage to the land or premises.

1 *Boyd v Shorrock* (1867) LR 5 Eq 72 at 79, 80; *Holland v Hodgson* (1872) LR 7 CP 328 at 337, Ex Ch; and see PARA 174 ante. A carpet, even though affixed to the floor, may be repeatedly removed independently of the existence of the term, and is not a fixture: *Boyd v Shorrock* supra at 79; cf *Young v Dalgety plc* [1987] 1 EGLR 116, CA (carpet fixed to the floor by gripper rods held at first instance to be a fixture; not considered on appeal).

2 *Boyd v Shorrock* (1867) LR 5 Eq 72.

3 *Wiltshear v Cottrell* (1853) 1 E & B 674; *Holland v Hodgson* (1872) LR 7 CP 328 at 339, Ex Ch.

4 *Walmsley v Milne* (1859) 7 CBNS 115 at 131; *Longbottom v Berry* (1869) LR 5 QB 123 at 138 (where the mode of attachment of numerous machines is fully stated); *Holland v Hodgson* (1872) LR 7 CP 328, Ex Ch (in effect an appeal against *Longbottom v Berry* supra); *Hobson v Gorringe* [1897] 1 Ch 182, CA; *Reynolds v Ashby & Son* [1904] AC 466, HL; *Crossley Bros Ltd v Lee* [1908] 1 KB 86, DC; *Mather v Fraser* (1856) 2 K & J 536; *Climie v Wood* (1868) LR 3 Exch 257; affd (1869) LR 4 Exch 328, Ex Ch. These cases overrule the particular application of the rule as to fixtures (see PARA 174 note 2 ante) made in *Hellawell v Eastwood* (1851) 6 Exch 295, although the rule itself is still good law. In *Lincolnshire Finance Co v Farrant* (1886) 2 TLR 248 an engine and machinery were held not to be fixtures, but it is not stated how they were erected. See also *Fisher v Dixon* (1845) 12 Cl & Fin 312 at 329, HL. Retorts, boilers, gas-holders and other machinery in gas works are fixtures, but not the meters fixed on the consumers' premises: *R v Lee Inhabitants* (1866) LR 1 QB 241 (a rating case). Buildings and machinery erected by miners working under customs entitling them to the use of surface land were held to be removable in *Wake v Hall* (1883) 8 App Cas 195, HL. As to taking trade fixtures as part of a manufactory under the Lands Clauses Consolidation Act 1845 s 92 see *Gibson v Hammersmith and City Rly Co* (1863) 2 Drew & Sm 603; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 628.

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### 177. Fixtures with removable parts.

Where an article is a fixture (or part of the land)<sup>1</sup>, portions of it which are removable, but which are an essential part of it, are also fixtures<sup>2</sup>. Electric lamps have been held, however, not to form part of an electric light installation and so not to be fixtures<sup>3</sup>.

1 For the modern threefold classification of things brought onto the land see PARA 172 ante.

<sup>2</sup> *Mather v Fraser* (1856) 2 K & J 536 at 559; *Metropolitan Counties etc Society v Brown* (1859) 26 Beav 454 at 459; *Re Richards, ex p Astbury, ex p Lloyds Banking Co* (1869) 4 Ch App 630 at 635; *Sheffield and South Yorkshire Permanent Benefit Building Society v Harrison* (1884) 15 QBD 358, CA; and see *Fisher v Dixon* (1845) 12 Cl & Fin 312 at 330, HL. These cases relate to machinery, but there appears no reason why the principle they enunciate should not be of general application.

3 *British Economical Lamp Co Ltd v Empire Mile End, Ltd* (1913) 29 TLR 386. See also *Jordan v May* [1947] KB 427, [1947] 1 All ER 231, CA (storage batteries held not to be an essential part of an electric lighting plant, although they were necessary to its effective functioning); cf *Young v Dalgety plc* [1987] 1 EGLR 116, CA (fluorescent tubes contained in glass boxes securely affixed to the plaster of the ceiling held at first instance to be fixtures; not considered on appeal). Doors and windows attached to premises belong to a class of chattels made so completely a part of the land, as being essential to its convenient use, that even a tenant could not remove them: *Climie v Wood* (1869) LR 4 Exch 328 at 329, Ex Ch.

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## (ii) Removal of Fixtures

### 178. Relaxations of the general rule.

The general rule that chattels, once annexed to the land, become part of the property demised and therefore cannot properly be removed by the tenant<sup>1</sup> has been relaxed to some extent as between landlord and tenant<sup>2</sup>. Where an article has been attached to the demised premises by the tenant so as to become a fixture, if it has been affixed for the purposes of trade or ornament, the tenant is entitled, in the absence of agreement to the contrary, to sever the article from the premises and to remove it<sup>3</sup>.

1 See PARA 173 ante. The question of whether an item has become part of the land must be distinguished from the question of whether a person (generally the tenant) has a right to remove it: see *Elitestone Ltd v Morris* [1997] 2 All ER 513 at 522, [1997] 1 WLR 687 at 695-696, HL, per Lord Clyde.

Questions of the right to remove fixtures also arise on the devise of land, as between competing claims of devisees and those entitled to the personalty (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 351 the text and notes 7-10), or between mortgagor and legal mortgagee (see *Mather v Fraser* (1856) 2 K & J 536; *Walmsley v Milne* (1859) 7 CBNS 115; *Meux v Jacobs* (1875) LR 7 HL 481; and MORTGAGE vol 77 (2010) PARA 195. In those cases the decisions that establish a tenant's right to remove trade fixtures have no application: *Climie v Wood* (1869) LR 4 Exch 328 at 330, Ex Ch; *Grymes v Boweren* (1830) 6 Bing 437 at 440 (rule as between heir and executor more strict than between landlord and tenant). As to the rights of landlords and mortgagees in relation to chattels that are the subject of hire purchase or consumer credit agreements by the tenant see MORTGAGE vol 77 (2010) PARA 195.

Questions of the right to remove fixtures also arise between the personal representatives of a tenant for life, if he affixed the articles during his life tenancy, and the remainderman. In this class of case there is a similar relaxation of the ordinary rule of irremovability so that ornamental fixtures and trade fixtures may be removed: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 351.

2 *Elwes v Maw* (1802) 3 East 38.

3 These fixtures are known as 'tenant's fixtures', and these relaxations have been grafted on to the general rule in the progress of time as the injustice of denying the right of removal to the tenant came to be clearly

recognised: see *Elliott v Bishop* (1854) 10 Exch 496 at 507; *Spyer v Phillipson* [1931] 2 Ch 183 at 192, 193, CA. The purpose of the annexation therefore has again to be considered when deciding whether a fixture is a 'tenant's fixture', just as it has to be considered when deciding whether an article has become a fixture at all: see *Webb v Frank Bevis Ltd* [1940] 1 All ER 247, CA.

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### 179. Trade fixtures.

A tenant may remove fixtures if they have been affixed for the purposes of trade or manufacture, so long as the lease does not provide to the contrary<sup>1</sup>, and so long as they are capable of being severed from the land without irreparable injury to it<sup>2</sup>. This relaxation of the ordinary rule as to the irremovability of fixtures was made in order to encourage industry<sup>3</sup>, but the relaxation has not been extended to agricultural fixtures<sup>4</sup>, and such fixtures may be removed only in circumstances where there is a statutory right to do so<sup>5</sup>.

1 See PARA 185 post.

2 See *Climie v Wood* (1869) LR 4 Exch 328, Ex Ch; *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260; and PARA 151 post. Thus, a tenant might remove vats used for soap boiling (*Poole's Case* (1703) 1 Salk 368), salt pans (*Lawton v Salmon* (1782) 1 Hy Bl 260n (b)) and engines for working collieries (*Lawton v Lawton* (1743) 3 Atk 13; *Lord Dudley v Lord Warde* (1751) Amb 113; *Ward v Countess Dudley* (1887) 57 LT 20).

3 *Poole's Case* (1703) 1 Salk 368; *Penton v Robart* (1801) 2 East 88 at 90; *Elwes v Maw* (1802) 3 East 38 at 52.

4 *Elwes v Maw* (1802) 3 East 38.

5 See the Agricultural Holdings Act 1986 s 10; the Agricultural Tenancies Act 1995 s 8; and AGRICULTURAL LAND vol 1 (2008) PARA 305, 336.

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### 180. Ornamental fixtures.

Objects which have been fixed to the freehold by way of ornament<sup>1</sup> or for domestic convenience and utility<sup>2</sup> have from the earliest times been removable by the tenant provided that the lease does not provide to the contrary<sup>3</sup> and that they are capable of being severed without irreparable injury to the land<sup>4</sup>.

Articles which form an essential part of a house at the time of its construction may not be removed<sup>5</sup>; and it is doubtful whether such articles may properly be called fixtures of any description<sup>6</sup>. Skylights are not fixtures but form part of the roof<sup>7</sup>.

The removal of certain fixtures may require listed building consent<sup>8</sup>.

1 *Elliott v Bishop* (1854) 10 Exch 496; *Climie v Wood* (1869) LR 4 Exch 328, Ex Ch; *Holland v Hodgson* (1872) LR 7 CP 328 at 333, Ex Ch; *Re de Falbe, Ward v Taylor* [1901] 1 Ch 523, CA (affd sub nom *Leigh v Taylor* [1902] AC 157, HL); *Spyer v Phillipson* [1931] 2 Ch 183, CA. The old cases are of value only in so far as they lay down general principles: *Spyer v Phillipson* supra at 192. The articles of ornament dealt with in them were ornamental chimney-pieces, pier-glasses, tapestry and other hangings, and wainscot fixed only by screws (*Elwes v Maw* (1802) 3 East 38 at 53; *Buckland v Butterfield* (1820) 2 Brod & Bing 54 at 58); marble chimney-pieces (*Allen v Allen* (1729) Mos 112; *Lawton v Lawton* (1743) 3 Atk 13 at 15; *Ex p Quincy* (1750) 1 Atk 477; *Lord Dudley v Lord Warde* (1751) Amb 113; *Lawton v Salmon* (1782) 1 Hy Bl 260n(b); *Elliott v Bishop* (1854) 10 Exch 496 at 510 (on appeal (1855) 11 Exch 113 at 119, Ex Ch)); pier-glasses (*Beck v Rebow* (1706) 1 P Wms 94); tapestry (*Squier v Mayer* (1701) Freem Ch 249; *Harvey v Harvey* (1740) 2 Stra 1141; *Beck v Rebow* supra; *Leigh v Taylor* supra; affg *Re de Falbe, Ward v Taylor* supra which overruled on this point *D'Eyncourt v Gregory* (1866) LR 3 Eq 382), but tapestry fixed as a part of a general and permanent scheme of decoration will pass as a fixture under a devise of a mansion house (*Norton v Dashwood* [1896] 2 Ch 497; *Re Whaley, Whaley v Roehrich* [1908] 1 Ch 615); stuffed birds and other specimens in cases forming the contents of a museum in a settled mansion house (*Viscount Hill v Bullock* [1897] 2 Ch 482, CA).

The relaxation of the rule requires that the article should be specifically ornamental, and not an ordinary accessory to the house, such as a conservatory on a brick foundation, communicating with the rest of the house: *Buckland v Butterfield* supra at 58; *Leach v Thomas* (1835) 7 C & P 327; *Jenkins v Gething* (1862) 2 John & H 520. A marble chimney-piece, when these chimney-pieces became more common, was not necessarily ornamental, and a chimney-piece may be ornamental even if not made of marble: *Bishop v Elliott* (1855) 11 Exch 113 at 121. A cornice, if ornamental, is removable: *Avery v Cheslyn* (1835) 3 Ad & El 75.

2 The following articles of domestic utility have been held removable: stoves and grates, fixed with brickwork in the chimney-places, which can be removed without doing injury to the chimney-places (*R v St Dunstan, Kent, Inhabitants* (1825) 4 B & C 686 at 691; *Grymes v Boweren* (1830) 6 Bing 437 at 439; *Re Gawan, ex p Barclay* (1855) 5 De GM & G 403 at 410; *R v Lee Inhabitants* (1866) LR 1 QB 241 at 254; *Squier v Mayer* (1701) Freem Ch 249); kitchen ranges, ovens and boilers (*Grymes v Boweren* supra; *Darby v Harris* (1841) 1 QB 895; *Winn v Ingilby* (1822) 5 B & Ald 625); cupboards which stand on the ground and are removable without other injury to the walls than the marks of a few nails (*R v St Dunstan, Kent, Inhabitants* supra; *Re Gawan, ex p Barclay* supra); pumps (*Grymes v Boweren* supra); bells (*Lyde v Russell* (1830) 1 B & Ad 394; *Pugh v Arton* (1869) LR 8 Eq 626 at 629).

3 See PARA 185 post.

4 See *Spyer v Phillipson* [1931] 2 Ch 183, CA; and PARA 181 post.

5 This applies eg to doors and windows (*Bishop v Elliott* (1855) 11 Exch 113 at 119, Ex Ch; *Climie v Wood* (1869) LR 4 Exch 328 at 329, Ex Ch), and hearths and chimney pieces put in to complete a house (*Poole's Case* (1703) 1 Salk 368).

6 *Boswell v Crucible Steel Co* [1925] 1 KB 119, CA; *Elitestone Ltd v Morris* [1997] 2 All ER 513, [1997] 1 WLR 687, HL

7 *Taylor v Webb* [1937] 2 KB 283, [1937] 1 All ER 590, CA; overruled on other grounds in *Regis Property Co Ltd v Dudley* [1959] AC 370, [1958] 3 All ER 491, HL.

8 See TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1091. The fact that an object is free-standing is not conclusive evidence that it is not a 'fixture' for these purposes: see *Kennedy v Secretary of State for Wales* [1996] EGCS 17 (carillon clock resting on floor by own 'colossal' weight; held that its removal required listed building consent).

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## 181. Removal causing serious damage.

So long as an article can be removed without doing irreparable damage to the demised premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done either to the article itself or to the demised premises by the removal, have any bearing upon the tenant's right to remove it, except in so far as they indicate the intention with



which the tenant affixed the article to the premises<sup>1</sup>. Where trade fixtures have to be taken to pieces in the removal, in general it is essential that they are capable of being put together in the same form in some other place<sup>2</sup>. Buildings of a permanent nature are not removable<sup>3</sup>, but a temporary corrugated iron shed used for trade is removable<sup>4</sup>. Glasshouses are removable when erected for the purpose of his business by a market gardener<sup>5</sup> but, when erected for ornament or convenience, are not removable<sup>6</sup>. Slight buildings, erected for the purpose of trade<sup>7</sup>, and buildings which are accessory to removable machinery are removable<sup>8</sup>.

1 *Spyer v Phillipson* [1931] 2 Ch 183 at 209, CA. Petrol pumps affixed to tanks embedded in the ground are removable tenant's fixtures, but the tanks themselves are irremovable fixtures: *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260. Formerly a fixture was removable only if it could be removed without material damage being done to the freehold (*Trappes v Harter* (1833) 2 Cr & M 153 at 181; *Avery v Cheslyn* (1835) 3 Ad & El 75; *Re Gawan, ex p Barclay* (1855) 5 De GM & G 403; *Gibson v Hammersmith and City Rly Co* (1863) 2 Drew & Sm 603 at 608; *Wake v Hall* (1883) 8 App Cas 195 at 205, HL), but trifling damage to the freehold was not regarded (*Martin v Roe* (1857) 7 E & B 237 at 244). Fixtures affixed for convenience or utility formerly could be removed only when they were slightly affixed and could be removed entire: *Grymes v Boweren* (1830) 6 Bing 437 at 440. It appears to be general practice that the tenant is liable to repair the damage done by the removal (see *Spyer v Phillipson* supra at 201) but, where the removal causes injury to brickwork, the brickwork need not be restored to a perfect state as though the article it was intended to support were still there, but may be left in such a state as to be most useful to the landlord or the next tenant (*Foley v Addenbrooke* (1844) 13 M & W 174 at 196).

2 *Whitehead v Bennett* (1858) 27 LJ Ch 474; *Webb v Frank Bevis Ltd* [1940] 1 All ER 247 at 251, CA per Scott LJ.

3 *Whitehead v Bennett* (1858) 27 LJ Ch 474; *Wake v Hall* (1880) 7 QBD 295 at 301, CA; affd (1883) 8 App Cas 195, HL (see PARA 176 note 4 ante); *Pole-Carew v Western Counties and General Manure Co Ltd* [1920] 2 Ch 97, CA.

4 *Webb v Frank Bevis Ltd* [1940] 1 All ER 247, CA.

5 *Penton v Robart* (1801) 2 East 88; *Mears v Callender* [1901] 2 Ch 388. Probably the brickwork should be left, although this has been treated as doubtful: *Syme v Harvey* (1861) 24 D (Ct of Sess) 202. Shrubs and trees forming part of a nursery gardener's stock in trade are removable (*Penton v Robart* supra at 90; *Oakley v Monck* (1866) LR 1 Exch 159 at 167, Ex Ch), but this does not authorise cutting or removing plants which would only be destroyed in the process (*Oakley v Monck* supra at 167; *Watherell v Howells* (1808) 1 Camp 227). Orchard trees are not removable: *Mears v Callender* [1901] 2 Ch 388 at 395. See further PARA 190 post.

6 *Buckland v Butterfield* (1820) 2 Brod & Bing 54; *Jenkins v Gething* (1862) 2 John & H 520. Pipes which form the heating apparatus, but not the boiler, are removable: *Jenkins v Gething* supra. As to ornamental fixtures which are removable see PARA 180 ante.

7 Eg wooden buildings erected on a foundation of brick (*Penton v Robart* (1801) 2 East 88; and see *Fitzherbert v Shaw* (1789) 1 Hy Bl 258 at 259 per Gould J; *Dean v Allalley* (1799) 3 Esp 11; *Elwes v Maw* (1802) 3 East 38 at 55) and a corrugated iron shed (*Webb v Frank Bevis Ltd* [1940] 1 All ER 247, CA).

8 *Wake v Hall* (1883) 8 App Cas 195 at 210, HL. In *Whitehead v Bennett* (1858) 27 LJ Ch 474 it was said that only a slight building, such as a shed, could be removed as being accessory to machinery.

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## 182. Time for removal.

Where fixtures are removable by a tenant, the general rule is that he is entitled to exercise this right only during the term<sup>1</sup> and, if he omits to do so, the fixtures become the reversioner's absolute property<sup>2</sup>. If, however, the tenant remains in possession after the term in such

circumstances that he is entitled still to consider himself as tenant, his right to remove fixtures continues as long as this state of things lasts<sup>3</sup>. Thus, where the tenant takes a new lease from his landlord thereby effecting a surrender by operation of law of his existing tenancy, the tenant's right to remove tenant's fixtures nevertheless continues<sup>4</sup>. If he is a tenant holding on an uncertain tenancy, his right to remove fixtures continues for such a time as is reasonable to enable him to remove the fixtures after the determination of his tenancy<sup>5</sup>. The general rule applies in whatever manner the term comes to an end, whether by effluxion of time or by surrender<sup>6</sup> or forfeiture<sup>7</sup>, but in a case of surrender<sup>8</sup> or forfeiture<sup>9</sup> a third person, such as a mortgagee of the fixtures from the tenant, is entitled to a reasonable time<sup>10</sup> within which to remove them. A tenant who is entitled to remove fixtures under the stipulations of the lease may remove them within a reasonable time after the determination of the term<sup>11</sup> but he has an obligation to make good damage caused by their installation and removal<sup>12</sup>.

1 *Poole's Case* (1703) 1 Salk 368; *Ex p Quincy* (1750) 1 Atk 477; *Lord Dudley v Lord Warde* (1751) Amb 113; *Lyde v Russell* (1830) 1 B & Ad 394 at 395; *Minshall v Lloyd* (1837) 2 M & W 450 at 459; *Gibson v Hammersmith and City Rly Co* (1863) 2 Drew & Sm 603 at 608; *British Economical Lamp Co Ltd v Empire, Mile End Ltd* (1913) 29 TLR 386. In the case of land requisitioned in the exercise of emergency powers, the right of removal may be exercised within a reasonable time after the requisitioning authority gives up possession, when that occurs after or shortly before the expiry of the term: see the Landlord and Tenant (Requisitioned Land) Act 1942 s 7.

2 *Poole's Case* (1703) 1 Salk 368; *Meux v Jacobs* (1875) LR 7 HL 481 at 490; *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260.

3 *New Zealand Government Property Corp v HM and S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA; *Minshall v Lloyd* (1837) 2 M & W 450; *Mackintosh v Trotter* (1838) 3 M & W 184 at 186 per Parke B; *Weeton v Woodcock* (1840) 7 M & W 14 at 19; *Roffey v Henderson* (1851) 17 QB 574 at 586; *Leader v Homewood* (1858) 5 CBNS 546; *Re Roberts, ex p Brook* (1878) 10 ChD 100 at 109, CA; *Leschallas v Woolf* [1908] 1 Ch 641 at 652; *Slough Picture Hall Co Ltd v Wade, Wilson v Nevile, Reid & Co Ltd* (1916) 32 TLR 542 at 543.

There is authority that the tenant's right to remove fixtures continues so long as he retains possession: *Penton v Robart* (1801) 2 East 88 at 90-91 (tenant held entitled to remove fixtures after the expiration of the term and judgment for possession had been obtained as they were removed when the tenant 'was in fact still in possession of the premises'). *Penton v Robart* supra has, however, been doubted and distinguished (see *Weeton v Woodcock* supra; *Leader v Homewood* supra; and *Barff v Probyn* (1895) 64 LJQB 557) and expressly dissented from (see *Deeble v McMullen* (1857) 8 Ir CLR 355); but it was referred to with approval in *New Zealand Government Property Corp v HM and S Ltd* supra. It seems that a tenant at sufferance may be entitled to remove fixtures: *Barff v Probyn* supra. Where possession proceedings are compromised between the parties, the effect of which is to postpone the date on which the tenant is to deliver up possession of the premises, the question whether the tenant is entitled to remove fixtures in the interim depends upon the construction of the compromise agreement: see *Fitzherbert v Shaw* (1789) 1 Hy Bl 258, followed in *Heap v Barton* (1852) 12 CB 274.

4 *New Zealand Government Property Corp v HM and S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA. See further PARA 183 post.

5 *Oakley v Monck* (1866) LR 1 Exch 159 at 164, Ex Ch; *Re Roberts, ex p Brook* (1878) 10 ChD 100 at 109, CA; *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260.

6 *Re Roberts, ex p Brook* (1878) 10 ChD 100 at 110, CA.

7 *Pugh v Arton* (1869) LR 8 Eq 626; and see *Weeton v Woodcock* (1840) 7 M & W 14 at 19, applied in *Re Palmiero (Debtor No 3666 of 1999)* [1999] 3 EGLR 27, [1999] 38 EG 195 (tenant not entitled to remove tenant's fixtures after forfeiture). This does not apply to fixtures which by the express terms of the lease are to be the tenant's property: *Re Walker, ex p Gould* (1884) 13 QBD 454.

8 *London and Westminster Loan and Discount Co Ltd v Drake* (1859) 6 CBNS 798; *Saint v Pilley* (1875) LR 10 Exch 137.

9 *Re Glasdir Copper Works Ltd, English Electro-Metallurgical Co Ltd v Glasdir Copper Works Ltd* [1904] 1 Ch 819. It has been held that a person who lets electric lamps on hire to a tenant of premises has no right of action against the landlords, who have re-entered for non-payment of rent, for refusal to permit him to enter to remove them or for refusal to remove and restore them, even though a claim for conversion might lie against the landlords, if there were evidence of an assertion by them of a property in the lamps and of a dealing with the lamps by them as their property: *British Economical Lamp Co Ltd v Empire, Mile End Ltd* (1913) 29 TLR 386.

at 387. As to removal by a trustee in bankruptcy who disclaims the lease see the Insolvency Act 1986 s 317(2); *Re Moser* (1884) 13 QBD 738; cf *Re Roberts, ex p Brook* (1878) 10 ChD 100, CA; and see PARA 642 post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 481.

10 *Moss v James* (1878) 38 LT 595, CA. The assignee of growing crops can, however, only take them subject to payment of the rent and expenses of cultivation since the surrender: *Clements v Matthews* (1883) 11 QBD 808, CA.

11 *Pugh v Arton* (1869) LR 8 Eq 626 at 630, applied in *Re Palmiero (Debtor No 3666 of 1999)* [1999] 3 EGLR 27, [1999] 38 EG 195; and see *Stansfeld v Portsmouth Corp'n* (1858) 4 CBNS 120; *Sumner v Bromilow* (1865) 34 LJQB 130.

12 *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, [1986] 1 All ER 449, CA (removal of tenant's fixtures without making good any damage, namely the failure to fill in holes exposed by the removal of pipes and extractor fans, held to be waste). The obligation extends to structural as well as decorative damage: *Spyer v Phillipson* [1931] 2 Ch 183, CA. The extent of the obligation is one requiring the premises after removal of the fixtures to be left in a reasonable condition: *Foley v Addenbrooke* (1844) 13 M & W 174 as explained in *Mancetter Developments Ltd v Garmanson Ltd* supra at 1219 and at 453 per Dillon LJ. The filling of screw holes or nail holes where a fixture is removed which has been screwed or nailed to a wall may be a matter de minimis: *Mancetter Developments Ltd v Garmanson Ltd* supra at 1220 and at 454 per Dillon LJ.

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### 183. Effect of new lease.

If the previous tenancy has expired by effluxion of time or is determined by surrender by operation of law, the right to remove fixtures is carried forward into the new tenancy<sup>1</sup>. Where there is an express surrender, the question must be determined in accordance with the provisions of the deed but, in the absence of an express renunciation of the right to remove tenant's fixtures, the right carries forward into the new tenancy<sup>2</sup>.

1 *New Zealand Government Property Corp'n v HM and S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA. It was formerly supposed that the tenant lost his right to remove tenant's fixtures upon the determination of the term and the tenant's taking a new lease of the premises unless express provision was made to carry forward into the new tenancy the tenant's right to remove: see *Leschallas v Woolf* [1908] 1 Ch 641; *Slough Picture Hall Co Ltd v Wade, Wilson v Nevile, Reid & Co Ltd* (1916) 32 TLR 542; *Pole-Carew v Western Counties and General Manure Co Ltd* [1920] 2 Ch 97, CA.

2 *New Zealand Government Property Corp'n v HM and S Ltd* [1982] QB 1145 at 1160, [1982] 1 All ER 624 at 629, CA, per Lord Denning MR and at 1161-1162 and 630 per Dunn LJ.

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### 184. Licence to remove fixtures.

In order that a licence by the landlord for the removal of fixtures after the determination of the tenancy may be available against the succeeding tenant it should be by deed<sup>1</sup>. An oral agreement by the landlord to take fixtures which the tenant could remove is, however, enforceable, because it does not relate to an interest in land<sup>2</sup>.

1 *Roffey v Henderson* (1851) 17 QB 574. Fixtures may not be removed under such an agreement as against a mortgagee taking without notice of the agreement: *Thomas v Jennings* (1896) 45 WR 93.

2 *Hallen v Runder* (1834) 1 Cr M & R 266; *Lee v Gaskell* (1876) 1 QBD 700; *Lee v Risdon* (1816) 7 Taunt 188. Where the tenant has not removed fixtures during the term, he cannot maintain conversion for them afterwards (*Lee v Risdon* supra; *Colegrave v Dias Santos* (1823) 2 B & C 76; *Minshall v Lloyd* (1837) 2 M & W 450), unless the articles in fact remain personal chattels throughout (*Davis v Jones* (1818) 2 B & Ald 165). As to conversion and other categories of wrongful interference with goods see TORT vol 45(2) (Reissue) PARA 542 et seq.

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### 185. Contract to leave fixtures.

The tenant's right to remove trade or other fixtures is subject to the terms of the contract between the landlord and himself, and will be lost if he has covenanted to yield up the demised premises with the fixtures in such language as to make it imperative to construe 'fixtures' as including fixtures removable by a tenant. If it stands in the covenant by itself, the word 'fixtures' will include landlord's and tenant's fixtures<sup>1</sup> but, if the covenant enumerates a series of specific items all of which are of the nature of landlord's fixtures, and then concludes with general words such as 'all other fixtures', the general words will be construed according to the ejusdem generis rule<sup>2</sup> as including only landlord's fixtures and the tenant will retain his ordinary right to remove tenant's fixtures<sup>3</sup>. To restrict the general words in this manner it is sufficient that the specific words should refer only to articles which ordinarily are not removable by the tenant<sup>4</sup>. If the specific words are not assignable exclusively to landlord's fixtures, the general words will have their full effect and will prevent the removal of tenant's fixtures<sup>5</sup>.

A covenant to deliver up buildings erected during the term includes trade fixtures<sup>6</sup>, and a covenant to yield up specified machinery extends to substituted machinery<sup>7</sup>, but not to new machinery of an improved kind which was not contemplated at the time of the lease<sup>8</sup>. A covenant to leave in good repair all erections, fences and fixed machinery is sufficient to deprive the tenant of the right to remove trade fixtures<sup>9</sup>, but a covenant to yield up works does not extend to articles which are not fixtures<sup>10</sup>. For the lease to take away a tenant's ordinary legal right to remove 'tenant's fixtures', the intention to this effect must, however, be clearly expressed<sup>11</sup> so that it is not sufficient to deprive the tenant of this right that the tenant had installed the relevant item pursuant to a contractual obligation to do so<sup>12</sup>.

1 *Leschallas v Woolf* [1908] 1 Ch 641. It is possible that the new threefold classification of things brought onto the land (see PARA 172 ante) will mean that the word 'fixtures' will subsequently be construed rather more narrowly so that it is more likely, after *Elitestone Ltd v Morris* [1997] 2 All ER 513 at 522, [1997] 1 WLR 687 at 695-696, HL, to include fixtures removable by a tenant.

2 As to the ejusdem generis rule generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 234.

3 *Bishop v Elliott* (1855) 11 Exch 113, Ex Ch; and see *Dumergue v Rumsey* (1863) 2 H & C 777 at 788, Ex Ch; *Sumner v Bromilow* (1865) 34 LJQB 130.

4 *Lambourn v McLellan* [1903] 2 Ch 268, CA.

5 *Wilson v Whateley* (1860) 1 John & H 436; *Bidder v Trinidad Petroleum Co* (1868) 17 WR 153 ('erections' also held to be wider than 'buildings' and to include cisterns and boilers embedded in brickwork).

6 *Naylor v Collinge* (1807) 1 Taunt 19 (approved in *HE Dibble Ltd v Moore* [1970] 2 QB 181, [1969] 3 All ER 1465, CA); *Thresher v East London Water Works Co* (1824) 2 B & C 608 at 614; and see *Foley v Addenbrooke* (1844) 13 M & W 174 (buildings had to be delivered up but not machinery). A covenant to deliver up a water mill with all fixtures and improvements includes new millstones set up by the tenant, although according to the custom of the country he could have removed them: *Martyr v Bradley* (1832) 9 Bing 24. A covenant to yield up 'erections and improvements' extends to a greenhouse (*West v Blakeway* (1841) 2 Man & G 729 at 754), to a verandah (*Penry's Administratrix v Brown* (1818) 2 Stark 403) and to a plate-glass front (*Haslett v Burt* (1856) 18 CB 893).

7 See *Sunderland v Newton* (1830) 3 Sim 450.

8 *Cosby v Shaw* (1888) 23 LR Ir 181, CA.

9 *Re British Red Ash Collieries Ltd* [1920] 1 Ch 326, CA; and see *Earl of Mansfield v Blackburne* (1840) 6 Bing NC 426 (covenant to leave salt works in good repair held to prevent the removal of salt pans which had been erected so as to be fixtures).

10 *Duke of Beaufort v Bates* (1862) 3 De GF & J 381 at 388.

11 *Duke of Beaufort v Bates* (1862) 3 De GF & J 381 at 390; *Mowats Ltd v Hudson Bros Ltd* (1911) 105 LT 400, CA, followed in *Young v Dalgety plc* [1987] 1 EGLR 116, CA. The covenant to yield up in repair usually contains an express exception of tenant's fixtures. When it expressly includes all fixtures, whether tenant's or trade fixtures or otherwise, the intention to prevent removal of any fixtures is equally clear: see *Dumergue v Rumsey* (1863) 2 H & C 777, Ex Ch. A covenant in a head lease for delivery up of trade fixtures prevents an undertenant from removing those fixtures: *Porter v Drew* (1880) 5 CPD 143; and see PARA 92 ante.

12 *Mowats Ltd v Hudson Bros Ltd* (1911) 105 LT 400, CA (new shop front); *Young v Dalgety plc* [1987] 1 EGLR 116, CA (carpets and light fittings to fit out offices).

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## 186. Remedies for wrongful removal of fixtures.

If a tenant wrongfully removes fixtures which have become part of the realty, the landlord may maintain a claim for waste<sup>1</sup> or, where appropriate, for breach of covenant<sup>2</sup>. He may also sue in tort for conversion<sup>3</sup> and may obtain an injunction to prevent the wrongful removal of fixtures which have not yet been removed<sup>4</sup>.

1 As to liability for waste see PARAS 431, 435 post.

2 *Kinlyside v Thornton* (1776) 2 Wm Bl 1111.

3 *Farrant v Thompson* (1822) 5 B & Ald 826; and see *Hitchman v Walton* (1838) 4 M & W 409.

4 *Sunderland v Newton* (1830) 3 Sim 450; *Richardson v Ardley* (1869) 38 LJ Ch 508.

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## (5) TREES AND UNDERWOOD

### 187. Tenant's right to timber.

The respective rights of landlord and tenant as to trees vary according to whether the trees are timber trees or not<sup>1</sup>. All trees pass as parcel of the demised premises unless they are excepted<sup>2</sup>, but the tenant has only a limited property in, and limited rights over, timber trees for so long as they are annexed to the land. By virtue thereof he is entitled to all benefit, such as fruit or shade, that may be derived from them while so annexed<sup>3</sup>. Subject to the general statutory restrictions on the felling of trees<sup>4</sup>, he is also entitled to fell timber for the purpose of repairing buildings and fences so as to keep them as he found them, and to mend implements, and also for fuel if there is not sufficient dead wood available<sup>5</sup>. If the house falls by tempest or other act of God, the tenant may take timber to rebuild it<sup>6</sup>. When timber trees are dead, the tenant is entitled to cut them down and take them<sup>7</sup>, and such dead trees also belong to him if they are blown down<sup>8</sup>. If the tenant cuts down timber under any other circumstances, or tops it or does any act by which it may decay, that is waste<sup>9</sup>.

1 Co Litt 53a; *Aubrey v Fisher* (1809) 10 East 446 at 455; *Dunn v Bryan* (1872) IR 7 Eq 143; cf *Whitty v Lord Dillon* (1860) 2 F & F 67. As to what trees are timber see FORESTRY vol 52 (2009) PARA 54.

2 *Mervyn v Lyds* (1553) 1 Dyer 90a; and see *Barret v Barret* (circa 1629) Het 34.

3 *Herlakenden's Case* (1589) 4 Co Rep 62a at 62b.

4 With certain exceptions, no growing tree may be felled without the licence of the Forestry Commissioners: see the Forestry Act 1967 s 9(1); and FORESTRY vol 52 (2009) PARA 120. Where a tree preservation order has been made under the Town and Country Planning Act 1990 s 198 (as amended) (power to make tree preservation orders) or s 211 (as amended) (preservation of trees in conservation areas), the statutory consents must be obtained: see FORESTRY vol 52 (2009) PARAS 131-132. As to the preservation of trees generally see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 847 et seq; and as to the preservation of important hedgerows see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 700 et seq.

5 Co Litt 53b. The use of timber for these purposes was called 'housebote', 'plowbote' and 'firebote' (Co Litt 53b), or 'estovers' (Co Litt 41b). Cf *Courtenay v Fisher* (1826) 4 Bing 3. Although the tenant may fell timber for such necessary purposes, he must, however, at his own peril select such trees as are fit for the purpose, and employ them accordingly (*Simmons v Norton* (1831) 7 Bing 640 at 649), and the tenant may not sell the timber and use the proceeds in the purchase of other material for the repair of buildings (Co Litt 53b), nor may he cut down timber in advance so as to be used for repairs as occasion requires (*Gorges v Stanfield* (1597) Cro Eliz 593). The tenant does not acquire a right of sale by the landlord's long acquiescence: see *Lord Courtown v Ward* (1802) 1 Sch & Lef 8. Similarly, a tenant may cut turf for fuel, but not for sale (*Lord Courtown v Ward* supra; *Count De Salis v -* (1809) 2 Mol 516; *Lord Waterpark v Austen* (1822) 1 Jo Ex Ir 627n; *Pollard v Smith* (1826) 1 Hog 391; *White v Walsh* (1829) 1 Jo Ex Ir 626n), unless nothing but bog is demised and it is not capable of use except by being cut for sale, or if it was cut for sale at the time of demise (*Coppinger v Gubbins* (1846) 3 Jo & Lat 397 at 410). As to estovers see COMMONS vol 13 (2009) PARAS 459-460.

6 *Herlakenden's Case* (1589) 4 Co Rep 62a at 63a.

7 Co Litt 53a.

8 *Herlakenden's Case* (1589) 4 Co Rep 62a at 63a. See further FORESTRY vol 52 (2009) PARA 55.

9 Co Litt 53c.

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### 188. Landlord's right to timber.

The general property in timber trees, unless dead, is in the landlord<sup>1</sup> and, if the tenant or any other person severs them from the land, or if they are blown down, the limited property of the tenant is determined and the landlord may take them as parcel of his inheritance. Similarly, if the house is pulled down, the timber of which the house was made belongs at once to the landlord<sup>2</sup>.

<sup>1</sup> *Berriman v Peacock* (1832) 9 Bing 384 at 386. As to what trees are timber see FORESTRY vol 52 (2009) PARA 54; and as to dead trees see PARA 187 ante.

<sup>2</sup> *Herlakenden's Case* (1589) 4 Co Rep 62a; *Ward v Andrews* (1772) 2 Chit 636; and see *Edwards v Heather* (1724) Cas temp King 3. Hence a tenant for years cannot maintain trespass for timber cut down: *Evans v Evans* (1810) 2 Camp 491.

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### **189. Young timber trees.**

Where trees have not attained the age necessary to make them timber trees, their prospective value as timber trees prevents the tenant from cutting them down, except in a proper course of thinning and, if he does so, he commits waste<sup>1</sup>. It is also waste for the tenant to allow the young plants or germens to be destroyed<sup>2</sup>; but, if he does this in a due course of cultivation, and for the purpose of improving the growth of adjacent timber trees, he is entitled to the proceeds<sup>3</sup>. There may also be a coppice of timber trees, where the trees are felled and shoots are allowed to grow from the stumps<sup>4</sup>, these being cut at intervals of 15 years and upwards. In that case the tenant is entitled to continue the same cutting at the proper time, and to take the proceeds without regard to the age of the trees<sup>5</sup>.

<sup>1</sup> *Phillipps v Smith* (1845) 14 M & W 589 at 594; *Honywood v Honywood* (1874) LR 18 Eq 306 at 310; and see *Anon* (1581) Godb 4. As to what trees are timber see FORESTRY vol 52 (2009) PARA 54.

<sup>2</sup> Co Litt 53a. A germen (or germin) is a shoot or sprout.

<sup>3</sup> *Honywood v Honywood* (1874) LR 18 Eq 306 at 312.

<sup>4</sup> *Dashwood v Magniac* [1891] 3 Ch 306 at 362, CA.

<sup>5</sup> *Phillipps v Smith* (1845) 14 M & W 589 at 594; *Bagot v Bagot*, *Legge v Legge* (1863) 32 Beav 509 at 517; *Dashwood v Magniac* [1891] 3 Ch 306 at 330, CA, per Chitty J; and see *Viscount Hood v Kendall* (1855) 17 CB 260.

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### **190. Tenant's general property in trees not being timber.**

The general property in trees which are not timber and in underwood is in the tenant<sup>1</sup>, and he may cut them down, provided that they are not planted for ornament or for the protection of

the house or for shade to animals at pasture<sup>2</sup>, and that the cutting does not change the nature of the property demised. Thus, the tenant may not cut down apple trees in a garden or orchard, or cut down a quick-set hedge<sup>3</sup>, or plough up strawberry beds in full bearing<sup>4</sup>. Where the tenant properly cuts down trees or underwood, he is entitled to the proceeds, and this applies also where the trees or underwood are cut down by a stranger and the tenant adopts his act<sup>5</sup>. The tenant may, however, cut down the trees or underwood in a reasonable manner only<sup>6</sup>, and not so as to prevent them from growing again<sup>7</sup>. He may not take up a growing tree<sup>8</sup> or grub up the stools from which the young shoots will spring<sup>9</sup> and, if he exceeds his right, he is liable to a claim for waste<sup>10</sup>.

1 *Berriman v Peacock* (1832) 9 Bing 384 at 387. As to non-timber trees and underwood see *R v Ferrybridge Inhabitants* (1823) 1 B & C 375 at 383. As to what trees are timber see FORESTRY vol 52 (2009) PARA 54.

2 Co Litt 53a; *Phillipps v Smith* (1845) 14 M & W 589; *Honywood v Honywood* (1874) LR 18 Eq 306 at 310.

3 Co Litt 53a; *Phillipps v Smith* (1845) 14 M & W 589 at 594; *Berriman v Peacock* (1832) 9 Bing 384 at 387.

4 *Watherell v Howells* (1808) 1 Camp 227.

5 *Berriman v Peacock* (1832) 9 Bing 384 at 386.

6 *Brydges v Stephens* (1821) 6 Madd 279.

7 See *Anon* (1581) Godb 4.

8 *Empson v Soden* (1883) 4 B & Ad 655 at 657. A market gardener is, however, entitled to remove trees and shrubs in the course of his trade: *Penton v Robart* (1801) 2 East 88 at 90; *Wyndham v Way* (1812) 4 Taunt 316. Cf *Wardell v Usher* (1841) 3 Scott NR 508. See also PARA 181 note 5 ante; the Agricultural Holdings Act 1986 s 79(4); and AGRICULTURAL LAND vol 1 (2008) PARA 468.

9 Co Litt 53a; *Phillipps v Smith* (1845) 14 M & W 589 at 594; *Dunn v Bryan* (1872) IR 7 Eq 143; and see *Gage and Smith's Case* (1613) Godb 209.

10 *Berriman v Peacock* (1832) 9 Bing 384.

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### **191. Exception of trees from lease.**

The common law rights of landlord and tenant in respect of trees growing on the demised land may be varied by the parties' contract, and this is done either by exception or by covenant or agreement. An exception of 'trees' refers prima facie to trees which are useful for their wood, and hence it does not extend to fruit trees<sup>1</sup>. In an exception of 'timber and other trees, underwood and bushes and thorns other than such bushes and thorns as shall be necessary for the repair of the fences', the final words do not specify any particular bushes and thorns, and hence they do not operate as an exception from the exception. All the bushes and thorns are excepted, subject to the tenant's right to take those necessary for the repair of fences<sup>2</sup>.

An exception of 'timber and other trees' refers only to the trees themselves and does not except the soil but only sufficient nutriment out of the land to sustain the life of the trees<sup>3</sup>. It is the same where the exception is of 'saleable woods'<sup>4</sup>, but an exception of 'plantations'<sup>5</sup>, or of 'woods and underwoods'<sup>6</sup>, refers also to the soil and excepts the soil on which the trees grow. If the exception is of 'timber and other trees, wood and underwood', the former words control the latter, and the soil of land covered with growing wood does not pass<sup>7</sup>.



- 1 *London v Chapter of Southwell Collegiate Church* (1618) Hob 303; *Wyndham v Way* (1812) 4 Taunt 316 at 318 note (a). An exception of 'all timber and other trees, but not the annual fruit thereof' will prima facie be construed in the same way, for the term 'fruit' is not in legal terminology confined to trees which are popularly known as fruit trees, but applies to the produce of oak, elm and walnut trees: *Bullen v Denning* (1826) 5 B & C 842 at 847 per Bagley J.
- 2 *Jenney v Brook* (1844) 6 QB 323, Ex Ch. If the landlord has covenanted to provide stakes and bushes for repair, it seems that he must assign the bushes before the tenant may cut them: *Jenney v Brook* supra at 339.
- 3 *Liford's Case* (1614) 11 Co Rep 46b at 50a; *Whilster v Paslow* (1619) Cro Jac 487; cf *Rolls v Rock* (1729) 2 Selwyn's Law of NP (13th Edn) 1244; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 238.
- 4 *Pincomb v Thomas* (1619) Cro Jac 524.
- 5 *Simpson v Brook* (1855) 19 JP 436.
- 6 *Ive v Sams* (1597) Cro Eliz 521; *Whilster v Paslow* (1619) Cro Jac 487.
- 7 *Legh v Heald* (1830) 1 B & Ad 622.

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## 192. Right to enter and cut.

An exception of timber or other trees is usually accompanied by a reservation of the right to enter and to cut and carry them away, but this is not essential. An exception of trees carries with it the right to do all things necessary for getting and disposing of them, and consequently, without express reservation, the landlord may enter to show the trees to an intending purchaser, and either he or the purchaser may cut them down and carry them away<sup>1</sup>, unless the timber is ornamental and the landlord has so acted as to make it inequitable that he should fell it, as, for example, where he has consented to the tenant's spending money in improving the grounds<sup>2</sup>. In the absence of express agreement, the excepted trees are at the landlord's risk, and the tenant is not bound to protect them from his cattle<sup>3</sup>.

- 1 *Liford's Case* (1614) 11 Co Rep 46b. It is not necessary that the lease should be by deed; if the lease is under hand only, the landlord enters as the tenant's licensee: *Hewitt v Isham* (181) 7 Exch 77. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 238.
- 2 *Jackson v Cator* (1800) 5 Ves 688.
- 3 *Clithero v Higgs* (1636) W Jo 388; *Glenham v Hanby* (1699) 1 Ld Raym 739. This seems to be contrary to principle, as the damage by the tenant's cattle is a trespass and, where a field contains young trees and shrubs, the tenant should give notice to the landlord before grazing cattle in it so that the landlord may protect them by fences: *Fowler v Johnstone* (1892) 8 TLR 327. As to trespass by animals generally see ANIMALS vol 2 (2008) PARA 752 et seq.

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### 193. Effect of covenants as to trees.

The parties' rights may also be affected by express covenants relating to trees, such as a covenant by the landlord to provide for the delivery of timber for repairs or a covenant by the tenant to restrain interference with trees, whether they are included in the demise or excepted. Under a covenant by the landlord to deliver timber growing on the premises sufficient for the repair of those premises, he must deliver timber sufficient in quality as well as in quantity<sup>1</sup>.

Where trees are not excepted out of a demise, the tenant may nevertheless be placed under special restrictions as to removing them during the tenancy, or under special obligations as to delivering them up at the end of the tenancy. Under a covenant not to remove or grub up or destroy trees, the tenant is prevented from removing trees from one part of the premises to another, or taking them away (unless dead), even though he plants a greater number than he takes away<sup>2</sup>. However, under a covenant to deliver up at the end of the term all the orchard trees existing at the time of the demise, reasonable use and wear only excepted, it is a reasonable use of the orchard, if it is overcrowded, to remove trees past bearing<sup>3</sup>.

1 *Snell v Snell* (1825) 4 B & C 741 at 749.

2 *Doe d Wetherell v Bird* (1833) 6 C & P 195.

3 *Doe d Jones v Crouch* (1810) 2 Camp 449; and see *Love v Pares* (1810) 13 East 80.

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### 194. Cutting of excepted trees.

Where trees are excepted out of a demise, the cutting of them is not waste, as waste can only be committed of the thing demised<sup>1</sup>. Although the cutting would be actionable as trespass, it is usual to support the exception by an express covenant on the tenant's part not to fell, lop or top the trees<sup>2</sup>. Such a covenant will not prevent the tenant from cutting trees or underwood which interfere with the use of the land for the purpose for which it is demised<sup>3</sup>.

1 *Goodright d Peters v Vivian* (1807) 8 East 190 at 192; and see *Barret v Barret* (circa 1629) Het 34.

2 See *Raymond v Fitch* (1835) 2 Cr M & R 588. The landlord's executor may sue for a breach of the covenant committed in the landlord's lifetime: *Raymond v Fitch* supra.

3 Thus, where in a lease of a farm and quarries of stone, with liberty to work the quarries, there is an exception of trees and a covenant not to commit waste by cutting down wood or underwood, it is not a breach of the covenant to cut down wood and underwood required to be removed in order to work the quarries: *Doe d Rogers v Price* (1849) 8 CB 894.

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## (6) ENCROACHMENTS

### 195. Presumption as to encroachments by tenant.

Where, during the currency of his tenancy, a tenant encroaches<sup>1</sup> upon, or without title to do so takes possession of, other land, there is a presumption that the land so taken becomes annexed to the demised premises, whether or not it is immediately adjacent to the demised premises, and whether or not it belongs to the landlord or to a third person, and on the determination of the tenancy the land must be given up to the landlord together with the demised premises<sup>2</sup>. The presumption applies whether or not the land taken by the tenant is waste land<sup>3</sup>. Where the land belongs to a third person and the title is not registered, the third person's title is extinguished after the requisite period of adverse possession under the Limitation Act 1980<sup>4</sup>, and the tenant is entitled to retain possession until the determination of his tenancy, whereupon the landlord then becomes entitled to possession together with the property originally demised. Where the land belongs to the landlord, the presumption applies whether or not the landlord has given his consent to the encroachment<sup>5</sup>. The tenant may acquire an interest in the land after the requisite period of adverse possession, but that interest will be a leasehold interest only<sup>6</sup>. In the case of registered land, an adverse possessor may apply to be registered as proprietor of the registered estate after the period of ten years ending on the date of the application<sup>7</sup>.

1 Technically, encroachment occurs only in respect of waste land, but the same principles apply whether the land is waste or not: see the text and note 3 infra.

2 *Kingsmill v Millard* (1855) 11 Exch 313; *Tabor v Godfrey* (1895) 64 LJQB 245; *Smirk v Lyndale Developments Ltd* [1975] Ch 317, [1974] 2 All ER 8, (the judgment of Pennycuik V-C was reversed by the Court of Appeal on another point [1975] Ch 317, [1975] 1 All ER 690, but it contains a full review of the authorities and was approved on this point); *Kensington Pension Developments Ltd v Royal Garden Hotel (Oddenino's) Ltd* [1990] 2 EGLR 117 (property encroached upon held to be included in the property to be valued for the purpose of rent review). If a tenant encroaches on his landlord's land, he may not then deny that the land is included in his lease, and he is, therefore, liable on the covenants in the lease as regards that land: *JF Perrott & Co Ltd v Cohen* [1951] 1 KB 705, [1950] 2 All ER 939, CA.

3 *Smirk v Lyndale Developments Ltd* [1975] Ch 317, [1974] 2 All ER 8, (not following *Lord Hastings v Saddler* (1898) 79 LT 355, DC); revsd on another point [1975] Ch 317, [1975] 1 All ER 690, CA.

4 See the Limitation Act 1980 s 15(1); cf LIMITATION PERIODS vol 68 (2008) PARA 1025. As to the extension of the statutory period in case of disability, acknowledgment, fraud or mistake see LIMITATION PERIODS vol 68 (2008) PARA 1168 et seq. As to what is 'adverse possession' see *Wallis' Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] QB 94, [1974] 3 All ER 575, CA; *Treloar v Nute* [1977] 1 All ER 230, [1976] 1 WLR 1295, CA; *Powell v McFarlane* (1977) 38 P & CR 452; and LIMITATION PERIODS vol 68 (2008) PARA 1078 et seq. As to registration of the title of an adverse possessor see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1025 et seq.

5 *Whitmore v Humphries* (1871) LR 7 CP 1.

6 *King v Smith* [1950] 1 All ER 553, CA.

7 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 1025 et seq.

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### 196. Presumption where encroachment not contiguous.

The application of the presumption as to an encroachment enuring for the benefit of the holding or of the landlord is not confined to encroachments on land immediately adjacent to the demised premises. It is enough if the encroachment is so near that by reason of its nearness the tenant gained the opportunity of making it, and the landlord might have tacitly acquiesced in it<sup>1</sup>. Thus, the presumption is not rebutted by the intervention of a small river and fence and a narrow strip of waste<sup>2</sup>, or of a road<sup>3</sup>.

1 *Earl Lisburne v Davies* (1866) LR 1 CP 259 at 268 per Willes J; *Kingsmill v Millard* (1855) 11 Exch 313.

2 *Earl Lisburne v Davies* (1866) LR 1 CP 259.

3 *Andrews v Hailes* (1853) 2 E & B 349; *Doe d Lloyd v Jones* (1846) 15 M & W 580.

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### **197. Rebuttal of presumption.**

The presumption that an encroachment by the tenant enures for the landlord's benefit may be rebutted by proving that the landlord and the tenant so conducted themselves as to show that the landlord treated the encroachment as not enuring for his benefit<sup>1</sup>. Thus, if the landlord on application refuses his consent to an encroachment and the tenant nevertheless incloses and builds, the presumption is rebutted<sup>2</sup>. Again, if, after an encroachment has been made, the land encroached upon is severed from the demised premises by a conveyance to a third person and the severance is brought to the landlord's knowledge, the presumption is rebutted; but, if the landlord is allowed to remain under the belief that the encroachment is part of the holding, the tenant is estopped from denying it<sup>3</sup>. The fact that an encroacher in adverse possession of land takes a lease of adjoining land from the owner of the land encroached upon does not raise the presumption that after the date of the lease the land encroached upon was occupied as part of the demised premises<sup>4</sup>.

1 *A-G v Tomline* (1877) 5 ChD 750; *East Stonehouse UDC v Willoughby Bros Ltd* [1902] 2 KB 318; *King v Smith* [1950] 1 All ER 553, CA.

2 See *Doe d Baddeley v Massey* (1851) 17 QB 373.

3 *Kingsmill v Millard* (1855) 11 Exch 313; *Doe d Lloyd v Jones* (1846) 15 M & W 580 (tenant made an indorsement on his lease that inclosures made by him were to be delivered up at the end of the term, but subsequently executed a conveyance of them to his son, which was not delivered nor followed by any possession).

4 *Dixon v Baty* (1866) LR 1 Exch 259.

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## **5. DURATION OF TENANCY**

## (1) TENANCY AT WILL

### 198. Nature of tenancy at will.

A tenancy at will is a tenancy under which the tenant is in possession, and which is determinable at the will of either the landlord or the tenant. Although on its creation such a tenancy is expressed to be at the will of the landlord or, as the case may be, the tenant only, the law implies that it is to be at the will of the other party also, because every lease at will must in law be at the will of both parties<sup>1</sup>. As in other tenancies, a tenancy at will arises by contract binding both the landlord and the tenant<sup>2</sup>; and the contract may be express or implied<sup>3</sup>. An express tenancy at will may have effect as such even though an annual rent is reserved<sup>4</sup>. The use of the words 'tenant at will' in an agreement does not create a tenancy at will where the remainder of the agreement is inconsistent with such a tenancy<sup>5</sup>.

1 Littleton's Tenures ss 68, 69; Co Litt 55a.

2 *Ley v Peter* (1858) 3 H & N 101 at 107. There must be a contract and an intention to enter into legal relations for a tenancy at will to be created; if there is no such intention, possession will be as licensee only: *Heslop v Burns* [1974] 3 All ER 406, [1974] 1 WLR 1241, CA.

3 For examples of express tenancies at will see *Richardson v Langridge* (1811) 4 Taunt 128; *Morgan v William Harrison Ltd* [1907] 2 Ch 137, CA; *Young v Hargreaves* (1963) 186 Estates Gazette 355, CA; *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, [1970] 3 All ER 143; *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209, [1975] 3 All ER 234, CA.

4 *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209, [1975] 3 All ER 234, CA; *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, [1970] 3 All ER 143; and see *Doe d Bastow v Cox* (1847) 11 QB 122; *Walker v Giles* (1848) 6 CB 662 at 702; *Doe d Dixie v Davies* (1851) 7 Exch 89. In some of these cases the tenancy was between mortgagee and mortgagor since, formerly, tenancies at will were often created by the attornment clause in mortgage deeds. See also *Pinhorn v Souster* (1853) 8 Exch 763; *Turner v Barnes* (1862) 2 B & S 435; *Morton v Woods* (1869) LR 4 QB 293, Ex Ch; *Re Stockton Iron Furnace Co* (1879) 10 ChD 335; CA. Such attornment clauses are now of less frequent use: see PARA 3 ante.

5 *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA (person allowed to occupy a cottage 'as tenant at will free of rent for the remainder of her life or until determined as hereinafter provided'; not a tenancy at will).

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### 199. Implied tenancy at will.

A tenancy at will is implied where a person is in possession by the owner's consent<sup>1</sup>, and his possession is not as employee or agent<sup>2</sup> or as a licensee holding under an irrevocable licence<sup>3</sup>, and is not held in virtue of any freehold estate or of any tenancy for a certain term<sup>4</sup>. Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent<sup>5</sup>, for example the occupation of a house by a nonconformist minister under trustees in whom the property in the house is vested<sup>6</sup>.

Such a tenancy may be implied upon a mere general letting if there are circumstances from which the court may infer that the tenancy is not to be a periodic one<sup>7</sup>. The payment of a periodic rent is only one, albeit an important one, of the circumstances to consider<sup>8</sup>.

1 *Doe d Hull v Wood* (1845) 14 M & W 682 at 687. It has been said that this must be an affirmative consent, and not a mere negative or silent consent (*Ley v Peter* (1858) 3 H & N 101 at 108 per Bramwell B); but it seems to be sufficient if the circumstances show assent by the owner (see *Wheeler v Mercer* [1957] AC 416 at 423, [1956] 3 All ER 631 at 632, HL, per Viscount Simonds and at 432 and 638 per Lord Cohen, agreeing with the county court judge that positive assent could and must, in that case, be implied from the circumstances). Cf *Wheeler v Mercer* supra at 427-428 and at 635 per Lord Morton of Henryton, who inclined to the view that the tenancy was a tenancy at sufferance. As to tenancies at sufferance see PARAS 206-207 post.

2 An employee may well occupy only as licensee: see PARA 15 ante.

3 *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA; *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462, [1976] 1 WLR 852, CA. As to the distinction between licensee and tenant see PARA 7 et seq ante.

4 See *Doe d Rogers v Pullen* (1836) 2 Bing NC 749. Where a rent is reserved the landlord may distrain for it: see DISTRESS vol 13 (2007 Reissue) PARA 909. Where no rent is fixed, the landlord may bring a claim for use and occupation: see PARA 284 post.

5 *Doe d Groves v Groves* (1847) 10 QB 486; *Smith v Seghill Overseers* (1875) LR 10 QB 422 at 429; *Woodhouse v Hooney* [1915] 1 IR 296; *R v Collett* (1823) Russ & Ry 498; cf *R v Jobling* (1823) Russ & Ry 525; *Buck v Howarth* [1947] 1 All ER 342, DC (oral permission to occupy for life created tenancy at will); *Young v Hargreaves* (1963) 186 Estates Gazette 355, CA (permission to live in house for 'as long as you wish, and I hope it will be for the rest of your lives' held to be a tenancy at will converted into a yearly tenancy where rent by reference to a year was paid); but see *Bannister v Bannister* [1948] 2 All ER 133, CA (oral undertaking to allow persons to live rent-free in cottage created life interest); applied in *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA. See also *Hughes v Griffin* [1969] 1 All ER 460 at 465, [1969] 1 WLR 23 at 31, CA. A beneficiary in actual occupation is in law a tenant at will to the trustees (*Garrard v Tuck* (1849) 8 CB 231); but, if he is receiving the rents, he does this as the trustees' agent (*Melling v Leak* (1855) 16 CB 652 at 669). Cf *Morgell v Paul* (1828) 2 Man & Ry KB 303; *Vallance v Savage* (1831) 7 Bing 595. A tenancy at will without any consideration is not enlarged into a tenancy from year to year by the Agricultural Holdings Act 1986 s 2: see *Goldsack v Shore* [1950] 1 KB 708, [1950] 1 All ER 276, CA.

6 See ECCLESIASTICAL LAW vol 14 para 1408.

7 The basic rule is that if one party permits another into possession of his land on payment of rent, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a periodic tenancy: see *Javad v Aqil* [1991] 1 All ER 243 at 249, [1991] 1 WLR 1007 at 1011, CA, per Nicholls LJ, applied in *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA. See also *Richardson v Langridge* (1811) 4 Taunt 128 at 132 per Chambre J; *Doe d Hull v Wood* (1845) 14 M & W 682; *Doe d Robertson v Gardiner* (1852) 12 CB 319; and see *Roe d Bree v Lees* (1777) 2 Wm Bl 1171 at 1173; *Re Stroud and East and West India Docks and Birmingham Junction Rly Co* (1849) 8 CB 502; *Bayley v Fitzmaurice* (1857) 8 E & B 664 at 679 (on appeal sub nom *Fitzmaurice v Bayley* (1860) 9 HL Cas 78); *Hunt v Allgood* (1861) 10 CBNS 253; cf *Doe d Martin v Watts* (1797) 7 Term Rep 83 at 85 (a 'general occupation' said to be an occupation from year to year, but in that case rent had been paid).

8 Circumstances additional to possession of the land and payment of a rent may negate the inference of a periodic tenancy: see *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007, CA (entry into occupation pending negotiation for the grant of a lease held to be a tenancy at will notwithstanding payment of a quarterly rent); *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368 (tenant holding over after expiry of a business tenancy excluded from the Landlord and Tenant Act 1954 ss 24-28 (as amended) (see PARA 713 et seq post) pending negotiations for the grant of a new lease held to be a tenant at will notwithstanding payment of a monthly rent); but cf *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA (business lease held by a company that was struck off the register; on expiry, a new lease was agreed in principle to the individuals (former directors of the struck-off company) who had remained in possession; rent was paid but there were no continuing negotiations for the grant of a new lease for over two years; held that a periodic tenancy had arisen rather than a tenancy at will). See also the other cases cited in note 7 supra which must be considered in the light of the modern tendency to inquire as to the correct inference to be drawn from the circumstances of the case as to the parties' intentions, rather than applying any presumption which is said to arise from the mere payment and acceptance of a periodic rent; and see PARA 209 post.

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## 200. Possession pending completion.

A person who enters on land with the owner's consent under a contract which does not immediately give him a definite interest in the land enters as tenant at will. For example, a purchaser who enters into possession of land pending the completion of the purchase is generally a tenant at will<sup>1</sup>. This is so where the consideration is the payment of sums for use and occupation<sup>2</sup> or where there is no special stipulation<sup>3</sup>. If, however, a purchaser enters into possession of land pending the completion of the purchase on the terms that his right to possession is to cease if he defaults in payment of sums which are not payable for use and occupation but are payable in respect of the purchase price, interest and outgoings on the property, the purchaser is not a tenant at will<sup>4</sup>. Entry into occupation by a prospective purchaser prior to exchange of contracts but with an intention to purchase may, however, give rise to a periodic tenancy<sup>5</sup>.

Entry into occupation of land pending negotiation for the grant of a lease<sup>6</sup> or pursuant to an agreement for a lease<sup>7</sup> gives rise to a tenancy at will, unless there are circumstances from which the court may infer that the parties intended to grant a periodic tenancy<sup>8</sup>. The payment of periodic rent, even in advance, is not inconsistent with the grant of a tenancy at will, it being merely one, albeit an important one, of the circumstances to consider in determining the fair inference to be drawn as to the parties' intentions<sup>9</sup>. Similarly, entry under a lease which is void gives rise to a tenancy at will<sup>10</sup>, subject to the subsequent payment of rent giving rise to a periodic tenancy<sup>11</sup>.

1 *Right d Lewis v Beard* (1811) 13 East 210; *Doe d Newby v Jackson* (1823) 1 B & C 448; *Ball v Cullimore* (1835) 2 Cr M & R 120; *Doe d Tones v Chamberlaine* (1839) 5 M & W 14; *Howard v Shaw* (1841) 8 M & W 118; *Doe d Stanway v Rock* (1842) 4 Man & G 30; *Doe d Parker v Boulton* (1817) 6 M & S 148. Consequently the tenancy cannot be determined without demand of possession (see *Pollen v Brewer* (1859) 7 CBNS 371), although in *Doe d Leeson v Sayer* (1811) 3 Camp 8 this was not considered necessary; cf *Doe d Moore v Lawder* (1816) 1 Stark 308; *Doe d Hiatt v Miller* (1833) 5 C & P 595. While the purchaser is thus in possession, he is not bound to pay rent and a claim for use and occupation does not lie against him (*Winterbottom v Ingham* (1845) 7 QB 611; and see *Hearn v Tomlin* (1793) Peake 191; *Kirtland v Pounsett* (1809) 2 Taunt 145; *Corringan v Woods* (1867) 15 WR 318; cf *Tew v Jones* (1844) 13 M & W 12), save by virtue of special agreement (*Saunders v Musgrave* (1827) 6 B & C 524); although, if the remains in possession after the purchase has been abandoned, the claim does lie (*Howard v Shaw* supra; *Markey v Coote* (1876) IR 10 CL 149 at 155); and a vendor who remains in possession after the time for completion may be liable for use and occupation (*Metropolitan Rly Co v Defries* (1877) 2 QBD 387, CA). Contracts for the sale of land often expressly provide that, if the purchaser is allowed into possession in advance of completion, he takes possession as the vendor's licensee; and see the Standard Conditions of Sale (4th Edn) condition 5.2 which expressly provides that the purchaser is to occupy as licensee and not as tenant pending completion.

2 See eg *Francis Jackson Developments Ltd v Stemp* [1943] 2 All ER 601, CA.

3 *Wheeler v Mercer* [1957] AC 416 at 425, [1956] 3 All ER 631 at 633, 634, HL, per Viscount Simonds (disapproving the observation of Denning LJ in the lower court [1956] 1 QB 274 at 284, [1955] 3 All ER 455 at 457, CA, and, on this point, *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA (irrevocable licence)); and see PARA 10 ante.

4 *Dunthorne and Shore v Wiggins* [1943] 2 All ER 678, CA.

5 *Bretherton v Paton* (1986) 18 HLR 257, [1986] 1 EGLR 172, CA (prospective purchaser held to be a periodic tenant where she contributed by way of weekly payments to the insurance premiums for the property); cf *Sharp v McArthur and Sharp* (1987) 19 HLR 364, CA (occupation pending sale by the owner, although not to the occupier, created a temporary licence).

6 *Javad v Aqil* [1991] 1 All ER 243 at 254, [1991] 1 WLR 1007 at 1019, CA, per Nicholls LJ ('entry into possession while negotiations proceed is one of the classic circumstances in which a tenancy at will may exist' (citing *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209 at 217, [1975] 3 All ER 234 at 237, CA, per Scarman LJ); *British Railways Board v Bodywright Ltd*, *British Railways Board v Hayward* (1971) 220 Estates Gazette 651); *Coggan v Warwicker* (1852) 3 Car & Kir 40 (where the intending tenant was held liable for use and occupation). Cf *Doe d Knight v Quigley* (1810) 2 Camp 505 (intending tenant said to be a tenant at sufferance); and *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA (where negotiations had ceased).

7 *Hamerton v Stead* (1824) 3 B & C 478 at 483; *Braythwayte v Hitchcock* (1842) 10 M & W 494 at 497; *Anderson v Midland Rly Co* (1861) 3 E & E 614; *Coatsworth v Johnson* (1886) 55 LJQB 220, CA. If specific performance is obtainable, the tenant holds for the terms agreed to be granted: see PARAS 75-76 ante.

8 *Javad v Aqil* [1991] 1 All ER 243 at 247-248, [1991] 1 WLR 1007 at 1011-1013, CA.

9 *Javad v Aqil* [1991] 1 All ER 243 at 247-248, [1991] 1 WLR 1007 at 1011-1013, CA; *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368; but cf *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA.

10 *Goodtitle d Gallaway v Herbert* (1792) 4 Term Rep 680; *Denn d Warren v Fearnside* (1747) 1 Wils 176; *Anderson v Midland Rly Co* (1861) 3 E & E 614 at 621.

11 *Doe d Rigge v Bell* (1793) 5 Term Rep 471; and see PARA 209 post.

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## 201. Possession after expiry of lease.

A tenant who, with the landlord's consent, remains in possession after his lease has expired is tenant at will until some other interest is created<sup>1</sup>, either by express grant or by implication by the payment and acceptance of rent<sup>2</sup>. Thus, where a lease of war-damaged premises was disclaimed and so deemed to have been surrendered<sup>3</sup> and the landlord and the tenant were willing that the tenant should remain in occupation as a trespasser, in law the tenant continued in possession as tenant at will<sup>4</sup>. The terms of a tenancy at will which arises in this way will be those of the expired lease unless inconsistent with the nature of a tenancy at will and unless there is evidence of a contrary intention<sup>5</sup>. A tenant who remains in possession after his lease has expired and who is entitled to the protection of the Rent Act 1977 or Part I of the Housing Act 1988<sup>6</sup> is, however, a statutory tenant or statutory periodic tenant and not a tenant at will<sup>7</sup>; and a tenant of a business tenancy under the Landlord and Tenant Act 1954<sup>8</sup> remains in possession after the expiry of the term specified in his lease not as a tenant at will but because by the Act the term is continued unless and until the landlord or the tenant serves the notice or request prescribed<sup>9</sup>.

1 See PARA 209 post; *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368. See also *Doe d Hollingsworth v Stennett* (1799) 2 Esp 717 at 719. Cf *Morgan v William Harrison Ltd* [1907] 2 Ch 137, CA. In *Simkin v Ashurst* (1834) 1 Cr M & R 261, however, a holding over by a subtenant with consent was said to make him tenant at sufferance only. A notice to quit the premises, stating that the term has long since expired, does not recognise a yearly tenancy, but is a mere demand of possession: *Doe d Godsell v Inglis* (1810) 3 Taunt 54.

2 As to the circumstances justifying the implication of a periodic tenancy see *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007, CA, distinguished in *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA; *Right d Flower v Darby and Bristow* (1786) 1 Term Rep 159; *Longrigg, Burrough and Trounson v Smith* (1979) 251 Estates Gazette 847, CA; *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368; cf *Dougal v McCarthy* [1893] 1 QB 736, CA (application of presumption as to the creation of a yearly tenancy by the payment of rent by reference to a year). See also PARAS 209, 212 post.

3 See under the Landlord and Tenant (War Damage) Act 1939 s 8(2): see PARA 645 post.

4 *Meye v Electric Transmission Ltd* [1942] Ch 290. See also *Dreamgate Properties Ltd v Arnot* (1997) 76 P & CR 25, [1997] EGCS 121, CA, where the court left open the question as to whether a subjective or an objective approach should be adopted in considering whether a tenancy has been created.

5 *Morgan v William Harrison Ltd* [1907] 2 Ch 137, CA.



- 6   le the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq post.
- 7   See PARAS 831, 1067 post.
- 8   See the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) and PARA 701 et seq post.
- 9   See *ibid* ss 24-27 (as amended); and PARA 713 et seq post.

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## 202. Determination of tenancy at will.

A tenancy at will is determinable by either party on his expressly or impliedly intimating to the other his wish that the tenancy should be at an end<sup>1</sup>. Until the intimation is thus given, the tenant is lawfully in possession; and accordingly the landlord may not recover the premises in a claim for recovery of land without a previous demand for possession<sup>2</sup> or other determination of the tenancy. A demand for possession by the landlord which determines the tenancy at will is not a notice to quit; and the issue of a possession claim is a sufficient demand for possession to bring the tenancy to an end<sup>3</sup>. The statutory minimum period of four weeks' notice to quit in respect of premises let as a dwelling<sup>4</sup> does not apply to a tenancy at will<sup>5</sup>. Where rent is payable under a tenancy at will and the tenancy is determined between the rent days, the rent is apportioned<sup>6</sup>.

1   A tenancy at will, whether created expressly or by implication, is not a tenancy within the meaning of that term in the Landlord and Tenant Act 1954 s 69(1) for the purposes of the provisions of that Act (see PARA 706 note 2 post) giving security of tenure for business, professional and other tenants: *Wheeler v Mercer* [1957] AC 416, [1956] 3 All ER 631, HL; *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, [1970] 3 All ER 143; approved in *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209, [1975] 3 All ER 234, CA. A tenancy at will is, however, within the provisions of the Rent Act 1977 and the Housing Act 1988 Pt I (ss 1-45) (as amended) provided the rent is a monetary one (see PARAS 862, 1026 note 4 post) and is not a low rent within the meaning of those Acts (see PARAS 861, 1028 post): see *Chamberlain v Farr* [1942] 2 All ER 567, CA; *Francis Jackson Development Ltd v Stemp* [1943] 2 All ER 601, CA (cf *Dunthorne and Shore v Wiggins Ltd* [1943] 2 All ER 678, CA).

2   *Goodtitle d Gallaway v Herbert* (1792) 4 Term Rep 680. Receipt of rent under a void lease, although in such circumstances as not to imply a yearly tenancy, is such a recognition of the tenant's lawful possession as to prevent his being a trespasser until after notice to quit: *Denn d Brune v Rawlins* (1808) 10 East 261.

3   *Martinali v Ramuz* [1953] 2 All ER 892, [1953] 1 WLR 1196, CA.

4   See the Protection from Eviction Act 1977 s 5 (as amended); and PARA 214 post.

5   *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA.

6   See the Apportionment Act 1870 ss 2, 3; and PARA 278 post. In *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612 at 618, [1970] 3 All ER 143 at 147 it was said obiter that, where rent was payable in advance under a tenancy at will and the tenancy was determined during a period for which rent had been paid, an appropriate adjustment would have been made. In *Ellis v Rowbotham* [1900] 1 QB 740, CA, it was, however, held that, in the absence of special statutory provisions or express covenants, the Apportionment Act 1870 did not apply to rent payable in advance. Formerly it was otherwise, and a tenant at a quarterly rent determining the tenancy during a quarter paid the rent for the quarter, but the landlord determining the tenancy lost it: *Leighton v Theed* (1701) 2 Salk 413; and see *Disdale v Iles* (1673) 2 Lev 88.

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### 203. Determination by landlord.

Anything which amounts to a demand for possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will<sup>1</sup>. Thus, the landlord may expressly demand possession<sup>2</sup>, or state that the tenant is in against his, the landlord's, will, or send for the keys<sup>3</sup>. If the notice states terms and intimates that, if they are not accepted, the landlord will take steps to recover the premises, and the terms are rejected, this is a sufficient notice to determine the tenancy<sup>4</sup>. The landlord is not required to allow the tenant a reasonable time within which to vacate the premises<sup>5</sup>.

The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with the continuance of the tenancy, as, for example, when he re-enters to take possession<sup>6</sup>, or puts in a new tenant<sup>7</sup>, or cuts down trees or carries away stone<sup>8</sup>, the trees and stone not being excepted from the demise<sup>9</sup>, and also when he does an act off the premises which is inconsistent with the tenancy, as, for example, when he grants a lease of the premises to commence forthwith<sup>10</sup>. An act done off the premises does not, however, determine the tenancy until the tenant has notice of it<sup>11</sup>.

1 *Doe d Price v Price* (1832) 9 Bing 356 at 358; and see *Locke v Matthews* (1863) 13 CBNS 753.

2 Previous notice to quit is unnecessary: see *Doe d Jones v Jones* (1830) 10 B & C 718; *Doe d Nicholl v M'Kaeg* (1830) 10 B & C 721 at 723; *Doe d Rogers v Pullen* (1836) 2 Bing NC 749 at 753; *Doe d Tomes v Chamberlaine* (1839) 5 M & W 14; *Coatsworth v Johnson* (1886) 55 LJQB 220, CA.

3 *Pollen v Brewer* (1859) 7 CBNS 371 at 373.

4 *Doe d Price v Price* (1832) 9 Bing 356; *Fox v Hunter Paterson* [1948] 2 All ER 813.

5 *Doe d Nicholl v M'Kaeg* (1830) 10 B & C 721. If, however, 'the tenant, after the determination of his tenancy ... by a demand of possession, had entered on the premises for the sole purpose of removing his goods and continued there no longer than was necessary for that purpose, and did not exclude the landlord, perhaps he might not have been a trespasser': *Doe d Nicholl v M'Kaeg* supra at 723-724 per Lord Tenterden CJ.

6 Co Litt 55b. Entering for the purpose of doing repairs does not determine the tenancy: *Lynes v Snaith* [1899] 1 QB 486, DC.

7 *Wallis v Delmar* (1860) 29 LJ Ex 276.

8 *Turner v Doe d Bennett* (1842) 9 M & W 643, Ex Ch.

9 If the trees and stone are excepted, the act is lawful and hence is not an implied determination of the tenancy: Co Litt 55b.

10 *Disdale v Iles* (1673) 2 Lev 88; *Hogan v Hand* (1861) 14 Moo PCC 310; *Farrelly v Robins* (1869) IR 3 CL 284.

11 *Doe d Davies v Thomas* (1851) 6 Exch 854; *Pinhorn v Souster* (1853) 8 Exch 763 at 770. Similarly, an oral notice given off the premises must be shown to have reached the tenant: Co Litt 55b. A tenant is presumed to have notice of any act done openly on the premises: *Pinhorn v Souster* supra. Cf *Ball v Cullimore* (1835) 2 Cr M & R 120.

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#### **204. Determination by tenant.**

A mere notice by the tenant to determine a tenancy at will is not effectual unless he actually gives up possession<sup>1</sup>. The tenancy is impliedly determined on his part when he usurps the landlord's rights, as when he cuts down timber trees or pulls down houses<sup>2</sup>.

1 Co Litt 55b note (15).

2 Co Litt 57a. As to what trees are timber see FORESTRY vol 52 (2009) PARA 54.

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#### **205. Tenancy at will is personal relationship.**

A tenancy at will is a personal relationship between the original landlord and tenant, and is determined by the death of either of them<sup>1</sup>. It is also determined if the landlord conveys away his reversion<sup>2</sup> or the tenant assigns<sup>3</sup> or sublets<sup>4</sup> the premises and the assignment or subletting comes to the landlord's notice<sup>5</sup>.

1 Co Litt 57b; *James v Dean* (1805) 11 Ves 383 at 391; *Doe d Stanway v Rock* (1842) Car & M 549 at 553; *Turner v Barnes* (1862) 2 B & S 435; *Scobie v Collins* [1895] 1 QB 375. In *Morton v Woods* (1869) LR 4 QB 293 at 306, Ex Ch, it was, however, intimated that a tenancy at will might continue to subsist after the death of one of the parties unless the successor in title manifested his intention to determine it. See also *Re Manser, Killick v Manser* [1910] WN 61 (administrator of a deceased tenant at will accepted as tenant at will; her tenancy held to be on behalf of the deceased's estate). On the death of one of two joint tenants at will the tenancy at will subsists and vests in the surviving tenant: see REAL PROPERTY vol 39(2) (Reissue) PARA 195.

2 *Doe d Davies v Thomas* (1851) 6 Exch 854 at 857; *Doe d Dixie v Davies* (1851) 7 Exch 89 at 93; and see *Daniels v Davison* (1809) 16 Ves 249 at 252. An involuntary alienation, such as a vesting in a trustee in bankruptcy, has the same effect: *Doe d Davies v Thomas* supra. A feoffment with livery of seisin on the land determined the tenancy, even though the tenant was off the land and had no notice: *Ball v Cullimore* (1835) 2 Cr M & R 120.

3 *Pinhorn v Souster* (1853) 8 Exch 763 at 772.

4 *Birch v Wright* (1786) 1 Term Rep 378 at 382. Cf *Day v Day* (1871) LR 3 PC 751 at 760 (where it was suggested that acts of subletting and assignment which are impliedly authorised by the character in which, and the circumstances under which, the tenant occupies at will do not determine the tenancy).

5 *Pinhorn v Souster* (1853) 8 Exch 763 at 772.

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### **(2) TENANCY AT SUFFERANCE**

## 206. Nature of tenancy at sufferance.

A person who enters on land by a lawful title<sup>1</sup> and, after his title has ended, continues in possession without statutory authority and without obtaining the consent of the person then entitled, is said to be a tenant at sufferance<sup>2</sup>, as distinct from a tenant at will who is in possession with the landlord's consent. This is so whatever the nature of the tenant's original estate, whether he was tenant for years<sup>3</sup>, or the subtenant of a tenant for years<sup>4</sup>, or a tenant at will<sup>5</sup>. A tenancy at sufferance arises by implication of law and may not be created by contract between the parties.

A tenancy at sufferance does not arise upon the holding over by one whose title was created by act of law<sup>6</sup>; and there can be no tenancy at sufferance against the Crown<sup>7</sup>. In these cases the person holding over is a mere trespasser<sup>8</sup>. One tenant at sufferance cannot make another<sup>9</sup>; but it seems that, on the death of a tenant at sufferance, the like tenancy will continue in favour of a person claiming under him<sup>10</sup>. A release from the landlord to the tenant at sufferance does not operate to enlarge the tenant's estate<sup>11</sup>.

1 A person who, in expectation of being granted a tenancy when a prospective landlord (as purchaser of the freehold) is in a position to grant one, pays 'advance rent' may find that he obtains no tenancy at all, but is only an occupier on sufferance and liable to eviction at the instance of mortgagees: see *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713. It has been held that a tenant who pays rent in advance and goes into possession or occupation will have a title good as against a mortgagee when the entry into possession was earlier than the date of the mortgage (*Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777, CA); but the case is probably no longer good law as one premise on which it was based (that there was a scintilla of time when the landlord was an absolute owner) was overruled in *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL (cited in PARA 34 note 4 ante).

2 Co Litt 57b. Any assent by the landlord to the holding over constitutes a tenancy at will, although a written acknowledgment that the tenant holds 'on sufferance only' has been held to be a mere acknowledgment and not to require to be stamped as an agreement for a tenancy: *Barry v Goodman* (1837) 2 M & W 768. Once the landlord indicates his dissent at the holding over, the tenant at sufferance becomes a trespasser. A tenant who holds over after the expiry of a protected tenancy of premises by virtue of the provisions of the Rent Act 1977 is, however, a statutory tenant and not a tenant at sufferance: see PARA 831 post. Similarly, a tenant who holds over after the expiry of an assured tenancy by virtue of the provisions of the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARA 1011 et seq post) or a business tenant who holds over by virtue of the provisions of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) is not a tenant at sufferance.

3 Co Litt 57b, 270b; and see *Bayley v Bradley* (1848) 5 CB 396; *Doe d Patrick v Duke of Beaufort* (1851) 6 Exch 498, 503. This applies also where the tenant under a landlord who was only tenant for life holds over after the landlord's death: *Roe d Jordan v Ward* (1789) 1 Hy Bl 96 at 99.

4 *Simkin v Ashurst* (1834) 1 Cr M & R 261.

5 *Doe d Bennett v Turner* (1840) 7 M & W 226; *Turner v Doe d Bennett* (1842) 9 M & W 643, Ex Ch (where it was left open whether he would be a trespasser or tenant at sufferance); *Doe d Goody v Carter* (1847) 9 QB 863 at 868; *Day v Day* (1871) LR 3 PC 751 at 760.

6 Eg where a guardian in socage held over after the heir had come of age: Co Litt 57b.

7 Co Litt 57b.

8 The recognition of a tenancy at sufferance in other cases probably arose from a desire to prevent the person holding over from being a disseisor and, therefore, in a position to acquire a title by adverse possession. The revision of the doctrine of adverse possession has rendered this use of the tenancy obsolete: see LIMITATION PERIODS vol 68 (2008) PARA 901 et seq.

9 *Thunder d Weaver v Belcher* (1803) 3 East 449. He may create a licence by admitting another person as his lodger: *Bensing v Ramsay* (1898) 62 JP 613.

10 See *Doe d Burrell v Perkins* (1814) 3 M & S 271.

11 A tenant at sufferance has possession, but no privity of estate, and thus a release to him is void; but it is otherwise with a tenant at will: Co Litt 270b; *Butler v Duckmanton* (1607) Cro Jac 169. Such an instrument might, however, be held to operate as a grant: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 177.

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## **207. Rights of tenant and landlord.**

A tenant at sufferance may maintain a claim of trespass by virtue of his possession<sup>1</sup>, and, like any other person holding without title who is deprived of possession, he may bring a claim for recovery of possession against a mere wrongdoer<sup>2</sup>.

The tenancy requires no notice to determine it; and consequently the landlord may enter, or the tenant may leave, at any time without notice<sup>3</sup>. A tenant at sufferance is not entitled to emblements<sup>4</sup>.

The landlord may sue the tenant at sufferance for use and occupation<sup>5</sup>, but he may not distrain<sup>6</sup>.

1 See *Graham v Peat* (1801) 1 East 244.

2 *Asher v Whitlock* (1865) LR 1 QB 1; *Perry v Clissold* [1907] AC 73, PC.

3 *Doe d Bennett v Turner* (1840) 7 M & W 226 at 235; and see *Doe d Godsell v Inglis* (1810) 3 Taunt 54; *Doe d Moore v Lawder* (1816) 1 Stark 308; *Doe d Rogers v Pullen* (1836) 2 Bing NC 749; *Randall v Stevens* (1853) 2 E & B 641; contra *Doe d Harrison v Murrell* (1837) 8 C & P 134 (where Lord Abinger CB considered that trespass would lie against a landlord who turned out his tenant at sufferance without notice). The landlord immediately on entry is, however, lawfully in possession: *Jones v Chapman* (1849) 2 Exch 803, Ex Ch. As to a landlord's right of re-entry see PARA 651 post. Tenants at sufferance of premises to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1919 (expired) applied were protected by the Act (*Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301; *Hunt v Bliss* (1919) 89 LJB 174, DC; *Dobson v Richards* (1919) 63 Sol Jo 663; *Epsom Grand Stand Association Ltd v Clarke* (1919) 35 TLR 525, CA), and became statutory tenants (see PARA 831 post). See also *Remon v City of London Real Property Co Ltd* [1921] 1 KB 49, CA.

4 *Doe d Bennett v Turner* (1840) 7 M & W 226. As to the right to emblements see AGRICULTURAL LAND vol 1 (2008) PARA 369.

5 *Bayley v Bradley* (1848) 5 CB 396 at 406; and see *Hellier v Sillcox* (1850) 19 LJB 295.

6 *Jenner v Clegg* (1832) 1 Mood & R 213; *Alford v Vickery* (1842) Car & M 280; and see DISTRESS vol 13 (2007 Reissue) PARA 965.

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## **(3) TENANCY FROM YEAR TO YEAR**

### **(i) Creation of Tenancy from Year to Year**

#### **208. Nature of tenancy.**

A tenancy from year to year<sup>1</sup> arises either by express agreement or by implication of law or by statute<sup>2</sup>. It may be determined only by notice duly given<sup>3</sup> except where there is a stipulation for determination without notice<sup>4</sup>. The appropriate words for the express creation of the tenancy are 'from year to year'. The agreement may stipulate the time and length of any notice required to determine the tenancy<sup>5</sup>; but, in the absence of any such stipulation and of any statutory provision preventing determination<sup>6</sup>, the tenancy may be determined at the end of the first or any subsequent year<sup>7</sup>, unless the parties use further words showing that they contemplate a tenancy for two years at least<sup>8</sup>. Thus, where the lease is 'for one year certain and so on from year to year', the notice may not be given in the course of the first year<sup>9</sup>. A yearly tenancy does not become a tenancy for two years at least merely by the inclusion of expressions showing that the parties contemplated that it would last for more than one year<sup>10</sup>; and the lease may be so worded that it will be for one year only unless there is a further agreement between the parties<sup>11</sup>. A perpetual right of renewal is repugnant to a tenancy from year to year; but, where the tenant was given the right to renew by notice, the tenancy operated as a contract to create a succession of reversionary terms, each for one year certain, provided that the requisite notice was given<sup>12</sup>. A tenancy for 364 days and thereafter for successive periods of 364 days does not create a term of years or a tenancy from year to year<sup>13</sup>.

Where a tenancy from year to year continues beyond the first year, it is not treated as a tenancy determining and recommencing with every year. The tenant has a lease for one year certain, with a growing interest during every year thereafter, springing out of the original contract and parcel of it<sup>14</sup>. The tenancy does not determine with his death, but passes to his personal representative<sup>15</sup>. The tenancy may be assigned by the tenant unless there is an express provision to the contrary<sup>16</sup>. Where the lease is for a year<sup>17</sup>, or for one year and no longer, it expires at the end of the year without notice to quit<sup>18</sup>.

1 This tenancy is correctly described as a tenancy for a term (*Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, [1992] 1 All ER 1, HL; *Doe d Hull v Wood* (1845) 14 M & W 682 at 686 per Parke B), and is included in the definition of 'term of years absolute' in the Law of Property Act 1925 s 205(1) (xxvii) (see PARA 2 note 3 ante).

2 Thus, an agreement to let agricultural land for a period of less than one year takes effect as a tenancy from year to year if it is a tenancy to which the Agricultural Holdings Act 1986 applies: see s 2; and AGRICULTURAL LAND vol 1 (2008) PARA 327. See also *Epsom and Ewell Borough Council v C Bell (Tadworth) Ltd* [1983] 2 All ER 59, [1983] 1 WLR 379 (illustrating the statutory exception).

3 See PARA 213 post.

4 *Re Threlfall, ex p Queen's Benefit Building Society* (1880) 16 ChD 274, CA.

5 *Godfrey Thornfield Ltd v Bingham* [1946] 2 All ER 485; *Wembley Corp v Sherren* [1938] 4 All ER 255; *H and G Simonds Ltd v Heywood* [1948] 1 All ER 260.

6 Unlike a tenancy at will, a tenancy from year to year attracts the protection of the Agricultural Holdings Act 1986 or falls within the Agricultural Tenancies Act 1995; it also attracts the protection of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post). It is often, therefore, the case that the common law rules discussed in the text have to be applied with the addition of the relevant statutory provisions.

7 *Mayo v Joyce* [1920] 1 KB 824, DC.

8 *Doe d Clarke v Smaridge* (1845) 7 QB 957 at 959; *Doe d Hogg v Taylor* (1837) 1 Jur 960.

9 *Doe d Chadborn v Green* (1839) 9 Ad & El 658; *R v Chawton Inhabitants* (1841) 1 QB 247; *Cannon Brewery v Nash* (1898) 77 LT 648, CA (a lease for six months and so on from six months to six months until six calendar months' notice is given is for a year at least); *Herron v Martin* (1911) 27 TLR 431 (a lease for three years and so on from year to year is properly terminated by notice to quit at the end of the fourth year); *Re Searle, Brooke v Searle* [1912] 1 Ch 610 (a lease for two years certain and after that from year to year, until either party gives

three months' notice to determine, is a lease for three years at least terminable at the end of the third or any subsequent year); *Re John Brinsmead & Sons Ltd* (1912) 56 Sol Jo 253; and see *Birch v Wright* (1786) 1 Term Rep 378 at 380; *Doe d Monck v Geekie* (1844) 5 QB 841; *British Iron and Steel Corp'n Ltd v Malpern* [1946] KB 171, [1946] 1 All ER 408. The position is similar where the tenancy is 'not for one year only, but from year to year': *Denn d Jacklin v Cartright* (1803) 4 East 29 at 33.

10 *Doe d Plumer v Mainby* (1847) 10 QB 473.

11 *Harris v Evans* (1756) Amb 329; cf *Bishop of Bath's Case* (1605) 6 Co Rep 34b at 36a; *Austin v Newham* [1906] 2 KB 167, DC.

12 *Gray v Spyer* [1922] 2 Ch 22, CA; *Northchurch Estates Ltd v Daniels* [1947] Ch 117, [1946] 2 All ER 524. As to perpetually renewable leases see PARAS 540-542 post.

13 *Land Settlement Association Ltd v Carr* [1944] KB 657, [1944] 2 All ER 126, CA. A tenancy for such a curious period was created in order to avoid the provisions of the Agricultural Holdings Act 1923 (repealed) but would not now avoid the provisions contained in the Agricultural Holdings Act 1986: see s 2.

14 *Oxley v James* (1844) 13 M & W 209 at 214; *Cattley v Arnold*, *Banks v Arnold* (1859) 1 John & H 651 at 660; *R v Thornton Inhabitants* (1860) 2 E & E 788 at 792; *Gandy v Jubber* (1865) 9 B & S 15 at 18, Ex Ch; cf *Hayes v Fitz-Gibbon* (1870) IR 4 CL 500. As to the application of this principle to weekly and other periodic tenancies see PARA 233 post.

15 *Mackay v Mackreth* (1785) 4 Doug KB 213; *Doe d Shore v Porter* (1789) 3 Term Rep 13; and see *Parker d Walker v Constable* (1769) 3 Wils 25.

16 *Allcock v Moorhouse* (1882) 9 QBD 366, CA; *Botting v Martin* (1808) 1 Camp 317.

17 See *Messenger v Armstrong* (1785) 1 Term Rep 53 at 54; *Right d Flower v Darby and Bristow* (1786) 1 Term Rep 159 at 162.

18 *Cobb v Stokes* (1807) 8 East 358 at 361.

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## **209. Tenancy from year to year by presumption of law.**

The old common law presumption of a yearly or other periodic tenancy arising by entry upon premises with payment of rent by reference to a yearly holding or other period seldom now arises<sup>1</sup>. The fundamental question in each case is with what intent the rent was received and what was the real intention of both parties<sup>2</sup>. It is unclear whether subjective evidence of the intention of the parties is admissible in determining this question<sup>3</sup>.

If one party permits another to enter into<sup>4</sup> or remain in possession of<sup>5</sup> his land upon payment of rent<sup>6</sup> with reference to a yearly holding, failing more, the inference reasonably to be drawn is that the parties intended a yearly tenancy<sup>7</sup>. A typical case, however, involves more than the simple facts of possession and unexplained payment of rent<sup>8</sup>. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn as to the intention of the parties depends upon a fair consideration of all the circumstances of which the payment of rent on a periodical basis is one, albeit a very important one<sup>9</sup>.

Where the tenant has a statutory right to remain in possession of the premises after expiry of the lease and he does so, paying rent, the fair inference to be drawn is that he does so in pursuance of his statutory rights and not under any new periodic tenancy<sup>10</sup>. Alternatively, where the tenant has no statutory right to remain in possession, the circumstances may show only an intention that the occupier should be a tenant at will<sup>11</sup>, or that no tenancy was intended to be granted<sup>12</sup>. Where a person is in possession under an agreement for a lease, he acquires a

legal estate from year to year as soon as he pays rent on a yearly basis<sup>13</sup>. Where the agreement is specifically enforceable, the tenant is, in equity, entitled to hold for the term specified in the agreement<sup>14</sup>. The equitable rule prevails in all courts<sup>15</sup> and the tenant's equitable rights prevail over the position at common law<sup>16</sup>. The common law position is, however, still of importance where the agreement for lease is not specifically enforceable, as, for example, where the tenant has not performed a condition precedent<sup>17</sup>. A tenant who enters under a void lease and pays rent on a yearly basis similarly acquires a legal tenancy from year to year<sup>18</sup>; and in addition the void lease may be construed as an agreement for a lease<sup>19</sup> and may, therefore, be enforceable in equity<sup>20</sup>.

A tenancy from year to year is implied only where the rent paid is a yearly rent, even though it may be payable quarterly or at any other intervals constituting an aliquot part of a year. Thus payment of £100 under an agreement reserving a yearly rent of £1200 payable monthly will create a yearly tenancy, but payment of £100 under an agreement reserving a rent of £100 per month will create only a tenancy from month to month<sup>21</sup>. A tenant holding over after a term of years at a weekly rent acquires only a weekly tenancy<sup>22</sup>; and a tenant holding over after the expiration of a term which was for less than one year is only a tenant at will or a weekly tenant, or possibly not a tenant at all<sup>23</sup>.

1 In *Longrigg, Burrough and Trounson v Smith* (1979) 251 Estates Gazette 847 at 849, CA, Ormerod LJ was of the view that the presumption was 'unsound and no longer holds'; in *Javad v Aqil* [1991] 1 All ER 243 at 252, [1991] 1 WLR 1007 at 1017, CA, Nicholls LJ observed that the alternative view was rather that in present day conditions the circumstances in which the presumption will operate are very few and far between; but the continuing relevance of the common law presumption of a periodic tenancy was confirmed by Nicholls LJ in *Javad v Aqil* supra at 248 and 1012 and applied in *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA.

2 *Doe d Cheny v Batten* (1775) 1 Cowp 243 at 245 per Lord Mansfield CJ, cited in *Javad v Aqil* [1991] 1 All ER 243 at 248, 249, [1991] 1 WLR 1007 at 1013, CA; *Dealex Properties Ltd v Brooks* [1966] 1 QB 542 at 550, [1965] 1 All ER 1080 at 1082, CA, per Harman LJ; *Clarke v Grant* [1950] 1 KB 104 at 106, [1949] 1 All ER 768 at 769, CA; *Land v Sykes* [1992] 1 EGLR 1 at 4, CA. See also *Longrigg, Burrough and Trounson v Smith* [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847, CA; and *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368.

3 *Maconochie Bros Ltd v Brand* [1946] 2 All ER 778; *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA; *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953; *Sector Properties Ltd v Meah* (1974) 229 Estates Gazette 1097 at 1103, CA, per Edmund Davies LJ (judge entitled to hear evidence from the landlord as to the animus with which he received rent); *Baron v Phillips* (1978) 38 P & CR 91 at 104, CA (concession by counsel that evidence of subjective intention was admissible); *Longrigg, Burrough and Trounson v Smith* [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847, CA (facts indicate that evidence of subjective intention admitted); *Land v Sykes* [1992] 1 EGLR 1 at 4, CA, per Scott LJ (grave reservations expressed as to whether evidence of the subjective intentions of the parties was admissible; the intention should be ascertained objectively).

4 See PARA 200 ante; and *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858; *Bretherton v Paton* (1986) 18 HLR 257, [1986] 1 EGLR 172, CA (payment pending entry into contract of sale gave rise to a weekly periodic tenancy); cf *Sharp v McArthur and Sharp* (1987) 19 HLR 364, CA.

5 This may be because his lease has expired by effluxion of time (*Digby v Atkinson* (1815) 4 Camp 275; *Bishop v Howard* (1823) 2 B & C 100; *Finch v Miller* (1848) 5 CB 428; *Hyatt v Griffiths* (1851) 17 QB 505; *Dougal v McCarthy* [1893] 1 QB 736 at 740, CA) or because the landlord's title was determined (*Doe d Martin v Watts* (1797) 7 Term Rep 83; *Doe d Tucker v Morse* (1830) 1 B & Ad 365 at 369; *Cornish v Stubbs* (1870) LR 5 CP 334; *Wyatt v Cole* (1877) 36 LT 613; and see *Nixon v Darley* (1868) IR 2 CL 467). Payment of rent under attornment to a person claiming by title paramount has been held to create a yearly tenancy: see *Doe d Chawner v Boulter* (1837) 6 Ad & El 675.

6 It has been held to be sufficient that the rent has been charged in an account and the charge admitted although no rent has actually been paid (*Cox v Bent* (1828) 5 Bing 185; cf *Vincent v Godson* (1854) 4 De GM & G 546 at 552, 553) or that there has been a tender in the nature of rent (*Doe d Tucker v Morse* (1830) 1 B & Ad 365). There may, however, be evidence of a yearly tenancy where there has been no payment of rent: see *Taylor v Young* (1837) 6 LJKB 141; *Fahy v O'Donnell* (1870) IR 4 CL 332; *Neall v Beadle* (1912) 107 LT 646.



7 Javad v Aqil [1991] 1 All ER 243 at 248, [1991] 1 WLR 1007 at 1012, CA; Walji v Mount Cook Land Ltd [2002] 1 P & CR 13, [2000] All ER (D) 2440, CA; Doe d Bastow v Cox (1847) 11 QB 122 at 123 per Lord Denman CJ; Doe d Lord v Cargo (1848) 6 CB 90 at 98-99 per Wilde CJ; Lewis v MTC (Cars) Ltd [1975] 1 All ER 874 at 878, [1975] 1 WLR 457 at 462, CA, per Russell LJ. A notice to 'quit the premises which you hold under me, your term therein having long since expired' was held to be a mere demand of possession, and did not recognise a subsisting tenancy from year to year subsequent to the term: Doe d Godsell v Inglis (1810) 3 Taunt 54.

8 See Javad v Aqil [1991] 1 All ER 243 at 248, [1991] 1 WLR 1007 at 1012, CA; Longrigg, Burrough and Trounson v Smith [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847 at 849, CA, per Scarman LJ; Sopwith v Stutchbury (1983) 17 HLR 50 at 74, CA, per Stephenson LJ.

9 Javad v Aqil [1991] 1 All ER 243 at 248, [1991] 1 WLR 1007 at 1012, CA.

10 Dealex Properties Ltd v Brooks [1966] 1 QB 542, [1965] 1 All ER 1080, CA; Marcroft Wagons Ltd v Smith [1951] 2 KB 496, [1951] 2 All ER 271, CA; Harvey v Stagg (1977) 247 Estates Gazette 463, CA; Baron v Phillips (1978) 38 P & CR 91, CA; Sopwith v Stutchbury (1983) 17 HLR 50 at 74, CA. The continuation of a business tenancy under the Landlord and Tenant Act 1954 s 24 (as amended) (see PARA 713 post) effects a continuation of the common law tenancy with a statutory variation of the mode of determination: Bowes-Lyon v Green [1963] AC 420, [1961] 3 All ER 843, HL, approving the dictum of Denning LJ in HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 at 168, [1956] 3 All ER 624 at 626, CA; and see Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd [1958] Ch 437 at 445, sub nom Re Bleachers' Association's Leases, Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd [1957] 3 All ER 663 at 667. A change in the terms of the occupation agreed between the landlord and a statutory tenant within the meaning of the Rent Acts (see PARA 831 post) may be evidence of the creation of a new tenancy: see Bungalows (Maidenhead) Ltd v Mason [1954] 1 All ER 1002, [1954] 1 WLR 769, CA; Isherwood v Currie 1954 SLT (Sh Ct) 61. A new tenancy was created on the conditions of the former lease where the landlord sued for possession after the expiry of a notice to quit and an order for possession was suspended by consent: see Edmunds v Driver [1949] WN 111, CA.

11 See Cardiothoracic Institute v Shrewdcrest Ltd [1986] 3 All ER 633, [1986] 1 WLR 368 (tenant holding over after expiry of term which was excluded from protection of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) by court order, held to be tenant at will notwithstanding periodic payment of rent in advance). As to entry into occupation pursuant to an agreement for lease or pending negotiations for the grant of a lease see PARA 200 ante.

12 Land v Sykes [1992] 1 EGLR 1, CA (acceptance of cheque tendered as rent did not give rise to a periodic tenancy where the acceptance was necessitated by the personal circumstances of the owner the nature of which was fully explained to the occupier and the owner had repeatedly requested the delivery up of possession); Westminster City Council v Basson (1992) 62 P & CR 57, 23 HLR 225, CA (no tenancy granted where payment of charges for use and occupation requested and made during period that possession proceedings afoot); Bramwell v Bramwell [1942] 1 KB 370, [1942] 1 All ER 137, CA (husband deducting sums from maintenance on account of the wife's occupation of the matrimonial home; no intention to create a tenancy), considered in Pargeter v Pargeter [1946] 1 All ER 570, CA. See also PARA 211 post.

13 Knight v Benett (1826) 3 Bing 361; Mann v Lovejoy (1826) Ry & M 355; Doe d Westmoreland and Perfect v Smith (1827) 1 Man & Ry KB 137; Cox v Bent (1828) 5 Bing 185; Doe d Thomson v Amey (1840) 12 Ad & El 476; Chapman v Towner (1840) 6 M & W 100; Braythwayte v Hitchcock (1842) 10 M & W 494; Doe d Bailey v Foster (1846) 3 CB 215; Bennet v Ireland (1858) EB & E 326.

14 See PARAS 75-76 ante.

15 See the Supreme Court Act 1981 s 49(1); and EQUITY vol 16(2) (Reissue) PARA 500. The Supreme Court Act 1981 is prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1; at the date at which this title states the law, that amendment was not in force.

16 Walsh v Lonsdale (1882) 21 ChD 9, CA. It is not necessary for a lease to have been tendered by the landlord or demanded by the tenant: Weakly d Yea v Bucknell (1776) 2 Cowp 473. For the agreement to be specifically enforceable it must be in writing in order to comply with the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

17 Cornish v Brook Green Laundry Ltd [1959] 1 QB 394, [1959] 1 All ER 373, CA; and see Bell Street Investments Ltd v Wood (1970) 216 Estates Gazette 585 (duly executed deed of lease had been prepared but it did not include any dates; rent had in the past been paid and accepted on a yearly basis; incomplete deed held to have created no interest, but a yearly tenancy had been created).

18 Rhyl UDC v Rhyl Amusements Ltd [1959] 1 All ER 257, [1959] 1 WLR 465; and see Doe d Rigge v Bell (1793) 5 Term Rep 471; Doe d Martin v Watts (1797) 7 Term Rep 83; Clayton v Blakey (1798) 8 Term Rep 3; Richardson v Gifford (1834) 1 Ad & El 52; Doe d Pennington v Tanriere (1848) 12 QB 998 at 1013; Doe d Brammall v Collinge (1849) 7 CB 939 at 960; Doe d Davenish v Moffatt (1850) 15 QB 257; Lee v Smith (1854) 9

Exch 662; *Tress v Savage* (1854) 4 E & B 36; *Martin v Smith* (1874) LR 9 Exch 50 at 52. Thus, where, prior to the Corporate Bodies' Contracts Act 1960 (see CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1272-1274), a corporation purported to grant a lease by an instrument not under seal, a tenant who entered under the instrument and paid rent on a yearly basis became a tenant from year to year: *Re Northumberland Avenue Hotel Co Ltd* (1886) 33 ChD 16 at 20, 21, CA. See also *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA; *Prudential Assurance Co Ltd v London Residuary Body* (1992) 63 P & CR 386, [1992] 1 EGLR 47, CA (overruled [1992] 2 AC 386, [1992] 3 All ER 504, HL, on the basis that a provision fettering the right of the landlord to determine the tenancy before the occurrence of an event, the time of which was uncertain, was repugnant to the notion of a tenancy from year to year: see PARA 238 post).

19 See PARA 75 ante.

20 See PARA 76 ante.

21 *Richardson v Langridge* (1811) 4 Taunt 128; *Braythwayte v Hitchcock* (1842) 10 M & W 494 at 497; *Doe d Hull v Wood* (1845) 14 M & W 682 at 687; *King v Eversfield* [1897] 2 QB 475, CA.

22 *Ladies' Hosiery and Underwear Ltd v Parker* [1930] 1 Ch 304, CA; *Pope v Garland* (1841) 4 Y & C Ex 394 at 399; *Adler v Blackman* [1953] 1 QB 146, [1952] 2 All ER 945, CA, overruling *Covered Markets Ltd v Green* [1947] 2 All ER 140.

23 *Swift v Ambrose* (1931) 47 TLR 594.

## UPDATE

### 209 Tenancy from year to year by presumption of law

NOTE 15--Amendment in force on 1 October 2009: SI 2009/1604.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/5. DURATION OF TENANCY/(3) TENANCY FROM YEAR TO YEAR/(i) Creation of Tenancy from Year to Year/210. Terms of yearly tenancy implied by law.

### 210. Terms of yearly tenancy implied by law.

Where there is an instrument of tenancy with reference to which possession is taken or retained, the yearly tenancy implied by law is deemed to be upon such of the terms of the instrument as are applicable to a yearly tenancy. Thus, upon an entry under an agreement for a lease, followed by payment of rent, the tenant becomes a yearly tenant upon such terms of the agreement as are consistent with that tenancy<sup>1</sup>; and the agreement so far controls the implied tenancy that the tenancy ceases without notice to quit at the end of the agreed term<sup>2</sup>. Similarly, a tenant who holds over after the expiration of the term and pays rent<sup>3</sup> in circumstances where the court implies the grant of a yearly tenancy<sup>4</sup> will, in the absence of facts pointing to a contrary conclusion, be held impliedly to have agreed to hold as tenant from year to year upon such terms of the old lease as are applicable to such a tenancy<sup>5</sup>. The applicable terms are not confined to those necessarily incident to a yearly tenancy, but include those terms which may be incident to such a tenancy<sup>6</sup>.

Certain terms are regarded as inconsistent with the nature of a yearly tenancy and they will not govern an implied yearly tenancy, for example a covenant to paint every three years<sup>7</sup>, a provision for two years' notice to quit<sup>8</sup> and an option to purchase the reversion<sup>9</sup>. Certain provisions, although not in their nature consistent with a yearly tenancy, bind the tenant if the implied yearly tenancy lasts long enough for them to apply<sup>10</sup>. The general principle is that, where a tenant has entered under an agreement for a lease and becomes a yearly tenant by reason of the payment of rent without the lease being granted, he is bound by all the covenants of the proposed lease if he actually occupies the premises for the term proposed<sup>11</sup>.

In the case of agricultural tenancies, the tenant does not hold over; his tenancy is continued from year to year on the terms incident to his tenancy<sup>12</sup> as modified by statute<sup>13</sup>.

1 *Roe d Jordan v Ward* (1789) 1 Hy Bl 96; *Doe d Rigge v Bell* (1793) 5 Term Rep 471; *Mann v Lovejoy* (1826) Ry & M 355; *Richardson v Gifford* (1834) 1 Ad & El 52; *Beale v Sanders* (1837) 3 Bing NC 850; *Doe d Thomson v Amey* (1840) 12 Ad & El 476; *Tress v Savage* (1854) 4 E & B 36; *Elliott v Johnson* (1866) LR 2 QB 120 at 124; *Wyatt v Cole* (1877) 36 LT 613. Before payment of rent, and while the tenant is tenant at will, he is subject to the terms of the agreement (*Richardson v Gifford* supra at 56), and the doctrine applies equally to assignees of a void lease (*Beale v Sanders* supra), and to tenants who continue in occupation after the term under an express agreement that they are to be tenants at will (*Morgan v William Harrison Ltd* [1907] 2 Ch 137, CA). It follows that reference may be made to the instrument to ascertain the terms of the holding (*De Medina v Polson* (1815) Holt NP 47; *Lee v Smith* (1854) 9 Exch 662 at 665, 666; *Tress v Savage* supra); and reference may be made to it also to ascertain the commencement of the year of the tenancy (*Roe d Jordan v Ward* (1789) 1 Hy Bl 96; *Kelly v Patterson* (1874) LR 9 CP 681).

2 *Doe d Tilt v Stratton* (1828) 4 Bing 446; *Berrey v Lindley* (1841) 3 Man & G 498 at 513; *Doe d Davenish v Moffatt* (1850) 15 QB 257; *Tress v Savage* (1854) 4 E & B 36; and see *Sauvage v Dupuis* (1811) 3 Taunt 410.

3 *Digby v Atkinson* (1815) 4 Camp 275; *Bishop v Howard* (1823) 2 B & C 100; *Finch v Miller* (1848) 5 CB 428; *Hyatt v Griffiths* (1851) 17 QB 505; *Dougal v McCarthy* [1893] 1 QB 736 at 740, CA. This is so also where a bankrupt tenant continues to hold after his discharge: *Ponsford v Abbott* (1884) Cab & El 225.

4 See PARA 209 ante.

5 *Wedd v Porter* [1916] 2 KB 91 at 98, CA, per Swinfen Eady LJ; *Cole v Kelly* [1920] 2 KB 106 at 132, CA, per Atkin LJ; and see PARA 212 post. Payment of rent for lodgings for a year is not evidence of a tenancy from year to year, as this would be contrary to the general usage in letting lodgings: *Wilson v Abbott* (1824) 3 B & C 88 at 90.

6 *Hyatt v Griffiths* (1851) 17 QB 505 at 509. Of this nature are provisions for payment of rent in advance (*Finch v Miller* (1848) 5 CB 428; *Lee v Smith* (1854) 9 Exch 662) or for payment of rent, damage by fire excepted (*Bennett v Ireland* (1858) EB & E 326); covenants to keep the premises in repair (*Digby v Atkinson* (1815) 4 Camp 275; *Richardson v Gifford* (1834) 1 Ad & El 52; *Beale v Sanders* (1837) 3 Bing NC 850; *Arden v Sullivan* (1850) 14 QB 832; *Ecclesiastical Comrs v Merril* (1869) LR 4 Exch 162; *Wyatt v Cole* (1877) 36 LT 613); covenants relating to the user of the premises, such as to carry on a particular trade (*Sanders v Karnell* (1858) 1 F & F 356); provisos with respect to the determination of the tenancy by a specified notice (*Bridges v Potts* (1864) 17 CBNS 314; *Godfrey Thornfield Ltd v Bingham* [1946] 2 All ER 485; *Wembley Corp v Sherren* [1938] 4 All ER 255); and provisos for re-entry on non-payment of rent or breach of covenant (*Doe d Thomson v Amey* (1840) 12 Ad & El 476; *Thomas v Packer* (1857) 1 H & N 669; *Crawley v Price* (1875) LR 10 QB 302). If the lease was subject to determination on a given event, so also is the yearly tenancy arising on holding over: *Johnson v Reardon* (1839) 2 I Eq R 123.

7 *Pinero v Judson* (1829) 6 Bing 206. A further example is a covenant to build or to do substantial repairs such as are not usually done by yearly tenants: *Doe d Thomson v Amey* (1840) 12 Ad & El 476 at 479; *Bowes v Croll* (1856) 6 E & B 255.

8 *Tooker v Smith* (1857) 1 H & N 732.

9 *Re Leeds and Batley Breweries Ltd and Bradbury's Lease, Bradbury v Grimble & Co* [1920] 2 Ch 548. As to stipulations in respect of notice to quit which are avoided for repugnancy see also PARA 213 post.

10 Thus a covenant to paint the premises every three or seven years of the term will be imported into the yearly tenancy if the tenant occupies that long: *Martin v Smith* (1874) LR 9 Exch 50.

11 *Pistor v Cater* (1842) 9 M & W 315; *Adams v Clutterbuck* (1883) 10 QBD 403 at 406. The same result will be achieved if the agreement is specifically enforceable: see PARA 76 ante.

12 Eg covenants with respect to the cultivation of the land (*Roe d Jordan v Ward* (1789) 1 Hy Bl 96 at 99; *Doe d Thomson v Amey* (1840) 12 Ad & El 476; *Tooker v Smith* (1857) 1 H & N 732 at 736); and provisions as to the tenant's liabilities and rights at the end of the tenancy, such as liability to leave manure on the farm (*Roberts v Barker* (1833) 1 Cr & M 808) or the right to be paid for tillages or to have away-going crops (*Boraston v Green* (1812) 16 East 71; *Hutton v Warren* (1836) 1 M & W 466; *Brocklington v Saunders* (1864) 13 WR 46) or (probably), in a lease of nursery gardens, to be paid for fruit trees (*Oakley v Monck* (1866) LR 1 Exch 159 at 164, Ex Ch); or to use the land after the end of the term (*Hyatt v Griffiths* (1851) 17 QB 505).

13 See the Agricultural Holdings Act 1986 s 3; the Agricultural Tenancies Act 1995 s 5 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARAS 304, 328.

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### **211. Effect of payment of rent.**

Payment of rent with reference to a yearly holding is not conclusive as to the creation of a tenancy from year to year; it is only evidence of such a tenancy. The fundamental question is always with what intention was the rent paid and received<sup>1</sup>. Accordingly, it is competent for either the payer or the receiver of rent to prove the circumstances in which the payment was made, and by those circumstances to rebut the inferences which would otherwise be drawn from the receipt of rent unexplained<sup>2</sup>. Whether the circumstances exclude the implication of a yearly tenancy is a question of fact to be decided on the circumstances of the case<sup>3</sup>. Thus, it is excluded where the parties have expressly created a tenancy at will<sup>4</sup>, or where the rent has been received in ignorance that the former tenancy has expired<sup>5</sup> or that the tenant has died<sup>6</sup>. In the case of a holding under a void lease, the yearly tenancy may be excluded if there is a great disproportion between the rent reserved by the void lease and the real value<sup>7</sup>.

1 *Doe d Cheney v Batten* (1775) 1 Cowp 243 at 245 per Lord Mansfield; and see PARA 209 note 2 ante; *Holder v Holder* [1968] Ch 353, [1968] 1 All ER 665, CA. See also *Doe d Tucker v Morse* (1830) 1 B & Ad 365; *Doe d Pennington v Tanriere* (1848) 12 QB 998 at 1013; *Finlay v Bristol and Exeter Rly Co* (1852) 7 Exch 409 at 420; *Smith v Widlake* (1877) 3 CPD 10, CA. Thus, the payment may be made in the course of negotiations for a new lease (*Caulfield v Farr* (1873) IR 7 CL 469); and mere payment of rent is not proof of a demise from year to year from a particular date (*Phillips v Mosely* (1824) 1 C & P 262). In the case of joint tenants the payment must be with the consent of all: *Doidge v Bowers* (1837) 2 M & W 365.

2 *Doe d Lord v Crago* (1848) 6 CB 90 at 98; *Right d Dean and Chapter of Wells v Bawden* (1803) 3 East 260; *Mildmay d Lord Digby v Shirley* (1806) cited in 10 East at 164; *Doe d Harvey v Francis* (1837) 2 Mood & R 57; *Woodbridge Union Guardians v Colneis and Carlford Hundreds Guardians* (1849) 13 QB 269; *Marquis of Camden v Batterbury* (1860) 7 CBNS 864. As to the admissibility of evidence of the subjective intention of the parties see PARA 209 note 3 ante.

3 *Finlay v Bristol and Exeter Rly Co* (1852) 7 Exch 409 at 417, 420; and see *Jones v Shears* (1836) 4 Ad & El 832.

4 *Doe d Bastow v Cox* (1847) 11 QB 122; and see *Doe d Dixie v Davies* (1851) 7 Exch 89.

5 *Doe d Lord v Crago* (1848) 6 CB 90 at 98.

6 *Tickner v Buzzacott* [1965] Ch 426, [1965] 1 All ER 131.

7 *Roe d Brune v Prideaux* (1808) 10 East 158; *Denn d Brune v Rawlins* (1808) 10 East 261; *Smith v Widlake* (1877) 3 CPD 10, CA.

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### **212. Holding over.**

A tenancy which arises by implication in favour of a tenant who holds over after the expiration of his lease and pays rent is only deemed to be on the terms of the old lease in the absence of evidence of a different understanding<sup>1</sup>. The question is one of fact; and, in the absence of any facts excluding an implied agreement between the parties to hold upon the terms of the old lease, so far as they are applicable to an annual tenancy, the law implies a new agreement to that effect between them<sup>2</sup>. Where nothing has been said by landlord or tenant with reference to any terms of tenancy, such an agreement is implied as a matter of law<sup>3</sup>; but, where there have been negotiations after the expiration of the old lease with regard to the terms of a tenancy, it is a question of fact whether there has been a consent by both parties to a continuance of the old tenancy and, if so, upon what terms<sup>4</sup>. The terms may be implied from the parties' relationship, as in the case of a landlord and tenant of an agricultural holding, from the use of certain words, such as the word 'demise', and from the surrounding circumstances existing at the time when the parties consent to the continuance of the tenancy; and what terms are to be implied is in each case an inference of fact<sup>5</sup>. Thus, where there have been negotiations for a letting at an increased rent, and the tenant stays on, it is not a necessary inference that he is liable only for the former rent<sup>6</sup>; although, if a different rent has been in fact agreed upon, this does not prevent the new tenancy being upon the old terms in other respects<sup>7</sup>.

The implied tenancy operates as a new contract and has reference to the state of affairs existing at its commencement, so that a covenant to repair and to leave premises in the same state as at the beginning of the lease, if imported into the new tenancy, has reference to the state of the premises at the commencement of the new, not of the old, tenancy<sup>8</sup>. The presumption that the former terms are incorporated in the new tenancy does not apply where the new tenancy is under a different landlord, as, for example, where the lease is by a tenant for life and then after his death the reversioner receives rent, so as to bind the new landlord by a term which is unusual and which was in fact unknown to him<sup>9</sup>.

1 *Thetford Corpn v Tyler* (1845) 8 QB 95 at 101; *Wedd v Porter* [1916] 2 KB 91, CA (where it was agreed that the tenant should not hold over on the terms of the expired lease, and the tenant was held to hold on such terms as the law implies into a yearly tenancy); *Mitchell v Turner* (1919) 63 Sol Jo 776.

2 *Hyatt v Griffiths* (1851) 17 QB 505; *Dougal v McCarthy* [1893] 1 QB 736 at 742, CA, per Lopes LJ; *Morgan v William Harrison Ltd* [1907] 2 Ch 137 at 143, CA; *Wedd v Porter* [1916] 2 KB 91, CA; *Cole v Kelly* [1920] 2 KB 106 at 125, CA, per Bankes LJ; *Lowther v Clifford* [1927] 1 KB 130, CA.

3 *Wedd v Porter* [1916] 2 KB 91, CA; and see *Oakley v Monck* (1866) LR 1 Exch 159 at 167, Ex Ch.

4 *Cole v Kelly* [1920] 2 KB 106, CA.

5 *Cole v Kelly* [1920] 2 KB 106 at 126, CA per Bankes LJ. For examples of terms which have been implied see PARA 210 note 6 ante. As to the use of the word 'demise' see PARA 511 post.

6 *Thetford Corpn v Tyler* (1845) 8 QB 95; and see *Elgar v Watson* (1842) Car & M 494.

7 *Digby v Atkinson* (1815) 4 Camp 275; *Doe d Monck v Geekie* (1844) 5 QB 841.

8 *Johnson v Churchwardens of St Peter, Hereford* (1836) 4 Ad & El 520; and see *Felnex Central Properties Ltd v Montague Burton Properties Ltd* [1981] 2 EGLR 73, (1981) 260 Estates Gazette 705.

9 *Oakley v Monck* (1866) LR 1 Exch 159, Ex Ch.

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## (ii) Determination of Tenancy from Year to Year

### A. NOTICE TO QUIT

#### 213. How tenancy is determined.

A tenancy from year to year is determinable by notice to quit<sup>1</sup>, and the parties may enter into special stipulations both as to the length of the notice and the time when the tenancy may be determined under it<sup>2</sup>. In the absence of special stipulation or of special custom<sup>3</sup> or statute<sup>4</sup>, a yearly tenancy may be determined by a half-year's notice, expiring at the end of some year of the tenancy<sup>5</sup>. Where there is a term specifying the length of notice required, then, in the absence of any provision to the contrary, that notice must be given so as to expire at the end of some year of the tenancy<sup>6</sup>. A notice to quit must be given by an existing landlord to an existing tenant. It cannot, therefore, be given so as to determine a tenancy before that tenancy has commenced<sup>7</sup>.

The right to determine a yearly tenancy by service of notice to quit is an essential characteristic of such a tenancy. If a provision of the tenancy purports wholly to deprive one or other party of the right to end the tenancy by notice to quit, that provision is void for repugnancy<sup>8</sup>. Although the parties may agree that a notice to quit cannot be given before a specified time, an agreement fettering the right of one or both of the parties to serve notice to quit before the occurrence of an event, the time of which is uncertain, is repugnant to the notion of a periodic tenancy and the term granted is void for uncertainty<sup>9</sup>. Thus a provision fettering the landlord's right to serve a notice to quit until the premises were required for road-widening purposes was void<sup>10</sup>.

Where a tenancy is for a year or years certain and thereafter from year to year, notice to quit cannot, unless there is a stipulation to the contrary<sup>11</sup>, be given so as to determine the tenancy at the end of the fixed term<sup>12</sup>.

The effect of a term that the tenancy is to be terminable 'at any time' by notice of a certain length is that the notice may be given for any date, notwithstanding that the date is not an anniversary of the commencement of the tenancy or a quarter day<sup>13</sup>; but, if the tenancy is a yearly one, such a term does not justify the termination of the tenancy before the expiration of the first year<sup>14</sup>.

If, on the construction of the tenancy agreement, the tenancy is not a yearly tenancy<sup>15</sup>, the notice must be given so as to expire at the end of any complete period of the tenancy<sup>16</sup>, and, in the absence of any stipulation as to its length, must be equal to the length of the period<sup>17</sup>.

1 A subtenant is not entitled to leave without notice because he anticipates a distress by the superior landlord: *Rickett v Tullick* (1833) 6 C & P 66. A tenancy from year to year may also be terminated by surrender (see the cases cited in PARA 232 note 3 post) or other appropriate means.

2 *Bridges v Potts* (1864) 17 CBNS 314 at 333; *Re Threlfall, ex p Queen's Benefit Building Society* (1880) 16 ChD 274 at 281, CA; *Herron v Martin* (1911) 27 TLR 431; *Mitchell v Turner* (1919) 63 Sol Jo 776; *Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301 (quarter's notice to be confirmed by the half-quarter day); *H and G Simonds Ltd v Heywood* [1948] 1 All ER 260 (tenancy determinable on three months' notice at any time). The parties may, however, agree that on a specified event (*Bethell v Blencowe* (1841) 3 Man & G 119), or on a date following a specified event, such as the sale of a farm (*Allison v Scargall* [1920] 3 KB 443), the tenancy is to determine without notice, or that the tenant may quit without notice (*Bethell v Blencowe* supra), or that he may quit on payment of an agreed sum by way of rent in advance (*Florence v Robinson* (1871) 24 LT 705).

3 *Doe d Dagget v Snowdon* (1779) 2 Wm Bl 1224 at 1225. There must be clear evidence of the custom: *Roe d Henderson v Charnock* (1790) Peake 5; Co Litt 270b note 228; *Tyley v Seed* (1696) Skin 649; *Vint v Constable* (1871) 25 LT 324. Cf *Brown v Burtinshaw* (1826) 7 Dow & Ry KB 603.

4 See PARA 214 post.

5 le at the end of the first or any subsequent year, unless the tenancy is for two years certain, when it may be given only for the end of the second or some subsequent year: see PARA 208 ante. In the absence of express stipulation, the notice must be a reasonable notice: *Doe d Martin v Watts* (1797) 7 Term Rep 83 at 85. In the case of a tenancy from year to year, half a year's notice is a reasonable notice: *Right d Flower v Darby and Bristow* (1786) 1 Term Rep 159 at 163; *Birch v Wright* (1786) 1 Term Rep 378 at 379; *Doe d Shore v Porter* (1789) 3 Term Rep 13 at 17. This does not depend on the rent being reserved half-yearly, and it is the same where the rent is payable quarterly: *Shirley v Newman* (1795) 1 Esp 266. The rule applies where a minor becomes entitled to the reversion (*Maddon d Baker v White* (1787) 2 Term Rep 159) and where the tenancy devolves upon an executor (*Gulliver d Tasker v Burr* (1766) 1 Wm Bl 596).

6 *Doe d Pitcher v Donovan* (1809) 1 Taunt 555 (letting from year to year to quit at a quarter's notice); *Dixon v Bradford and District Railway Servants' Coal Supply Society* [1904] 1 KB 444 (letting at an annual rent, 'three months' notice on either side to determine this agreement'); and see PARA 208 ante.

7 *Lower v Sorrell* [1963] 1 QB 959, [1962] 3 All ER 1074, CA.

8 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL; *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1, [1973] 2 All ER 720; and see *Doe d Warner v Browne* (1807) 8 East 165 at 167.

9 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL.

10 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL, overruling *Re Midland Rly Co's Agreement, Charles Clay & Sons Ltd v British Railways Board* [1971] Ch 725, [1971] 1 All ER 1007, CA (where a provision that a landlord could serve a notice to quit only if it required the premises for the purposes of its undertaking was held to be valid).

11 The actual words of the demise may show that the notice may be given for the end of the fixed term: *Jones v Nixon* (1862) 1 H & C 48 (demise for a term of three years and, unless terminated by a six months' previous notice to quit, to continue from year to year).

12 *Cannon Brewery v Nash* (1898) 77 LT 648, CA; *Herron v Martin* (1911) 27 TLR 431; *Re Searle, Brooke v Searle* [1912] 1 Ch 610. The decision in *Thompson v Maberly* (1811) 2 Camp 573 to the contrary effect would seem not now to be good law. Similarly, where a term of five years is determinable by notice after the expiration of three years, the term may not be determined except by a notice given after the expiration of the three years: *Gardner v Ingram* (1889) 61 LT 729; DC; *Re Lancashire and Yorkshire Bank's Lease, W Davis & Son v Lancashire and Yorkshire Bank* [1914] 1 Ch 522, CA; cf *Associated London Properties Ltd v Sheridan* [1946] 1 All ER 20 ('if on or after 24 June 1945 either party shall desire to determine this lease'; notice given expiring on 24 June 1945; notice invalid). In *British Iron and Steel Corp Ltd v Malpern* [1946] KB 171, [1946] 1 All ER 408, however, a tenancy for two years from 24 June 1943 'and then quarterly subject to three calendar months' notice ... expiring on any quarter day' was held to be validly terminated on 29 September 1945 by a notice served on 21 June 1945.

13 *Bridges v Potts* (1864) 17 CBNS 314 at 333; *Soames v Nicholson* [1902] 1 KB 157; cf *King v Eversfield* [1897] 2 QB 475, CA; *Wembley Corp v Sherren* [1938] 4 All ER 255; *H and G Simonds Ltd v Heywood* [1948] 1 All ER 260; *Harler v Calder* (1988) 21 HLR 214, [1989] 1 EGLR 88, CA (monthly periodic tenancy; agreement provided for termination by either party by 'not less than one month's prior written notice in accordance with statutory requirements but no other formality will be required'; these words held not to have the same effect as 'at any time' so as to oust the common law rule that notice must be given so as to expire at the end of a complete period of the tenancy; the common law rule was not a formality but part of what the law reads into a periodic tenancy unless there were express terms in the agreement enabling the tenancy to be determined other than on a rent day).

14 *Mayo v Joyce* [1920] 1 KB 824, DC. This case did not, however, lay down any general proposition of law: *H and G Simonds Ltd v Heywood* [1948] 1 All ER 260 at 263, 264.

15 *Kemp v Derrett* (1814) 3 Camp 510 (tenant 'always' to 'be subject to quit at three months' notice'); *Doe d King v Grafton* (1852) 18 QB 496, where, although there was a reservation of a yearly rent payable quarterly, the habendum was 'until one of the said parties shall give unto the other six calendar months' notice in writing to quit'. These words rebutted the presumption of a yearly tenancy arising on the reservation of rent. In the first case, the notice could be given for the end of any period of three months; in the second, for the end of any period of six months. In *Lewis v Baker* [1905] 2 KB 576; affd [1906] 2 KB 599, CA, however, where the habendum was 'until such tenancy shall be determined as hereinafter mentioned', and it was provided that either party might determine the tenancy by three calendar months' notice, it was held that the reference in the habendum to determination by notice did not cut down the prima facie yearly tenancy, and the notice could be given only for the end of the current year. Cf *Doe d Carter v Roe* (1842) 10 M & W 670.

16 *Kemp v Derrett* (1814) 3 Camp 510; *Doe d King v Grafton* (1852) 18 QB 496; *Savory v Bayley* (1922) 38 TLR 619. As to weekly and other periodic tenancies see PARAS 233-234 post.

17 *Doe d Parry v Hazell* (1794) 1 Esp 94; *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117. This principle applies to periodic tenancies of any length less than a year: *Queen's Club Gardens Estates Ltd v Bignell* supra at 125; and see PARA 234 post.

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## 214. Effect of statute.

By statute and notwithstanding any agreement to the contrary, a notice to quit an agricultural holding to which the Agricultural Holdings Act 1986 applies is invalid if it purports to terminate the tenancy before the expiration of 12 months from the end of the then current year of the tenancy<sup>1</sup>. A notice to quit a farm business tenancy which is a tenancy from year to year is invalid unless it is to take effect at the end of a year of the tenancy and is given at least 12 months before the date on which it is to take effect<sup>2</sup>. These restrictions apply to an allotment which is an agricultural holding<sup>3</sup>, and to a smallholding which is an agricultural holding<sup>4</sup>.

A notice to quit an allotment garden must be for at least 12 months expiring on or before 6 April or on or after 29 September<sup>5</sup>.

A notice to determine a business tenancy given under statute must be given not more than 12 nor less than six months before the date of termination specified in it<sup>6</sup>.

No notice:

- 370 (1) by a landlord or a tenant to quit any premises let<sup>7</sup> as a dwelling<sup>8</sup>; or
- 371 (2) by a licensor or a licensee to determine a periodic licence<sup>9</sup> to occupy premises as a dwelling<sup>10</sup>,

is valid unless it is in writing and contains such information as may be prescribed<sup>11</sup> and it is given not less than four weeks before the date on which it is to take effect<sup>12</sup>. This provision does not apply:

- 372 (a) to premises let on an excluded tenancy<sup>13</sup> or occupied under an excluded licence<sup>14</sup>;
- 373 (b) to a tenancy at will<sup>15</sup> or a tenancy arising under an attornment clause in a mortgage<sup>16</sup>.

A statute may prescribe and validate a notice to be given before the statute itself comes into force<sup>17</sup>.

1 See the Agricultural Holdings Act 1986 ss 25-33; and AGRICULTURAL LAND vol 1 (2008) PARA 373 et seq. The notice need not comply with regulations under the Protection from Eviction Act 1977 s 5 (as amended) (see note 11 infra): *National Trust for Places of Historic Interest or Natural Beauty v Knipe* [1997] 4 All ER 627, [1998] 1 WLR 230, CA; but see note 8 infra.

2 See the Agricultural Tenancies Act 1995 s 6(1) (amended by the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006, SI 2006/2805); and AGRICULTURAL LAND vol 1 (2008) PARA 304.

3 See AGRICULTURAL LAND vol 1 (2008) PARA 563.



4 See AGRICULTURAL LAND vol 1 (2008) PARA 499.

5 See AGRICULTURAL LAND vol 1 (2008) PARA 564.

6 See the Landlord and Tenant Act 1954 s 25(2); and PARA 716 post.

7 Ie whether before or after 29 August 1977.

8 It has been held for the purposes of the Protection from Eviction Act 1977 s 2 (see PARA 653 post) that 'let as a dwelling' means 'let wholly or partly as a dwelling' and so applies to premises which are let for mixed residential and business purposes: see *Pirabakaran v Patel* [2006] EWCA Civ 685, [2006] 23 EG 165 (CS), [2006] All ER (D) 380 (May), distinguishing *National Trust for Places of Historic Interest or Natural Beauty v Knipe* [1997] 4 All ER 627, [1998] 1 WLR 230, CA.

9 For the meaning of 'periodic licence' see *Norris v Checksfield* [1991] 4 All ER 327, [1991] 1 WLR 1241, CA.

10 Ie whether the licence was granted before or after 29 July 1977.

11 For the purposes, 'prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister by statutory instrument; and a statutory instrument made by the Secretary of State containing any such regulations is subject to annulment in pursuance of a resolution of either House of Parliament: Protection from Eviction Act 1977 s 5(2). Regulations so made may make different provision in relation to different descriptions of lettings and different circumstances: s 5(3). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions under the 1977 Act, so far as exercisable in relation to Wales, see PARA 27 note 4 ante.

In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Notices to Quit (Prescribed Information) Regulations 1988, SI 1988/2201, which came into force on 15 January 1989: reg 1. The prescribed information is information (1) that if the tenant or licensee does not leave the dwelling, the landlord or licensor must get an order for possession from the court before the tenant or licensee can lawfully be evicted; the landlord or licensor cannot apply for such an order before the notice to quit or notice to determine has run out; and (2) that a tenant or licensee who does not know if he has any right to remain in possession after a notice to quit or a notice to determine runs out can obtain advice from a solicitor (which may be publicly funded) or information from a Citizens' Advice Bureau, a Housing Aid Centre or a rent officer: see reg 2, Schedule.

12 Protection from Eviction Act 1977 s 5(1), (1A) (respectively amended and added by the Housing Act 1988 s 32(1), (2)). It is not necessary that there should be four clear weeks: *Schnabel v Allard* [1967] 1 QB 627, [1966] 3 All ER 816, CA.

13 Ie an excluded tenancy which is entered into on or after 15 January 1989 unless it is entered into pursuant to a contract made before that date.

14 Protection from Eviction Act 1977 s 5(1B) (added by the Housing Act 1988 s 32(2)). For these purposes, 'excluded tenancy' and 'excluded licence' have the meanings assigned by the Protection from Eviction Act 1977 s 3A (as added and amended) (see PARA 215 post): s 8(4) (added by the Housing Act 1988 s 33(3)).

As to the special provisions which apply in the case of agricultural employees see the Protection from Eviction Act 1977 s 4 (as amended); and PARAS 1194-1195 post.

Where premises are let on a joint tenancy, the protection of s 5(1) (as so amended) cannot be avoided by an agreement made by one of those tenants; one joint tenant is not entitled to deprive the other of that protection: *Hounslow London Borough Council v Pilling* [1994] 1 All ER 432, [1993] 1 WLR 1242, CA, distinguishing *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, [1992] 1 All ER 1, HL.

15 *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA.

16 *Alliance Building Society v Pinwell* [1958] Ch 788, [1958] 2 All ER 408.

17 See *Orman Bros Ltd v Greenbaum* [1955] 1 All ER 610, [1955] 1 WLR 248, CA; explained in *Brown v Jamieson* [1959] 1 QB 338, [1959] 1 All ER 144, CA.

Determination of Tenancy from Year to Year/A. NOTICE TO QUIT/215. Meaning of 'excluded tenancy' and 'excluded licence'.

## 215. Meaning of 'excluded tenancy' and 'excluded licence'.

Any reference<sup>1</sup> to an excluded tenancy or an excluded licence is a reference to a tenancy<sup>2</sup> or licence which is excluded by virtue of any of the following provisions<sup>3</sup>.

A tenancy or licence is excluded:

374 (1) if:

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32. (a) under its terms the occupier<sup>4</sup> shares any accommodation<sup>5</sup> with the landlord or licensor; and

33. (b) immediately before the tenancy or licence was granted and also at the time it comes to an end, the landlord or licensor occupied as his only or principal home premises of which the whole or part of the shared accommodation formed part<sup>6</sup>;

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375 (2) if:

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34. (a) under its terms the occupier shares any accommodation with a member of the family<sup>7</sup> of the landlord or licensor;

35. (b) immediately before the tenancy or licence was granted and also at the time it comes to an end, the member of the family of the landlord or licensor occupied as his only or principal home premises of which the whole or part of the shared accommodation formed part; and

36. (c) immediately before the tenancy or licence was granted and also at the time it comes to an end, the landlord or licensor occupied as his only or principal home premises in the same building as the shared accommodation and that building is not a purpose-built block of flats<sup>8</sup>;

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376 (3) if it was granted as a temporary expedient to a person who entered the premises in question or any other premises as a trespasser, whether or not, before the beginning of that tenancy or licence, another tenancy or licence to occupy the premises or any other premises had been granted to him<sup>9</sup>;

377 (4) if:

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37. (a) it confers on the tenant or licensee the right to occupy the premises for a holiday only; or

38. (b) it is granted otherwise than for money or money's worth<sup>10</sup>;

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378 (5) if it is granted in order to provide accommodation under specified provisions<sup>11</sup> of the Immigration and Asylum Act 1999<sup>12</sup>;

379 (6) if it is granted in order to provide accommodation under the Displaced Persons (Temporary Protection) Regulations 2005<sup>13</sup>.

A licence is excluded if it confers rights of occupation in a hostel<sup>14</sup> which is provided by:

380 (i) the council of a county, county borough<sup>15</sup>, district<sup>16</sup> or London borough<sup>17</sup>, the Common Council of the City of London<sup>18</sup>, the Council of the Isles of Scilly<sup>19</sup>, the London Fire and Emergency Planning Authority<sup>20</sup> or a joint authority<sup>21</sup>;

381 (ii) a development corporation<sup>22</sup>;

382 (iii) the Commission for the New Towns<sup>23</sup>;

- 383 (iv) an urban development corporation<sup>24</sup>;
- 384 (v) a housing action trust<sup>25</sup>;
- 385 (vi) the Housing Corporation<sup>26</sup>;
- 386 (vii) the relevant authority<sup>27</sup> under the specified provision of the Housing Associations Act 1985<sup>28</sup>;
- 387 (viii) a housing trust<sup>29</sup> which is a charity<sup>30</sup> or a registered social landlord<sup>31</sup>; or
- 388 (ix) any other person who is, or who belongs to a class of person which is, specified in an order<sup>32</sup> made by the Secretary of State<sup>33</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>34</sup>.

Any licence which a resident of an accommodation centre for asylum-seekers established under Part 2 of the Nationality, Immigration and Asylum Act 2002<sup>35</sup> has to occupy premises in the centre is also to be an excluded licence for these purposes<sup>36</sup>.

1    In the Protection from Eviction Act 1977: see PARA 214 ante, PARAS 653, 1194-1195 post.

2    For the purposes of *ibid* Pt I (ss 1-4) (as amended): see the text and notes 3-36 *infra*; and PARAS 653, 1194-1195 post), a person who, under the terms of his employment, had exclusive possession of any premises other than as a tenant is deemed to have been a tenant; and the expressions 'let' and 'tenancy' are to be construed accordingly: s 8(2).

3    *Ibid* s 3A(1) (s 3A added by the Housing Act 1988 s 31). If, on or after 15 January 1989, the terms of an excluded tenancy or excluded licence entered into before that date are varied, then (1) if the variation affects the amount of the rent which is payable under the tenancy or licence, the tenancy or licence is treated for the purposes of the Protection from Eviction Act 1977 s 3(2C) (as added) (see PARA 653 post) and s 5(1B) (as added) (see PARA 214 ante) as a new tenancy or licence entered into at the time of the variation; and (2) if the variation does not affect the amount of the rent which is so payable, nothing in the 1977 Act affects the determination of the question whether the variation is such as to give rise to a new tenancy or licence: s 8(5) (s 8(5), (6) added by the Housing Act 1988 s 33(3)). For these purposes, any reference to a variation affecting the amount of the rent which is payable under a tenancy or licence does not include a reference to (a) a reduction or increase effected under the Rent Act 1977 Pt III (ss 44-61) (as amended) (see PARA 891 et seq post) or Pt VI (ss 86-97) (as amended) (see PARA 905 et seq post), s 78 (as amended) (see PARA 991 post) or the Rent (Agriculture) Act 1976 ss 11-14 (as amended) (see PARA 1160 et seq post); or (b) a variation which is made by the parties and has the effect of making the rent expressed to be payable under the tenancy or licence the same as a rent for the dwelling which is entered in the register under the Rent Act 1977 Pt IV (ss 62-75) (as amended) (see PARA 909 et seq post) or s 79 (as amended) (see PARA 996 post): Protection from Eviction Act 1977 s 8(6) (as so added).

4    For the purposes, 'occupier' means, in relation to a tenancy, the tenant and, in relation to a licence, the licensee: *ibid* s 3A(5)(b) (as added: see note 3 *supra*).

5    For these purposes, 'accommodation' includes neither an area used for storage nor a staircase, passage, corridor or other means of access: *ibid* s 3A(5)(a) (as added: see note 3 *supra*). An occupier shares accommodation with another person if he has the use of it in common with that person, whether or not also in common with others, and any reference to shared accommodation is to be construed accordingly; and, if in relation to any tenancy or licence there is at any time more than one person who is the landlord or licensor, any reference to the landlord or licensor is to be construed as a reference to any one of those persons: s 3A(4) (as so added).

6    *Ibid* s 3A(2) (as added: see note 3 *supra*). In determining the place of a person's principal home, the most important factor to consider is where he sleeps: *Sumeghova v McMahon* [2002] EWCA Civ 1581, [2003] HLR 349, [2002] All ER (D) 371 (Oct).

7    For these purposes, the Housing Act 1985 s 113 (as amended) (see PARA 1319 note 5 post) applies to determine whether a person is a member of another's family as it applies for the purposes of Pt IV (ss 79-117) (as amended) (see PARA 1300 et seq post): Protection from Eviction Act 1977 s 3A(5) (as added: see note 3 *supra*).

8    *Ibid* s 3A(3) (as added: see note 3 *supra*). For these purposes, 'purpose-built block of flats' has the same meaning as in the Housing Act 1988 s 1(2)(c), Sch 1 Pt III (paras 17-22) (as amended) (see PARA 1035 note 9 post): Protection from Eviction Act 1977 s 3A(5)(c) (as added: see note 3 *supra*).

9    *Ibid* s 3A(6) (as added: see note 3 *supra*).

10 Ibid s 3A(7) (as added: see note 3 supra). See eg *West Wiltshire District Council v Snelgrove* (1997) 30 HLR 57 (house borrowed from friend, and only food and services paid for; licence not for money or money's worth).

11 Ie under the Immigration and Asylum Act 1999 s 4 (as substituted and amended) or Pt VI (ss 94-127) (as amended). See further BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

12 Protection from Eviction Act 1977 s 3A(7A) (added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 73; amended by the Immigration, Asylum and Nationality Act 2006 s 43(4)(a)).

13 Protection from Eviction Act 1977 s 3A(7C) (added by the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379, Schedule para 1). See further BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

14 For the purposes, 'hostel' means a building in which is provided, for persons generally or for a class or classes of persons (1) residential accommodation otherwise than in separate and self-contained sets of premises; and (2) either board or facilities for the preparation of food adequate to the needs of those persons, or both: Housing Act 1985 s 622 (definition applied by the Protection from Eviction Act 1977 s 3A(8) (as added: see note 3 supra)). See *Brennan v Lambeth London Borough Council* (1998) 30 HLR 481, CA (the fact that a licence contained a condition allowing services to be withdrawn did not mean that the building ceased to be a hostel); *Rogerson v Wigan Metropolitan Borough Council* [2004] EWHC 1677 (QB), [2005] 2 All ER 1000, [2005] HLR 129.

15 As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq.

16 As to districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

17 As to London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30 et seq.

18 As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq.

19 As to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

20 As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

21 Ie within the meaning of the Local Government Act 1985: see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

22 Ie within the meaning of the New Towns Act 1981: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

23 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

24 Ie an urban development corporation established by an order under the Local Government, Planning and Land Act 1980 s 135 (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq.

25 Ie established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

26 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

27 For the meaning of 'the relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 20 note 1.

28 Ie under the Housing Associations Act 1985 s 89 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 40.

29 Ie within the meaning of the Housing Associations Act 1985: see HOUSING vol 22 (2006 Reissue) PARA 12.

30 Ie within the meaning of the Housing Act 1985: see PARA 1300 note 16 post.

31 Ie within the meaning of the Housing Act 1985: see HOUSING vol 22 (2006 Reissue) PARA 67.

32 The power so to make an order is exercisable by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Protection from Eviction Act 1977 s 3A(9) (as added: see note 3 supra). The following orders have been made in the exercise of

the power so conferred: (1) the Protection from Eviction (Excluded Licences) Order 1991, SI 1991/1943, specifying London Hostels Association, Limited (see art 2); (2) the Protection from Eviction (Excluded Licences) (The Shaftesbury Society) Order 1999, SI 1999/1758; (3) the Protection from Eviction (Excluded Licences) (Royal British Legion Industries Ltd) (England) Order 2003, SI 2003/2436.

33 As to the Secretary of State see PARA 27 note 3 ante.

34 Protection from Eviction Act 1977 s 3A(8) (as added (see note 3 supra); amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 4(1); the Government of Wales Act 1998 ss 140, 152, Sch 16 para 2, Sch 18 Pts IV, VI; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 27; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5(1), Sch 2, PARA 7). As to the transfer of functions, so far as exercisable in relation to Wales, see PARA 27 note 4 ante.

The Protection from Eviction Act 1977 s 3A(8) (as so added and amended) is expressed also to apply to a hostel provided by the former Inner London Education Authority or by a former residuary body within the meaning of the Local Government Act 1985.

35 Ie under the Nationality, Immigration and Asylum Act 2002 Pt 2 (ss 16-42): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

36 See *ibid* s 32(4); and the Protection from Eviction Act 1977 s 3A(7B) (prospectively added by the Nationality, Immigration and Asylum Act 2002 s 32(5), as from a day to be appointed under s 162(1)). At the date at which this title states the law, s 32 was not in force.

## UPDATE

### 215 Meaning of 'excluded tenancy' and 'excluded licence'

NOTE 10--See also *Polar Park Enterprises Inc v Allason* [2007] EWHC 1088 (Ch), [2008] 1 P & CR 64 (licence not excluded; money or money's worth provided by obligation to repair and insure).

TEXT AND NOTE 34--Protection from Eviction Act 1977 s 3A(8) further amended: Housing and Regeneration Act 2008 Sch 8 para 24; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 47. Protection from Eviction Act 1977 s 3A(8A) added: Housing and Regeneration Act 2008 Sch 8 para 24. See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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## **B. PERIOD OF NOTICE TO DETERMINE A TENANCY FROM YEAR TO YEAR**

### **216. Tenancy commencing on quarter day.**

The reckoning of the period of half a year<sup>1</sup> varies according as to whether the tenancy commences on one of the usual quarter days, or on some intermediate day. Where the tenancy commences on a quarter day, the period of the notice is a customary half-year, that is to say, the interval between one quarter day and the next quarter day but one. Such a notice is sufficient even if in point of length it falls short of the actual period of half a year, namely 182 days<sup>2</sup>; and it is necessary even though it may exceed that period. Thus, notice may be given on 29 September to quit on 25 March, although the interval is only 177 days<sup>3</sup>; and notice to quit on 29 September must be given not later than 25 March, although the interval is 187 days<sup>4</sup>.

1 See PARA 213 ante.

2 Co Litt 135b.

3 *Roe d Durrant v Doe* (1830) 6 Bing 574; and see *Doe d Harrop v Green* (1802) 4 Esp 198; *Howard v Wemsley* (1806) 6 Esp 53.

4 *Right d Flower v Darby and Bristow* (1786) 1 Term Rep 159; *Morgan v Davies* (1878) 3 CPD 260; and see *Papillon v Brunton* (1860) 5 H & N 518.

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## 217. Tenancy commencing on intermediate day.

Where the tenancy commences on an intermediate day, the length of the notice must be 182 days at least, the days being reckoned by including the one extreme and excluding the other<sup>1</sup>. If, however, there is an express stipulation for determination on six months' notice, this will be construed literally whether the tenancy commences on a quarter day or between two quarter days; and, unless the context otherwise requires, a notice of six calendar months is sufficient<sup>2</sup>.

1 *Wms Saund* (1871 Edn) 385, 386n; *Sidebotham v Holland* [1895] 1 QB 378 at 384, CA (notice given on 17 November to quit on 19 May, the anniversary of the commencement of the tenancy, thus allowing the sufficient interval of 183 days).

2 See the Law of Property Act 1925 s 61(a) ('month', in all deeds, contracts, and other instruments made or coming into operation after 31 December 1925, unless the context otherwise requires, means a calendar month). Before that Act, if 'calendar month' was not used (*Travers v Mason* (1896) 45 WR 77; and see *Quartermaine v Selby* (1889) 5 TLR 223, CA), notice of six lunar months was sufficient: *Rogers v Kingston-upon-Hull Dock Co* (1864) 12 WR 1101 (affd 13 WR 217); *Johnstone v Hudlestone* (1825) 4 B & C 922 at 932; *Wilkins v M'Ginity* [1907] 2 IR 660, Ir CA. See also TIME vol 97 (2010) PARA 310.

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## 218. Date of expiration of notice.

In the absence of any specific agreement to the contrary, the notice must be given so as to expire at the end of the year or other period of the tenancy<sup>1</sup>; and, if it expires at a later date, it is bad<sup>2</sup>. Strictly the notice should be given so as to expire on the last day of the current year or period, although, as the tenant has the whole of that day in which to leave, it must not be given for any particular hour of the day<sup>3</sup>. The exact ascertainment of the last day of the year depends upon whether the tenancy began 'on' or 'from' the day named for commencement; and to avoid the inconvenience arising from this distinction it has been settled that the notice may in

all cases be given for the anniversary of the commencement of the tenancy without considering whether the word 'on' or 'from' or any similar expression was used<sup>4</sup>.

1 See PARAS 208, 213 ante. As to expressing the notice in an alternative form see PARA 221 post. Where an agreement not made by deed specifies Lady Day or Michaelmas as the commencement of the tenancy, evidence may be given that Old Lady Day and Old Michaelmas Day were intended (*Doe d Hall v Benson* (1821) 4 B & Ald 588; *Den d Peters v Hopkinson* (1823) 3 Dow & Ry KB 507; cf *Hogg v Norris and Berrington* (1860) 2 F & F 246; *Rogers v Kingston-upon-Hull Dock Co* (1864) 13 WR 217 at 218); but not where the agreement is by deed (*Doe d Spicer v Lea* (1809) 11 East 312; cf *Smith v Walton* (1832) 8 Bing 235). Where the commencement of the tenancy is on one of the feast-days, Old Style, a notice to quit at the corresponding feast-day will be construed to mean Old Style: *Denn d Willan v Walker* (1800) Peake Add Cas 194; *Doe d Hinde v Vince* (1809) 2 Camp 256; *Doe d Willis v Perrin* (1840) 9 C & P 467; and see *Furley d Canterbury Corp'n v Wood* (1794) 1 Esp 198.

2 *Doe d Spicer v Lea* (1809) 11 East 312; *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117. The notice may be given on Sunday: *Sangster v Noy* (1867) 16 LT 157; and see TIME vol 97 (2010) PARA 327.

3 *Page v More* (1850) 15 QB 684; *Bathavon RDC v Carlile* [1958] 1 QB 461, [1958] 1 All ER 801, CA (notice to quit by noon of the anniversary of the commencement date of a weekly tenancy held to be invalid). As to notices to quit expiring on the anniversary of the commencement date see the text and note 4 infra.

4 *Sidebotham v Holland* [1895] 1 QB 378, CA; *Schnabel v Allard* [1967] 1 QB 627, [1966] 3 All ER 816, CA; *Ladyman v Wirral Estates Ltd* [1968] 2 All ER 197; and see *Wilkins v M'Ginity* [1907] 2 IR 660, Ir CA. According to strict reckoning the whole of the first day must be included in the tenancy (*Clayton's Case* (1585) 5 Co Rep 1a), so that in a tenancy commencing on 19 May, 18 May is the last day. If, however, the tenancy commences from 19 May, that day would be excluded, and 19 May would be the last day: see eg *Savory v Bayley* (1922) 38 TLR 619 per Bailhache J (where a tenancy from 8 March was held to commence on 9 March); *Dempsey v Tracy* [1924] 2 IR 171, CA (where a tenancy from 1 September was held to commence on 2 September, thereby making a notice to quit on a subsequent 1 September valid). In practice the notice is usually given for the anniversary of the day of commencement: see *Roe d Durant v Doe* (1830) 6 Bing 574; *Doe d Cornwall v Matthews* (1851) 11 CB 675; *Papillon v Brunton* (1860) 5 H & N 518; *Herron v Martin* (1911) 27 TLR 431. Cf *Crate v Miller* [1947] KB 946, [1947] 2 All ER 45, CA (weekly tenancy beginning on Saturday may be determined by notice to quit on Friday or on Saturday); and see PARA 234 post.

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## 219. Necessity for ascertaining date of commencement of tenancy.

In order to ascertain the effect of a notice to quit, it is necessary to know the day of the commencement of the tenancy. Where the agreement expressly specifies that day, the words of the agreement prevail over any contrary indication afforded by the dates for payment of rent<sup>1</sup>. Where no day is expressly specified, and the tenant enters as yearly tenant in the middle of a quarter, the commencement of the year depends on the manner in which rent is paid or agreed to be paid. If the tenant pays rent up to the next quarter day, and then pays quarterly<sup>2</sup>, or if the agreement specifies a quarter day as the day for first payment<sup>3</sup>, the broken part of the quarter is neglected, and the year is taken to begin from the first quarter day; but otherwise the year runs from the date of the agreement<sup>4</sup>. Where the tenant enters upon different parts of the premises at different times, it must be ascertained which is the principal part of the premises in value and importance, and which is accessory<sup>5</sup>; and it is sufficient if the notice is given with reference to the entry on the principal part<sup>6</sup>. The effect of giving and accepting a notice before a tenancy begins may be to create a new tenancy<sup>7</sup>.

1 *Sidebotham v Holland* [1895] 1 QB 378 at 382, CA.

2 *Doe d Holcomb v Johnson* (1806) 6 Esp 10; *Doe d Savage v Stapleton* (1828) 3 C & P 275; *Simmons v Underwood* (1897) 76 LT 777.

3 *Sandill v Franklin* (1875) LR 10 CP 377.

4 *Doe d Cornwall v Matthews* (1851) 11 CB 675 at 676; *Bishop v Wraith* (1853) 2 CLR 287; *Sandill v Franklin* [1875] LR 10 CP 377. If the agreement is oral or undated, the tenancy apparently commences from actual entry: see *Doe d Cornwall v Matthews* supra.

5 *Doe d Heapy v Howard* (1809) 11 East 498 at 501.

6 *Doe d Dagget v Snowdon* (1779) 2 Wm Bl 1224; *Doe d Strickland v Spence* (1805) 6 East 120 at 123; *Doe d Lord Bradford v Watkins* (1806) 7 East 551 at 555; *Doe d Kindersley v Hughes* (1840) 7 M & W 139; and see *Doe d Davenport v Rhodes* (1843) 11 M & W 600.

7 See *Lower v Sorrell* [1963] 1 QB 959, [1962] 3 All ER 1074, CA.

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## 220. Proof of date of commencement.

If there is any doubt as to the day of the commencement of the tenancy, this is a matter of fact to be proved by evidence<sup>1</sup>. The mere specifying of a particular date for quitting in a notice given by the landlord is not evidence that such was the date of commencement, nor does it throw upon the tenant the onus of proving that the tenancy commenced on a different date<sup>2</sup>. If, however, the date is a day on which rent has been paid, and the contents of the notice are brought to the tenant's attention when he is served with it and he makes no objection to the date, this is prima facie evidence that the specified date is correct<sup>3</sup>, although the tenant is not precluded from afterwards disproving it<sup>4</sup>. If the tenant is asked as to the commencement of the tenancy and specifies a particular day, and notice to quit on that day is given accordingly, he may not afterwards allege that the tenancy began on a different day; and the result is the same whether he gave erroneous information by mistake or by design<sup>5</sup>. If, however, in giving notice to quit, a tenant gives it for a day previous to the end of the year, this does not bind him, notwithstanding that it is accepted by the landlord<sup>6</sup>.

Where a lease is for a certain number of years and a part of another year, and the tenant holds over and becomes a yearly tenant by payment of rent, notice must be given for the anniversary of the commencement of the yearly tenancy, that is to say, the date when the term certain expired<sup>7</sup>.

Where a tenant enters under a void lease, or under an agreement for lease, and becomes a yearly tenant, he holds on the terms of the lease as to quitting. His holding determines without notice to quit at the end of the specified term and, if there is any further provision as to the date of quitting, it applies to the yearly tenancy<sup>8</sup>; but, subject thereto, the current year dates from the time of entry and notice to determine it must be given accordingly<sup>9</sup>.

1 *Walker v Gode* (1861) 6 H & N 594.

2 *Lemon v Lardeur* [1946] KB 613, [1946] 2 All ER 329, CA; *Doe d Ash v Calvert* (1810) 2 Camp 387 at 388; *Doe d Clarges v Forster* (1811) 13 East 405. At one time the onus of disproving the date mentioned in the notice was held to be on the tenant: *Doe d Puddicombe v Harris* (1784) cited in 1 Term Rep 161; and see *Doe d Matthewson v Wrightman* (1801) 4 Esp 5.



3 *Doe d Leicester v Biggs* (1809) 2 Taunt 109; *Doe d Clarges v Forster* (1811) 13 East 405; *Doe d Baker v Woombwell* (1811) 2 Camp 559; *Thomas d Jones v Thomas* (1811) 2 Camp 647.

4 *Oakapple d Green v Copous* (1791) 4 Term Rep 361.

5 *Doe d Eyre v Lambly* (1798) 2 Esp 635.

6 *Doe d Murrell v Milward* (1838) 3 M & W 328.

7 *Doe d Buddle v Lines* (1848) 11 QB 402; *Croft v William F Blay Ltd* [1919] 2 Ch 343, CA; *Addis v Burrows* [1948] 1 KB 444, [1948] 1 All ER 177, CA, distinguishing *Doe d Robinson v Dobell* (1841) 1 QB 806; cf *Kelly v Patterson* (1874) LR 9 CP 681 (terms such as to imply an agreement that the yearly tenancy dated from the anniversary of the commencement of the fixed term).

8 *Doe d Rigge v Bell* (1793) 5 Term Rep 471; and see PARA 210 the text and note 2 ante.

9 *Berrey v Lindley* (1841) 3 Man & G 498 at 513, discussed in *Croft v William F Blay Ltd* [1919] 2 Ch 343, CA.

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### **C. FORM AND CONSTRUCTION OF NOTICE TO QUIT**

#### **221. Form of notice.**

Subject to any term of the tenancy, and to any statutory requirements<sup>1</sup>, a notice to quit need not be in any particular form<sup>2</sup>, nor need it be addressed to the tenant by name, provided it is properly served on him<sup>3</sup>. A notice to quit addressed to the directors of a company may be a good notice to the company<sup>4</sup>. If the tenancy was created orally, the notice may be given orally<sup>5</sup>. Errors in the description of the premises<sup>6</sup>, or as to the tenant's first name<sup>7</sup>, do not invalidate the notice if the tenant is not misled by them<sup>8</sup>. In the absence of an express or statutory<sup>9</sup> power to resume possession of part of the premises it must be a notice to quit the whole; and a notice to quit a part only is void<sup>10</sup>. The notice need not state to whom the premises are to be given up<sup>11</sup>, although, if this is stated, it should be stated with certainty<sup>12</sup>; but the notice must indicate when the premises are to be given up, and it must be expressed unequivocally<sup>13</sup>.

A notice to quit 'on or before' a fixed date<sup>14</sup> or even 'by' a fixed date<sup>15</sup> may be valid, as may a notice to quit 'within' a specified period<sup>16</sup>. Where the landlord gave 'three months' notice to terminate the lease' without specifying the date on which possession was to be given, the notice was valid and the period of three months ran from the date of receipt of the notice by the tenant<sup>17</sup>. If the lease and the notice to quit involve so many difficult questions of construction that there is a failure on the landlord's part to give a certain date or to supply the tenant with a formula from which certainty could be ascertained, the notice is bad; but the fact that the notice, instead of specifying a date of determination, identifies that date by reference to terms of the lease which are themselves ambiguous does not necessarily render the notice bad<sup>18</sup>. Each case depends upon its own facts and circumstances. Where a tenant under a tenancy beginning on 1 January was on 30 June 1939 given 'formal notice of determination at the end of the last quarter of this year', the notice was effective to determine the tenancy on 1 January 1940<sup>19</sup>.

The notice may state the exact day on which the premises are to be given up<sup>20</sup>; or it may be expressed generally by such words as 'at the expiration of the present year's tenancy'<sup>21</sup>. A notice in the latter form is not void, because it does not purport to be served half a year before

the end of the current year; and the onus of proving that it was not in fact served in due time is on the party who disputes its sufficiency<sup>22</sup>. The appropriate general words are, however, 'at the end of the year of the tenancy which will expire next after the end of one half-year from the date of the service of this notice'<sup>23</sup>; and it is usual, after first mentioning the day which is believed to be the anniversary of the commencement of the tenancy, to add these general words in the alternative, so that an error as to the specific day may not invalidate the notice<sup>24</sup>.

1 See eg the Protection from Eviction Act 1977 s 5 (as amended); and PARA 214 ante. As to the prescribed forms of notice relating to tenancies to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies see PARA 702 post; and as to notices in respect of agricultural tenancies see the Agricultural Holdings Act 1986 ss 25-33; the Agricultural Tenancies Act 1995 s 6 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARAS 304, 373 et seq.

2 *Easton v Penny* (1892) 67 LT 290; *Gardner v Ingram* (1889) 61 LT 729 at 730, DC, per Lord Coleridge CJ. If the notice is in writing, signature is apparently not essential: *Carleton v Herbert* (1866) 14 WR 772.

3 *Doe d Matthewson v Wrightman* (1801) 4 Esp 5.

4 *Hawtrey v Beaufront Ltd* [1946] KB 280, [1946] 1 All ER 296.

5 *Doe d Lord Macartney v Crick* (1805) 5 Esp 196; *Roe d Dean and Chapter of Rochester v Pierce* (1809) 2 Camp 96; *Bird v Defonvielle* (1846) 2 Car & Kir 415 at 420. A notice to quit premises let as a dwelling must, however, be in writing: see PARA 214 ante.

6 *Doe d Cox v Roe* (1802) 4 Esp 185 (notice specified 'The Waterman's Arms' instead of 'The Bricklayer's Arms'; only one house held by the tenant under the landlord); *Doe d Armstrong v Wilkinson* (1840) 12 Ad & El 743.

7 *Doe v Spiller* (1806) 6 Esp 70 (no other tenant of the landlord with the same surname); and see *Frankland v Capstick* [1959] 1 All ER 209, [1959] 1 WLR 205, CA (notice under the Agricultural Holdings Act 1948 s 70 (repealed) held valid notwithstanding an error as to the landlord's name).

8 The test to be applied is whether the notice is clear to the person reading it so that the recipient cannot be misled: *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573, [1976] 1 WLR 442, approved and applied in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL, where it was said (at 370-371 and at 768 per Lord Steyn) that notices containing errors may be valid if they are sufficiently clear and unambiguous to leave the reasonable recipient in no reasonable doubt as to how and why they are intended to operate, and it was also made clear that this principle applies generally to unilateral notices served under contractual rights reserved in a lease, including notices to quit.

9 Eg under the Agricultural Holdings Act 1986 s 31: see AGRICULTURAL LAND vol 1 (2008) PARAS 395-399.

10 *Doe d Morgan v Church* (1811) 3 Camp 71; *Doe d Rodd v Archer* (1811) 14 East 245; *Prince v Evans* (1874) 29 LT 835; *Woodward v Earl of Dudley* [1954] Ch 283, [1954] 1 All ER 559; *Dodson Bull Carpet Co Ltd v City of London Corp* [1975] 2 All ER 497, [1975] 1 WLR 781. Under the Law of Property Act 1925 s 140 (as amended) (see PARA 555 post), where the reversion is severed, a person entitled to a severed part of the reversion may give notice to quit that part; and, on receipt of that notice, the tenant may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate a counter-notice expiring at the same time as the original notice: see *Persey v Bazley* (1983) 47 P & CR 37, CA; *Jelley v Buckman* [1974] QB 488, [1973] 3 All ER 853, CA. The Law of Property Act 1925 s 140 (as amended) does not, however, apply to the right to give a notice under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 post): *Dodson Bull Carpet Co Ltd v City of London Corp* supra; *Nevill Long & Co (Boards) Ltd v Firmenich & Co* (1983) 47 P & CR 59, CA. Formerly, the purchaser of the reversion of part of an estate had no power to give a tenant of the whole property notice to quit that part of which he held the reversion: see *Prince v Evans* supra.

11 *Doe d Bailey v Foster* (1846) 3 CB 215 at 225.

12 *Doe d Brooks v Fairclough* (1817) 6 M & S 40 (notice to give up possession to 'the rector and churchwardens for the time being' insufficient, those persons not being a corporation).

13 *Goode v Howells* (1838) 4 M & W 198 at 201 per Parke B ('such a notice can only be good if, on a reasonable construction of it, it denotes an intention to give up the premises at the lawful time'); *Gardner v Ingram* (1889) 61 LT 729 at 730 per Lord Coleridge CJ ('there must be plain, unambiguous words claiming to determine the existing tenancy at a certain time'), cited with approval in *P Phipps & Co (Northampton and Towcester Breweries) Ltd v Rogers* [1925] 1 KB 14 at 27, CA, per Atkin LJ.

14 *Dagger v Shepherd* [1946] KB 215, [1946] 1 All ER 133, CA, overruling on this point *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117.

15 *Eastaugh v Macpherson* [1954] 3 All ER 214, [1954] 1 WLR 1307, CA ('by the date' held to mean, in its context, 'on or before the date'; notice need only be unambiguous after it has been properly construed); and see *Joseph v Joseph* [1967] Ch 78, [1966] 3 All ER 486, CA. In *May v Borup* [1915] 1 KB 830, it was held that a notice to quit 'at the earliest possible moment' was good; but this decision was disapproved in *P Phipps & Co (Northampton and Towcester Breweries) Ltd v Rogers* [1925] 1 KB 14 at 28-29, CA, per Atkin LJ. In *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638 it was held that a notice was valid to determine numerous licences to erect advertisements where the words were 'to cease occupation of the sites referred to at the earliest date after the service of this notice that such agreement ... can lawfully be terminated'.

16 *Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd* [1986] 1 All ER 573, [1986] 1 EGLR 79, CA (landlord entitled under the terms of the lease to terminate the lease at any time during the term by giving to the tenant 'not less than three months' previous notice in writing'; landlord served notice on tenant requiring tenant to vacate the premises 'within' three months; notice held to be valid and 'within' in the context of time was held capable of meaning 'during' or 'before the expiry of' that period and a requirement that something be done within a specified period meant that the full amount of that period was available to complete the task).

17 *W Davis (Spitalfields) Ltd v Huntley* [1947] 1 All ER 246; affd [1947] 2 All ER 371n, CA.

18 *Addis v Burrows* [1948] 1 KB 444, [1948] 1 All ER 177, CA; cf *P Phipps & Co (Northampton and Towcester Breweries) Ltd v Rogers* [1925] 1 KB 14, CA. See also *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826 at 839, [1968] 1 WLR 638 at 652 per Buckley J (the distinction is between cases where the validity of the notice depends upon complex or difficult question of law, in which case the notice will be invalid, and cases where the question of law is simple, in which case the notice will be valid; the question is thus one of degree).

19 *Winchester Court Ltd v Holmes* [1941] 2 All ER 542. See also *Peel Developments (South) Ltd v Siemens plc* [1992] 2 EGLR 85 (clause in lease provided that 'if the lessee shall be desirous of determining this present lease at the end of the fifth year of the term [24 June 1991] and of such its desire shall deliver to the lessor not less than nine months' prior notice in writing to expire on 28 September 1991 ...'; notice served by lessee expressing its 'desire and intention to determine the lease at the end of the fifth year of the term' effective to determine lease from 28 September 1991; it was not necessary to specify 28 September 1991 in the notice).

20 Where, however, the tenant simply gave notice of his desire to quit and asked the landlord as to the time of quitting, and the landlord by his reply fixed the time, this cured any insufficiency in the notice: *General Assurance Co v Worsley* (1895) 72 LT 358, DC.

21 See eg *Winchester Court Ltd v Holmes* [1941] 2 All ER 542.

22 *Doe d Gorst v Timothy* (1847) 2 Car & Kir 351.

23 *Doe d Phillips v Butler* (1797) 2 Esp 589.

24 *Doe d Digby v Steel* (1811) 3 Camp 115 at 117; *Mills v Goff* (1845) 14 M & W 72 at 75; *Sidebotham v Holland* [1895] 1 QB 378 at 389, CA; and see *Lord Ashtown v Larke* (1872) IR 6 CL 270; cf *Ferguson v Daly* (1873) IR 8 CL 216 (both decided under the Landlord and Tenant (Ireland) Act 1870 s 58 (repealed)). Similarly, the notice may state two specific days in the alternative, provided that it is in fact served half a year before the anniversary of the commencement of the tenancy: *Doe d Matthewson v Wrightman* (1801) 4 Esp 5.

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## 222. Construction of incorrect notice.

If possible, a notice to quit will be construed so as to make it effectual, and inaccuracies obviously opposed to the intention of the party giving it will not invalidate it<sup>1</sup>. The test generally

applicable is whether the notice is quite clear to a reasonable tenant reading it and whether it is plain that he cannot be misled by it<sup>2</sup>. The reasonable tenant reading the notice is to be taken to have the knowledge of the surrounding facts and circumstances which the actual landlord and tenant enjoyed<sup>3</sup>. Thus a notice to quit a 291 acre farm was valid notwithstanding that it purported to include a small strip of land which, to the knowledge of the tenant, the landlord no longer owned<sup>4</sup>.

A notice which is expressed to be for the end of the 'present' or 'current' year is effectual for the following year if this is clearly the intention<sup>5</sup>, as, for example, where the current year ends only two days after the service of the notice<sup>6</sup>. A notice which is not long enough to determine the tenancy at the end of the current year is not, however, merely on that ground treated as a notice for the end of the following year<sup>7</sup>. This will be done only if necessary to effectuate the obvious intention<sup>8</sup>. A notice to quit given after the determination of a term of years is not necessarily a recognition of an existing tenancy<sup>9</sup>.

1 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL (minor misdescription did not invalidate tenant's notice to quit); applied in *Havant International Holdings Ltd v Lionsgate (H) Investment Ltd* [1999] 47 LS Gaz R 34, [1999] All ER (D) 1344 and *Peer Freeholds Ltd v Clean Wash International Ltd* [2005] EWHC 179 (Ch), [2005] 17 EG 124, [2005] All ER (D) 280 (Feb). Cf *Proctor & Gamble Technical Centres Ltd v Brixton Estates plc* [2002] EWHC 2835 (Ch), [2003] 2 EGLR 24, [2002] All ER (D) 305 (Dec) (notice purportedly served under break clause wrongly identified tenant; held that the notice was ineffective to determine the lease). See also *Germax Securities Ltd v Spiegel* (1978) 37 P & CR 204, CA (wrong date put on tenant's copy of notice to quit; notice sent with covering letter which referred to correct date; the correct test was held to be whether the notice would be clear to a reasonable tenant reading it; covering letter ensured that no reasonable tenant would be misled and, therefore, the notice was valid); applying *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573, [1976] 1 WLR 442 (notice to operate a break clause in a lease dated 6 September 1974 referred to 27 September 1973 as the day on which the lease was to end, this being an obvious error for 27 September 1975; held to be valid notice). See also *Doe d Duke of Bedford v Kightley* (1796) 7 Term Rep 63 (notice given at Michaelmas 1795, to quit at Lady Day 1795, held good for Lady Day 1796). Where notice to quit was given for a specified day 'or at the expiration of the current period of your tenancy which shall expire next after the service upon you of this notice' and it was plain that the landlord regarded the 'current period' as weekly, however, the notice was ineffective to determine the tenancy which proved to be a yearly tenancy: *Chez Auguste Ltd v Cottat* [1951] 1 KB 292.

2 *Carradine Properties Ltd v Aslam* [1976] 1 All ER 573 at 576, [1976] 1 WLR 442 at 444; approved in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL, and in *Land v Sykes* [1992] 1 EGLR 1 at 3-4, CA, per Scott LJ (if a notice to quit in fact communicates the correct information to the recipient tenant, the notice is valid albeit, if construed objectively, the notice would be deprived of validity).

3 *Land v Sykes* [1992] 1 EGLR 1 at 4, CA; and see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL.

4 *Land v Sykes* [1992] 1 EGLR 1, CA.

5 *Doe d Williams v Smith* (1836) 5 Ad & El 350.

6 *Doe d Lord Huntingtower v Culliford* (1824) 4 Dow & Ry KB 248 at 249 per Bayley J (it is quite sufficient if the tenant understands what is meant).

7 *Doe d Richmond Corpn v Morphet* (1845) 7 QB 577; *Mills v Goff* (1845) 14 M & W 72.

8 *Wride v Dyer* [1900] 1 QB 23, disapproving of the adverse criticism of *Doe d Lord Huntingtower v Culliford* (1824) 4 Dow & Ry KB 248 in *Doe d Richmond Corpn v Morphet* (1845) 7 QB 577. Such problems may be avoided in practice by adding an 'omnibus' or 'umbrella' clause to the notice to the effect that the notice determines the tenancy on the specified date 'or at the end of the next complete period of your tenancy' or equivalent wording.

9 *Doe d Godsell v Inglis* (1810) 3 Taunt 54; *Doe d Wilcockson v Lynch* (1771) 2 Chit 683.

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### **223. Notice to quit on a contingency.**

A notice to quit must be clear and certain in its terms<sup>1</sup>. It is bad if it is expressed so as to take effect on a contingency, such as a notice to quit given by the landlord if a breach of covenant is committed<sup>2</sup>, or a notice by the tenant to take effect when he can get another situation<sup>3</sup>. If, however, a definite notice to quit is given, it is not invalidated by the addition of words requiring, in a notice by the landlord, an increase<sup>4</sup> or, in a notice by the tenant, a diminution, of rent, if the tenant stays on<sup>5</sup>. A notice so expressed operates as a notice to quit, with an offer to grant or to take a new tenancy as the case may be<sup>6</sup>. Similarly, a notice to quit containing a statement that the person giving it hopes that in certain circumstances the notice will be cancelled<sup>7</sup>, and a notice to quit accompanied by a letter stating that it is intended to terminate the tenancy unless the landlords see sufficient reason in the meantime to change their opinion<sup>8</sup>, have been held to be valid notices, because, by the addition of those statements, no rights are reserved to the persons giving them and they are not conditional.

1 *Ahearn v Bellman, Sedgwick v Ahearn* (1879) 4 Ex D 201 at 205, CA; *Gardner v Ingram* (1889) 61 LT 729; and see PARA 221 note 13 ante.

2 *Muskett v Hill* (1839) 5 Bing NC 694 at 711. In *Hall v Flanagan* (1877) IR 11 CL 470 a notice to quit served during the pendency of an action for possession for non-payment of rent was held to be conditional and, therefore, bad; but this decision is now unlikely to be followed.

3 *Farrance v Elkington* (1811) 2 Camp 591. Where the tenant gave notice that he would surrender his tenancy and not that he would quit, it was held that the notice was invalid as a notice to quit, as he could surrender only by agreement (*Gardner v Ingram* (1889) 61 LT 729), but it is doubtful whether this case would now be followed where it is obvious that the tenant intended to give notice to quit.

4 *Ahearn v Bellman, Sedgwick v Ahearn* (1879) 4 Ex D 201 at 205, CA. Notice to quit stating that in default the landlord will require payment of double value is good: *Doe d Matthews v Jackson* (1779) 1 Doug KB 175; *Doe d Lyster v Goldwin* (1841) 2 QB 143 at 144.

5 *Bury v Thompson* [1895] 1 QB 696, CA.

6 *Ahearn v Bellman, Sedgwick v Ahearn* (1879) 4 Ex D 201, CA. If the tenant stays on, he must pay the altered rent: *Roberts v Hayward* (1828) 3 C & P 432.

7 *May v Borup* [1915] 1 KB 830.

8 *Norfolk County Council v Child* [1918] 2 KB 805, CA.

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### **D. PERSONS TO GIVE AND RECEIVE NOTICE TO QUIT**

#### **224. Who may give or receive notice.**

A notice to quit may be given by either the landlord or the tenant<sup>1</sup>. For these purposes, the landlord is the person in whom the legal reversion is vested, or the person whom the tenant is bound to recognise as his landlord by estoppel<sup>2</sup>. A valid notice to quit may not be given before the commencement of the tenancy as there is then no existing landlord and no existing tenant<sup>3</sup>. The notice, once given, enures for the benefit of the successors in title of the landlord or tenant giving it<sup>4</sup>. Similarly, the notice must be given to the tenant or the reversioner. Where the tenant has died intestate, or leaving a will which does not appoint executors, then, before letters of administration are taken out, notice to quit may be served on the Public Trustee<sup>5</sup>. A notice may not be given by a landlord to a subtenant of part of the premises so as to determine the subtenancy, even though the intermediate tenant has given up possession of the remainder of the premises<sup>6</sup>; but, where no subletting has taken place, a person who succeeds the tenant in the occupation of the premises is presumed to be his assign, and notice may be given to him<sup>7</sup>.

1 Any provision which purports wholly to deprive the landlord or the tenant of the right to serve a notice to quit is void: see PARA 213 ante.

2 *Doe d Green v Baker* (1818) 8 Taunt 241; and see *Burton v Dickenson* (1867) 17 LT 264; and PARA 4 ante. A beneficiary (*Stait v Fenner* [1912] 2 Ch 504) or a purchaser before completion (*Thompson v McCullough* [1947] KB 447, [1947] 1 All ER 265, CA; *Graham v M'Ilwaine* [1918] 2 IR 353) cannot, unless he is acting for the persons having the legal estate (*Re Knight and Hubbard's Underlease, Hubbard v Highton* [1923] 1 Ch 130), give a valid notice to quit. A purchaser may, however, after completion, be estopped by his conduct from alleging the invalidity of the notice: *Farrow v Orttewell* [1933] Ch 480, CA. When the landlord has granted a lease for a term by deed to a third person, he ceases to be entitled to the reversion on the yearly tenancy, and may not give a notice to quit to the yearly tenant: *Wordsley Brewery Co v Halford* (1903) 90 LT 89. Where the tenancy was in existence at the time of a mortgage, it was formerly necessary that the notice should be given by the mortgagee (see *Miles v Murphy* (1871) IR 5 CL 382) unless the mortgagor had been constituted his agent to give the notice (*Stacpoole v Parkinson* (1874) IR 8 CL 561); but the mortgagor, while in possession, may now perhaps give the notice by virtue of the Law of Property Act 1925 s 98. As to a mortgagor's rights while in possession see MORTGAGE vol 77 (2010) PARAS 341-344.

3 *Lower v Sorrell* [1963] 1 QB 959, [1962] 3 All ER 1074, CA.

4 *Doe d Earl Egremont v Forwood* (1842) 3 QB 627.

5 See *Smith v Mather* [1948] 2 KB 212, [1948] 1 All ER 704, CA; *Fred Long & Son Ltd v Burgess* [1950] 1 KB 115, [1949] 2 All ER 484, CA; *Egerton v Rutter* [1951] 1 KB 472; and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34. Service of a notice to quit on persons in occupation of the premises and purporting to be tenants is good, if no personal representative has been constituted before the expiry of the notice (*Rees d Mears v Perrot* (1830) 4 C & P 230; *Sweeny v Sweeny* (1876) IR 10 CL 375; *Egerton v Rutter* supra), or if one or more of those persons obtain a grant of administration while the notice is still operative (*Earl of Harrowby v Snelson* [1951] 1 All ER 140). See also *Wirral Borough Council v Smith* (1982) 43 P & CR 312, 4 HLR 81, CA (local authority landlord failed to obtain possession because it had not served an appropriate notice to quit after the death of the tenant who died intestate). As to service on the tenant see PARA 228 post.

6 *Pleasant (Lessee of Hayton) v Benson* (1811) 14 East 234.

7 *Doe d Morris v Williams* (1826) 6 B & C 41; cf *Rees d Mears v Perrot* (1830) 4 C & P 230; *Sweeny v Sweeny* (1876) IR 10 CL 375; *Egerton v Rutter* [1951] 1 KB 472; *Earl of Harrowby v Snelson* [1951] 1 All ER 140.

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## 225. Notice given by or to agent.

A notice to quit may be given by the agent of either party, provided that he is duly authorised for that purpose at the time of giving it. If he is not so authorised, a subsequent ratification of the notice after the time for giving it has passed does not make it effectual<sup>1</sup>, as the notice must be one which is, in fact, binding on the landlord when it is served<sup>2</sup>. Moreover, the tenant must have reason to believe that it is so binding, so that he may safely act on it<sup>3</sup>. If it is given by an agent having only a special authority, the notice must be given in the principal's name or expressly on his behalf<sup>4</sup>; but this is not necessary if the agent has been held out as having a general authority<sup>5</sup>. Where a notice has to be given in the principal's name or expressly on the principal's behalf, it is sufficient if the agent identifies the principal in a manner which truly amounts to an identification even if the principal is not actually named<sup>6</sup>. An agent who is entrusted with the management of an estate, and who has authority to let and to receive rents, has a general authority in respect of the tenancies, and may give<sup>7</sup> or receive<sup>8</sup> notice to quit.

Notice may be validly given by being served on the tenant's agent<sup>9</sup> or on the landlord's agent<sup>10</sup>. Where both parties stand by and allow others to deal on their behalf with the tenancy, as, for example, by sending out demands for rent and accepting payment of rent, a general agency may be created in these other persons so as to give them authority to send and receive a notice determining the tenancy<sup>11</sup>.

1 *Doe d Mann v Walters* (1830) 10 B & C 626; *Doe d Lyster v Goldwin* (1841) 2 QB 143; and see AGENCY vol 1 (2008) PARA 63. A notice given by an agent's agent is not effectual without the principal's recognition: *Doe d Rhodes v Robinson* (1837) 3 Bing NC 677.

2 *Jones v Phipps* (1868) LR 3 QB 567 at 573. In this case the trustees had given the beneficiary full authority to manage the property, and he was, therefore, entitled to give notice to quit as their agent. The case did not decide that a beneficiary ordinarily acts as agent for the trustees; *Stait v Fenner* [1912] 2 Ch 504.

3 *Doe d Mann v Walters* (1830) 10 B & C 626 at 633 per Parke J; *Doe d Lyster v Goldwin* [1841] 2 QB 143; *Jones v Phipps* (1868) LR 3 QB 567.

4 *Lemon v Lardeur* [1946] KB 613 at 617, 620, [1946] 2 All ER 329 at 331, 332, CA. Provided that personal signature is not required by the terms of the lease, the agent may sign in the principal's name: *LCC v Vitamins Ltd* [1955] 2 QB 218, [1955] 2 All ER 229, CA; *Tennant v LCC* (1957) 121 JP 428, CA; cf *Becker v Crosby Corp* [1952] 1 All ER 1350, DC.

5 *Jones v Phipps* (1868) LR 3 QB 567 at 572; but see *Stacpoole v Parkinson* (1874) IR 8 CL 561.

6 *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638.

7 *Doe d Earl Manvers v Mizem* (1837) 2 Mood & R 56; *Earl Erne v Armstrong* (1872) IR 6 CL 279. A receiver appointed by the court is such an agent (*Wilkinson v Colley* (1771) 5 Burr 2694; *Doe d Marsark v Read* (1810) 12 East 57); and the steward of a corporation may be a general agent for this purpose, even though not appointed by deed (*Roe d Dean and Chapter of Rochester v Pierce* (1809) 2 Camp 96; *Doe d Birmingham Canal Navigations v Bold* (1847) 11 QB 127). In *Harmond Properties Ltd v Gajdzis* [1968] 3 All ER 263, [1968] 1 WLR 1858, CA, it was held that a notice to quit in respect of a weekly tenancy signed by a director of the landlord company was a valid notice on the basis that the director was a general agent of the landlord company. A beneficiary who did not create the tenancy may not give notice unless he has been held out as the trustees' agent (*Easton v Penny* (1892) 67 LT 290) as, for example, where he has been permitted to have the management of the trust estate (*Jones v Phipps* (1868) LR 3 QB 567); and see PARA 224 notes 2, 4 ante. See also note 2 supra.

8 *Peel Developments (South) Ltd v Siemens plc* [1992] 2 EGLR 85 (tenant's break notice addressed to and received by landlord's managing agents held to be valid).

9 *Doe d Prior v Ongley* (1850) 10 CB 25 (notice served on the attorney of the administrator of the person who paid rent); *Tanham v Nicholson* (1872) LR 5 HL 561; and see PARA 228 post.

10 *Papillon v Brunton* (1860) 5 H & N 518; and see PARA 229 post. As to the special provisions for service on the landlord's agent under the Rent Act 1977 see PARA 227 post.

11 *Townsend Carriers Ltd v Pfizer Ltd* (1977) 33 P & CR 361; *Peel Developments (South) Ltd v Siemens plc* [1992] 2 EGLR 85 (*Townsend Carriers Ltd v Pfizer Ltd* supra held to be merely an example of the circumstances in which the inference of a general agency as to landlord and tenant could be drawn; subject to any restriction

on authority, a managing agent, among other things, would have general authority to receive notices relating to property and receive them in its own name). See also *Lemmerbell Ltd v Britannia LAS Direct Ltd* [1998] 3 EGLR 67, [1998] 48 EG 188, CA (demands and acceptance of rent and insurance premiums from another company on the tenant's instructions not enough to establish company as the tenant's general agent); *Proctor & Gamble Technical Centres Ltd v Brixton Estates plc* [2002] EWHC 2835 (Ch), [2003] 2 EGLR 24, [2002] All ER (D) 305 (Dec) (mere fact that claimant's solicitors were authorised to serve a notice which wrongly identified the claimant did not make the notice valid on its face).

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## **226. Notice given by one of several joint owners or joint tenants.**

In the case of a periodic tenancy, such as a tenancy from year to year, a notice given by one of several joint owners is effective to determine the tenancy because the tenant enjoys the whole of the property only so long as he and all the landlords concur. Likewise a notice by one of several joint tenants will terminate a periodic tenancy<sup>1</sup>. Personal representatives are joint tenants, and one of several may give an effective notice<sup>2</sup>. Where, however, a lease is determinable under an express power contained in the lease for determination by 'the landlords', the lease may be determined by one of the landlords only if he has been authorised by all the landlords to exercise the power<sup>3</sup>. This rule must, however, give way to any contrary intention in the express terms of the lease<sup>4</sup>. Where the reversion to an agricultural holding has been severed without any legal apportionment of the rent, a notice to quit given by two reversioners is not invalidated by the fact that one of them enters into a contract subsequently to sell his part of the land<sup>5</sup>.

1 *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, [1992] 1 All ER 1, HL (service by one only of two joint tenants held to be effectual), disapproving dicta to the contrary in *Howson v Buxton* (1928) 97 LJB 749 at 752, CA, and expressly approving *Doe d Aslin v Summersett* (1830) 1 B & Ad 135; *Doe d Kindersley v Hughes* (1840) 7 M & W 139 at 141; *Alford v Vickery* (1842) Car & M 280. See also *Mills v Hoey* (1913) 47 ILT 246 at 248; *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788 at 792-795, [1952] 2 All ER 492 at 495-496, CA; *Greenwich London Borough Council v McGrady* (1982) 81 LGR 288, CA (service by one of two joint weekly tenants valid); *Parsons v Parsons* [1983] 1 WLR 1390, (1983) 47 P & CR 494 (service of notice to quit by one of several owners on tenant valid). Cf *Doe d Whayman v Chaplin* (1810) 3 Taunt 120 (giving of a notice to quit by three out of four joint tenants insufficient to determine the tenancy of the whole); *Goodtitle d King v Woodward* (1820) 3 B & Ald 689 (joint tenants held capable of ratifying a notice by one of them); but these cases are no longer good law and the last is opposed to the cases cited in PARA 225 note 1 ante. See also *Fletcher v Brent London Borough Council* [2006] EWCA Civ 960, [2006] All ER (D) 96 (Jul). Where, however, one of two joint periodic tenants purports to serve a notice to quit which is in fact a notice operating a break clause in the tenancy agreement, the notice is ineffective: see *Hounslow London Borough Council v Pilling* [1994] 1 All ER 432, [1993] 1 WLR 1242, CA, distinguishing *Hammersmith and Fulham London Borough Council v Monk* supra. Whether the phrase 'the tenant' in a statutory provision means 'the joint tenants or any one or more of them' is clearly a matter of statutory construction: see eg *Featherstone v Staples* [1986] 2 All ER 461, [1986] 1 WLR 861, CA (the expression 'the tenant' within the Agricultural Holdings (Notice to Quit) Act 1977 s 2(1) (repealed; see now the Agricultural Holdings Act 1986 s 26(1)) meant all the tenants in the case of a joint tenancy and not any one or more of them). A joint tenant giving notice to quit is not acting as a trustee for the other joint tenant and service of the notice is not a function within the Trusts of Land and Appointment of Trustees Act 1996 s 11 (see TRUSTS (2007 Reissue) PARA 1036) requiring consultation with the other joint tenant: *Notting Hill Housing Trust v Brackley* [2001] EWCA Civ 601, [2001] 3 EGLR 11, [2002] HLR 212.

2 Cole on Ejectment 43. As to the position before the grant of probate or letters of administration see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 29 et seq.

3 *Re Viola's Indenture of Lease, Humphrey v Stenbury* [1909] 1 Ch 244; *Right d Fisher v Cuthell* (1804) 5 East 491; and see *Quartermaine v Selby* (1889) 5 TLR 223, CA. In the case of partners, authority may be



presumed: *Doe d Elliott, Call and Lambert v Hulme* (1828) 2 Man & Ry KB 433; and see PARTNERSHIP vol 79 (2008) PARA 45 et seq.

4 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA.

5 *Rochester and Chatham Joint Sewerage Board v Clinch* [1925] Ch 753.

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## **E. SERVICE OF NOTICE**

### **227. Statutory provisions.**

In the case of a lease executed or coming into operation after 31 December 1925, a notice to quit may be served in the manner provided by the Law of Property Act 1925<sup>1</sup>, unless a contrary intention appears<sup>2</sup>.

The provisions of the Landlord and Tenant Act 1927 relating to the service of notices<sup>3</sup> apply for the purposes of the Landlord and Tenant Act 1954, including (inter alia) the service of notices terminating tenancies protected under that Act<sup>4</sup>.

Documents required or authorised by the Rent Act 1977 to be served by the tenant of a dwelling house on the landlord are deemed to be duly served if served on any agent of the landlord named as such in the rent book or other similar document<sup>5</sup> or on the person who receives the rent of the dwelling house<sup>6</sup>.

Any notice, request, demand or other instrument under the Agricultural Holdings Act 1986 is duly given to or served on the person to or on whom it is to be given or served if it is delivered to him, or left at his proper address, or sent to him by post in a registered letter or by the recorded delivery service<sup>7</sup>. Any notice or other document required or authorised to be given under the Agricultural Tenancies Act 1995 may be given to a person by transmitting its text to him by facsimile or other electronic means, but only if this is a manner authorised by a written agreement made, at any time before the giving of the notice, between him and the person giving the notice; otherwise it must be delivered to him or left at his proper address<sup>8</sup>.

Normally, statutory provisions as to methods of service are permissive only in the sense that a notice which actually reaches the intended recipient is validly served even though none of the means of service stipulated by the statute has been used<sup>9</sup>.

1 See the Law of Property Act 1925 s 196(2)-(4); the Recorded Delivery Service Act 1962 s 1(1); and PARA 621 post. Where a notice is sent by recorded delivery (or where a signature is required by way of acknowledgment of delivery) service is deemed to be effected on a presumed date (at the date when the letter would in the ordinary course of post be delivered: see the Law of Property Act 1925 s 196(4)) and not on the later date when the letter is handed over and signed for: *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 WLR 2849, [2002] 3 EGLR 47 (service deemed on the first day that the postman attempted to deliver the letter).

2 Law of Property Act 1925 s 196(5).

3 See the Landlord and Tenant Act 1927 s 23: see PARA 703 post. In the case of notices given by virtue of s 23, the date of service is the date of entrusting the notice to the postal service since this provision does not provide for an attempted or actual delivery: *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320, approving *Beanby Estates v Egg Stores (Stamford Hill)* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] All ER (D) 122 (May) and disapproving *Lex Service plc v Johns* (1989) 59 P & CR 427, [1990] 1 EGLR 92, CA.

4 Landlord and Tenant Act 1954 s 66(4). As to such notices see PARAS 713-719, 1209-1214 post.

5 Rent Act 1977 s 151(1)(a).

6 Ibid s 151(1)(b).

7 See the Agricultural Holdings Act 1986 s 93(1); the Recorded Delivery Service Act 1962 s 1(1); and AGRICULTURAL LAND vol 1 (2008) PARA 328.

8 See the Agricultural Tenancies Act 1995 s 36(1)-(3). It may, however, be delivered to an agent or servant: see s 36(4).

9 *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396, [1959] 3 All ER 901 (service under the Landlord and Tenant Act 1927 s 23); *Galinski v McHugh* (1988) 57 P & CR 359, 21 HLR 47, CA (service under the Landlord and Tenant Act 1927 s 23 held to be permissive only); *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, [1963] 1 All ER 612 (service under the Agricultural Holdings Act 1948 s 92(1) (repealed: see now the Agricultural Holdings Act 1986 s 93(1))); *Lord Newborough v Jones* [1975] Ch 90, [1974] 3 All ER 17, CA (notice pushed under tenant's door by landlord; notice to quit properly served under the Agricultural Holdings Act 1948 s 92(1) (repealed)).

## UPDATE

### 227 Statutory provisions

NOTE 2--See also *Enfield LBC v Devonish* (1996) 74 P & CR 288, CA (a notice to quit was not a notice required or authorised by the 1925 Act s 196).

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### 228. Service on tenant.

A notice to quit need not be served personally upon the tenant<sup>1</sup>. It may be served upon his agent<sup>2</sup> and, when so served, it is unnecessary to prove that the notice actually came to his knowledge; it is sufficient if the fact of the agency is established. The spouse, or a member of the domestic staff, of the tenant at the tenant's dwelling house, whether this is on or off the demised premises, is an implied agent to receive a notice to quit, although the tenant may give evidence to rebut the implication<sup>3</sup>. Apart from any question of agency, the fact that the notice has been delivered to the tenant's spouse<sup>4</sup> or servant<sup>5</sup> raises a strong presumption that it has reached the tenant, especially if an explanation of the notice was given when it was delivered<sup>6</sup>. The presumption may be rebutted only by proof that the notice did not come to the tenant's knowledge at all<sup>7</sup>.

Even if the statutory provisions as to method of service<sup>8</sup> do not apply, a notice left at a tenant's house, but not served on anyone personally, is effectual if it can be proved that the notice actually came to his hands in time to give him notice of the proper length<sup>9</sup>.

It is not necessary that the notice should be directed to the tenant; it is sufficient if it can be proved, either by direct evidence or by his own admission<sup>10</sup>, that it was delivered to him in proper time<sup>11</sup>. If the tenant has disappeared, however, service becomes impossible unless the lease makes special provision for such a case, as, for example, by authorising service of the notice on the premises or at the tenant's last known address<sup>12</sup>, or unless the relevant statutory provisions<sup>13</sup> apply. Where the premises are held by two tenants jointly, the service of notice on

one who lives on the premises is evidence that it reached the other who lives elsewhere<sup>14</sup>; and apparently, even without that evidence, it is effectual as to both<sup>15</sup>.

1 A memorandum of service should be indorsed on a duplicate of the notice at the time when the notice is served; the duplicate is then primary evidence: *Doe d Patteshall v Turford* (1832) 3 B & Ad 890; *Doe d Fleming v Somerton* (1845) 7 QB 58; *Stapylton v Clough* (1853) 2 E & B 933.

2 See *Doe d Prior v Ongley* (1850) 10 CB 25. In the case of a corporation service should be on an officer: *Doe d Earl of Carlisle v Woodman* (1807) 8 East 228.

3 *Tanham v Nicholson* (1872) LR 5 HL 561 at 569; and see *Jones d Griffiths v Marsh* (1791) 4 Term Rep 464; *London School Board v Peters* (1902) 18 TLR 509; and AGENCY vol 1 (2008) PARAS 137, 138.

Consequently it is immaterial that the notice came to the tenant's knowledge too late to allow for a proper length of service on him personally (*Doe d Neville v Dunbar* (1826) Mood & M 10); contra, if the notice was addressed to the wrong person (*Doe d Exeter Corpn v Mitchell* (1837) 1 Jur 795). As to a provision for service of the notice at the usual place of abode of the tenant see *Liddy v Kennedy* (1871) LR 5 HL 134.

4 *Roe d Blair v Street* (1834) 2 Ad & El 329; *Smith v Clark* (1840) 9 Dowl 202.

5 *Jones d Griffiths v Marsh* (1791) 4 Term Rep 464.

6 See *Doe d Buross v Lucas* (1804) 5 Esp 153.

7 *Tanham v Nicholson* (1872) LR 5 HL 561.

8 See PARA 227 ante.

9 *Alford v Vickery* (1842) Car & M 280 (notice put under door of house); cf *Lord Newborough v Jones* [1975] Ch 90, [1974] 3 All ER 17, CA (notice to quit pushed under the door by the landlord held to be properly served under the Agricultural Holdings Act 1948 s 92(1) (repealed: see now the Agricultural Holdings Act 1986 s 93(1)), even though the tenant did not find it for several months).

10 *Doe d Simpson v Hall* (1843) 5 Man & G 795.

11 *Doe d Matthewson v Wrightman* (1801) 4 Esp 5.

12 *Hogg v Brooks* (1885) 15 QBD 256, CA. If the notice is to be served on the tenant or his assigns, service on a mortgagee by sub-demise is ineffectual: *Hogg v Brooks* supra.

13 See the provisions cited in PARA 227 ante. As to the power of the county court to determine tenancies of derelict land see PARA 648 post.

14 *Doe d Lord Bradford v Watkins* (1806) 7 East 551.

15 *Doe d Lord Macartney v Crick* (1805) 5 Esp 196.

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## 229. Service on landlord.

Apart from statute<sup>1</sup> a notice given by the tenant may be served on the landlord or his agent<sup>2</sup>. If sent by post, the notice is sufficient if it is delivered during the last day on which service may be made, even though after business hours<sup>3</sup>. If the posting is proved, the notice is presumed to have been delivered in due course of post<sup>4</sup>; and the time of delivery is the time of service<sup>5</sup>.

- 1 For special statutory provisions as to service of documents on the agent of landlords of dwelling houses under the Rent Act 1977 see s 151(1); and PARA 227 ante.
- 2 The agent must be authorised to receive a notice to quit either specially or by the course of his employment, as, for example, where he has the general management of the estate. It is not sufficient that he collects the rents: *Pearse v Boulter* (1860) 2 F & F 133.
- 3 *Papillon v Burnton* (1860) 5 H & N 518 at 522.
- 4 *Gresham House Estate Co v Rossa Grande Gold Mining Co* [1870] WN 119.
- 5 *R v Slawstone Inhabitants* (1852) 18 QB 388; *R v Richmond Recorder* (1858) EB & E 253. See also the Interpretation Act 1978 ss 7, 22(1), Sch 2 para 3 (references to service by post: see STATUTES vol 44(1) (Reissue) PARA 1388). The presumption as to service in that Act may, therefore, be relied upon when service by post is effected pursuant to the provisions of the Law of Property Act 1925 s 196 (as amended): see PARA 227 ante. Where, however, a notice relating to a tenancy protected by the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) is served by a primary method authorised by the Landlord and Tenant Act 1927 s 23 (see PARA 703 post), such as by recorded delivery post, it does not matter whether the notice is received and there is no scope for the application of the Interpretation Act 1978 s 7: *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320, disapproving *Lex Service plc v Johns* (1989) 59 P & CR 427, [1990] 1 EGLR 92, CA. See also PARA 227 ante.

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## **F. WAIVER OF, AND DISPENSING WITH, NOTICE TO QUIT**

### **230. Withdrawal and waiver of notice.**

Once a valid notice to quit has been served, it automatically brings the tenancy to an end on the expiration of the notice<sup>1</sup> and, strictly, may not be withdrawn or waived<sup>2</sup>. After a valid notice to quit has been served, the landlord and the tenant may, however, agree expressly or by implication for the grant of a new tenancy to take effect on the expiry of the notice. If such an agreement is effected during the currency of the notice to quit, the notice is, inaccurately, said to be 'withdrawn'<sup>3</sup>. If such an agreement is effected after the expiry of the notice to quit, the notice is, inaccurately, said to be 'waived'<sup>4</sup>. By reason of the fact that a new agreement is necessary, the person who gives the original notice to quit, whether landlord or tenant, may not 'withdraw' or 'waive' the notice without the consent of the person to whom the notice is given<sup>5</sup>.

While a person who serves a notice to quit may not unilaterally withdraw it, he may, even in the absence of an agreement for a new lease, so conduct himself as to be estopped from relying on the notice under the principles of equitable or promissory estoppel<sup>6</sup>.

1 *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA; *Lowenthal v Vanhoute* [1947] KB 342 at 345, [1947] 1 All ER 116 at 117, CA. The tenancy continues as an annual tenancy up to the date of the expiry of the notice to quit: *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465.

2 *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA (drawing a distinction between waiver of a right to forfeit a lease and the so-called 'waiver' of a notice to quit). The waiver of a right to forfeit a lease is probably best regarded as an application of the doctrine of election: see *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882-883, [1970] 2 All ER 871 at 894, HL, per Lord Diplock (where the various meanings in law of 'waiver' are distinguished and explained); and EQUITY vol 16(2) (Reissue) PARA 907.

3 *Lower v Sorrell* [1963] 1 QB 959, [1962] 3 All ER 1074, CA; *Freeman v Evans* [1922] 1 Ch 36, CA; *Tayleur v Wildin* (1868) LR 3 Exch 303; *Vance v Vance* (1871) IR 5 CL 363. Hence a guarantor of rent under the old tenancy is not liable for rent under the new tenancy: *Tayleur v Wildin* supra.

4 *Lord Inchiquin v Lyons* (1887) 20 LR Ir 474, Ir CA; *Davies v Bristow* [1920] 3 KB 428 at 437-438, DC.

5 *Blyth v Dennett* (1853) 13 CB 178; *Tayleur v Wildin* (1868) LR 3 Exch 303 at 305.

6 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; and see *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 882-883, [1970] 2 All ER 871 at 894-895, HL, per Lord Diplock; and ESTOPPEL vol 16(2) (Reissue) PARA 1082.

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### **231. Acts by which effect of a notice to quit may be lost.**

Questions of so-called 'waiver' usually arise when some act is done by the landlord after the expiration of a notice to quit which either necessarily or prima facie imports the recognition of an existing tenancy. A distress levied for rent accrued due since the expiration of the notice, if acquiesced in by the tenant, necessarily operates as an acceptance by the landlord that he will not enforce the notice<sup>1</sup>. In other cases it may be possible to show that the landlord's act was done with some other intention; and, when that evidence is offered, it must be determined, as a question of fact, whether the act was intended to create a new tenancy<sup>2</sup>. A mere demand of rent accrued due after the expiration of the notice, not followed by a promise to pay by the tenant, cannot operate to create a new tenancy, for want of the tenant's consent<sup>3</sup>. Payment and acceptance of rent so accrued due<sup>4</sup> implies, however, the concurrence of both parties and may operate to create a new tenancy<sup>5</sup>. The crucial question is always with what intent the rent was paid and accepted, that is to say, whether it was with the mutual intention of creating a new tenancy<sup>6</sup>. Where one tenant is entitled to remain in possession by statute notwithstanding the determination of his tenancy, for example as a statutory tenant under the Rent Act 1977<sup>7</sup>, the continued payment and acceptance of rent after the expiration of the notice to quit does not normally amount to the 'waiver' of the notice by the creation of a new contractual tenancy as the landlord is entitled to be paid under the statutory tenancy or statutory continuation of the contractual tenancy<sup>8</sup>. Other instances of the acceptance of rent not operating as a 'waiver' of the notice to quit are where it is accepted because of an error in programming a computer<sup>9</sup>, or where it is accepted in lieu of double rent or double value<sup>10</sup>, or where it is accepted pending the hearing of a claim for possession<sup>11</sup>. It is common practice for landlords to accept monetary payments after the expiration of a notice to quit as mesne profits in order to prevent the possibility of waiver<sup>12</sup>.

Where a notice to quit is given and subsequently a second notice is given and the second notice is effective to determine the tenancy before the expiration of the first notice, the second notice is effective and determines the tenancy at the expiration of it<sup>13</sup>. Where a notice to quit is given, a second notice expiring after the currency of the first notice does not 'waive' or revoke the first notice, unless the second notice with other circumstances suffices to show that the parties intended to create a new tenancy to take effect after the expiration of the first notice<sup>14</sup>. It is plain that no new tenancy is contemplated where the second notice is given as a preliminary to recovering double value<sup>15</sup> or where the landlord is at the same time proceeding for recovery of possession<sup>16</sup>. Where there is some doubt as to the validity of the first notice, the landlord may give a second notice without thereby accepting the invalidity of the earlier notice; and the second notice operates without prejudice to the earlier notice even without its being

marked as such<sup>17</sup>, although it is frequent and good practice to mark the second notice 'without prejudice'.

A mere holding over by the tenant after the expiration of the notice does not by itself operate as a waiver of the notice, whether the notice was given by himself<sup>18</sup> or by the landlord<sup>19</sup>. It is a question of fact whether the tenant intended to avail himself of the notice to quit, or whether the circumstances of the holding over amounted to a waiver of the notice<sup>20</sup>. An agreement by the landlord to suspend the exercise of his rights under a notice to quit, as, for example, where he promises that the tenant is not to be turned out until the premises are sold, is not a waiver of the notice, and the landlord retains all his rights under it, subject only to the agreement<sup>21</sup>. A statement by the landlord that he will not enforce his right to possession upon the expiration of the notice to quit may bind the landlord under the principles of promissory estoppel<sup>22</sup>.

1 *Zouch d Ward v Willingale* (1790) 1 Hy Bl 311. Until a new tenancy is created, the landlord is not entitled to distrain: *Jenner v Clegg* (1832) 1 Mood & R 213; *Alford v Vickery* (1842) Car & M 280. Submitting to a distress is, however, an acknowledgment of a tenancy: *Panton v Jones* (1813) 3 Camp 372. After judgment in a claim for possession a distress may be evidence of a tenancy but it is no ground for setting aside the judgment: *Doe d Holmes v Darby* (1818) 8 Taunt 538.

2 *Javad v Aqil* [1991] 1 All ER 243, [1991] 1 WLR 1007, CA, distinguished in *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 163 (Case No 13), [2000] All ER (D) 2440, CA; *Doe d Cheny v Batten* (1775) 1 Cowp 243; *Maconochie Bros Ltd v Brand* [1946] 2 All ER 778 (acceptance of rent by mistake for a period after the expiry of the notice to quit did not 'waive' the notice); *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA; *Longrigg, Burrough and Trounson v Smith* [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847, CA; and see PARA 209 ante.

3 *Blyth v Dennett* (1853) 13 CB 178. Authorising the tenant to pay an annuity charged on the premises is not a recognition of his tenancy, so as to constitute a 'waiver': *Doe d Bath v Scott* (1827) 6 LJOSKB 110.

4 This is so even though only for a single day: *Keith, Prowse & Co v National Telephone Co* [1894] 2 Ch 147. Where rent has been paid quarterly, the subsequent payment of a year's rent in one sum is, however, not necessarily a 'waiver': *London School Board v Peters* (1902) 18 TLR 509.

5 *Goodright d Charter v Cordwent* (1795) 6 Term Rep 219. Where the rent is received by an agent, there is no waiver unless he is authorised to receive it notwithstanding the notice: *Doe d Ash v Calvert* (1810) 2 Camp 387.

6 *Clarke v Grant* [1950] 1 KB 104, [1950] 1 All ER 768, CA.

7 See PARA 831 et seq post.

8 *Davies v Bristow* [1920] 3 KB 428 at 437 et seq, DC; *Shuter v Hersh* [1922] 1 KB 438; *Clarke v Grant* [1950] 1 KB 104, [1949] 1 All ER 768, CA, approving *Davies v Bristow* supra and overruling *Hartell v Blackler* [1920] 2 KB 161, DC; and see *Morrison v Jacobs* [1945] KB 577, [1945] 2 All ER 430, CA. The same principle applies to a statutory continuation of a business tenancy under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post), or to the holding over by a tenant who claims such a continuation, although not entitled to it: *Lewis v MTC (Cars) Ltd* [1975] 1 All ER 874, [1975] 1 WLR 457, CA; and see PARA 729 post.

9 *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953, 113 Sol Jo 876.

10 *Doe d Cheny v Batten* (1775) 1 Cowp 243 at 245, 246. As to claims for double rent or double value see PARAS 667-669 post.

11 *Sammon v Cawley* (1919) 53 ILT 224.

12 In possession proceedings the tenant may be ordered to make an interim payment under CPR Pt 25: see CIVIL PROCEDURE vol 11 (2009) PARAS 324-325.

13 *Thompson v McCullough* [1947] KB 447, [1947] 1 All ER 265, CA.

14 *Lowenthal v Vanhoute* [1947] KB 342, [1947] 1 All ER 116, CA; *Lower v Sorrell* [1963] 1 QB 959, [1962] 3 All ER 1074, CA.

15 *Doe d Digby v Steel* (1811) 3 Camp 115 at 117; cf *Messenger v Armstrong* (1785) 1 Term Rep 53.

- 16 *Doe d Williams v Humphreys* (1802) 2 East 237.
- 17 *Allam & Co Ltd v Europa Poster Services Ltd* [1968] 1 All ER 826, [1968] 1 WLR 638.
- 18 *Gray v Bompas* (1862) 11 CBNS 520.
- 19 *Jenner v Clegg* (1832) 1 Mood & R 213; *Cusack v Farrell* (1886) 18 LR Ir 494; affd (1887) 20 LR Ir 56, Ir CA.
- 20 *Jones v Shears* (1836) 4 Ad & El 832 at 836.
- 21 *Whiteacre d Boulton v Symonds* (1808) 10 East 13; and see *London School Board v Peters* (1902) 18 TLR 509.
- 22 See ESTOPPEL vol 16(2) (Reissue) PARA 1082.

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### 232. Dispensing with notice.

Failure for a long time to pay rent accruing under a yearly tenancy raises a presumption that the tenancy has been determined<sup>1</sup>. If at the end of a year the landlord accepts a new tenant, he dispenses with notice to quit by the old tenant<sup>2</sup> and may not sue the old tenant for rent; but this is because there is a surrender by operation of law, and the immediate change of possession is an essential element<sup>3</sup>. There probably cannot be a surrender to operate in the future; and, therefore, the landlord's mere acquiescence in a short notice, whether that notice is oral or in writing, does not make the notice binding<sup>4</sup>. If, however, the tenant quits in accordance with the notice after that acquiescence, he is not liable for subsequent rent<sup>5</sup>.

1 *Stagg v Wyatt* (1838) 2 Jur 892.

2 *Sparrow v Hawkes* (1796) 2 Esp 504. The landlord may not dispense with notice so as to put an end to the tenancy unless the circumstances are such as to show that the tenant is offering to surrender the term. Dispensing with notice to quit is, therefore, relevant more often as a defence to a claim by a landlord for rent than in any other context.

3 *Johnstone v Hudleston* (1825) 4 B & C 922; *Bessell v Landsberg* (1845) 7 QB 638; and see *Doe d Read v Ridout* (1814) 5 Taunt 519; *Stone v Whiting* (1817) 2 Stark 235; *Thomas v Cook* (1818) 2 B & Ald 119; *Hamerton v Stead* (1824) 3 B & C 478; *Aldenburgh v Peaple* (1834) 6 C & P 212; *Fenner v Blake* [1900] 1 QB 426, DC. As to surrender generally see PARA 630 post.

4 *Doe d Murrell v Milward* (1838) 3 M & W 328; and see PARA 632 post.

5 *Shirley v Newman* (1795) 1 Esp 266; cf *Brown v Burtinshaw* (1826) 7 Dow & Ry KB 603.

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### (4) WEEKLY, MONTHLY OR OTHER PERIODIC TENANCIES

### 233. Nature of tenancy.

A weekly or other periodic tenancy is a tenancy by the week or the period<sup>1</sup> and does not expire without notice at the end of the first week or period or at the end of each succeeding week or period<sup>2</sup>, there being not a reletting at the beginning of every week or period but a springing interest which arises and which is determined only by a proper notice to quit<sup>3</sup>. A weekly or other periodic tenancy arises either by express agreement or presumption of law<sup>4</sup>. A holding over with the landlord's consent, which prima facie gives rise to a tenancy at will, may be converted by the parties by their acts or by agreement into a weekly or other periodic tenancy<sup>5</sup>.

<sup>1</sup> *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117 at 125; *Land Settlement Association v Carr* [1944] KB 657, [1944] 2 All ER 126, CA.

<sup>2</sup> *Bowen v Anderson* [1894] 1 QB 164, differing from *Sandford v Clarke* (1888) 21 QBD 398; *Mellows v Low* [1923] 1 KB 522, DC; and see *Jones v Chappell* (1875) LR 20 Eq 539 at 544.

<sup>3</sup> *Mellows v Low* [1923] 1 KB 522 at 525, DC. As to the application of this principle to a tenancy from year to year see PARA 208 ante. As to the requisites of a proper notice to quit see PARA 234 post. A weekly tenancy is property within the meaning of the Matrimonial Causes Act 1973 s 24(1)(a) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 500); *Hale v Hale* [1975] 2 All ER 1090, [1975] 1 WLR 931, CA.

<sup>4</sup> See eg *Beamish v Cox* (1885) 16 LR Ir 270; affd 16 LR Ir 458, Ir CA. If there is nothing more than the reservation of a weekly rent, the inference may be drawn that there is a weekly tenancy; but no such inference will be drawn where the reservation of a weekly rent is followed by a provision inconsistent with a weekly tenancy: *Adams v Cairns* (1901) 85 LT 10, CA.

<sup>5</sup> *Cole v Kelly* [1920] 2 KB 106 at 132, CA; *Ladies' Hosiery and Underwear Ltd v Parker* [1930] 1 Ch 304 at 328, CA (holding over under agreement at a rent not exactly divisible into the number of days either of an ordinary year or of a leap year); *Adler v Blackman* [1953] 1 QB 146, [1952] 2 All ER 945, CA (tenant for one year at a weekly rent held over as weekly tenant). See also PARA 209 ante.

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### 234. Determination of tenancy.

A weekly or other periodic tenancy is determinable by notice to quit<sup>1</sup>, which, in the absence of special stipulations<sup>2</sup>, should be given so as to expire at the end of any complete period of the tenancy<sup>3</sup>, and should, subject to the statutory minimum in the case of dwellings<sup>4</sup>, be equal to the length of the period, that is to say, in a weekly tenancy a week's notice<sup>5</sup>, in a monthly tenancy a month's notice<sup>6</sup>, and in a quarterly tenancy a quarter's notice<sup>7</sup>.

A weekly tenancy which begins, for example, on a Saturday and, therefore, expires at midnight on Friday may be determined by notice to quit on a Friday or Saturday<sup>8</sup>. Any question as to the validity of the notice may be avoided by giving it in a general form, that is to say, to quit at the end of the next complete week or four weeks<sup>9</sup>, as the case may be, of the tenancy after the date of the notice<sup>10</sup>. The onus of proving that a notice expires on the correct date lies on the person who gives the notice specifying the date<sup>11</sup>. Parties to a periodic tenancy may, however, agree between themselves as to the terms of the notice to quit<sup>12</sup>. A covenant by the landlord in a quarterly tenancy not to determine the tenancy for a number of years except in certain circumstances may bind the landlord's assigns and is not repugnant to the grant of a quarterly tenancy<sup>13</sup>.



In the case of any premises let as a dwelling<sup>14</sup>, no notice to quit given by a landlord or tenant is valid unless given not less than four weeks before the date on which it is to take effect<sup>15</sup>. A notice to quit in respect of certain dwellings may be suspended as to its date of operation<sup>16</sup>.

1 See PARA 233 ante. Thus, upon the tenant's death, the tenancy passes under his will or on his intestacy and continues until determined by notice to quit: *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA. As to the form and construction of notices, the persons who may give and receive notices, the service of notices and waiver and dispensing with notices see PARA 221 et seq ante. The same general principles regarding these matters apply whether the notice to quit is in respect of an annual periodic tenancy or a periodic tenancy of some different period.

2 *Land Settlement Association Ltd v Carr* [1944] KB 657, [1944] 2 All ER 126, CA (lease determinable 'at any time'); *Maconochie Bros Ltd v Brand* [1946] 2 All ER 778 (half-yearly tenancy determinable by six months' notice expiring on any quarter day); *Harler v Calder* (1988) 21 HLR 214, [1989] 1 EGLR 88, CA (provision for determination of a monthly tenancy by 'not less than one month's prior written notice in accordance with statutory requirements but no other formality will be required' held not to have the same effect as a provision for determination 'at any time').

3 *Lemon v Lardeur* [1946] KB 613, [1946] 2 All ER 329, CA, approving on this point *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117, and *Precious v Reedie* [1924] 2 KB 149, and overruling *Simmons v Crossley* [1922] 2 KB 95, and not following *Harvey v Copeland* (1892) 30 LR Ir 412; *Skelly v Thompson* (1911) 45 ILT 138; and see *Bathavon RDC v Carlile* [1958] 1 QB 461, [1958] 1 All ER 801, CA.

4 I.e. the Protection from Eviction Act 1977 s 5 (as amended): see the text and notes 14-15 infra; and PARA 214 ante.

5 *Doe d Peacock v Raffan* (1806) 6 Esp 4; *Jones v Mills* (1861) 10 CBNS 788; *Bowen v Anderson* [1894] 1 QB 164, DC; *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117. A tenancy determinable at any time at a week's notice may properly include a stipulation allowing the tenant a reasonable time after the week to remove his goods: *Cornish v Stubbs* (1870) LR 5 CP 334.

6 *Doe d Parry v Hazell* (1794) 1 Esp 94; *Beamish v Cox* (1885) 16 LR Ir 270 (affd 16 LR Ir 458, Ir CA); *Precious v Reedie* [1924] 2 KB 149.

7 *Kemp v Derrett* (1814) 3 Camp 510; *Wilkinson v Hall* (1837) 3 Bing NC 508 at 531.

8 *Crate v Miller* [1947] KB 946, [1947] 2 All ER 45, CA; cf *Eastaugh v Macpherson* [1954] 3 All ER 214, [1954] 1 WLR 1307, CA; *Newman v Slade* [1926] 2 KB 328, following *Sullivan v Sheehan* (1916) 50 ILT 41. A notice of seven clear days may, however, be required by the particular terms of the agreement as in *Weston v Fidler* (1903) 88 LT 769. A notice to quit by noon on Monday, where the tenancy expired at midnight on Sunday, has been held to be invalid: see *Bathavon RDC v Carlile* [1958] 1 QB 461, [1958] 1 All ER 801, CA.

9 See the Protection from Eviction Act 1977 s 5 (as amended); the text and notes 14-15 infra; and PARA 214 ante.

10 *Doe d Campbell v Scott* (1830) 6 Bing 362; *Queen's Club Gardens Estates Ltd v Bignell* [1924] 1 KB 117 at 126.

11 *Lemon v Lardeur* [1946] KB 613, [1946] 2 All ER 329, CA.

12 The parties may not, however, seek to fetter the right of one or both of them to serve a notice to quit before the occurrence of an event the time of which is uncertain: *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL, overruling *Re Midland Railway Co's Agreement, Charles Clay & Sons Ltd v British Railways Board* [1971] Ch 725, [1971] 1 All ER 1007, CA (where a proviso as to the determination of a tenancy agreement by the landlord, which rendered its maximum duration uncertain, was upheld). See also *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1, [1973] 2 All ER 720 (term making a weekly tenancy determinable only by the tenant held to be repugnant to the nature of the tenancy and accordingly void).

13 *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1, [1948] 1 All ER 758, CA; and see PARA 213 ante.

14 As to the termination of business tenancies see PARAS 713-719 post.

15 Protection from Eviction Act 1977 s 5(1)(b). As to the other requirements of notices in such cases see PARA 214 ante. The period required is not four clear weeks and thus a notice given on eg a Monday to expire on the fourth subsequent Monday is sufficient: *Schnabel v Allard* [1967] 1 QB 627, [1966] 3 All ER 816, CA.

16 See the Rent Act 1977 ss 103-106 (as amended); and PARA 1003 et seq post. A notice to quit is of no effect in relation to a periodic assured tenancy under the Housing Act 1988: see s 5(1); and PARA 1065 post.

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## (5) TERM OF YEARS

### 235. Tenancy for years.

A tenancy for a term of years arises by express contract or by statute<sup>1</sup>; and it is essential to the contract that the commencement and duration of the term should be so defined as either to be certain in the first instance<sup>2</sup>, or to be capable of being afterwards ascertained with certainty<sup>3</sup>. A term of years need not be for a continuous period<sup>4</sup>.

The term may commence either immediately or from a past or future date<sup>5</sup>. Where it is expressed to commence from a past day, the tenant's actual interest commences only on the execution of the deed<sup>6</sup>, and his liability is limited accordingly. Thus the tenant is not liable, for example, for matters arising before the date of execution under the covenant to repair<sup>7</sup>, or under a covenant not to erect buildings of less than a specified value<sup>8</sup>, unless the lease itself imposes such obligations in respect of the period prior to its execution<sup>9</sup>. Where in a provision of the lease there is a reference to a particular year of it, it is a question of construction whether time is to be measured from the execution of the lease or from the date by reference to which the term is measured. For example, in a lease granted to run for a term of years measured from a past date, a break clause to operate at the end of the seventh year was held to mean at the end of the seventh year reckoned from that past date<sup>10</sup>. Where the term is to commence from a future date, the tenant's interest in the land subsists as from the date of the lease<sup>11</sup> but his right to possession will arise only at the future date specified for the commencement of the term.

1 Eg leases for lives are converted by statute into terms of years: see PARAS 240-241 post. As to leases 'for the duration of the war' see PARA 238 note 1 post. At common law a lease for a term of years, without more, is a term for two years certain: *Land Settlement Association Ltd v Carr* [1944] KB 657, [1944] 2 All ER 126, CA, citing *Bishop of Bath's Case* (1606) 6 Co Rep 34b (where, however, it would appear the words commonly relied upon to support the proposition were not only obiter but unconnected with the subject matter of the decision: see *EWP Ltd v Moore* [1992] QB 460 at 472, [1992] 1 All ER 880 at 889, CA, per Nolan LJ). A tenancy for a term of years under which no rent is payable is nevertheless a term of years: *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (overruled on another point by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL); *Canadian Imperial Bank of Commerce v Bello* (1991) 64 P & CR 48, 24 HLR 155, CA. See also PARA 1 note 5 ante.

2 See *Say v Smith* (1563) 1 Plowd 269 at 272; *Anon* (1674) 1 Mod Rep 180 (lease made 10 October, habendum from 20 November, without mentioning the year; void for uncertainty); *Kirsley v Duck* (1712) 2 Vern 684. A lease is good for a term specified even though it is also granted for a further indefinite term: *Gwynne v Mainstone* (1828) 3 C & P 302.

3 *Goodright d Hall v Richardson* (1789) 3 Term Rep 462 at 463. 'Term' in a covenant means the term which the landlord purports to grant: *Evans v Vaughan* (1825) 4 B & C 261. Where, by mistake, a shorter term was granted than that agreed upon, the landlord was restrained by injunction from recovering possession at the end of the shorter term: see *Wilde v Ashley* (1838) 2 Jur 679. See also PARA 130 ante where the modern caselaw on certainty of term is set out.

4 *Cottage Holiday Associates Ltd v Customs and Excise Comrs* [1983] QB 735, [1983] 2 WLR 861 (right to occupy for one week in each year for 80 years held not to be a lease for a period exceeding 21 years and not, therefore, zero-rated for VAT purposes); and see *Smallwood v Sheppards* [1895] 2 QB 627 (grant of the right to occupy for three successive Bank Holidays).

5 See PARA 237 post.

6 *Roberts v Church Comrs for England* [1972] 1 QB 278, [1973] 3 All ER 703, CA; *Jervis v Tomkinson* (1856) 1 H & N 195; and see *Cooper v Robinson* (1842) 10 M & W 694 at 696; *Earl of Cadogan v Guinness* [1936] Ch 515 at 517, [1936] 2 All ER 29 at 31; *Colton v Becollda Property Investments Ltd* [1950] 1 KB 216 at 225, CA; *Bradshaw v Pawley* [1979] 3 All ER 273, [1980] 1 WLR 10. The parties may, however, by agreement make an obligation or liability enforceable in respect of such anterior date as they wish: *Bradshaw v Pawley* supra at 277 and at 15.

7 *Shaw v Kay* (1847) 1 Exch 412.

8 *Bennett v Kidd* [1926] NI 50.

9 See *Bradshaw v Pawley* [1979] 3 All ER 273 at 279, [1980] 1 WLR 10 at 16-17 per Sir Robert Megarry V-C (where the relevant law is summarised).

10 *Bird v Baker* (1858) 1 E & E 12.

11 *Northcote Laundry Ltd v Frederick Donnelly Ltd* [1968] 2 All ER 50, [1968] 1 WLR 562, CA.

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### 236. Effect of the instrument.

The purpose of the habendum in a deed is to limit the estate granted; and, therefore, in a lease by deed the habendum should state specifically both the commencement and duration of the term<sup>1</sup>. In the case of a prescribed clauses lease<sup>2</sup>, the wording with which it begins must include a statement of the term for which the property is leased, using one only of the three prescribed forms of wording, duly completed<sup>3</sup>; and that information will be used as part of the particulars to identify the lease in the property register<sup>4</sup>.

Where the term is expressed to commence 'from' a specified day, that day is in strictness not included in the term, and the term, therefore, lasts during the whole anniversary of the day from which it begins<sup>5</sup>. There may, however, be circumstances which lead to the conclusion that the parties wished the day specified to be included in the term, as, for example, the fact that the first payment of rent was to be made on that day<sup>6</sup>. If the term commences 'on' a specified day, that day is included<sup>7</sup>. A deed must be interpreted, however, so as to give effect to the parties' substantial rights and for practical purposes this distinction is often of no significance<sup>8</sup>; but it may be of significance when a notice is given determining the tenancy on a certain date in accordance with a break clause in the lease or in accordance with statute<sup>9</sup>. Where the term is expressed to be from a specified date until another specified date, the term commences on the specified date and not on the following day<sup>10</sup>.

If in a lease by deed the term is expressed to commence 'from henceforth' or 'from the making hereof'<sup>11</sup>, or if no date is specified<sup>12</sup>, the term commences from the time when the deed takes effect, that is to say from delivery<sup>13</sup>. If the lease is expressed to commence from the date of the deed, that date is by reference inserted in the habendum and the term commences on the following day<sup>14</sup>; but, if in such a case the deed is not dated, or if it bears an impossible date, the term commences from delivery<sup>15</sup>. Where the tenant enters under an agreement not by deed

which does not specify the commencement of the term, it usually commences from entry<sup>16</sup>; but oral evidence is admissible to show when the instrument was intended to take effect<sup>17</sup>.

1 *Buckler's Case* (1597) 2 Co Rep 55a; *Burton v Barclay* (1831) 7 Bing 745 at 757; *Doe d Timmis v Steele* (1843) 4 QB 663 at 667; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 242. The limitation in the habendum may, in a clear case, be controlled by other parts of the instrument: *Strickland v Maxwell* (1834) 2 Cr & M 539 at 549.

2 For the meaning of 'prescribed clauses lease' see PARA 100 ante.

3 See PARA 126 ante at head (6) in the text.

4 See PARA 126 note 18 ante.

5 Co Litt 46b; *Anon* (1773) Lofft 275; *Cutting v Derby* (1776) 2 Wm BI 1075; *Ackland v Lutley* (1839) 9 Ad & El 879 at 894; *Sidebotham v Holland* [1895] 1 QB 378, CA; *Meggesson v Groves* [1917] 1 Ch 158 (where it was stated that, while the judgments in *Sidebotham v Holland* supra were in accordance with *Ackland v Lutley* supra, the headnote was misleading); *Re Crowhurst Park, Sims Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583. The tenancy commences, therefore, at midnight following the day specified eg 'from 25 March' means from midnight of the night of 25 March: *Meggesson v Groves* supra.

6 *Ladyman v Wirral Estates Ltd* [1968] 2 All ER 197, (1968) 19 P & CR 781; *Whelton Sinclair (a firm) v Hyland* [1992] 2 EGLR 158, CA.

7 Co Litt 46b; *Clayton's Case* (1585) 5 Co Rep 1a.

8 *Sidebotham v Holland* [1895] 1 QB 378, CA; *Pugh v Duke of Leeds* (1777) 2 Cowp 714 at 717, 725; *Doe d Cox v Day* (1809) 10 East 427; *Wilkinson v Gaston* (1846) 9 QB 137 at 144, 145.

9 Eg a notice under the Landlord and Tenant Act 1954 s 25 (as amended) where the lease is of business premises: see *Whelton Sinclair (a firm) v Hyland* [1992] 2 EGLR 158, CA; and PARA 716 post.

10 *Meadfield Properties Ltd v Secretary of State for the Environment* [1995] 1 EGLR 39, [1995] 03 EG 128.

11 Co Litt 46b; *Clayton's Case* (1585) 5 Co Rep 1a; *Llwelyn v Williams* (1610) Cro Jac 258; *Steele v Mart* (1825) 4 B & C 272 at 278.

12 Co Litt 46b.

13 As to delivery see PARA 111 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 31.

14 Co Litt 46b; *Styles v Wardle* (1825) 4 B & C 908 at 911.

15 *Doe d Cornwall v Matthews* (1851) 11 CB 675; cf *Sandill v Franklin* (1875) LR 10 CP 377.

16 See note 14 supra.

17 *Davis v Jones* (1856) 17 CB 625.

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### 237. Commencement.

It is sufficient if the commencement of the term is ascertained with certainty at the time when the lease is to take effect in possession<sup>1</sup>. Hence the term may be made to commence after the failure of specified lives<sup>2</sup>, or upon the occurrence of a future contingent event<sup>3</sup>. Where it is to take effect after the expiration of a previous term, and the previous term is surrendered or

forfeited, the lease takes effect on the surrender or forfeiture<sup>4</sup>; and, if the previous lease has already determined, or if it is void or non-existent, the new lease takes effect at once<sup>5</sup>.

A term at a rent or granted in consideration of a fine, limited on or after 1 January 1926 to take effect more than 21 years from the date of the instrument purporting to create it, is void; and any contract made on or after that date to create such a term is likewise void<sup>6</sup>. What is restricted is the period which may elapse between the date of the lease and the later date on which the term is to commence. There is no similar restriction on the period which may elapse between an agreement to grant a lease and the date stipulated in the agreement as the date on which the lease is to be granted, provided that the lease, when granted, is to be for a term which will commence within 21 years of the grant<sup>7</sup>.

1 Co Litt 45b; *Shep Touch* (8th Edn) 272; *Bishop of Bath's Case* (1605) 6 Co Rep 34b.

2 *Goodright d Hall v Richardson* (1789) 3 Term Rep 462 at 463.

3 *Bishop of Bath's Case* (1605) 6 Co Rep 34b; Co Litt 45b. Where a mortgagor in possession was, on default, to become tenant at a rent, it was held that the mortgagee was not entitled to distrain after default unless he had given notice to the mortgagor of his intention to treat him as tenant (*Clowes v Hughes* (1870) LR 5 Exch 160); but such a case could not now arise (see PARA 3 ante).

4 Co Litt 45b; *Wrotesley v Adams* (1560) 2 Dyer 177b; *Rector of Chedington's Case* (1598) 1 Co Rep 148b at 154b. Where the premises are subject in part to lease A and in part to lease B, and the new lease is to begin after the determination of lease A and B, it will begin as to each part on the determination of the lease of that part: *Windham's (Justice) Case* (1589) 5 Co Rep 7a.

5 *Miller v Manwaring* (1635) Cro Car 397 at 399.

6 Law of Property Act 1925 s 149(3). As to the terms to which s 149(3) does not apply see PARA 106 ante.

7 *Re Strand and Savoy Properties Ltd, DP Development Co Ltd v Cumbrae Properties Ltd* [1960] Ch 582, [1960] 2 All ER 327.

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### 238. Duration of term.

The duration of the term must be fixed either by specifying the number of years in the first instance or by referring to some collateral matter in itself certain or capable before the lease takes effect of being rendered certain<sup>1</sup>. A lease granted with a provision that the tenant is to give up possession by a certain date is valid, as it will be construed as a term certain to that date with an option to the tenant to determine the lease at an earlier date<sup>2</sup>. If to a certain term the lease purports to add a term which is uncertain, it is valid only as to the certain term<sup>3</sup>. The term may be for any length of time, however great, and in building leases terms of 99 years or 999 years are often granted; but there must be a definite limit. There cannot be a lease in perpetuity<sup>4</sup>, except by virtue of statute<sup>5</sup>. An instrument purporting to create a perpetual lease at a rent would operate, if at all, as a conveyance in fee simple subject to a perpetual rentcharge, or as an agreement to convey such an estate<sup>6</sup>.

If the maximum duration of the term is fixed, the lease may be subject to determination within the period; and this may be provided either by a provision that the lease may be determined by notice on a given event<sup>7</sup>, for example, upon the termination of a war<sup>8</sup>, or by a provision that the lease is to endure only during the continuation of a specified state of affairs<sup>9</sup>, as, for example, while the tenant remains in the landlord's employment<sup>10</sup>, or continues to occupy the premises<sup>11</sup>,

so that, upon that state of affairs ceasing, the lease automatically determines. The duration of a term, once fixed, may be altered with retrospective effect<sup>12</sup>. A subtenancy at a weekly rent, with a provision that the rent is not to be raised during the head term, gives the subtenant a right to hold until the end of that term<sup>13</sup>.

Certain long residential tenancies at low rents<sup>14</sup> and business tenancies<sup>15</sup> have been afforded a measure of security of tenure by the statutory continuation of those tenancies after the end of the contractual term.

1 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL (tenancy to continue until landlord required land for road widening purposes held void for uncertainty); *Lace v Chantler* [1944] KB 368, sub nom *Lace v Chandler* [1994] 1 All ER 305, CA (lease 'for the duration of the war' invalid); cf *Eker v Becker* [1946] 1 All ER 721. Leases 'for the duration of the war' were converted into terms of ten years determinable by notice at the end of the war by the Validation of War-time Leases Act 1944 s 1 (repealed). See also *Birrell v Carey* (1989) 58 P & CR 184, CA (lease for so long as company is trading invalid). A lease void for uncertainty is void even though the uncertainty may be made certain by either party eg by service of a notice: *Prudential Assurance Co Ltd v London Residuary Body* supra, overruling on this point *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (as explained in *Prudential Assurance Co Ltd v London Residuary Body* (1992) 63 P & CR 386, [1992] 1 EGLR 47, CA). A lease for a term from a fixed date for so many years as A shall name is, however, valid if A specifies the length of the term before the death of the landlord or the tenant: *Bishop of Bath's Case* (1605) 6 Co Rep 34b at 35a, 35b; Co Litt 45b; Shep Touch (8th Edn) 274.

2 *Joseph v Joseph* [1967] Ch 78, [1966] 3 All ER 486, CA.

3 *Say v Smith* (1563) 1 Plowd 269 at 271; *Gwynne v Mainstone* (1828) 3 C & P 302.

4 *Doe d Robertson v Gardiner* (1852) 12 CB 319 at 333; *Sevenoaks, Maidstone and Tunbridge Rly Co v London, Chatham and Dover Rly Co* (1879) 11 ChD 625 at 635. As to covenants for perpetual renewal see PARAS 540-541 post.

5 *Sevenoaks, Maidstone and Tunbridge Rly Co v London, Chatham and Dover Rly Co* (1879) 11 ChD 625; *Manchester Ship Canal Co v Manchester Racecourse Co* [1900] 2 Ch 352 at 360 per Farwell J (affd [1901] 2 Ch 37, CA).

6 It would, perhaps, operate as a conveyance subject to a rentcharge if made by deed in favour of the tenant and his heirs (*Doe d Robertson v Gardiner* (1852) 12 CB 319); otherwise it might operate as an agreement for a conveyance, or, if not, a tenancy from year to year would arise on payment of rent (*Doe d Robertson v Gardiner* supra; cf *Re Coleman's Estate* [1907] 1 IR 488).

7 As to leases determinable with life see PARAS 240-241 post.

8 *Great Northern Rly Co v Arnold* (1916) 33 TLR 114. This decision can, however, be supported only on the ground that the tenancy was for a fixed period determinable on the cessation of war: see *Lace v Chantler* [1944] KB 368 at 371, sub nom *Lace v Chandler* [1944] 1 All ER 305 at 306, 307, CA.

9 As to leases for a life or lives see PARAS 240-241 post; *Hughes and Crowther's Case* (1610) 13 Co Rep 66; *Wright d Plowden v Cartwright* (1757) 1 Burr 282; Co Litt 225a; Shep Touch (8th Edn) 274; and see *Truepenny's Case* (1587) cited in Cro Eliz 270 (reported sub nom *Baldwin v Cooke* Moore KB 239); *Daniel v Waddington* (1615) Cro Jac 377; cf *Nesham v Selby* (1872) LR 13 Eq 191; affd 7 Ch App 406.

10 *Wrenford v Gyles* (1597) Cro Eliz 643 (where, however, it was held that the lease did not determine by the landlord's death).

11 *Doe d Lockwood v Clarke* (1807) 8 East 185; *Doe d Shaw v Steward* (1834) 1 Ad & El 300 (condition for occupation in a will). The condition itself must not be void for uncertainty: see *Re Field's Will Trusts, Parry-Jones v Hillman* [1950] Ch 520, [1950] 2 All ER 188.

12 In *Baker v Merckel (Anson, third party)* [1960] 1 QB 657, [1960] 1 All ER 668, CA, a lease was granted for a period of seven years with a provision that the tenant might during the term give notice that the lease was to have effect as if granted for 11 years, and it was held that the retrospective enlargement of the term was valid.

13 *Adams v Cairns* (1901) 85 LT 10, CA.

14 See PARA 1196 et seq post.

15 See PARA 701 et seq post.

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### 239. Time of quitting.

A lease for a term generally<sup>1</sup> requires no notice to quit at the end of the term, whether the term expires by effluxion of time<sup>2</sup>, or on the happening of an event on which it is expressed to determine<sup>3</sup>. The tenant is not bound to quit until midnight on the last day of the term<sup>4</sup>.

A tenant is not justified in quitting before the end of the term because the landlord has failed in the performance of a stipulation on his part, such as a covenant to repair<sup>5</sup>. In such a case the tenant remains liable for the rent, although he may be entitled to recover from the landlord damages for breach of the covenant; and those damages may include the cost of substituted lodgings until the premises are repaired<sup>6</sup>. The tenant may be entitled to set off his claim for damages against any rent due from him<sup>7</sup>.

The lease may provide for different parts of the premises to be delivered up at different times<sup>8</sup>; or it may enable the landlord to resume possession of the premises, or part of them, for building or other purposes, on a specified notice<sup>9</sup>. It may also contain a break clause enabling the tenant to give notice to quit on a specified date before the end of the term<sup>10</sup>.

1 As to leases of agricultural holdings see AGRICULTURAL LAND vol 1 (2008) PARA 301 et seq; and as to leases for a term determinable on notice after death, marriage or the formation of a civil partnership see PARAS 240-241 post.

2 *Cobb v Stokes* (1807) 8 East 358.

3 *Right d Flower v Darby and Bristow* (1786) 1 Term Rep 159 at 162. A lease by a partner to a firm of which he is a member determines on the dissolution of the partnership: *Doe d Waithman v Miles* (1816) 1 Stark 181; *Doe d Colnaghi v Bluck* (1838) 8 C & P 464; and see PARTNERSHIP vol 79 (2008) PARA 174.

4 *Re Crowhurst Park, Sims-Hilditch v Simmonds* [1974] 1 All ER 991 at 996, [1974] 1 WLR 583 at 588.

5 *Surplice v Farnsworth* (1844) 7 Man & G 576. The landlord's actions may, however, constitute a repudiation of the lease which the tenant accepts: see PARA 601 post.

6 *Hart v Rogers* [1916] 1 KB 646 at 651 per Scrutton J; *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *McGreal v Wake* [1984] 1 EGLR 42, (1984) 269 Estates Gazette 1254, CA; cf *Morris v Liverpool City Council* (1988) 20 HLR 498, [1988] 1 EGLR 47, CA; and see PARA 276 post. The tenant may be able to deduct the cost of the repairs from the rent which would otherwise be due: see *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; and PARA 266 post.

7 See PARA 266 post.

8 *Doe d Walters v Houghton* (1827) 1 Man & Ry KB 208. Consequently a claim for possession lies for the part to be delivered up first, before the time for delivering up the rest has arrived: *Doe d Waters v Houghton* supra.

9 The premises must be genuinely wanted for the purpose specified: *Gough v Worcester and Birmingham Canal Co* (1801) 6 Ves 354; *Russell v Coggins* (1802) 8 Ves 34. The resumption may extend to the whole of the premises: *Doe d Lady Wilson v Abel* (1814) 2 M & S 541; *Doe d Gardner v Kennard* (1848) 12 QB 244; *Liddy v Kennedy* (1871) LR 5 HL 134. If possession is resumed by an assignee of part of the premises, any liability to pay compensation attaches to him and not to the landlord: *Bath v Bowles* (1905) 93 LT 801, DC.

10 See PARAS 141-143 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/5. DURATION OF TENANCY/(6) LEASE FOR A TERM DETERMINABLE ON NOTICE AFTER DEATH, MARRIAGE ETC/240. Nature of interest.

## **(6) LEASE FOR A TERM DETERMINABLE ON NOTICE AFTER DEATH, MARRIAGE ETC**

### **240. Nature of interest.**

A lease or underlease, at a rent or in consideration of a fine, for life or lives, or for any term of years determinable with life or lives, or on the marriage of the lessee, or on the formation of a civil partnership between the lessee and another person, or any contract therefor, made before, on or after 1 January 1926, takes effect<sup>1</sup> as a lease, underlease, or contract therefor, for a term of 90 years determinable after, as the case may be, the death or marriage of, or the formation of a civil partnership by, the original lessee or the survivor of the original lessees, by notice in writing<sup>2</sup>. If the lease, underlease or contract therefor is made determinable on the dropping of the lives of persons other than or besides the lessees, the notice is capable of being given after the death of any person or of the survivor of any persons, whether or not including the lessees, on the cesser of whose life or lives the lease, underlease or contract is made determinable, instead of after the death of the original lessee or of the survivor of the original lessees<sup>3</sup>. The notice must be in writing, and be at least one month's notice to determine the tenancy on one of the quarter days applicable to the tenancy<sup>4</sup>, or, if no quarter days are specially applicable to the tenancy, on one of the usual quarter days<sup>5</sup>. The notice may be given either by the lessor<sup>6</sup> or the persons deriving title under him, to the person entitled to the leasehold interest, or, if no such person is in existence, by affixing it to the premises; or the notice may be given by the lessee or other persons in whom the leasehold interest is vested to the lessor or the persons deriving title under him<sup>7</sup>. These provisions do not, however, have effect where a person is given the right to occupy premises rent-free for life as there is no rent or premium<sup>8</sup>.

Where a lease, underlease or contract:

389 (1) relates to commonhold land<sup>9</sup>; and

390 (2) would take effect by virtue of the above provisions<sup>10</sup> as a lease, underlease or contract of the kind mentioned above,

the lease, underlease or contract is to be treated as if it purported to be a lease, underlease or contract of the kind referred to in head (2) above<sup>11</sup> so that the limitations on leasing commonhold units<sup>12</sup> apply to those purported leases, underleases or contracts<sup>13</sup>.

<sup>1</sup> Before 1 January 1926, a lease for the tenant's life or the life or lives of any other person or persons created a freehold estate, in the latter case an estate pur autre vie: Co Litt 41b. The lease could also be for the lives of the tenant and some other person or persons: Co Litt 41b; *Wright d Plowden v Cartwright* (1757) 1 Burr 282. A tenant who entered into a written agreement to rent a house, the landlord agreeing not to raise the rent or to give notice to quit so long as the tenant paid it regularly, was entitled to obtain the grant of a lease for his life: *Zimble v Abrahams* [1903] 1 KB 577, CA; *Re Coleman's Estate* [1907] 1 IR 488; cf *Austin v Newham* [1906] 2 KB 167, DC. This was so even though prima facie the tenancy was a weekly one: *Adams v Cairns* (1901) 85 LT 10, CA. Alternatively, if the landlord had only a leasehold interest then the tenant was entitled to obtain the grant of a lease for the residue of the landlord's term if the tenant lived so long: *Kusel v Watson* (1879) 11 ChD 129, CA; *Re King's Leasehold Estates, ex p East of London Rly Co* (1873) LR 16 Eq 521; and see *Siew Soon Wah alias Siew Pooi Yong v Yong Tong Hong (sued as a firm)* [1973] AC 836, [1973] 2 WLR 713, PC. The agreement could, however, be so worded as to create merely a personal obligation not binding on subsequent purchasers of the reversion even if they had notice of the agreement: *Roberts v Tregaskis* (1878) 38 LT 176. If the duration of the lease was made dependent on the landlord's power of leasing, the lease was void for uncertainty: *Wood v Beard* (1876) 2 Ex D 30.



2 Law of Property Act 1925 s 149(6) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 1(1)-(3)). The Law of Property Act 1925 s 149(6) (as so amended) applies only where the tenancy is automatically determinable with life; and it does not apply to a tenancy determinable by notice in the event of the tenant's death: *Bass Holdings Ltd v Lewis* [1986] 2 EGLR 40, CA. Nor does the Law of Property Act 1925 s 149(6) (as amended) apply to a term taking effect in equity under a settlement, or created out of an equitable interest under a settlement for mortgage, indemnity, or other like purposes: Law of Property Act 1925 s 149(6) proviso (a). Formerly, where no reference to survivors was made in a lease, then, if the lease was to A during the lives of B and C, A continued to hold during the survivor's life; but it was otherwise where the lease was for 100 years if B and C should so long live: *Brudnell's Case* (1592) 5 Co Rep 9a; *Hughes and Crowther's Case* (1610) 13 Co Rep 66. As to copyholds held for lives see REAL PROPERTY vol 39(2) (Reissue) PARAS 39-41. For the meaning of 'lease' see PARA 145 note 1 ante.

3 Law of Property Act 1925 s 149(6) proviso (c).

4 Ibid s 149(6).

5 Ibid s 149(6) proviso (d).

6 For these purposes, 'lessor' includes an underlessor and a person deriving title under a lessor or underlessor: ibid s 205(1)(xxiii).

7 Ibid s 149(6).

8 *Binions v Evans* [1972] Ch 359, [1972] 2 All ER 70, CA.

9 As to commonhold land see COMMONHOLD vol 13 (2009) PARA 302.

10 I.e. the Law of Property Act 1925 s 149(6) (as amended): see the text and notes 2-7 supra.

11 Ibid s 149(7), (8) (added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 3).

12 I.e. the Commonhold and Leasehold Reform Act 2002 ss 17, 18 (residential and non-residential leases of commonhold units): see PARA 18 ante.

13 See the Law of Property Act 1925 s 149(8) (as added: see note 11 supra). The purported lease, underlease or contract may be invalid if it is a lease of a residential commonhold unit (see the Commonhold and Leasehold Reform Act 2002 s 17(1)) or take effect subject to any provision of the commonhold community statement in the case of a lease of a commonhold unit which is not residential: see PARA 18 ante.

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## **241. Lives should be specified.**

A lease for life without mentioning the life which was to define its duration was formerly deemed to be for the tenant's life<sup>1</sup>, unless the landlord might lawfully grant a lease for his own life but not for the tenant's life in which case the lease was taken to be for the landlord's life<sup>2</sup>. Similar principles would, it seems, apply in deciding upon the cesser of whose life the term for 90 years, into which leases for lives are now converted<sup>3</sup>, would become determinable by notice. It is always desirable that the life should be clearly specified in the habendum of the lease; and, where the lease is determinable upon the cesser of lives other than that of the lessee, the lives must be so specified. On an assignment of the lease with a covenant that the lease is a valid and subsisting lease determinable upon notice after the dropping of the lives mentioned in it, there is no implied covenant that all the original lives are still in existence<sup>4</sup>.

1 An estate for a person's own life is deemed to be greater than an estate for the life of another; and, as a lease is to be construed most strongly against the grantor, it was the tenant's life which set the measure of the

term: Co Litt 41b, 42a; *Re Coleman's Estate* [1907] 1 IR 488. In a demise by A to B for the term of 'his' life, the word 'his' usually referred to B; but it referred to A if it appeared upon the whole instrument that such was the intention: *Doe d Pritchard v Dodd* (1833) 5 B & Ad 689 at 693.

2 Co Litt 42a. In *Doe d Bromfield v Smith* (1805) 6 East 530 such a lease was held to be for the joint lives of the landlord and the tenant.

3 See PARA 240 ante.

4 *Coates v Collins* (1871) LR 7 QB 144, Ex Ch. As to the presumption of death after absence for seven years see CIVIL PROCEDURE vol 11 (2009) PARAS 1100-1101.

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## 6. PAYMENT OF RENT

### (1) NATURE AND RESERVATION OF RENT

#### 242. Nature of rent.

Rent is the recompense paid by the tenant to the landlord for the exclusive possession of corporeal hereditaments<sup>1</sup>. It need not consist of the payment of money. It may consist in the render of chattels<sup>2</sup>, or the performance of services<sup>3</sup>, but rent of this nature constitutes rent within the meaning of the Rent Act 1977<sup>4</sup> only if the parties to a tenancy otherwise subject to that Act have quantified its value in terms of money<sup>5</sup>. The possibility of distraining is the mark of rent, and so it may not be reserved out of incorporeal hereditaments, since the landlord may not distrain thereon<sup>6</sup>; but it may be reserved out of a remainder or reversion, since the landlord may distrain when the property falls into possession<sup>7</sup>.

The modern conception of rent is a payment which a tenant is bound by contract to make to his landlord for the use of the property let<sup>8</sup>. Rent does not necessarily represent the annual produce of the land; a royalty, notwithstanding that it is reserved in respect of substances which are taken from the land so as to cause its permanent diminution, is a true rent<sup>9</sup>. An annual payment which is described as a premium but is payable substantially throughout the whole of the period of the lease may be rent<sup>10</sup>. A single rent reserved in respect of the whole of the demised land issues or becomes due out of every part of the land, and, therefore, the landlord may distrain for it on any part<sup>11</sup>; but in a single lease separate rents may be reserved in respect of different parts of the demised premises<sup>12</sup> and may be made payable at different times<sup>13</sup>.

The reservation of rent is not necessary for the creation of a tenancy<sup>14</sup>. The court will normally accept that a payment which the parties have described as rent is rent but will not infer that a payment is rent if there is a more likely explanation such as that it is for household expenses<sup>15</sup>.

1 Rent, ie rent service, must be distinguished from a rentcharge, ie an annual sum issuing out of land but not as an incident of tenure: see DISTRESS vol 13 (2007 Reissue) PARA 905; REAL PROPERTY vol 39(2) (Reissue) PARA 83; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 753 et seq. Special kinds of rent are sometimes referred to; these include ground rent, which is the sum paid by the owner or builder of houses for the use of the land to build on, and rack rent, which is generally a rent representing the gross annual value of the holding (see REAL PROPERTY vol 39(2) (Reissue) PARA 85; cf the definition in the Highways Act 1980 s 329(1) (as amended) (see PARA 268 note 6 post), and in the Public Health Act 1936 s 343(1) (as amended) (see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 116)). The former rent seck was a bare rent for which no distress could be made: see DISTRESS vol 13 (2007 Reissue) PARA 905. As to service charges see PARA 319 et seq post.

2 Eg at one time, hens, spurs, horses or wheat: *Co Litt* 142a; *Pitcher v Tovey* (1692) 4 Mod Rep 71. In *Lanyon v Carne* (1669) 2 Saund 161 a reservation in a lease for lives of a heriot payable on each tenant's death was treated as a rent, and the heriots were not payable after the determination of the term in the tenants' lives.

3 See eg *Co Litt* 96a (sheep shearing); *Doe d Tucker v Morse* (1830) 1 B & Ad 365 (carrying coals); *Doe d Edney v Benham* (1845) 7 QB 976 (cleaning a church); *Duke of Marlborough v Osborn* (1864) 5 B & S 67 (work with horses and cart); *Montague v Browning* [1954] 2 All ER 601, [1954] 1 WLR 1039, CA (cleaning a synagogue). The landlord may not, however, reserve as rent a right involving the actual use by him of the land, as the vesture or herbage: see *Co Litt* 142a (where such a right is called 'parcel of the annual profits'). This phrase is, however, misleading, for the landlord may reserve part of the produce if it is delivered by the tenant, as in corn rents: see *Master and Brehren of the House of St Cross Hospital v Lord Howard de Walden* (1795) 6 Term Rep 338 at 343. Reservation of the actual use of the land is, however, repugnant to the grant: *Co Litt* 142a.

4 See PARA 862 post.

5 See eg *Montague v Browning* [1954] 2 All ER 601, [1954] 1 WLR 1039, CA; and PARA 862 post; cf *Barnes v Barratt* [1970] 2 QB 657, [1970] 2 All ER 483, CA (value of services not quantified by the parties; they were held not to be 'rent' for the purposes of the Rent Acts); followed in *Bostock v Bryant* (1990) 61 P & CR 23, [1990] 2 EGLR 101, CA. Cf the Housing Act 1988 s 1(2), Sch 1 para 2(2) (as substituted and amended); and PARA 1026 note 4 post; s 14(4) (as amended); and PARA 1092 note 5 post.

6 'A rent must be reserved out of the lands or tenements where unto the lessor may have recourse or resort to distrain': *Co Litt* 47a; *Butt's Case* (1600) 7 Co Rep 23a at 24a; and see DISTRESS vol 13 (2007 Reissue) PARA 909. Apparently the Crown may reserve rent out of incorporeal hereditaments, as it may distrain on any tenant's land: *Co Litt* 47a note 284.

7 *Co Litt* 47a, 142a.

8 See *Property Holding Co Ltd v Clark* [1948] 1 KB 630 at 648, [1948] 1 All ER 165 at 173, CA, per Evershed LJ. See also *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 All ER 1003, [1974] 1 WLR 728, CA (overruling in part, and disapproving on this point, *Re Essoldo (Bingo) Ltd's Underlease, Essoldo Ltd v Elcresta Ltd* (1971) 23 P & CR 1); *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 956, [1977] 2 All ER 62 at 93, HL.

9 *R v Westbrook, R v Everist* (1847) 10 QB 178 at 203; *Daniel v Gracie* (1844) 6 QB 145; *Barrs v Lea* (1864) 33 LJ Ch 437; *Coal Commission v Earl Fitzwilliam's Royalties Co* [1942] Ch 365, [1942] 2 All ER 56.

10 *Samuel v Salmon and Gluckstein Ltd* [1946] Ch 8, [1945] 2 All ER 520 (premiums payable for 21 years under a lease for 22 years held to be rent reserved within the meaning of the War Damage Act 1943 s 50(3) (repealed)). As to payments which are not rent see PARA 243 post. See also *Woods v Wise* [1955] 2 QB 29, [1955] 1 All ER 767, CA (extrinsic evidence held to be admissible to show the true nature of the transaction where contravention of what is now the Rent Act 1977 s 119 (as amended) (see PARA 931 post) is in question); *Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777, CA (for the purposes of the general law of landlord and tenant rent payable three years in advance held not to lose its character as 'rent' so as to become a premium); *Brecker Grossmith & Co v Canworth Group Ltd* [1974] 3 All ER 561 (meaning of 'rent reserved' in the Royal Institution of Chartered Surveyors' scale).

11 *Hargrave v Shewin* (1826) 6 B & C 34; *Curtis v Spitty* (1835) 1 Bing NC 756 at 760.

12 *Knight's Case* (1588) 5 Co Rep 54b at 55a; Gilbert on Rents (1758) 34-35.

13 *Coomber v Howard* (1845) 1 CB 440.

14 *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA, explaining dicta of Lord Templeman in *Street v Mountford* [1985] AC 809 at 825, [1985] 2 All ER 289 at 299, HL (overruled on other grounds by *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL); *AG Securities v Vaughan* [1990] 1 AC 417 at 430, [1988] 2 All ER 173, CA, per Fox LJ (revsd on a different point [1990] 1 AC 417 at 451, [1988] 3 All ER 1058, HL).

15 *Bostock v Bryant* (1990) 61 P & CR 23, [1990] 2 EGLR 101, CA (payment by occupants of majority of house of gas and electricity bills held not to be rent).

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### 243. Payments which are not rent.

As a rent may be reserved only on a demise<sup>1</sup> of corporeal hereditaments, the following payments, even though recoverable by virtue of the contract, are not rent:

- 391 (1) payments reserved on the grant of a licence for the use of premises<sup>2</sup>;
- 392 (2) payments reserved on a lease of an incorporeal hereditament<sup>3</sup>;
- 393 (3) payments reserved on a lease of chattels<sup>4</sup>;
- 394 (4) payments, not included in the reservation, which are agreed to be made in addition to the rent<sup>5</sup>, such as the payment of a premium by instalments for the granting of a lease<sup>6</sup>;
- 395 (5) payments made under a covenant of guarantee contained in a licence to assign<sup>7</sup>;
- 396 (6) payments on account of a service charge which is not reserved as a rent<sup>8</sup>;
- 397 (7) if the demise was by lease by deed, payments by way of increased rent which the tenant agrees, otherwise than by deed, to make subsequently to the demise<sup>9</sup>; and
- 398 (8) payments for dilapidations<sup>10</sup>.

In contrast, where a rent reserved by a lease by deed is subject to revision, whether by virtue of a rent review clause contained in the lease or by reason of statute<sup>11</sup>, the amount of the revised rent will be true rent and the revision will not create a new demise<sup>12</sup>. Where the tenancy is one which does not require to be by deed, so that it may be varied orally, or where the variation is itself effected by deed, it is in any case possible to reserve an additional rent in the strict technical sense without a surrender of the old tenancy explicitly or by operation of law<sup>13</sup>.

1 Formerly sums reserved as rent on a mere agreement for a lease under which the intending tenant had entered could not be distrained for (*Hegan v Johnson* (1809) 2 Taunt 148; *Dunk v Hunter* (1822) 5 B & Ald 322; *Regnart v Porter* (1831) 7 Bing 451) until a yearly tenancy had arisen by payment of one of those sums; but now such an agreement can usually be specifically enforced, and, if so, it is equivalent to a lease, and the landlord has the remedy of distress (*Walsh v Lonsdale* (1882) 21 ChD 9, CA: see PARA 76 ante). As to reservation of rent see also *Earl Inchiquin v Burnell* (1795) 3 Ridg Parl Rep 376 at 418.

2 *Hancock v Austin* (1863) 14 CBNS 634; cf *Selby v Greaves* (1868) LR 3 CP 594 (exclusive possession given of part of a room in a factory). See also *Errington v Errington and Woods* [1952] 1 KB 290, [1952] 1 All ER 149, CA. As to the distinction between a lease and a licence see PARA 7 et seq ante.

3 Eg a fair (*Jewel's Case* (1588) 5 Co Rep 3a); or tithes (*Dean and Chapter of Windsor v Gover* (1671) 2 Saund 302; *Gardiner v Williamson* (1831) 2 B & Ad 336 at 339); or an easement (*Buszard v Capel* (1828) 8 B & C 141 at 150; affd (1829) 6 Bing 150, Ex Ch). The lease leaves, however, a reversion in the owner to which the payments in the nature of rent are attached, and the right to receive them passes to the assignee of the reversion: *Lord Hastings v North Eastern Rly Co* [1898] 2 Ch 674 at 678; affd [1899] 1 Ch 656 at 665, CA; sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL. A payment reserved on the grant of an easement by a tenant will cease with his tenancy: *Jones v Dorothea Co* (1887) 58 LT 80.

4 See *Spencer's Case* (1583) 5 Co Rep 16a.

5 *Smith v Mapleback* (1786) 1 Term Rep 441 at 445; *Cox v Harper* [1910] 1 Ch 480, CA (payment in lieu of premium for the purchase of goodwill); *Marquis of Breadalbane v Robertson* 1914 51 SLR 156 (payment by the tenant of part of a fire insurance premium on the premises held not part of the rent); *T and E Homes Ltd v Robinson (Inspector of Taxes)* [1976] 3 All ER 497, [1976] 1 WLR 1150 (payments described as royalties in a document made contemporaneously with, but separate from, the lease).

6 *Hill v Booth* [1930] 1 KB 381, CA; *Regor Estates Ltd v Wright* [1951] 1 KB 689, [1951] 1 All ER 219, CA. Such payments, even though expressed to be reserved out of the land, in fact are not so reserved, and merely constitute payments under a personal contract. The right to them does not cease when the tenant purchases the reversion. Certain payments described as premiums may, however, be rent: see PARA 242 ante.

7 *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA.

8 See PARA 319 et seq post.

9 *Hoby v Roebuck and Palmer* (1816) 7 Taunt 157; *Donellan v Read* (1832) 3 B & Ad 899 at 905; *Lambert v Norris* (1837) 2 M & W 333; *Duke of Westminster v Store Properties Ltd* [1944] Ch 129, [1944] 1 All ER 118. To make the increased payment a true rent there must be a new demise: see *Foquet v Moor* (1852) 7 Exch 870. Cf *Phillips v Miller* LR 10 CP 420, Ex Ch; and see the cases cited in note 12 infra.

10 See *Standard Life Co Ltd v Greycoat Devonshire Square Ltd* [2000] EGCS 40, (2000) Times, 10 April (landlord entitled under the terms of the lease to a percentage of the gross rent, in excess of an agreed sum, received by the tenant from its subtenants; payment for dilapidations could not be taken into account when calculating gross rents payable).

11 Eg the revision of the rent of an agricultural holding pursuant to the Agricultural Holdings Act 1986 s 12 (as amended): see AGRICULTURAL LAND vol 1 (2008) PARA 338.

12 *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, [1970] 3 All ER 414, CA (rent revised under what is now the Agricultural Holdings Act 1986 s 12).

13 *Gable Construction Co Ltd v IRC* [1968] 2 All ER 968, [1968] 1 WLR 1426; and see *Fenner v Blake* [1900] 1 QB 426 at 428, DC, per Channell J; *Lord Inchiquin v Lyons* (1887) 20 LR 474 at 478, 497, Ir CA; *Associated London Properties Ltd v Williams (Inspector of Taxes)* [1948] 1 All ER 442, CA.

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#### **244. Single rent in respect of land and chattels.**

Where a single rent is reserved on a lease of land and incorporeal hereditaments<sup>1</sup>, or of land and chattels<sup>2</sup>, the rent is treated as issuing out of the land alone<sup>3</sup>. If the titles to the land and chattels are severed, either the rent will be apportioned or a new agreement will be inferred under which the tenant takes the land at a reasonable proportion of the rent from the person entitled to it and agrees to pay the remainder as compensation to the person entitled to the chattels<sup>4</sup>.

1 *Smith v Bowles* (1617) 2 Roll Abr 451. To be effective as to the incorporeal hereditaments the lease must be by deed (*Gardiner v Williamson* (1831) 2 B & Ad 336), unless the incorporeal hereditaments are appurtenant to the land (see PARA 103 ante).

2 *Collins v Harding* (1597) Cro Eliz 606 at 607; *Farewell v Dickenson* (1827) 6 B & C 251.

3 *Read v Lawnse* (1561) 2 Dyer 212b; *Farewell v Dickenson* (1827) 6 B & C 251 at 257; *Brown v Peto* [1900] 1 QB 346 at 354 (affd [1900] 2 QB 653, CA); *Munster and Leinster Bank v Hollinshead* [1930] IR 187, CA; *Somersfield v Robin* [1946] KB 244, [1946] 1 All ER 218, CA. Thus, rent for furnished lodgings (*Newman v Anderton* (1806) 2 Bos & PNR 224), or for part of a factory with a supply of power (*Selby v Greaves* (1868) LR 3 CP 594; cf *Bentley Bros v Metcalfe & Co* [1906] 2 KB 548, CA) may be distrained for, and is recoverable notwithstanding that the premises are destroyed by fire (*Marshall v Schofield & Co* (1882) 52 LJQB 58, CA).

4 *Salmon v Matthews* (1841) 8 M & W 827 at 833; and see *Charles Hoare & Co v Hove Bungalows Ltd* (1912) 56 Sol Jo 686, CA.

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## **245. Rent must be certain.**

The rent must be certain, or must be so stated that it can afterwards be ascertained with certainty<sup>1</sup>. For this purpose, it is sufficient if, by calculation and upon the happening of certain events, the rent becomes certain; and, provided that it can be so ascertained from time to time, it is no objection that the rent is of fluctuating amount<sup>2</sup>.

An option to renew at such a rental as may be agreed is void unless means are provided of fixing the rent in default of agreement<sup>3</sup>; but, if the criteria for assessing the rent are stipulated but the machinery for doing so is missing, the court can undertake the task<sup>4</sup>.

Where an agreement provides for a fair and reasonable price and provides machinery to ascertain that price applying objective standards but the machinery breaks down, the court will substitute its own machinery to ascertain that price<sup>5</sup>. Thus, in the case of a lease containing provisions for the rent to be reviewed to such rent as shall be agreed, the courts have held that the tenant must pay a fair rent representing what the premises were worth on the review date<sup>6</sup>.

Rent is sufficiently certain if it can be calculated with certainty at the time it becomes payable even if the increase is dependent upon the whim of the landlord<sup>7</sup> and, even if it has not been ascertained by the due date, will be payable retrospectively if the lease so requires on its true construction, there being no absolute rule that rent must be ascertained by the due date<sup>8</sup>.

1 Co Litt 142a; *Parker v Harris* (1692) 1 Salk 262 (reservation 'after the rate' of £18 per annum held void for uncertainty, but the phrase subsequently became widely used by conveyancers). If the rent, although at first uncertain, is afterwards fixed, this will operate as a new demise: see *Watson v Waud* (1853) 8 Exch 335 at 339. The rent may be fixed by arbitration (see *Daly v Duggan* (1839) 7 I Eq R 311), but an agreement for a lease at a rent to be fixed by arbitration will not be specifically enforced if the arbitration is improperly conducted (*Chichester v M'Intire* (1830) 4 Bli NS 78). As to rent review clauses see PARA 292 et seq post.

2 *Re Knight, ex p Voisey* (1882) 21 ChD 442 at 458, CA; and see Co Litt 96a (where the service of shearing 'all the sheep pasturing within the lord's manor' is said to have the requisite certainty). Thus the rent may vary with the price of wheat (*Kendall v Baker* (1852) 11 CB 842), with the amount of electrical horsepower generated (*A-G for Ontario v Canadian Niagara Power Co* [1912] AC 852, PC), or with the tenant's income (*Smith v Cardiff Corp'n* (No 2) [1955] Ch 159 at 173, [1955] 1 All ER 113 at 120) or with the amount of the tenant's turnover (*Debenhams Retail plc v Sun Alliance and London Insurance Co Ltd* [2005] EWCA Civ 868, [2005] STC 1443, [2005] 3 EGLR 34 (rent calculated by reference to a company's annual turnover ('the gross amount of total sales') held to include VAT). See also DISTRESS vol 13 (2007 Reissue) PARA 910; HOUSING vol 22 (2006 Reissue) PARAS 255-256. A tenant for life is authorised to reserve a variable rent to a mining lessee: see the Settled Land Act 1925 s 45(1); and SETTLEMENTS vol 42 (Reissue) PARA 843 (but note that subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see SETTLEMENTS vol 42 (Reissue) PARA 676).

Although a rent may be fluctuating in amount, a clause which purports to reserve a rent at a fixed annual sum of money and to measure its value by reference to the value of gold may well be construed, if its language permits, as reserving a fixed annual rent of the amount stated: *Treseder Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127, [1956] 2 All ER 33, CA (rent varying with value of gold sterling). In this case both Lord Goddard CJ at first instance and Harman J in the Court of Appeal accepted the validity of a clause in a lease causing the rent to fluctuate so as to protect the landlord against the changing value of money. On appeal it was held that the clause in the particular lease failed to have that effect, but this result was the consequence of its wording. See also *British Railways Board v Elgar House Ltd* (1969) 209 Estates Gazette 1313 (an equity rent provision giving the landlord a share in the profit which over the period of the lease the tenant might be expected to obtain); *Greater London Council v Connolly* [1970] 2 QB 100, [1970] 1 All ER 870, CA (rent 'liable to be increased or decreased on notice being given').

3 *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426.

4 *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505.

5 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL; applied in *Trustees of National Deposit Friendly Society v Beatties of London Ltd* [1985] 2 EGLR 59.

6 *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Lear v Blizard* [1983] 3 All ER 662 (option to renew). In each of those cases tenant's improvements were disregarded in the assessment of rent.

7 *Greater London Council v Connolly* [1970] 2 QB 100, [1970] 1 All ER 870, CA.

8 *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 All ER 1003, [1974] 1 WLR 728, CA, disapproving *Re Essoldo (Bingo) Ltd's Underlease, Essoldo Ltd v Elcresta Ltd* (1971) 23 P & CR 1; approved in *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL.

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## 246. Agreements to increase or reduce rents.

Unless the lease contains a provision<sup>1</sup> permitting the landlord to increase the amount of the rent or unless special statutory provisions apply<sup>2</sup>, the landlord may increase the rent only with the tenant's agreement, and similarly the tenant, in the absence of any relevant provision in the lease, may not reduce the rent unless the landlord agrees to that reduction<sup>3</sup>; but, subject to any special statutory provisions<sup>4</sup>, if both the landlord and the tenant agree to vary the terms of the tenancy, they may increase or decrease the rent<sup>5</sup>. An agreement to vary the lease may, however, be unenforceable for want of consideration if no equity has arisen<sup>6</sup>. A landlord who, in the absence of consideration, has promised to accept a reduced rent will not be permitted to act inconsistently with his promise, if it was intended to be legally binding and to be acted upon and it was in fact acted upon, unless he has given reasonable notice of his intention to demand the full rent to which he is entitled under the contract of tenancy<sup>7</sup>. The mere payment and acceptance of the reduced rent does not operate as a new demise<sup>8</sup>. An increased rent may be agreed upon orally for good consideration, such as the execution of improvements<sup>9</sup>, but it may be recovered only on the agreement and does not pass with the reversion<sup>10</sup>. As in the case of reduction of rent, the mere fact of an increase of rent does not operate as a new demise<sup>11</sup>.

1 le a rent review clause. Technically the rent is not varied but the amount of the rent reserved is ascertained: see PARA 243 notes 6, 11-13 ante, PARA 292 note 4 post.

2 Eg the Rent Act 1977 ss 86, 93, 97(1) (as amended) (periodic tenancies of housing associations etc: see PARAS 905-907 post); the Agricultural Holdings Act 1986 s 12 (as amended) (see AGRICULTURAL LAND vol 1 (2008) PARA 338); the Housing Act 1985 s 25 (as amended) (weekly or other periodic tenancies, not being secure tenancies or introductory tenancies, of dwelling houses let by local housing authorities: see HOUSING vol 22 (2006 Reissue) PARA 256); s 103 (secure tenancies: see PARA 1338 post); the Housing Act 1988 s 13 (as amended) (assured periodic tenancies: see PARA 1091 post); and s 85 (dwelling housing let by housing action trusts on periodic tenancies which are not secure tenancies: see HOUSING vol 22 (2006 Reissue) PARA 356).

3 This does not apply, however, where no lease subsists and where the tenancy is merely a statutory tenancy under the Rent Act 1977 (see PARA 831 post). If that statutory tenancy is a regulated tenancy, either the landlord or the tenant may apply to the rent officer for the determination of a fair rent. On a fair rent being registered, the rent is automatically reduced to the amount registered; and, if that amount exceeds the rent currently payable, the landlord may increase the recoverable rent to the amount of the registered rent by the service of appropriate notices of increase: see PARA 909 et seq post. As to the procedure for increasing rents under the Housing Act 1988 Pt I (ss 1-45) (as amended) see PARA 1091 et seq post.

4 In certain circumstances the Rent Act 1977 makes any agreement to pay an increased rent unenforceable (see PARA 899 post); and in respect of a restricted contract it is an offence to demand rent in excess of a registered rent, notwithstanding any agreement by the tenant to pay it (see s 81(1), (4) (as amended); and PARAS 997, 999 post).

5 It was formerly held that, if the lease was in writing, an agreement for reduction of rent, if it was to be enforceable, had to be evidenced by writing: *O'Connor v Spaight* (1804) 1 Sch & Lef 305 at 306; *Hilton v Goodhind* (1827) 2 C & P 591; and see *Mitas v Hyams* [1951] 2 TLR 1215, CA. At common law a deed could be varied only by a deed; but the equitable rule now prevails.

6 See *Fitzgerald v Lord Portarlington* (1835) 1 Jo Ex Ir 431; *Crowley v Vitty* (1852) 7 Exch 319. Alternatively, the consideration may be too uncertain: *Morgan v Rainsford* (1845) 8 1 EQ R 299. As to presumption of an agreement for reduction of rent see *Enraght v Haughton* (1845) 8 1 Eq R 274; and as to abatement where the estate is under the administration of the court see *Lateward v Schreiber* (1817) Coop Pr Cas 46; *Millbank v Stevens* (1838) Coop Pr Cas 45. Cf *Fitzgibbon v Flynn* (1837) Sau & Sc 687; *Maguire v Richards* (1838) Sau & Sc 690.

7 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n (applied in *Smith v Lawson* (1998) 75 P & CR 466, CA); and ESTOPPEL vol 16(2) (Reissue) PARA 1082. See also *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA; *Central Street Properties Ltd v Mansbrook Rudd & Co Ltd* [1986] 2 EGLR 33.

8 *Clarke v Moore* (1844) 1 Jo & Lat 723 at 729; *Crowley v Vitty* (1852) 7 Exch 319. Where the landlord agrees to accept the rent by different instalments than those reserved, the original reservation revives on default: *Re Smith and Hartogs, ex p Official Receiver* (1895) 73 LT 221.

9 *Donellan v Read* (1832) 3 B & Ad 899 at 905.

10 See, however, *Burrowes v Gradin* (1843) 1 Dow & L 213 (mortgagee allowed to sue in use and occupation for an increased rent agreed by the tenant with the mortgagor after the mortgage).

11 *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, [1970] 3 All ER 414, CA; and see *Geeckie v Monk, Doe d Monk v Geeckie* (1844) 1 Car & Kir 307 (sub nom *Doe d Monck v Geekie* 5 QB 841); *Kelly v Patterson* (1874) LR 9 CP 681; *Delmege v Mullins* (1875) IR 9 CL 209, Ex Ch.

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## **247. Statutory limitations on the amount of rent.**

The maximum rent payable under tenancies of some properties is limited by statute. The properties chiefly affected are dwelling houses<sup>1</sup> within the Rent Act 1977<sup>2</sup>, including some dwelling houses let by housing associations, housing trusts, the Housing Corporation or the relevant authority for certain purposes of the Housing Associations Act 1985<sup>3</sup>. Under these provisions the landlord or the tenant may refer the amount of the rent to the rent officer or rent tribunal, as the case may be<sup>4</sup>, for a fair rent<sup>5</sup> to be determined.

If the landlord of a dwelling held on an assured periodic tenancy<sup>6</sup> serves a notice of increase, the tenant may refer the rent to a rent assessment committee for a determination of the rent at which the dwelling might reasonably be expected to be let in the open market under an assured tenancy<sup>7</sup>. Similarly, a tenant holding under an assured shorthold tenancy<sup>8</sup> may in some circumstances apply to a rent assessment committee for a determination of the rent which the landlord might reasonably be expected to obtain under the assured shorthold tenancy<sup>9</sup>.

Local housing authorities<sup>10</sup> and housing action trusts<sup>11</sup> may make such reasonable charges as they may determine for the tenancy or occupation of their houses.

In respect of agricultural holdings to which the Agricultural Holding Act 1986 applies, in certain circumstances either the landlord or the tenant may require that the amount of the rent be



revised by arbitration<sup>12</sup>; and in respect of tenancies of business premises<sup>13</sup> where the contractual tenancy is continued by the Landlord and Tenant Act 1954<sup>14</sup> or where the court orders that a new lease is to be granted<sup>15</sup>, the amount of the rent is determined by the court<sup>16</sup>. In respect of farm business tenancies<sup>17</sup> there is a statutory procedure for rent review under the Agricultural Tenancies Act 1995<sup>18</sup>.

Where land is compulsorily hired by a smallholdings authority, the rent to be paid for the land hired must, in default of agreement, be determined by a single valuer appointed by the Secretary of State or, in Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>19</sup>, although a tenant in occupation may by notice require that any claim by him be referred to arbitration under the Agricultural Holdings Act 1986, where that Act applies<sup>20</sup>.

- 1 For this purpose, 'dwelling house' includes a part of a house: see the Rent Act 1977 s 1; and PARAS 818, 821 post.
- 2 See PARA 855 post.
- 3 See the Rent Act 1977 Pt VI (ss 86-97) (as amended), especially s 86 (as amended); and PARAS 905-907 post. For the meaning of 'the relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 20 note 1.
- 4 See ibid s 67 (as amended) (regulated tenancies: see PARA 915 post), s 77(1) (as amended) (restricted contracts, where the reference is to the rent tribunal: see PARA 989 post).
- 5 See PARA 909 et seq post.
- 6 For the meaning of 'assured tenancy' see PARA 1018 post.
- 7 See the Housing Act 1988 s 13 (as amended); and PARA 1091 post.
- 8 For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 post.
- 9 See the Housing Act 1988 s 22 (as amended); and PARA 1096 post.
- 10 See the Housing Act 1985 s 24 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 255.
- 11 See the Housing Act 1988 s 85; and HOUSING vol 22 (2006 Reissue) PARA 356.
- 12 See the Agricultural Holdings Act 1986 s 12 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 338. As to agricultural holdings to which that Act applies see PARA 806 post.
- 13 See the Landlord and Tenant Act 1954 s 23 (as amended), 56(3); and PARAS 706-707, 768 post.
- 14 See PARA 713 post.
- 15 See PARAS 748-755 post.
- 16 See PARAS 753-755 post.
- 17 For the meaning of 'farm business tenancy' see PARA 807 post.
- 18 See the Agricultural Tenancies Act 1995 Pt II (ss 9-14) (as amended); and AGRICULTURAL LAND vol 1 (2008) PARAS 307-309.
- 19 See AGRICULTURAL LAND vol 1 (2008) PARA 540. As to references to the Assembly see PARA 27 note 4 ante.
- 20 See AGRICULTURAL LAND vol 1 (2008) PARA 540.

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## 248. Reserve power to limit rent.

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by order provide for:

- 399 (1) restricting or preventing increases of rent<sup>3</sup> for dwellings<sup>4</sup> which would otherwise take place; or
- 400 (2) restricting the amount of rent which would otherwise be payable on new lettings<sup>5</sup> of dwellings;

and may so provide either generally or in relation to any specified description of dwelling<sup>6</sup>.

The mischief to which this provision is directed is not to counter inflation, but to confer a reserve power to be exercised by the Secretary of State or the Assembly or minister if he or it reasonably judges it necessary or desirable to protect tenants from hardship caused by increased or excessive rents<sup>7</sup>.

In the exercise of this power, and prior to the transfer of functions in relation to Wales, the Secretary of State has made the Rent Acts (Maximum Fair Rent) Order 1999<sup>8</sup>, which is discussed in a later part of this title<sup>9</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions of the Secretary of State under the Landlord and Tenant Act 1985 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For these purposes, 'rent' includes a sum payable under a licence, but does not include a sum attributable to rates, council tax or, in the case of dwellings of local authorities, National Park authorities or new town corporations, to the use of furniture, or the provision of services: Landlord and Tenant Act 1985 s 31(3) (amended by the Environment Act 1995 s 78, Sch 10 para 25(3); and by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 2 para 16). 'New town corporation' means (1) a development corporation established by an order made, or treated as made, under the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq); or (2) the Commission for the New Towns (now part of English Partnerships) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq); Landlord and Tenant Act 1985 s 38. As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

'Local authority' means a district, county, county borough or London borough council, the Common Council of the City of London or the Council of the Isles of Scilly; and in the Landlord and Tenant Act 1985 s 14(4) (as amended) (see PARA 419 post), s 26(1) (as amended) (see PARA 325 post) and 28(6) (as amended) (see PARA 328 post) includes the Broads Authority, a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139), the Metropolitan Police Authority, a joint authority established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq) and the London Fire and Emergency Planning Authority (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217); Landlord and Tenant Act 1985 s 38 (definition amended by the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 26; the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 7; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 60; the Police Act 1996 s 103, Sch 7 para 1(2)(x); the Police Act 1997 s 134(1), Sch 9 para 51; the Greater London Authority Act 1999 ss 325, 328, 423, Sch 27 para 53, Sch 29 Pt I para 44, Sch 34 Pt VIII; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 3 para 69, Sch 7 Pt 5(1)). As to the counties and districts in England and their councils and the counties and county boroughs in Wales see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq; as to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT 29(2) (Reissue) PARA 31 et seq; as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36; and as to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

4 For the meaning of 'dwelling' see PARA 52 note 2 ante.

5 For these purposes, 'new letting' includes any grant of a tenancy, whether or not the premises were previously let, and any grant of a licence: Landlord and Tenant Act 1985 s 31(3).

6 Ibid s 31(1). Any such order must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 31(4). An order may contain supplementary or incidental provisions, including provisions excluding, adapting or modifying any provision made by or under an enactment, whenever passed, relating to rent or the recovery of overpaid rent: s 31(2).

Section 31 (as amended) does not, however, apply to a dwelling forming part of a property subject to a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies, but without prejudice to the application of the Landlord and Tenant Act 1985 s 31 (as amended) in relation to a subtenancy of a part of the premises comprised in such a tenancy: s 32(3).

7 See *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL.

8 See the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, which came into force on 1 February 1999: art 1(1).

9 See PARA 922 post.

## UPDATE

### 248 Reserve power to limit rent

NOTE 3--Definition of 'new town corporation' in Landlord and Tenant Act 1985 s 38 amended: Housing and Regeneration Act 2008 Sch 8 para 36.

Definition of 'local authority' in Landlord and Tenant Act 1985 s 38 further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 42; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 70.

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### 249. Reservation of rent.

The reservation of rent usually commences with the word 'paying' or 'rendering'. In addition to creating a rent for which the remedy of distress will lie, such a word creates, if the tenant executes the lease or a counterpart, a covenant for payment of the rent<sup>1</sup>, although an express covenant is usually inserted in the lease. Conversely, any words which operate as an agreement to pay the rent, such as a covenant<sup>2</sup>, a proviso<sup>3</sup> or a letting at a stated rent<sup>4</sup>, also constitute a good reservation. Whether the lease is oral or by deed, the rent constitutes a debt which is in the same rank as a specialty debt<sup>5</sup>. The obligation of a contractual tenant under a covenant to pay rent, whether express or implied, continues during the currency of the tenancy, so that upon the tenant's death his estate continues to be liable for rent until the tenancy is determined<sup>6</sup>. Where, however, the tenancy was a statutory tenancy only, the tenancy determines or may in some cases be transmitted to another tenant by operation of law upon the tenant's death<sup>7</sup>.

1 *Giles v Hooper* (1690) Carth 135; *Iggulden v May* (1804) 9 Ves 325 at 330. On principle, as the covenant arises on construction of the words, it should be regarded as an express covenant, and this view has often been taken (*Newton v Osborn* (1653) Sty 387; *Porter v Swetnam* (1654) Sty 406; *Hellier v Casbard* (1665) 1 Sid 266; *Steward v Wolveridge* (1832) 9 Bing 60 at 67 (revsd on other grounds sub nom *Wolveridge v Steward* (1833) 1 Cr & M 644)); but more usually it has been treated as an implied covenant (*Paradine v Jane* (1647) Aleyn 26; *Anon* (1670) 1 Sid 447 (pl 9); *Harper v Burgh* (1677) 2 Lev 206; *Webb v Russell* (1789) 3 Term Rep 393 at 402; *Vyvyan v Arthur* (1823) 1 B & C 410; *Iggulden v May* supra at 330; *Church v Brown* (1808) 15 Ves 258 at 264). The practical distinction is that the tenant's liability under an implied covenant does not arise before entry and

would cease on assignment; but on an express covenant it is not so limited. The balance of authority appears, however, to be in favour of the view that, for this purpose at any rate, the covenant is only an implied covenant, or a covenant in law (see Platt on Covenants (1829) 53; 2 Platt on Leases (1847) 87); and in order that the tenant may be liable before entry or after assignment the lease must be by an instrument executed by him (see 2 Platt on Leases (1847) 87; Platt on Covenants (1829) 55). As to the statutory restriction on the recovery of rent after assignment see PARAS 289-291 post.

Under an express covenant for the payment of rent where there is no place specified for payment, it has been held that the tenant must seek out the landlord and pay the rent to him: *Haldane v Johnson* (1853) 8 Exch 689 at 695; and see CONTRACT vol 9(1) (Reissue) PARA 940. If the landlord has been in the custom of calling at the demised premises to collect the rent, the place for payment may by implication become those premises: see *Browne v White* [1947] 2 DLR 309, BC CA. In a proviso for acceptance of a reduced rent if the covenants in the lease are performed, the word 'covenants' does not include the covenant for payment of rent: *M'Kay v M'Nally* (1879) 4 LR Ir 438, CA. For a provision for postponing payment of rent on giving security see *Jones v Winkfield* (1833) 10 Bing 308. As to retention of rent in satisfaction of a debt due from the landlord see *Ledger v Stanton* (1861) 2 John & H 687. Where a surety joins to covenant for payment of rent, any qualification of his liability must be observed in suing on his covenant: *Sicklemore v Thistleton* (1817) 6 M & S 9.

Where there is no express covenant, it has been held that the tenant must be prepared to pay his rent on the demised premises on the appointed day (*Crouche v Fastolfe* (1680) T Raym 418; *Rowe v Young* (1820) 2 Brod & Bing 165 at 234, HL, per Bayley J; and see PARA 259 post), unless some other place has been fixed (Co Litt 201b; *Boroughs' Case* (1596) 4 Co Rep 72b at 73a). As to rent reserved on a Crown lease see *Boroughs' Case* supra.

2 *Drake v Munday* (1631) Cro Car 207.

3 *Harrington v Wise* (1596) Cro Eliz 486.

4 *Doe d Rains v Kneller* (1829) 4 C & P 3 (letting 'at and under the rent of £80' held to constitute an agreement to pay the rent).

5 *Gage (or Gray) v Acton* (1699) 1 Salk 325; *Thompson v Thompson* (1821) 9 Price 464 at 471; *Vincent v Godson* (1854) 4 De GM & G 546 at 551; *Kidd v Boone* (1871) LR 12 Eq 89; *Re Hastings, Shirreff v Hastings* (1877) 6 ChD 610; and see *Talbot v Earl of Shrewsbury* (1873) LR 16 Eq 26.

6 See *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA (weekly tenant of furnished rooms died and the administrator of her estate did not enter into possession of the rooms; the estate held to be liable for rent, although personal liability on the administrator's part would have arisen only if he had taken possession).

7 See PARA 842 et seq post.

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## 250. Rent follows the reversion.

In the case of tenancies granted before 1 January 1996<sup>1</sup>, rent reserved by a lease is annexed and incident to and goes with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease<sup>2</sup>. If it is reserved to a stranger, it is not a true rent and cannot be distrained for, but the stranger may recover it by bringing a claim<sup>3</sup>. Similarly, no rent can be reserved on the assignment of a lease, as no reversion remains in the assignor, but here also the reservation is good as a contract to pay the rent<sup>4</sup>. An assignee of the reversion takes the benefit of a guarantee of rent and covenants (and of a covenant by a guarantor to take a new lease if the existing lease is disclaimed) without there being any express assignment by the assignor<sup>5</sup>.

In the case of a tenancy granted on or after 1 January 1996<sup>6</sup>, the benefit and burden of all landlord and tenant covenants of a tenancy are annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them and pass

on an assignment of the reversion in them<sup>7</sup>. As from the assignment of the reversion the assignee becomes entitled to the benefit of the tenant covenants of the tenancy<sup>8</sup>.

1 The tenancies which are not 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995. For the meaning of 'new tenancy' see PARA 578 post.

2 See the Law of Property Act 1925 s 141(1); and PARA 567 post. At common law it was also proper to leave the law to make the distribution of the rent, without an express reservation to any person: *Whitlock's Case* (1609) 8 Co Rep 69b at 71a. Where there was such an express reservation, slight inaccuracies were overlooked 'for the law uses all industry imaginable to conform the reservation to the estate': *Sacheverel v Frogat* (1671) 1 Vent 161 at 162; and see *Drake v Munday* (1631) Cro Car 207. However, a reservation to the landlord, without mention of his heirs, confined the rent to his life (Co Litt 47a; *Wooton v Edwin* (1607) 12 Co Rep 36), unless it was expressly reserved during the term (*Sacheverel v Frogat* supra as reported in 2 Saund 367). Where the whole rent was reserved to one person and part of the premises belonged to another person who concurred in the lease, the court ordered the rent payable to be apportioned: *Harryman v Collins* (1854) 18 Beav 11.

3 *Jewel's Case* (1588) 5 Co Rep 3a; Littleton's Tenures s 346; Co Litt 143b; *Oates v Frith* (1615) Hob 130; *Cole v Sury* (1627) Lat 264; *Deering v Farrington* (1674) 1 Mod Rep 113; *Dollen v Batt* (1858) 4 CBNS 760 at 768; *Gilbertson v Richards* (1859) 4 H & N 277 at 295. A landlord without title has a reversion by estoppel to which the rent is properly incident: see PARA 4 ante. It has been suggested that the Crown could reserve rent to a stranger (Co Litt 143b); but such a reservation would rather have been of the nature of a rentcharge, and thus would now in most circumstances be precluded by the Rentcharges Act 1977 s 2 (as amended) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774).

4 *Whitton v Bye* (1618) Cro Jac 486; - *v Cooper* (1768) 2 Wils 375; *Parmenter v Webber* (1818) 8 Taunt 593; *Langford v Selmes* (1857) 3 K & J 220; and see PARA 107 ante.

5 *Kumar v Dunning* [1989] QB 193, [1987] 2 All ER 801, CA; *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 643, [1988] 2 All ER 885, HL; *Coronation Street Industrial Properties Ltd v Ingall Industries plc* [1989] 1 All ER 979, [1989] 1 WLR 304, HL.

6 The 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 post.

7 See *ibid* s 3(1); and PARA 580 post.

8 See *ibid* s 3(3)(b); and PARA 580 post.

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## 251. Nature of penal rents.

An increased rent may be reserved in case the tenant commits a breach of the covenants of his lease<sup>1</sup>. Such a rent is commonly known as a penal rent<sup>2</sup>. In general, however, it is not in the nature of a penalty, but is a liquidated sum or succession of sums payable by way of satisfaction<sup>3</sup>. If the increased rent is made payable as rent, and if it has once become payable, it will continue to be payable periodically during the residue of the term<sup>4</sup>, notwithstanding that the breach of covenant has been remedied, as, for example, where land which has been ploughed up has been laid down to grass again<sup>5</sup>, unless the terms of the lease as a whole show that the rent is to be payable only while the breach continues<sup>6</sup>. A receipt of the original rent is not a waiver of the landlord's claim to the additional rent<sup>7</sup>.

Prima facie the tenant is bound to observe his covenants, and the mere circumstance that a penal rent is reserved does not give him the option of breaking the covenant and paying the increased rent<sup>8</sup>. In general he has no such option where a single sum is made payable<sup>9</sup>, or where the landlord has a right of re-entry on breach of the covenant<sup>10</sup>. If, however, the increased rent is payable throughout the remainder of the term, this is an indication that the

tenant is to have the right to break the covenant and render himself liable to the additional rent<sup>11</sup>. Where the tenant does not have the option of breaking the covenant, the landlord is entitled to have a breach prevented by injunction<sup>12</sup>, and, if he has a right of re-entry, he is entitled either to exercise this right and forfeit the lease, or to require payment of the increased rent<sup>13</sup>.

1 Eg if he sells hay off the premises (*Pollitt v Forrest* (1847) 11 QB 949, Ex Ch; *Fielden v Tattersall* (1863) 7 LT 718; *Massey v Goodall* (1851) 17 QB 310; *Legh v Lillie* (1860) 6 H & N 165), or does not follow a specified system of cultivation (*Fuller v Fenwick* (1846) 3 CB 705) or turns pasture into arable land (*Rolfe v Peterson* (1772) 2 Bro Parl Cas 436); but the description of land as pasture in the lease, although sufficient if no evidence to the contrary is given (*Birch v Stephenson* (1811) 3 Taunt 469), is not conclusive (*Skipworth v Green* (1724) 8 Mod Rep 311; and see *Aldridge v Howard* (1842) 4 Man & G 921), and does not include land subsequently turned into pasture by the tenant (*Rush v Lucas* [1910] 1 Ch 437). See, however, note 2 infra.

2 In the case of penal rents reserved in respect of agricultural holdings to which the Agricultural Holdings Act 1986 applies (see PARA 806 post) the landlord may not recover any sum in excess of the damage actually suffered (see s 24; and AGRICULTURAL LAND vol 1 (2008) PARA 331); and in the case of burning heather, rough grass etc with the consent of the Agricultural Land Tribunal the tenant is relieved from all liability for the breach of covenant (see the Hill Farming Act 1946 s 21 (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 361).

3 *Rolfe v Peterson* (1772) 2 Bro Parl Cas 436; *Farrant v Olmius* (1820) 3 B & Ald 692; *Jones v Green* (1829) 3 Y & J 298; *Smith v Ryan* (1844) 9 ILR 235; *Wright v Tracey* (1873) IR 7 CL 134; *Re Earl of Mexborough and Wood* (1882) 47 LT 516; *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332, HL; *Pollitt v Forrest* (1847) 11 QB 949 at 962. As to satisfaction generally see CONTRACT vol 9(1) (Reissue) PARA 1045. If it were a penalty, the landlord could recover only the actual damage suffered. As to the distinction between penalties and liquidated damages see DAMAGES vol 12(1) (Reissue) PARA 1065. An increased rent may be reserved in case the tenant suffers the land to be occupied by other persons (*Greenslade v Tapscott* (1834) 1 Cr M & R 55; *Ponsonby v Adams* (1770) 2 Bro Parl Cas 431, HL), or ceases to reside on the premises (*Ponsonby v Adams* supra), or carries on specified trades (*Weston v Metropolitan Asylum District Managers* (1882) 9 QBD 404, CA).

4 *Bowers v Nixon* (1848) 12 QB 558n; and see *Farrant v Olmius* (1820) 3 B & Ald 692.

5 *Birch v Stephenson* (1811) 3 Taunt 469 at 478.

6 *Domville v Forde* (1873) IR 7 CL 534.

7 *Denton v Richmond* (1833) 1 Cr & M 734 at 742.

8 *French v Macale* (1842) 2 Dr & War 269 at 274, 284; *Bray v Fogarty* (1870) 4 IR Eq 544. Similarly, a provision for a reduction of rent while the tenant observes a 'tied house' covenant does not entitle him to pay the full rent and disregard the tie: *Hanbury v Cundy* (1887) 58 LT 155; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 272; *Hardy v Martin* (1783) 1 Cox Eq Cas 26; *Bringloe v Goodson* (1839) 8 Scott 71. As to covenants relating to licensed premises see PARA 543 et seq post.

9 *City of London v Pugh* (1727) 4 Bro Parl Cas 395 at 397, HL; *French v Macale* (1842) 2 Dr & War 269.

10 See *Barret v Blagrove* (1800) 5 Ves 555.

11 In such a case the parties themselves have fixed the recompense for the act in question: *Woodward v Gyles* (1690) 2 Vern 119; *Rolfe v Peterson* (1772) 2 Bro Parl Cas 436; *French v Macale* (1842) 2 Dr & War 269 at 277; *Gerard v O'Reilly* (1843) 3 Dr & War 414 at 430; *Legh v Lillie* (1860) 6 H & N 165. See also *Aylet v Dodd* (1741) 2 Atk 238 at 239; *Benson v Gibson* (1746) 3 Atk 395 at 396; *Jones v Green* (1829) 3 Y & J 298 at 304.

12 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 272.

13 *Weston v Metropolitan Asylum District Managers* (1882) 9 QBD 404, CA; *Doe d Antrobus v Jepson* (1832) 3 B & Ad 402.

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## 252. Treatment of rent for purposes of VAT and stamp duty land tax.

Where the grant of a lease constitutes a taxable supply liable to VAT at the standard rate, the rent is liable to VAT as constituting the value of the taxable supply made by the landlord to the tenant<sup>1</sup>.

For the purposes of stamp duty land tax, where the chargeable consideration for a transaction consists of rent, particular statutory provision is made for determining the amount of rent payable under a lease where that amount varies in accordance with provision in the lease, or is contingent, uncertain or unascertained<sup>2</sup>. No account is to be taken for the purposes of stamp duty land tax of any provision for rent to be adjusted in line with the retail prices index<sup>3</sup>.

Where:

- 401 (1) A surrenders an existing lease to B ('the old lease') and in consideration of that surrender B grants a lease to A of the same or substantially the same premises ('the new lease');
- 402 (2) the tenant under a lease ('the old lease') of premises to which Part II of the Landlord and Tenant Act 1954<sup>4</sup> applies makes a request for a new tenancy ('the new lease') which is duly executed;
- 403 (3) on termination of a lease ('the head lease') a subtenant is granted a lease ('the new lease') of the same or substantially the same premises as those comprised in his original lease ('the old lease');
- 31 39. (a) in pursuance of an order of a court on a claim for relief against re-entry or forfeiture; or
- 40. (b) in pursuance of a contractual entitlement arising in the event of the head lease being terminated; or
- 32 404 (4) a person who has guaranteed the obligations of a lessee under a lease that has been terminated ('the old lease') is granted a lease of the same or substantially the same premises ('the new lease') in pursuance of the guarantee,

then for the purposes of stamp duty land tax the rent payable under the new lease in respect of any period falling within the overlap period<sup>5</sup> is treated as reduced by the amount of the rent that would have been payable in respect of that period under the old lease<sup>6</sup>. These provisions do not, however, have effect so as to require the rent payable under the new lease to be treated as a negative amount<sup>7</sup>.

<sup>1</sup> See VALUE ADDED TAX. As to the landlord's option to charge VAT on the rent of business premises see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 157.

<sup>2</sup> See the Finance Act 2003 120, Sch 17A para 7(1) (s 120, Sch 17A added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22). As regards rent payable in respect of any period before the end of the fifth year of the term of the lease (1) the provisions of the Finance Act 2003 Pt 4 (ss 42-124) (as amended) apply as in relation to other chargeable consideration; and (2) the provisions of s 51(1), (2) (contingent, uncertain or unascertained consideration) accordingly apply if the amount is contingent, uncertain or unascertained: Sch 17A para 7(2) (as so added). As regards rent payable in respect of any period after the end of the fifth year of the term of the lease, the annual amount is assumed for the purposes of stamp duty land tax to be, in every case, equal to the highest amount of rent payable in respect of any consecutive 12 month period in the first five years of the term; and in determining that amount there must be taken into account (if necessary) any amounts determined as mentioned in head (2) supra but Sch 17A para 9(2) (as added) (deemed reduction of rent for overlap period in case of grant of further lease: see the text to notes 5-6 infra) is to be disregarded: Sch 17A para 7(3) (as so added). These provisions have effect subject to Sch 17A para 8 (as added) (adjustment where rent payable ceases to be uncertain) (see PARA 293 post): Sch 17A para 7(4) (as so added).

3 Ibid Sch 17A para 7(5) (as added: see note 2 supra).

4 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

5 The overlap period is the period between the date of grant of the new lease and what would have been the end of the term of the old lease had it not been terminated: Finance Act 2003 Sch 17A para 9(3) (as added: see note 2 supra).

6 Ibid Sch 17A para 9(1), (2) (as added: see note 2 supra). The rent that would have been payable under the old lease is to be taken to be the amount taken into account in determining the stamp duty land tax chargeable in respect of the acquisition of the old lease: Sch 17A para 9(4) (as so added).

7 Ibid Sch 17A para 9(5) (as added: see note 2 supra).

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## (2) RENT BOOKS

### 253. Duty to provide rent book etc.

Where a tenant<sup>1</sup> has a right to occupy premises as a residence in consideration of a rent payable weekly, the landlord<sup>2</sup> must provide a rent book or other similar document<sup>3</sup> for use in respect of the premises<sup>4</sup>, unless the rent includes a payment in respect of board and the value of that board to the tenant forms a substantial proportion<sup>5</sup> of the whole rent<sup>6</sup>. If the landlord of such premises fails so to provide a rent book or other similar document, he commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>7</sup>; and, if a default in respect of which a landlord is convicted of such an offence continues for more than 14 days after the conviction, the landlord commits a further offence in respect of that default<sup>8</sup>.

If a person demands or receives rent on behalf of the landlord in respect of such premises while the requirement to provide a rent book or other similar document<sup>9</sup> is not complied with, then, unless he shows that he neither knew nor had reasonable cause to suspect that any such requirement had not been complied with, he commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>10</sup>.

1 For these purposes, 'tenant' includes a statutory tenant and a person having a contractual right to occupy the premises: Landlord and Tenant Act 1985 s 4(3)(a). For the meaning of 'statutory tenant' see PARA 52 note 1 ante.

2 For these purposes, 'landlord', in relation to a person having a contractual right to occupy the premises, means the person who granted the right or any successor in title of his, as the case may require: ibid s 4(3)(b). For the meaning of 'landlord' in relation to statutory tenants see PARA 52 note 1 ante.

3 Eg a rent card.

4 Landlord and Tenant Act 1985 s 4(1). The words 'in consideration of a rent payable weekly' in s 4(1) mean rent that is payable as a matter of obligation under the tenancy agreement, and do not necessarily refer to when the rent is in fact paid: see *R (on the application of Dewa) v Marylebone Magistrates' Court* [2004] EWHC 1022 (Admin), [2004] All ER (D) 289 (Apr). As to the information to be contained in rent books see PARA 254 post; as to the local housing authority's power to require the production of rent books see the Housing Act 1985 s 336; and HOUSING vol 22 (2006 Reissue) PARA 456; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under the Landlord and Tenant Act 1985 ss 4, 7 see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

5 As to what is a substantial proportion see the cases decided under the Rent Acts and discussed in PARA 873 post.



6 Landlord and Tenant Act 1985 s 4(2).

7 Ibid s 7(1). See also note 4 supra. As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate see s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

8 Ibid s 7(4).

9 Ie any relevant requirement of ibid s 4: see the text and notes 1-6 supra.

10 Ibid s 7(2). See also note 7 supra.

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## **254. Information to be contained in rent books.**

A rent book or other similar document provided by the landlord<sup>1</sup> must contain notice of the name and address<sup>2</sup> of the landlord of the premises and:

- 405 (1) if the premises are occupied by virtue of a restricted contract<sup>3</sup>, particulars of the rent and of the other terms and conditions of the contract and notice of such other matters as may be prescribed<sup>4</sup>;
- 406 (2) if the premises are let on or subject to a protected<sup>5</sup> or statutory<sup>6</sup> tenancy or let on an assured tenancy<sup>7</sup>, notice of such matters as may be prescribed<sup>8</sup>.

If the premises are occupied by virtue of a restricted contract or let on or subject to a protected or statutory tenancy or let on an assured tenancy, the notice and particulars so required must be in the prescribed form<sup>9</sup>.

If the landlord of such premises fails to provide the information so required, he commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>10</sup>; and, if a default in respect of which a landlord is convicted of such an offence continues for more than 14 days after the conviction, the landlord commits a further offence in respect of that default<sup>11</sup>.

If a person demands or receives rent on behalf of the landlord in respect of such premises while the requirement to provide information in a rent book or other similar document<sup>12</sup> is not complied with, then, unless he shows that he neither knew nor had reasonable cause to suspect that any such requirement had not been complied with, he commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>13</sup>.

1 Ie in pursuance of the Landlord and Tenant Act 1985 s 4: see PARA 253 ante. For the meaning of 'landlord' see PARA 253 note 2 ante.

2 For the meaning of 'address' see PARA 52 note 4 ante.

3 For these purposes, 'restricted contract' has the same meaning as in the Rent Act 1977 (see PARA 986 post): Landlord and Tenant Act 1985 s 38.

4 For these purposes, 'prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister which (1) may make different provision for different cases; and (2) must, if made by the Secretary of State, be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: ibid s 5(3).

As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

5 For these purposes, 'protected tenancy' has the same meaning as in the Rent Act 1977 (see PARA 818 post): Landlord and Tenant Act 1985 s 38.

6 For the meaning of 'statutory tenancy' see PARA 52 note 1 ante.

7 le within the meaning of the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq post.

8 Landlord and Tenant Act 1985 s 5(1) (amended by the Housing Act 1988 s 140(1), Sch 17 para 67(1)). By virtue of the Housing (Consequential Provisions) Act 1985 s 2(2), the Rent Book (Forms of Notice) Regulations 1982, SI 1982/1474 (as amended) have effect as if made in exercise of the power so conferred: see note 9 infra.

As to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under the Landlord and Tenant Act 1985 s 5 (as amended), s 7 see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

9 Landlord and Tenant Act 1985 s 5(2) (amended by the Housing Act 1988 Sch 17 para 67(2)). The prescribed form in which, under the Landlord and Tenant Act 1985 s 5 (as amended), notice or particulars are required to be contained in a rent book or other similar document provided in pursuance of s 4 if the premises are (1) occupied by virtue of a restricted contract within the meaning of the Rent Act 1977; (2) a dwelling house let on or subject to a protected or statutory tenancy within the meaning of the Rent Act 1977; (3) a dwelling house subject to a statutory tenancy as defined in the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 post); or (4) a dwelling house let on an assured tenancy or an assured agricultural occupancy within the meaning of the Housing Act 1988 (see PARAS 1018, 1183 post) is as set out in the Rent Book (Forms of Notice) Regulations 1982, SI 1982/1474, reg 3(1), Schedule Pts I-IV (amended by SI 1988/2198; 1990/1067; SI 1993/656) or, in each case, a form substantially to the same effect: Rent Book (Forms of Notice) Regulations 1982, SI 1982/1474, regs 2, 3(1) (amended by SI 1988/2198); Housing (Consequential Provisions) Act 1985 s 2(2). In the cases referred to in heads (1)-(4) supra, such rent book or similar document must contain notice of the matters set out in the appropriate prescribed form, in addition to the name and address of the landlord and the particulars required by the Landlord and Tenant Act 1985 s 5 (as amended): Rent Book (Forms of Notice) Regulations 1982, SI 1982/1474, regs 2, 3(2) (amended by SI 1988/2198); Housing (Consequential Provisions) Act 1985 s 2(2).

10 Landlord and Tenant Act 1985 s 7(1). See also note 8 supra. As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate see s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

11 Ibid s 7(4).

12 le any relevant requirement of ibid s 5 (as amended): see the text and notes 1-9 supra.

13 Ibid s 7(2). See also note 10 supra.

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## **255. Information to be supplied by companies.**

Where the landlord<sup>1</sup> of premises occupied by a tenant<sup>2</sup> as a residence in consideration of a rent payable weekly<sup>3</sup> is a company, and the tenant serves on the landlord a request in writing to that effect, the landlord must give the tenant in writing particulars of the name and address<sup>4</sup> of every director and of the secretary of the company<sup>5</sup>. Such a request is duly served on the landlord if it is served on an agent of the landlord named as such in the rent book or other similar document or on the person who receives the rent of the premises; and a person on whom a request is so served must forward it to the landlord as soon as may be<sup>6</sup>.

If the landlord of such premises fails to provide such information, he commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>7</sup>; and, if a person fails to comply with his duty to forward such a request to the landlord<sup>8</sup>, he commits a

summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>9</sup>.

If a default in respect of which a landlord<sup>10</sup> or, as the case may be, another person<sup>11</sup> is convicted of such an offence continues for more than 14 days after the conviction, the landlord or other person commits a further offence in respect of that default<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 253 note 2 ante.

2 For the meaning of 'tenant' see PARA 253 note 1 ante.

3 The premises to which the Landlord and Tenant Act 1985 s 4(1) applies: see PARA 253 ante.

4 For the meaning of 'address' see PARA 52 note 4 ante.

5 Landlord and Tenant Act 1985 s 6(1). As to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under ss 6, 7 see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

6 Landlord and Tenant Act 1985 s 6(2).

7 Ibid s 7(1). See also note 5 supra. As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate see s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

8 The requirement imposed on him by ibid s 6(2): see the text and note 6 supra.

9 Ibid s 7(3). See also note 7 supra.

10 The case of an offence under ibid s 7(1): see the text and note 7 supra.

11 The case of an offence under ibid s 7(3): see the text and notes 8-9 supra.

12 Ibid s 7(4). See also note 7 supra.

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## **256. Rent book as evidence.**

A rent book is prima facie merely a book containing acknowledgment of the payment of rent and the information required by law to be set out in it. It is not a contract for granting a tenancy, still less a lease creating an estate<sup>1</sup>. The issue of a rent book in the prescribed form did not estop the landlord from denying that the premises were controlled<sup>2</sup>. A rent book may, however, be evidence of the terms on which the tenant holds<sup>3</sup> or may be evidence, although not conclusive evidence, of the tenant's identity<sup>4</sup>. A variation in a rent book or the issue of a new rent book in altered terms may be evidence of a variation in the terms of the tenancy<sup>5</sup>, or of the termination of a contractual tenancy<sup>6</sup> or the substitution of a contractual tenancy for a statutory tenancy<sup>7</sup> or the exercise of an option to take a new lease<sup>8</sup>.

1 *Moses v Lovegrove* [1952] 2 QB 533 at 536, [1952] 1 All ER 1279 at 1280, CA, per Evershed MR (rent book not a lease in writing within what is now the Limitation Act 1980 s 15(6), (7), Sch 1 para 6 (see LIMITATION PERIODS vol 68 (2008) PARA 1063)). An entry in a rent book could, however, be a memorandum of an agreement for the purposes of the Law of Property Act 1925 s 40(1) (repealed).

2 *Territorial and Auxiliary Forces Association of the County of London v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA. As to former controlled tenancies see PARA 848 et seq post; and as to estoppel generally in relation to the Rent Act 1977 see PARA 813 post.

3 *Moses v Lovegrove* [1952] 2 QB 533 at 536, [1952] 1 All ER 1279 at 1280, CA; *Esdaile v Lewis* [1956] 2 All ER 357, [1956] 1 WLR 709, CA. Where a rent book which started some years after the commencement of the tenancy contained a provision against subletting, the county court judge was held entitled to infer that such a provision formed one of the terms of the original tenancy: *Maley v Fearn* [1946] 2 All ER 583, CA; and see *Shreeve v Hallam* (1949) 93 Sol Jo 771 (revsd on other grounds [1950] WN 140, CA). Cf *Lister v Bancroft* [1950] EGD 121, CA (county court judge held entitled to reach an opposite conclusion, the question being one of fact in each case). A condition in a current rent book by which the landlord reserves the right to enter and do repairs would, it seems, render the landlord liable to a third person injured while on a highway by a collapse of part of the demised premises: *Mint v Good* as reported in [1951] 1 KB 517 at 520, CA (no such condition incorporated in the rent book until after the accident in question; but landlord held liable on the basis that, apart from the rent book, the reservation of such a right was to be implied). As to liability to third persons for the consequences of disrepair generally see PARAS 474-476 post.

4 Eg where the question arises which member of a family is tenant: see *Nugent v Nugent* [1951] EGD 158, CA (rent books in wife's name; wife treated throughout as tenant; wife held to be tenant); cf *Beeley v Walker* [1946] EGD 40, CA (rent book in wife's name, husband paid rent; husband tenant). See also *Wassell v Hine* [1953] EGD 350 (widow became tenant on husband's death and subsequently left premises; agent gave rent book in son's name; widow still tenant in absence of evidence that she did not intend to return); *Calvert v Neale* [1952] EGD 326, CA (alleged transfer of tenancy; the fact that rent book remained in the original tenant's name normally strongest possible evidence that the original tenant remained tenant); *Dealex Properties Ltd v Brooks* [1966] 1 QB 542, [1965] 1 All ER 1080, CA (rent books in name of deceased male tenant ('Mr Brooks' or 'James Brooks') held to indicate that his son (of the same name) had succeeded to the statutory tenancy, rather than his daughter).

5 *Wallis v Semark* [1951] 2 TLR 222, CA (tenancy subject to one month's notice on either side; subsequent alteration to one month's notice from tenant, two years' notice from landlord).

6 *Brownlow v Whelan* (1958) 171 Estates Gazette 133, CA (rent books showed increases of rent; evidence of rent books if it had stood alone might have justified inference that a notice of increase had been served and had terminated contractual tenancy).

7 *Bungalows (Maidenhead) Ltd v Mason* [1954] 1 All ER 1002, [1954] 1 WLR 769, CA (widow became statutory tenant on husband's death; new rent book issued in which widow was entered as tenant and conditions of tenancy varied; widow became contractual tenant). See also *Railway Executive v Botley* [1950] EGD 306, CA; and PARA 813 post.

8 *Hill v Hill* [1947] Ch 231, [1947] 1 All ER 54, CA (entry in the rent book initialled by the landlord held to be a memorandum of the agreement for a new lease for the purposes of the Law of Property Act 1925 s 40(1) (repealed), assuming that a memorandum was then necessary).

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### (3) DEMANDS FOR RENT

#### 257. Details to be contained in demands for rent etc.

Where any written demand<sup>1</sup> is given to a tenant<sup>2</sup> of premises which consist of or include a dwelling<sup>3</sup> and are not held under a tenancy to which Part II of the Landlord and Tenant Act 1954<sup>4</sup> applies, the demand must contain the following information, namely:

- 407 (1) the name and address of the landlord; and
- 408 (2) if that address is not in England and Wales, an address in England and Wales at which notices, including notices in proceedings<sup>5</sup>, may be served on the landlord by the tenant<sup>6</sup>.

Where a tenant of any such premises is given such a demand but it does not contain any information required to be so contained in it, any part of the amount demanded which consists of a service charge<sup>7</sup> or an administration charge<sup>8</sup> ('the relevant amount') is treated for all purposes as not being due from the tenant to the landlord at any time before that information is furnished by the landlord by notice given to the tenant<sup>9</sup>; but the relevant amount is not so treated in relation to any time when, by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager<sup>10</sup> whose functions include the receiving of service charges or, as the case may be, administration charges from the tenant<sup>11</sup>.

A landlord of such premises is in any event obliged to furnish the tenant with an address in England and Wales for service of notice and failure to comply will lead to the rent, as well as any service charge, being treated as not due from the tenant<sup>12</sup>.

A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice<sup>13</sup>.

1 For these purposes, 'demand' means a demand for rent or other sums payable to the landlord under the terms of the tenancy: Landlord and Tenant Act 1987 s 47(4); and see note 2 *infra*. Where the premises are managed by an RTM company, references to the landlord include the RTM company: Commonhold and Leasehold Reform Act 2002 s 102, Sch 7 para 12(2), (2). For the meaning of 'landlord' generally, and for the meaning of 'tenancy' see PARA 53 note 1 *ante*; and for the meaning of 'RTM company' see PARA 374 *post*.

2 Where the premises are managed by an RTM company, references to a tenant include a person who is landlord under a lease of the whole or any part of the premises; and in relation to such a person the reference in the Landlord and Tenant Act 1987 s 47(4) (see note 1 *supra*) to sums payable to the landlord under the terms of the tenancy are to sums paid by him under the Commonhold and Leasehold Reform Act 2002 s 103 (see PARA 395 *post*): Sch 7 para 12(1), (3). For the meaning of 'tenant' generally see PARA 53 note 1 *ante*.

3 For the meaning of 'dwelling' see PARA 53 note 2 *ante*.

4 *Ie* the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 *et seq post*.

5 For the meaning of 'notices in proceedings' see PARA 53 note 5 *ante*.

6 Landlord and Tenant Act 1987 ss 46(1), 47(1). As to the service of notices see PARA 53 note 4 *ante*.

7 For the meaning of 'service charge' see PARA 53 note 7 *ante*.

8 For the meaning of 'administration charge' see PARA 53 note 8 *ante*.

9 Landlord and Tenant Act 1987 s 47(2) (s 47(2), (3) amended by the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 Pt 2 paras 7, 10(1)-(3)).

10 As to the appointment of a receiver or manager to receive service charges see PARA 399 *et seq post*.

11 Landlord and Tenant Act 1987 s 47(3) (as amended (see note 9 *supra*); further amended by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13, PARAS 8, 10). As to the application of the Landlord and Tenant Act 1987 s 47 (as amended) to tenancies from the Crown see PARA 24 *ante*; and as to its application to agricultural holdings see PARA 53 note 6 *ante*.

12 See PARA 53 *ante*.

13 See PARA 260 *post*.

## **258. Demand or receipt for rent including rates.**

Every document containing a demand for rent or receipt for rent<sup>1</sup> which includes any sum for rates paid or payable under any statutory enactment by the owner instead of the occupier<sup>2</sup> must state either the annual, half-yearly, quarterly, monthly or weekly amount of those rates paid or payable in accordance with the last demands received by the owner from the rating authorities at the time of making his demand or giving his receipt in respect of the hereditament in question<sup>3</sup>. Where, however, such a statement has been furnished in connection with a demand for rent or receipt for rent in respect of a particular period, it is not necessary to furnish the statement upon any subsequent demand for rent or receipt for rent in respect of that period<sup>4</sup>.

If any person makes a demand for rent or gives a receipt for rent in contravention of the above provisions, he is liable, in respect of each offence, on summary conviction to a fine not exceeding level 1 on the standard scale<sup>5</sup>.

1 The expressions 'demand for rent' and 'receipt for rent' include a rent book, rent card and any document used for the notification or collection of rent due or for the acknowledgment of the receipt of the same: Statement of Rates Act 1919 s 2.

2 See PARA 521 post; and RATING AND COUNCIL TAX. Council tax in respect of residential property is normally payable by the tenant: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

3 Statement of Rates Act 1919 s 1(1) (amended by the Statute Law Revision Act 1927). The Statement of Rates Act 1919 does not apply to weekly lettings at inclusive rentals in any market established under or controlled by statute: s 1(2).

4 Ibid s 1(1) proviso.

5 Ibid s 3 (amended by the Criminal Justice Act 1982 s 46). As to the standard scale see PARA 52 note 6 ante.

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## **(4) TIME AND MODE OF PAYMENT**

### **259. When rent is payable.**

The reddendum fixes the periods when the rent is to be paid<sup>1</sup>. If no periods are fixed, a yearly rent is not payable until the end of the year<sup>2</sup>; but it is usually made payable quarterly or half-yearly<sup>3</sup> and it may be made payable in advance, either generally<sup>4</sup>, or for the last quarter or half-year, so as to give the landlord the remedy of distress for the rent in respect of that period before the expiration of the lease<sup>5</sup>. The reddendum should also specify the days on which the payments are to be made<sup>6</sup>, and the day for the first payment<sup>7</sup>. If the first payment reserved is to cover a greater or less time than the usual rent period, this should be expressly stated<sup>8</sup>; and, if the words of limitation defining the duration of the term created by the lease limit the term by reference to a commencement date antecedent to the grant of the lease, it is important that, unless it is intended that rent be paid as from the earlier date, the lease should specify the date from which the rent is to be paid<sup>9</sup>. Slight inaccuracies in the days of payment will not, however, prevent the landlord from recovering the full aggregate rent for the term<sup>10</sup>.

The tenant has the whole of the rent day in which to pay his rent, and the rent is not in arrear until after midnight of that day<sup>11</sup>. Special considerations apply, however, to payments made by post<sup>12</sup>. If the rent is payable in advance, it will only then be payable if the term has continued until the end of the rent day<sup>13</sup>. A payment made before the rent day is a payment not of rent but of a sum in gross<sup>14</sup>. It is an advance to the landlord, with an agreement that, on the day when the rent becomes due, that advance is to be treated as a fulfilment of the obligation to pay the rent<sup>15</sup>. Hence it is no discharge to the tenant unless, when the day arrives, the landlord is still entitled to receive and give a discharge for the rent<sup>16</sup>. In the case of rent incident to a freehold reversion, if the landlord receives prepayment<sup>17</sup> and dies before the rent day, his personal representatives must account to the devisee for an apportioned part from his death to the rent day<sup>18</sup>. Where, however, the rent is payable in advance and the rent day falls before the landlord's death, the whole of the rent, including that which is referable to the period from the landlord's death until the next subsequent rent day, has accrued due before his death, so that no such account or apportionment has to be made<sup>19</sup>.

If rent is expressed to be payable at the usual quarter days, those days are, in England and Wales, Lady Day (25 March), Midsummer Day (24 June), Michaelmas Day (29 September) and Christmas Day (25 December)<sup>20</sup>.

If the lease is in writing, an oral agreement for the variation of the time of payment must be evidenced by writing; and a receipt showing the alteration is sufficient evidence<sup>21</sup>.

1 As to the place of payment see PARA 249 ante.

2 *Cole v Sury* (1627) Lat 264; *Turner v Allday* (1836) Tyr & Gr 819; *Coomber v Howard* (1845) 1 CB 440; *Collett v Curling* (1847) 10 QB 785. Where, however, the time of payment is left indefinite, evidence may be given of the parties' contemporaneous or subsequent dealings to show that the rent was to be payable earlier than the end of the year: *Gore v Lloyd* (1844) 12 M & W 463.

3 See *Tomkins v Pinsent* (1702) 2 Ld Raym 819; *Doe d Rudd v Golding* (1821) 6 Moore CP 231; *Coomber v Howard* (1845) 1 CB 440; *Bishop v Goodwin* (1845) 14 M & W 260. A provision for determination of the term by notice expiring on any quarter day does not, however, make the rent payable quarterly: *Collett v Curling* (1847) 10 QB 785. A reservation of rent at a fixed sum per quarter, with a provision for continuance of the tenancy from quarter to quarter, creates a quarterly tenancy: *R v Norwich Incorporation* (1874) 30 LT 704. If the rent is payable 'quarterly, or half-quarterly, if required', the landlord, after receiving it quarterly, may not distrain for a half-quarter's rent without previous demand: *Mallam v Arden* (1833) 10 Bing 299.

4 *Finch v Miller* (1848) 5 CB 428; and see *Hopkins v Helmore* (1838) 8 Ad & El 463. If so intended, it should be expressly stated that the rent is to be payable 'from time to time', or 'throughout the term', in advance; otherwise the provision may be held to relate to the first payment only: *Holland v Palser* (1817) 2 Stark 161. Cf *Allen v Bates* (1833) 3 LJ Ex 39. As to rent payable in advance see further DISTRESS vol 13 (2007 Reissue) PARA 911.

5 *Witty v Williams* (1864) 12 WR 755. As to a clause allowing the tenant to retain a half-year's rent in hand see - *v Nicholls* (1774) Lofft 393.

6 Where the days are not mentioned, the rent is payable by equal instalments on the half-yearly or quarterly days, as the case may be, reckoned from the commencement of the term: *Tomkins v Pinsent* (1702) 2 Ld Raym 819; Gilbert on Rents 50; and see *Harrington v Wise* (1596) Cro Eliz 486. Rent payable at the 'two usual feasts of the year' is due at Lady Day and Michaelmas: *Harrington v Wise* supra. Evidence of a custom of the country as to the meaning of 'Lady Day', or any similar expression, is, however, admissible to explain an oral demise: *Doe d Hall v Benson* (1821) 4 B & Ald 588 at 589; cf *Den d Peters v Hopkinson* (1823) 3 Dow & Ry KB 507. If days of grace are allowed, where, that is, the rent is payable on specified days, or within a certain number of days afterwards, it is not due, so as to entitle the landlord to his remedies for it, until the expiration of the last of the days of grace (*Blunden's Case* (1598) Cro Eliz 565; *Pilkington v Dalton* (1598) Cro Eliz 575; *Clun's Case* (1613) 10 Co Rep 127a at 128a), except that, if the term expires on a rent day, the last instalment of rent then becomes due, and the days of grace are disregarded (*Barwick v Foster* (1610) Cro Jac 227 at 233; and see *Biggin v Bridge* (1676) 3 Keb 534).

7 Where the day for first payment is not mentioned, the first payment will be due on such of the specified rent days as first occurs, although it is not the first mentioned: *Hill v Grange* (1556) 1 Plowd 164 at 171; Co Litt 217b. As to the construction of the words '25 December next' in a lease dated 23 December see *Simner v*

*Watney* (1911) 28 TLR 162, CA (the lease having been executed before 23 December, the first payment was held to fall to be made on 25 December of the same year).

8 See *Hutchins v Scott* (1837) 2 M & W 809 at 810; *Simner v Watney* (1911) 28 TLR 162, CA. For a subsequent agreement operating retrospectively to make a reservation of rent from an earlier date see *M'Leish v Tate* (1778) 2 Cowp 781.

9 A lease limited to commence on a date prior to the grant of the lease cannot retrospectively create a term of years, but the parties may agree to regulate their relationship as if the term had existed from the 'commencement date': see *Roberts v Church Comrs for England* [1972] 1 QB 278 at 285, [1971] 3 All ER 703 at 707, CA, per Stamp LJ; *Bradshaw v Pawley* [1979] 3 All ER 273 at 279, [1980] 1 WLR 10 at 16-17 per Megarry V-C (where it was held that the lease had validly reserved, or the tenant had effectively covenanted to pay, rent in respect of a period prior to the execution of the lease). A frequently used method for indicating that the rent is not to be payable as from the earlier date expressed as the commencement date for the term is to add to the *reddendum* a phrase such as 'the first payment of £... [(being a proportionate part of the [quarterly] payment)] to be made on ...' (where the amount to be specified will be the amount of one [quarter]'s rent or an apportioned part of it if rent is to commence during a rent period).

10 *Hopkins v Helmore* (1838) 8 Ad & El 463. If necessary for the purpose of making up the full payment, one day of payment will be reckoned after the expiration of the term: *Hopkins v Helmore* supra.

11 *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526, [1961] 2 All ER 751; *Dibble v Bowater* (1853) 2 E & B 564; *Duppa v Mayo* (1669) 1 Wms Saund 275 at 287 (see 1 Wms Saund (1871 Edn) 455); *Cutting v Derby* (1776) 2 Wm Bl 1075 at 1077. Cf *Tinckler v Prentice* (1812) 4 Taunt 549. Rent falling due on a Sunday may be lawfully paid on that day, and is therefore in arrear on Monday: *Child v Edwards* [1909] 2 KB 753; and see TIME vol 97 (2010) PARAS 324, 340.

12 See PARA 264 post.

13 *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526, [1961] 2 All ER 751. Accordingly, where the testator died on the morning of a rent day, neither the rents due in advance on that day nor the rents then due in arrear had accrued before the testator died, so that they fell to be treated as income of his estate, subject to apportionment: *Re Aspinall, Aspinall v Aspinall* supra. By that apportionment, as regards rent due in advance one day's rent only, and, as regards the rent payable in arrear, all but one day's rent, fell to be treated as having accrued during the testator's lifetime: *Re Aspinall, Aspinall v Aspinall* supra.

14 *Lord Cromwel v Andrews* (1583) Cro Eliz 15. The payment is voluntary unless there is an express obligation: *Clun's Case* (1613) 10 Co Rep 127a.

15 *De Nicholls v Saunders* (1870) LR 5 CP 589 at 594. At law the payment did not save a condition for re-entry on non-payment on the day (*Lord Cromwel v Andrews* (1583) Cro Eliz 15), but in equity it was a defence to any further claim in respect of the rent by the person who had received it (*Lord Rockingham v Penrice* (1711) 1 P Wms 177; and see 1 Swan 345 note (a); *Nash v Gray* (1861) 2 F & F 391).

16 Thus, where the landlord has mortgaged his reversion, a prepayment to him of rent does not discharge the tenant if before the rent day he has notice of the mortgage and receives a demand for payment of the rent to the mortgagee (*De Nicholls v Saunders* (1870) LR 5 CP 589 at 594); but so much of the prepayment of rent as becomes due as rent prior to the giving of notice by the mortgagee is irrecoverable by the mortgagee (*Cook v Guerra* (1872) LR 7 CP 132). Similarly, a payment of rent to a judgment debtor after registration of a writ of *elegit* by the judgment creditor with notice to the tenant did not discharge the tenant: *Lord Ashburton v Nocton* [1915] 1 Ch 274, CA. A mortgagee as a purchaser is affected by constructive notice of the tenant's rights, and is, therefore, bound by any agreement made prior to the mortgage as to the lease between the mortgagor and tenant, such as an agreement to commute the rent by one lump sum payment: *Green v Rheinberg* (1911) 104 LT 149, CA; and see *Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777, CA. As to the circumstances giving rise to the mortgagee's right to receive rent see MORTGAGE vol 77 (2010) PARAS 417-422.

17 *Ie* in the sense indicated in the text and notes 12-16 supra.

18 *Lord Rockingham v Penrice* (1711) 1 P Wms 177; and see PARA 278 post.

19 *Re Aspinall, Aspinall v Aspinall* [1961] Ch 526, [1961] 2 All ER 751 (in addition to the rents payable on the date of the testator's death, other rents were due in advance four weeks before his death but referable to a quarter ending two months after his death; those other rents held not to be apportionable as between the income and capital of his estate).

20 See also TIME vol 97 (2010) PARA 306.



21 *Mitas v Hyams* [1951] 2 TLR 1215, CA. As to agreements to increase or reduce rents see PARA 246 ante. The landlord may, however, be equitably estopped from enforcing his strict legal rights: see ESTOPPEL vol 16(2) (Reissue) PARA 1082.

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## **260. Requirement to notify long leaseholders that rent is due.**

A tenant<sup>1</sup> under a long lease of a dwelling<sup>2</sup> is not liable to make a payment of rent<sup>3</sup> under the lease unless the landlord<sup>4</sup> has given him a notice relating to the payment<sup>5</sup>; and the date on which he is liable to make the payment is that specified in the notice<sup>6</sup>. The notice must specify:

- 409 (1) the amount of the payment;
- 410 (2) the date on which the tenant is liable to make it; and
- 411 (3) if different from that date, the date on which he would have been liable to make it in accordance with the lease,

and must contain any such further information as may be prescribed<sup>7</sup>. The date on which the tenant is liable to make the payment must not be:

- 412 (a) either less than 30 days or more than 60 days after the day on which the notice is given; or
- 413 (b) before that on which he would have been liable to make it in accordance with the lease<sup>8</sup>.

If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment of rent have effect accordingly<sup>9</sup>.

1 For the meaning of 'tenant' see PARA 369 note 8 post (definition applied by the Commonhold and Leasehold Reform Act 2002 s 166(9)).

2 For these purposes, 'long lease of a dwelling' does not include (1) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (business tenancies: see PARA 701 et seq post) applies; (2) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 post); or (3) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post): Commonhold and Leasehold Reform Act 2002 s 166(8). 'Long lease' has the meaning given by ss 76, 77 (see PARA 371 post) and 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante): Commonhold and Leasehold Reform Act 2002 s 166(9).

3 For these purposes 'rent' does not include (1) a service charge (within the meaning of the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 post); or (2) an administration charge (within the meaning of the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 Pt 1 (paras 1-6) (see PARAS 355-358 post): s 166(7).

4 For the meaning of 'landlord' see PARA 369 note 8 post (definition applied by *ibid* s 166(9)).

5 The notice (1) must be in the prescribed form; and (2) may be sent by post: *ibid* s 166(5). If the notice is sent by post, it must be addressed to a tenant at the dwelling unless he has notified the landlord in writing of a different address in England and Wales at which he wishes to be given notices under s 166 (in which case it must be addressed to him there): s 166(6). For the prescribed form of notice see the Landlord and Tenant (Notice of Rent) (England) Regulations 2004, SI 2004/3096, reg 2(2), Schedule; the Landlord and Tenant (Notice of Rent) (Wales) Regulations 2005, SI 2005/1355, reg 3(2), Schedule. In Wales, a form substantially to the like

effect may be used: see the Landlord and Tenant (Notice of Rent) (Wales) Regulations 2005, SI 2005/1355, reg 3(2).

6 Commonhold and Leasehold Reform Act 2002 s 166(1).

7 Ibid s 166(2). A notice under s 166(1) must contain, in addition to the information specified in accordance with heads (1)-(2) in the text and, if applicable, head (3) in the text: (1) the name of the leaseholder to whom the notice is given; (2) the period to which the rent demanded is attributable; (3) the name of the person to whom payment is to be made, and the address for payment; (4) the name of the landlord by whom the notice is given and, if not specified pursuant to head (3) *supra*, his address; and (5) the information provided in the notes to the prescribed form (as to which see note 5 *supra*): Landlord and Tenant (Notice of Rent) (England) Regulations 2004, SI 2004/3096, reg 2(1); Landlord and Tenant (Notice of Rent) (Wales) Regulations 2005, SI 2005/1355, reg 3(1).

8 Commonhold and Leasehold Reform Act 2002 s 166(3).

9 Ibid s 166(4).

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## **261. By whom rent is payable.**

In general the landlord is not bound to receive the rent if it is tendered by a stranger to the contract of tenancy who has no interest in the land<sup>1</sup>; but the payment or tender of rent by the tenant's spouse or civil partner, where that spouse or civil partner has a right of occupation<sup>2</sup>, is as good as if made or done by the spouse or civil partner who is tenant<sup>3</sup>. Payment to the landlord by a third person of the amount of rent due does not discharge the tenant, unless it is made by the payer as agent for the tenant and with his prior authority or subsequent ratification<sup>4</sup>; but payment by an assignee of the term does discharge the tenant<sup>5</sup>. Where the survivor of joint tenants succeeds to the whole beneficial interest in the lease, he becomes liable for the whole rent and may not compel the deceased tenant's executors to contribute<sup>6</sup>.

1 Co Litt 206b; and see *Matthews v Dobbins* [1963] 1 All ER 417, [1963] 1 WLR 227, CA, where a person other than the tenant was held not to be entitled to pay into court the amount of rent claimed against the tenant in forfeiture proceedings so as to achieve a stay of the proceedings under what is now the County Courts Act 1984 s 138(2) (as amended) (see PARA 628 post), there being no proof that the person making such payment in was a subtenant; but a subtenant is a 'lessee' for the purposes of s 138 (as amended) and is thus entitled to pay into court the rent due from the head tenant (*United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, 67 P & CR 18, CA; and see PARA 629 post). See also *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1969] 3 All ER 621, [1969] 1 WLR 1215 (revsd on another point [1971] Ch 764, [1970] 2 All ER 600, CA); *Richards v De Freitas* (1974) 29 P & CR 1 (payment by guarantor).

2 Ie under the Family Law Act 1996 s 30 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285.

3 See *ibid* s 30(3) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285.

4 *Smith v Cox* [1940] 2 KB 558, [1940] 3 All ER 546.

5 *Re House Property and Investment Co Ltd* [1954] Ch 576 at 586, [1953] 2 All ER 1525 at 1529 per Roxburgh J. As to the statutory restriction on liability after assignment see PARAS 289-291 post.

6 *Cunningham-Reid v Public Trustee* [1944] KB 602, [1944] 2 All ER 6, CA. One joint tenant of a periodic secure tenancy cannot transfer his interest in that tenancy to the other joint tenant: see *Burton v Camden London Borough Council* [2000] 2 AC 399, [2000] 1 All ER 943, HL, cited in PARA 1323 note 11 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/6. PAYMENT OF RENT/(4) TIME AND MODE OF PAYMENT/262. To whom rent is payable.

## **262. To whom rent is payable.**

The rent is payable either to the landlord, or to his agent expressly or impliedly authorised to receive it<sup>1</sup>. An authority is implied where the landlord has held out the person in question as his agent to receive the rent<sup>2</sup>, as, for example, by recognising from time to time the validity of his receipts<sup>3</sup>; and the tenant is entitled to continue payment in pursuance of that authority until he has notice that it is withdrawn<sup>4</sup>. On the landlord's death the rent is payable to his personal representatives until the reversion becomes vested by their consent or by conveyance in the person to whom it devolves<sup>5</sup>.

Where the landlords are joint tenants, any one of them may sue and give a receipt for the entire rent<sup>6</sup>, and, on the death of any, the entire rent is due to the survivors<sup>7</sup>.

On an assignment of the reversion the assignee becomes entitled to receive the rent, but the tenant is not prejudiced if he continues to pay it to the assignor until he has received notice of the assignment<sup>8</sup>. Without assigning the reversion, the landlord may assign the right to receive the rent, and a written direction to the tenant to pay the rent to the assignee, if given for valuable consideration, operates as an equitable assignment<sup>9</sup>, but in the absence of consideration it is a mere authority, revocable on notice to the tenant<sup>10</sup>. An assignee of the rent without the reversion may sue for it<sup>11</sup>, but may not recover it by distress except in the assignor's name<sup>12</sup>. Where rent is due to a judgment debtor, the judgment creditor may obtain the right to receive it by a third party debt order<sup>13</sup>, or by procuring the appointment of a receiver by way of equitable execution whether or not a charge has been imposed on the judgment debtor's land<sup>14</sup>.

Where rent has been paid to a person not entitled to the reversion, the tenant may recover it from that person<sup>15</sup>, or the reversioner may at his option himself sue the person receiving the rent in a claim for money had and received<sup>16</sup>. Payment of rent may, however, estop the tenant from disputing the title of the person to whom it is paid<sup>17</sup>.

1 See *Goodland v Blewith* (1808) 1 Camp 477. Even though the principal's name is not disclosed at the time of payment, if the rent is paid over to him, the payment is evidence as against the tenant of his title: *Hitchings v Thompson* (1850) 5 Exch 50. Where a tenant has paid direct to the landlord for a long period, a request to pay an agent does no more than provide an alternative method of payment: *Beevers v Mason* (1978) 37 P & CR 452, CA.

2 As to cases of implied agency or agency by estoppel see AGENCY vol 1 (2008) PARAS 25, 37-44.

3 Thus the landlord will constitute his wife his agent by recognising payment of rent to her: *Browne v Powell* (1827) 4 Bing 230 at 232.

4 See *Drew v Nunn* (1879) 4 QBD 661, CA.

5 See the Administration of Estates Act 1925 ss 1-3 (as amended). As to devolution of real estate see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 363 et seq.

6 *Robinson v Hofman* (1828) 4 Bing 562 at 565.

7 *Henstead's Case* (1594) 5 Co Rep 10a; and see REAL PROPERTY.

8 See the Law of Property Act 1925 s 151(1); and PARA 552 post. Where the half-yearly rent accrues partly before and partly after the assignment of the reversion, the assignee may sue for the whole half-yearly rent:

*Rickett v Green* [1910] 1 KB 253. As to payment of rent where the landlord has mortgaged the land, whether before or after the date of the lease see PARA 259 note 16 ante; and MORTGAGE vol 77 (2010) PARAS 417-422.

As to the duty to inform the tenant of an assignment of the landlord's interest see PARA 553 post; and as to the circumstances in which the landlord's identity must be disclosed see PARA 52 ante.

9 *Knill v Prowse* (1884) 33 WR 163, DC.

10 *Re Whitting, ex p Hall* (1879) 10 ChD 615, CA; *Venning v Bray* (1862) 2 B & S 502. As to the requirements of a legal assignment see CHOSER IN ACTION vol 13 (2009) PARA 72 et seq; and as to equitable assignments see CHOSER IN ACTION vol 13 (2009) PARA 24 et seq.

11 *Robins v Cox and Warwick* (1661) 1 Lev 22; *Allen v Bryan* (1826) 5 B & C 512; *Williams v Hayward* (1859) 1 E & E 1040 at 1050.

12 The person distraining must have the reversion in himself: see DISTRESS vol 13 (2007 Reissue) PARA 913.

13 *Mitchell v Lee* (1867) LR 2 QB 259; and see CPR Pt 72; and CIVIL PROCEDURE vol 12 (2009) PARA 1411 et seq. The rent must be actually due: *Jones v Thompson* (1858) EB & E 63.

14 See *Lord Ashburton v Nocton* [1915] 1 Ch 274, CA; the Supreme Court Act 1981 s 37(4), (5) (the Supreme Court Act 1981 prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed); the County Courts Act 1984 s 107; and CIVIL PROCEDURE vol 12 (2009) PARA 1498.

15 *Newsome v Graham* (1829) 10 B & C 234; *Barber v Brown* (1856) 1 CBNS 121; *Finck v Tranter* [1905] 1 KB 427, DC.

16 *Gledhill v Hunter* (1880) 14 ChD 492 at 495. As to claims for money had and received see RESTITUTION vol 40(1) (2007 Reissue) PARA 5.

17 See ESTOPPEL vol 16(2) (Reissue) PARA 1037.

## UPDATE

### 262 To whom rent is payable

NOTE 14--Appointed day is 1 October 2009: SI 2009/1604.

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### 263. Payment in cash or by cheque or notes.

Rent reserved in money is payable in cash<sup>1</sup> on the date appointed for payment ('the rent day'); and, where a written lease stipulates for payment of rent in advance, evidence of an antecedent oral agreement by the landlord to accept a bill of exchange is not admissible<sup>2</sup>. A subsequent agreement by the landlord to accept payment by cheque as substituted satisfaction for performance of the tenant's obligation to pay cash will, however, prevent the landlord from relying upon the non-payment of the rent in cash on the rent day if the cheque is subsequently honoured<sup>3</sup>. As rent constitutes a debt of equal degree with a specialty debt<sup>4</sup>, it is not discharged by the landlord's act in accepting a bill of exchange or promissory note; such a bill or note is a conditional payment only, that is to say, it does not operate as satisfaction until it is paid, in the absence of specific agreement to the contrary<sup>5</sup>. An agent who is not authorised to receive payment of rent by cheque is not justified in doing so if the circumstances are such

that the landlord will be prejudiced should the cheque be dishonoured, and in such a case the agent is liable to pay to the landlord the amount of the dishonoured cheque<sup>6</sup>.

1 See *Henderson v Arthur* [1907] 1 KB 10, CA.

2 *Henderson v Arthur* [1907] 1 KB 10, CA.

3 *Beevers v Mason* (1978) 37 P & CR 452, CA; applied in *Luttenberger v North Thoresby Farms Ltd* [1992] 1 EGLR 261, CA. If, however, the landlord does not present the cheque, the tenant has only a defence of tender and the debt is not discharged: *Official Solicitor v Thomas* [1986] 2 EGLR 1, CA.

4 See PARA 249 ante.

5 *Davis v Gyde* (1835) 2 Ad & El 623; and see *Harris v Shipway* (1744) Bull NP (5th Edn) 182; *Palfrey v Baker* (1817) 3 Price 572; *Davidson v Allen* (1886) 20 LR Ir 16 at 23. As the bill or note is no satisfaction, a judgment recovered on it is no satisfaction until it results in payment: *Drake v Mitchell* (1803) 3 East 251 at 259. As to the effect of the landlord discounting the bill, and as to the presumption raised by his accepting a bill or note of an agreement to suspend his remedy by distress see DISTRESS vol 13 (2007 Reissue) PARA 973. A subsequent agreement that no rent is due discharges the note: *Howell v Lewis* (1836) 7 C & P 566.

6 *Papé v Westacott* [1894] 1 QB 272, CA. In general the acceptance of the cheque does not prejudice the landlord, as his remedies for the rent remain, but it is otherwise if under the circumstances the remedy by distress has become unavailable. As to payment by cheque generally see CONTRACT vol 9(1) (Reissue) PARAS 951-955; and as to agents generally see AGENCY vol 1 (2008) PARA 1 et seq.

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## **264. Payment of rent by post.**

Ordinarily, if rent is remitted by post, it is done at the tenant's risk. If, however, the landlord has expressly or impliedly authorised that method of payment then, as the postal operator transmits the letter as the landlord's agent in such circumstances, the landlord assumes the risk<sup>1</sup> and payment is then deemed to be made at the date of posting<sup>2</sup>; but the tenant must exercise due care in addressing and posting the rent<sup>3</sup>. The agreement of the landlord that he will accept substituted performance of the tenant's obligation to pay the rent in cash on the rent day by the tenant posting a cheque to the landlord for the amount of the rent will be readily inferred from an established usage between the parties<sup>4</sup>, or from a request by the landlord for payment by post, even if that request is not complied with strictly<sup>5</sup>. In such a case the rent is paid, subject to the cheque being honoured on presentation, when the cheque is posted but, if the landlord does not present the cheque, the obligation to pay is not discharged<sup>6</sup>.

1 *Warwicke v Noakes* (1791) Peake 68; *Norman v Ricketts* (1886) 3 TLR 182, CA; *Luttges v Sherwood* (1895) 11 TLR 233; *Pennington v Crossley & Son* (1897) 13 TLR 513, CA; *Beevers v Mason* (1978) 37 P & CR 452, CA.

2 *Beevers v Mason* (1978) 37 P & CR 452, CA.

3 *Hawkins v Rutt* (1793) Peake 187; *Mitchell-Henry v Norwich Union Life Society* [1918] 2 KB 67, CA.

4 *Beevers v Mason* (1978) 37 P & CR 452, CA; and see *AS Tankexpress v Compagnie Financière Belge des Petroles SA, The Petrofina* [1949] AC 76 at 101-103, 105, [1948] 2 All ER 939 at 950-953, HL (a charterparty case); followed in *Beevers v Mason* supra.

5 *Beevers v Mason* (1978) 37 P & CR 452, CA.

6 *Official Solicitor to the Supreme Court v Thomas* [1986] 2 EGLR 1 at 5, CA, per Nichols LJ (receipt and retention of the cheque may give rise to a defence of tender or preclude the landlord from asserting that rent is due for the purpose of serving a notice to pay under the Agricultural Holdings Act 1986).

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## **265. Payment by standing order or electronic transfer.**

The landlord and tenant may agree that payment of rent may be made by standing order to the landlord's bank. Further, it is possible for a landlord to waive his right to accept cash<sup>1</sup> by directing the tenant to pay the rent into his bank account<sup>2</sup>. Where this occurs, payment is made when the money is transferred to the landlord's account and not when the landlord's bank notifies the landlord that payment has been made<sup>3</sup>.

Where the tenant transfers money to the landlord's account, it will not be taken as having been accepted if it is returned to the tenant as quickly as possible<sup>4</sup>; thus, a landlord may avoid waiving a breach of covenant by returning the money promptly so that objectively considered the tenant would not suppose that the rent had been accepted<sup>5</sup>. However, if the landlord does not return the money, it will normally be inferred that the payment has been accepted<sup>6</sup>.

The same principles will apply where payment is made by means of electronic transfer.

1 See PARA 263 ante.

2 Compare *Breed v Green* (1816) Holt NP 204.

3 *Eyles v Ellis* (1827) 4 Bing 112.

4 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp'n of Liberia* [1977] AC 850, [1977] 1 All ER 545, HL (a charter-party case).

5 *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 77 at 85 per Mummery J.

6 *Pierson v Harvey* (1885) 1 TLR 430; see also *Antaios Cia Naviera SA v Salen Rederierna AB* [1983] 3 All ER 777, [1983] 2 Lloyd's Rep 473, CA; affd [1985] AC 191, [1984] 3 All ER HL (a charter-party case). Cf *John Lewis Properties plc v Viscount Chelsea* (1993) 67 P & CR 120, [1993] 2 EGLR 77 (where quarterly payments were credited to the landlord's account by its banker despite no demand for payment of any of those sums having been paid; held that the payments did not amount to an acceptance of rent and waiver of any right the landlord might have had to forfeit the leases; although there were delays in returning the rent payments, in all the circumstances the landlord had not given the tenant any ground for supposing that the rent had in fact been accepted).

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## **(5) PERMITTED DEDUCTIONS**

### **266. Authorised deductions.**

If the landlord brings a claim for rent, and a claim by the tenant to a sum of money (whether of an ascertained amount or not) is relied upon as a defence to the whole or part of the landlord's claim, the tenant's claim may be included in the defence and set off against the landlord's claim, whether as a counterclaim or an additional claim<sup>1</sup>. The claim may be set off only if it is connected with the same transaction or property, but it is not necessary for the claim to have arisen under the lease itself; thus a claim for unliquidated and unascertained damages for breaches of a building agreement which was antecedent to the lease under which the rent was payable was allowed to be set off against the tenant's admitted liability for rent under the lease<sup>2</sup>. A provision in a lease that the rent should be paid 'without any deductions' is too ambiguous to exclude the tenant's equitable right to set off unliquidated claims for damages for the landlord's breach of covenants against rent due<sup>3</sup>; but a provision expressly excluding the right of set-off is effective<sup>4</sup>.

Where, however, the landlord is exercising his remedy of distress, the right of set-off is not recognised<sup>5</sup>. The tenant is nevertheless entitled to credit for sums which he is expressly authorised to deduct from the rent, either by the terms of the lease<sup>6</sup> or by statute<sup>7</sup>, and for payments made to the landlord, or on his behalf and with his express or implied authority; and the landlord may distrain only for the balance. Where a tenant has expended money upon repairs which it is the landlord's duty to carry out, the tenant may deduct or set off the cost of the repairs from the rent<sup>8</sup>, and possibly also resist any attempt to distrain in respect of the amount so expended<sup>9</sup>.

Where the tenant has paid on the landlord's behalf sums which it was the landlord's duty to pay and which are charged on the land, so that failure to pay them would prevent the tenant's peaceable possession of the property, the tenant is considered as authorised by the landlord to make those payments and to treat them as made in satisfaction or part satisfaction of the rent. Thus, an undertenant is entitled to deduct from his rent arrears of rent due to the superior landlord which have been demanded from him and which he has paid<sup>10</sup>. There need not be a threat of immediate distress, and after actual payment the deduction may be made notwithstanding that the superior landlord has allowed time for payment. It is sufficient that the superior landlord has demanded the rent and is entitled to distrain<sup>11</sup>. The rule is the same in the case of a rentcharge enforceable by distress which the tenant has paid on demand, notwithstanding that there was no personal liability on the landlord to pay it<sup>12</sup>. In such a case it is the landlord's duty to make the payment in order to protect the tenant. If the landlord leaves the tenant to pay, that payment is treated as being a payment of so much of the rent due or growing due to him as the immediate landlord, and he is entitled to distrain only for the balance<sup>13</sup>. The same rule applies in the case of a mortgage where the mortgagor has granted a lease which is not binding on the mortgagee and the tenant pays rent to the mortgagee who is threatening to assert his legal rights<sup>14</sup>; but there must have been an actual payment on demand to the mortgagee and not merely notice to pay<sup>15</sup>.

1 Set-off may also be available against the present landlord in respect of damages due for a former landlord's breach of repairing obligations: see eg *Muscat v Smith* [2003] EWCA Civ 962, [2003] 1 WLR 2853, [2003] All ER (D) 192 (Jul) (tenant entitled to set off in equity against present landlord's claim for assigned rent any damages due to him for his former landlord's breach of repairing obligations, approving *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13, [1995] NPC 55); but cf *Edlington Properties Ltd v JH Fenner & Co Ltd* [2006] EWCA Civ 403, [2006] 3 All ER 1200, [2006] 1 WLR 1583 (tenant's right to claim damages against a predecessor in title of the landlord, whether or not arising under a covenant in the lease, is a personal right; claim by the tenant against the landlord for damages for defective construction of the building could not be set off against the rent due to the assignee of the reversion for periods after assignment). As counterclaims and additional claims see CPR Pt 20; and CIVIL PROCEDURE vol 11 (2009) PARA 618 et seq. See also CIVIL PROCEDURE vol 11 (2009) PARA 715. As to equitable set-off see EQUITY vol 16(2) (Reissue) PARA 901 et seq.

2 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063; *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179. See also *Asco Developments Ltd v Gordon* [1978] 2 EGLR 41, (1978) 248 Estates Gazette 683 (leave to defend a claim for rent by set-off allowed in respect of (1) set-off for expenditure for repairs which were the landlord's responsibility; and (2) damages for breaches of the landlord's repairing covenant, although the general rule that cross-claims must be definite and

quantified was asserted); *Telefantos v McCulloch* (1990) 23 HLR 412, [1991] 1 EGLR 123, CA (no rent held to be due because at the date the action was brought the tenant had available a defence of equitable set-off of a damages claim which, when quantified, exceeded the rent then due). If, however, the landlord is not liable for repairs, the tenant may not set off the cost of doing them: *Alton House Holdings Ltd v Calflane (Management) Ltd* (1987) 20 HLR 129, [1987] 2 EGLR 52. In support of the general rule see *Roper v Bumford* (1810) 3 Taunt 76; *Willson v Davenport* (1833) 5 C & P 531. Cf *Gower v Hunt* (1734) Barnes 290. It was not possible formerly to set off a claim for damages for a breach of covenant against a demand for rent: *Weigall v Waters* (1795) 6 Term Rep 488. In *Reeves v Pope* [1914] 2 KB 284, CA the defendant in an action for rent by the assignee of the original landlord was not permitted to set off a claim for damages for breach of covenant by the original landlord, the covenant being held to be a personal one, and the right claimed, therefore, was not an interest in the land. For a case in which a tenant was held entitled to set off money expended on improvements made in anticipation of the grant of a lease see *Cleghorn v Durrant* (1858) 22 JP 419. As to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

3 *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 4 All ER 834, [1994] 1 WLR 501, CA, disapproving *Famous Army Stores v Meehan* [1993] 1 EGLR 73.

4 A provision which excludes the right of set-off in terms is effective and is not invalidated by the Unfair Contract Terms Act 1977: *Electricity Supply Nominees Ltd v IAF Group plc* [1993] 3 All ER 372, [1993] 1 WLR 1059.

5 *Absolon v Knight and Barber* (1743) Barnes 450; *Laycock v Tufnell* (1787) 2 Chit 531; *Andrew v Hancock* (1819) 1 Brod & Bing 37 at 46; *Willson v Davenport* (1833) 5 C & P 531; *Graham v Allsop* (1848) 3 Exch 186 at 198. The distinction has, however, been emphatically disapproved: *Sapsford v Fletcher* (1792) 4 Term Rep 511 at 513 per Lord Kenyon CJ. As there is no set-off in distress, it follows that the tenant cannot obtain an injunction against a distress for the full amount: see *Townrow v Benson* (1818) 3 Madd 203; *Pratt v Keith* (1864) 33 LJ Ch 528; and see DISTRESS vol 13 (2007 Reissue) PARA 986.

6 *Dallman v King* (1837) 4 Bing NC 105. There must be an agreement to allow deduction from the rent; it is not sufficient that the landlord has agreed to allow a specified sum for repairs: *Graham v Tate* (1813) 1 M & S 609; *Davies v Stacey* (1840) 12 Ad & El 506. The reservation of rent often expresses that it is to be free from specified deductions, such as taxes, charges and impositions (*Giles v Hooper* (1690) Carth 135), or from deductions generally, and the tenant is then debarred from making deductions which he could make in the absence of an agreement (*Bradbury v Wright* (1781) 2 Doug KB 624). It is the same where the lease reserves a net rent (*Bennett v Womack* (1828) 7 B & C 627 at 629), save as regards deductions, such as income tax, which the tenant cannot abandon.

7 See the text and notes 7-15 infra; and PARAS 267-269 post.

8 *Lee-Parker v Izzet* [1971] 3 All ER 1099 at 1107, [1971] 1 WLR 1688 at 1693 (where Goff J described the right as 'an ancient common law right' having nothing to do with the technical rules of set-off, and applied dicta in *Taylor v Beal* (1591) Cro Eliz 222).

9 In *Lee-Parker v Izzet* [1971] 3 All ER 1099 at 1107, [1971] 1 WLR 1688 at 1692-1693 Goff J doubted that the rule that there is no set-off for distress could apply where expenditure by the tenant on repairs was to be regarded as payment of the rent.

10 *Sapsford v Fletcher* (1792) 4 Term Rep 511; *Jones v Morris* (1849) 3 Exch 742. As to setting off such a payment in a claim see *Sturgess v Farrington* (1812) 4 Taunt 614. See also *Wilkinson v Cawood* (1797) 3 Anst 905; *Doe v Hare* (1833) 2 Cr & M 145; *O'Donoghue v Coalbrook and Broadoak Co Ltd* (1872) 26 LT 806, Ex Ch. As to the statutory right of lodgers and certain undertenants to prevent a distress by paying rent to the superior landlord see DISTRESS vol 13 (2007 Reissue) PARA 960.

11 *Carter v Carter* (1829) 5 Bing 406 at 409. As to the degree of pressure necessary to prevent the payments from being voluntary see *Valpy v Manley* (1845) 1 CB 594.

12 *Taylor v Zamira* (1816) 6 Taunt 524; *Whitmore v Walker* (1848) 2 Car & Kir 615; *Lord Irnham's Lessee v Luttrell* (1775) Wallis 243.

13 *Sapsford v Fletcher* (1792) 4 Term Rep 511; *Graham v Allsopp* (1848) 3 Exch 186 at 198; *Boodle v Cambell* (1844) 7 Man & G 386. Those payments discharge rent growing due, as well as rent actually due: see *Carter v Carter* (1829) 5 Bing 406.

14 *Johnson v Jones* (1839) 9 Ad & El 809; *Underhay v Read* (1887) 20 QBD 209, CA; and see *Dyer v Bowley* (1824) 2 Bing 94; and MORTGAGE vol 77 (2010) PARA 356.

15 *Wheeler v Branscombe* (1843) 5 QB 373; *Wilton v Dunn* (1851) 17 QB 294; *Hickman v Machin* (1859) 4 H & N 716.



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## **267. Income tax, rates and council tax.**

Where payment of rent chargeable under Schedule A<sup>1</sup> or as the profits of a United Kingdom property business<sup>2</sup> is made, in the United Kingdom or elsewhere, directly to a person whose usual place of abode is outside the United Kingdom, the payer is normally required to deduct and account for tax at the basic rate<sup>3</sup>. Where the non-resident makes a successful application for payment of gross income, the tenant will be given notice by the Commissioners for Revenue and Customs specifying the date from which that obligation ceases to apply<sup>4</sup>.

A tenant who has paid sums on account of rates which the landlord is liable to pay may deduct those sums from the rent<sup>5</sup>.

1 As to tax under the Income and Corporation Taxes Act 1988 s 15(1), Schedule A (as substituted and amended) see INCOME TAXATION vol 23(1) (Reissue) PARA 45 et seq.

2 I.e. under the Income Tax (Trading and Other Income) Act 2005 Pt 3 Ch 3 (ss 24-31): see INCOME TAXATION.

3 See the Income and Corporation Taxes Act 1988 s 42A(2)(a), (3) (as added and amended); the Taxation of Income from Land (Non-residents) Regulations 1995, SI 1995/2902; and INCOME TAXATION vol 23(1) (Reissue) PARA 55. If the tax is not so deducted when an instalment of rent is paid, the tax cannot be set off against or deducted from a later instalment: *Tenbry Investments Ltd v Peugeot Talbot Motor Co Ltd* [1993] 1 EGLR 71. For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

4 See the Taxation of Income from Land (Non-residents) Regulations 1995, SI 1995/2902, reg 17(5)(b); and INCOME TAXATION vol 23(1) (Reissue) PARA 57.

5 See PARA 521 post. The tenant of residential premises is, however, normally liable for the payment of council tax: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

## **UPDATE**

### **267 Income tax, rates and council tax**

NOTE 3--Income and Corporation Taxes Act 1988 s 42A(2)(a), (3) now Income Tax Act 2007 s 971(3)(a), (4).

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## **268. Local authorities' improvement expenses.**

A local authority may recover from the owner of premises certain expenses incurred by it in exercise of its powers under the Public Health Act 1936<sup>1</sup>. The local authority may by order declare that those expenses are payable, together with interest, by instalments<sup>2</sup>. Any such

instalments and interest are then recoverable from the owner or occupier, but the occupier may deduct sums paid by him in this way from the rent due from him for the premises<sup>3</sup>. The statutory right of deduction may be overridden or modified by covenant between the landlord and the tenant<sup>4</sup>.

Provision is also made for the recovery from occupiers as well as owners of the expenses of paving and lighting private streets<sup>5</sup>. If the occupier holds the premises at a rent not less than the rack rent<sup>6</sup>, he may deduct from the rent an amount equal to three-quarters of any sum paid by him on account of those expenses<sup>7</sup>; and, if he holds the premises at a rent less than the rack rent, he may deduct from the rent such proportion of an amount equal to three-quarters of the sum paid by him as his rent bears to the rack rent<sup>8</sup>. If the landlord himself holds the premises under a lease for a term of which less than 20 years is unexpired, he may make a corresponding deduction from the rent payable by him<sup>9</sup>.

1 See the Public Health Act 1936 s 291(1); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 123. The power of recovery so conferred (1) applies to expenses incurred under any enactment repealed by that Act or under an agreement with the local authority (see s 291(1)); (2) is applied to expenses incurred by local authorities in the destruction of rats and mice (see the Prevention of Damage by Pests Act 1949 s 7(2) (as amended)); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 871; and (3) is applied to expenses incurred by sewerage undertakers (see the Water Industry Act 1991 ss 107(5), 109(3), 160(2); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARAS 1025, 1042, 1043). The Public Health Act 1936 in general now applies to Greater London: see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 4.

2 See *ibid* s 291(2); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 123.

3 See *ibid* s 291(2). An occupier is not to be required to pay at any one time any sum in excess of the amount due from him on account of rent: see s 291(2) proviso.

4 For examples arising out of earlier legislation see *Allum v Dickinson* (1882) 9 QBD 632, CA; *Aldridge v Ferne* (1886) 17 QBD 212, DC; *Skinner v Hunt* [1904] 2 KB 452, CA. As to such covenants and their construction generally see PARAS 524-531 post.

5 See eg the Highways Act 1980 s 212(1); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 159.

6 For these purposes, 'rack rent', in relation to any premises, means a rent which is not less than two-thirds of the rent at which the premises might reasonably be expected to let from year to year, free from all usual tenant's rates and taxes, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses (if any) necessary to maintain the same in a state to command such rent: *ibid* s 291(1) (definition amended by the Statute Law (Repeals) Act 1993).

7 See the Highways Act 1980 s 212(4), Sch 13 para 1(a); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 159. Schedule 13 also applies in respect of sums recoverable from occupiers under ss 152, 153 (as amended) and ss 237, 305: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 943.

8 See *ibid* Sch 13 para 1(b); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 943.

9 See *ibid* Sch 13 paras 2, 3; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 943. The right of deduction may be modified by covenants between the landlord and the tenant: see the text and note 4 *supra*.

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## **269. Compensation and overpayments.**

Where the amount of compensation due to the tenant of an agricultural holding, whether under the Agricultural Holdings Act 1986<sup>1</sup> or under a former enactment relating to such holdings, or under custom<sup>2</sup> or agreement, has been ascertained before the landlord distrains for rent, the

tenant may set off the amount of the compensation against the rent, and the landlord may distrain only for the balance<sup>3</sup>.

A tenant of trade or business premises may deduct from the rent any sum payable to him by the landlord by way of compensation for improvements<sup>4</sup>.

The right of a protected or statutory tenant<sup>5</sup> to recover overpayments of rent is exercisable by means of deduction from rent payable<sup>6</sup>.

1 As to tenancies of agricultural holdings to which the Agricultural Holdings Act 1986 applies see PARA 806 post.

2 As to the exclusion of the right to compensation under custom with certain exceptions see AGRICULTURAL LAND vol 1 (2008) PARAS 355, 417.

3 See the Agricultural Holdings Act 1986 s 17; and AGRICULTURAL LAND vol 1 (2008) PARA 346. No corresponding provision is made by the Agricultural Tenancies Act 1995. As to farm business tenancies to which the 1995 Act applies see PARA 807 post; and as to compensation under that Act see Pt III (ss 15-27) (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 310 et seq.

4 See the Landlord and Tenant Act 1927 s 11(2); and PARA 801 post.

5 As to protected tenancies see PARA 818 et seq post; and as to statutory tenancies see PARA 831 et seq post.

6 See the Rent Act 1977 s 57(2) (regulated tenancies: see PARA 903 post), s 94(2) (housing association etc tenancies: see PARA 906 post), s 126(6) (recovery of advance payments: see PARA 935 post), Sch 17 para 9 (converted tenancies: see PARA 853 post).

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## **(6) SUSPENSION OF RENT**

### **270. Suspension of rent clauses.**

Because the tenant, in principle, remains liable for the rent even though the premises have become unusable<sup>1</sup>, a commercial lease will normally contain a provision dealing with the suspension of rent in the event of damage or destruction. Such clauses commonly provide that only the rent is suspended, in which case other payments due to the landlord under the lease, such as service charge payments and contributions to the insurance premiums, will continue to be payable<sup>2</sup>. A suspension of rent clause will be strictly construed<sup>3</sup>.

A proviso for the suspension of rent will not be implied even where the tenant pays the cost of insurance<sup>4</sup>.

It is recommended best practice that if the premises are so damaged by an uninsured risk as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to reinstate at his own cost<sup>5</sup>.

1 See PARAS 275-276 post.

2 See eg *P & O Property Holdings Ltd v International Computers Ltd* [2000] 2 All ER 1015, [1999] 2 EGLR 17 (suspension of rent applied to 'the rent hereby reserved or a fair proportion thereof'; held that this did not include insurance premiums and service charge payments reserved as additional rent).

3 *Saner v Bilton* (1878) 7 ChD 815; *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507.

4 *Cleveland Shoe Co Ltd v Murray's Book Sales (King's Cross) Ltd* (1973) 229 Estates Gazette 1465, CA.

5 See *A Code of Practice for Commercial Leases in England and Wales* (2nd edition) (April 2002) ISBN 1-84219-098-9 recommendation 8. The code is the copyright of the Commercial Leases Working Group (whose secretariat can be contacted at The Royal Institution of Chartered Surveyors, 12 Great George Street, Parliament Square, London SW1P 3AD) and is reproduced by their kind permission.

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## 271. Eviction.

The tenant is not liable for rent accruing due after<sup>1</sup> he has been evicted from the premises either by the landlord, or by a person lawfully claiming by title paramount<sup>2</sup>, so long as the eviction continues<sup>3</sup>.

To constitute an eviction for this purpose, it is not necessary that there should be an actual physical expulsion from any part of the premises. Any wrongful act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises, or any part of them, will operate as an eviction<sup>4</sup>. Thus, there is an eviction if the landlord enters and uses the premises, the tenant remaining in possession<sup>5</sup>, although a mere trespass by the landlord is not sufficient<sup>6</sup> nor is an entry by the landlord merely to secure the premises<sup>7</sup>. It seems that it will be an eviction if the landlord induces the subtenants to leave by notice to quit, so that the premises are left unoccupied<sup>8</sup>.

1 The tenant remains liable for rent accrued due before the eviction, and so, in resisting a claim for rent, he must show that it accrued due after the eviction: *Boodle v Cambell* (1844) 7 Man & G 386; *Selby v Browne* (1845) 7 QB 620; *Newport v Hardy* (1845) 2 Dow & L 921. As to the effect of surrender on the liability for rent see PARA 639 post; and as to apportionment see PARA 278 post.

2 As to eviction under title paramount see the text and notes 3-8 infra; and PARA 273 post; and as to unlawful eviction see PARAS 280, 653-655 post.

3 *Tomlinson v Day* (1821) 2 Brod & Bing 680; *Prentice v Elliott* (1839) 5 M & W 606. If the landlord brings proceedings for a forfeiture, he cannot recover rent accruing after the issue of the writ; his remedy is in damages for the detention of the premises (*Birch v Wright* (1786) 1 Term Rep 378; *Jones v Carter* (1846) 15 M & W 718); and see PARA 285 note 4 post. An eviction by the landlord, in addition to stopping the rent, prevents him from forfeiting the lease for non-performance of covenants (*Pellatt v Boosey* (1862) 31 LJCP 281), but it does not discharge the tenant from his covenants other than for payment of rent, or put an end to the tenancy (*Morrison v Chadwick* (1849) 7 CB 266; *Newton v Allin* (1841) 1 QB 518).

4 *Crown Lands Comrs v Page* [1960] 2 QB 274, [1960] 2 All ER 726, CA (requisitioning of premises held under a Crown lease held not to constitute eviction and it was said that for there to be an eviction there had to be an element of wrongfulness; but as to the extent to which the Protection from Eviction Act 1977 now binds the Crown see s 10; and PARA 653 post); and see *Upton v Townend* (1855) 17 CB 30; *Henderson v Mears* (1859) 28 LJQB 305; *Baynton v Morgan* (1888) 22 QBD 74, CA; *Wheeler v Stevenson* (1860) 6 H & N 155; notes to *Salmon v Smith* (1669) 1 Wms Saund 202. The alteration of tolls after a demise of them does not constitute an eviction (*Harris v Morrice* (1842) 10 M & W 260), nor does interference by the landlord with an easement (*Williams v Hayward* (1859) 1 E & E 1040).

5 *Smith v Raleigh* (1814) 3 Camp 513; *Griffith v Hodges* (1824) 1 C & P 419 at 420.

6 *Hunt v Cope* (1775) 1 Cowp 242; *Newby v Sharpe* (1878) 8 ChD 39 at 51, CA.

7 *Relvok Properties Ltd v Dixon* (1972) 25 P & CR 1, CA.

8 *Burn v Phelps* (1815) 1 Stark 94; cf *Capital & City Holdings Ltd v Dean Warburg Ltd* (1988) 58 P & CR 346, [1989] 1 EGLR 90, CA.

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## **272. Abandonment and reletting.**

The mere abandonment of the premises by the tenant does not affect his liability to pay rent<sup>1</sup>. If, however, the landlord subsequently enters and uses the premises for his own purposes, this is equivalent to an eviction<sup>2</sup>, and he cannot recover rent subsequently accruing due<sup>3</sup>; and thus, if the landlord relets the premises to another tenant who goes into possession, this operates as an eviction of the previous tenant, from whom the landlord may not recover any rent which falls due after the reletting<sup>4</sup>, even in respect of a subsequent period when the premises are unoccupied<sup>5</sup>. The landlord may, however, protect himself by reletting on the tenant's account, and giving notice to him accordingly<sup>6</sup>; and it is no eviction if he merely enters for the purpose of protecting the house<sup>7</sup>, or puts in a caretaker for the same purpose<sup>8</sup>, or puts up a notice for reletting<sup>9</sup>.

1 As to the special position of a statutory tenant who vacates without giving notice see PARA 840 post.

2 Alternatively, the landlord's action may be construed as his acceptance of an offer by the tenant to surrender the premises.

3 *Bird v Defonvielle* (1846) 2 Car & Kir 415; *Gray v Gwen* [1910] 1 KB 622, DC (where, however, the landlord recovered damages for breach of agreement of tenancy).

4 *Hall v Burgess* (1826) 5 B & C 332 at 333.

5 *Walls v Atcheson* (1826) 3 Bing 462. Formerly, where the reletting took place between two rent days, the landlord could not recover the rent from the previous rent day up to the reletting (*Hall v Burgess* (1826) 5 B & C 332), but apparently the rent would now be apportionable for this purpose (see PARA 278 post).

6 *Walls v Atcheson* (1826) 3 Bing 462.

7 *Smith v Raleigh* (1814) 3 Camp 513; *Griffith v Hodges* (1824) 1 C & P 419; and see *Relvok Properties Ltd v Dixon* (1972) 25 P & CR 1, CA; and PARAS 609, 633 post.

8 *Bird v Defonvielle* (1846) 2 Car & Kir 415.

9 *Redpath v Roberts* (1800) 3 Esp 225.

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## **273. Eviction under title paramount.**

In order to constitute an eviction by a person claiming under title paramount, it is not necessary that the tenant should be put out of possession, or that proceedings should be brought<sup>1</sup>. A threat of eviction is sufficient; and, if the tenant, in consequence of that threat,

attorns to the claimant, he may set this up as an eviction by way of defence to a claim for rent<sup>2</sup>, subject to his proving the evictor's title<sup>3</sup>. There is no eviction, however, if the tenant gives up possession voluntarily<sup>4</sup>.

1 *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307 at 315.

2 *Poole Corpn v Whitt* (1846) 15 M & W 571; *Carpenter v Parker* (1857) 3 CBNS 206 at 234-235.

3 *Jordan v Twells* (1735) Lee temp Hard 171; *Simons v Farren* (1834) 1 Bing NC 272; *Poole Corpn v Whitt* (1846) 15 M & W 571. Where the tenant sues on the covenant for quiet enjoyment, it is sufficient for him to allege generally that the evictor entered lawfully claiming title under the landlord without setting out particulars of his title: *Foster v Pierson* (1792) 4 Term Rep 617; *Hodgson v East India Co* (1799) 8 Term Rep 278; and see *Simons v Farren* supra at 278. As to breach of the covenant for quiet enjoyment see PARA 514 post; and as to unlawful eviction see PARAS 280, 653-655 post.

4 *Re Emery and Barnett* (1858) 4 CBNS 423. This is on account of the danger of collusion: *Delaney v Fox* (1857) 2 CBNS 768 at 778; and see *Dunn v Di Nuovo* (1841) 3 Man & G 105.

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#### **274. Effect of eviction under other titles; frustration.**

If the tenant is evicted by some person other than his landlord or a person claiming under title paramount, he remains liable for the rent during the period of his eviction. Thus, he remains liable if he is expelled by a trespasser or enemy occupation<sup>1</sup>, or if the Crown requisitions the premises in pursuance of statutory powers or in the exercise of the prerogative in time of war<sup>2</sup>, or if part of the premises is demolished by a local authority as a dangerous structure<sup>3</sup>; for in none of these cases is there eviction by title paramount. An alien tenant under a lease made before the outbreak of hostilities remains liable for rent accruing after that date, even if he becomes an alien enemy<sup>4</sup> or if, as an alien enemy, he is prohibited by Order in Council from residing personally in the premises<sup>5</sup>.

The contractual doctrine of frustration can apply to any type of lease; but the circumstances in which the doctrine applies are exceedingly rare<sup>6</sup>. For the doctrine to apply there must have occurred an event such that no substantial use of the demised premises as would have been permitted by the lease and as was in the contemplation of the parties when the lease was made remains possible to the tenant after the frustrating event<sup>7</sup>.

1 *Pelepah Valley (Johore) Rubber Estates Ltd v Sungei Besi Mines Ltd* (1944) 170 LT 338; *Paradine v Jane* (1647) Aleyn 26.

2 *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680; *Matthey v Curling* [1922] 2 AC 180; *Swift v Macbean* [1942] 1 KB 375, [1942] 1 All ER 126. In such circumstances the tenant is not freed from liability under the covenants in the lease; and, if the premises are destroyed by fire during their occupation by the government, he is liable: *Matthey v Curling* supra; and see PARA 443 post. A tenant has a limited power of disclaiming requisitioned premises under the Landlord and Tenant (Requisitioned Land) Act 1942: see PARA 646 post.

3 *Popular Catering Association Ltd v Romagnoli* [1937] 1 All ER 167.

4 *Halsey v Lowenfeld* [1916] 2 KB 707, CA; *Edward H Lewis & Son Ltd v Morelli* [1948] 1 All ER 433; revsd on the facts [1948] 2 All ER 1021, CA.

5 *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20.

6 See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL. See also *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL; *Denman v Brise* [1949] 1 KB 22 at 26-28, [1948] 2 All ER 141 at 143, CA; *Cusack-Smith v London Corp'n* [1956] 1 WLR 1368 at 1373 (cases relating to properties destroyed by enemy action). It was suggested in *Sturcke v SW Edwards Ltd* (1971) 23 P & CR 185 that the doctrine of frustration may be applied to particular covenants in leases; and in *John Lewis Properties plc v Viscount Chelsea* (1993) 67 P & CR 120, [1993] 2 EGLR 77 it was held that an obligation to build in a lease was suspended because of supervening impossibility so as not to give rise to a forfeiture. All earlier decisions must be reconsidered in the light of *National Carriers Ltd v Panalpina (Northern) Ltd* supra. Cf *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA (covenant held not to be capable of discharge by repudiation so long as the lease itself subsisted). See further PARA 601 post; and see CONTRACT vol 9(1) (Reissue) PARA 900 et seq; BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 113.

7 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL. Since a contract will not be frustrated when an event foreseen and provided for by the parties occurs, it may be that an express proviso in a lease for the abatement of the rent will defeat some attempts to apply the doctrine of frustration.

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## **275. Effect on rent of damage by fire.**

In the absence of express stipulation, the destruction of the premises by fire does not necessarily suspend the tenant's liability to pay rent<sup>1</sup>. This is so notwithstanding that there is a covenant to repair by the tenant which contains an express exception of damage by fire<sup>2</sup>. Where the landlord has the duty to insure, whether by covenant or as a matter of practice, the lease often contains a proviso for suspending the rent while the premises are uninhabitable by reason of fire<sup>3</sup>. Where, however, the premises are completely destroyed, it would seem that the doctrine of frustration may be applied to the lease so that the tenant is freed from any further liability to pay rent<sup>4</sup>.

It is recommended best practice that if the premises are so damaged by an uninsured risk as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to reinstate at his own cost<sup>5</sup>.

1 See *Matthey v Curling* [1922] 2 AC 180 (tenant liable on covenant to reinstate); *Baker v Holtzapffell* (1811) 4 Taunt 45; *Izon v Gorton* (1839) 5 Bing NC 501; *Marshall v Schofield & Co* (1882) 52 LQB 58, CA; *Monk v Cooper* (1727) 2 Stra 763. For this reason, commercial leases will usually contain a clause providing for the suspension of rent in such circumstances: see PARA 270 ante.

2 *Belfour v Weston* (1786) 1 Term Rep 310; *Hare v Groves* (1796) 3 Anst 687. If there is no demise for a term certain, however, the rent may be treated as accruing from day to day, so that it will cease if the premises are rendered uninhabitable by fire: see *Packer v Gibbins* (1841) 1 QB 421 (furnished lodgings).

3 *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507; but cf *Leeds v Cheetham* (1827) 1 Sim 146; *Holtzapffell v Baker* (1811) 18 Ves 115. A covenant to pay rent, damage by fire excepted, entitles the tenant to an abatement of rent only in proportion to the damage suffered (*Bennett v Ireland* (1858) EB & E 326); and an exception freeing the tenant from liability for rent if the premises are damaged or destroyed by fire, flood, storm, tempest or other inevitable accident is not wide enough to absolve the tenant from liability for rent while the landlord is executing repairs under a covenant to do so (*Saner v Bilton* (1878) 7 ChD 815).

4 See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 690, [1981] 1 All ER 161 at 168, HL, per Lord Hailsham of St Marylebone LC. See also PARAS 274 ante, PARA 601 post. There is no reported case in which a lease has been held to be frustrated.

5 See PARA 270 the text and note 5 ante.

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## **276. Premises becoming uninhabitable.**

Unless the lease contains express provision to the contrary<sup>1</sup> and with certain statutory exceptions<sup>2</sup>, the tenant takes the demised premises subject to any defects existing in them at the time of the letting, and to any events which subsequently affect their value<sup>3</sup>. Hence, it has been the general rule that the rent continues to be payable notwithstanding that, in the case of a dwelling house or flat, it is at the time of letting<sup>4</sup>, or subsequently<sup>5</sup> becomes, unfit for habitation<sup>6</sup>; or, in the case of land near the seashore, that it is of no value<sup>7</sup>; or, in the case of agricultural land, that it is unsuitable for the intended use<sup>8</sup>; or that, by the landlord's neglect of an obligation to repair, the premises have become useless to the tenant<sup>9</sup>, although the tenant may have a claim against the landlord for breach of the landlord's covenant<sup>10</sup>. If, however, the premises are unfit by reason of war damage, the tenant may, subject to certain conditions, disclaim the lease<sup>11</sup>.

Certain types of physical catastrophe<sup>12</sup> or other supervening events which could not have been in the contemplation of the parties may, in exceptional circumstances, frustrate the lease so that rent is no longer payable<sup>13</sup>. It is recommended best practice that if the premises are so damaged by an uninsured risk as to prevent occupation, the tenant should be allowed to terminate the lease unless the landlord agrees to reinstate at his own cost<sup>14</sup>.

1 *Bennett v Ireland* (1858) EB & E 326; *Johnstone v Swan Estates Ltd* [1942] Ch 98, [1941] 3 All ER 446. A provision for suspension of rent applies only to the events specified in the provision: *Saner v Bilton* (1878) 7 ChD 815; *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507. As to such provision see further PARA 270 ante.

2 As to the statutory conditions as to fitness for habitation in the case of small dwelling houses see PARA 424 post.

3 No contract or condition is implied by law on the demise of real property that it is fit for the purpose for which it is let: see *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA, citing with approval the dicta in *Edler v Auerbach* [1950] 1 KB 359 at 373-374, [1949] 2 All ER 692 at 699 per Devlin J, who had cited *Hart v Windsor* (1844) 12 M & W 68 at 87 per Parke B.

4 *Hart v Windsor* (1844) 12 M & W 68 (house and garden ground); *Manchester Bonded Warehouse Co Ltd v Carr* (1880) 5 CPD 507 (floors in a warehouse); *Cruse v Mount* [1933] Ch 278 (flat). The tenant may, however, be entitled to recover damages for breach of the covenant for quiet enjoyment: *Cruse v Mount* supra. The doctrine of *Hart v Windsor* supra applies only to unfurnished premises. As to furnished premises see PARA 426 post.

5 *Arden v Pullen* (1842) 10 M & W 321 at 328; *Murray v Mace* (1874) IR 8 CL 396; *Collins v Barrow* (1831) 1 Mood & R 112 contra is not good law.

6 If, however, the cause of the defect is a failure by the landlord to fulfil repairing obligations, then if those breaches are severe enough to vitiate the central purpose of the letting the tenant can bring the tenancy to an end by accepting the repudiatory conduct of the landlord as putting an end to the contract of letting: *Hussein v Mehman* [1992] 2 EGLR 87, county court, approved and applied in *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7. However, although liability to pay the rent necessarily ceased in *Hussein v Mehman* supra on the date the lease was repudiated the tenants were not able to extinguish or diminish the rent because of the landlord's failure prior to that date: see [1992] 2 EGLR 87 at 93 per Sir Stephen Sedley QC.

7 *Earl of Meath v Cuthbert* (1876) IR 10 CL 395.

8 *Sutton v Temple* (1843) 12 M & W 52 at 62; and see *Cheater v Cater* [1918] 1 KB 247, CA (field dangerous for cattle as a result of yew trees overhanging it). Cf *Conolly v Baxter* (1819) 2 Stark 525.



9 *Surplice v Farnsworth* (1844) 7 Man & G 576; *Hart v Rogers* [1916] 1 KB 646; and see *Christie v Wilson* 1915 SC 645, Ct of Sess. A lodger, if he leaves abruptly through the landlord's misconduct, is perhaps liable for rent only for the time of actual occupation: see *Kirkman v Jervis* (1839) 7 Dowl 678. In *Hussein v Mehlman* [1992] 2 EGLR 87, county court (a case followed in *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7 and, according to Judge Weekes QC sitting as a judge of the High Court in that case, apparently treated as correct without argument by the court of Appeal in *Chartered Trust plc v Davies* [1997] 2 EGLR 83, CA: see *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* supra at 12) it was held that a landlord's failure to comply with his repairing covenants amounted to a repudiatory breach which entitled the tenant to return the keys and give up possession.

10 *Hart v Rogers* [1916] 1 KB 646. As to deductions permitted from rent see PARA 266 ante.

11 Or in the case of short tenancies the rent may be suspended: see PARA 644 et seq post. Cf, however, *Simper v Coombs* [1948] 1 All ER 306; *Denman v Brise* [1949] 1 KB 22, [1948] 2 All ER 141, CA (tenant still liable for rent where premises destroyed by enemy action).

12 Eg the collapse of a property into the sea as a result of coastal erosion: see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700-701, [1981] 1 All ER 161 at 175-176, HL, per Lord Simon of Glaisdale ('obviously occupation of a dwelling house is something significantly different in nature from its aqualung contemplation after it has suffered a sea change'). Cf, however, *Carter v Cummins* (1665) cited in 1 Cas in Ch at 84 (tenant still liable to pay rent where premises carried away in a flood); and see 1 Roll Abr 236 (in a case where premises are inundated by fresh water, it is said, the tenant has the fish and usually the land may be reclaimed, but it is different in case of invasion by the sea, as the right to fish is in the public, and usually the land cannot be reclaimed).

13 See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL; and PARA 274 ante, PARA 601 post.

14 See PARA 270 the text and note 5 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/6. PAYMENT OF RENT/(6) SUSPENSION OF RENT/277. Effect on mining lease of exhaustion of minerals.

## **277. Effect on mining lease of exhaustion of minerals.**

A fixed rent reserved by a mining lease continues to be payable throughout the term, notwithstanding that the minerals have been worked out<sup>1</sup>, or are not worth the cost of working<sup>2</sup>. If, however, no rent is fixed, but the tenant has covenanted to get a minimum amount of minerals, he is not liable to pay royalty on this amount if in fact it does not exist in the land<sup>3</sup>.

1 *Marquis of Bute v Thompson* (1844) 13 M & W 487 at 493.

2 *Mellers v Duke of Devonshire* (1852) 16 Beav 252; *Ridgway v Sneyd* (1854) Kay 627 at 636; *Strelley v Pearson* (1880) 15 ChD 113 at 119; and see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 333.

3 *Lord Clifford v Watts* (1870) LR 5 CP 577 at 587-588.

## **UPDATE**

### **277 Effect on mining lease of exhaustion of minerals**

NOTE 2--See also *Homepace Ltd v Sita South East Ltd* [2008] EWCA Civ 1, [2008] 1 P & CR 436.

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## **(7) APPORTIONMENT OF RENT**

### **278. Apportionment in respect of time.**

Subject to any express agreement to the contrary<sup>1</sup>, rent, whether reserved or made payable under an instrument in writing or otherwise, is considered as accruing from day to day and is apportionable in respect of time accordingly<sup>2</sup>.

The apportionment does not accelerate the time for payment of the apportioned part. In the case of a continuing rent, the apportioned part of any such rent becomes payable when the entire portion of which it forms a part becomes due and payable, and not before<sup>3</sup>; and, in the case of a rent determined by re-entry, death or otherwise, it becomes payable when the next entire portion of the rent would have been payable if the same had not so determined, and not before<sup>3</sup>. Apportionment is, however, allowed only of rent accruing due at the date of the event which necessitates the apportionment. Sums made payable in advance, and already due before that event, are not apportioned<sup>4</sup>. Thus, where a forfeiture is effected in the middle of a quarter, the whole quarter's rent due on the previous quarter day is payable<sup>5</sup>. Variable rents are apportionable on a time basis in the same way as fixed rent<sup>6</sup>.

On an assignment of the term between two quarter days the assignor alone is liable to the landlord for rent in respect of the period down to the date of assignment and the assignee is liable only for the rent referable to the period after the date of the assignment<sup>7</sup>. If the resolution of a rent review is delayed with the result that arrears of rent become payable only after an assignment, the arrears are payable by the person in whom the lease was vested during the period to which they relate<sup>7</sup>. The same is true if a lease is surrendered before an outstanding review is resolved<sup>8</sup>.

Persons entitled to the apportioned parts of the rent have respectively the same remedies for recovering those parts, when payable, as they would have had for recovering the entire portion of rent if entitled to it respectively; but the tenant of the land is not to be resorted to for any such apportioned part forming part of an entire or continuing rent specifically. Where the entire or continuing rent, including the apportioned part, has been recovered by a person other than the personal representative of a deceased person, the apportioned part is recoverable from that other person by the personal representative<sup>9</sup>.

An apportionment may be made, not only as between the persons entitled to the rent, but also as against a tenant whose liability for rent ceases<sup>10</sup>, or changes its character<sup>11</sup>, between two rent days; and after the day when the entire portion of rent has, or would have, fallen due, the proportionate part is recoverable against the tenant as rent due under the lease<sup>12</sup>.

Consequently a tenant who surrenders his lease between two rent days is liable for rent up to the surrender; and a tenant on whose property a landlord lawfully re-enters is liable for rent up to the re-entry<sup>13</sup>, but he is not liable if he is wrongfully evicted<sup>14</sup>.

<sup>1</sup> Apportionment Act 1870 s 7; and see *Re Meredith, Stone v Meredith* (1898) 67 LJ Ch 409; *Tyrrell v Clark* (1854) 2 Drew 86.

<sup>2</sup> Apportionment Act 1870 s 2 (amended by the Statute Law Revision (No 2) Act 1893). At common law there was no apportionment of rent in respect of time as the rent became payable only on the expiration of the full quarterly or other period in respect of which it was reserved: *Clun's Case* (1613) 10 Co Rep 127a at 128a.

- 3 Apportionment Act 1870 s 3; and see *Re United Club and Hotel Co Ltd* (1889) 60 LT 665; *Re Lucas, Parish v Hudson* (1885) 55 LJ Ch 101, CA.
- 4 *Ellis v Rowbotham* [1900] 1 QB 740, CA. See also *William Hill (Football) Ltd v Willen Key & Hardware Co Ltd* as reported at (1964) 108 Sol Jo 482 (Apportionment Act 1870 applies only to rent paid in arrears, not to rent paid in advance).
- 5 *Capital & City Holdings Ltd v Dean Warburg Ltd* (1988) 58 P & CR 346, [1989] 1 EGLR 90, CA. See also *Re A Company* [2006] All ER (D) 126 (Aug) (break clauses in two leases; full amount of rent due for quarter in which each lease ended).
- 6 *Coal Commission v Earl Fitzwilliam's Royalties Co* [1942] Ch 365, [1942] 2 All ER 56.
- 7 *Parry v Robinson-Wyllie Ltd* (1987) 54 P & CR 187, [1987] 2 EGLR 133.
- 8 *Torminster Properties Ltd v Green* [1983] 2 All ER 457, [1983] 1 WLR 676, CA.
- 9 Apportionment Act 1870 s 4.
- 10 *Swansea Bank v Thomas* (1879) 4 Ex D 94; *Hartcup & Co v Bell* (1883) Cab & El 19; *Re Johnson, ex p Blackett* (1894) 70 LT 381. This includes the case of eviction by title paramount: *Elvidge v Meldon* (1889) 24 LR 91. As to eviction see PARA 271 ante; and as to unlawful eviction see PARA 280 ante, PARAS 653-655 post.
- 11 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 519, 686 et seq (tenant's bankruptcy); COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 794, 889 (company in liquidation).
- 12 See *Re Wilson, ex p Lord Hastings* (1893) 62 LJQB 628 at 632. It has been held that an assignee is liable for the apportioned rent only from the assignment: *Glass v Patterson* [1902] 2 IR 660; *Parry v Robinson-Wyllie Ltd* (1987) 54 P & CR 187, [1987] 2 EGLR 133.
- 13 Formerly this was otherwise: see *Grimman v Legge* (1828) 8 B & C 324. Cf *Slack v Sharpe* (1838) 8 Ad & El 366 (surrender). See also *Oldershaw v Holt* (1840) 12 Ad & El 590 (re-entry).
- 14 *Clapham v Draper* (1885) Cab & El 484.

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## 279. Apportionment in respect of estate.

Rent is apportionable in respect of the demised premises, either because the reversion has been severed so that different portions of the rent are payable to different persons, or because the tenant has ceased to be in possession of the whole of the demised premises.

Rent is apportionable upon a severance of the reversion, whether this takes place by the act of the parties or by an act of law<sup>1</sup>. Thus it is apportionable where the reversion is severed by grant of a part to a stranger or to the tenant<sup>2</sup>, and where it is severed on the landlord's death<sup>3</sup>. If the apportionment is to be binding on the tenant, it must be made with his consent or by judicial process<sup>4</sup>.

The rent is also apportionable where the tenant ceases to have possession of part of the demised premises, provided this is not due to unlawful eviction by the landlord. Thus it is apportionable where the tenant surrenders part of the premises<sup>5</sup>, or where the landlord re-enters upon part for a forfeiture under a special condition for re-entry allowing this to be done<sup>6</sup>, or where the tenant is evicted from part by a person lawfully claiming under title paramount<sup>7</sup>, or where a part of the premises is destroyed by an inundation of the sea<sup>8</sup>, or where on the termination of a long lease of residential premises at a low rent, a part only of the premises

qualifies for protection under Part I of the Landlord and Tenant Act 1954<sup>9</sup>. The tenant claiming apportionment on any of these grounds must prove the apportioned value of the land withdrawn from the demise<sup>10</sup>, ascertained at the date of the withdrawal<sup>11</sup>; and the right to apportionment depends upon the person claiming it being in possession of the land, whether as original tenant or as assignee<sup>12</sup>. Where the tenant has assigned the lease and is sued on his personal contract, he may possibly be liable for the whole rent, notwithstanding that the assignee has surrendered part of the premises<sup>13</sup>.

1 Co Litt 148a; *Collins and Harding's Case* (1597) 13 Co Rep 57; *Hartley v Maddocks* [1899] 2 Ch 199; *Mitchell v Mosley* [1914] 1 Ch 438 at 445, CA. On severance of the reversion, rent is now annexed to the severed portions by statute: see PARA 555 post.

2 *West v Lussels* (1601) Cro Eliz 851.

3 *Ewer v Moyle* (1600) Cro Eliz 771 (devise of different parcels, leased at an entire rent to different persons). Where the rent was reserved in respect of a house and furniture, and these devolved upon different persons, the rent was apportioned, notwithstanding that it issued only out of the house: *Salmon v Matthews* (1841) 8 M & W 827; *Charles Hoare & Co v Hove Bungalows Ltd* (1912) 56 Sol Jo 686, CA; and see PARA 244 ante.

4 *Bliss v Collins* (1822) 5 B & Ald 876; *Swansea Corp'n v Thomas* (1882) 10 QBD 48 at 51; and see *Collins and Harding's Case* (1597) 13 Co Rep 57. Where there are co-tenants, both should be parties to a claim for apportionment: *Stafford v City of London* (1718) 1 Stra 95.

5 *Smith v Malings* (1608) Cro Jac 160; Co Litt 148a.

6 *Walker's Case* (1587) 3 Co Rep 22a at 22b; Co Litt 148a. Under certain statutes the tenant may resume possession of part of the land, or part of the land may be taken for public purposes, and provision is made for apportionment of the rent: see the Agricultural Holdings Act 1986 s 33; and AGRICULTURAL LAND vol 1 (2008) PARA 395; the Lands Clauses Consolidation Act 1845 s 119; the Compulsory Purchase Act 1965 s 19; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 707-708. As to land acquired by the Church Commissioners see the New Parishes Measure 1943 s 15(3); and ECCLESIASTICAL LAW vol 14 para 1062 note 8; and as to allotments see AGRICULTURAL LAND vol 1 (2008) PARA 540. For other statutory powers of apportionment see PARA 281 post. As to provisions in the lease for resumption of possession see PARA 239 ante.

7 *Walker's Case* (1587) 3 Co Rep 22a; *Smith v Malings* (1608) Cro Jac 160; and see *Stevenson v Lambard* (1802) 2 East 575; *Doe d Vaughan v Meyler* (1814) 2 M & S 276; *Tomlinson v Day* (1821) 2 Brod & Bing 680; *Hartley v Maddocks* [1899] 2 Ch 199; and PARA 273 ante. An eviction by his landlord from part gives rise, however, to a suspension of the whole rent: *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1969] 3 All ER 621, [1969] 1 WLR 1215 (revsd on another point [1971] Ch 764, [1970] 2 All ER 600, CA); and see PARA 280 post.

8 1 Roll Abr 236; and see PARA 276 note 12 ante.

9 See the Landlord and Tenant Act 1954 s 3(2)(b); and PARA 1209 post.

10 *Smith v Malings* (1608) Cro Jac 160.

11 *Salts v Battersby* [1910] 2 KB 155.

12 *West v Lussels* (1601) Cro Eliz 851; and see *Walker's Case* (1587) 3 Co Rep 22a.

13 *Stevenson v Lambard* (1802) 2 East 575; *Baynton v Morgan* (1888) 22 QBD 74, CA; cf *Swansea Corp'n v Thomas* (1882) 10 QBD 48. As to the apportionment of rent between tenant and assignee on severance of part of the premises demised see PARA 551 post; and as to the statutory restriction on liability for rent after assignment see PARAS 289-291 post.

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## 280. Unlawful eviction; inability to take possession.

There is no apportionment in favour of a landlord who unlawfully evicts the tenant from part of the demised premises, and no part of the rent is recoverable so long as the eviction continues<sup>1</sup>; nor may the landlord recover in a claim for use and occupation in respect of the part of the premises retained by the tenant<sup>2</sup>. Similarly, where the lease includes land and chattels, and the tenant is unlawfully evicted from the land, there is no apportionment<sup>3</sup>.

Where part of the premises is held by a third person rightfully claiming under a title adverse to the landlord so that the tenant cannot obtain possession, the result is the same as in the case of unlawful eviction by the landlord, and no part of the rent is recoverable<sup>4</sup>. This was formerly the case, also, where the lease was oral and part of the premises was held under a prior lease made by the same landlord, as the oral lease carried no interest in the reversion<sup>5</sup>, whereas, if the later lease was by deed, it carried the reversion in the part of the premises already let, as well as the immediate possession of the rest, and the whole rent was recoverable<sup>6</sup>; and similarly where the tenant is merely excluded from enjoyment of an easement granted in connection with the premises<sup>7</sup>. It seems, however, that an oral lease may now carry an interest in the reversion in certain circumstances and that in those circumstances the whole rent may, therefore, be recoverable<sup>8</sup>.

1 *Morrison v Chadwick* (1849) 7 CB 266; and see *Furnivall v Grove* (1860) 8 CBNS 496. As to eviction see PARA 271 ante; and as to unlawful eviction see further PARAS 653-655 post.

2 *Upton v Townend* (1855) 17 CB 30; and see *Reeve v Bird* (1834) 1 Cr M & R 31 at 36; *Hutchinson v Taylor* (1884) 77 LT Jo 120 (in the county court); *Wilson v Burne* (1889) 24 LR Ir 14 at 27, CA; contra *Stokes v Cooper* (1814) 3 Camp 514n; *Smith v Raleigh* (1814) 3 Camp 513.

3 In this case there is the further reason that the rent issues wholly out of the land, and is therefore gone (*Emott v Cole* (1591) Cro Eliz 255; *Read v Lawnse* (1561) 2 Dyer 212b; and see PARA 244 ante); although this reason is not operative where the title to the land and goods is lawfully severed (*Salmon v Matthews* (1841) 8 M & W 827).

4 *Holgate v Kay* (1844) 1 Car & Kir 341.

5 *Neale v Mackenzie* (1836) 1 M & W 747, Ex Ch; *Watson v Waud* (1853) 8 Exch 335 at 339. See, however, text and note 8 infra.

6 *Ecclesiastical Comrs of Ireland v O'Connor* (1858) 9 ICLR 242; and see PARAS 104-106 ante.

7 See *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA.

8 See PARA 105 the text and notes 2-3 ante.

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## 281. Statutory powers of apportionment of rents.

An order of apportionment of a rent reserved by a lease, or other rent or payment as is mentioned in the Inclosure Act 1854<sup>1</sup>, may be made<sup>2</sup> by the Secretary of State<sup>3</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>4</sup>, on the application of any person interested in the rent or payment, or any part thereof, or in the land in respect of which the rent or payment is payable, without the concurrence of any other person<sup>5</sup>. The Secretary of State or the Assembly or minister may in any such case, on the application of any

person entitled to the rent or payment or any part thereof, require as a condition of making the order that any apportioned part of the rent or payment which does not exceed the yearly sum of £5<sup>6</sup> is to be redeemed<sup>7</sup> forthwith<sup>8</sup>. An order of apportionment may provide for the amount apportioned to any part of the land in respect of which the rent or payment is payable to be nil<sup>9</sup>.

On an application for leave to enforce a judgment or order for recovery of possession in default of payment of rent under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951<sup>10</sup>, the court has power, where the land is held in distinct parcels under one lease, to apportion the arrears<sup>11</sup>.

There are other statutory powers of apportionment of rent under the Settled Land Act 1925<sup>12</sup>.

1     I.e. the Inclosure Act 1854 s 10 (as amended). The only rents or payments now referred to are annual or periodical fixed rents or other certain payments: see s 10 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 844. 'Other certain payment' would appear to include covenanted sums, eg service charges of a fixed amount. No application for apportionment under s 10 (as amended) may be made in a case in which an application for apportionment may be entertained under the Rentcharges Act 1977 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 839 et seq): Inclosure Act 1854 s 10 (amended by the Rentcharges Act 1977 s 17(1), Sch 1 para 1).

2     I.e. under the Inclosure Act 1854 ss 10-14 (as amended).

3     By virtue of the combined effect of the Transfer of Functions (Ministry of Food) Order 1955, SI 1955/554, art 3(1); the Minister of Land and Natural Resources Order 1965, SI 1965/143, art 2(1)(b), Schedule; the Ministry of Land and Natural Resources (Dissolution) Order 1967, SI 1967/156, art 2(2)(a), (5); and the Secretary of State for the Environment Order 1970, SI 1970/1681, art 2(1), the reference to the Minister of Agriculture and Fisheries in the Landlord and Tenant Act 1927 s 20(1) is now to be construed, in relation to England, as a reference to the Secretary of State. As to the Secretary of State see PARA 27 note 3 ante.

4     As to the transfer of functions, so far as exercisable in relation to Wales, see PARA 27 note 4 ante.

5     Landlord and Tenant Act 1927 s 20(1). Where the reason for the application was due to any action taken by a person other than the applicant, the Secretary of State or the Assembly or minister has power, notwithstanding anything in the Inclosure Act 1854 s 14, to direct by whom and in what manner the expenses of the application or any part thereof are to be paid: Landlord and Tenant Act 1927 s 20(2).

6     The Secretary of State or the Assembly or minister may vary the amount by order: Housing Act 1980 s 143(2).

6     I.e. in accordance with the Rentcharges Act 1977 ss 8-10 (as amended) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 900 et seq), which, for the purposes of the Landlord and Tenant Act 1927 s 20 (as amended), have effect with necessary modifications.

7     Ibid s 20(1) proviso (amended by the Rentcharges Act 1977 Sch 1 para 3; the Housing Act 1980 s 143(1)).

8     Landlord and Tenant Act 1927 s 20(1A) (added by the Housing Act 1980 s 143(3)).

9     See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 2 (as amended); para 287 post; and ARMED FORCES vol 2(2) (Reissue) PARA 83.

10    See ibid s 4(3).

11    See the Settled Land Act 1925 ss 52(2), 60; and SETTLEMENTS vol 42 (Reissue) PARAS 859, 862.

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## **(8) RECOVERY OF RENT AND RELATED SUMS**

## (i) In general

### 282. Distress.

As incident to his reversion, a landlord has a right to distrain for arrears of rent upon all goods found upon the premises<sup>1</sup>; and in certain cases the landlord may distrain on goods which are not upon the demised premises<sup>2</sup>.

No distress for the rent of any dwelling house let on a protected tenancy<sup>3</sup> or an assured tenancy<sup>4</sup> or subject to a statutory tenancy<sup>5</sup> may be levied except with the leave of the county court<sup>6</sup>.

1 As to the right to distrain and the exceptions to such right see DISTRESS vol 13 (2007 Reissue) PARA 901 et seq; and as to the restrictions on the right of distress after the tenant's bankruptcy or winding up of a company or the appointment of a receiver see DISTRESS vol 13 (2007 Reissue) PARA 1020 et seq. Where the court makes an interim order for an individual voluntary arrangement, then during the period for which it is in force no distress may be levied against the debtor or his property except with the leave of the court: see the Insolvency Act 1986 s 252(2)(b) (amended by the Insolvency Act 2000 s 3, Sch 3 paras 1, 2(b)); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 83. The amendment made by the Insolvency Act 2000 reverses the decision in *McMullen & Sons Ltd v Cerrone* (1993) 66 P & CR 351, [1994] 1 EGLR 99.

2 See DISTRESS vol 13 (2007 Reissue) PARA 980.

3 For the meaning of 'protected tenancy' see PARA 818 post.

4 For the meaning of 'assured tenancy' see PARA 1018 post.

5 For the meaning of 'statutory tenancy' see PARA 831 post.

6 Rent Act 1977 s 147(1); Housing Act 1988 s 19(1); and see PARAS 908, 1090 post. Nothing in those provisions applies to distress levied under the County Courts Act 1984 s 102 (as amended) (see CIVIL PROCEDURE vol 12 (2009) PARA 1353); see the Rent Act 1977 s 147(2) (amended by the County Courts Act 1984 s 148(1), Sch 2 Pt V para 67); the Housing Act 1988 s 19(2).

With respect to any application for such leave, the court has the same or similar powers with respect to adjournment, stay, suspension, postponement and otherwise as are conferred by the Rent Act 1977 s 100 (as amended) (see PARA 972 post) or the Housing Act 1988 s 9 (as amended) (see PARA 1117 post) in relation to proceedings for possession of such a dwelling house: Rent Act 1977 s 147(1); Housing Act 1988 s 19(1).

Protected occupiers and statutory tenants under the Rent (Agriculture) Act 1976 and assured agricultural occupiers under the Housing Act 1988 are similarly protected from distress without leave of the court: see PARAS 1158, 1186 respectively post.

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### 283. Proceedings to recover rent.

Where the lease is by deed, a claim for arrears of rent may be brought<sup>1</sup> on the express covenant for payment of rent contained in the lease, or, if there is no express covenant, on the covenant implied by the reservation of rent<sup>2</sup>. Similarly, where the lease is oral, a claim may be brought on the express or implied agreement for payment of rent<sup>3</sup>. In these claims the rent is recoverable by virtue of the contract, and, except where the tenancy is at will<sup>4</sup>, it is not necessary to show that the tenant has been in occupation<sup>5</sup>. In order that a claim may be

brought on a guarantee for rent, the guarantee must be in writing, and must be given to the landlord<sup>6</sup>.

A claim for arrears of rent, with or without a claim for possession, is often brought summarily<sup>7</sup>; but summary judgment may not be given in proceedings for possession of residential premises against a tenant or a person holding over after the end of his tenancy whose occupancy is protected within the meaning of the Rent Act 1977<sup>8</sup> or the Housing Act 1988<sup>9</sup>.

1 As to the effect of distress upon the remedy and the effect of obtaining judgment upon the right to distrain see DISTRESS vol 13 (2007 Reissue) PARAS 974, 1045; as to proof for rent on bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 519; and as to proof for rent on the winding up of a tenant company see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 889.

2 See PARA 249 ante. As to the recovery of interest see the Supreme Court Act 1981 s 35A (as added); the County Courts Act 1984 s 69 (as amended); *Allied London Investments Ltd v Hambro Life Assurance plc* (1985) 50 P & CR 207, [1985] 1 EGLR 45, CA; and DAMAGES vol 12(1) (Reissue) PARA 848; and as the time limit on claims see LIMITATION PERIODS vol 68 (2008) PARA 915 et seq. The Supreme Court Act 1981 is prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1; at the date at which this title states the law, that amendment was not in force.

Claims for recovery of rent are often coupled with a claim for possession. As to possession proceedings see PARA 656 et seq post. There is a pre-action protocol for certain possession claims based on rent arrears: see PARA 657 post.

3 Where land is occupied by the owner's relative, the usual presumption of an agreement to pay rent may be reversed: *Alington v Booth* (1856) 3 Jur NS 50.

4 See PARA 198 ante.

5 *Bellasis v Burbrick* (1697) 1 Salk 209. The rent is not payable, however, if the tenant has abstained from entering until performance by the landlord of a condition precedent, such as obtaining a licence from the superior landlord to carry on a particular trade (*Brook v Fletcher* (1877) 37 LT 100), or where the rent is expressed to become payable only when the landlord has complied with a condition, such as to put the premises in a state of repair (*Fox v Slaughter* (1919) 35 TLR 668).

6 *Nash v Spencer* (1896) 13 TLR 78; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1024, 1052 et seq.

7 See under CPR Pt 24: see CIVIL PROCEDURE vol 11 (2009) PARA 524 et seq. When producing computer-generated rent records, it is not necessary for a deponent for a landlord to identify, in an affidavit in support of a claim for summary judgment, the particular individual who obtained the records from the computer: *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, [1999] 24 EG 155.

8 See PARA 818 post.

9 CPR 24.3(2)(a)(ii). As to protected tenancies within the meaning of the Housing Act 1988 see PARA 1009 post.

## UPDATE

### 283 Proceedings to recover rent

NOTE 2--Amendment in force on 1 October 2009: SI 2009/1604.

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### 284. Claim for use and occupation.



Where there is a valid and subsisting tenancy agreement or an agreement for lease, a claim may be brought in contract for rent; but it is doubtful whether a claim for use and occupation may be brought<sup>1</sup>. A claim for use and occupation is now of practical importance only in situations where there is occupation of land without such an agreement.

Wherever the landlord has permitted the defendant to occupy his land with the intention of creating the relationship of landlord and tenant, the landlord may bring a claim for use and occupation to recover a reasonable satisfaction<sup>2</sup> for the land so occupied<sup>3</sup>. This remedy is available (and ordinarily will only be relevant) where a person has been in occupation of land without an agreement fixing the amount of rent<sup>4</sup>. The compensation is recovered as damages for breach of an implied agreement to pay for the use of the land<sup>5</sup>. The claim lies only if the tenant has actually entered on the premises with the intention of occupying as tenant<sup>6</sup> and, if he has entered without any period for the tenancy being fixed, the landlord may recover in respect of the period of occupation only<sup>7</sup>; but, if he has entered under a contract fixing the period, the compensation is recoverable in respect of the whole period, notwithstanding that the occupation has not lasted so long<sup>8</sup>. To maintain the claim the landlord must show an express or implied contract with himself<sup>9</sup>, and he must have the legal estate<sup>10</sup>. A legal title by estoppel is sufficient, as, for example, where he has let the premises to the defendant<sup>11</sup>, or where the defendant has recognised his title by payment of rent<sup>12</sup>.

1 At common law an action for use and occupation could (at least if brought in assumpsit rather than debt) be defeated by proof of an actual demise: see *Beverley v Lincoln Gas Light and Coke Co* (1837) 6 Ad & El 829 at 839 note (a) (assumpsit); *Churchward and Blight v Ford* (1857) 2 H & N 446 at 449 per Bramwell B (debt); *Gibson v Kirk* (1841) 1 QB 850 (debt). This rule was altered by the Distress for Rent Act 1737 s 14, which provided that proof of a parol demise or an agreement, not being by deed, reserving a certain rent was not to cause the plaintiff to be non-suited in an action on the case. The Distress for Rent Act 1737 s 14 was, however, repealed by the Statute Law (Repeals) Act 1989 s 1(1), Sch 1 Pt I, presumably because the technical difficulties which it was designed to overcome no longer exist. Once again, therefore, the common law rule will apply where there is a demise by deed and in cases of parol lettings. The action lay at common law and the Distress for Rent Act 1737 s 14 (repealed) established the action but did not introduce it: *Beverley v Lincoln Gas Light and Coke Co* supra at 839; *Gibson v Kirk* supra. Thus the repeal of the Distress for Rent Act 1737 s 14 leaves the common law remedy, although the express statutory right to recover 'a reasonable satisfaction' from the occupying defendant under s 14 is now abolished by the repeal of s 14.

2 The sum as the occupation is worth: *Thetford Corp'n v Tyler* (1845) 8 QB 95 at 100.

3 An actual demise is not a prerequisite (*Hellier v Sillcox* (1850) 19 LJQB 295; *Churchward and Blight v Ford* (1857) 26 LJ Ex 354); but there must at least be the intention to create a demise (*Morris v Tarrant* [1971] 2 QB 143, [1971] 2 All ER 920).

4 The claim may lie where nothing appears except that the claimant is entitled to land which the defendant has occupied (*Hellier v Sillcox* (1850) 19 LJQB 295), or holds over in circumstances that point to the conclusion that he is doing so with the landlord's consent (*Harding v Crethorn* (1793) 1 Esp 56; *Waring v King* (1841) 8 M & W 571) or leaves his subtenant in occupation at the end of the term (*Ibbs v Richardson* (1839) 9 Ad & El 849) unless the subtenant is entitled to statutory security of tenure and the tenant has done everything possible to evict him (*Reynolds v Bannerman* [1922] 1 KB 719; *Watson v Saunders-Roe Ltd* [1947] KB 437, CA); but an accidental holding over for a short time does not make the tenant liable for the whole quarter (*Gray v Bompas* (1862) 11 CBNS 520); nor is the tenant liable where there is a demise on the express condition that there is to be no liability for rent until the landlord has put the premises in repair (*Fox v Slaughter* (1919) 35 TLR 668), or where a substituted tenant has been accepted by the landlord (*Laurance v Faux* (1861) 2 F & F 435), though the substituted tenant is liable (*Phipps v Sculthorpe* (1817) 1 B & Ald 50; cf *Hyde v Moakes* (1832) 5 C & P 42; *Theatre Royal Drury Lane Co of Proprietors v Chapman* (1843) 1 Car & Kir 14). Occupation in anticipation of an intended lease will render the occupier liable (*Coggan v Warwicker* (1852) 3 Car & Kir 40; *Smith v Eldridge* (1854) 15 CB 236; *Dawes v Dowling* (1874) 31 LT 65 (shooting rights)), unless the lease does not proceed through the landlord's fault (*Rumball v Wright* (1824) 1 C & P 589); and see PARA 200 ante.

5 Accordingly no claim will lie where the circumstances negative the implication of a contract or where the defendant is a trespasser setting up an adverse title: *Phillips v Homfray* (1883) 24 ChD 439 at 461, CA; *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508 at 532, HL; *Morris v Tarrant* [1971] 2 QB 143, [1971] 2 All ER 920.

6 *Edge v Strafford* (1831) 1 Cr & J 391; *Clarke v Webb* (1834) 1 Cr M & R 29; *How v Kennett* (1835) 3 Ad & El 659 at 666; *Woolley v Watling* (1837) 7 C & P 610; *Lowe v Ross* (1850) 5 Exch 553. Putting up a board for letting (*Sullivan v Jones* (1829) 3 C & P 579), or sending in persons to clean and decorate the premises, is evidence of occupation (*Smith v Twoart* (1841) 2 Man & G 841; *Towne v D'Heinrich* (1853) 13 CB 892); and occupation by a subtenant is sufficient (*Bull v Sibbs* (1799) 8 Term Rep 327; *Neal v Swind* (1832) 2 Cr & J 377), and so is occupation by a co-tenant (*Christy v Tancred* (1840) 7 M & W 127; *Electric Telegraph Co v Moore* (1861) 2 F & F 363); but digging holes to examine the fitness of the land for mining is not (*Jones v Reynolds* (1836) 7 C & P 335).

7 *Gibson v Kirk* (1841) 1 QB 850 at 856. Payment in advance cannot be recovered: *Angell v Randall* (1867) 16 LT 498.

8 *Smallwood v Sheppards* [1895] 2 QB 627 at 629; and see *Pinero v Judson* (1829) 6 Bing 206; *Jones v Reynolds* (1836) 7 C & P 335.

9 See *Churchward and Blight v Ford* (1857) 26 LJ Ex 354; *Sloper v Saunders* (1860) 29 LJ Ex 275.

10 *Cobb v Carpenter* (1809) 2 Camp 13n; *Harris v Booker* (1827) 4 Bing 96; *Morgell v Paul* (1828) 2 Man & Ry KB 303.

11 Hence an auctioneer may sue if he has let as principal (*Fisher v Marsh* (1865) 6 B & S 411), but not if he is known to let only as agent (*Evans v Evans* (1835) 3 Ad & El 132).

12 *Dolby v Iles* (1840) 11 Ad & El 335; and see *Allason v Stark* (1838) 9 Ad & El 255. See further ESTOPPEL vol 16(2) (Reissue) PARAS 1029 et seq, 1078.

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## 285. Mesne profits.

The landlord may recover in a claim for mesne profits the damages which he has suffered through being out of possession of the land or, if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the value<sup>1</sup> of the premises to the defendant for the period of the defendant's wrongful occupation<sup>2</sup>. In most cases the rent paid under any expired tenancy is strong evidence as to the open market value<sup>3</sup>. Mesne profits, being a type of damages for trespass, may be recovered in respect of the defendant's continued occupation only after the expiry of his legal right<sup>4</sup> to occupy the premises. The landlord is not limited to a claim for the profits which the defendant has received from the land, or those which he himself has lost<sup>5</sup>.

Mesne profits are treated as income for tax purposes and are thus calculated on a gross basis without deduction of income or corporation tax payable by the recipient<sup>6</sup>.

1 Ie a rack rent, but assuming short-term occupation only, and not eg the rate at which rent would be obtained under a lease for seven years. A rack rent may not exceed the maximum level permitted by statute: *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642.

2 *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA; *Whitwham v Westminster Brymbo Coal and Coke Co* [1896] 2 Ch 538. This will usually be the open market value but may be less if the defendant remained involuntarily: see *Ministry of Defence v Ashman* (1993) 66 P & CR 195, [1993] 2 EGLR 102, CA and *Ministry of Defence v Thompson* (1993) 25 HLR 552, [1993] 2 EGLR 107, CA (where mesne profits were ordered to be assessed on the basis of the former concessionary rent or what the occupier would have had to pay for suitable local authority housing, whichever was the higher). On the forfeiture of a headlease, both the headlease and also any underleases are terminated, and the landlord is entitled to mesne profits assessed on the basis of the letting value of the house for the duration of the period for which he is kept out of possession. That right is not prejudiced even if a vesting order is made in favour of the underlessees under the Law of

Property Act 1925 s 146(4) (see PARA 627 post): *Viscount Chelsea v Hutchinson* [1994] 2 EGLR 61, [1994] 43 EG 153, CA. See also *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841, [1995] 1 WLR 713, PC.

3 In the vast majority of cases in which mesne profits are claimed, they are awarded, if at all, at the rate of the previous rent; and, as a rule of practice, if not of law, it can be taken as being the case that the burden lies upon a party who argues for a different rate for mesne profits, whether higher or lower, to adduce evidence to rebut the inference arising from any reasonably recent rack rental transaction.

4 Thus, where the landlord seeks to recover possession under a proviso for re-entry for breach of covenant, mesne profits may be claimed only from the date of his election to determine the tenancy, and not from the date of the breach; and, where the landlord re-enters by issuing a writ or summons claiming possession (as opposed to physically re-entering the demised premises), the landlord's election occurs when the writ or the summons is served upon the tenant, so that the landlord is entitled to recover rent up to that date and mesne profits in respect of any subsequent occupation by the tenant: *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795, CA, overruling in part *Elliott v Boynton* [1924] 1 Ch 236, CA.

5 *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240 [1979] 1 WLR 285, CA; *Goodtitle v Tombs* (1770) 3 Wils 118 at 121; *Dunn v Large* (1783) 3 Doug KB 335; *Doe d Levi v Roe* (1848) 6 CB 272; *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 at 284 per Denning J.

6 *Raja's Commercial College v Gian Singh & Co Ltd* [1977] AC 312, [1976] 2 All ER 801, PC.

## UPDATE

### 285 Mesne profits

NOTE 2--Mesne profits can only be claimed for the period of the defendant's occupation; a tolerated trespasser has no obligation to notify the landlord when he gives up possession: *Jones v Merton LBC* [2008] EWCA Civ 660, [2008] 4 All ER 287.

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### 286. Limitation periods.

No claim may be brought or distress made to recover arrears of rent or damages in respect of them after the expiration of six years from the date on which the arrears became due, or on which a written acknowledgment was made<sup>1</sup>. The right to recover six years' arrears subsists so long as the relationship of landlord and tenant continues, notwithstanding the non-payment of rent for any number of years<sup>2</sup>. In a claim for mesne profits, which is a claim for trespass, only arrears for six years before action may be recovered<sup>3</sup>.

1 See the Limitation Act 1980 ss 19, 29, 30; and LIMITATION PERIODS vol 68 (2008) PARAS 1033, 1184-1185. The right of distress upon an agricultural holding to which the Agricultural Holdings Act 1986 applies (see PARA 806 post) is limited to rent which became due not more than one year before the making of the distress: see s 16; and AGRICULTURAL LAND vol 1 (2008) PARAS 346-348.

2 *Archbold v Scully* (1861) 9 HL Cas 360. As to when the landlord's title is barred see LIMITATION PERIODS vol 68 (2008) PARA 1016.

3 See the Limitation Act 1980 s 2; and LIMITATION PERIODS vol 68 (2008) PARA 993. See also *Reade v Reade* (1801) 5 Ves 744.

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## **287. Protection of service personnel.**

Where the tenant is a serviceman or servicewoman to whom the relevant provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951<sup>1</sup> apply, the court's leave is required before the landlord may levy a distress or proceed to execution on, or otherwise to the enforcement of, any judgment for the payment of rent, or for the recovery of land in default of payment of rent<sup>2</sup>. The 1951 Act does not, however, apply to tenancies created after the tenant began to perform the period of relevant service<sup>3</sup>.

1 In the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2-6 (as amended): see ARMED FORCES vol 2(2) (Reissue) PARA 81 et seq.

2 See *ibid* s 2 (as amended); and ARMED FORCES vol 2(2) (Reissue) PARAS 83-85.

3 See *ibid* ss 2(2) proviso, 3(10); and ARMED FORCES vol 2(2) (Reissue) PARAS 86-87. For other statutory protection of such tenants see PARAS 780 et seq, 1073 et seq post.

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## **(ii) Recovery after Assignment by Tenant**

### **288. Liability of original tenant for rent; the position at common law and the statutory limitations.**

At common law, an original tenant remains liable on the covenant to pay rent notwithstanding any assignment of the term<sup>1</sup>. The landlord may sue both the original tenant and the assignee for the same arrears and obtain judgment against both<sup>2</sup> but may have satisfaction against one only<sup>3</sup>. The original tenant's covenant is direct and primary<sup>4</sup> and is not treated after assignment of the term as one of suretyship; and accordingly it is not affected by the landlord's accepting a surrender of part of the demised premises<sup>5</sup> or by the release of a guarantor<sup>6</sup>. The original tenant is liable to pay an increased rent resulting from a rent review carried out after the assignment of the term<sup>7</sup> even if the value of the premises has been increased by works carried out by the assignee without the original tenant's knowledge<sup>8</sup>. The original tenant is also liable, notwithstanding assignment of the term, to an assignee of the reversion<sup>9</sup>. He is, however, not liable in respect of any period after the date on which the term was limited to expire when the tenancy continues under Part II of the Landlord and Tenant Act 1954<sup>10</sup> by virtue of the assignee's remaining in occupation<sup>11</sup>; nor, in the absence of clear words to the contrary effect, is a surety so liable<sup>12</sup>.

The operation of these common law rules is now tempered by statute. In the case of a tenancy granted on or after 1 January 1996<sup>13</sup>, the original tenant will not remain liable under any covenants including the covenant to pay rent and the landlord will not be able to sue the original tenant and the assignee for the same arrears<sup>14</sup>. The original tenant may, however, be required by the landlord to enter into an authorised guarantee agreement guaranteeing the

performance of the covenant to pay rent (or of any other tenant covenant) by the assignee<sup>15</sup>, in which case he will be liable to make payment provided that the landlord satisfies the statutory notice conditions<sup>16</sup>. In the case of a tenancy granted before 1 January 1996<sup>17</sup>, the former tenant will only be liable to pay rent after an assignment if the landlord satisfies the statutory notice conditions<sup>18</sup>. Where either the guarantor or the former tenant then makes full payment he has the right to be granted an overriding lease<sup>19</sup>.

1 *Baynton v Morgan* (1888) 22 QBD 74, CA; *Warnford Investments Ltd v Duckworth* [1979] Ch 127 at 137, [1978] 2 All ER 517 at 525. A term that the landlord is to take reasonable care to ensure that subsequent assignees are financially able to meet the rent will not be implied: *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* (1991) 64 P & CR 187, [1992] 1 EGLR 86, CA. See also *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, [1999] 24 EG 155 (claim against original tenant for arrears of rent, service charge and insurance premiums).

2 *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* (1991) 64 P & CR 187, [1992] 1 EGLR 86, CA (which stressed that the remedies are cumulative, not alternatives).

3 *House Property and Investment Co Ltd v Bernardout* [1948] 1 KB 314, [1947] 2 All ER 753.

4 *Warnford Investments Ltd v Duckworth* [1979] Ch 127 at 137, [1978] 2 All ER 517 at 525; and see the cases cited in notes 5-6 *infra*. As between the tenant and the assignee, however, it is the assignee's liability which is regarded as primary or ultimate: *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376.

5 *Baynton v Morgan* (1888) 22 QBD 74, CA.

6 *Allied London Investments Ltd v Hambro Life Assurance plc* [1984] 1 EGLR 16, (1983) 269 Estates Gazette 41. The release of an assignee by way of accord and satisfaction by a compromise expressed to be in full and final satisfaction of all claims and demands against the tenant under the lease releases the original tenant: *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945. See also, in relation to tenancies which began before 1 January 1996, *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581, [1994] 2 EGLR 70 (where an original tenant is not a party to a voluntary arrangement between an assignee and his creditors, he cannot rely on the terms of the arrangement to avoid liability under the lease); *Mytre Investments Ltd v Reynolds* [1995] 3 All ER 588, [1995] 2 EGLR 40 (where an assignee enters into a voluntary arrangement with his creditors which makes no provision for the forfeiture, disclaimer or variation of the lease and no express provision for the original tenants, the liability of those tenants under the lease is preserved).

7 *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P & CR 393, [1983] 2 EGLR 45; *GUS Property Management Ltd v Texas Homecare Ltd* [1993] 2 EGLR 63, [1993] 27 EG 130.

8 *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 Estates Gazette 643, 743.

9 *Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 113, [1971] 1 WLR 1080, CA.

10 *le the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.*

11 *City of London Corp'n v Fell* [1994] 1 AC 458, [1993] 4 All ER 968, HL.

12 *Junction Estates Ltd v Cope* (1974) 27 P & CR 482; *A Plessner & Co Ltd v Davis* [1983] 2 EGLR 70, (1983) 267 Estates Gazette 1039.

13 *le a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 post.*

14 *See ibid ss 1, 5; and PARAS 578, 582 post.*

15 *See PARA 593 post.*

16 *See the Landlord and Tenant (Covenants) Act 1995 s 17; and PARA 289 post.*

17 *le a tenancy which is not a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995.*

18 *See ibid s 17; and PARA 289 post.*

19 *See ibid s 19; and PARA 290 post.*

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**289. Restriction on liability of former tenant or his guarantor for rent or service charge etc.**

The following provisions apply where a person ('the former tenant') is as a result of an assignment<sup>1</sup> no longer a tenant<sup>2</sup> under a tenancy<sup>3</sup> but:

- 414 (1) in the case of a tenancy which is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995<sup>4</sup> he has under an authorised guarantee agreement<sup>5</sup> guaranteed the performance by his assignee of a tenant covenant<sup>6</sup> of the tenancy under which any fixed charge<sup>7</sup> is payable; or
- 415 (2) in the case of any tenancy he remains bound by such a covenant<sup>8</sup>.

The former tenant is not liable under that agreement or, as the case may be, the covenant to pay any amount in respect of any fixed charge payable under the covenant unless, within the period of six months beginning with the date when the charge becomes due<sup>9</sup>, the landlord<sup>10</sup> serves<sup>11</sup> on the former tenant a notice<sup>12</sup> informing him:

- 416 (a) that the charge is now due; and
- 417 (b) that in respect of the charge the landlord intends to recover from the former tenant such amount as is specified in the notice and, where payable, interest calculated on such basis as is so specified<sup>13</sup>.

Where a person ('the guarantor') has agreed to guarantee the performance by the former tenant of such a covenant as is mentioned above<sup>14</sup>, the guarantor is not liable under the agreement to pay any amount in respect of any fixed charge payable under the covenant unless, within the period of six months beginning with the date when the charge becomes due, the landlord serves on the guarantor a notice<sup>15</sup> informing him:

- 418 (i) that the charge is now due; and
- 419 (ii) that in respect of the charge the landlord intends to recover from the guarantor such amount as is specified in the notice and, where payable, interest calculated on such basis as is so specified<sup>16</sup>.

Where the landlord has duly served a notice under the above provisions, the amount, exclusive of interest, which the former tenant or the guarantor is liable to pay in respect of the fixed charge in question is not to exceed the amount specified in the notice unless:

- 420 (A) his liability in respect of the charge is subsequently determined to be for a greater amount;
- 421 (B) the notice informed him of the possibility that that liability would be so determined; and
- 422 (C) within the period of three months beginning with the date of the determination, the landlord serves on him a further notice<sup>17</sup> informing him that the

landlord intends to recover that greater amount from him, plus interest, where payable<sup>18</sup>.

1 Unless the context otherwise requires, 'assignment' includes equitable assignment and in addition (subject to the Landlord and Tenant (Covenants) Act 1995 s 11: see PARA 588 post) assignment in breach of a covenant of a tenancy or by operation of law: s 28(1).

2 Unless the context otherwise requires, 'landlord' and 'tenant', in relation to a tenancy, mean the person for the time being entitled to the reversion expectant on the term of the tenancy and the person so entitled to that term respectively: ibid s 28(1). For the meaning of 'tenancy' see note 3 infra.

3 Unless the context otherwise requires, 'tenancy' means any lease or other tenancy and includes a subtenancy and an agreement for a tenancy, but does not include a mortgage term: ibid s 28(1). As to tenancies to which the 1995 Act applies see PARA 578 post; and see note 8 infra.

4 For the meaning of 'new tenancy' see PARA 578 post.

5 For the meaning of 'authorised guarantee agreement' see PARA 593 post.

6 Unless the context otherwise requires, 'tenant covenant', in relation to a tenancy, means a covenant falling to be complied with by the tenant of premises demised by the tenancy; 'covenant' includes term, condition and obligation; and references to a covenant (or any description of covenant) of a tenancy include a covenant (or a covenant of that description) contained in a collateral agreement: Landlord and Tenant (Covenants) Act 1995 s 28(1). 'Collateral agreement', in relation to a tenancy, means any agreement collateral to the tenancy, whether made before or after its creation: s 28(1).

7 For these purposes, 'fixed charge', in relation to a tenancy, means (1) rent; (2) any service charge as defined by the Landlord and Tenant Act 1985 s 18 (as amended) (see PARA 326 post) (the words 'of a dwelling' being disregarded for this purpose); and (3) any amount payable under a tenant covenant of the tenancy providing for the payment of a liquidated sum in the event of a failure to comply with any such covenant: Landlord and Tenant (Covenants) Act 1995 s 17(6).

8 Ibid s 17(1). Section 17 applies where the tenancy referred to in s 17(1) is an overriding lease (as to which see PARA 290 post) as it applies in other cases falling within s 17(1): s 20(5)(b).

9 For transitional provisions regarding fixed charges which had become due before 1 January 1996 see ibid s 17(5).

10 For these purposes, 'landlord', in relation to a fixed charge, includes any person who has a right to enforce payment of the charge: ibid s 17(6).

11 The Landlord and Tenant Act 1927 s 23 (see PARA 703 post) applies in relation to the service of notices for these purposes: Landlord and Tenant (Covenants) Act 1995 s 27(5). A notice served in accordance with the statutory provisions has been held to have been validly served even if not actually received by the tenant: *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, [1999] 24 EG 155, applying *Galinski v McHugh* (1988) 57 P & CR 359, [1989] 1 EGLR 109, CA.

12 The form of any notice to be served for these purposes must be prescribed by regulations made by the Lord Chancellor by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Landlord and Tenant (Covenants) Act 1995 s 27(1), (6). The regulations must require any notice served for the purposes of s 17 to include an explanation of the significance of the notice: s 27(3). For the prescribed form of notice for the purposes of s 17(2) or (3) see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, regs 1(2), 2, Schedule, Form 1. A form substantially to the like effect may be used: reg 2. If any notice purporting to be served for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 17 is not in the prescribed form, or in a form substantially to the same effect, the notice is not effective: s 27(4). A minor error in the notice (eg as to the way interest on rent arrears is calculated under the lease) does not invalidate it: *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, [1999] 24 EG 155.

13 Landlord and Tenant (Covenants) Act 1995 s 17(2); and see *Scottish and Newcastle plc v Raguz* [2006] EWHC 821 (Ch), [2006] All ER (D) 148 (Apr) (notice served by the reversioner specifying rent due under the original lease not effective but the original tenant subsequently paid rent arrears irrespective of its strict liability to the reversioner; original tenant entitled to recover sums paid from its assignees).

The requirement to notify the former tenants of arrears does not apply to an indemnity between tenants: *MW Kellogg Ltd v Tobin* [1999] L & TR 513, sub nom *MW Kellogg Ltd v Tobin* [2000] CLY 3889.

14 le such a covenant as is mentioned in the Landlord and Tenant (Covenants) Act 1995 s 17(1).

15 As to the form of notice see note 12 supra.

16 Landlord and Tenant (Covenants) Act 1995 s 17(3). A landlord who wishes to enforce a guarantee against a guarantor must follow the procedure in s 17(3), but there is no precondition that, merely because the liability of the guarantor is secondary to the primary liability of the original tenant, the landlord has first to serve a notice under s 17(2): *Cheverell Estates Ltd v Harris* [1998] 1 EGLR 27, [1998] 02 EG 127.

17 For the prescribed form of notice for these purposes see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, regs 1(2), 2, Schedule, Form 2; and see further note 12 supra.

18 Landlord and Tenant (Covenants) Act 1995 s 17(4).

## UPDATE

### **289 Restriction on liability of former tenant or his guarantor for rent or service charge etc**

NOTE 13--*Raguz*, cited, reversed in part: [2008] UKHL 65, [2009] 1 All ER 763.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/6. PAYMENT OF RENT/(8) RECOVERY OF RENT AND RELATED SUMS/(ii) Recovery after Assignment by Tenant/290. Right of former tenant or his guarantor to overriding lease.

### **290. Right of former tenant or his guarantor to overriding lease.**

Where in respect of any tenancy<sup>1</sup> ('the relevant tenancy') any person ('the claimant') makes full payment of an amount which he has been duly required to pay in accordance with the provisions restricting liability for the payment of a fixed charge<sup>2</sup>, together with any interest payable, he is entitled<sup>3</sup> to have the landlord<sup>4</sup> under that tenancy grant him an overriding lease<sup>5</sup> of the premises demised by the tenancy<sup>6</sup>. An overriding lease is not required to reproduce any covenant of the relevant tenancy to the extent that the covenant is, in whatever terms, expressed to be a personal covenant between the landlord and the tenant<sup>7</sup> under that tenancy<sup>8</sup>. If any right, liability or other matter arising under a covenant of the relevant tenancy falls to be determined or otherwise operates, whether expressly or otherwise, by reference to the commencement of that tenancy:

423 (1) the corresponding covenant of the overriding lease must be so framed that that right, liability or matter falls to be determined or otherwise operates by reference to the commencement of that tenancy; but

424 (2) the overriding lease is not required to reproduce any covenant of that tenancy to the extent that it has become spent by the time that that lease is granted<sup>9</sup>.

A claim to exercise the right to an overriding lease is made by the claimant making a request for such a lease to the landlord<sup>10</sup>; and any such request:

425 (a) must be made to the landlord in writing and specify the payment by virtue of which the claimant claims to be entitled to the lease ('the qualifying payment'); and

426 (b) must be so made at the time of making the qualifying payment or within the period of 12 months beginning with the date of that payment<sup>11</sup>.



Where the claimant duly makes such a request:

- 427 (i) the landlord must<sup>12</sup> grant and deliver to the claimant an overriding lease of the demised premises within a reasonable time of the request being received by the landlord; and
- 428 (ii) the claimant must thereupon deliver to the landlord a counterpart of the lease duly executed by the claimant<sup>13</sup>, and is liable for the landlord's reasonable costs of and incidental to the grant of the lease<sup>14</sup>.

A claim that the landlord has failed to comply with head (i) above may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty<sup>15</sup>. The landlord is not, however, under any obligation to grant an overriding lease of the demised premises at a time when the relevant tenancy has been determined; and a claimant is not entitled to the grant of such a lease if at the time when he makes his request either the landlord has already granted such a lease and that lease remains in force or another person has already duly made<sup>16</sup> a request for such a lease to the landlord and that request has been neither withdrawn nor abandoned by that person<sup>17</sup>.

Where a claimant who has duly made a request for an overriding lease subsequently withdraws or abandons the request before he is granted such a lease by the landlord, the claimant is liable for the landlord's reasonable costs incurred in pursuance of the request down to the time of its withdrawal or abandonment<sup>18</sup>.

The above provisions apply where the landlord is the tenant under an overriding lease granted under them as they apply where no such lease has been granted; and accordingly there may be two or more such leases interposed between the first such lease and the relevant tenancy<sup>19</sup>.

An overriding lease is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995<sup>20</sup> only if the relevant tenancy is such a new tenancy<sup>21</sup>. Every overriding lease must state that it is a lease granted under the above provisions<sup>22</sup> and whether it is or is not a new tenancy for those purposes<sup>23</sup>. An overriding lease is deemed to be authorised as against the persons interested in any mortgage<sup>24</sup> of the landlord's interest, however created or arising, and is binding on any such persons<sup>25</sup>. If any such person is by virtue of such a mortgage entitled to possession of the documents of title relating to the landlord's interest:

- 429 (A) the landlord must within one month of the execution of the lease deliver to that person the counterpart executed in pursuance of head (ii) above; and
- 430 (B) if he fails to do so, the instrument creating or evidencing the mortgage applies as if the obligation to deliver a counterpart were included in the terms of the mortgage as set out in that instrument<sup>26</sup>.

The fact that an overriding lease takes effect subject to the relevant tenancy does not constitute a breach of any covenant of the lease against subletting or parting with possession of the premises demised by the lease or any part of them<sup>27</sup>.

1 For the meaning of 'tenancy' see PARA 289 note 3 ante.

2 Ie in accordance with the Landlord and Tenant (Covenants) Act 1995 s 17: see PARA 289 ante.

3 Ie subject to and in accordance with ibid s 19: see the text and notes 4-19 infra.

4 For the meaning of 'landlord' see PARA 289 note 2 ante.

5 For these purposes, 'overriding lease' means a tenancy of the reversion expectant on the relevant tenancy which: (1) is granted for a term equal to the remainder of the term of the relevant tenancy plus three days or

the longest period, less than three days, that will not wholly displace the landlord's reversionary interest expectant on the relevant tenancy, as the case may require; and (2) subject to the Landlord and Tenant (Covenants) Act 1995 s 19(3), (4) (see the text and notes 7-9 *infra*) and to any modifications agreed to by the claimant and the landlord, otherwise contains the same covenants as the relevant tenancy, as they have effect immediately before the grant of the lease: s 19(2).

6 Ibid s 19(1).

7 For the meaning of 'tenant' see PARA 289 note 2 *ante*.

8 Landlord and Tenant (Covenants) Act 1995 s 19(3).

9 Ibid s 19(4).

10 Any request or notification under *ibid* s 19 may be sent by post: s 19(10).

11 Ibid s 19(5). No tenancy is registrable under the Land Charges Act 1972 or be taken to be an estate contract within the meaning of that Act by reason of any right or obligation that may arise under the Landlord and Tenant (Covenants) Act 1995 s 19, and any right arising from a request made under s 19 is not capable of falling within the Land Registration Act 2002 Sch 1 para 2 or Sch 3 para 2 (see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962); but any such request is registrable under the Land Charges Act 1972, or may be the subject of a notice under the Land Registration Act 2002, as if it were an estate contract: Landlord and Tenant (Covenants) Act 1995 s 20(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (4)).

12 *Ie* subject to the Landlord and Tenant (Covenants) Act 1995 s 19(7): see the text and notes 16-17 *infra*.

13 If the claimant fails to comply with this requirement he is not entitled to exercise any of the rights otherwise exercisable by him under the overriding lease: *ibid* s 20(3).

14 Ibid s 19(6).

15 Ibid s 20(3).

16 Where two or more requests are duly made on the same day, then for these purposes: (1) a request made by a person who was liable for the qualifying payment as a former tenant must be treated as made before a request made by a person who was so liable as a guarantor; and (2) a request made by a person whose liability in respect of the covenant in question commenced earlier than any such liability of another person must be treated as made before a request made by that other person: *ibid* s 19(8).

17 Ibid s 19(7). For these purposes, a claimant's request is withdrawn by the claimant notifying the landlord in writing that he is withdrawing his request; and a claimant is to be regarded as having abandoned his request if (1) the landlord has requested the claimant in writing to take, within such reasonable period as is specified in the landlord's request, all or any of the remaining steps required to be taken by the claimant before the lease can be granted; and (2) the claimant fails to comply with the landlord's request, and is accordingly to be regarded as having abandoned it at the time when that period expires: s 19(9).

18 Ibid s 19(9).

19 Ibid s 19(11).

20 *Ie* for the purposes of *ibid* s 1: see PARA 578 *post*.

21 Ibid s 20(1).

22 *Ie* granted under *ibid* s 19: see the text and notes 1-19 *supra*.

23 Ibid s 20(2). Any such statement must comply with such requirements as may be prescribed by land registration rules under the Land Registration Act 2002: Landlord and Tenant (Covenants) Act 1995 s 20(2) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (3)). As to who may claim the benefit of a tenant covenant when the overriding lease is a new tenancy see *First Penthouse Ltd v Channel Hotels & Properties (UK) Ltd*, *Channel Hotels & Properties; (UK) Ltd v Al Tamimi* [2003] EWHC 2713 (Ch) at [58], [2004] 1 EGLR 16 *obiter per* Lightman J; *affd* on other grounds [2004] EWCA Civ 1072, [2004] All ER (D) 568 (Jul), cited in PARA 580 note 6 *post*.

24 For these purposes, 'mortgage' includes 'charge': Landlord and Tenant (Covenants) Act 1995 s 20(7)(a).

25 Ibid s 20(4)(a), (b).

26 Ibid s 20(4)(i), (ii).

27 Ibid s 20(5)(a). As to covenants against alienation see PARA 481 et seq post.

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### **291. Restriction of liability of former tenant or his guarantor where tenancy subsequently varied.**

The following provisions apply where a person ('the former tenant') is as a result of an assignment<sup>1</sup> no longer a tenant<sup>2</sup> under a tenancy<sup>3</sup> but:

- 431 (1) in the case of a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995<sup>4</sup> he has under an authorised guarantee agreement<sup>5</sup> guaranteed the performance by his assignee of any tenant covenant<sup>6</sup> of the tenancy; or
- 432 (2) in the case of any tenancy he remains bound by such a covenant<sup>7</sup>.

The former tenant is not liable under the agreement or, as the case may be, the covenant to pay any amount in respect of the covenant to the extent that the amount is referable to any relevant variation<sup>8</sup> of the tenant covenants of the tenancy effected after the assignment<sup>9</sup>. Where a person ('the guarantor') has agreed to guarantee the performance by the former tenant of a tenant covenant of the tenancy, the guarantor, where his liability to do so is not wholly discharged by any such variation of the tenant covenants of the tenancy, is not liable under the agreement to pay any amount in respect of the covenant to the extent that the amount is referable to any such variation<sup>10</sup>.

For these purposes, a variation of the tenant covenants of a tenancy is a 'relevant variation' if either:

- 433 (a) the landlord<sup>11</sup> has, at the time of the variation, an absolute right to refuse to allow it; or
- 434 (b) the landlord would have had such a right if the variation had been sought by the former tenant immediately before the assignment by him but, between the time of that assignment and the time of the variation, the tenant covenants of the tenancy have been so varied as to deprive the landlord of such a right<sup>12</sup>;

and in determining whether the landlord has or would have had such a right at any particular time regard must be had to all the circumstances, including the effect of any provision made by or under any enactment<sup>13</sup>. Nothing in these provisions applies to any variation of the tenant covenants of a tenancy effected before 1 January 1996<sup>14</sup>.

1 For the meaning of 'assignment' see PARA 289 note 1 ante.

2 For the meaning of 'tenant' see PARA 289 note 2 ante.

3 For the meaning of 'tenancy' see PARA 289 note 3 ante.

4 For the meaning of 'new tenancy' for these purposes see PARA 578 post.

- 5 For the meaning of 'authorised guarantee agreement' see PARA 593 post.
- 6 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.
- 7 Landlord and Tenant (Covenants) Act 1995 s 18(1). As to the tenancies to which these provisions apply see PARA 578 post. Section 18 applies where the tenancy referred to in s 18(1) is an overriding lease (as to which see PARA 290 ante) as it applies in other cases falling within s 18(1): s 20(5)(b).
- 8 For these purposes, 'variation' means a variation whether effected by deed or otherwise: *ibid* s 18(7).
- 9 *Ibid* s 18(2).
- 10 *Ibid* s 18(3).
- 11 For the meaning of 'landlord' see PARA 289 note 2 ante.
- 12 Landlord and Tenant (Covenants) Act 1995 s 18(4).
- 13 *Ibid* s 18(5).
- 14 *Ibid* s 18(6).

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## **7. RENT REVIEW**

### **(1) IN GENERAL**

#### **292. Types of rent review clause.**

Some kind of rent review clause<sup>1</sup> is almost invariably included in leases of commercial premises<sup>2</sup>, so that the rent reserved may continue both to hold its value in real economic terms and to reflect the current market value from time to time of the demised premises. The variety of such clauses is infinite, but all of them belong to one of the following two types (or are combinations of the two):

- 435 (1) rent variation or escalation clauses;
- 436 (2) rent review clauses properly so called.

A rent variation or escalation clause in a lease is a clause by which, with or without the landlord being required to initiate the process<sup>3</sup> of calculation, the amount of the rent is varied<sup>4</sup> by reference to the fluctuations of some other rent, cost, price or index. Examples of this type of variable rent clause are 'indexed rents' (rising or falling by reference to the general index of retail trade prices, the index of building construction costs, or some other index) or turnover rents varying in amount in proportion to the sales or production achieved by the tenant in the demised premises<sup>5</sup>. A difficulty with indexed rents is, however, that changes tend to be made in the basing or composition of published indices. It is a matter of degree whether the changes are so radical as to lead to the conclusion that the index has gone rather than been revised<sup>6</sup>. The periodical rebasing of the index does not invalidate the rent review<sup>6</sup>; nor do changes in the composition of the basket of items to which the index is related designed to reflect changes in social habits and tastes and thus to preserve the accuracy of the index<sup>7</sup>. Other examples of rent variation clauses involve rents linked to capital value<sup>8</sup>, or to the amount of the head rent<sup>9</sup> or to the rents received or receivable from the occupiers of the demised premises<sup>10</sup>.

A rent review clause properly so called is a clause which permits the landlord or, as the case may be, the tenant to call for the reconsideration and reassessment of the amount of the rent. At stated intervals, and in accordance with the procedure laid down by the clause, the new rate of the rent is agreed by the then landlord and tenant<sup>11</sup> or determined by the process laid down in the lease, the new rate applying until the next review date or the expiry of the term. Normally, if the new rate of rent has not been agreed by a stipulated date<sup>12</sup>, the clause provides for reference of the dispute to an independent person, usually a surveyor, who may be appointed to function as an arbitrator or as an independent valuer and who will value the demised premises in accordance with the formula laid down in the clause. This formula usually requires that the valuer make certain assumptions, that is, that he value the premises upon assumed facts which may differ from the actual existing state of affairs in respect of the tenancy. There is, however, no presumption that a rent review clause has to be exercisable by both parties to the lease<sup>13</sup>.

A rent review clause will set out the machinery for resolving disputes<sup>14</sup> and may also set out the machinery for implementing the review<sup>15</sup> and the valuation criteria to be applied<sup>16</sup>.

A rent review clause which purports to allow for dramatic increases in the rent so as to bring the tenancy outside the protection of one of the statutory codes<sup>17</sup> is likely to be viewed as a sham and may be disallowed by a court, even if the tenant has agreed to it<sup>18</sup>.

Many rent review clauses in commercial leases provide for the rent to be reviewed 'upwards only'<sup>19</sup>; but it is recommended best practice that the basis of rent review is to open market rent and that, wherever possible, landlords should offer alternatives which are priced on a risk-adjusted basis, including alternatives to upwards only rent reviews; these might include up/down reviews to open market rent with a minimum of the initial rent, or another basis such as annual indexation<sup>20</sup>. The absence of an upwards only review formula is not sufficient to require or permit a construction of the rent review clause as requiring either a mandatory review or one exercisable by both landlord and tenant<sup>21</sup>.

Once the contractual term of a business tenancy has expired, the landlord is not entitled to operate the rent review clause during the continuation of the tenancy under Part II<sup>22</sup> of the Landlord and Tenant Act 1954<sup>23</sup>.

1 As to the principles from which the validity and enforceability of rent review clauses derive see PARA 245 ante.

2 Many residential leases also contain rent review clauses, and many leases at ground rents contain provision for review at longer intervals.

3 Usually this will involve the service of a notice.

4 Although the amount is varied, the new amount remains the rent reserved by the lease, and in agreeing or determining the new rate of rent the parties are implementing and not varying the original contract, in contrast to the situation where as a result of a new bargain between them the landlord and tenant vary that contract: see PARA 243 notes 6, 11-13 ante.

5 Modern indexed rents or shopping centre turnover rents are only recent examples of leases employing the principles established in the cases cited in PARA 245 note 2 ante. Variable rent clauses occasion practical difficulties, as the value of the demised premises may alter other than in accordance with the chosen factor by reference to which it is to be adjusted, so that the resulting revised rental figure may turn out to be above or below the true value of the demised premises. For examples of turnover rents see *Edwards v Rees* (1836) 7 C & P 340 (rent calculated on amount of coal sold); *Walsh v Lonsdale* (1882) 21 ChD 9, CA (rent variable according to number of machines in use); *Tucker (Inspector of Taxes) v Granada Motorway Services Ltd* [1979] 2 All ER 801, [1979] 1 WLR 683, HL (percentage of gross takings); *SB Property Co Ltd v Chelsea Football and Athletic Co Ltd* [1990] EGCS 132 (rent linked to football gate receipts); *Burford UK Properties Ltd v Forte Hotels (UK) Ltd (formerly Trust House Forte)* [2003] EWCA Civ 1800, 148 Sol Jo LB 145, [2003] All ER (D) 309 (Dec) (rent linked to net bedroom revenue). Where rent is calculable by reference to a company's annual turnover, VAT is to be included in 'turnover': *Debenhams Retail plc v Sun Alliance and London Insurance Co Ltd* [2005] EWCA Civ 868, [2005] STC 1443, [2005] 3 EGLR 34 ('the gross amount of total sales' held to include VAT).

- 6 *Cumshaw Ltd v Bowen* [1987] 1 EGLR 30; cf *Wyndham Investments Ltd v Motorway Tyres & Accessories Ltd* [1991] 2 EGLR 114, CA.
- 7 *Blumenthal v Gallery Five Ltd* (1971) 220 Estates Gazette 31; *Cumshaw Ltd v Bowen* [1987] 1 EGLR 30.
- 8 Eg as in *Wallace v McMullen & Sons Ltd* [1988] 2 EGLR 143.
- 9 Eg as in *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co (a firm)* [1987] 1 All ER 289, [1987] 1 WLR 916, CA. This can give rise to problems if the head tenancy is surrendered: see *Lorien Textiles (UK) Ltd v SI Pension Trustees Ltd* (1981) 259 Estates Gazette 771; *R & A Millett (Shops) Ltd v Leon Allan International Fashions Ltd* [1989] 1 EGLR 138, CA.
- 10 Eg as in *Leigh v Certibilt Investments Ltd* [1988] 1 EGLR 116 (a hybrid case where the valuer had to assess the rack rental value of each unit on an industrial estate and aggregate those values); *Freehold & Leasehold Shop Properties Ltd v Friends Provident Life Office* (1984) 271 Estates Gazette 451, CA. See also *Buyneat Ltd v Tanap Investments (UK) Ltd* [1992] 1 EGLR 283; *WGTC Nominees Ltd v Hamilton Installations Ltd* [1992] 1 EGLR 287; *Commission for the New Towns v Chesterfield Properties plc* [1992] 2 EGLR 123. A rent review clause which requires rent to be determined by reference to a percentage of the rack rents 'receivable by the lessee' will be construed as meaning 'capable of being received if the property had been sublet' so that even in the absence of a subletting, the formula will still be applicable: *Ashworth Frazer Ltd v Gloucester City Council* [1997] 1 EGLR 104, [1997] 26 EG 150, CA.
- 11 Their agreement will be binding upon their predecessors in title so that, if an assignee of a tenant agrees a revised rent, the original tenant will be liable for the amount so agreed; and this will be so notwithstanding that the landlord and the assignee have not strictly complied with the procedure originally laid down in the rent review clauses: *Haselmere Estates v British Olivetti* (1 June 1977, unreported) (following and applying the principle laid down in *Baynton v Morgan* (1888) 22 QBD 74, CA, that by assigning the term the tenant confers irrevocable authority upon the assignee to act in respect of the term and of the demised premises); *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P & CR 393, [1983] 2 EGLR 45; *GUS Property Management Ltd v Texas Homecare Ltd* [1993] 2 EGLR 63, [1993] 27 EG 130. This is so even if the value of the premises has been increased by works carried out by the assignee: *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 Estates Gazette 643, 743.
- 12 As to whether it is of the essence of the contract that any step should be taken by a stipulated date see PARA 295 et seq post.
- 13 See *Hemingway Realty Ltd v Master Wardens and Commonalty of Freedom of Art or Mystery of the City of London (commonly called the Clothworkers' Co)* [2005] EWHC 299 (Ch), [2005] 2 EGLR 36, [2005] All ER (D) 121 (Mar).
- 14 See PARA 314 et seq post.
- 15 See PARA 294 et seq post. A majority of modern clauses avoid detailed rent review machinery of the notice (and sometimes counter-notice) type and merely provide an obligation on both parties to negotiate and agree a rent; in default of agreement the clause will set out machinery for resolving the dispute. Such an approach avoids any possible (and essentially sterile) dispute over the validity of notices or time limits.
- 16 See PARA 304 et seq post.
- 17 As to the statutory codes see PARA 701 et seq post.
- 18 See *Bankway Properties v Pensfold-Dunsford* [2001] EWCA Civ 528, [2001] 1 WLR 1369, sub nom *Bankway Properties v Dunsford* [2001] 2 EGLR 36. A rent review clause will not necessarily reflect the value of money; a clause which refers repeatedly to an increase in rent and which contains a formula for calculation of the new rent which does not lend itself easily to a downwards variation will not be construed as permitting such a variation: *Standard Life Assurance v Unipath Ltd* (1997) 75 P & CR 473, [1997] 2 EGLR 121, CA.
- 19 See eg *Theodore Goddard v Fletcher King Services Ltd* [1997] 2 EGLR 131, [1997] 32 EG 90 (negligent solicitor failed to include 'upwards only' rent review clause as instructed; negligent managing surveyor failed to notice mistake; professionals 80% and 20% liable respectively); *Melanesian Mission Trust Board v Australian Mutual Provident Society* (1996) 74 P & CR 297, [1997] 2 EGLR 128, PC (a clause which provides that 'the lessee must pay to the lessor during the term of the lease rent at the rate specified or where increased in accordance with the express provisions of this lease at the increased rent' is an 'upwards only' clause, and its failure to mention whether the rent might or might not be decreased does not mean that it allows for that possibility); applied in *Hart Investments Ltd v Burton Hotel Ltd* [2001] All ER (D) 307 (Oct). Some words may have to be implied into the rent review clause to show that the provision is to operate in an upwards only direction: *Great Bear Investments Ltd v Solon Co-operative Housing Services Ltd* [1997] EGCS 177. A reference to the rent being increased at each review may be decisive in favour of the review being construed as upwards only: see

*Secretary of State for the Environment v Associated Newspapers Holdings Ltd* (1995) 72 P & CR 395, [1995] EGCS 166, CA; *Standard Life Assurance v Unipath Ltd* (1997) 75 P & CR 473, [1997] 2 EGLR 121, CA.

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21 *Hemingway Realty Ltd v Master Wardens and Commonalty of Freedom of Art or Mystery of the City of London (commonly called the Clothworkers' Co)* [2005] EWHC 299 (Ch), [2005] 2 EGLR 36, [2005] All ER (D) 121 (Mar).

22 le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

23 *Willison v Cheverell Estates Ltd* [1995] NPC 101, [1996] 1 EGLR 116, CA.

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### **293. Effect of rent review for the purposes of the charge to stamp duty land tax.**

Where:

- 437 (1) a lease contains provision under which the rent may be adjusted;
- 438 (2) under that provision the first or only such adjustment is to an amount that, before the adjustment, is uncertain, and that has effect from a date (the 'review date') that is expressed as falling five years after a specified date; and
- 439 (3) the specified date falls within the three months before the beginning of the term of the lease,

the particular provisions of the Finance Act 2003 relating to leases and the charge to stamp duty land tax<sup>1</sup> have effect as if references to the first five years of the term of the lease were to the period beginning with the start of the term of the lease and ending with the review date, and references in those provisions to the fifth year of the term of the lease are to be read accordingly<sup>2</sup>.

Where the statutory provisions relating to contingent, uncertain or unascertained consideration<sup>3</sup> apply in relation to a transaction by virtue of the above provisions, and either:

- 440 (a) the end of the fifth year of the term of the lease is reached; or
- 441 (b) the amount of rent payable in respect of the first five years of the term of the lease ceases to be uncertain<sup>4</sup> at an earlier date,

the following provisions have effect to require or permit reconsideration of how the charge to stamp duty land tax applies to the transaction, and to any transaction in relation to which it is a linked transaction<sup>5</sup>. If the result as regards the rent paid or payable in respect of the first five years of the term of the lease is that a transaction becomes notifiable, or that additional tax is payable in respect of a transaction or that tax is payable where none was payable before:

- 442 (i) the purchaser must make a return to the Commissioners for Revenue and Customs within 30 days of the date referred to in head (a) or head (b) above<sup>6</sup>;
- 443 (ii) the return must contain a self-assessment of the tax chargeable in respect of the transaction on the basis of the information contained in the return;

- 444 (iii) the tax so chargeable is to be calculated by reference to the rates in force at the effective date of the transaction; and
- 445 (iv) the return must be accompanied by payment of any tax or additional tax payable<sup>7</sup>.

If the result as regards the rent paid or payable in respect of the first five years of the term of the lease is that less tax is payable in respect of the transaction than has already been paid, the purchaser may, within the period allowed for amendment of the land transaction return, amend the return accordingly, and after the end of that period he may (if the land transaction return is not so amended) make a claim to the Commissioners for Revenue and Customs for repayment of the amount overpaid<sup>8</sup>.

If, after the end of the fifth year of the term of a lease, the amount of rent payable increases, or is increased, in accordance with the provisions of the lease and the rent payable as a result ('the new rent') is such that the increase falls to be regarded as abnormal<sup>9</sup>, the increase in rent is treated as if it were the grant of a lease in consideration of the excess rent<sup>10</sup>.

1    I.e. the Finance Act 2003 s 120, Sch 17A (added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22): see PARAS 124, 148, 252 ante.

2    Finance Act 2003 Sch 17A para 7A (as added: see note 1 supra).

3    I.e. ibid s 51(1), (2): see STAMP DUTIES AND STAMP DUTY RESERVE TAX.

4    For these purposes, the amount of rent payable ceases to be uncertain when (1) in the case of contingent rent, the contingency occurs or it becomes clear that it will not occur; and (2) in the case of uncertain or unascertained rent, the amount becomes ascertained: ibid Sch 17A para 8(2) (as added: see note 1 supra).

5    Ibid Sch 17A para 8(1) (as added: see note 1 supra).

6    The provisions of ibid Sch 10 (as amended) (returns, inquiries, assessment and other matters: see STAMP DUTIES AND STAMP DUTY RESERVE TAX) apply to a return under Sch 17A para 8 (as added) as they apply to a return under s 76 (general requirement to make land transaction return: see STAMP DUTIES AND STAMP DUTY RESERVE TAX), subject to the adaptation that references to the effective date of the transaction must be read as references to the date referred to in head (a) or head (b) in the text: Sch 17A para 8(4) (as added: see note 1 supra).

7    Ibid Sch 17A para 8(3) (as added (see note 1 supra); amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50).

8    Finance Act 2003 Sch 17A para 8(4) (as added (see note 1 supra); amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

9    As to when an increase is regarded as abnormal see the Finance Act 2003 Sch 17A para 15 (as added); and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

10   See ibid Sch 17A para 14 (as added); and PARA 148 ante.

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## **(2) IMPLEMENTING THE REVIEW**

### **294. Review date, valuation date and payment date.**



The review date, that is to say the date with effect from which the new rent is to run, may be specified by reference to the expiry of a specified year of the term which will normally be computed by reference to the date from which the term is expressed to run rather than the date of grant<sup>1</sup>. The valuation date, that is to say the date by reference to which the reviewed rent is to be determined, is normally the same as the review date and the court will lean in favour of such a construction<sup>2</sup>; but the court will give effect to a specific direction that the valuation date is to be a different date<sup>3</sup>.

Where the revised rent has not been determined by the date from which it has been stipulated that it is to be paid, the lease often provides expressly for payment of rent at the previous rate until the new rent has been agreed or determined, and then for payment of the shortfall in relation to the period from the review date until the date of determination of the new rate of rent. Even if the lease does not expressly so provide, in the absence of a clear stipulation to the contrary, the new rent, when determined, will be payable retrospectively as from the rent review date<sup>4</sup>. Nevertheless, until the amount of the new rent has been determined, the landlord is unable to distrain for it<sup>5</sup> or to obtain judgment for it<sup>6</sup>.

Subject to express provisions to the contrary, rent which becomes payable from a past date need not be paid until the next rent day under the lease after the date on which the new rent is determined<sup>7</sup>. Thus, rent is not in arrear until then and interest is not payable on the sum in question under a provision which requires the tenant to pay interest on arrears of rent<sup>8</sup>, although many leases provide separately for the payment of interest on late resolution of the review; but an obligation to pay interest on late review will not be implied<sup>9</sup>.

It is recommended best practice that landlords and tenants ensure that they understand the basis upon which rent may be reviewed and the procedure to be followed, including the existence of any strict time limits<sup>10</sup> which could create pitfalls. They should obtain professional advice on these matters well before the review date and also immediately upon receiving, and before responding to, any notice or correspondence on the matter from the other party or his or her agent<sup>11</sup>.

1 *Beaumont Property Trust v Tai* [1983] 1 EGLR 122, (1982) 265 Estates Gazette 872; and see *FLC Management Ltd v Ganton House Investments Ltd* [1991] 1 EGLR 132, CA. Modern leases usually set out the review dates precisely and this is better practice.

2 *Glofield Properties Ltd v Morley (No 2)* (1989) 59 P & CR 14, [1989] 2 EGLR 118, CA; *Webber v Halifax Building Society* [1985] 1 EGLR 58; *Henniker-Major v Daniel Smith (a firm)* (1990) 62 P & CR 24, [1991] 1 EGLR 128, CA.

3 *Prudential Assurance Co Ltd v Gray* [1987] 2 EGLR 134 (date of determination); *Parkside Knightsbridge Ltd v German Food Centre Ltd* [1990] 2 EGLR 265 (date of notice).

4 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 All ER 1003, [1974] 1 WLR 728, CA (overruling on this point *Re Essoldo (Bingo) Ltd's Underlease, Essoldo Ltd v Elcresta Ltd* (1971) 23 P & CR 1); *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155.

5 *Re Knight, ex p Voisey* (1882) 21 ChD 442, CA; and see *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL.

6 *Walsh v Lonsdale* (1882) 21 ChD 9, CA; and see *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL.

7 *South Tottenham Land Securities Ltd v R & A Millett (Shops) Ltd* [1984] 1 All ER 614, [1984] 1 WLR 710, CA.

8 *Shield Properties & Investments Ltd v Anglo Overseas Transport Co Ltd (No 2)* (1986) 53 P & CR 215, [1986] 2 EGLR 112.

9 *Trust House Forte Albany Hotels Ltd v Daejan Investments Ltd* [1980] 2 EGLR 123, (1980) 256 Estates Gazette 915.

10 As to time limits see PARA 295 et seq post.

11 *A Code of Practice for Commercial Leases in England and Wales* (2nd Edn) (April 2002) ISBN 1-84219-098-9, recommendation 13. The code is the copyright of the Commercial Leases Working Group (whose secretariat can be contacted at The Royal Institution of Chartered Surveyors, 12 Great George Street, Parliament Square, London SW1P 3AD) and is reproduced by their kind permission.

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## 295. Whether time of the essence.

It is now settled that rent review clauses are not to be regarded as landlord's options, and that ordinarily any time limits imposed by the procedure laid down in those clauses are not of the essence of the contract<sup>1</sup>. A rent review, therefore, is not frustrated if the landlord or the tenant misses such a time limit<sup>2</sup>, but the parties may expressly make a time limit of the essence<sup>3</sup>, or may make a time limit of the essence by clear implication<sup>4</sup>. Where a time limit has been missed by one party, the other party may make time of the essence by giving reasonable notice to the first party<sup>5</sup>. The lease may provide that a notice to initiate a rent review has to be served within specified time limits but may then make express provision for the service of a late notice; it will be a matter of construction of the relevant provisions whether in the case of a late notice the reviewed rent is payable from the specified rent review date or from some later date<sup>6</sup>.

1 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL. Formerly, it had been supposed that rent review clauses had to be construed literally, so that time limits were ordinarily binding and 'late' reviews were lost, and this was the view of the Court of Appeal in the same case (see *United Scientific Holdings Ltd v Burnley Borough Council* [1976] Ch 128, [1976] 2 All ER 220, CA); and before that it had been supposed that rent review clauses had to be divided into 'mandatory' or 'option-type' clauses (under which time limits were invariable) and 'machinery' or 'obligation' or 'directory' clauses (under which time limits mattered less, as they were merely part of the procedure for determining the new rent). These distinctions are now wholly discredited, and all cases decided before the decision of the House of Lords in *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* supra require to be reconsidered in the light of that decision. Cases in which time limits had been held to be mandatory included *Imperial Life Assurance Co of Canada v Derwent Publications Ltd* (1972) 227 Estates Gazette 2241; *C Richards & Son Ltd v Karenita Ltd* (1971) 221 Estates Gazette 25; *Samuel Properties (Development) Ltd v Hayek* [1972] 3 All ER 473, [1972] 1 WLR 1296, CA; *Fousset v Twenty Seven Welbeck Street Ltd* (1973) 25 P & CR 277; *Mount Charlotte Investments Ltd v Leek and Westbourne Building Society* [1976] 1 All ER 890, 30 P & CR 410. Cases in which time limits had been held to be merely 'directory' or 'machinery' included *Stylo Shoes Ltd v Wetherall Bond Street W1 Ltd* (1974) 237 Estates Gazette 343, CA; *Kenilworth Industrial Sites Ltd v EC Little & Co Ltd* [1974] 2 All ER 815, [1974] 1 WLR 1069 (affd [1975] 1 All ER 53, [1975] 1 WLR 143, CA); *Accuba Ltd v Allied Shoe Repairs Ltd* [1975] 3 All ER 782, [1975] 1 WLR 1559. See also *Amherst v James Walker Goldsmith & Silversmith Ltd* (1980) 254 Estates Gazette 123, CA; *Wilderbrook Ltd v Oluwu* [2005] EWCA Civ 1361, [2006] 2 P & CR 54, [2005] All ER (D) 201 (Nov).

2 *Davstone (Holdings) Ltd v Al-Rifai* (1976) 32 P & CR 18. This decision was prior to *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL (see note 1 supra), but anticipates its result in that the time limit for the service of a tenant's counter-notice under a clause which fixed the rent at the figure proposed by the landlord unless such a counter-notice were served was held not to be of the essence of the contract. See also eg *Lancecrest Ltd v Asiawaju* [2005] EWCA Civ 117, [2005] 1 EGLR 40, [2005] All ER (D) 174 (Feb).

3 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; and see PARA 296 post.

4 See PARA 297 post.

5 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 933-934, [1977] 2 All ER 62 at 75, HL, per Lord Diplock; and see eg *Iceland Foods plc v Dangoor* [2002] All ER (D) 116 (Feb).

6 *H Turner & Son Ltd v Confederation Life Insurance Co (UK) Ltd* [2002] EWHC 2949 (Ch), [2003] 2 EGLR 11, [2003] 21 EG 192.

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## 296. Time made expressly of the essence.

Although it is a simple matter for a draftsman to provide in terms that time shall be of the essence of some or all of the steps involved in a rent review, it may be obscure to which steps that stipulation is meant to apply<sup>1</sup>. Where time is expressly made of the essence in relation to certain steps but not others, that tends to indicate that the time limits for those other steps were not intended to be strict<sup>2</sup>. Any form of expression which clearly evinces the concept of finality attached to the time limit will suffice to make time of the essence<sup>3</sup> but it is best for the draftsman to state whether time is to be of the essence in terms in view of the nice distinctions which have been drawn by the courts<sup>4</sup>. Further, the parties may make time of the essence by agreeing what is to happen if a time limit is not complied with, as, for example, by providing that, if application is not made for the appointment of a surveyor within a specified period, the rent review notice shall be 'void and of no effect'<sup>5</sup>, or the rent set out in a tenant's counter-notice shall be the market rent<sup>6</sup>, or that the rent shall be a sum equal to the old rent<sup>7</sup>. A provision to the effect that, if no counter-notice is served, the tenant is deemed to agree the landlord's figure does not, however, of itself make time of the essence for the service of the tenant's counter-notice<sup>8</sup>.

1 It may apply to the time for giving notice or counter-notice or applying for the appointment of a third party or even to the date by which the third party must make the decision: see eg *C Bradley & Sons Ltd v Telefusion Ltd* (1981) 259 Estates Gazette 337; applied in *Art & Sound Ltd v West End Litho Ltd, Art & Sound Ltd v Tampo Supplies Ltd* (1991) 64 P & CR 28, [1992] 1 EGLR 138 (stipulation held to apply to the making of the arbitrator's award); distinguished and doubted in *Kings (Estate Agents) Ltd v Anderson* [1992] 1 EGLR 121; distinguished in *Shuwa Ashdown House Corpn v Grayrigg Properties Ltd* [1992] 2 EGLR 127, CA.

2 *Amherst v James Walker Goldsmith & Silversmith Ltd* (1980) 254 Estates Gazette 123, CA; *Laing Investment Co Ltd v G A Dunn & Co* (1981) 262 Estates Gazette 879; *London & Manchester Assurance Co Ltd v G A Dunn & Co* (1982) 265 Estates Gazette 39, 131, CA.

3 *Henry Smith's Charity Trustees v AWADA Trading & Promotion Service Ltd* (1983) 47 P & CR 607 at 619, CA, per Slade LJ; and see *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306, [2002] 4 All ER 264.

4 The following expressions have been held to make time of the essence: notice to be given by a certain date 'but not otherwise' (*Drebbond Ltd v Horsham District Council* (1978) 37 P & CR 237, [1978] 1 EGLR 96); rent to be 'conclusively fixed' at the amount stated in a landlord's notice unless the tenant served a counter-notice within a certain period (*Mammoth Greeting Cards Ltd v Agra Ltd* [1990] 2 EGLR 124; *Barrett Estate Services Ltd v David Greig (Retail) Ltd* [1991] 2 EGLR 123). In the following cases, however, time has been held not to be of the essence: rent to be referred to a surveyor 'as soon as practicable and in any event not later than' a given date (*Touche Ross & Co v Secretary of State for the Environment* (1982) 46 P & CR 187, [1983] 1 EGLR 123, CA; *Thorn EMI Pension Trust Ltd v Quinton Hazell plc* [1984] 1 EGLR 113, (1983) 269 Estates Gazette 414); service of 12 months' notice should be a condition precedent (*North Hertfordshire District Council v Hitchin Industrial Estate Ltd* [1992] 2 EGLR 121). For a case where time was clearly stated to be of the essence but there was a dispute as to the construction of the remainder of the clause providing for the appointment of an expert see *Holicater Ltd v Grandred Ltd* [1993] 1 EGLR 135, CA.

5 *Lewis v Barnett, Scarborough v Barnett* (1981) 264 Estates Gazette 1079, CA; distinguished in *Panavia Air Cargo Ltd v Southend-on-Sea Borough Council* (1988) 56 P & CR 365, [1988] 1 EGLR 124, CA; *Staines Warehousing Co Ltd v Montagu Executor & Trustee Co Ltd* (1985) 51 P & CR 211m [1986] 1 EGLR 101 (affd (1987) 54 P & CR 302, [1987] 2 EGLR 130, CA).

6 *Trustees of Henry Smith's Charity v AWADA Trading & Promotion Services Ltd* (1983) 47 P & CR 607, [1984] 1 EGLR 116, CA; distinguished in *Mecca Leisure Ltd v Renown (Investments) Holdings Ltd* (1984) 49 P & CR 12, [1984] 2 EGLR 137, CA. In *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306, [2002] 4 All ER 264 the Court of Appeal applied the ruling in the former case and were of the view that the decision in *Mecca Leisure Ltd v Renown (Investments) Holdings Ltd* supra was decided per incuriam. 'Default' rent provisions will now operate according to their terms.

7 *Greenhaven Securities Ltd v Compton* [1985] 2 EGLR 117.

8 *Davstone (Holdings) Ltd v Al-Rifai* (1976) 32 P & CR 18; *Mecca Leisure Ltd v Renown (Investments) Holdings Ltd* (1984) 49 P & CR 12, [1984] 2 EGLR 137, CA; *Taylor Woodrow Property Co Ltd v Lonrho Textiles Ltd* (1985) 52 P & CR 28, [1985] 2 EGLR 120; *Phipps-Faire Ltd v Malvern Construction Ltd* [1987] 1 EGLR 129. Where, however, the relevant provision clearly establishes the contracting parties' intention where a specified time limit is not complied with, it will rebut the presumption that time is not of the essence: *Starmark Enterprises Ltd v CPL Distribution Ltd* [2001] EWCA Civ 1252, [2002] Ch 306, [2002] 4 All ER 264; and see *Monella v Pizza Express (Restaurants) Ltd* [2003] EWHC 2966 (Ch), [2004] 1 EGLR 43, [2004] 12 EG 172 (change in the law rendering time limit of the essence was within reasonable contemplation of parties to a lease). For a discussion of different types of default clause see *Power Securities (Manchester) Ltd v Prudential Assurance Co Ltd* [1987] 1 EGLR 121.

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## 297. Time made of the essence by implication.

The general presumption that time is not of the essence applies in the absence of any contra-indications in the express words of the lease or in the inter-relation of the rent review clause itself and other clauses or in the surrounding circumstances<sup>1</sup>. Where the review clause is associated with a tenant's option to determine the lease (in respect of which time is of the essence), that is a strong indication that time was intended to be of the essence of the rent review timetable<sup>2</sup>. Time will be held to be of the essence even where the last day for the tenant to exercise the break and for the landlord to serve the rent review notice are the same, whether the rent review and the right to break are in the same<sup>3</sup> or different<sup>4</sup> clauses, whether or not it is open to either party to initiate the review or whether or not the review is upwards only<sup>5</sup>. The same is true where the tenant may give notice exercising his option to break after the last day for service of the landlord's notice<sup>6</sup>. Where rent was to be agreed prior to the quarter day before the rent review date, and, in default of agreement, the rent was 'to be assessed by a surveyor to be appointed on the application of the landlord by the President of the Royal Institution of Chartered Surveyors', the Court of Appeal held that a term should be implied into the rent review provisions that the landlord should make the application for the appointment of the independent expert within a reasonable time of the relevant quarter day. Business efficacy required the implication of such a term and it was therefore open to the tenant to make time of the essence<sup>7</sup>.

Time is not of the essence, however, if there is no requirement for the landlord to serve a trigger notice<sup>8</sup> or where the step to be taken within the specified time is not within the landlord's control, for example the making of an arbitrator's award, even where the time stipulated for that step demonstrates an obvious association with the tenant's right to break<sup>9</sup>. If the lease extends the tenant's right to break if the rent has not been determined by the relevant date, time will probably not be held to be of the essence<sup>10</sup>. The inclusion of a timetable

in the definition of 'yearly rack rental value' does not dispense with the presumption that time is not of the essence<sup>11</sup>.

1 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 930, [1977] 2 All ER 62 at 72, HL, per Lord Diplock; and see eg *McDonald's Property Co Ltd v HSBC Bank plc* [2002] 1 P & CR 333, [2001] 36 EG 181, [2001] All ER (D) 177 (Apr), ChD. The presumption is capable of rebuttal where the rent review provisions create an 'ultimatum procedure' whereby the parties specify the consequences of a failure to complete a particular step in the rent review procedure on time: *Banks v Kokkinos* [1999] 3 EGLR 133, (1999) Times, 19 January, following *Visionhire Ltd v Britel Fund Trustees Ltd* [1992] 1 EGLR 128, 1991 SLT 883, Ct of Sess. As to express words see PARA 296 ante. There is no reported case in which time has been held to be of the essence because of surrounding circumstances alone.

2 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904 at 946, [1977] 2 All ER 62 at 85, HL, per Lord Simon of Glaisdale; *C Richards & Son Ltd v Karenita Ltd* (1971) 221 Estates Gazette 25. Where a lease provides for four rent reviews and one break clause which coincides with one of them, an interrelation can exist between the break clause and the coincident rent review period, so as to make time of the essence in relation to the service of a rent review notice under the coincident rent review but not under the others: *Central Estates Ltd v Secretary of State for the Environment* (1996) 72 P & CR 482, [1997] 1 EGLR 239, CA.

3 Eg as in *Al Saloom v Shirley James Travel Service Ltd* (1981) 42 P & CR 181, CA.

4 Eg as in *Legal & General Assurance (Pension Management) Ltd v Cheshire County Council* (1983) 46 P & CR 160, CA.

5 *Stephenson & Son v Orca Properties Ltd* [1989] 2 EGLR 129, following the cases cited in notes 3-4 supra but suggesting that their reasoning is difficult to reconcile with *Metrolands Investments Ltd v JH Dewhurst Ltd* [1986] 3 All ER 659, 52 P & CR 232, CA.

6 *Rahman v Kenshire* [1981] 2 EGLR 102, (1980) 259 Estates Gazette 1074; *Coventry City Council v J Hepworth & Son Ltd* (1982) 46 P & CR 170, [1983] 1 EGLR 119, CA; *William Hill (Southern) Ltd v Govier & Govier* [1984] 1 EGLR 121, (1983) 269 Estates Gazette 1168.

7 See *Barclays Bank plc v Savile Estates Ltd* [2002] EWCA Civ 589, [2003] 2 P & CR 374, [2002] 2 EGLR 16. Cf *Northern and Midland Holdings Ltd v Magnet Ltd* [2004] All ER (D) 179 (Jan) (time not of the essence for appointment of independent expert).

8 *Edwin Woodhouse Trustee Co Ltd v Sheffield Brick Co plc* [1984] 1 EGLR 130, (1983) 270 Estates Gazette 548.

9 *Metrolands Investments Ltd v JH Dewhurst Ltd* [1986] 3 All ER 659, 52 P & CR 232, CA.

10 *Samuel Properties (Developments) Ltd v Hayek* [1972] 3 All ER 473, [1972] 1 WLR 1296, CA, as explained in *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL.

11 *Pembroke St Georges Ltd v Cromwell Developments Ltd* [1991] 2 EGLR 129.

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## 298. Notice making time of the essence.

If a rent review clause lays down a time limit for the taking of a particular step but time is not of the essence for the taking of that step, it may be made of the essence, once the date in question has passed, by the party not in default serving on the other party a notice fixing a reasonable time within which the party in default must take that step or lose the right to take

it<sup>1</sup>. A party may not, however, make time of the essence where the step in question may be taken by either party; his remedy then is to take that step himself<sup>2</sup>.

1 *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; *London & Manchester Assurance Co Ltd v GA Dunn & Co* (1982) 265 Estates Gazette 39, 131, CA; *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch 305, [1983] 2 All ER 1067, CA; *Trustees of Henry Smith's Charity v AWADA Trading & Promotion Services Ltd* (1983) 47 P & CR 607, [1984] 1 EGLR 116, CA; *Mecca Leisure Ltd v Renown Investments (Holdings) Ltd* (1984) 49 P & CR 12, [1984] 2 EGLR 137, CA. It appears that the notice may be served immediately after the expiry of the time limit without the party in default being allowed a further reasonable time for compliance: *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. This doctrine was applied to rent reviews in *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* supra by analogy with the concept of notices to complete in connection with contracts for the sale of land. Although the analogy is imprecise (in that a landlord's failure to implement a rent review involves no breach of contract), the principle is universally accepted and may be treated as established. For an example of a notice successfully making time of the essence see *Barclays Bank plc v Savile Estates Ltd* [2002] EWCA Civ 589, [2003] 2 P & CR 374, [2002] 2 EGLR 16.

2 *Factory Holdings Group Ltd v Leboff International Ltd* [1987] 1 EGLR 135.

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### **299. Effect of delay.**

Where time is or has been made of the essence in relation to a time limit, then, once the time fixed has passed, the step in question cannot validly be taken. If the result is that the machinery for implementing the review can go no further, as, for example, because the landlord cannot serve a trigger notice or apply for the appointment of an arbitrator, the landlord cannot proceed with the review and is entitled only to the rent previously payable<sup>1</sup>. Likewise, if the tenant fails to serve a counter-notice in time, he will be unable to take the review further and will have to pay the rent proposed in the landlord's notice<sup>2</sup>.

The court has no general equitable jurisdiction to extend time for complying with a rent review timetable<sup>3</sup>. The court has power to extend time for the appointment of an arbitrator or for the taking of some other step to commence the arbitration<sup>4</sup>; but this discretion does not normally apply to rent review<sup>5</sup>. Where it does, any party to the arbitration agreement may apply for such an order upon notice to the other parties, but only after a claim has arisen and after exhausting any available arbitral process for obtaining an extension of time<sup>6</sup>. The court may make an order only if satisfied:

- 446 (1) that the circumstances are such as were outside the reasonable contemplation of the parties when they agreed the provision in question, and that it would be just to extend the time<sup>7</sup>; or
- 447 (2) that the conduct of one party makes it unjust to hold the other party to the strict terms of the provision in question<sup>8</sup>.

The court may extend the time for such period and on such terms as it thinks fit<sup>9</sup>, and may do so whether or not the time previously fixed, by agreement or by a previous order, has expired<sup>10</sup>. The court also has power to enlarge the time for the making of an arbitrator's award, whether or not time has expired<sup>11</sup>, but may only do so if satisfied that a substantial injustice would otherwise be done<sup>12</sup>.

If time is not of the essence, it is now settled that even long delay will not of itself cause the landlord to lose the right to have a review in the absence of circumstances giving rise to an estoppel<sup>13</sup>. Neither a remark apparently accepting that the right to review has been lost<sup>14</sup> nor the acceptance of the rent payable under the lease in any event<sup>15</sup> will give rise to an estoppel.

1 *Weller v Akehurst* [1981] 3 All ER 411, 42 P & CR 320.

2 *Amalgamated Estates Ltd v Joystretch Manufacturing Ltd* [1981] 1 EGLR 96, (1980) 257 Estates Gazette 489, CA.

3 *Samuel Properties (Developments) Ltd v Hayek* [1972] 3 All ER 473, [1972] 1 WLR 1296, CA. See also *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514, [1997] 2 All ER 215, PC (once time for performance of a contractual obligation has passed, performance of that obligation is no longer possible (not a rent review case)).

4 See the Arbitration Act 1996 s 12(1)(a); and ARBITRATION vol 2 (2008) PARA 1221. Under the Arbitration Act 1950 s 27 (repealed), the taking of such a step was held to include the service of a tenant's counter-notice calling for an arbitration (*Pittalis v Sherefettin* [1986] QB 868, [1986] 2 All ER 227, CA, overruling *Tote Bookmakers Ltd v Development & Property Holding Co Ltd* [1985] Ch 261, [1985] 2 All ER 555) but not the service of a landlord's notice initiating the review (*Richurst Ltd v Pimenta* [1993] 2 All ER 559, [1993] 1 WLR 159). The power to extend time was exercisable where undue hardship would otherwise be caused, that is to say hardship out of proportion to the degree of fault involved (*Pittalis v Sherefettin* supra), which might include procedural default (or delay) in pursuing the application once it had been made (*Prudential Property Services Ltd v Capital Land Holdings Ltd* [1993] 1 EGLR 128). However, the Arbitration Act 1996 s 12 is in different terms; its purpose is to restrict the circumstances in which the court has power to extend the time: see *Fox & Widley v Guram* [1998] 1 EGLR 91, [1998] 03 EG 142.

5 *Fox & Widley v Guram* [1998] 1 EGLR 91, [1998] 03 EG 142. See also *Monella v Pizza Express (Restaurants) Ltd* [2003] EWHC 2966 (Ch), [2004] 1 EGLR 43, [2004] 12 EG 172.

6 See the Arbitration Act 1996 s 12(2); and ARBITRATION vol 2 (2008) PARA 1221.

7 See *ibid* s 12(3)(a); and ARBITRATION vol 2 (2008) PARA 1221. It is appropriate to take account of the underlying commercial purpose of rent review provisions; but it is also important to have regard to the particular provision in question: *Fox & Widley v Guram* [1998] 1 EGLR 91, [1998] 03 EG 142.

8 See the Arbitration Act 1996 s 12(3)(b); and ARBITRATION vol 2 (2008) PARA 1221. The fact that the landlords simply overstated the case (by stating a sum in the trigger notice later alleged to be in excess of the market rent), as happens many times, does not bring their conduct within head (2) in the text: *Fox & Widley v Guram* [1998] 1 EGLR 91, [1998] 03 EG 142.

9 Eg as to payment of interest: see *Chartered Trust plc v Maylands Green Estate Co Ltd* (1984) 270 Estates Gazette 845; *Patel v Peel Investments (South) Ltd* [1992] 2 EGLR 116.

10 See the Arbitration Act 1996 s 12(4); and ARBITRATION vol 2 (2008) PARA 1221.

11 See *ibid* s 50(4); and ARBITRATION vol 2 (2008) PARA 1261.

12 See *ibid* s 50(3); and ARBITRATION vol 2 (2008) PARA 1261.

13 *Amherst v James Walker Goldsmith & Silversmith Ltd* [1983] Ch 305, [1983] 2 All ER 1067, CA, overruling *Telegraph Properties (Securities) Ltd v Courtaulds Ltd* [1981] 1 EGLR 104, (1980) 257 Estates Gazette 1153; and see *H West & Son Ltd v Brech* [1982] 1 EGLR 113, (1982) 261 Estates Gazette 156; *Printing House Properties Ltd v J Winston & Co Ltd* [1982] 2 EGLR 118, (1982) 263 Estates Gazette 725; *Million Pigs Ltd v Parry (No 2)* (1983) 46 P & CR 333.

14 *James v Heim Gallery (London) Ltd* (1980) 41 P & CR 269, [1980] 1 EGLR 119, CA.

15 *London & Manchester Assurance Co Ltd v GA Dunn & Co* (1982) 265 Estates Gazette 39, 131, CA.

### 300. Trigger notices.

Many rent review clauses contain no requirement for any notice to be served by the landlord to set the review in motion<sup>1</sup>. In such a case no obligation to give a notice by a particular time will be implied<sup>2</sup> nor will it be implied that steps to implement the review must be taken with all due expedition within a reasonable time of the review date<sup>3</sup>.

In other cases (particularly in older leases) rent review clauses require the initiation of the rent review process by the service of a notice (a 'trigger notice') by the landlord<sup>4</sup>. A trigger notice may be served, unless there is a strict time limit for doing so<sup>5</sup>, even after the expiry of the relevant rent review period<sup>6</sup> or after the surrender of the lease<sup>7</sup>. The time for service of the notice may be prescribed by the lease by reference to a date before which or after which the notice is to be served and sometimes difficulties have arisen in the interpretation of such stipulations<sup>8</sup>.

Leases do not usually prescribe any particular form of trigger notice but, if a particular format or content is stipulated, that stipulation, like those as to time, will not be regarded as of the essence unless it is clear by necessary implication from the terms of the clause as a whole that it is intended to be so regarded<sup>9</sup>. Where time is of the essence and the parties have to reach agreement in a short period, the stipulation that the landlord shall specify a rental figure may be held to be essential<sup>10</sup>. Probably such a stipulation is also of the essence in the common form of clause which requires the tenant to pay the rent stated in the landlord's notice unless the tenant serves a counter-notice<sup>11</sup>. The test of validity is whether the notice is in sufficiently clear terms to show to the recipient that the person serving the notice is intending to set the rent review procedure in motion<sup>12</sup>. An obvious typographical error will not matter<sup>13</sup>. It would appear to be implicit in a requirement that notice be served that the notice be in writing<sup>14</sup>. If a figure is inserted in the notice, it need not be the landlord's genuine pre-estimate of the rental value; and the notice is not invalid if the figure is excessive<sup>15</sup>.

A notice stated to be 'subject to contract' is likely to be held invalid<sup>16</sup>; and it has also been held that a notice headed 'without prejudice' is similarly invalid<sup>17</sup> but this is not always so<sup>18</sup>. A letter from a landlord purporting to initiate rent review proceedings and proposing a new annual rent, followed by ongoing correspondence with the tenant but no agreement, is not sufficient to fix the new rent<sup>19</sup>.

1 See eg *CH Bailey Ltd v Memorial Enterprises Ltd* [1974] 1 All ER 1003, [1974] 1 WLR 728, CA; *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P & CR 393, [1983] 2 EGLR 45; and the cases cited in notes 2-3 infra. This is the modern approach.

2 *Edwin Woodhouse Trustee Co Ltd v Sheffield Brick Co plc* [1984] 1 EGLR 130, (1983) 270 Estates Gazette 548.

3 *Million Pigs Ltd v Parry (No 2)* (1983) 46 P & CR 333.

4 See eg *Lancecrest Ltd v Asiwaju* [2005] EWCA Civ 117, [2005] 1 EGLR 40, [2005] All ER (D) 174 (Feb). It is not legitimate to construe a variation agreement as creating not only a waiver of a specific right but also a new mandatory obligation to serve a trigger notice unless the circumstances or the words used compel that conclusion: *Sunflower Services Ltd v Unisys New Zealand Ltd* (1997) 74 P & CR 112, 141 Sol Jo LB 46, PC.

5 The time being of the essence: see PARAS 295-298 ante. The fact that time is made expressly of the essence for the service of the counter-notice (as to which see PARA 301 post) does not support the proposition that time is to be impliedly of the essence for the service of the landlord's trigger notice: see *Lancecrest Ltd v Asiwaju* [2005] EWCA Civ 117 at [25], [2005] 1 EGLR 40, [2005] All ER (D) 174 (Feb) per Neuberger LJ.

6 *Million Pigs Ltd v Parry (No 2)* (1983) 46 P & CR 333.

7 *Torminster Properties Ltd v Green* [1983] 2 All ER 457, [1983] 1 WLR 676, CA.



8 See eg *Rahman v Kenshire* [1981] 2 EGLR 102, (1980) 259 Estates Gazette 1074 (not less than and not more than 12 months before the review date); *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, (1982) 263 Estates Gazette 61, CA (not less than two clear quarters immediately preceding the review date); *London & Manchester Assurance Co Ltd v GA Dunn & Co* (1982) 265 Estates Gazette 39, 131, CA (not earlier than 12 months prior to the expiration of seven years immediately preceding the first review period); *Maraday Ltd v Sturt Properties Ltd* [1988] 2 EGLR 163 (at least six months before the expiry of the review period); *First Property Growth Partnership LP v Royal & Sun Alliance Property Services Ltd* [2002] EWCA Civ 1687, [2003] 1 All ER 533, [2003] 2 P & CR 292 (not more than 12 months before the end of the expiration of the relevant period).

9 *Dean and Chapter of Chichester Cathedral v Lennards Ltd* (1977) 35 P & CR 309, [1977] 2 EGLR 78, CA, applying *United Scientific Holdings Ltd v Burnley Borough Council, Cheapside Land Development Co Ltd v Messels Service Co* [1978] AC 904, [1977] 2 All ER 62, HL; *Taylor Woodrow Property Co Ltd v Lonrho Textiles Ltd* (1985) 52 P & CR 28; and see *Warborough Investments Ltd v Central Midlands Estate Ltd* [2006] All ER (D) 146 (Jun), CA (lease provided that notice was to be served on the lessee by leaving it at the demised premises or by sending it by registered post to the lessee's last known address; notice served by process servers on the lessee at the demised premises, but the lessee never received it; notice held to be valid).

10 *Commission for the New Towns v R Levy & Co Ltd* [1990] 2 EGLR 121.

11 In *Dean and Chapter of Chichester Cathedral v Lennards Ltd* (1977) 35 P & CR 309, [1977] 2 EGLR 78, CA, the clause was not of this kind.

12 *Nunes v Davies Laing & Dick Ltd* (1985) 51 P & CR 310, [1986] 1 EGLR 106 (counter-notice) applied to a trigger notice in *Norwich Union Life Insurance Society v Sketchley plc* [1986] 2 EGLR 126 and in *Museprime Properties Ltd v Adhill Properties Ltd* (1990) 61 P & CR 111, [1990] 2 EGLR 196.

13 *Durham City Estates Ltd v Felicetti* [1990] 1 EGLR 143, CA.

14 *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196 at 201; and see *Dean and Chapter of Chichester Cathedral v Lennards Ltd* (1977) 35 P & CR 309 at 314, CA, per Lord Russell.

15 *Davstone (Holdings) Ltd v Al-Rifai* (1976) 32 P & CR 18; *Amalgamated Estates Ltd v Joystretch Manufacturing Ltd* [1981] 1 EGLR 96, (1980) 257 Estates Gazette 489, CA.

16 *Shirlcar Properties Ltd v Heinitz* [1983] 2 EGLR 120, (1983) 268 Estates Gazette 362, CA; cf *Norwich Union Life Insurance Society v Tony Waller Ltd* [1984] 1 EGLR 126, (1984) 270 Estates Gazette 42; *British Rail Pension Trustee Co Ltd v Cardshops Ltd* [1987] 1 EGLR 127.

17 *Norwich Union Life Insurance Society v Tony Waller Ltd* [1984] 1 EGLR 126, (1984) 270 Estates Gazette 42; disapproved in *South Shropshire District Council v Amos* [1987] 1 All ER 340, [1986] 1 WLR 1271, CA.

18 *Royal Life Insurance v Phillips* (1990) 61 P & CR 182, [1990] 2 EGLR 135.

19 *Maurice Investments Ltd v Lincoln Insurance Services Ltd* [2006] All ER (D) 402 (Feb).

## UPDATE

### 300 Trigger notices

NOTE 19--*Maurice Investments Ltd*, cited, reported at [2006] EWHC 276 (Ch), [2007] 1 P & CR 235.

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### 301. Counter-notices.

Some rent review clauses require the landlord to serve a notice stipulating a rent and the tenant, if he objects to that rent, to serve a counter-notice. If the clause requires the tenant

only to indicate that he objects to the rent proposed, it is enough for him to say that he considers the rent proposed 'to be excessive'<sup>1</sup> and even a letter headed 'subject to contract' may suffice<sup>2</sup>. If, however, as is usually the case, he is required within a given time to elect to have the rent determined by a third party, the counter-notice must make clear that he intends to make that election<sup>3</sup> and expressions of mere disagreement, coupled with requests for the evidence relied upon by the landlord or with proposals for negotiation, are not enough<sup>4</sup>. The test is whether the terms of the notice are sufficiently clear to show to the ordinary landlord that the tenant is purporting to exercise his right to have the rent determined by a third party<sup>5</sup>. A letter expressed to be a formal notice or counter-notice under the terms of the lease probably suffices<sup>6</sup>. A requirement that a counter-notice be served implies that it must be in writing<sup>7</sup>; and if it is required to be served at the landlord's 'last known place of business' and that has changed but the lease has not been amended to reflect that change, it is not validly served if served at the address given in the lease, provided that the change was known to the tenant or his solicitor<sup>8</sup>. Requirements that the counter-notice shall state the rent that the tenant is willing to pay and call on the landlord to negotiate are not mandatory<sup>9</sup>.

1 *Barrett Estate Services Ltd v David Greig (Retail) Ltd* [1991] 2 EGLR 123.

2 *British Rail Pension Trustee Co Ltd v Cardshops Ltd* [1987] 1 EGLR 127.

3 *Amalgamated Estates Ltd v Joystretch Manufacturing Ltd* [1981] 1 EGLR 96, (1980) 257 Estates Gazette 489, CA.

4 Eg as in *Bellinger v South London Stationers* [1979] 2 EGLR 88, (1979) 252 Estates Gazette 699 ('we do not accept your revised figure'); *Oldschool v Johns* (1980) 256 Estates Gazette 381 (tenant said the premises were worth less than he was paying for them and asked for evidence supporting the landlord's figure); *Amalgamated Estates Ltd v Joystretch Manufacturing Ltd* [1981] 1 EGLR 96, (1980) 257 Estates Gazette 489, CA (tenant said the landlord's figure was too high); *Edlingham Ltd v MFI Furniture Centres Ltd* [1981] 2 EGLR 97, (1981) 259 Estates Gazette 421 ('please accept this letter as counter-notice to the effect that we consider the rent is excessive' coupled with a request for comparables supporting the landlord's figure); *Horserace Totalisator Board v Reliance Mutual Insurance Society* (1982) 266 Estates Gazette 213 ('the Board does not accept your proposed increase' coupled with a request for evidence); *Sheridan v Blaircourt Investments Ltd* [1984] 1 EGLR 139, (1984) 270 Estates Gazette 1290 ('the rent you have quoted is considerably higher than the open market value' coupled with a proposal for a meeting to discuss comparables and followed by a letter headed 'without prejudice and subject to contract' suggesting that it would be appropriate to apply to the Royal Institution of Chartered Surveyors for the appointment of a valuer). See also *Scottish Life Assurance Co Ltd v Agfa-Gevaert Ltd* 1997 SLT 481, 1998 SCLR 238, Ct of Sess (lease required tenant to state a figure in his counter-notice; rejection of notice and statement that agent would contact landlord did not constitute counter-notice).

5 *Amalgamated Estates Ltd v Joystretch Manufacturing Ltd* [1981] 1 EGLR 96, (1980) 257 Estates Gazette 489, CA; applied in *Nunes v Davies Laing & Dick Ltd* (1985) 51 P & CR 310, [1986] 1 EGLR 106; *Glofield Properties Ltd v Morley* [1988] 1 EGLR 113; *Prudential Property Services Ltd v Capital Land Holdings Ltd* [1993] 1 EGLR 128; and see *Lancecrest Ltd v Asiwaju* [2005] EWCA Civ 117, [2005] 1 EGLR 40, [2005] All ER (D) 174 (Feb). This line of authorities is consistent with the decision regarding tenants' break notices in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL: see PARA 222 ante.

6 *Nunes v Davies Laing & Dick Ltd* (1985) 51 P & CR 310, [1986] 1 EGLR 106; *Glofield Properties Ltd v Morley* [1988] 1 EGLR 113, not following *Edlingham Ltd v MFI Furniture Centres Ltd* [1981] 2 EGLR 97, (1981) 259 Estates Gazette 421.

7 *Museprime Properties Ltd v Adhill Properties Ltd* (1990) 61 P & CR 111, [1990] 2 EGLR 196.

8 See *Arundel Corpn v Khokher* [2003] EWCA Civ 1784, 148 Sol Jo LB 25, [2003] All ER (D) 149 (Dec). Where service must be made by a postal service requiring a signature, the notice is deemed to be served on the first day on which delivery is attempted: see *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 WLR 2849, [2002] 3 EGLR 47.

9 *Patel v Earlspring Properties Ltd* [1991] 2 EGLR 131, CA.

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### **302. Agreement between the parties.**

Many rent review clauses stipulate that the parties are to have a period within which to agree the new rent before the matter is referred to a third party. It is always possible for the parties to agree even after this period has expired<sup>1</sup>. The fact that time is allowed for agreement or that provision is made for determination by a third party 'in default of agreement' or 'failing agreement' does not, however, imply any obligation to negotiate or make an attempt to agree a condition precedent to the right to apply to have the review determined by the third party<sup>2</sup>, even if time is made of the essence of the period for reaching agreement<sup>3</sup>.

To be effective for the purposes of a rent review clause an agreement on the new rent must be a contractually binding agreement; an agreement 'subject to contract' or 'subject to board approval' does not suffice<sup>4</sup> and such expressions used in earlier letters may infect later correspondence and prevent a contract from arising unless their effect is expressly or implicitly expunged<sup>5</sup>. An agreement by surveyors to recommend a figure to their respective clients is not binding<sup>6</sup>.

1 See *C Bradley & Sons Ltd v Telefusion Ltd* [1981] 2 EGLR 94, (1981) 259 Estates Gazette 337.

2 *Re Essoldo (Bingo) Ltd's Underlease, Essoldo Ltd v Elcresta Ltd* (1971) 23 P & CR 1.

3 *Wrenbridge Ltd v Harries (Southern Properties) Ltd* (1981) 260 Estates Gazette 1195; *Laing Investment Co Ltd v GA Dunn & Co* (1981) 262 Estates Gazette 879, applying *Amherst v James Walker Goldsmith & Silversmith Ltd* (1980) 254 Estates Gazette 123, CA.

4 *Darlington Borough Council v Waring & Gillow (Holdings) Ltd* [1988] 2 EGLR 159; but cf *Prudential Assurance Co Ltd v Power Securities (Manchester) Ltd* [1993] EGCS 64 (where it was held that 'subject to the execution of the supplemental deed' did not prevent a binding contract arising).

5 *Henderson Group plc v Superabbey Ltd* [1988] 2 EGLR 155.

6 *Esso Petroleum Co Ltd v Anthony Gibbs Financial Services Ltd* [1983] 2 EGLR 112, (1983) 267 Estates Gazette 351, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/7. RENT REVIEW/(2) IMPLEMENTING THE REVIEW/303. Defective machinery.

### **303. Defective machinery.**

Where the machinery by which the value of a property is to be ascertained is subsidiary and non-essential to the main agreement and the machinery breaks down, the court can substitute other machinery to perform the valuation in order to ensure that the agreement is carried out<sup>1</sup>. This principle is directly applicable to rent review clauses where either no machinery for fixing the new rent has been stipulated<sup>2</sup> or where the machinery provided has been frustrated by somebody's failure to co-operate in taking an agreed step<sup>3</sup>. Where it is obvious that words have been omitted from the review machinery, it may be possible for the court to supply them as a matter of construction<sup>4</sup>.

Where, however, the agreed machinery is an essential part of the review and either cannot be operated or cannot be taken further because, for example, the landlord has failed to serve a notice<sup>5</sup> or the tenant a counter-notice<sup>6</sup> in time, the court will not interfere to supply substitute machinery and the rent will remain payable at the previous rate<sup>7</sup> or become payable at the rate specified in the landlord's notice<sup>8</sup>, as the case may be.

Defects or errors in the machinery of a rent review clause may also be cured by rectification on the grounds of mutual or unilateral mistake<sup>9</sup> in accordance with the established principles of equity<sup>10</sup>. The right to rectify passes to an assignee of the reversion<sup>11</sup>.

1 *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL (option in lease to purchase reversion); *Royal Bank of Scotland v Jennings* (1996) 75 P & CR 458, [1997] 1 EGLR 101, CA (cited in note 3 *infra*); *Ashworth Frazer Ltd v Gloucester City Council* [1997] 1 EGLR 104, [1997] 26 EG 150, CA (a rent review clause which requires rent to be determined by reference to a percentage of the rack rents 'receivable by the lessee' will be construed as meaning 'capable of being received if the property had been sublet' so that even in the absence of a subletting, the formula will still be applicable, reversing the decision in *Fraser Pipestock Ltd v Gloucester City Council* (1995) 71 P & CR 123, [1995] 2 EGLR 90 that the court could not imply a term or machinery for determining a rent because the original parties to the lease had agreed an ad hoc means of arriving at a ground rent and it was not clear what rental basis any implied term or machinery could be directed to). Cf *Harben Style Ltd v Rhodes Trust* [1995] 1 EGLR 118, [1995] 17 EG 125 (no need to imply an obligation, as in *Sudbrook Trading Estate Ltd v Eggleton* *supra*, that the landlord was under a duty to seek the appointment of a surveyor, because there was a rent provided for if the landlord elected not to seek such an appointment).

2 *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA; *Gregory v Mighell* (1811) 18 Ves 328; cf *Central and Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60, (1982) 266 Estates Gazette 900 (rectification case); *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505 (option case; the court was also prepared to direct an inquiry into rental value). See also the cases cited in PARA 292 note 9 *ante* where the court found means to operate the review in a sublease where the rent was linked to that determined under the headlease but the headlease had been surrendered.

3 Eg as in *Sudbrook Trading Estates Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, CA. See also *Royal Bank of Scotland v Jennings* (1996) 75 P & CR 458, [1997] 1 EGLR 101, CA (the failure of a defendant to apply to a person specified in the lease, for the purposes of a rent review valuation, is a matter of machinery and not of substance, and where that machinery breaks down the court will supplement it).

4 *Wolverhampton and Dudley Breweries plc v Trusthouse Forte Catering Ltd* (1984) 272 Estates Gazette 1072.

5 Eg as in *Weller v Akehurst* [1981] 3 All ER 411, 42 P & CR 320.

6 See the cases cited in PARA 301 note 4 *ante*.

7 See note 5 *supra*.

8 See note 6 *supra*.

9 For examples of rectification being ordered of a rent review clause on grounds of unilateral mistake (ie where the tenant was aware of the mistake but lay low) see *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Central & Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60, (1982) 266 Estates Gazette 900. For an example of mutual mistake see *Equity and Law Life Assurance Society Ltd v Coltness Group Ltd* [1983] 2 EGLR 118, (1983) 267 Estates Gazette 949 (rectification of rent review memorandum decreed against successor in title to the tenant because successor not a purchaser for value). For examples of cases where rectification was refused or dismissed see *City Wall Properties (Scotland) Ltd v Pearl Assurance plc (No 2)* [2005] CSOH 137 (counterclaim for rectification dismissed); *Cadogan v Escada AG* [2006] EWHC 78 (Ch), [2006] 05 EG 272 (CS), [2006] All ER (D) 143 (Jan) (rent review clause was an 'inelegant compromise' between the parties but no evidence of mistake; rectification refused).

10 See PARAS 155-158 *ante*; and MISTAKE vol 77 (2010) PARA 57 *et seq*.

11 *Boots the Chemist Ltd v Street* [1983] 2 EGLR 51, (1983) 268 Estates Gazette 817; Law of Property Act 1925 s 63(1).

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### **(3) VALUATION CRITERIA**

#### **304. In general.**

Rent review clauses have become increasingly sophisticated and now tend to contain a number of directions as to matters which are to be assumed, whether or not those assumptions correspond with reality<sup>1</sup>, and other matters which are to be disregarded<sup>2</sup> for the purpose of the valuation. The drafting of these directions is continually evolving and this tends to give rise to novel problems of interpretation and valuation either because the draftsman has not fully appreciated the valuation consequences or difficulties produced by his direction or because a new direction does not fit comfortably with an already conventional one. A different kind of difficulty arises where a direction that has come to be expected is omitted<sup>3</sup>.

Certain general principles are now well established as the basis for resolving difficulties in the interpretation of rent review clauses<sup>4</sup>;

- 448 (1) although the particular language used by the draftsman will always be of paramount importance, it is proper and only sensible, when construing a rent review clause, to have in mind what normally is the commercial purpose of such a clause, namely to keep the rent in line with current property values having regard to the current value of money and not to provide either party with a windfall arising from an artificial basis of valuation<sup>5</sup>;
- 449 (2) while effect must be given to agreed assumptions and disregards, subject thereto it is the real circumstances affecting the property which should be the basis of valuation<sup>6</sup> and further hypotheses should not be inferred from those expressed<sup>7</sup>;
- 450 (3) while the construction of the clause is a question of law for the decision of the court so that the valuer can know what is to be valued and upon the basis of which assumptions the valuation is to be made, it is not the function of the court to give directions as to how the valuer is to go about his task as by telling him which factors to take into account or the weight to attach to them<sup>8</sup>;
- 451 (4) to give commercial efficacy to a rent review provision and, in particular, the direction to ascertain an open market rent, it may be necessary to imply a counter-factual assumption<sup>9</sup> or disregard or to treat the terms of the lease as subject to some modification<sup>10</sup>.

There is nevertheless no presumption that parties to a commercial lease invariably intend that the rent should not in real terms fall below the market rent initially agreed upon<sup>11</sup> or that a rent review clause will always produce an increase in the rent<sup>12</sup>.

Where the lease fails to provide any valuation criteria, the court will not deny the landlord the benefit of the review<sup>13</sup> which the parties intended but will imply appropriate criteria such as that the rent is to be a 'fair' rent<sup>14</sup> or a rent such as would have been reasonable for the particular parties to have agreed<sup>15</sup> or that the review is to be to a 'fair and reasonable' rent<sup>16</sup>.

A determination of an expert may also be challenged after it was made if the court considers the wrong meaning of the lease provisions has been applied<sup>17</sup>. It is only in the case of some ambiguity, however, that the court can apply the principle of interpreting the lease in accordance with the commercial purpose of rent review<sup>18</sup>.

- 1 A fundamental assumption that does not correspond with reality, but which is almost always stipulated, is that the premises are vacant and available for letting: see PARA 309 post.
- 2 The concept of a rental valuation on a basis which disregards the effect on rent of tenant's improvements, the tenant's own occupation and goodwill is familiar from the Landlord and Tenant Act 1954 s 34 (as amended): see PARA 755 post.
- 3 As to what happens when such a direction is missing see PARAS 306-312 post.
- 4 The text set out in this paragraph draws heavily upon the judgment of Mummery J in *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141 at 144.
- 5 *Basingstoke and Deane Borough Council v Host Group Ltd* [1988] 1 All ER 824, [1988] 1 WLR 348, CA; *British Gas Corp v Universities Superannuation Scheme Ltd* [1986] 1 All ER 978, [1986] 1 WLR 398; *Equity and Law Life Assurance Society plc v Bodfield Ltd* (1987) 54 P & CR 290, [1987] 1 EGLR 124, CA.
- 6 *Norwich Union Life Insurance Society v Trustee Savings Banks Central Board* [1986] 1 EGLR 136; *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146 at 149; *Basingstoke and Deane Borough Council v Host Group Ltd* [1988] 1 All ER 824, [1988] 1 WLR 348, CA; *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141. This is often referred to as 'the presumption of reality'. The presumption may operate in regard to the terms of the letting to be assumed (as in the cases cited in note 5 supra) or in regard to the state of the property to be assumed (see PARA 307 post) or in regard to other matters.
- 7 *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146. Where a rent review clause specifies that rent will be determined by reference to 'notional premises', but fails to specify the exact location of such premises, so that it could give rise to various rental levels, the court will infer that the notional premises could only have been intended to be situated in a location comparable to the premises in question: *Dukeminster (Ebbgate House One) Ltd v Somerfield Property Co Ltd* (1997) 75 P & CR 154, [1997] 2 EGLR 125, CA.
- 8 *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141; *Compton Group Ltd v Estates Gazette Ltd* (1977) 36 P & CR 148 at 152, 159, 161, CA.  
  
If a rent review merely refers the issue of what rent increase is to be payable to a valuer, the court has no jurisdiction; but most leases contain a detailed set of directions as to the assumptions and disregards within which the valuer must act and the limit of that power is a matter of construction and a question of law. Unless the lease either expressly or by implication gives the valuer the sole and exclusive power to construe the lease as well as determine the rent, then the court can intervene if the valuer has gone outside his decision-making authority: *National Grid Co plc v M25 Group Ltd* [1999] 1 EGLR 65, CA, distinguishing *Norwich Union Life Insurance Society v P & O Property Holdings Ltd* [1993] 1 EGLR 164, CA. Most rent review clauses providing for expert determination will not give power to resolve issues of construction to the expert valuer; the court thus has power to resolve the issue of construction in advance of the expert's determination: see *National Grid Co plc v M25 Group Ltd* supra at 67-68, CA, per Mummery LJ.
- 9 Eg as in *Jefferies v O'Neill* (1983) 46 P & CR 376, [1984] 1 EGLR 106.
- 10 Eg as in *Law Land Co Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109, (1980) 255 Estates Gazette 617, CA.
- 11 *Philpots (Woking) Ltd v Surrey Conveyancers Ltd* [1986] 1 EGLR 97, CA. See *Norwich Union Life Insurance Society v A-G* [1995] NPC 86, [1995] EGCS 85, PC (rent review clause which provided that rent would not fall below rent at commencement of lease was not an uncommercial concession).
- 12 *Bodfield v Caldew Colour Plates* [1985] 1 ETLR 110.
- 13 In *King v King* (1980) 41 P & CR 311, where the clause provided that after the first seven years of the term the tenant was to pay 'such rent as may be agreed', it was held that the original yearly rent remained payable but the decision is inconsistent with the earlier decision in *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA, (which was not cited) and with *Thomas Bates & Son Ltd v Wyndham's Lingerie Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA.
- 14 *Beer v Bowden* [1981] 1 All ER 1070, [1981] 1 WLR 522n, CA.
- 15 *Thomas Bates & Son Ltd v Wyndham's Lingerie Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA. The significance of this formulation was that it enabled tenant's improvements to be disregarded: see PARA 307-308 post.
- 16 *Central and Metropolitan Estates Ltd v Compusave* [1983] 1 EGLR 60, (1982) 266 Estates Gazette 900.

17 See *National Grid Co plc v M25 Group Ltd* [1999] 1 EGLR 65 at 67-68, [1999] 08 EG 169, CA, per Mummery LJ.

18 See eg *Bellow Properties Ltd v Trinity College, Cambridge* [2001] EWCA Civ 1386, [2001] 1 P & CR D10, [2001] All ER (D) 506 (Jul) (in a ground rent review, after 28 years and for a 28-year period, there was the notional assumption of an assumed bare site, to be let in 1998, but it included the actual covenant to erect a building in accordance with plans which had been approved and as contained in the lease; Rattee J held ([2000] EGCS 97) that this had to relate to the plans approved in 1970, and since no hypothetical lessee would be willing to proceed to build in 1998 to 1970 plans, the impact on the rent was substantial; the Court of Appeal, observing that 'it seems very odd that a formula for a rent review which is to take place 28 years after the lease has been entered into should be deemed to incorporate a covenant to erect a building which was acceptable at the date of the lease and not one which would be acceptable at the date of the review' (see *Bellow Properties Ltd v Trinity College, Cambridge* supra at [15] per Sir Martin Nourse), held that the rent review clause was to be construed in accordance with the rest of the lease which did not make specific reference to the 1970 plans).

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### 305. Defining the rental value.

Rent review clauses necessarily require the valuer to ascertain rental value but may qualify this expression with words such as 'market', 'open market', 'rack', 'fair', 'reasonable', 'best' or 'highest'; but none of these qualifications seems to make any difference. It has been said that there is no difference between a market rent and an open market rent<sup>1</sup>; that in the expression 'market rack rental value' the word 'market' adds nothing to 'rack'<sup>2</sup> or vice versa<sup>3</sup>; and that in the commonly used formula 'the highest rent at which the premises might reasonably be expected to be let' the word 'highest' adds only emphasis because the rent at which premises might reasonably be expected to be let in the open market by a willing landlord is the highest rent available<sup>4</sup>. The open market<sup>5</sup> is a market which includes all possible tenants each of whom has had an equal opportunity of bidding to become the tenant on the letting<sup>6</sup>. There can be an open market even if the landlord is in a monopoly position and there is only one possible tenant<sup>7</sup>. A fair and/or reasonable rent is the same as a market rent in that it requires an objective assessment of the rent which could be obtained without taking into account considerations personal to the actual parties<sup>8</sup>. The concept of a reasonable rent differs from that of a rent which it would be reasonable for the tenant to pay, which will let in considerations personal to the actual parties such as whether the tenant should or would agree to pay rent for his own improvements<sup>9</sup>.

1 *Sterling Land Office Developments Ltd v Lloyds Bank plc* [1984] 2 EGLR 135, (1984) 271 Estates Gazette 894.

2 'Rack rent' usually means the full rent which the law permits to be recovered but in the context of rent review this will not limit the new rent to the amount permitted under a temporary counter-inflation provision: *Compton Group Ltd v Estates Gazette Ltd* (1977) 36 P & CR 148, [1977] 2 EGLR 73, CA; cf *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642.

3 *Royal Exchange Assurance v Bryant Samuel Properties (Coventry) Ltd* [1985] 1 EGLR 84.

4 *Daejan Investments Ltd v Cornwall Coast Country Club* (1984) 50 P & CR 157, [1985] 1 EGLR 77. The terms of a rent review clause must be assessed on the basis of the terms subsisting at the rent review date; thus where the rent review clause provided that 'the lessee shall pay to the lessor a supplementary rent during the first 15 years of the term hereby demised' and that supplementary rent was no longer payable by the review date, the rent was to be assessed without any deduction for supplementary rent: *Watergate Properties (Ellesmere) Ltd v Securicor Cash Services Ltd* [2005] EWHC 3438 (Ch), sub nom *Watergate Properties (Ellesmere) Ltd v Securicor Cash Services Ltd* [2005] All ER (D) 109 (Nov).

5 'Open market' is a concept which is used in a number of ways. For the purposes of assets valuations different considerations apply; and the Royal Institution of Chartered Surveyors' Guidance Notes in relation to assets valuations should not be applied, and are not directed to apply, to the context of rent review.

6 *Daejan Investments Ltd v Cornwall Coast Country Club* (1984) 50 P & CR 157, [1985] 1 EGLR 77.

7 *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1977) 36 P & CR 185 at 190, 193; affd as reported in (1977) 245 Estates Gazette 657 at 662, CA.

8 *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL; 99 *Bishopgate Ltd v Prudential Assurance Co Ltd* [1985] 1 EGLR 72, CA; *ARC Ltd v Schofield* [1990] 2 EGLR 52. It was suggested in *Ponsford v HMS Aerosols Ltd* supra that 'reasonable' would enable the valuer to disregard an exceptionally high or freak rent. It is also sometimes argued that 'best' or 'highest' entitles the valuer to take into account the bid of a special purchaser, but he is probably required to do that anyway: see *IRC v Clay* [1914] 3 KB 466, CA; *Webber v Halifax Building Society* [1985] 1 EGLR 58; *First Leisure Trading Ltd v Dorita Properties Ltd* [1991] 1 EGLR 133; *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141.

9 See *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA; *Lear v Blizzard* [1983] 3 All ER 662.

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### 306. The hypothetical parties.

Rent review clauses normally require the valuer to assess the rent on the basis of a letting in the open market by a willing landlord to a willing tenant. It is, however, implicit in the notion of a letting in the market that there is a landlord and a tenant willing to be party to it and so the omission of a stipulation that either or both parties are willing will not make any difference<sup>1</sup>. Both the willing landlord and the willing tenant are abstractions who do not have the personal characteristics of the actual parties. The willing landlord is not a person to whom it is a matter of indifference whether he lets on the valuation date or waits for the market to improve; and the willing tenant is a person actively seeking premises to fulfil needs which the premises in question could fulfil<sup>2</sup>. The actual tenant cannot be treated as a potential bidder in the market in his capacity as a hypothetically displaced occupant of the demised premises<sup>3</sup> but, if he would in any event in fact have been in the market for the demised premises on the valuation date, there is no rule of law which would exclude the effect of his bid<sup>4</sup>.

1 *Dennis & Robinson Ltd v Kiossos Establishment* (1987) 54 P & CR 282, [1987] 1 EGLR 133, CA.

2 *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1977) 36 P & CR 185; affd as reported in (1977) 245 Estates Gazette 657 at 662, CA. Examples of personal characteristics given in the judgment are liquidity problems, importunate mortgagees and government pressures to boost employment in the area.

3 *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146.

4 *First Leisure Trading Ltd v Dorita Properties Ltd* [1991] 1 EGLR 133; *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141.

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### 307. The hypothetical property.



A rent review clause generally requires the demised premises<sup>1</sup> to be valued but sometimes, particularly where it is anticipated that it will be difficult to find comparable properties because the premises are very large or unusual in some other respect, the rent is required to be fixed by reference to a specified hypothetical building<sup>2</sup> or by aggregating the value of its parts<sup>3</sup>.

Subject to the following exceptions and qualifications, the general rule is that the premises are to be valued as found on the valuation date<sup>4</sup> and so improvements carried out after the demise will fall to be valued<sup>5</sup>. The exceptions are:

- 452 (1) where there is some express provision to the contrary in the lease, such as a direction that tenant's improvements are to be disregarded<sup>6</sup>;
- 453 (2) where the property is in a defective condition because of the tenant's breach of covenant<sup>7</sup>;
- 454 (3) where the tenant's fixtures will be assumed to have been removed<sup>8</sup>;
- 455 (4) where the wording of the lease shows that what is to be valued is the site alone<sup>9</sup>.

A direction that premises are to be assumed to be available for letting for a specified purpose<sup>10</sup> or are fit for use for a specified purpose<sup>11</sup> does not justify valuing a building notionally adapted for that purpose. The common assumption that premises are 'fit for immediate occupation and use' has been held to mean merely that the building is free from defects and ready for the tenant to go in and fit out for his business<sup>12</sup>; and the purpose of an assumption that all fitting out works required by the hypothetical tenant have already been completed is to preclude the actual tenant from arguing for a discount on the ground that the hypothetical tenant would have required further or different works from those carried out by the actual tenant<sup>13</sup>.

If a tenant occupies adjacent land or buildings not demised to him in connection with the demised premises, he may become liable to pay rent for the adjacent land on review as if it were part of the demise<sup>14</sup>.

1 As to appurtenant rights and structures deemed to be included in the demise see PARAS 161, 165 ante. It is open to the parties to a lease to agree that the valuer is to assess the rent on the basis that, notwithstanding the reality, the land is still undeveloped (*Braid v Walsall Metropolitan Borough Council* (1998) 78 P & CR 94, [1998] EGCS 41, CA); but prima facie, the rental value of the premises for the purposes of a rent review clause in a lease is the value of the whole of the demised premises including any buildings on the land; whilst the parties to a lease are able to depart from that starting assumption, whether they have done so depends on the language used and a clear intention to displace the general rule has to be shown: *Coors Holdings Ltd v Dow Properties Ltd* [2006] EWHC 1862 (Ch), [2006] All ER (D) 58 (May) (where it was held that the terms of the lease set in the relevant factual context disclosed, with sufficient clarity, that for rent review purposes only that part of the demised premises which consisted of the site, excluding buildings, should be valued for the purposes of determining the open market rental value of the demised premises).

2 Eg as in *Standard Life Assurance Co v Oxoid Ltd*, *Oxoid Ltd v Standard Life Assurance Co* [1987] 2 EGLR 140, CA; *Lansdown Estates Group Ltd v TNT Roadfreight (UK) Ltd* [1989] 2 EGLR 120.

3 Eg as in *Leigh v Certibilt Investments Ltd* [1988] 1 EGLR 116. Aggregating the value of the parts will not, however, be appropriate where the valuer is directed to value the property as a whole: *Royal Exchange Assurance v Bryant Samuel Properties (Coventry) Ltd* [1985] 1 EGLR 84.

4 *Goh Eng Wah v Yap Phooi Yin* [1988] 2 EGLR 148, PC; *Ravenseft Properties Ltd v Park* [1988] 2 EGLR 164; *Sheerness Steel Co plc v Medway Ports Authority* [1992] 1 EGLR 133, CA; *Laura Investment Co Ltd v Havering London Borough Council* [1992] 1 EGLR 155.

5 *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL.

6 See PARA 308 post.

- 7 *Harmsworth Pension Fund Trustees Ltd v Charringtons Industrial Holdings Ltd* (1985) 49 P & CR 297, [1985] 1 EGLR 97.
- 8 *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA; *Young v Dalgety plc* [1987] 1 EGLR 116, CA (light fittings and carpets); *Ocean Accident & Guarantee Corp v Next plc*, *Commercial Union Assurance Co plc v Next plc* [1996] 2 EGLR 84, [1996] 33 EG 91. For the meaning of 'tenant's fixtures' see PARAS 174, 178-180 ante.
- 9 *Ipswich Town Football Club Co Ltd v Ipswich Borough Council* [1988] 2 EGLR 146; *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141.
- 10 *Trust House Forte Albany Hotels Ltd v Daejan Investments Ltd* [1980] 2 EGLR 123, (1980) 256 Estates Gazette 915.
- 11 *Orchid Lodge (UK) Ltd v Extel Computing Ltd* [1991] 2 EGLR 116, CA; applied in *Iceland Frozen Food plc v Starlight Investments Ltd* [1992] 1 EGLR 126, CA.
- 12 *Pontsarn Investments Ltd v Kansallis-Osake-Pankki* [1992] 1 EGLR 148.
- 13 *London and Leeds Estates Ltd v Paribas Ltd* (1993) 66 P & CR 218, [1993] 2 EGLR 149, CA, where an appeal was allowed against a decision the effect of which was that the landlord was entitled to the increase in rental value attributable to the fitting out works. An assumption that the premises are 'fitted' or 'equipped' probably has the same purpose and effect.
- 14 *Kensington Pension Developments Ltd v Royal Garden Hotel (Oddenino's) Ltd* [1990] 2 EGLR 117 (applying the doctrine of accretion). As to accretion in relation to demised premises see PARA 195 ante.

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### 308. Tenant's improvements.

In the absence of a special direction improvements carried out or paid for by the tenant fall to be valued<sup>1</sup>. It is usual, however, for there to be an express direction that such improvements or their effect on rent are to be disregarded<sup>2</sup>. By an improvement is meant an addition or alteration to the premises as demised; and thus work carried out before the date of grant of the lease (which may include work done during the currency of a previous tenancy) will generally not count for this purpose<sup>3</sup>. In some cases<sup>4</sup>, however, the direction has been construed so as to apply to works carried out by the tenant prior to, but in anticipation of, the grant<sup>5</sup> or under a specifically enforceable agreement for lease<sup>6</sup>. Work carried out by the landlord's contractors to the tenant's order at his cost is a tenant's improvement<sup>7</sup>.

The disregard of tenant's improvements is often limited to improvements carried out:

- 456 (1) otherwise than in pursuance of an obligation to the landlord; and  
 457 (2) with his written consent.

Such an obligation does not have to be contained in the lease but may be imposed by another contractual document<sup>8</sup> or by a covenant to carry out works required by statute<sup>9</sup>. The usual form of covenant in a licence for alterations to do the works in a specified time or to a certain standard will not be construed as imposing an obligation to carry out the improvements<sup>10</sup>. Where the improvement is to be disregarded, an obligation to reinstate in the licence will also be disregarded<sup>11</sup>; and a provision in the licence that the lease is to apply as if the premises as altered had originally been comprised in the lease will not negative the disregard<sup>12</sup>. If the tenant has failed to obtain the landlord's consent for the improvement, the improvement will fall to be valued despite a provision that the tenant is to be assumed to have complied with his

covenants<sup>13</sup>. Where improvements 'carried out by the tenant' are to be disregarded, then the tenant need not have physically carried out the work but must establish some involvement in identifying, supervising and/or financing the works, resulting in the specific improvements concerned<sup>14</sup>.

It is not always easy for the valuer to determine how to give effect to the direction to disregard improvements. He must choose a method which will distinguish fairly between any increase in the value of the property as let attributable to movements in the market and any increase attributable to the tenant's improvements; and the most direct way of doing this will usually be by reference to unimproved comparables. If he has to adopt an alternative method, the valuer must be careful not to measure value by direct reference to the cost of the improvements save to the extent that the bid of a potential tenant in the market would be influenced by that factor<sup>15</sup>; thus it will probably be wrong to measure the effect on rent of the improvements simply by devaluing their original cost adjusted for inflation<sup>16</sup>.

1 *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL; and see the cases cited in PARA 307 note 4 ante. This is so where the valuer is required to fix a rent for the demised premises; but it is otherwise if the valuer is required to fix a rent which it would be reasonable for the parties to agree: *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 All ER 1077, [1981] 1 WLR 505, CA.

2 This direction may be effected by incorporating by reference the provisions of the Landlord and Tenant Act 1954 s 34 (as amended): see PARAS 753, 755 post.

3 *Brett v Brett Essex Golf Club Ltd* (1986) 52 P & CR 330, [1986] 1 EGLR 154, CA; *Panther Shop Investments Ltd v Keith Pople Ltd* [1987] 1 EGLR 131.

4 Where the Landlord and Tenant Act 1954 s 34 is incorporated by reference, it may be material whether on the true construction of the lease what is incorporated is s 34 in its original form or as amended. For a case where it was held that the Landlord and Tenant Act 1954 s 34 (as originally enacted) was incorporated see *Brett v Brett Essex Golf Club Ltd* (1986) 52 P & CR 330, [1986] 1 EGLR 154, CA; and for a case where it was assumed that the Landlord and Tenant Act 1954 s 34 (as amended) was incorporated see *Euston Centre Properties Ltd v H & J Wilson Ltd* [1982] 1 EGLR 57, (1981) 262 Estates Gazette 1079. The difference is that the Landlord and Tenant Act 1954 s 34 (as originally enacted) has been held to be confined to improvements carried out under the current tenancy (*East Coast Amusement Co Ltd v British Transport Board* [1965] AC 58, sub nom *Re Wonderland Cleethorpes*, *East Coast Amusement Co Ltd v British Railways Board* [1963] 2 All ER 775, HL) while the Landlord and Tenant Act 1954 s 34 (as amended) expressly applies to work done at any time in the previous 21 years if certain other conditions are satisfied (see PARA 755 note 8 post).

5 *Hambros Bank Executor and Trustee Co Ltd v Superdrug Stores Ltd* [1985] 1 EGLR 99 ('the tenant' held to mean the party who carried out the work).

6 *Euston Centre Properties Ltd v H & J Wilson Ltd* [1982] 1 EGLR 57, (1981) 262 Estates Gazette 1079 (agreement not specifically enforceable because at the time the improvements were effected there were unfulfilled conditions precedent and thus the improvements did not fall to be disregarded).

7 *Scottish and Newcastle Breweries plc v Sir Richard Sutton's Settled Estates* [1985] 2 EGLR 130.

8 *Godbold v Martin the Newsagents Ltd* [1983] 2 EGLR 128, (1983) 268 Estates Gazette 1202.

9 *Forte & Co Ltd v General Accident Life Assurance Ltd* (1986) 54 P & CR 9, [1986] 2 EGLR 115.

10 *Godbold v Martin the Newsagents Ltd* [1983] 2 EGLR 128, (1983) 268 Estates Gazette 1202.

11 *Pleasurama Properties Ltd v Leisure Investments (West End) Ltd* [1986] 1 EGLR 145, CA.

12 *Historic House Hotels Ltd v Cadogan Estates* [1993] 2 EGLR 151, [1993] 30 EG 94; affd [1994] NPC 119, [1995] 1 EGLR 117, CA.

13 *Hamish Cathie Travel England Ltd v Insight International Tours Ltd* [1986] 1 EGLR 244.

14 See *Durley House Ltd v Cadogan* [2000] 1 WLR 246, [1999] All ER (D) 1126.

15 *GREa Real Property Investments Ltd v Williams* [1979] 1 EGLR 121, (1979) 250 Estates Gazette 651.

16 *Estates Projects Ltd v Greenwich London Borough* [1979] 2 EGLR 85, (1979) 251 Estates Gazette 851.

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### 309. Vacant possession.

Rent review clauses normally provide that premises are to be valued on the basis that they are being let with vacant possession. The effect of this provision is that the tenant is to be deemed to have moved out or never to have occupied the premises<sup>1</sup>, that any sublettings which exist at the review date are to be ignored and that the tenant is to be assumed to have removed his tenant's fixtures<sup>2</sup>. Where the lease does not expressly provide that vacant possession is to be assumed, the normal assumption is that it is<sup>3</sup>; but whether this assumption is to be made requires the lease to be construed in the light of the circumstances surrounding the grant<sup>4</sup>. Directions that the valuer is to 'have regard to rental values of properties let with vacant possession'<sup>5</sup> and is to value the property 'as a whole'<sup>6</sup> and subject to the usual disregards<sup>7</sup> have been held to indicate that vacant possession is to be assumed. The opposite conclusion has been reached, however, where:

- 458 (1) a lease was granted subject to an existing tenancy<sup>8</sup>;
- 459 (2) a lease was granted in contemplation of the creation of subleases by reference to the rent of which the head rent was to be fixed and which would have coincident rent reviews<sup>9</sup>; and
- 460 (3) underlettings were mandated by the terms of the lease, the landlord could control the terms of the underlease and the rent review clause required the rent to be assessed on the assumption that the demised premises included the buildings which the undertenants were going to erect<sup>10</sup>.

1 *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1977) 36 P & CR 185, affd as reported in (1977) 245 Estates Gazette 657 at 662, CA.

2 *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA.

3 *Scottish and Newcastle Breweries plc v Sir Richard Sutton's Settled Estates* [1985] 2 EGLR 130; *Avon County Council v Alliance Property Co Ltd* [1981] 1 EGLR 110, (1981) 258 Estates Gazette 1181.

4 *Hill Samuel Life Assurance Ltd v Preston Borough Council* [1990] 2 EGLR 127.

5 *99 Bishopsgate Ltd v Prudential Assurance Co Ltd* [1985] 1 EGLR 72, CA.

6 *Avon County Council v Alliance Property Co Ltd* (1981) 258 Estates Gazette 1181.

7 le disregarding goodwill, the tenant's occupation and tenant's improvements.

8 *Forte & Co Ltd v General Accident Life Assurance Ltd* (1986) 54 P & CR 9, [1986] 2 EGLR 115.

9 *Scottish and Newcastle Breweries plc v Sir Richard Sutton's Settled Estates* [1985] 2 EGLR 130.

10 *Laura Investment Co Ltd v Havering London Borough Council (No 2)* [1993] 1 EGLR 124.

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PARAS 1386-2000)/7. RENT REVIEW/(3) VALUATION CRITERIA/310. Duration of the hypothetical tenancy.

### 310. Duration of the hypothetical tenancy.

There appears to be a strong presumption that the hypothetical tenancy will correspond to the actual term unexpired at the review date; thus, if the lease is silent as to the duration of the hypothetical tenancy or provides that it is to be on the same terms and conditions as the actual lease<sup>1</sup> or for a term equivalent to that of the actual lease<sup>2</sup>, the hypothetical term will normally be taken to run from the original term date, as opposed to the review date, so that on a grant at the review date the tenant would enjoy only the unexpired residue. It follows from this that the dates of rent reviews and of any options to break<sup>3</sup> in the hypothetical lease will be the same as in the actual lease. This presumption ought not, however, to be applied in a mechanistic manner, so that where the natural meaning of the clause in question is that the hypothetical term runs from the date of the relevant rent review date, and not from some earlier date (and, in particular, not from the date from which the term of the actual lease runs) then that natural meaning should be adopted<sup>4</sup>.

The valuer should take into account the tenant's prospects of renewing his tenancy at the end of the term<sup>5</sup> (unless he is directed to disregard statutory security of tenure<sup>6</sup>) and presumably also any entitlement to compensation he might have if renewal were successfully opposed.

The valuation significance of the length of the hypothetical term depends upon market conditions but a short term is likely to have a depressing effect upon the rent if it is insufficiently long to allow an incoming tenant to write down his fitting out costs<sup>7</sup>. For this reason review clauses often stipulate a minimum length of term to be assumed.

1 *Norwich Union Life Insurance Society v Trustee Savings Banks Central Board* [1986] 1 EGLR 136; *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155; *British Gas plc v Dollar Land Holdings plc* [1992] 1 EGLR 135.

2 *Ritz Hotel (London) Ltd v Ritz Casino Ltd* [1989] 2 EGLR 135; *Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd* [1990] 2 EGLR 131, CA; cf *Toyota (GB) Ltd v Legal and General Assurance (Pensions Management) Ltd* (1989) 59 P & CR 435, [1989] 2 EGLR 123, CA (court implied words which resulted in a hypothetical term being equivalent to the aggregate of the residue and a term granted by a reversionary lease granted as part of the same transaction); and see *St Martins Property Ltd v Citicorp Investment Bank Priorities Ltd* [1998] All ER (D) 570, [1998] EGCS 161, CA.

3 *R & A Millett (Shops) Ltd v Legal and General Assurance Society Ltd* [1985] 1 EGLR 103.

4 *Canary Wharf Investments (Three) v Telegraph Group Ltd* [2003] EWHC 1575 (Ch), [2003] 3 EGLR 31, [2003] 46 EG 132.

5 *Pivot Properties Ltd v Secretary of State for the Environment* (1980) 41 P & CR 248, [1980] 2 EGLR 126, CA.

6 *Ie as in Toyota (GB) Ltd v Legal and General Assurance (Pensions Management) Ltd* (1989) 59 P & CR 435, [1989] 2 EGLR 123, CA.

7 See *Pivot Properties Ltd v Secretary of State for the Environment* (1980) 41 P & CR 248, [1980] 2 EGLR 126, CA. Presumably this factor would have had devastating consequences for the landlord in *Toyota (GB) Ltd v Legal and General Assurance (Pensions Management) Ltd* (1989) 59 P & CR 435, [1989] 2 EGLR 123, CA, had the hypothetical term been held to be for one year only in circumstances where statutory security of tenure was to be disregarded. See also *Prudential Assurance Co Ltd v Salisburys Handbags Ltd* (1992) 65 P & CR 129, [1992] 1 EGLR 153 (where the combination of the length of the residue (85 years) and the fact that rent reviews were excluded from the hypothetical term caused the court to hold that the hypothetical term was to be such as the parties at each review date could reasonably expect to be granted at a fixed rack rent without provision for review).

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### **311. Terms of the hypothetical tenancy.**

Save where the rent review clause requires expressly or by necessary implication that the valuation be made on a basis which departs in some respect from the subsisting terms of the actual lease, the parties are to be taken to have intended that the notional letting postulated by the clause is to be on the same terms, other than as to quantum of rent, as those still subsisting between the parties in the actual subsisting lease<sup>1</sup>. The clause will be construed, if possible, so as not to make the tenant pay for something which he has not got<sup>2</sup>. These presumptions require any actual variations in the terms of the lease to be taken into account<sup>3</sup>, though not variations personal to a particular tenant or terms in a licence which do not amount to variations of the lease<sup>4</sup>. The possibility that the landlord might agree to a future variation or waive his contractual rights may not, however, be taken into account<sup>5</sup>, nor may a unilateral waiver by the landlord not requested by the tenant<sup>6</sup>; but the fact that a covenant is qualified by words providing that the giving of the landlord's consent is not to be unreasonably withheld should be taken into account<sup>7</sup>.

A particular application of the above general presumption arises in connection with 'rent exclusion provisions'<sup>8</sup>, that is to say directions that the valuer is to assume a letting on the terms of the lease 'other than as to rent' or 'other than those relating to rent'<sup>9</sup> or some similar expression. The question has arisen whether expressions of this kind are supposed to postulate a letting without provision for further rent review, thus enhancing the rental value<sup>10</sup>. The correct approach to the construction of these provisions is that effect must be given to clear words which require the rent review provision, as opposed to all provisions as to rent, to be disregarded, however wayward the result; but, subject thereto, it is proper to give effect to the underlying commercial purpose of rent review clauses and construe the words so as to enable further rent reviews to be taken into account<sup>11</sup>.

Sometimes, however, the terms of the actual lease require modification in their application to the hypothetical lease. One such case is where the use of the property is restricted to use by a named individual. In such a case it is to be assumed that the use will be restricted to the hypothetical tenant but not to the actual tenant because that would be inconsistent with the assumption of a letting in the open market<sup>12</sup>. Such a modification will not be made where the use is restricted merely to a particular class of business or permits a variety of uses<sup>13</sup>.

Another such modification to the terms of the actual lease will be made where the lease contains a covenant by the tenant to pay a rent in addition to the open market rent; in such a case the hypothetical lease will be assumed not to contain the obligation to pay the additional rent<sup>14</sup>. Similarly, where the rent payable on review is a percentage of the open market value, the open market value will be assessed on the basis of a letting which provides for review to full market value<sup>15</sup>.

1 *Basingstoke and Deane Borough Council v Host Group Ltd* [1988] 1 All ER 824, [1988] 1 WLR 348, CA; and see *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL.

2 *Pearl Assurance plc v Shaw* [1985] 1 EGLR 92.

3 *Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) Ltd* [1990] 2 EGLR 131, CA.

4 *Pleasurama Properties Ltd v Leisure Investments (West End) Ltd* [1986] 1 EGLR 145, CA; *SI Pension Trustees Ltd v Ministerio de Marina de la Republica Peruana* [1988] 1 EGLR 119.

5 *Plinth Property Investments Ltd v Mott, Hay and Anderson* (1978) 38 P & CR 361, [1979] 1 EGLR 17, CA.

- 6 *C & A Pension Trustees Ltd v British Vita Investments Ltd* [1984] 2 EGLR 75, (1984) 272 Estates Gazette 63; but see the comments on that case in *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155 at 157.
- 7 *Forte & Co Ltd v General Accident Life Assurance Ltd* (1986) 54 P & CR 9, [1986] 2 EGLR 115; and see *Mars Security Ltd v O'Brien* [1991] 2 EGLR 281.
- 8 'Rent exclusion provision' is an expression coined by Sir Nicholas Browne-Wilkinson V-C in *British Gas Corpn v Universities Superannuation Scheme Ltd* [1986] 1 All ER 978, [1986] 1 WLR 398.
- 9 This expression is also to be found in the Landlord and Tenant Act 1954 s 34(1) (as amended): see PARA 753 post.
- 10 This phenomenon is commonly called 'uplift' or 'overage' and at least for a time an uplift of 1% per annum for each year in excess of five between reviews became conventional. For an example see *National Westminster Bank plc v Arthur Young McClelland Moores & Co* [1985] 1 EGLR 61, a decision said to have been plainly wrong in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL.
- 11 These guidelines were laid down in *British Gas Corpn v Universities Superannuation Scheme Ltd* [1986] 1 All ER 978, [1986] 1 WLR 398 and approved in *Equity and Law Life Assurance Society plc v Bodfield Ltd* (1987) 54 P & CR 290, [1987] 1 EGLR 124, CA. For cases where clear words have dictated the disregarding of future reviews see *Pugh v Smiths Industries Ltd* [1982] 2 EGLR 120, (1982) 264 Estates Gazette 823; *Safeway Food Stores Ltd v Banderway Ltd* (1983) 267 Estates Gazette 850; *Securicor Ltd v Postel Properties Ltd* [1985] 1 EGLR 102; *Prudential Assurance Co Ltd v Salisburys Handbags Ltd* (1992) 65 P & CR 129, [1992] 1 EGLR 153. See also *Equity & Law Life Assurance Society plc v Bodfield* supra. *General Accident Fire and Life Assurance plc v Electronic Data Processing plc* (1986) 53 P & CR 189, [1987] 1 EGLR 112 (where the clause was silent on the question) appears, however, to be contrary to the general principle. For cases where further reviews have been taken into account see *Datastream International Ltd v Oakeep Ltd* [1986] 1 All ER 966, [1986] 1 WLR 404n; *MFI Properties Ltd v BICC Group Pension Trust Ltd* [1986] 1 All ER 974, [1986] 1 EGLR 115; *Electricity Supply Nominees Ltd v FM Insurance Co Ltd* [1986] 1 EGLR 143; *Amax International Ltd v Custodian Holdings Ltd* [1986] 2 EGLR 111; *British Home Stores plc v Ranbrook Properties Ltd* [1988] 1 EGLR 121. See also *Arnold v National Westminster Bank plc* [1991] 2 AC 93, [1991] 3 All ER 41, HL.
- 12 *Law Land Co Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109, (1980) 255 Estates Gazette 617, CA; *Sterling Land Office Developments Ltd v Lloyds Bank plc* [1984] 2 EGLR 135, (1984) 271 Estates Gazette 894; *Post Office Counters Ltd v Harlow District Council* (1991) 43 P & CR 46, [1991] 2 EGLR 121.
- 13 *Plinth Property Investments Ltd v Mott, Hay and Anderson* (1977) 38 P & CR 361, [1979] 1 EGLR 17, CA; *SI Pension Trustees Ltd v Ministerio de Marina de la Marina Republica Peruana* [1988] 1 EGLR 119; *James v British Craft Centre* (1987) 55 P & CR 56, [1987] 1 EGLR 139, CA.
- 14 *Lister Locks Ltd v TEI Pension Trust Ltd* [1982] 2 EGLR 124, (1981) 264 Estates Gazette 827; *Guys 'n' Dolls Ltd v Sade Brothers Catering Ltd* [1984] 1 EGLR 103, (1983) 269 Estates Gazette 129, CA; *Buffalo Enterprises Inc v Golden Wonder Ltd* [1991] 1 EGLR 141.
- 15 *Prudential Assurance Co Ltd v 99 Bishopsgate Ltd* [1992] 1 EGLR 119.

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### **312. Other assumptions and disregards.**

It is commonly provided<sup>1</sup> in rent review clauses that the premises are to be assumed to be let without a fine or premium<sup>2</sup>, that no work has been done which would diminish the rental value<sup>3</sup>, that, if the premises have been damaged or destroyed, they have been fully restored by the review date<sup>4</sup> and that no reduction is to be made on account of any rental concession or rent-free period which might have been granted to an incoming tenant for fitting out<sup>5</sup>.

The valuer must give effect to all the assumptions which he is expressly directed to make; otherwise he should value what the tenant has got<sup>6</sup>. He should not infer further assumptions from those he has been given<sup>7</sup>; nor should he make positive assumptions about matters which he has been told to disregard<sup>8</sup>.

In addition to the direction to disregard tenant's improvements, there is also usually a direction to disregard the effect on rent of the tenant's occupation and of any goodwill attached to the premises by reason of the carrying on of the tenant's business<sup>9</sup>. It follows from a direction to disregard the tenant's occupation that goodwill generated by that occupation must also be disregarded<sup>10</sup>.

In a rare case it may be necessary to imply a disregard, for example of the fact that the premises have no independent access, in order to give effect to the hypothesis of a letting in the open market<sup>11</sup>.

1    In addition to the other assumptions commonly found in rent review clauses: see PARAS 305-311 ante.

2    This probably includes a reverse premium.

3    This is to catch works which might not be classified as 'improvements' and so be disregarded: see PARA 308 ante.

4    This is in case the damage is so recent or extensive that the assumption that the tenant has complied with all his covenants, including his repairing covenant, would not cover the situation.

5    A clause which excludes the assumption that a hypothetical tenant would have the expense of moving in and fitting out is more in accordance with the presumption of reality (as to which see PARA 304 the text and note 6 ante) than one which does not: *Co-operative Wholesale Society Ltd v National Westminster Bank plc*, *Scottish Amicable Life Assurance Society v Middleton Potts & Co, Broadgate Square plc v Lehman Brothers Ltd*, *Prudential Nominees Ltd v Greenham Trading Ltd* [1995] 1 EGLR 97, [1995] 01 EG 111, CA. On the other hand, a clause which deems the market rent to be the headline rent obtainable after a rent-free period granted simply to disguise the fall in the rental value of the property is not in accordance with the basic purpose of a rent review clause. It enables the landlord to obtain an increase in rent without any rise in property values or fall in the value of the money by reason of changes in the way the market is choosing to structure the financial packaging of the deal. Therefore, in the absence of unambiguous language, a court should not be ready to construe a rent review clause as having this effect: *Co-operative Wholesale Society Ltd v National Westminster Bank plc*, *Scottish Amicable Life Assurance Society v Middleton Potts & Co, Broadgate Square plc v Lehman Brothers Ltd*, *Prudential Nominees Ltd v Greenham Trading Ltd* supra (where a clause providing that the open market rent was to be that which would become payable after the expiry of a rent-free period of such length as would be negotiated in the open market was construed in favour of the landlord as there was no possible ambiguity; but a clause providing that the rent was to be at the rate payable following the expiry of any rent-free periods or periods at concessionary rents which might be granted on a new letting was construed in favour of the tenant; those words were to be confined to rent-free periods for fitting out and did not include inducement rent-free periods so that the reviewed rent was not to be based on headline figures).

6    See PARA 304 note 6 ante.

7    Eg the direction to assume vacant possession means that the tenant is not occupying the demised premises but this does not justify an inquiry into what he would be doing in those circumstances and whether he would be accommodated in those circumstances adequately, inadequately or not at all.

8    *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146.

9    See the Landlord and Tenant Act 1954 s 34 (as amended) which is sometimes incorporated by reference, which does not apply to the occupation or goodwill of subtenants: see PARAS 753, 755 post. The purpose of these disregards is to negative the effect of the 'sitting tenant's overbid' but not, it seems, to make inadmissible the tenant's trading accounts: *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104, [1958] 1 WLR 108, CA; considered in *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146. The disregard of goodwill does not prevent the rent of a 'destination restaurant', ie one visited for its food or atmosphere rather than its location, from being valued by reference to rents paid for other destination restaurants: *My Kinda Town Ltd v Castlebrook Properties Ltd* [1986] 1 EGLR 121.

10   *Prudential Assurance Co Ltd v Grand Metropolitan Estate Ltd* [1993] 2 EGLR 153, [1993] 32 EG 74.



11 *Jefferies v O'Neill* (1983) 46 P & CR 376, [1984] 1 EGLR 106; *British Airways plc v Heathrow Airport Ltd* [1992] 1 EGLR 141.

In fixing the reviewed rent of a public sector tenancy, the court ought not to take account of the fact that the tenant has exercised, or might exercise, his right to buy the freehold at a discount to the market value under the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post): *Dickinson v Enfield London Borough Council* 29 HLR 465, [1996] 2 EGLR 88, CA.

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### 313. Planning.

The valuer is not entitled to reflect the possibility that the hypothetical tenant will use the property in breach of planning control<sup>1</sup> but should not exclude any potential tenant who might wish to take a lease of the building for any purpose for which it could physically and legally be used<sup>2</sup>. He may, therefore, take account of an actual planning permission obtained by the landlord for a use other than that contemplated by the tenant when he took the building, as long as that use is permitted by the terms of the lease, and may also take into account any hope value attaching to the possibility of obtaining a planning permission or other necessary licence in the future<sup>3</sup>.

Where the rent review clause provides that the property is to be assumed to be available for letting<sup>4</sup> or to be let<sup>5</sup> for a specified purpose, it is to be assumed that that purpose is lawful for the purposes of planning control even if it is not; but the fact that the property is to be assumed to be let on terms which permit a particular use does not justify an assumption that that use is lawful<sup>6</sup>. The replacement of the use classes order by reference to which the permitted use is defined does not affect the meaning of the covenant or extend the permitted use<sup>7</sup>.

1 *Compton Group Ltd v Estates Gazette Ltd* (1977) 36 P & CR 148, [1977] 2 EGLR 73, CA.

2 *Tea Trade Properties Ltd v CIN Properties Ltd* [1990] 1 EGLR 155.

3 *Rushmoor Borough Council v Goucher and Richmond* (1985) 52 P & CR 255, [1985] 2 EGLR 140; *6th Centre Ltd v Guildville Ltd, Jeanmamod-Karim v Guildville Ltd* [1989] 1 EGLR 260. Cf *Faucet Inn Pub Co plc v Ottley Corpn SA* [2006] EWHC 1170 (Ch), [2006] All ER (D) 401 (Mar).

4 *Trust House Forte Albany Hotels Ltd v Daejan Investments Ltd* [1980] 2 EGLR 123, (1980) 256 Estates Gazette 915.

5 *Bovis Group Pension Fund Ltd v GC Flooring & Furnishing Ltd* (1984) 269 Estates Gazette 1252, CA; *6th Centre Ltd v Guildville Ltd, Jeanmamod-Karim v Guildville Ltd* [1989] 1 EGLR 260; and see *Wolff v Enfield London Borough* (1987) 55 P & CR 78, [1987] 1 EGLR 119, CA.

6 *Daejan Investments Ltd v Cornwall Coast Country Club* (1984) 50 P & CR 157, [1985] 1 EGLR 77.

7 *Brewers' Co v Viewplan plc* [1989] 2 EGLR 133. As to use classes orders generally see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 224 et seq.

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## (4) RESOLUTION OF DISPUTES

### 314. Experts and arbitrators.

An expert appointed to decide a rent review is not limited by the evidence and submissions made to him by the parties<sup>1</sup>. The scope of a valuer appointed as an expert to resolve all questions relating to the determination of the rent, thereby excluding the jurisdiction of the court, will depend on the terms of the lease itself. Most leases contain a detailed set of directions as to the assumptions and disregards within which the expert valuer must act and the limit of that power is a matter of construction and a question of law. Unless the lease either expressly or by implication gives the valuer the sole and exclusive power to construe the lease as well as determine the rent, then the court can intervene if the valuer has gone outside his decision-making authority and it also has power to resolve the issue of construction in advance of the expert's determination. A determination of an expert can also be challenged after it was made if the court considers the wrong meaning of the lease provisions has been applied<sup>2</sup>. If as a matter of law the court has jurisdiction to interpret the words at issue, then the contractual obligation to be undertaken will be that which the court decides; for the parties to be bound by that interpretation is not to rewrite the contract embodied in the terms of the lease<sup>3</sup>. The expert owes the parties a duty of care in making his valuation<sup>4</sup> but, if he reasonably considers that they have provided him with enough evidence, he is not obliged to make further investigations<sup>5</sup>. An expert's determination given without reasons is generally binding upon the parties unless tainted by fraud or collusion<sup>6</sup>.

An arbitrator must determine the rent on the evidence before him; he is, however, entitled and intended to use his own expertise in evaluating the evidence<sup>7</sup> and he may arrive at his award by deploying the evidence in a way that is materially different from the way in which the parties' valuers deployed it, providing that the award addresses a matter that has been put into the arena by those valuers and with which they have had an opportunity to deal<sup>8</sup>. The attribution of weight to different comparables is a matter of judgment for the arbitrator<sup>9</sup>. The conduct of the reference is governed by the Arbitration Act 1996<sup>10</sup>. An arbitrator is not liable for negligence<sup>11</sup>.

Rent review clauses generally provide for the appointment of a valuer by the President of the Royal Institution of Chartered Surveyors if the parties cannot agree upon a choice. An application by letter, as opposed to on the official form, and unaccompanied by the prescribed fee is valid for the purposes of the lease<sup>12</sup>. An injunction does not lie to restrain the President from making an appointment, even if the application to him to do so is premature<sup>13</sup>. An appointment will be valid if it accords with the terms of the lease. The President's contract is with the party applying for the appointment, and he cannot be liable for breach of contract if the appointment is invalid; at most, he will owe a duty of care to the other party but he will not be in breach of that duty if the other party does not raise an issue prior to the appointment. It is not the function of the President to determine any legal questions and he can decline to make an appointment where the parties are in issue as to the correct categorisation of the premises until common ground has been reached<sup>14</sup>.

1 *Palacath Ltd v Flanagan* [1985] 2 All ER 161, [1985] 1 EGLR 86; *North Eastern Co-operative Society Ltd v Newcastle upon Tyne City Council* [1987] 1 EGLR 142.

2 See *National Grid Co plc v M25 Group Ltd* [1999] 1 EGLR 65, [1999] 08 EG 169, CA, where the authorities are reviewed. See also eg *British Shipbuilders v VSEL Consortium plc* [1997] 1 Lloyd's Rep 106 (not a landlord and tenant case).

3 Ie by analogy with *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 All ER 575 at 583, [1996] 1 WLR 48 at 59, HL, per Lord Slynn of Hadley (not a landlord and tenant case).

4 *Belvedere Motors Ltd v King* [1981] 2 EGLR 131, (1981) 260 Estates Gazette 813; *Wallshire Ltd v Aarons* [1989] 1 EGLR 147; and see *Zubaida v Hargreaves* [1995] 1 EGLR 127, [1995] 09 EG 320, CA (expert not negligent in relying on comparable rents of shop premises when determining rent of restaurant premises); *Palacath Ltd v Flanagan* [1985] 2 All ER 161, [1985] 1 EGLR 86 (valuer held to be an expert).

5 *Wallshire Ltd v Aarons* [1989] 1 EGLR 147.

6 *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175, CA.

7 *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84, [2003] 1 EGLR 1; *Lex Services plc v Oriel House BV, Oriel House BV v Lex Services plc* [1991] 2 EGLR 126. That expert knowledge must, however, be of the kind and in the range of knowledge that one would reasonably expect the arbitrator to have and he must use it to evaluate the evidence called and not to introduce new and different evidence; he does not have blanket permission to use his own expert knowledge to arrive at an award: see *Checkpoint Ltd v Strathclyde Pension Fund* supra at [28]-[34] per Ward LJ.

8 See *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 at [52]-[53], [2004] 2 P & CR 68, [2003] 2 EGLR 149 per Jonathan Parker LJ.

9 *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch), [2004] 2 EGLR 43, [2003] All ER (D) 438 (Nov). See also *South Tyneside Borough Council v Wickes Building Supplies Ltd* [2004] EWHC 2428 (Comm), [2004] All ER (D) 69 (Nov) (landlord issued witness summonses pursuant to the Arbitration Act 1996 s 43(2) requiring business competitor of tenant to produce evidence regarding its agreement with the landlord relating to another site, 'A', for which the tenant had unsuccessfully bid and which the landlord argued was a comparable which should be available for the purposes of the arbitration, in relation to the actual annual rent payable, the term of the letting, the rent review periods, the user provision, the repairing obligations and the alienation provisions applicable to the letting; the respondents to the summonses argued that they should be set aside on the basis, inter alia, that the information was commercially sensitive; held that on the assumption that the 'A' site was a comparable and relevant to the arbitration, production of the documents would be helpful to the arbitrator, but the evidence did not justify the conclusion that the arbitrator was unable to dispose fairly of the arbitration without them; and in any event the information could have been obtained by other means).

10 See PARAS 316-318 post; and see generally ARBITRATION vol 2 (2008) PARA 1201 et seq. If there is no agreement as to the number of arbitrators, the arbitral tribunal must consist of a sole arbitrator: see the Arbitration Act 1996 s 15(3); and ARBITRATION vol 2 (2008) PARA 1226.

11 See ARBITRATION vol 2 (2008) PARA 1237; and see eg *Palacath Ltd v Flanagan* [1985] 2 All ER 161, [1985] 1 EGLR 86 (where a surveyor appointed by the parties was held to be an expert, not an arbitrator, and was not therefore immune from suit). For other cases where the status of the valuer was in question see *Langham House Developments Ltd v Brompton Securities Ltd* [1980] 2 EGLR 117, (1980) 256 Estates Gazette 719; *Safeway Food Stores Ltd v Banderway Ltd* [1983] 2 EGLR 116, (1983) 267 Estates Gazette 850; *North Eastern Co-operative Society Ltd v Newcastle upon Tyne City Council* [1987] 1 EGLR 142. See also *Fordgate Bingley Ltd v Argyll Stores Ltd* [1994] 2 EGLR 84, [1994] 39 EG 135 (where a rent review clause provides that a disputed rent review is to be determined by a surveyor appointed by the President of the Royal Institution of Chartered Surveyors or chosen by the parties, the surveyor acts as an expert and not as an arbitrator unless the rent review provisions expressly state otherwise).

12 *Staines Warehousing Co Ltd v Montagu Executor and Trustee Co Ltd* (1987) 54 P & CR 302, [1987] 2 EGLR 130, CA.

13 *United Co-operatives Ltd v Sun Alliance & London Assurance Co Ltd* [1987] 1 EGLR 126.

14 See *Epoch Properties Ltd v British Home Stores (Jersey) Ltd* [2004] JCA 156, [2004] 3 EGLR 34, [2004] 48 EG 134.

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NOTES 7, 8--See also *JD Wetherspoon plc v Jay Mar Estates* [2007] EWHC 856 (TCC), [2007] BLR 285.

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### 315. Points of law.

If a point of law arises in a rent review dispute, it may be dealt with in several ways:

- 461 (1) an application may be made to the court for a declaration as to the construction of the clause so that the valuer can know what it is that he has to value<sup>1</sup>; in a case governed by an arbitration clause, it would be open to the other party to apply for a stay of such proceedings<sup>2</sup>, but in practice this is rarely done in rent review disputes;
- 462 (2) if there is a reference to arbitration, the court may be asked to determine a preliminary point of law if all the parties to the reference consent or the arbitrator gives permission and the court is satisfied that determination of the question is likely to produce substantial savings in costs and that the application was made without delay<sup>3</sup>; the court is precluded from entertaining an application unless satisfied that the point of law in question substantially affects the rights of one or more of the parties<sup>4</sup>; even if these conditions are satisfied, the court has a discretion whether to entertain the application<sup>5</sup>;
- 463 (3) the arbitrator may make a separate award deciding the preliminary point<sup>6</sup>, which award could then be made the subject of an appeal<sup>7</sup>;
- 464 (4) the parties can invite the arbitrator to make his final award in a form which states how he has decided the point of law and what figure he would have awarded had he decided it the other way<sup>8</sup>.

1 The court's jurisdiction to decide the point is not ousted by the parties having agreed to have the rent review decided by an expert: *Postel Properties Ltd v Greenwell* (1992) 65 P & CR 239, [1992] 2 EGLR 130. It was held in *Norwich Union Life Insurance Society v P & O Property Holdings Ltd* [1993] 1 EGLR 164 at 167, CA (not a rent review case), that if the parties did not agree to make such an application to the court, an injunction would not be granted to prevent the expert proceeding to make his decision and that it was his duty to do so; but in that case the agreement specifically provided that the particular matters in question were for the determination of the expert and his power to do so was not limited. The decision in *Norwich Union Life Insurance Society v P & O Property Holdings Ltd* supra has been distinguished for the purposes of rent review: see *National Grid Co plc v M25 Group Ltd* [1999] 1 EGLR 65, [1999] 08 EG 169, CA.

2 *Ie* under the Arbitration Act 1996 ss 9, 86: see ARBITRATION vol 2 (2008) PARA 1222. See also *Scottish and Newcastle Breweries plc v Sir Richard Sutton's Settled Estates* [1985] 2 EGLR 130.

3 See the Arbitration Act 1996 s 45(2); and ARBITRATION vol 2 (2008) PARA 1255.

4 See *ibid* s 45(1); and ARBITRATION vol 2 (2008) PARA 1255. As to leave to appeal see PARA 317 post.

5 *Chapman v Charlwood Alliance Properties Ltd* (1981) 260 Estates Gazette 1041 (decided on the differently worded provisions of the previous legislation).

6 *Ie* under the Arbitration Act 1996 s 47: see ARBITRATION vol 2 (2008) PARA 1258.

7 As to appeals see PARA 317 post.

8 As to the form of an award see the Arbitration Act 1996 s 52; and ARBITRATION vol 2 (2008) PARA 1263. The award will generally give reasons: see s 52(4).

PARAS 1386-2000)/7. RENT REVIEW/(4) RESOLUTION OF DISPUTES/316. Procedural matters in rent review arbitrations.

### **316. Procedural matters in rent review arbitrations.**

It is for the arbitral tribunal to decide all procedural and evidential matters<sup>1</sup>, subject to the right of the parties to agree any matter<sup>2</sup>, including:

- 465 (1) whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage<sup>3</sup>;
- 466 (2) whether to apply strict rules of evidence<sup>4</sup> or any other rules<sup>5</sup> as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion, and the time, manner and form in which such material should be exchanged and presented<sup>6</sup>; and
- 467 (3) whether and to what extent there should be oral or written evidence or submissions<sup>7</sup>.

The Court of Appeal has given guidance on the meaning and use of comparables in arbitration proceedings<sup>8</sup>.

The parties are free to agree on the form of an award<sup>9</sup> but if or to the extent that there is no such agreement, the award must be in writing signed by all the arbitrators or all those assenting to the award, and must contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons<sup>10</sup>. Without reasons, the award may not be appealed against<sup>11</sup>. It is common practice to ask the arbitrator to make an award final save as to costs so that the parties may have an opportunity to address representations to him on costs in the light of his award and any offers made 'without prejudice save as to costs'<sup>12</sup> which may have been made prior to or in the course of the arbitration.

1 For the meaning of 'procedural and evidential matters' see the Arbitration Act 1996 s 34(2); and ARBITRATION vol 2 (2008) PARA 1245.

2 Ibid s 34(1).

3 Ibid s 34(2)(d). As to disclosure of the tenant's trading accounts see *Cornwall Coast Country Club v Cardgrange Ltd* [1987] 1 EGLR 146; *Electricity Supply Nominees Ltd v London Clubs Ltd* [1988] 2 EGLR 152; *ARC Ltd v Schofield* [1990] 2 EGLR 52; *Electricity Supply Nominees Ltd v London Clubs Ltd* [1988] 2 EGLR 152; *Urban Small Space Ltd v Burford Investment Co Ltd* [1990] 2 EGLR 120 (all decided under previous legislation).

4 As to the strict rules of evidence see CIVIL PROCEDURE vol 11 (2009) PARA 753 et seq.

5 As to hearsay evidence see CIVIL PROCEDURE vol 11 (2009) PARA 806 et seq.

6 Arbitration Act 1996 s 34(2)(f).

7 Ibid s 34(2)(h). The parties are often content to proceed by written representations but the arbitrator should hold an oral hearing if one party requests it: *Henry Sotheran Ltd v Norwich Union Life Insurance Society* [1992] 2 EGLR 9, [1992] 31 EG 70 (decided under previous legislation).

8 See *Living Waters Christian Centres Ltd v Fetherstonhaugh* [1999] 2 EGLR 1, [1999] 28 EG 121, CA.

9 Arbitration Act 1996 s 52(1).

10 See *ibid* s 52(2)-(4); and ARBITRATION vol 2 (2008) PARA 1263.

11 See *ibid* s 69(1); para 317 post; and ARBITRATION vol 2 (2008) PARA 1278.

12 It is commonly known as a 'Calderbank' offer after *Calderbank v Calderbank* [1976] Fam 93, [1975] 3 All ER 333, CA, extended to all cases by *Cutts v Head* [1984] Ch 290, [1984] 1 All ER 597, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/7. RENT REVIEW/(4) RESOLUTION OF DISPUTES/317. Appeals against arbitration awards.

### **317. Appeals against arbitration awards.**

A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, appeal to the court on a question of law arising out of an award made in the proceedings<sup>1</sup>. An agreement to dispense with reasons for the arbitrator's award<sup>2</sup> is to be considered an agreement to exclude the court's jurisdiction under this provision<sup>3</sup>.

No such appeal may be brought except:

- 468 (1) with the agreement of all the other parties to the proceedings; or
- 469 (2) with the leave of the court<sup>4</sup>.

Nor may an appeal be brought if the applicant or appellant has not first exhausted:

- 470 (a) any available arbitral process of appeal or review; and
- 471 (b) any available recourse under the statutory provision<sup>5</sup> for correction of the award or the making of an additional award<sup>6</sup>.

Any appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process<sup>7</sup>.

The court may order the arbitrator to state the reasons for his award in more detail in order that it may consider the appeal<sup>8</sup>, and may order the appellant to provide security for the costs of the appeal and direct that the appeal be dismissed if the order is not complied with<sup>9</sup>.

On an appeal the court may by order:

- 472 (i) confirm the award;
- 473 (ii) vary the award;
- 474 (iii) remit the award to the arbitrator, in whole or in part, for reconsideration in the light of the court's determination; or
- 475 (iv) set aside the award in whole or in part, if satisfied that it would be inappropriate to remit the matters in question to the arbitrator for reconsideration<sup>10</sup>.

The decision of the court on such an appeal is to be treated as a judgment of the court for the purposes of a further appeal; but no such appeal lies without the leave of the court which may not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal<sup>11</sup>.

Where the award is:

- 476 (A) varied on appeal, the variation has effect as part of the arbitrator's award;
- 477 (B) remitted to the arbitrator, in whole or in part, for reconsideration, the arbitrator must make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct;

478 (c) set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award<sup>12</sup>.

1 See the Arbitration Act 1996 s 69(1); and ARBITRATION vol 2 (2008) PARA 1278.

2 See *ibid* s 52(4); para 316 ante; and ARBITRATION vol 2 (2008) PARA 1263.

3 See *ibid* s 69(1).

4 See *ibid* s 69(2). Leave to appeal may be given only if the court is satisfied: (1) that the determination of the question will substantially affect the rights of one or more of the parties; (2) that the question is one which the arbitrator was asked to determine; (3) that, on the basis of the findings of fact in the award (a) the decision of the arbitrator on the question is obviously wrong; or (b) the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt; and (4) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question: see s 69(3). An application for leave to appeal must identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted: s 69(4). The court must determine an application for leave to appeal without a hearing unless it appears to the court that a hearing is required: s 69(5). The leave of the court is required for any appeal from a decision of the court to grant or refuse leave to appeal: s 69(6). Leave to appeal may be granted subject to conditions: see s 70(8). It is not to be given for the purpose of 'fine tuning': *Manders Property (Estates) Ltd v Magnet House Properties Ltd* [1989] 2 EGLR 126. As to leave to appeal in rent review cases see *Ipswich Borough Council v Fisons plc* [1990] Ch 709, [1990] 1 All ER 730, CA, disapproving *Lucas Industries plc v Welsh Development Agency* [1986] Ch 500, [1986] 2 All ER 858 (where it had been held that leave should be given if the judge was in real doubt whether the arbitrator was right). The test laid down in *Ipswich Borough Council v Fisons plc* supra makes it clear that the test is flexible but is significantly stricter in a 'one off' case. For examples of the application of this test see *Prudential Assurance Co Ltd v Trafalgar House Group Estates Ltd* [1991] 1 EGLR 127, CA; *Lex Services plc v Oriel House BV* [1991] 2 EGLR 126. See also *Euripides v Gascoyne Holdings Ltd* (1995) 72 P & CR 301, CA. All the cases cited in this note were decided under the previous legislation. See further ARBITRATION vol 2 (2008) PARA 1279.

5 See under the Arbitration Act 1996 s 57: see ARBITRATION vol 2 (2008) PARA 1267.

6 See *ibid* s 70(2).

7 See *ibid* s 70(3). Failure to warn a client of the shortness of these time limits may be actionable negligence: see *Corfield v DS Boshier & Co* [1992] 1 EGLR 163.

8 See the Arbitration Act 1996 s 70(4); and ARBITRATION vol 2 (2008) PARA 1279.

9 See *ibid* s 70(6), (7); and ARBITRATION vol 2 (2008) PARA 1279.

10 See *ibid* s 69(7); and ARBITRATION vol 2 (2008) PARA 1278.

11 *Ibid* s 69(8).

12 See *ibid* s 71; and ARBITRATION vol 2 (2008) PARA 1280.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/7. RENT REVIEW/(4) RESOLUTION OF DISPUTES/318. Other challenges to arbitration awards.

### 318. Other challenges to arbitration awards.

A party to arbitral proceedings may, upon notice to the other parties and to the arbitrator:

- 479 (1) apply to the court challenging any award of the arbitrator as to his substantive jurisdiction, or for an order declaring an award made by the arbitrator on the merits to be of no effect, in whole or in part, because he did not have substantive jurisdiction<sup>1</sup>;
- 480 (2) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the arbitrator, the proceedings or the award<sup>2</sup>.

'Serious irregularity' means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice<sup>3</sup> to the applicant:

- 481 (a) failure by the arbitrator to comply with his general statutory duty<sup>4</sup>;
- 482 (b) the arbitrator exceeding his powers, otherwise than by exceeding his substantive jurisdiction under head (1) above;
- 483 (c) failure by the arbitrator to conduct the proceedings in accordance with the procedure agreed by the parties<sup>5</sup>;
- 484 (d) failure by the arbitrator to deal with all the issues that were put to him<sup>6</sup>;
- 485 (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- 486 (f) uncertainty or ambiguity as to the effect of the award;
- 487 (g) the award being obtained by fraud, or the award or the way in which it was procured being contrary to public policy;
- 488 (h) failure to comply with the requirements as to the form of the award; or
- 489 (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitrator or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award<sup>7</sup>.

The issue is not whether the arbitrator came to the right conclusion; the sole issue is whether he committed a serious irregularity in coming to the conclusion that he did<sup>8</sup>. Pursuit of the overall objective of arbitral proceedings, and the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense, requires that the courts accord a reasonably generous margin of appreciation to arbitrators in the discharge of their functions<sup>9</sup>.

Any application under head (1) or head (2) above must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process<sup>10</sup>. No such application may be brought if the applicant has not first exhausted:

- 490 (i) any available arbitral process of appeal or review; and
- 491 (ii) any available recourse under the statutory provision<sup>11</sup> for correction of the award or the making of an additional award<sup>12</sup>.

A party who continues to take part in the proceedings without raising an objection that the arbitrator lacks substantive jurisdiction, that the proceedings have been improperly conducted, that there has been a failure to comply with the arbitration agreement or with any relevant statutory provision<sup>13</sup> or that there has been any other irregularity affecting the tribunal or the proceedings, may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection<sup>14</sup>.

On an application under head (1) above, the court may confirm the award, vary the award, or set aside the award in whole or in part<sup>15</sup>. On an application under head (2) above, if there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may:



- 492 (A) remit the award to the arbitrator, in whole or in part, for reconsideration;
- 493 (B) set the award aside in whole or in part; or
- 494 (C) declare the award to be of no effect, in whole or in part,

but may not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration<sup>16</sup>. Where the award is remitted to the arbitrator, in whole or in part, for reconsideration, the arbitrator must make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct; and where it is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the bringing of legal proceedings in respect of a matter to which the arbitration agreement applies is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award<sup>17</sup>.

The leave of the court is required for any appeal from a decision of the court under these provisions<sup>18</sup>.

1 See the Arbitration Act 1996 s 67(1); and ARBITRATION vol 2 (2008) PARA 1276. For an unsuccessful challenge under this provision see eg *Macepark (Whittlebury) Ltd v Sargeant* [2002] All ER (D) 279 (Jul), cited in PARA 158 ante (not a rent review case).

2 See the Arbitration Act 1996 s 68(1); and ARBITRATION vol 2 (2008) PARA 1277. An arbitration claim form relating to a landlord and tenant dispute must be issued in the Chancery Division of the High Court: *Practice Direction--Arbitration* PD 62 para 2.3(2).

3 In deciding whether a serious irregularity has caused substantial injustice, the court should not decide what rent the arbitrator might have fixed if he had dealt with the case differently, but should try to assess how the aggrieved party would have conducted his case but for the irregularity. Only if the aggrieved party has suffered a substantial injustice because he was unable to present his case and so obtain a fair hearing will the irregularity be treated as falling within the Arbitration Act 1996 s 68: see *Checkpoint Ltd v Strathclyde Pension Fund* [2003] EWCA Civ 84 at [57]-[58], [2003] 1 EGLR 1, [2003] All ER (D) 56 (Feb) per Ward LJ; *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 at [56]-[60], [2004] 2 P & CR 68, [2003] 2 EGLR 149 per Jonathan Parker LJ. The test of 'substantial injustice' is intended to be applied by way of a support of the arbitral process and not by way of interference with that process. It is only in those cases where it can be said that what has happened was so far removed from what could reasonably be expected of the arbitral process that the court will interfere. The Arbitration Act 1996 s 68 is a longstop, which is available only in extreme cases where the arbitrator has gone so wrong in his conduct of the arbitration that justice calls out for it to be corrected; it is not a soft alternative to an application for leave to appeal: see *Checkpoint Ltd v Strathclyde Pension Fund* supra at [59] per Ward LJ.

4 In the context of rent review the following behaviour has been held to justify the remission or setting aside of an award under the previous legislation: (1) failure to copy one party's communications to the arbitrator to the other side (*Shield Properties & Investment Ltd v Anglo-Overseas Transport Co Ltd* [1985] 1 EGLR 7); (2) failure to enforce a direction that comparables should be within the direct knowledge of the witness or verified by documentary evidence (*Control Securities plc v Spencer* [1989] 1 EGLR 136); (3) the omission of the arbitrator to forward a letter to the other side (*Control Securities plc v Spencer* supra); (4) taking into account material obtained from the arbitrator's own knowledge or research without giving the parties an opportunity to deal with

le under the Arbitration Act 1996 s 33 (general duty of tribunal act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined): see ARBITRATION vol 2 (2008) PARA 1243. See eg *St George's Investment Co v Gemini Consulting Ltd* [2004] EWHC 2353 (Ch), [2005] 1 EGLR 5, [2004] All ER (D) 105 (Oct) (arbitrator applied further discounts for certain onerous features in the lease, which neither party had suggested should be made; the award thus produced a result that was not the subject of submission and which the landlord had had no opportunity to answer); *Guardcliffe Properties Ltd v City & St James Property Holdings* [2003] EWHC 215 (Ch), [2003] 2 EGLR 16, [2003] All ER (D) 53 (Feb) (decision to allow an annual equivalent of £10,000 pa in respect of a rent-free period without allowing the parties an opportunity to comment upon the principle of a rent-free period and its duration; also allowance of £8,500 pa in respect of the upper floors of the property when not only was the possibility of such an allowance not raised in the arbitral proceedings, but it went beyond the contention of the defendant's own surveyor, who was simply asking that no rental value be attributed to the upper parts).

it (*Top Shop Estates Ltd v Danino*, *Top Shop Estates Ltd v Tandy Corp* [1985] 1 EGLR 9); (5) making reductions in the rates derived from comparables without giving the parties an opportunity to comment on them (*Handley v Nationwide Anglia Building Society* [1992] 2 EGLR 114); (6) departing from the agreed statement of facts without giving the parties an opportunity to be heard on the question (*Techno Ltd v Allied Dunbar Assurance plc* [1993] 1 EGLR 29); (7) failing to send a copy of each party's cross-representations to the other (*Banner Industrial and Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139).

5 In the context of rent review the following behaviour has been held to justify the remission or setting aside of an award under the previous legislation: (1) the failure of the arbitrator, contrary to a prior direction, to raise with the parties whether they wanted an oral hearing (*Control Securities plc v Spencer* [1989] 1 EGLR 136); (2) failing to have an oral hearing after directing that there should be one if either party called for it and one party had done so (*Henry Sotheran Ltd v Norwich Union Life Insurance Society* [1992] 2 EGLR 9, [1992] 31 EG 70); (3) failure to inspect comparable properties in accordance with directions given to the parties (*Oakstead Garages Ltd v Leach Pension Scheme (Trustees) Ltd* [1996] 1 EGLR 26, [1996] 24 EG 147).

6 Eg, in the context of rent review, rejecting a zoning analysis applied by both parties' surveyors without giving either an opportunity to express a view on the arbitrator's rejection of such an approach: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14. Failure to consider whether the landlord had alternatives, such as subdivision, outside the transactional framework laid down by the lease does not fall within this head: *Marklands Ltd v Virgin Retail Ltd* [2003] EWHC 3428 (Ch), [2004] 2 EGLR 43, [2003] All ER (D) 438 (Nov).

7 See the Arbitration Act 1996 s 68(2); and ARBITRATION vol 2 (2008) PARA 1277. For cases which were held not to justify the remission or setting aside of an award under the previous legislation see eg *Moran v Lloyd's* [1983] QB 542, [1983] 2 All ER 200, CA; *Blexen Ltd v G Percy Trentham Ltd* [1990] 2 EGLR 9, CA; *King v Thomas McKenna Ltd* [1991] 2 QB 480, [1991] 1 All ER 653, CA; *Arnold v National Westminster Bank plc* [1993] 1 EGLR 23; *Moore Stephens & Co v Local Authorities' Mutual Investment Trust* [1992] 1 EGLR 33; *Banner Industrial & Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139.

8 See *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2002] EWHC 2502 (Ch) at [64], [2002] All ER (D) 399 (Nov) per Lawrence Collins J; affd [2003] EWCA Civ 751, [2004] 2 P & CR 68, [2003] 2 EGLR 149.

9 See *Warborough. Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] EWCA Civ 751 at [60], [2004] 2 P & CR 68, [2003] 2 EGLR 149 per Jonathan Parker LJ.

10 See the Arbitration Act 1996 s 70(3); and ARBITRATION vol 2 (2008) PARA 1279.

11 Ie under the Arbitration Act 1996 s 57: see ARBITRATION vol 2 (2008) PARA 1267.

12 See *ibid* s 70(2).

13 Ie any provision of *ibid* Pt I (ss 1-84): see generally ARBITRATION vol 2 (2008) PARA 1201 et seq.

14 See *ibid* s 73(1); and ARBITRATION vol 2 (2008) PARA 1282.

15 See *ibid* s 67(3); and ARBITRATION vol 2 (2008) PARA 1276.

16 See *ibid* s 68(3); and ARBITRATION vol 2 (2008) PARA 1277.

17 See *ibid* s 71; and ARBITRATION vol 2 (2008) PARA 1280.

18 See *ibid* ss 67(4), 68(4); and ARBITRATION vol 2 (2008) PARAS 1276, 1277.

## UPDATE

### 318 Other challenges to arbitration awards

NOTE 14--See *O'Donoghue v Enterprise Inns plc* [2008] All ER (D) 43 (Oct) (claim failed because plain claimant had permitted the arbitrator to deliberate and make award and only objected award after it had been published).

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## **8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE**

### **(1) SERVICE CHARGES**

#### **(i) General Principles**

##### **319. Nature of service charge.**

In contrast to rent strictly so called<sup>1</sup>, other sums of money are often payable by the tenant to the landlord<sup>2</sup> by reason of the tenant's covenants in the lease. For example, the tenant may covenant to reimburse the landlord the cost of insuring the premises, or, in a lease of a flat, to reimburse the landlord a proportionate part of the landlord's expenditure in carrying out repairs to the building of which the flat forms a part. These covenanted sums are not rents unless they are expressly reserved as rents<sup>3</sup>, and, if they are not reserved as a rent and are unpaid, the landlord will not be able to distrain<sup>4</sup> or to re-enter under any proviso for re-entry upon non-payment of rent, but must rely on the tenant's non-payment as a breach of his covenant to pay the relevant sum, so that the landlord will be able to re-enter only pursuant to the proviso for re-entry for breach of covenant and must comply with the statutory provisions relating to it<sup>5</sup>. There is now statutory protection for tenants of dwellings under long leases against forfeiture or re-entry by the landlord where the tenant has failed to pay an amount consisting of rent, service charges or administration charges, or a combination of them, if the outstanding sum is a small one and has not been payable for more than a prescribed period<sup>6</sup>. There is also a statutory restriction on the termination of a tenancy of a dwelling for failure to pay a service charge or administration charge<sup>7</sup>.

In modern conveyancing practice, by far the most usual and most important covenanted sum (or additional rent) is that which refers to the cost or value of repairs, maintenance and services provided to the tenant ('service charges'<sup>8</sup>), whether reserved as a rent or not. It is possible to have a service charge review clause, on the lines of a rent review clause<sup>9</sup>, but the almost invariable practice is to stipulate that the service charge is to be paid by reference to a formula<sup>10</sup>, which usually imposes upon the tenant liability for a fixed percentage, or a fair proportion to be determined pursuant to a specified procedure, of the cost<sup>11</sup> to the landlord of providing the relevant services and repairs. Leases often make performance of the landlord's obligation to provide services subject to payment of the service charge; but this does not make payment a condition precedent to the provision of the services<sup>12</sup>.

A clause in a lease permitting the recovery of the landlord's legal costs by way of service charge will be construed strictly against the landlord<sup>13</sup>. Where the lease is a long lease of a dwelling, the tenant may make an application for an order that all or any of such costs are not to be taken into account in determining the amount of any service charge payable<sup>14</sup>.

1 As to the nature of a rent as a payment (or thing) reserved from and notionally issuing out of the demised premises see PARA 242 et seq ante.

2 The sums may be payable to a third person, eg under the frequent practice by which the tenant covenants to pay a service charge to a maintenance company or trustee.

3 It is the modern and prudent practice to reserve such payments as rents.

4 As to distress for rent see PARA 282 ante.

5 He will, therefore, have to serve notice under the Law of Property Act 1925 s 146 (as amended), in respect of the breach as a preliminary to the forfeiture claim: see PARAS 619-620 post. The distinction between a service charge which is reserved as a rent and one which is a mere covenanted sum is also important where the lease contains a contractual provision for the payment of interest upon late rents, if that provision does not in terms refer also to other payments due under the lease.

The relationship between a tenant's claim for damages for breach of covenant and a landlord's claim for unpaid service charges is such that the doctrine of equitable set-off may be applied: *Filross Securities Ltd v Midgeley* (1998) 31 HLR 465, [1998] 3 EGLR 43, CA. There can, however, be no such set-off where a manager appointed by a leasehold valuation tribunal under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (see PARA 399 et seq post) claims payment of service charges from a tenant and the tenant claims damages for breach of covenant from the landlord, as there is no mutuality between the two claims: see *Taylor v Blaquiére* [2002] EWCA Civ 1633, [2003] 1 WLR 379, [2002] All ER (D) 190 (Nov).

Where a consent order settled forfeiture proceedings between a tenant and a landlord, in relation to a dispute concerning service charges, on the terms that a specified sum could not be recovered from the tenant, it did not, on its true construction, preclude the landlord from recovering that sum as a management company from its tenant as a shareholder, pursuant to the articles of association: see *Morshead Mansions Ltd v Mactra Properties Ltd* [2006] EWCA Civ 492, [2006] All ER (D) 17 (Apr).

6 See the Commonhold and Leasehold Reform Act 2002 s 167; and PARA 612 post.

7 See the Housing Act 1996 s 81 (as amended); and PARA 610 post.

8 For the meaning of 'service charge' and 'relevant costs' for the purposes of the Landlord and Tenant Act 1985 ss 18-40 (as amended), which sets out a statutory code applying to tenancies of dwellings, see PARA 326 post. There is, however, no statutory definition of 'services'.

9 See PARA 292 ante. For an example of a service charge indexed to the general index of retail trade prices see *Cumshaw Ltd v Bowen* [1987] 1 EGLR 30.

10 Ie as with rent variation or escalation clauses: see PARA 292 ante.

11 For these purposes, 'cost' can sometimes include a detriment suffered by the landlord, such as the loss of the rent which the landlord otherwise would have been able to recover for a flat provided for a porter or caretaker: *Agavil Investments Ltd v Corner* (3 October 1975, unreported), CA. A similar result is achieved in cases in which fair rents are being determined under the Rent Act 1977: see PARA 921 post. The lease may also provide that the service charge is to include the cost of borrowing to finance services: *Boldmark Ltd v Cohen* (1985) 19 HLR 136, [1986] 1 EGLR 47, CA (lease held not to do so); *Skilleter v Charles* (1991) 24 HLR 421, [1992] 1 EGLR 73, CA (lease held to do so).

The costs which are recoverable by way of service charge will depend upon the wording of the lease and the facts of the individual case: see eg *Embassy Court Residents Association v Lipman* [1984] 2 EGLR 60, (1984) 271 Estates Gazette 545, CA (term implied entitling a residents' association to recover the cost of employing managing agents); *Jollybird Ltd v Fairzone Ltd* [1990] 2 EGLR 55, CA (provisions of a lease construed as not entitling the landlord to recover a profit element in addition to the actual cost of supplying fuel oil for heating); *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 All ER 488, [1980] 1 WLR 425; *Boldmark Ltd v Cohen* (1985) 19 HLR 136, [1986] 1 EGLR 47, CA (interest on money borrowed to finance provision of services not recoverable in absence of express term); *Capital and Counties Freehold Equity Trust Ltd v BL plc* [1987] 2 EGLR 49 (only services provided during the term held to be chargeable); *Rapid Results College v Angell* [1986] 1 EGLR 53, CA; *Jacob Isbicki & Co Ltd v Goulding & Bird Ltd* [1989] 1 EGLR 236 (service charge held not to include works to certain parts of the exterior of the buildings; cf *Reston Ltd v Hudson* [1990] 2 EGLR 51 (service charge held to include the cost of replacement of windows and window-frames)); *Sella House Ltd v Mears* (1998) 21 HLR 147, [1989] 1 EGLR 65, CA (fees of solicitors and counsel incurred in bringing proceedings to recover the service charge held not to be recoverable); *Iperion Investments Corp v Broadwalk House Residents Ltd* [1992] 2 EGLR 235 at 251 (legal costs of prosecuting a claim for forfeiture not 'costs of management' but costs associated with a claim for an injunction are; affd (1994) 71 P & CR 34, [1995] 2 EGLR 47, CA); *Morgan v Stainer* (1992) 25 HLR 467, [1993] 2 EGLR 73 (legal costs of defending tenant's action for appointment of independent agents, setting up an independent account, declaration that service charge moneys held on trust and accounts and inquiries not costs incurred by the landlord in obtaining the payment of maintenance contributions); cf *Reston Ltd v Hudson* supra (costs of applying to the court for a declaration as to what was recoverable under the service charge held to be recoverable); *Sun Alliance and London Assurance Co Ltd v British Railways Board* [1989] 2 EGLR 237 (capital cost of installing a new fully automatic window cleaning system with cradle and fixed roof tracks was recoverable as a 'cost of providing such other services as the lessor shall consider ought properly and reasonably to be provided for the benefit of the building or for the proper maintenance and servicing of any part thereof'); *Skilleter v Charles* supra (landlord held entitled to employ a company to manage flats and recover the cost of doing so, even if he owned the company, provided that it was not a complete sham); *Embassy Court Residents' Association v Lipman* [1984] 2 EGLR 60, (1984) 271 Estates Gazette 545, CA (term implied entitling residents' association to recover costs of employing

managing agents); *Lloyds Bank plc v Bowker Orford* [1992] 2 EGLR 44 (the cost of replacing plant, the costs of employing managing agents and the notional cost of housing the caretaker held to be recoverable as comprised in the 'total cost' of providing specified services).

As to recovery of the costs of proceedings by a trustee of the maintenance fund see *Holding and Management Ltd v Property Holding and Investment Trust plc* [1990] 1 All ER 938, [1990] 1 EGLR 65, CA.

12 *Yorkbrook Investments Ltd v Batten* (1985) 32 P & CR 51, [1985] 2 EGLR 100, CA. A provision such as that in *Yorkbrook Investments Ltd v Batten* supra might deprive the non-payer of a right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach: see *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289 at [37], [2004] HLR 939, [2004] 2 EGLR 38, obiter, per Buxton LJ. Where a tenant evinces a fixed intention not to be bound by its obligation to pay service charges, *Yorkbrook Investments Ltd v Batten* supra is distinguishable, and the landlord will not then be liable to perform the repairing obligations: *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289 at [47]-[49], [2004] HLR 939, [2004] 2 EGLR 38 per Sir Martin Nourse.

13 See *Sella House Ltd v Mears* (1998) 21 HLR 147, [1989] 1 EGLR 65, CA; *Morgan v Stainer* (1992) 25 HLR 467, [1993] 2 EGLR 73.

14 See the Landlord and Tenant Act 1985 s 20C (as substituted and amended); and PARA 344 post.

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### **320. Information about service charges at common law.**

At common law a tenant has no right to demand information about the calculation or apportionment of a service charge; and, if the tenant cannot persuade the landlord to disclose the relevant information, the tenant's only remedy is to refuse to pay the service charge and force the landlord to sue to recover it, and put the landlord to strict proof of all matters relating to the service charge in those proceedings. As this is an unsatisfactory position for the tenant, a lease should, and often does, contain express provisions requiring the landlord to supply the relevant information. For example, the lease often confers upon the tenant the right to be provided with a statement of the costs and expenditure relevant to the computation of the service charge, and details of the apportionment of it, sometimes certified by the landlord's surveyor, managing agent or accountant<sup>1</sup>. Alternatively, the tenant may be given an express opportunity to check the relevant amounts and vouchers.

<sup>1</sup> The provision of such certificates is often made a condition precedent to the tenant's liability for the charge: see PARA 321 post. See also *CIN Properties Ltd v Barclays Bank plc* [1986] 1 EGLR 59, CA; *Northways Flats Management Co (Camden) Ltd v Wimpey Pension Trustees Ltd* [1992] 2 EGLR 42, CA (compliance by the landlord with an obligation to serve specifications and estimates on the tenant held to constitute a condition precedent to the tenant's liability for the service charge).

As to the tenant's statutory right to information relating to service charges see PARA 325 et seq post.

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### **321. Limitation of service charges at common law.**

At common law, where the landlord is entitled to expend money on services and then to recoup the expenditure from the tenants, there is implied in the contract a term that the service charge is to be fair and reasonable<sup>1</sup>. Whenever the giving of a certificate as to the amount of the service charge, or the doing of any other act or happening of any other event, is stipulated by the lease to be a condition precedent to the payment of the service charge, nothing is recoverable until that condition precedent has been complied with, and this necessitates that any such certificate is to be given by an agent who is not in fact the same person as the landlord<sup>2</sup>. Any attempt to oust the court's jurisdiction by making the determination of a third person, such as the landlord's agent, final and conclusive as to the amount of the service charge is void in so far as it seeks to make that person's decision final as to questions of law and construction (such as whether specific services can be charged for under the provisions of the lease), as opposed to referring to him the calculation or arithmetic involved in assessing the service charge<sup>3</sup>.

1 *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA; *Pole Properties Ltd v Feinberg* (1981) 43 P & CR 121, [1981] 2 EGLR 38, CA. Cf *Bandar Property Holdings Ltd v JS Darwen (Successors) Ltd* [1968] 2 All ER 305, 19 P & CR 785 (insurance premiums; landlords held to be under no duty to obtain cheapest cover so as to minimise sums payable by tenant). It is not clear whether this decision has to be treated as overruled by *Finchbourne Ltd v Rodrigues* supra. It would seem that the implied term as to the reasonableness applies rather in respect of choice of services than amount of cost, so that, if services of reasonable quality and appropriate character have been provided, it may be difficult for a tenant to show that a landlord who has genuinely paid the actual cost of those service is claiming an 'unreasonable' amount. The statutory right of some tenants to challenge service charges (see PARA 341 et seq post) therefore gives them a wider protection.

2 *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA; *Concorde Graphics Ltd v Andromeda Investments SA* [1983] 1 EGLR 53, (1983) 265 Estates Gazette 386; cf *New Pinehurst Residents Association (Cambridge) v Silow* [1988] 1 EGLR 227, CA; *Skilleter v Charles* (1991) 24 HLR 421, [1992] 1 EGLR 73, CA.

3 *Re Davstone Estates Ltd's Leases, Manprop Ltd v O'Dell* [1969] 2 Ch 378, [1969] 2 All ER 849; *Rapid Results College Ltd v Angell* [1986] 1 EGLR 53, CA. It has been suggested that, even where the mere process of calculation is referred to a third person, who is to act otherwise than as arbitrator, the court is able to correct any obvious error made by him, eg if he added up figures wrongly (see *Dean v Prince* [1954] Ch 409, [1954] 1 All ER 749, CA), but this is now doubtful. See *Sutcliffe v Thackrah* [1974] AC 727, [1974] 1 All ER 859, HL; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405, [1979] 3 All ER 901, HL; *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Nikko Hotels (UK) Ltd v MEPC plc* [1991] 2 EGLR 103. See also *Universities Superannuation Scheme Ltd v Marks & Spencer plc* [1999] 1 EGLR 13, [1998] All ER (D) 604, CA (where the lease is silent on the point, a landlord may claim a shortfall in the service charge following a miscalculation of the amount owing in the tenant's favour).

As to the tenant's statutory right to challenge service charges see PARA 341 et seq post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(i) General Principles/322. Service charges and the Rent Act 1977 and Housing Act 1988.

### **322. Service charges and the Rent Act 1977 and Housing Act 1988.**

Whether a service charge<sup>1</sup> is contractually a rent or not, for the purposes of the Rent Act 1977 it is to be regarded as rent<sup>2</sup>. Special statutory provisions<sup>3</sup>, therefore, were needed to prevent escalations in service charges from bringing tenancies which would otherwise be tenancies at low rents into the protection of the 1977 Act, and thus inhibiting the charging of premiums, whenever the total of the ground rent plus the service charge exceeded the low rent formula of that Act.

In respect of long tenancies<sup>4</sup> only, for the purpose of determining whether the tenancy is protected by reason of the amount of the rent<sup>5</sup>, there must be disregarded such part, if any, of the sums payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates, council tax, services, repairs, maintenance or insurance, unless it could not have been regarded by the parties as a part so payable<sup>6</sup>. Similar provisions apply for the purpose of determining whether a tenancy is an assured tenancy under the Housing Act 1988<sup>7</sup>.

Where a tenancy, whether a long tenancy or not, is a protected tenancy under the Rent Act 1977<sup>8</sup> and an application is made to register a rent, then, if the terms as to the payment of the service charge are reasonable, a variable rent may be registered, thereby enabling the provisions of the tenancy as to the computation of service charges to be enforced despite the registration of a fair rent<sup>9</sup>.

1 As to service charges generally see PARA 319 ante.

2 See PARA 862 the text and notes 1-2 post.

3 I.e. the Rent Act 1977 ss 5(4), (5), 146 (as amended): see PARA 862 post.

4 For the meaning of 'long tenancy' see PARA 862 note 3 post.

5 I.e. whether it is a low rent or not for the purposes of the Rent Act 1977.

6 See *ibid* ss 5(4), (5), 146 (as amended). The formula 'unless it could not have been regarded by the parties as a part so payable' would appear to be intended to prevent tenancies at more than low rents from being kept out of the Rent Act 1977 by merely labelling part of the rent as referring to the relevant costs: see PARA 862 post.

7 See the Housing Act 1988 s 1(2), Sch 1 para 3C (as substituted); and PARA 1028 post. For the meaning of 'assured tenancy' see PARA 1018 post.

8 As to what is a protected tenancy see PARA 818 post.

9 See the Rent Act 1977 s 71(4); and PARA 922 post. See also *Firstcross Ltd v Teasdale* (1982) 8 HLR 112, 47 P & CR 228; *Betts v Vivamat Properties Ltd* [1984] 1 EGLR 95, (1983) 270 Estates Gazette 849; *Wigglesworth v Property Holding & Investment Trust Ltd* (1984) 270 Estates Gazette 555. As to the treatment of service charges where a rent for an assured tenancy is determined see PARA 1092 note 5 post.

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### **323. VAT and stamp duty land tax.**

With effect from 1 April 1994, all mandatory service charges or similar charges paid by the occupants of residential property towards the upkeep of the dwellings or block of flats in which they reside and towards the provision of a warden, caretakers, and people performing a similar function for those occupants are, by an extra-statutory concession, exempted from charge to VAT<sup>1</sup>. That concession does not, however, exempt service charges paid in respect of holiday accommodation<sup>2</sup>.

When a new lease is granted, any undertaking by the tenant to repair, maintain or insure the premises or to pay any amount for services, repairs, maintenance or insurance or the landlord's costs of management does not count as chargeable consideration for the purposes of stamp duty land tax<sup>3</sup>.

1 See HMRC Notice 48 (March 2002), extra-statutory concession 3.18.

2 See note 1 *supra*. For these purposes, 'holiday accommodation' means holiday accommodation as defined in the Value Added Tax Act 1994 Sch 9, Group 1 para 1(e), notes (11)-(13) (as amended): see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 note 18.

3 See the Finance Act 2003 s 120, Sch 17A para 10(1), (2) (as added); and PARA 124 *ante*. See also HMRC Stamp Duty Land Tax Manual para 11200.

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### **324. Restriction on liability for payment of service charge after assignment.**

The Landlord and Tenant (Covenants) Act 1995 restricts the liability of a former tenant who has assigned his tenancy but who:

495 (1) in the case of a tenancy which is a new tenancy<sup>1</sup>, has under an authorised guarantee agreement<sup>2</sup> guaranteed the performance by his assignee of a tenant covenant of the tenancy under which any fixed charge (which includes any service charge)<sup>3</sup> is payable; or

496 (2) in the case of any tenancy, remains bound by such a covenant<sup>4</sup>;

and also restricts the liability of his guarantor<sup>5</sup>. That Act also restricts the liability of a former tenant or his guarantor where the tenancy is subsequently varied<sup>6</sup>. These restrictions have already been discussed in the context of liability for the payment of rent after assignment or subsequent variation of a tenancy<sup>7</sup>.

1 For the meaning of 'new tenancy' for these purposes see PARA 578 *post*.

2 For the meaning of 'authorised guarantee agreement' see PARA 593 *post*.

3 See the Landlord and Tenant (Covenants) Act 1995 s 17(6)(b); and PARA 289 note 7 *ante*.

4 See *ibid* s 17(1), (2), (4), (5); and PARA 289 *ante*.

5 See *ibid* s 17(3)-(5); and PARA 289 *ante*.

6 See *ibid* s 18; and PARA 291 *ante*.

7 See PARAS 289-291 *ante*.

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### **(ii) The Statutory Regime relating to Dwellings**



## **A. INTRODUCTION**

### **325. Application of the relevant provisions of the Landlord and Tenant Act 1985.**

The Landlord and Tenant Act 1985 imposes statutory limitations on the amount of service charges<sup>1</sup> in certain circumstances<sup>2</sup> and confers on a tenant<sup>3</sup> statutory rights to certain financial information from the landlord<sup>4</sup>. The relevant provisions of that Act<sup>5</sup> do not, however, apply to a service charge payable by a tenant of:

- 497 (1) a local authority<sup>6</sup>;
- 498 (2) a National Park authority<sup>7</sup>; or
- 499 (3) a new town corporation<sup>8</sup>,

unless the tenancy is a long tenancy<sup>9</sup>. For these purposes, the following tenancies are long tenancies:

- 500 (a) a tenancy granted for a term certain exceeding 21 years, whether or not it is, or may become, terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture<sup>10</sup>;
- 501 (b) a tenancy for a term fixed by law under a grant with a covenant<sup>11</sup> or obligation for perpetual renewal<sup>12</sup>, other than a tenancy by sub-demise from one which is not a long tenancy;
- 502 (c) any tenancy granted in pursuance of the right to buy under Part V of the Housing Act 1985<sup>13</sup>, including any tenancy granted in pursuance of that right as it has effect by virtue of the right to acquire<sup>14</sup> conferred by the Housing Act 1996<sup>15</sup>.

A tenancy granted so as to become terminable by notice after a death is not a long tenancy for these purposes unless:

- 503 (i) it is granted by a housing association<sup>16</sup> which at the time of the grant is a registered social landlord<sup>17</sup>;
- 504 (ii) it is granted at a premium calculated by reference to a percentage of the value of the dwelling house or the cost of providing it; and
- 505 (iii) at the time it is granted it complies with the specified statutory requirements<sup>18</sup>.

Nor do those provisions<sup>19</sup> apply to a service charge payable by the tenant of a dwelling the rent of which is registered under Part IV of the Rent Act 1977<sup>20</sup>, unless the amount registered is entered<sup>21</sup> as a variable amount<sup>22</sup>. They do, however, apply in relation to Crown land<sup>23</sup> as in relation to other land; but no failure by the Crown to perform a duty imposed by or by virtue of any of those provisions makes the Crown criminally liable<sup>24</sup>.

The relevant provisions of the 1985 Act have been extensively amended by the Commonhold and Leasehold Reform Act 2002<sup>25</sup> and are also modified by that Act where the premises in question are managed by an RTM company<sup>26</sup>.

1 For the meaning of 'service charge' see PARA 326 post.

2 See the Landlord and Tenant Act 1985 ss 19-20C (as amended); and PARA 341 et seq post.

3 For these purposes, 'tenant', in relation to service charges, includes a statutory tenant and, where the dwelling or part of it is sublet, the subtenant: *ibid* s 30 (definition amended by the Landlord and Tenant Act

1987 s 41(1), Sch 2 para 11(b)). Where, however, the premises are managed by an RTM company (see PARA 367 et seq post), references to a tenant of a dwelling include a person who is landlord under a lease of the whole or any part of the premises, so that sums paid by him in pursuance of the Commonhold and Leasehold Reform Act 2002 s 103 (see PARA 395 post) are service charges: s 102(1), Sch 7 para 4(1), (3). For the meanings of 'tenant' generally, and of 'statutory tenant', for these purposes see PARA 52 note 1 ante; and for the meaning of 'dwelling' see PARA 52 note 2 ante. See also *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389, [2006] All ER (D) 290 (Oct).

4 See the Landlord and Tenant Act 1985 ss 21-25 (as amended); and PARA 329 et seq post. For these purposes, 'landlord' includes any person who has a right to enforce payment of a service charge: s 30. Where, however, the premises are managed by an RTM company, references to the landlord are to that company: Commonhold and Leasehold Reform Act 2002 Sch 7 para 4(1), (2).

5 In the Landlord and Tenant Act 1985 ss 18-25 (as amended): see PARA 329 et seq post.

6 For the meaning of 'local authority' see PARA 248 note 3 ante.

7 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

8 For the meaning of 'new town corporation' see PARA 248 note 3 ante.

9 Landlord and Tenant Act 1985 s 26(1) (amended by the Environment Act 1995 s 78, Sch 10 para 25(1); the Government of Wales Act 1998 ss 129, 152, Sch 15 para 12, Sch 18 Pt IV; prospectively amended (so as to change the description in the Landlord and Tenant Act 1985 s 26(1) of the contents of ss 18-25 (as amended)) by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 5, as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed). Where the tenancy is a long tenancy the Landlord and Tenant Act 1985 ss 18-24 (as amended) (see PARA 329 et seq post) apply but s 25 (as amended) (see PARA 336 post) does not: s 26(1). Section 26 (as amended) does not apply where the premises are managed by an RTM company: see the Commonhold and Leasehold Reform Act 2002 Sch 7 para 4(1), (5).

As to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under the Landlord and Tenant Act 1985 ss 26, 27 (as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; and as to the restrictions on service charges payable after the disposal of a house in relation to which the Housing Act 1985 ss 47-51 (as amended) apply see s 45 (as amended); and HOUSING vol 22 (2006 Reissue) PARAS 315-316.

10 As to re-entry and forfeiture see PARA 603 et seq post.

11 For the meaning of references to covenants see PARA 52 note 1 ante.

12 As to covenants for perpetual renewal see PARAS 540-541 post.

13 In pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.

14 In the right to acquire conferred by the Housing Act 1996 ss 16-17 (as amended): see PARAS 1804-1807 post.

15 Landlord and Tenant Act 1985 s 26(2) (amended by the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 2, Schedule para 4).

16 For these purposes, 'housing association' has the same meaning as in the Housing Associations Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 11): Landlord and Tenant Act 1985 s 38.

17 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1985 (see s 5(4), (5) (as substituted and amended); and HOUSING vol 22 (2006 Reissue) PARA 67): Landlord and Tenant Act 1985 s 38 (definition substituted by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 16(4)).

18 Landlord and Tenant Act 1985 s 26(3) (amended by the Housing Act 1988 s 140(1), Sch 17 para 68; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 16(3)). The specified statutory requirements are the requirements of the regulations then in force under the Housing Act 1980 s 140(4)(b) (repealed) or the Leasehold Reform Act 1967 s 33A, Sch 4A para 4(2)(b) (as added) (see PARA 1413 post) or, in the case of a tenancy granted before any such regulations were brought into force, with the first such regulations to be in force.

19 See note 5 supra.

20 In the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq post.

21 le in pursuance of *ibid* s 71(4): see PARA 922 post.

22 Landlord and Tenant Act 1985 s 27 (amended by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 8; prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 5 (so as to change the description in the Landlord and Tenant Act 1985 s 27 of the contents of ss 18-25 (as amended)), as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed.). See also note 9 *supra*.

23 For the meaning of 'Crown land' see PARA 24 note 8 *ante*.

24 See the Commonhold and Leasehold Reform Act 2002 s 172(1)(a), (3); and PARA 24 *ante*.

25 See notes 9, 22 *supra*; and PARA 326 *et seq post*.

26 See *ibid* Sch 7 para 4; notes 3-4, 9 *supra*; and PARA 332 post.

## UPDATE

### **325 Application of the relevant provisions of the Landlord and Tenant Act 1985**

NOTE 3--*Ruddy*, cited, reported at [2007] 1 All ER 337.

TEXT AND NOTES 9, 22--Landlord and Tenant Act 1985 ss 26(1), 27 further amended: Housing and Regeneration Act 2008 Sch 12 paras 7, 8 (partly in force: SI 2008/3068).

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### **326. Meanings of 'service charge' and 'relevant costs'.**

'Service charge' means<sup>1</sup> an amount payable by a tenant<sup>2</sup> of a dwelling<sup>3</sup> as part of, or in addition to, the rent:

- 506 (1) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's<sup>4</sup> costs<sup>5</sup> of management; and
- 507 (2) the whole or part of which varies or may vary according to the relevant costs<sup>6</sup>.

The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable<sup>7</sup>.

1 le for the purposes of the Landlord and Tenant Act 1985 ss 19-40 (as amended): see PARA 327 *et seq post*.

2 For the meaning of 'tenant' see PARA 325 note 3 *ante*.

3 For the meaning of 'dwelling' see PARA 52 note 2 *ante*.

4 For the meaning of 'landlord' see PARA 325 note 4 *ante*.

5 For these purposes, 'costs' includes overheads: Landlord and Tenant Act 1985 s 18(3)(a).

6 Ibid s 18(1) (amended by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002, s 150, Sch 9 para 7). For these purposes, costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period: Landlord and Tenant Act 1985 s 18(3)(b). This clearly includes estimated and as yet not incurred expenditure: see *Frobisher (Second Investments) Ltd v Kiloran Trust Co Ltd* [1980] 1 All ER 488, [1980] 1 WLR 425. A landlord must account to its tenants for discounts and commissions received by it in respect of insurance policies it takes out to comply with insurance obligations under a standard form lease, but not for sums which are not in law or fact a rebate or deduction from the premium payable for the insurance but which are payments for services rendered by it in the administration of handling claims: *Williams v Southwark London Borough Council* [2000] LGR 646, [2000] All ER (D) 377. Insurance charges were held not to be relevant costs for these purposes where the new landlord of a block of flats directed the management company to insure with a new insurer at higher cost: see *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* (1996) 75 P & CR 210, [1997] 1 EGLR 47, CA.

As to the tenancies to which the Landlord and Tenant Act 1985 s 18 (as amended) does not apply see PARA 325 ante; as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 18 (as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; and as to the restrictions on service charges payable after the disposal of a house in relation to which the Housing Act 1985 ss 47-51 (as amended) apply see s 45 (as amended); and HOUSING vol 22 (2006 Reissue) PARAS 315-316.

7 Landlord and Tenant Act 1985 s 18(2). A management company is a landlord in relation to the charges it seeks to recover for costs incurred in the provision of services to a tenant: *Cinnamon Ltd v Morgan* [2001] EWCA Civ 1616, [2002] 2 P & CR 139 (service charges which were capable of being enforced by a management company and which varied according to the costs actually incurred by that company were intended to be within the scope of the Landlord and Tenant Act 1985).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/A. INTRODUCTION/327. Meaning of 'recognised tenants' association'.

### **327. Meaning of 'recognised tenants' association'.**

A recognised tenants' association is an association of qualifying tenants<sup>1</sup>, whether with or without other tenants, which is recognised for the statutory provisions relating to service charges<sup>2</sup> either:

- 508 (1) by notice in writing given by the landlord<sup>3</sup> to the secretary of the association;  
or
- 509 (2) by a certificate of a member of the local rent assessment committee panel<sup>4</sup>.

A notice given under head (1) above may be withdrawn by the landlord by notice in writing given to the secretary of the association not less than six months before the date on which it is to be withdrawn<sup>5</sup>; and a certificate given under head (2) above may be cancelled by any member of the local rent assessment committee panel<sup>6</sup>.

The Secretary of State<sup>7</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>8</sup> may by regulations<sup>9</sup> specify:

- 510 (a) the procedure which is to be followed in connection with an application for, or for the cancellation of, a certificate under head (2) above;
- 511 (b) the matters to which regard is to be had in giving or cancelling such a certificate;
- 512 (c) the duration of such a certificate; and

513 (d) any circumstances in which a certificate is not to be given under head (2) above<sup>10</sup>.

1 For these purposes, a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge: Landlord and Tenant Act 1985 s 29(4) (amended by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 10(1), (3)). For the meaning of 'tenant' see PARA 325 note 3 ante; and for the meaning of 'service charge' see PARA 326 ante.

2 le for the purposes of the Landlord and Tenant Act 1985 ss 18-31 (as amended): see PARA 325 et seq ante, PARA 328 et seq post.

3 For the meaning of 'landlord' see PARA 325 note 4 ante.

4 Landlord and Tenant Act 1985 s 29(1) (amended by the Landlord and Tenant Act 1987 Sch 2 para 10(1), (2)). For these purposes, 'local rent assessment committee panel' means the persons appointed by the Lord Chancellor under the Rent Act 1977 to the panel of persons to act as members of a rent assessment committee for the registration area in which the dwellings let to the qualifying tenants are situated: Landlord and Tenant Act 1985 s 29(4) (as amended: see note 1 supra). For the meaning of 'dwelling' see PARA 52 note 2 ante.

As to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 29 (as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; and as to rent assessment committees see PARA 910 post.

5 Landlord and Tenant Act 1985 s 29(2).

6 Ibid s 29(3).

7 As to the Secretary of State see PARA 27 note 3 ante.

8 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

9 Such regulations (1) may make different provisions with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Landlord and Tenant Act 1985 s 29(6). At the date at which this title states the law, no such regulations had been made.

10 Ibid s 29(5) (substituted by the Landlord and Tenant Act 1987 Sch 2 para 10(1), (4)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/A. INTRODUCTION/328. Meaning of 'qualified accountant'.

### **328. Meaning of 'qualified accountant'.**

'Qualified accountant' means<sup>1</sup> a person who has<sup>2</sup> the necessary qualification and is not disqualified from acting<sup>3</sup>. A person has the necessary qualification if he eligible<sup>4</sup> for appointment as a company auditor under the Companies Act 1989<sup>5</sup>. The following are, however, disqualified from acting:

514 (1) an officer, employee or partner of the landlord<sup>6</sup> or, where the landlord is a company, of an associated company<sup>7</sup>;

515 (2) a person who is a partner or employee of any such officer or employee<sup>8</sup>;

516 (3) an agent of the landlord who is a managing agent for any premises to which any of the costs covered by the summary in question relate or, as from a day to be appointed<sup>9</sup>, to which the statement of account in question relates<sup>10</sup>;

517 (4) an employee or partner of any such agent<sup>11</sup>.

Where the landlord is an emanation of the Crown<sup>12</sup>, a local authority<sup>13</sup>, a National Park authority<sup>14</sup> or a new town corporation<sup>15</sup>, the persons having the necessary qualification include members of the Chartered Institute of Public Finance and Accountancy<sup>16</sup> and head (1) above does not apply<sup>17</sup>.

1    Ie in the Landlord and Tenant Act 1985 s 21(6) (as amended) or, as from a day to be appointed (see note 9 infra), in s 21(3)(a) (as prospectively substituted) (certification of statements of account): see PARA 329 post.

2    Ie in accordance with *ibid* s 28(2), (4)-(6) (as amended): see the text and notes 3-17 infra.

3    *Ibid* s 28(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 6(1), (2), as from a day to be appointed (see note 9 infra); at the date at which this title states the law, no such day had been appointed). As to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 28 (as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

4    Ie under the Companies Act 1989 s 25: see COMPANIES vol 14 (2009) PARA 969.

5    Landlord and Tenant Act 1985 s 28(2) (substituted by the Companies Act (Eligibility for Appointment as Company Auditor) (Consequential Amendments) Regulations 1991, SI 1991/1997, reg 2, Schedule para 60).

6    For the meaning of 'landlord' see PARA 325 note 4 ante.

7    Landlord and Tenant Act 1985 s 28(4)(b) (amended by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 9(1), (2)(a)). For these purposes, a company is an associated company with a landlord company if it is, within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25), the landlord's holding company, a subsidiary of the landlord or another subsidiary of the landlord's holding company: Landlord and Tenant Act 1985 s 28(5).

8    *Ibid* s 28(4)(c).

9    Ie under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

10   Landlord and Tenant Act 1985 s 28(4)(d) (added by the Landlord and Tenant Act 1987 Sch 2 para 9(1), (2)(b); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 6(1), (3), as from a day to be appointed (see note 9 supra)). For these purposes, a person is a managing agent for any premises to which any costs relate (or, as from such a day, to which a statement of account relates) if he has been appointed to discharge any of the landlord's obligations relating to the management by him of the premises and owed to the tenants who may be required under the terms of their leases to contribute to those costs (or, as from such a day, to costs covered by the statement of account) by the payment of service charges: Landlord and Tenant Act 1985 s 28(5A) (added by the Landlord and Tenant Act 1987 Sch 2 para 9; prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 10 para 6(1), (4), as from a day to be so appointed). For the meaning of 'tenant' see PARA 325 note 3 ante; and for the meaning of 'service charge' see PARA 326 ante.

11   Landlord and Tenant Act 1985 s 28(4)(e) (added by the Landlord and Tenant Act 1987 Sch 2 para 9(1), (2)(b)).

12   Until a day to be appointed (see note 9 supra), this reference to an emanation of the Crown is omitted.

13   For the meaning of 'local authority' see PARA 248 note 3 ante.

14   As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

15   For the meaning of 'new town corporation' see PARA 248 note 3 ante.

16   The Chartered Institute of Public Finance and Accountancy ('CIPFA') is the only professional accountancy body in the United Kingdom which specialises in the public sector. It is responsible for the education and training of professional accountants and for their regulation through the setting and monitoring of professional standards. CIPFA maintains an internet site on the World Wide Web, accessible at the date at which this title states the law at [www.cipfa.org.uk](http://www.cipfa.org.uk).

17 Landlord and Tenant Act 1985 s 28(6) (amended by the Environment Act 1995 s 78, Sch 10 para 25(2); the Government of Wales Act 1998 s 129, Sch 15 para 13; prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 10 para 6(1), (5), as from a day to be appointed (see note 9 supra)).

## UPDATE

### 328 Meaning of 'qualified accountant'

TEXT AND NOTES--Repealed: Housing and Regeneration Act 2008 Sch 12 para 9, Sch 16 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/329. Landlord's duty to supply certain relevant information.

## **B. RIGHT TO INFORMATION**

### **329. Landlord's duty to supply certain relevant information.**

As from a day which, except for the purposes of making relevant regulations, is to be appointed<sup>1</sup>, the landlord<sup>2</sup> must supply to each tenant<sup>3</sup> by whom service charges<sup>4</sup> are payable, in relation to each accounting period<sup>5</sup>, a written statement of account dealing with:

- 518 (1) service charges of the tenant and the tenants of dwellings<sup>6</sup> associated with his dwelling<sup>7</sup>;
- 519 (2) relevant costs relating to those service charges;
- 520 (3) the aggregate amount standing to the credit of the tenant and the tenants of those dwellings at the beginning of the accounting period and at the end of the accounting period; and
- 521 (4) related matters<sup>8</sup>.

The statement of account in relation to an accounting period must be supplied to each such tenant not later than six months after the end of the accounting period<sup>9</sup>. Where the landlord supplies a statement of account to a tenant he must also supply to him:

- 522 (a) a certificate of a qualified accountant<sup>10</sup> that, in the accountant's opinion, the statement of account deals fairly with the matters with which it is required to deal and is sufficiently supported by accounts, receipts and other documents which have been produced to him; and
- 523 (b) a summary of the rights and obligations of tenants of dwellings in relation to service charges<sup>11</sup>.

The Secretary of State<sup>12</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>13</sup> may make regulations prescribing:

- 524 (i) requirements as to the form and content of statements of account, accountants' certificates, and summaries of rights and obligations so required to be supplied<sup>14</sup>;
- 525 (ii) exceptions from the requirement to supply an accountant's certificate<sup>15</sup>.

If the landlord has been notified by a tenant<sup>16</sup> of an address in England and Wales at which he wishes to have supplied to him documents required to be so supplied, the landlord must supply them to him at that address<sup>17</sup>.

Until the above provisions are brought into force, however, the following provisions have effect. A tenant may require the landlord in writing to supply him with a written summary of the costs incurred:

- 526 (A) if the relevant accounts are made up for periods of 12 months, in the last such period ending not later than the date of the request; or
- 527 (B) if the accounts are not so made up, in the period of 12 months ending with the date of the request,

and which are relevant costs in relation to the service charges payable or demanded as payable in that or any other period<sup>18</sup>. If the tenant is represented by a recognised tenants' association<sup>19</sup> and he consents, the request may be made by the secretary of the association instead of by the tenant and may then be for the supply of the summary to the secretary<sup>20</sup>. A request is duly served on the landlord if it is served on an agent of the landlord named as such in the rent book or similar document, or on the person who receives the rent on behalf of the landlord; and a person on whom a request is so served must forward it as soon as may be to the landlord<sup>21</sup>. The landlord must comply with the request within one month of the request or within six months of the end of the period referred to in head (A) or head (B) above, whichever is the later<sup>22</sup>. The summary must state whether any of the costs relate to works in respect of which a grant has been or is to be paid under the specified statutory provisions<sup>23</sup> and must set out the costs in a way showing how they have been or will be reflected in demands for service charges and, in addition, must summarise each of the specified items<sup>24</sup> and specify the aggregate of any amounts received by the landlord down to the end of that period on account of service charges in respect of relevant dwellings<sup>25</sup> and still standing to the credit of the tenants of those dwellings at the end of that period<sup>26</sup>. The summary must also state whether any of the costs relate to works which are included in the external works specified in a group repair scheme<sup>27</sup> in which the landlord participated or is participating<sup>28</sup>. If the service charges in relation to which the costs are relevant costs<sup>29</sup> are payable by the tenants of more than four dwellings, the summary must be certified by a qualified accountant as in his opinion a fair summary complying with the statutory requirements and as being sufficiently supported by accounts, receipts and other documents which have been produced to him<sup>30</sup>.

1    le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, 26 July 2002 had been appointed in relation to England, and 1 January 2003 had been appointed in relation to Wales, only for the purposes of making relevant regulations (see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(c); the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(c)); and no other day had been appointed for these purposes.

2    For the meaning of 'landlord' see PARA 325 note 4 ante.

3    For the meaning of 'tenant' see PARA 325 note 3 ante.

4    For the meaning of 'service charge' see PARA 326 ante.

5    For these purposes, 'accounting period' means such period (1) beginning with the relevant date; and (2) ending with such date, not later than 12 months after the relevant date, as the landlord determines; and in the case of the first accounting period in relation to any dwellings, the relevant date is the later of (a) the date on which service charges are first payable under a lease of any of them; and (b) the date on which the Commonhold and Leasehold Reform Act 2002 s 152 comes into force (see note 1 supra); and, in the case of subsequent accounting periods, it is the date immediately following the end of the previous accounting period:



Landlord and Tenant Act 1985 s 21(9), (10) (s 21 prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 152, partly as from a day to be appointed (see note 1 supra)).

6 For the meaning of 'dwelling' see PARA 52 note 2 ante.

7 For these purposes, a dwelling is associated with another dwelling if the obligations of the tenants of the dwellings under the terms of their leases as regards contributing to relevant costs relate to the same costs: Landlord and Tenant Act 1985 s 21(8) (as substituted: see note 5 supra). For the meaning of 'relevant costs' see PARA 326 ante.

8 Landlord and Tenant Act 1985 s 21(1) (as substituted: see note 5 supra). As to the tenancies to which s 21 (as so substituted) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 21 (as so substituted) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

9 Landlord and Tenant Act 1985 s 21(2) (as substituted: see note 5 supra).

10 For the meaning of 'qualified accountant' see PARA 328 ante.

11 Landlord and Tenant Act 1985 s 21(3) (as substituted: see note 5 supra).

12 As to the Secretary of State see PARA 27 note 3 ante.

13 As to the transfer of functions, so far as exercisable in relation to Wales, to the Assembly see PARA 27 note 4 ante.

14 Landlord and Tenant Act 1985 s 21(4) (as substituted: see note 5 supra). Regulations under s 21 (as so substituted) must be made by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament (see s 21(12) (as so substituted)); and regulations under s 21(4) (as so substituted) (see head (i) in the text) may make different provision for different purposes (s 21(11) (as so substituted)). At the date at which this title states the law, no such regulations had been made.

15 Ibid s 21(5) (as substituted: see note 5 supra). See also note 14 supra.

16 The landlord is to be taken to have been so notified if notification has been given to (1) an agent of the landlord named as such in the rent book or similar document; or (2) the person who receives the rent on behalf of the landlord; and where notification is given to such an agent or person he must forward it as soon as may be to the landlord: *ibid* s 21(7) (as substituted: see note 5 supra).

17 Ibid s 21(6) (as substituted: see note 5 supra).

18 See *ibid* s 21(1) (as originally enacted). Section 21 (as originally enacted and amended) and s 22 (as originally enacted and amended: see PARA 332 post) are not concerned with the adequacy of the landlord's accounts; if the landlord satisfies the requirement to produce all the documents, the fact that they are inadequate does not amount to an offence: *Taber v MacDonald and Clockscreen Holdings Ltd* (1998) 31 HLR 73, DC; and see PARA 336 post. As to the tenancies to which the Landlord and Tenant Act 1985 s 21 (as originally enacted and amended) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 21 (as originally enacted and amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

19 For the meaning of 'recognised tenants' association' see PARA 327 ante.

20 Landlord and Tenant Act 1985 s 21(2) (as originally enacted; amended by the Landlord and Tenant Act 1987 Sch 2 para 5(1), (2)).

21 Landlord and Tenant Act 1985 s 21(3) (as originally enacted).

22 Ibid s 21(4) (as originally enacted).

23 *Ie* under the Housing Act 1985 s 523 (as amended) (assistance for provision of separate service pipe for water supply: see WATER AND WATERWAYS vol 100 (2009) PARA 399) or any provision of the Housing Grants, Construction and Regeneration Act 1996 Pt I (ss 1-59) (as amended) (grants, etc for renewal of private sector housing: see HOUSING vol 22 (2006 Reissue) PARA 622 et seq) or any corresponding earlier enactment.

24 *Ie*: (1) any of the costs in respect of which no demand for payment was received by the landlord within the period referred to in the Landlord and Tenant Act 1985 s 21(1)(a) or (b) (as originally enacted); (2) any of the costs in respect of which a demand for payment was so received, but no payment was made by the landlord

within that period; and (3) any of the costs in respect of which a demand for payment was so received and payment was made by the landlord within that period: see s 21(5)(a)-(c) (as originally enacted).

25 For these purposes, 'relevant dwelling' means a dwelling whose tenant is either (1) the person by or with the consent of whom the request was made; or (2) a person whose obligations under the terms of his lease as regards contribution to relevant costs relate to the same costs as the corresponding obligations of the person mentioned in head (1) *supra* relate to: Landlord and Tenant Act 1985 s 21(5A) (as substituted by the Landlord and Tenant Act 1987 Sch 2 para 5(1), (3)). For the meaning of 'lease' see PARA 52 note 1 *ante*.

26 Landlord and Tenant Act 1985 s 21(5) (as originally enacted; amended by the Housing and Planning Act 1986 s 24(1)(i), Sch 5 Pt I para 9(2); the Landlord and Tenant Act 1987 Sch 2 para 5(1), (3); the Housing Grants, Construction and Regeneration Act 1996 s 103, Sch 1 para 12(a)). A certificate should, however, be granted only to an association which represents a single service charge regime: *R v London Assessment Panel, ex p Trustees of Henry Smith's Charity Estate* (1987) 20 HLR 103, [1988] 1 EGLR 34 (certificate granted to association representing tenants of five blocks of flats each with different service charge provisions held invalid).

27 *Ie* a group repair scheme within the meaning of the Housing Grants, Construction and Regeneration Act 1996 Pt I Ch II (repealed).

28 Landlord and Tenant Act 1985 s 21(5B) (as added by the Local Government and Housing Act 1989 Sch 11 para 91(2); amended by the Housing Grants, Construction and Regeneration Act 1996 Sch 1 para 12(b)).

29 *Ie* as mentioned in the Landlord and Tenant Act 1985 s 21(1) (as originally enacted).

30 *Ibid* s 21(6) (as originally enacted; amended by the Landlord and Tenant Act 1987 Sch 2 para 5(1), (4)).

## UPDATE

### 329 Landlord's duty to supply certain relevant information

TEXT AND NOTES--Landlord and Tenant Act 1985 s 21 substituted by Commonhold and Leasehold Reform Act 2002 s 152; and further substituted by Housing and Regeneration Act 2008 Sch 12 para 2 (in force for regulation-making purposes: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/330. Withholding of service charges if documents not supplied.

### 330. Withholding of service charges if documents not supplied.

As from a day to be appointed<sup>1</sup>, the following provisions have effect. A tenant<sup>2</sup> may withhold payment of a service charge<sup>3</sup> if:

528 (1) the landlord<sup>4</sup> has not supplied a document to him by the time by which he is required<sup>5</sup> to supply it; or

529 (2) the form or content of a document which the landlord has supplied to him<sup>6</sup> at any time does not conform exactly or substantially with the prescribed<sup>7</sup> requirements<sup>8</sup>.

The maximum amount which the tenant may withhold is an amount equal to the aggregate of:

- 530 (a) the service charges paid by him in the accounting period to which the document concerned would or does relate; and  
 531 (b) so much of the aggregate amount required to be dealt with in the statement of account for that accounting period<sup>9</sup> as stood to his credit<sup>10</sup>.

Where a tenant so withholds a service charge, any provisions of the tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it<sup>11</sup>.

An amount may not, however, be so withheld:

- 532 (i) in a case within head (1) above, after the document concerned has been supplied to the tenant by the landlord; or  
 533 (ii) in a case within head (2) above, after a document conforming exactly or substantially with the prescribed requirements<sup>12</sup> has been supplied to the tenant by the landlord by way of replacement of the one previously supplied<sup>13</sup>.

If, on an application made by the landlord to a leasehold valuation tribunal<sup>14</sup>, the tribunal determines that the landlord has a reasonable excuse for a failure giving rise to the right of a tenant to withhold an amount under these provisions, the tenant may not withhold the amount after the determination is made<sup>15</sup>.

1 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2 For the meaning of 'tenant' see PARA 325 note 3 ante.

3 For the meaning of 'service charge' see PARA 326 ante.

4 For the meaning of 'landlord' see PARA 325 note 4 ante.

5 le required under the Landlord and Tenant Act 1985 s 21 (as substituted): see PARA 329 ante.

6 le under ibid s 21 (as substituted): see PARA 329 ante.

7 le prescribed by regulations under ibid s 21(4) (as substituted): see PARA 329 ante.

8 Ibid s 21A(1) (s 21A prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 152, as from a day to be appointed (see note 1 supra)).

9 le required by the Landlord and Tenant Act 1985 s 21(1)(c)(i) (as substituted): see PARA 329 ante.

10 Ibid s 21A(2) (as substituted: see note 8 supra).

11 Ibid s 21A(5) (as substituted: see note 8 supra).

12 See note 7 supra.

13 Landlord and Tenant Act 1985 s 21A(3) (as substituted: see note 8 supra).

14 As to leasehold valuation tribunals see PARA 58 et seq ante.

15 Landlord and Tenant Act 1985 s 21A(4) (as substituted: see note 8 supra).

## UPDATE

### 330 Withholding of service charges if documents not supplied

TEXT AND NOTES 8, 10, 13--Landlord and Tenant Act 1985 s 21A(1) substituted, s 21A(2), (3) amended: Housing and Regeneration Act 2008 Sch 12 para 3 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/331. Notice to accompany demands for service charges.

### **331. Notice to accompany demands for service charges.**

As from a day which, except for the purposes of making relevant regulations, is to be appointed<sup>1</sup>, the following provisions have effect. A demand for the payment of a service charge<sup>2</sup> must be accompanied by a summary of the rights and obligations of tenants<sup>3</sup> of dwellings<sup>4</sup> in relation to service charges<sup>5</sup>; and a tenant may withhold payment of a service charge which has been demanded from him if this requirement is not complied with in relation to the demand<sup>6</sup>.

The Secretary of State<sup>7</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>8</sup> may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations<sup>9</sup>.

Where a tenant withholds a service charge under these provisions, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it<sup>10</sup>.

1     le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, 26 July 2002 had been appointed in relation to England, and 1 January 2003 had been appointed in relation to Wales, only for the purposes of making relevant regulations (see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(c); the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(c)); and no other day had been appointed for these purposes.

2     For the meaning of 'service charge' see PARA 326 ante.

3     For the meaning of 'tenant' see PARA 325 note 3 ante.

4     For the meaning of 'dwelling' see PARA 52 note 2 ante.

5     Landlord and Tenant Act 1985 s 21B(1) (s 21B added by the Commonhold and Leasehold Reform Act 2002 s 153, partly as from a day to be appointed (see note 1 supra)).

6     Landlord and Tenant Act 1985 s 21B(3) (as added: see note 5 supra).

7     As to the Secretary of State see PARA 27 note 3 ante.

8     As to the transfer of functions, so far as exercisable in relation to Wales, to the Assembly see PARA 27 note 4 ante.

9     Landlord and Tenant Act 1985 s 21B(2) (as added: see note 5 supra). Such regulations (1) may make different provision for different purposes; and (2) must be made by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 21B(5), (6) (as so added). At the date at which this title states the law, no such regulations had been made.

10    Ibid s 21B(4) (as added: see note 5 supra).

### **UPDATE**

### 331 Notice to accompany demands for service charges

TEXT AND NOTE 1--Day now appointed: SI 2007/1256 (England), SI 2007/3161 (Wales).

NOTE 9--See the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007, SI 2007/1257 (amended by SI 2009/1307); and the Service Charges (Summary of Rights and Obligations, and Transitional Provisions) (Wales) Regulations 2007, SI 2007/3160.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/332. Inspection etc of documents.

### 332. Inspection etc of documents.

As from a day to be appointed<sup>1</sup>, the following provisions have effect. A tenant<sup>2</sup> may by notice in writing require the landlord<sup>3</sup>:

- 534 (1) to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the matters which must be dealt with in a statement of account required to be supplied to him<sup>4</sup> and for taking copies of or extracts from them; or
- 535 (2) to take copies of or extracts from any such accounts, receipts or other documents and either send them to him or afford him reasonable facilities for collecting them, as he specifies<sup>5</sup>.

If the tenant is represented by a recognised tenants' association<sup>6</sup> and he consents, the notice may be served by the secretary of the association instead of by the tenant, and in that case any requirement imposed by it is to afford reasonable facilities, or to send copies or extracts, to the secretary<sup>7</sup>.

Such a notice may not be served after the end of the period of six months beginning with the date by which the tenant is required to be supplied<sup>8</sup> with the statement of account<sup>9</sup>; but if:

- 536 (a) the statement of account is not supplied to the tenant on or before that date; or
- 537 (b) the statement of account so supplied does not conform exactly or substantially with the prescribed requirements<sup>10</sup>,

the six month period mentioned above does not begin until any later date on which the statement of account, conforming exactly or substantially with those requirements, is supplied to him<sup>11</sup>. Such a notice is duly served on the landlord if it is served on an agent of the landlord named as such in the rent book or similar document, or on the person who receives the rent on behalf of the landlord; and a person on whom such a notice is so served must forward it as soon as may be to the landlord<sup>12</sup>.

The landlord must comply with a requirement imposed by such a notice within the period of 21 days beginning with the day on which he receives the notice<sup>13</sup>. To the extent that such a notice requires the landlord to afford facilities for inspecting documents, he must do so free of charge,

but he may treat as part of his costs of management any costs incurred by him in doing so<sup>14</sup>. The landlord may make a reasonable charge for doing anything else in compliance with a requirement imposed by such a notice<sup>15</sup>.

Until the above provisions are brought into force, however, the provisions set out below apply where a tenant, or the secretary of a recognised tenants' association, has obtained<sup>16</sup> a summary<sup>17</sup> of relevant costs<sup>18</sup>. The tenant, or the secretary with the consent of the tenant, may within six months of obtaining the summary require the landlord in writing to afford him reasonable facilities:

- 538 (i) for inspecting the accounts, receipts and other documents supporting the summary; and
- 539 (ii) for taking copies or extracts from them<sup>19</sup>.

Such a request is duly served on the landlord if it is served on an agent of the landlord named as such in the rent book or similar document, or on the person who receives the rent on behalf of the landlord; and a person on whom a request is so served must forward it as soon as may be to the landlord<sup>20</sup>. The landlord must make such facilities available to the tenant or secretary for a period of two months beginning not later than one month after the request is made<sup>21</sup>. The landlord:

- 540 (A) where such facilities are for the inspection of any documents, must make them so available free of charge<sup>22</sup>, but this does not preclude him from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available<sup>23</sup>;
- 541 (B) where such facilities are for the taking of copies or extracts, is entitled to make them so available on payment of such reasonable charge as he may determine<sup>24</sup>.

1    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2    For the meaning of 'tenant' see PARA 325 note 3 ante.

3    For the meaning of 'landlord' see PARA 325 note 4 ante.

4    Ie under the Landlord and Tenant Act 1985 s 21 (as substituted): see PARA 329 ante.

5    Ibid s 22(1) (s 22 prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 154, as from a day to be appointed (see note 1 supra)). As to the tenancies to which s 22 (as so substituted) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 22 (as so substituted) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post. As to information held by a superior landlord see PARA 333 post.

6    For the meaning of 'recognised tenants' association' see PARA 327 ante.

7    Landlord and Tenant Act 1985 s 22(2) (as substituted: see note 5 supra).

8    See note 4 supra.

9    Landlord and Tenant Act 1985 s 22(3) (as substituted: see note 5 supra).

10   Ie the requirements prescribed by regulations under ibid s 21(4) (as substituted): see PARA 329 ante.

11   Ibid s 22(4) (as substituted: see note 5 supra).

12   Ibid s 22(5) (as substituted: see note 5 supra). Where the premises are managed by an RTM company (see PARA 367 et seq post), s 22(5) (as so substituted) applies as if the reference to service on an agent of the landlord were omitted and the person who receives rent referred to in the text were a person who receives

service charges on behalf of the RTM company: see the Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 4(1), (4).

13 Landlord and Tenant Act 1985 s 22(6) (as substituted: see note 5 supra).

14 Ibid s 22(7) (as substituted: see note 5 supra).

15 Ibid s 22(8) (as substituted: see note 5 supra).

16 Ie whether in pursuance of ibid s 21 ((as originally enacted and as amended) or otherwise.

17 Ie such a summary as is referred to in ibid s 21(1) (as originally enacted): see PARA 329 ante.

18 Ibid s 22(1) (as originally enacted). For the meaning of 'relevant costs' see PARA 326 ante. As to the tenancies to which s 22 (as originally enacted and as amended) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 22 (as originally enacted and as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

19 Landlord and Tenant Act 1985 s 22(2) (as originally enacted). The obligation under s 22 (as originally enacted and amended) is to make available to the requesting tenant all those accounts, receipts and other documents supporting the summary which have been seen by the qualified accountant for the purpose of supporting the summary: *Taber v MacDonald and Clockscreen Holdings Ltd* (1998) 31 HLR 73, DC (underlying books and accounting records not made available; these must be produced even if they relate to more than one property). See also PARA 329 note 18 ante. As to requests relating to information held by a superior landlord see PARA 333 post.

20 Ibid s 22(3) (as originally enacted).

21 Ibid s 22(4) (as originally enacted).

22 Ibid s 22(5)(a) (s 22(5), (6) as added by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 6).

23 Landlord and Tenant Act 1985 s 22(6) (as added: see note 22 supra).

24 Ibid s 22(5)(b) (as added: see note 22 supra).

## UPDATE

### 332 Inspection etc of documents

TEXT AND NOTES 1-15--Landlord and Tenant Act 1985 s 22 (as substituted by the Commonhold and Leasehold Reform Act 2002 s 154) amended: Housing and Regeneration Act 2008 Sch 12 para 4 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/333. Information held by superior landlord.

### 333. Information held by superior landlord.

As from a day to be appointed<sup>1</sup>, the following provisions have effect. If a statement of account which the landlord<sup>2</sup> is required to supply<sup>3</sup> relates to matters concerning a superior landlord and the landlord is not in possession of the relevant information:

- 542 (1) he may by notice in writing require the person who is his landlord to give him the relevant information, and so on, if that person is not himself the superior landlord; and
- 543 (2) the superior landlord must comply with the requirement within a reasonable time<sup>4</sup>.

If a notice requiring facilities to be made available for the inspection etc of documents<sup>5</sup> imposes a requirement in relation to documents held by a superior landlord:

- 544 (a) the landlord must immediately inform the tenant<sup>6</sup> or secretary<sup>7</sup> of that fact and of the name and address of the superior landlord; and
- 545 (b) the relevant statutory provisions<sup>8</sup> then apply in relation to the superior landlord as in relation to the landlord<sup>9</sup>.

Until the above provisions are brought into force, however, the provisions set out below apply. If a request for a summary of relevant costs<sup>10</sup> relates in whole or in part to relevant costs incurred by or on behalf of a superior landlord, and the landlord to whom the request is made is not in possession of the relevant information:

- 546 (i) he must in turn make a written request for the relevant information to the person who is his landlord, and so on, if that person is not himself the superior landlord;
- 547 (ii) the superior landlord must comply with that request within a reasonable time; and
- 548 (iii) the immediate landlord must then comply with the tenant's or secretary's<sup>11</sup> request, or that part of it which relates to the relevant costs incurred by or on behalf of the superior landlord, within the time allowed<sup>12</sup> or such further time, if any, as is reasonable in the circumstances<sup>13</sup>.

If a request for facilities to inspect supporting accounts etc<sup>14</sup> relates to a summary of costs incurred by or on behalf of a superior landlord:

- 549 (A) the landlord to whom the request is made must forthwith inform the tenant or secretary of that fact and of the name and address of the superior landlord; and
- 550 (B) the tenant's or secretary's statutory power of inspection<sup>15</sup> applies to the superior landlord as it applies to the immediate landlord<sup>16</sup>.

1 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2 For the meaning of 'landlord' see PARA 325 note 4 ante.

3 le under the Landlord and Tenant Act 1985 s 21 (as substituted): see PARA 329 ante.

4 Ibid s 23(1) (s 23 prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 1, as from a day to be appointed (see note 1 supra)). As to the tenancies to which the Landlord and Tenant Act 1985 s 23 (as so substituted) does not apply see PARA 325 ante; as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 23 (as so substituted) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; as to the effect of a change of landlord or of assignment see PARAS 334-335 post; and as to offences see PARA 336 post.

5 le a notice under the Landlord and Tenant Act 1985 s 22 (as substituted): see PARA 332 ante.

6 For the meaning of 'tenant' see PARA 325 note 3 ante.



7     le the secretary of the recognised tenants' association: see PARA 332 ante. For the meaning of 'recognised tenants' association' see PARA 327 ante.

8     le the Landlord and Tenant Act 1985 s 22 (as substituted): see PARA 332 ante.

9     Ibid s 23(2) (as substituted: see note 4 supra).

10    le a request under the Landlord and Tenant Act 1985 s 21 (as originally enacted and as amended): see PARA 329 ante. For the meaning of 'relevant costs' see PARA 326 ante.

11    See note 7 supra.

12    le the time allowed by the Landlord and Tenant Act 1985 s 21 (as originally enacted and as amended): see PARA 329 ante.

13    Ibid s 23(1) (as originally enacted). As to the tenancies to which the Landlord and Tenant Act 1985 s 23 (as originally enacted) does not apply see PARA 325 ante; as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 23 (as originally enacted) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; as to the effect of assignment see PARA 335 post; and as to offences see PARA 336 post.

14    le a request under the Landlord and Tenant Act 1985 s 22 (as originally enacted and as amended): see PARA 332 ante.

15    le ibid s 22 (as originally enacted and as amended).

16    Ibid s 23(2) (as originally enacted).

## **UPDATE**

### **333 Information held by superior landlord**

TEXT AND NOTE 4--Landlord and Tenant Act 1985 s 23(1) (as substituted by the Commonhold and Leasehold Reform Act 2002 Sch 10 para 1) amended: Housing and Regeneration Act 2008 Sch 12 para 5 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/334. Effect of change of landlord.

### **334. Effect of change of landlord.**

As from a day to be appointed<sup>1</sup>, the following provisions apply where, at a time when a duty imposed on the landlord<sup>2</sup> or a superior landlord by or by virtue of any of the statutory provisions relating to information about service charges<sup>3</sup> remains to be discharged by him, he disposes of the whole or part of his interest as landlord or superior landlord to another person<sup>4</sup>.

If the landlord or superior landlord is, despite the disposal, still in a position to discharge the duty to any extent, he remains responsible for discharging it to that extent<sup>5</sup>.

If the other person is in a position to discharge the duty to any extent, he is responsible for discharging it to that extent<sup>6</sup>; and where the other person is responsible for discharging the duty to any extent, whether or not the landlord or superior landlord is also responsible for discharging it to that or any other extent:

551 (1) references<sup>7</sup> to the landlord or superior landlord are to, or include, the other person so far as is appropriate to reflect his responsibility for discharging the duty to that extent; but

552 (2) in connection with its discharge by the other person, the duty to comply within 21 days with a notice requiring him to afford facilities for inspection etc of documents<sup>8</sup> applies as if the reference to the day on which the landlord receives the notice were to the date of the disposal<sup>9</sup> referred to above<sup>10</sup>.

1 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2 For the meaning of 'landlord' see PARA 325 note 4 ante.

3 le by or by virtue of any of the Landlord and Tenant Act 1985 ss 21-21A (as substituted), s 21B (as added) or s 23 (as substituted): see PARA 329 et seq ante.

4 Ibid s 23A(1) (s 23A prospectively added by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 2, as from a day to be appointed (see note 1 supra)). As to the tenancies to which the Landlord and Tenant Act 1985 s 23A (as so added) does not apply see PARA 325 ante; as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 23A (as so added) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post; as to the effect of assignment see PARA 335 post; and as to offences see PARA 336 post.

5 Landlord and Tenant Act 1985 s 23A(2) (as added: see note 4 supra).

6 Ibid s 23A(3) (as added: see note 4 supra).

7 le in ibid ss 21-21A (as substituted), s 21B (as added) or s 23 (as substituted): see PARA 329 et seq ante.

8 le ibid s 22(6) (as substituted): see PARA 332 ante.

9 le the date of the disposal referred to in ibid s 23A(1) (as added): see the text and notes 1-4 supra.

10 Ibid s 23A(4) (as added: see note 4 supra).

## UPDATE

### 334 Effect of change of landlord

TEXT AND NOTE 10--Landlord and Tenant Act 1985 s 23A(4) amended: Housing and Regeneration Act 2008 Sch 12 para 6 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/335. Effect of assignment.

### 335. Effect of assignment.

As from a day to be appointed<sup>1</sup>, the assignment of a tenancy<sup>2</sup> does not affect any duty imposed by or by virtue of any of the statutory provisions relating to information about service charges<sup>3</sup>; but a person is not required to comply with more than a reasonable number of requirements imposed by any one person<sup>4</sup>.

Similarly, at the date at which this title states the law, the assignment of a tenancy does not affect the validity of a request made under the relevant statutory provisions<sup>5</sup> before the

assignment; but a person is not obliged to provide a summary or make facilities available more than once for the same dwelling<sup>6</sup> and for the same period<sup>7</sup>.

1     le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2     For the meaning of 'tenancy' see PARA 52 note 1 ante.

3     le any of the Landlord and Tenant Act 1985 ss 21-21A (as substituted), s 21B (as added), s 23 (as substituted) or s 23A (as added): see PARA 329 et seq ante.

4     Ibid s 24 (prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 3, as from a day to be appointed (see note 1 supra)).

5     le made under the Landlord and Tenant Act 1985 s 21, s 22 or s 23 (as originally enacted and as amended): see PARAS 329, 332-333 ante.

6     For the meaning of 'dwelling' see PARA 52 note 2 ante.

7     Landlord and Tenant Act 1985 s 24 (as originally enacted; amended by the Landlord and Tenant Act 1987 s 41, Sch 2 para 7).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/B. RIGHT TO INFORMATION/336. Offences.

### 336. Offences.

It is a summary offence for a person to fail without reasonable excuse to perform a duty imposed on him by the provisions<sup>1</sup> set out in the preceding paragraphs<sup>2</sup>; and a person committing such an offence is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>3</sup>.

1     le (1) as from a day to be appointed (see note 2 infra), imposed by or by virtue of any of the Landlord and Tenant Act 1985 ss 21-21A (as substituted), s 21B (as added), s 23 (as substituted) or s 23A (as added) (see PARA 329 et seq ante); (2) at the date at which this title states the law, imposed by s 21, s 22 or s 23 (as originally enacted and as amended) (see PARAS 329, 332-333 ante).

2     Ibid s 25(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 4, as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed); and see note 1 supra. As to offences by bodies corporate see the Landlord and Tenant Act 1985 s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

As to what may constitute a reasonable excuse for the landlord not to produce certain documents in accordance with s 22 (as originally enacted: see PARA 332 ante) see *Taber v MacDonald and Clockscreen Holdings Ltd* (1998) 31 HLR 73, DC (since the lease provided an arbitration mechanism to provide for a challenge to the composite charge in dispute, which the tenant had not activated, the landlord was not guilty of a wilful and inexcusable failure to produce the documents).

3     Landlord and Tenant Act 1985 s 25(2). As to the standard scale see PARA 52 note 6 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE)

PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/C. RIGHT TO APPOINT SURVEYOR TO ADVISE/337. Right to appoint surveyor to advise on matters relating to service charges.

### ***C. RIGHT TO APPOINT SURVEYOR TO ADVISE***

#### **337. Right to appoint surveyor to advise on matters relating to service charges.**

A recognised tenants' association<sup>1</sup> may appoint a surveyor for the purposes of these provisions to advise on any matters relating to, or which may give rise to, service charges<sup>2</sup> payable to a landlord<sup>3</sup> by one or more members of the association<sup>4</sup>. A person may not be so appointed unless he is a qualified surveyor<sup>5</sup>.

The appointment takes effect for these purposes upon notice in writing being given to the landlord<sup>6</sup> by the association stating the name and address of the surveyor, the duration of his appointment and the matters in respect of which he is appointed<sup>7</sup>; and an appointment ceases to have effect for these purposes if the association gives notice in writing to the landlord to that effect or if the association ceases to exist<sup>8</sup>.

A surveyor so appointed has statutory rights of access to documents and premises<sup>9</sup>.

The statutory right to appoint a surveyor for these purposes applies in relation to Crown land<sup>10</sup> as in relation to other land<sup>11</sup>.

1 For these purposes, 'recognised tenants' association' has the same meaning as in the provisions of the Landlord and Tenant Act 1985 relating to service charges (see s 29 (as amended); and PARA 327 ante): Housing Act 1996 s 84(6).

2 For these purposes, 'service charge' means a service charge within the meaning of the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante), other than one excluded from s 18 (as amended) by s 27 (as amended) (rent of dwelling registered and not entered as variable: see PARA 325 ante): Housing Act 1996 s 84(6).

3 In the Housing Act 1996, 'lease' and 'tenancy' have the same meaning (s 229(1)); both expressions include (1) a sub-lease or a sub-tenancy; and (2) an agreement for a lease or tenancy (or sub-lease or sub-tenancy) (s 229(2)); and the expressions 'lessor' and 'lessee' and 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly (s 229(3)). Where, however, the premises are managed by an RTM company (see PARA 367 et seq post), s 84 (see the text and notes 4-9 infra) and Sch 4 (see PARAS 338-340 post) (apart from Sch 4 para 7: see PARA 340 post) have effect as if references to the landlord were to the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 15(1).

4 Housing Act 1996 s 84(1).

5 Ibid s 84(2). For this purpose 'qualified surveyor' has the same meaning as in the Leasehold Reform, Housing and Urban Development Act 1993 s 78(4)(a) (persons qualified for appointment to carry out management audit: see PARA 406 post): Housing Act 1996 s 84(2).

6 A notice is duly given under ibid s 84 to a landlord of any tenants if it is given to a person who receives on behalf of the landlord the rent payable by those tenants; and a person to whom such a notice is so given must forward it as soon as may be to the landlord: s 84(5). Where, however, the premises are managed by an RTM company, s 84(5) and Sch 4 para 4(5) (see PARA 338 post) apply as if the reference to a person who receives rent were to a person who receives service charges: Commonhold and Leasehold Reform Act 2002 Sch 7 para 15(2).

7 Housing Act 1996 s 84(3).

8 Ibid s 84(4).

9 See ibid s 84(1), Sch 4 (as amended); and PARA 338 post.

10 For the meaning of 'Crown land' see PARA 24 note 8 ante.

11 See the Commonhold and Leasehold Reform Act 2002 s 172(1)(g); and PARA 24 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/C. RIGHT TO APPOINT SURVEYOR TO ADVISE/338. Surveyor's rights.

### 338. Surveyor's rights.

A surveyor appointed for the purposes of advising on matters relating to service charges<sup>1</sup> has the rights conferred by the following provisions<sup>2</sup>.

The surveyor may appoint such persons as he thinks fit to assist him in carrying out his functions<sup>3</sup>.

The surveyor has a right to require the landlord<sup>4</sup> or any other relevant person<sup>5</sup>:

- 553 (1) to afford him reasonable facilities for inspecting any documents sight of which is reasonably required by him for the purposes of his functions<sup>6</sup>; and
- 554 (2) to afford him reasonable facilities for taking copies of or extracts from any such documents<sup>7</sup>.

The rights conferred on the surveyor by heads (1) and (2) above are exercisable by him by notice in writing given by him to the landlord or other person concerned<sup>8</sup>. Where a notice is given to a person other than the landlord, the surveyor must give a copy of the notice to the landlord<sup>9</sup>. The landlord or other person to whom notice is given must, within the period of one week beginning with the date of the giving of the notice or as soon as reasonably practicable thereafter, either:

- 555 (a) afford the surveyor the facilities required by him for inspecting and taking copies or extracts of the documents to which the notice relates; or
- 556 (b) give the surveyor a notice stating that he objects to doing so for reasons specified in the notice<sup>10</sup>.

Facilities for the inspection of any documents required under head (1) above must be made available free of charge; but this does not mean that the landlord cannot treat as part of his costs of management any costs incurred by him in connection with making the facilities available<sup>11</sup>. A reasonable charge may be made for facilities for the taking of copies or extracts required under head (2) above<sup>12</sup>.

The surveyor also has the right to inspect any common parts<sup>13</sup> comprised in relevant premises<sup>14</sup> or any appurtenant property<sup>15</sup>. On being requested to do so<sup>16</sup>, the landlord must afford the surveyor reasonable access for the purposes of carrying out such an inspection<sup>17</sup>. Such reasonable access must be afforded to the surveyor free of charge; but this does not mean that the landlord cannot treat as part of his costs of management any costs incurred by him in connection with affording reasonable access to the surveyor<sup>18</sup>.

If the landlord or other person to whom notice was given requiring the facilities described in heads (1) and (2) above<sup>19</sup> has not, by the end of the period of one month beginning with the date on which notice was given, complied with the notice, the court<sup>20</sup> may, on the application of the surveyor, make an order requiring him to do so within such period as is specified in the order<sup>21</sup>. Similarly, if the landlord does not, within a reasonable period after the making of a

request for access<sup>22</sup>, afford the surveyor reasonable access for the purposes of carrying out an inspection<sup>23</sup>, the court may, on the application of the surveyor, make an order requiring the landlord to do so on such date as is specified in the order<sup>24</sup>. An application for an order under these provisions must be made before the end of the period of four months beginning with the date on which notice was given<sup>25</sup> or the request<sup>26</sup> was made<sup>27</sup>. Such an order may be made in general terms or may require the landlord or other person to do specific things, as the court thinks fit<sup>28</sup>.

1 le for the purposes of the Housing Act 1996 s 84: see PARA 337 ante.

2 Ibid s 84(1), Sch 4 para 1(1).

3 Ibid Sch 4 para 2(1). References in Sch 4 (paras 1-8) (as amended) to the surveyor in the context of (1) being afforded any such facilities as are mentioned in Sch 4 para 3 (see the text and notes 4-12 infra); or (2) carrying out an inspection under Sch 4 para 4 (as amended) (see the text and notes 13-18 infra), include a person so appointed: Sch 4 para 2(2). For these purposes, the surveyor's 'functions' are his functions in connection with the matters in respect of which he was appointed: Sch 4 para 1(2)(b).

4 For the meaning of 'landlord' see PARA 337 note 3 ante.

5 For these purposes, 'other relevant person' means a person other than the landlord who is or, in relation to a future service charge, will be (1) responsible for applying the proceeds of the service charge; or (2) under an obligation to a tenant who pays the service charge in respect of any matter to which the charge relates: Housing Act 1996 Sch 4 para 3(2). Where a notice under Sch 4 para 3 has been given to a person other than the landlord and, at a time when any obligations arising out of the notice remain to be discharged by him, he ceases to be such a person as is mentioned in Sch 4 para 3(2), then, if he is still in a position to discharge those obligations to any extent he remains responsible for discharging those obligations, and the provisions of Sch 4 (as amended) continue to apply to him, to that extent: Sch 4 para 8. For the meaning of 'service charge' see PARA 337 note 2 ante; and for the meaning of 'tenant' see PARA 337 note 3 ante.

6 Ibid Sch 4 para 3(1)(a).

7 Ibid Sch 4 para 3(1)(b).

8 Ibid Sch 4 para 3(3). A notice is duly given under Sch 4 para 3 to the landlord of a tenant if it is given to a person who receives on behalf of the landlord the rent payable by that tenant; and a person to whom such a notice is so given must forward it as soon as may be to the landlord: Sch 4 para 3(7).

9 Ibid Sch 4 para 3(3).

10 Ibid Sch 4 para 3(4).

11 Ibid Sch 4 para 3(5).

12 Ibid Sch 4 para 3(6).

13 For these purposes, 'common parts', in relation to a building or part of a building, includes the structure and exterior of the building or part and any common facilities within it: ibid Sch 4 para 4(2).

14 For these purposes, 'relevant premises' means so much of (1) the building or buildings containing the dwellings let to members of the tenants' association; and (2) any other building or buildings, as constitute premises in relation to which management functions are discharged in respect of the costs of which service charges are payable by members of the association; and 'management functions' includes functions with respect to the provision of services, or the repair, maintenance, improvement or insurance of property: ibid Sch 4 para 4(2) (definition of 'management functions' amended by the Commonhold and Leasehold Reform Act 2002 s 150, Sch 9 para 12). 'The tenants' association' means the association by which the surveyor was appointed: Housing Act 1996 Sch 4 para 1(2)(a).

15 Ibid Sch 4 para 4(1). For these purposes, 'appurtenant property' means so much of any property not contained in relevant premises as constitutes property in relation to which any such management functions as are described in note 14 supra are discharged: Sch 4 para 4(2).

16 A request is duly made under ibid Sch 4 para 4 (as amended) to the landlord of a tenant if it is made to a person appointed by the landlord to deal with such requests or, if no such person has been appointed, to a person who receives on behalf of the landlord the rent payable by that tenant; and a person to whom such a

request is made must notify the landlord of the request as soon as may be: Sch 4 para 4(5). This provision is modified where the premises are managed by an RTM company: see PARA 337 note 6 ante.

17 Ibid Sch 4 para 4(3).

18 Ibid Sch 4 para 4(4).

19 Ie notice under ibid Sch 4 para 3.

20 Ie the county court: see ibid s 95(1). Any jurisdiction expressed by a provision to which s 95 applies to be conferred on the court is to be exercised by a county court: s 95(1). There must also be brought in a county court any proceedings for determining any question arising under or by virtue of any provision to which s 95 applies: s 95(2). Where, however, other proceedings are properly brought in the High Court, that court has jurisdiction to hear and determine proceedings to which s 95(1) or (2) applies which are joined with those proceedings: s 95(3). Where proceedings are brought in a county court by virtue of s 95(1) or (2), that court has jurisdiction to hear and determine other proceedings joined with those proceedings despite the fact that they would otherwise be outside its jurisdiction: s 95(4). The provisions to which s 95 applies are (1) s 81 (as amended) (restriction on termination of tenancy for failure to pay service charge: see PARA 610 post); and (2) s 84 (see PARA 337 ante) and Sch 4 (as amended) (see the text and notes 1-19 supra, 21-28 infra; and PARAS 339-340 post): s 95(5).

21 Ibid Sch 4 para 5(1).

22 Ie under ibid Sch 4 para 4 (as amended).

23 See note 22 supra.

24 Housing Act 1996 Sch 4 para 5(2); and see note 20 supra.

25 Ie under ibid Sch 4 para 3.

26 See note 22 supra.

27 Housing Act 1996 Sch 4 para 5(3).

28 Ibid Sch 4 para 5(4).

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### **339. Documents held by superior landlord.**

Where a landlord<sup>1</sup> is required by a notice<sup>2</sup> to afford the surveyor facilities for inspection or taking copies or extracts in respect of any document which is in the custody or under the control of a superior landlord:

557 (1) the landlord must on receiving the notice inform the surveyor as soon as may be of that fact and of the name and address of the superior landlord; and

558 (2) the surveyor may then give the superior landlord notice in writing requiring him to afford the facilities in question in respect of the document<sup>3</sup>.

The relevant statutory provisions conferring rights of inspection and copying on the surveyor<sup>4</sup> and providing for the enforcement of those rights by the court<sup>5</sup> have effect, with any necessary modifications, in relation to a notice so given to a superior landlord<sup>6</sup>.

1 For the meaning of 'landlord' see PARA 337 note 3 ante.

2    Ie under the Housing Act 1996 s 84(1), Sch 4 para 3: see PARA 338 ante.

3    Ibid Sch 4 para 6(1).

4    Ie ibid Sch 4 para 3: see PARA 338 ante.

5    Ie ibid Sch 4 para 5(1), (3): see PARA 338 ante.

6    Ibid Sch 4 para 6(2).

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### **340. Effect of disposal by landlord.**

Where a notice requiring facilities for the inspection or copying of documents<sup>1</sup> has been given or a request for access to carry out an inspection of common parts<sup>2</sup> has been made to a landlord<sup>3</sup>, and at a time when any obligations arising out of the notice or request remain to be discharged by him:

- 559 (1)    he disposes of the whole or part of his interest as landlord of any member of the tenants' association<sup>4</sup>; and
- 560 (2)    the person acquiring that interest ('the transferee') is in a position to discharge any of those obligations to any extent,

that person is responsible for discharging those obligations to that extent, as if he had been given the notice<sup>5</sup> or had received<sup>6</sup> the request<sup>7</sup>.

If the landlord is, despite the disposal<sup>8</sup>, still in a position to discharge those obligations, he remains responsible for doing so; but otherwise, the transferee is responsible for discharging them to the exclusion of the landlord<sup>9</sup>.

1    Ie a notice under the Housing Act 1996 s 84(1), Sch 4 para 3: see PARA 338 ante.

2    Ie a notice under ibid Sch 4 para 4 (as amended): see PARA 338 ante.

3    For the meaning of 'landlord' see PARA 337 note 3 ante.

4    For the meaning of 'tenants' association' for these purposes see PARA 338 note 14 ante.

5    Ie under the Housing Act 1996 Sch 4 para 3.

6    Ie under ibid Sch 4 para 4 (as amended).

7    Ibid Sch 4 para 7(1).

8    For these purposes, 'disposal' means a disposal whether by the creation or transfer of an estate or interest, and includes the surrender of a tenancy; and references to the transferee are to be construed accordingly: ibid Sch 4 para 7(4).

9    Ibid Sch 4 para 7(2). In connection with the discharge of such obligations by the transferee, Sch 4 paras 3-6 (as amended) (see PARAS 338-339 ante) apply with the substitution for any reference to the date on which notice was given under Sch 4 para 3 or the request was made under Sch 4 para 4 (as amended) of a reference to the date of the disposal: Sch 4 para 7(3).



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## **D. LIMITATION OF SERVICE CHARGES**

### **(A) IN GENERAL**

#### **341. Reasonableness.**

Relevant costs<sup>1</sup> are to be taken into account in determining the amount of a service charge<sup>2</sup> payable for a period:

- 561 (1) only to the extent that they are reasonably incurred<sup>3</sup>; and
- 562 (2) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable is limited accordingly<sup>4</sup>.

Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable; and, after the relevant costs have been incurred, any necessary adjustment must be made by repayment, reduction or subsequent charges or otherwise<sup>5</sup>.

<sup>1</sup> For the meaning of 'relevant costs' see PARA 326 ante.

<sup>2</sup> For the meaning of 'service charge' see PARA 326 ante.

<sup>3</sup> Costs were not reasonably incurred when the work could have been done at no charge by way of claim under a damp-proofing guarantee: *Continental Property Ventures Inc v White* [2006] 1 EGLR 85, [2006] 16 EG 148, Lands Tribunal.

<sup>4</sup> Landlord and Tenant Act 1985 s 19(1). If the services are not of a reasonable standard, the whole of the cost does not have to be disallowed but an appropriate deduction may be made: *Yorkbrook Investments Ltd v Batten* (1985) 52 P & CR 51, [1985] 2 EGLR 100, CA. However, it has been held that it is not possible to give the statutory words a wide meaning to encompass both the costs actually incurred and the circumstances in which they were incurred (including past disrepair); the reasonableness of incurring costs to remedy disrepair cannot, as a matter of natural meaning, depend upon how the need for remedy arose: *Continental Property Ventures Inc v White* [2006] 1 EGLR 85, [2006] 16 EG 148, Lands Tribunal, not following dicta to the contrary in *Wandsworth London Borough Council v Griffin* [2000] 2 EGLR 105 at 110, Lands Tribunal (costs of repair could not be reduced on the basis that the costs would have been less if the landlord had timeously complied with the repairing covenant). But a leasehold valuation tribunal does have jurisdiction to determine the damages for the breach of covenant and such damages may give rise to an equitable set-off which may be applied by the tribunal: see PARA 351 post.

As to the tenancies to which the Landlord and Tenant Act 1985 s 19 (as amended) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 19 (as amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

<sup>5</sup> Landlord and Tenant Act 1985 s 19(2).

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### **342. Grant-aided works.**

Where relevant costs<sup>1</sup> are incurred or to be incurred on the carrying out of works in respect of which a specified grant<sup>2</sup> has been or is to be paid, the amount of the grant must be deducted from the costs and the amount of the service charge<sup>3</sup> payable must be reduced accordingly<sup>4</sup>.

In any case where:

- 563 (1) relevant costs are incurred or to be incurred on the carrying out of works which are included in the external works specified in a group repair scheme<sup>5</sup>; and
- 564 (2) the landlord<sup>6</sup> participated or is participating<sup>7</sup> in that scheme,

the amount which, in relation to the landlord, is the outstanding balance<sup>8</sup> must be deducted from the costs, and the amount of the service charge payable must be reduced accordingly<sup>9</sup>.

1 For the meaning of 'relevant costs' see PARA 326 ante.

2 I.e. under (1) the Housing Act 1985 s 523 (assistance for provision of separate service pipe for water supply: see WATER AND WATERWAYS vol 100 (2009) PARA 399); or (2) any provision of the Housing Grants, Construction and Regeneration Act 1996 Pt I (ss 1-59) (as amended) (grants, etc for renewal of private sector housing: see HOUSING vol 22 (2006 Reissue) PARA 622 et seq) or any corresponding earlier enactment.; or (3) the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, SI 2002/1860, art 3 (power of local housing authorities to provide assistance: see HOUSING vol 22 (2006 Reissue) PARA 233).

3 For the meaning of 'service charge' see PARA 326 ante.

4 Landlord and Tenant Act 1985 s 20A(1) (added by the Housing and Planning Act 1986 s 24(1)(i), Sch 5 Pt I para 9(1); numbered as such by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 90; amended by the Housing Grants, Construction and Regeneration Act 1996 s 103, Sch 1 para 11(1); and the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, SI 2002/1860, art 9, Sch 1 para 2). As to the tenancies to which the Landlord and Tenant Act 1985 s 20A (as added and amended) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 20A (as added and amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

5 I.e. within the meaning of the Housing Grants, Construction and Regeneration Act 1996 Pt I (as amended). The provisions of Pt I (as amended) relating to group repair schemes are now repealed, subject to transitional provisions: see HOUSING vol 22 (2006 Reissue) PARA 621.

6 For the meaning of 'landlord' see PARA 325 note 4 ante.

7 I.e. as an assisted participant.

8 I.e. determined in accordance with the Housing Grants, Construction and Regeneration Act 1996 s 69(3) (repealed subject to transitional provisions).

9 Landlord and Tenant Act 1985 s 20A(2) (added by the Local Government and Housing Act 1989 Sch 11 para 90; amended by the Housing Grants, Construction and Regeneration Act 1996 s 103, Sch 1 para 11(2)).

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### **343. Time limit on making demands.**

If any of the relevant costs<sup>1</sup> taken into account in determining the amount of any service charge<sup>2</sup> were incurred more than 18 months before a demand for payment of the service charge is served on the tenant<sup>3</sup>, the tenant is not liable to pay so much of the service charge as reflects the costs so incurred, unless, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease<sup>4</sup> to contribute to them by the payment of a service charge<sup>5</sup>.

1 For the meaning of 'relevant costs' see PARA 326 ante.

2 For the meaning of 'service charge' see PARA 326 ante.

3 For the meaning of 'tenant' see PARA 325 note 3 ante.

4 For the meaning of 'lease' see PARA 52 note 1 ante.

5 Landlord and Tenant Act 1985 s 20B(1), (2) (added by the Landlord and Tenant Act 1987 s 41(1), Sch 2 para 4). As to the tenancies to which the Landlord and Tenant Act 1985 s 20B (as added) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 20B (as added) see the Rent Act 1977 s 149(1)(a) (i) (as substituted); and PARA 816 post. As to the requirement that a demand for service charge contain the name and address of the landlord see PARA 257 ante; and see *Lindsey Trading Properties Inc v Dallhold Estates (UK) Pty Ltd* (1993) 70 P & CR 332, sub nom *Dallhold Estates (UK) Pty Ltd (in administration) v Lindsey Trading Properties Inc* [1994] 1 EGLR 93, CA.

On its true construction the Landlord and Tenant Act 1985 s 20B (as so added) has no application where payments on account are made to the lessor in respect of service charges, the actual expenditure of the lessor does not exceed the payments on account and no request by the lessor for any further payment by the tenant needs to be or is in fact made: see *Gilje v Charlegrove Securities Ltd* [2003] EWHC 1284 (Ch), [2004] 1 All ER 91, [2004] HLR 1 (where it was said that the policy embodied within the Landlord and Tenant Act 1985 s 20B (as so added) is that a tenant should not be faced with a bill for expenditure without proper warning to set aside provision for payment).

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### **344. Application that costs of proceedings are not to be regarded as relevant costs.**

A tenant<sup>1</sup> may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord<sup>2</sup> in connection with proceedings before a court, residential property tribunal<sup>3</sup> or leasehold valuation tribunal, or the Lands Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs<sup>4</sup> to be taken into account in determining the amount of any service charge<sup>5</sup> payable by the tenant or any other person or persons specified in the application<sup>6</sup>. The application must be made:

- 565 (1) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court<sup>7</sup>;
- 566 (2) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal<sup>8</sup>;
- 567 (3) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal<sup>9</sup>;
- 568 (4) in the case of proceedings before the Lands Tribunal, to the tribunal<sup>10</sup>;
- 569 (5) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court<sup>11</sup>.

The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 325 note 3 ante.

2 For the meaning of 'landlord' see PARA 325 note 4 ante.

3 As to residential property tribunals see HOUSING vol 22 (2006 Reissue) PARAS 187-188.

4 For the meaning of 'relevant costs' see PARA 326 ante. See also *Iperion Investments Corp v Broadwalk House Residents Ltd* [1992] 2 EGLR 235 at 251 (cited in PARA 319 note 11 ante); affd (1994) 71 P & CR 34, [1995] 2 EGLR 47, CA.

5 For the meaning of 'service charge' see PARA 326 ante.

6 Landlord and Tenant Act 1985 s 20C(1) (s 20C substituted by the Housing Act 1996 s 83(4); amended by the Housing Act 2004 s 265(1), Sch 15 para 32(1)-(3)), Subject to such an application or order, an express term making legal costs recoverable may assist the landlord to obtain an order for indemnity costs against a defendant tenant: *Primeridge v Jean Muir Ltd* [1992] 1 EGLR 273; *Bank of Baroda v Panessar* [1987] Ch 335, [1986] 3 All ER 751 (costs of enforcing repayment under a debenture).

As to the tenancies to which the Landlord and Tenant Act 1985 s 20C (as substituted and amended) does not apply see PARA 325 ante; and as to the power of a local authority to publish information, for the assistance of landlords and tenants and others, as to their rights and duties under s 20C (as substituted and amended) see the Rent Act 1977 s 149(1)(a)(i) (as substituted); and PARA 816 post.

7 Landlord and Tenant Act 1985 s 20C(2)(a) (as substituted: see note 6 supra).

8 Ibid s 20C(2)(aa) (as added: see note 6 supra).

9 Ibid s 20C(2)(b) (as substituted: see note 6 supra).

10 Ibid s 20C(2)(c) (as substituted: see note 6 supra).

11 Ibid s 20C(2)(d) (as substituted: see note 6 supra).

12 Ibid s 20C(3) (as substituted: see note 6 supra).

## UPDATE

### **344 Application that costs of proceedings are not to be regarded as relevant costs**

TEXT AND NOTES 6, 10--References to the Lands Tribunal are now to the Upper Tribunal: Landlord and Tenant Act 1985 s 20C(1), (2)(c) (amended by SI 2009/1307).

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## (B) CONSULTATION REQUIREMENTS IN RESPECT OF QUALIFYING WORKS OR LONG TERM AGREEMENTS

### **345. Consultation requirements; in general.**

Where the following provisions apply to any qualifying works<sup>1</sup> or qualifying long term agreement<sup>2</sup>, the relevant contributions<sup>3</sup> of tenants are limited<sup>4</sup> unless the consultation requirements<sup>5</sup> have been either:

- 570 (1) complied with in relation to the works or agreement; or
- 571 (2) dispensed with in relation to the works or agreement by, or on appeal from, a leasehold valuation tribunal<sup>6</sup>.

These provisions apply to qualifying works if relevant costs<sup>7</sup> incurred on carrying out the works exceed an appropriate amount<sup>8</sup>. An appropriate amount is an amount set by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister; and the regulations may make provision for either or both of the following to be an appropriate amount:

- 572 (a) an amount prescribed by, or determined in accordance with, the regulations; and
- 573 (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations<sup>9</sup>.

The Secretary of State or the Assembly or minister may by regulations provide that these provisions apply to a qualifying long term agreement:

- 574 (i) if relevant costs incurred under the agreement exceed an appropriate amount; or
- 575 (ii) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount<sup>10</sup>.

Where an appropriate amount is set by virtue of head (a) above, the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount<sup>11</sup>; and where an appropriate amount is set by virtue of head (b) above, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined<sup>12</sup>.

Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements<sup>13</sup>.

1 For these purposes and the purposes of the Landlord and Tenant Act 1985 s 20ZA (as substituted), 'qualifying works' means works on a building or any other premises: s 20ZA(2) (ss 20, 20ZA substituted by the Commonhold and Leasehold Reform Act 2002 s 151).

2 For these purposes and the purposes of the Landlord and Tenant Act 1985 s 20ZA (as substituted), 'qualifying long term agreement' means, subject to s 20ZA(3) (as substituted), an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than 12 months: s 20ZA(2) (as substituted: see note 1 supra). For the meaning of 'landlord' see PARA 325 note 4 ante. The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by regulations provide that an agreement is not a qualifying long term agreement (1) if it is an agreement of a description prescribed by the regulations; or (2) in any circumstances so prescribed: s 20ZA(3) (as so substituted). As to the exercise of this power see PARA 346 post. Regulations under s 20 (as substituted) or s 20ZA (as substituted): (a) may make provision generally or only in relation to specific cases; and (b) may make different provision for different purposes (s 20ZA(6) (as so substituted)); and must be made by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament (s 20ZA(7) (as so substituted)). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For these purposes, 'relevant contribution', in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement: *ibid* s 20(2) (as substituted: see note 1 supra). For the meaning of 'tenant' see PARA 325 note 3 ante; and for the meaning of 'service charge' see PARA 326 ante.

4 *Ie* in accordance with *ibid* s 20(6) (as substituted) or s 20(7) (as substituted), or both: see the text and notes 11-12 *infra*.

5 For these purposes, 'the consultation requirements' means requirements prescribed by regulations made by the Secretary of State or, in relation to Wales, by the Assembly or minister: *ibid* s 20ZA(4) (as substituted: see note 1 supra). Regulations under s 20ZA(4) (as so substituted) may in particular include provision requiring the landlord: (1) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them; (2) to obtain estimates for proposed works or agreements; (3) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates; (4) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates; and (5) to give reasons in prescribed circumstances for carrying out works or entering into agreements: s 20ZA(5) (as so substituted). For the meaning of 'recognised tenants' association' see PARA 327 ante. As to the exercise of this power see the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987 (as amended); the Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684 (as amended); notes 8, 10 *infra*; and PARA 346 *et seq* post.

6 Landlord and Tenant Act 1985 s 20(1) (as substituted: see note 1 supra).

7 For the meaning of 'relevant costs' see PARA 326 ante.

8 Landlord and Tenant Act 1985 s 20(3) (as substituted: see note 1 supra). For the purposes of s 20(3) (as so substituted), the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 6; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 6.

9 Landlord and Tenant Act 1985 s 20(5) (as substituted: see note 1 supra).

10 *Ibid* s 20(4) (as substituted: see note 1 supra). Section 20 (as so substituted) applies to a qualifying long term agreement if relevant costs incurred under the agreement in any accounting period exceed an amount which results in the relevant contribution of any tenant, in respect of that period, being more than £100; and for these purposes, 'accounting period' means the period beginning with the relevant date, and ending with the date that falls 12 months after the relevant date: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 4(1), (2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 4(1), (2). Subject to transitional provisions, in the case of the first accounting period, the relevant date is (1) if the relevant accounts are made up for periods of 12 months, the date on which the period that includes the date on which the relevant regulations came into force ends; or (2) if the accounts are not so made up, the date on which those regulations came into force: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 4(3) (amended by SI 2004/2939); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 4(3) (amended by SI 2005/1357). In the case of subsequent accounting periods, the relevant date is the date immediately following the end of the previous accounting period: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 4(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI

2004/684, reg 4(4). The relevant regulations came into force on 31 October 2003 in England and on 31 March 2004 in Wales: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 1(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 1(1).

11 Landlord and Tenant Act 1985 s 20(6) (as substituted: see note 1 supra).

12 Ibid s 20(7) (as substituted: see note 1 supra).

13 Ibid s 20ZA(1) (as substituted: see note 1 supra). A fee is payable for making an application under s 20ZA(1) (as so substituted): see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(3)(a), (4), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(3)(a), (4), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by a copy of the lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(a), Sch 2 para 2(3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(a), Sch 2 para 2(3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/D. LIMITATION OF SERVICE CHARGES/ (B) Consultation Requirements in respect of Qualifying Works or Long Term Agreements/346. Agreements that are not qualifying long term agreements.

### **346. Agreements that are not qualifying long term agreements.**

An agreement is not a qualifying long term agreement<sup>1</sup>:

- 576 (1) if it is a contract of employment; or
- 577 (2) if it is a management agreement<sup>2</sup> made by a local housing authority<sup>3</sup> and a tenant management organisation<sup>4</sup> or a body established under the provisions of the Local Government Act 2000 (known as an arm's length management organisation)<sup>5</sup>;
- 578 (3) if the parties to the agreement are a holding company<sup>6</sup> and one or more of its subsidiaries<sup>7</sup> or two or more subsidiaries of the same holding company;
- 579 (4) if:
- 33 41. (a) when the agreement is entered into, there are no tenants<sup>8</sup> of the building or other premises to which the agreement relates; and
- 42. (b) the agreement is for a term not exceeding five years<sup>9</sup>.
- 34

An agreement entered into, by or on behalf of the landlord<sup>10</sup> or a superior landlord:

- 580 (i) before the coming into force of the relevant regulations<sup>11</sup>; and
- 581 (ii) for a term of more than 12 months,

is not a qualifying long term agreement, notwithstanding that more than 12 months of the term remained unexpired on the coming into force of those regulations<sup>12</sup>.

An agreement for a term of more than 12 months entered into, by or on behalf of the landlord or a superior landlord, which provides for the carrying out of qualifying works<sup>13</sup> for which public

notice had been given before the date on which the relevant regulations came into force<sup>14</sup>, is not a qualifying long term agreement<sup>15</sup>.

1 For the meaning of 'qualifying long term agreement' see PARA 345 note 2 ante.

2 For these purposes, 'management agreement' has the meaning given by the Housing Act 1985 s 27(2) (as substituted) (see HOUSING vol 22 (2006 Reissue) PARA 259 note 5): Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(4).

3 For these purposes, 'local housing authority' has the same meaning as in the Housing Act 1985 s 1 (as amended) (see PARA 1311 note 4 post): Landlord and Tenant Act 1985 s 38.

4 For these purposes, 'tenant management organisation' has the meaning given by the Housing Act 1985 s 27AB(8) (as substituted) (see HOUSING vol 22 (2006 Reissue) PARA 260 note 3): Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(4).

5 Ie a body established under the Local Government Act 2000 s 2: see LOCAL GOVERNMENT vol 69 (2009) PARA 463.

6 For these purposes, 'holding company' and 'subsidiaries' have the same meanings as in the Companies Act 1985 (see COMPANIES vol 14 (2009) PARA 25): Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(4).

7 See note 6 supra.

8 For the meaning of 'tenant' see PARA 325 note 3 ante.

9 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(1).

10 For the meaning of 'landlord' see PARA 325 note 4 ante.

11 Ie 31 October 2003 in England and 31 March 2004 in Wales: see PARA 345 note 10 ante.

12 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(2).

13 For the meaning of 'qualifying works' see PARA 345 note 1 ante.

14 See note 12 supra.

15 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 3(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 3(3).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/D. LIMITATION OF SERVICE CHARGES/ (B) Consultation Requirements in respect of Qualifying Works or Long Term Agreements/347. Consultation requirements for qualifying long term agreements other than those for which public notice is required.

### **347. Consultation requirements for qualifying long term agreements other than those for which public notice is required.**



Except where public notice<sup>1</sup> is required to be given of the relevant matters<sup>2</sup> to which a qualifying long term agreement<sup>3</sup> relates, the consultation requirements in relation to such agreements<sup>4</sup> for the statutory purposes<sup>5</sup> are as follows<sup>6</sup>:

- 582 (1) the landlord<sup>7</sup> must give notice in writing of his intention to enter into the agreement to each tenant<sup>8</sup> and, where a recognised tenants' association<sup>9</sup> represents some or all of the tenants, to the association<sup>10</sup>;
- 583 (2) where a notice under head (1) above specifies a place and hours for inspection:
- 35
43. (a) the place and hours so specified must be reasonable; and
44. (b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours<sup>11</sup>;
- 36
- 584 (3) where, within the relevant period<sup>12</sup>, observations are made in relation to the proposed agreement by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>13</sup>;
- 585 (4) where, within the relevant period:
- 37
45. (a) a single nomination is made<sup>14</sup> by a recognised tenants' association, whether or not a nomination is made by any tenant, the landlord must try to obtain an estimate<sup>15</sup> from the nominated person<sup>16</sup>;
46. (b) a single nomination is made by only one of the tenants, whether or not a nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from the nominated person<sup>17</sup>;
47. (c) a single nomination is made by more than one tenant, whether or not a nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from the person who received the most nominations, or, if there is no such person, but two or more persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two or more persons, or in any other case, from any nominated person<sup>18</sup>;
48. (d) more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from at least one person nominated by a tenant<sup>19</sup> and from at least one person<sup>20</sup> nominated by the association<sup>21</sup>;
- 38
- 586 (5) the landlord must prepare at least two proposals in respect of the relevant matters<sup>22</sup>, at least one of which must propose that goods or services are provided, or works are carried out, as the case may be, by a person wholly unconnected with the landlord<sup>23</sup>; and where an estimate has been obtained from a nominated person, the landlord must prepare a proposal based on that estimate<sup>24</sup>;
- 587 (6) the landlord must give notice in writing of proposals prepared under head (5) above to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>25</sup>;
- 588 (7) where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>26</sup>;
- 589 (8) where the landlord enters into an agreement relating to relevant matters, he must, within 21 days of entering into the agreement, by notice in writing to each tenant and the recognised tenants' association, if any:
- 39
49. (a) state his reasons for making that agreement or specify the place and hours at which a statement of those reasons may be inspected; and

50. (b) where he has received observations to which he is required<sup>27</sup> to have regard, summarise the observations and respond to them or specify the place and hours at which that summary and response may be inspected<sup>28</sup>;
- 40
- 590 but this does not apply where the person with whom the agreement is made is a nominated person or submitted the lowest estimate<sup>29</sup>.

In relation to an RTB tenant<sup>30</sup> and a particular qualifying long term agreement, nothing in the above provisions requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the thirty-first day of the RTB tenancy<sup>31</sup>.

1 'Public notice' means notice published in the Official Journal of the European Union pursuant to the Public Contracts Regulations 2006, SI 2006/5: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1) (definition substituted by SI 2006/5); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1) (definition as so substituted).

2 'The relevant matters', in relation to a proposed agreement, means the goods or services to be provided or the works to be carried out (as the case may be) under the agreement: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

3 For the meaning of 'qualifying long term agreement' see PARA 345 note 2 ante.

4 In relation to qualifying long term agreements to which the Landlord and Tenant Act 1985 s 20 (as substituted) applies: see PARA 345 ante.

5 In relation to the purposes of ibid ss 20, 20ZA (as substituted): see PARA 345 ante.

6 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(1).

7 For the meaning of 'landlord' see PARA 325 note 4 ante.

8 For the meaning of 'tenant' see PARA 325 note 3 ante.

9 For the meaning of 'recognised tenants' association' see PARA 327 ante.

10 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(1), Sch 1 para 1(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(1), Sch 1 para 1(1). The notice must (1) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected; (2) state the landlord's reasons for considering it necessary to enter into the agreement; (3) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works; (4) invite the making, in writing, of observations in relation to the proposed agreement; and (5) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends; and must also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate in respect of the relevant matters: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 1(2), (3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 1(2), (3). For the meaning of 'the relevant period' see note 12 infra; and for the meaning of 'qualifying works' see PARA 345 note 1 ante.

11 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 2(1). If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord must provide to any tenant, on request and free of charge, a copy of the description: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 2(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 2(2).

12 'Relevant period', in relation to a notice, means the period of 30 days beginning with the date of the notice: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

13 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 3; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 3.

14 For these purposes, 'nominated person' means a person whose name is proposed in response to an invitation made as mentioned in note 10 supra; and 'nomination' means any such proposal: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

15 For the purposes of any estimate required by any provision of the relevant regulations to be made by the landlord, VAT must be included where applicable and, where the estimate relates to a proposed agreement, it must be assumed that the agreement will terminate only by effluxion of time: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(2).

16 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 4(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 4(1).

17 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 4(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 4(2).

18 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 4(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 4(3).

19 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 4(4) (a); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 4(4)(a).

20 le other than a person from whom an estimate is sought as mentioned in the text to note 19 supra.

21 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 4(4) (b); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 4(4)(b).

22 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(1).

23 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(2).

24 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(3). Each proposal must (1) contain a statement of the relevant matters; (2) contain a statement, as regards each party to the proposed agreement other than the landlord, of the party's name and address and of any connection (apart from the proposed agreement) between the party and the landlord; and for these purposes it must be assumed that there is a connection between a party (as the case may be) and the landlord: (a) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (b) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (c) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company; (d) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or (e) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(4)-(6); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(4)-(6). 'Close relative', in relation to a person, means a spouse or cohabitee, a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister, sister-in-law, step-parent, step-son or step-daughter of that person; and 'cohabitee', in relation to a person, means (i) a person of the opposite sex who is living with that person as husband or wife; or (ii) a person of the same sex living with that person in a relationship which has the characteristics of the relationship between husband and wife: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

Where, as regards each tenant's unit of occupation and the relevant matters, it is reasonably practicable for the landlord to estimate the relevant contribution attributable to the relevant matters to which the proposed agreement relates, each proposal must contain a statement of that estimated contribution; and where it is not reasonably practicable for the landlord to make that estimate, and it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement, each proposal must contain a statement of that estimated expenditure: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(7)-(8); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI

2004/684, Sch 1 para 5(7)-(8). Where it is not reasonably practicable for the landlord to make the estimate so mentioned, and it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters, each proposal must contain a statement of that cost or rate: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(9); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(9).

Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal must contain a statement: (i) that the person whose appointment is proposed is or, as the case may be, is not, a member of a professional body or trade association and subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and (ii) if the person is a member of a professional body or trade association, of the name of the body or association: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(10); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(10).

Each proposal must contain a statement as to the provisions (if any) for variation of any amount specified in, or to be determined under, the proposed agreement, and a statement of the intended duration of the proposed agreement: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(11)-(12); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(11)-(12). Where the landlord has received observations to which (in accordance with head (3) in the text) he is required to have regard, each proposal must also contain a statement summarising the observations and setting out the landlord's response to them: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 5(13); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 5(13).

25 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 6(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 6(1). The notice must (1) be accompanied by a copy of each proposal or specify the place and hours at which the proposals may be inspected; (2) invite the making, in writing, of observations in relation to the proposals; and (3) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 6(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 6(2). Head (2) in the text applies to proposals so made available for inspection as it applies to a description of the relevant matters made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 6(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 6(3).

26 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 7; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 7.

27 Ie in accordance with head (7) in the text.

28 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 8(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 8(1). Head (2) in the text applies to a statement, summary and response so made available for inspection as it applies to a description of the relevant matters made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 8(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 8(3).

29 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 1 para 8(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 1 para 8(2).

30 For these purposes, 'RTB tenant', in relation to a landlord, means a person who has become a tenant of the landlord by virtue of the Housing Act 1985 s 138 (as amended) (duty of landlord to convey freehold or grant lease: see PARA 1843 post), s 171A (as added) (cases in which right to buy is preserved: see PARA 1900 post), or the Housing Act 1996 s 16 (as amended) (right of tenant to acquire dwelling: see PARA 1805 post) under a lease whose terms include a requirement that the tenant is to bear a reasonable part of such costs incurred by the landlord as are mentioned in the Housing Act 1985 s 139(1), Sch 6 paras 16A-16D (as added and amended) (service charges and other contributions payable by the tenant: see PARA 1861 et seq post): Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

31 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(3). 'RTB tenancy' means the tenancy of an RTB tenant: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

## UPDATE

### **347 Consultation requirements for qualifying long term agreements other than those for which public notice is required**

NOTE 24--In relation to Wales, 'close relative' includes a civil partner: SI 2004/684 reg 2(1) (amended by SI 2005/3302).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/D. LIMITATION OF SERVICE CHARGES/ (B) Consultation Requirements in respect of Qualifying Works or Long Term Agreements/348. Consultation requirements for qualifying long term agreements where public notice is required.

### **348. Consultation requirements for qualifying long term agreements where public notice is required.**

Where public notice<sup>1</sup> is required to be given of the relevant matters<sup>2</sup> to which a qualifying long term agreement<sup>3</sup> relates, the consultation requirements as regards the agreement for the statutory purposes<sup>4</sup> are as follows<sup>5</sup>:

591 (1) the landlord<sup>6</sup> must give notice in writing of his intention to enter into the agreement to each tenant<sup>7</sup> and, where a recognised tenants' association<sup>8</sup> represents some or all of the tenants, to the association<sup>9</sup>;

592 (2) where a notice under head (1) above specifies a place and hours for inspection:

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51. (a) the place and hours so specified must be reasonable; and

52. (b) a description of the relevant matters must be available for inspection, free of charge, at that place and during those hours<sup>10</sup>;

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593 (3) where, within the relevant period, observations are made in relation to the proposed agreement by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>11</sup>;

594 (4) the landlord must prepare a proposal in respect of the proposed agreement in accordance with the prescribed requirements<sup>12</sup>;

595 (5) the landlord must give notice in writing of proposals prepared under head (4) above to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>13</sup>;

596 (6) where, within the relevant period, observations are made in relation to the landlord's proposals by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>14</sup>;

597 (7) where the landlord receives observations to which he is required<sup>15</sup> to have regard, he must, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations<sup>16</sup>;

598 (8) where a proposal prepared under head (4) above contains a statement that it is not reasonably practicable for him to make the specified estimate<sup>17</sup>, the landlord must, within 21 days of receiving sufficient information to enable him to estimate the specified amount, cost or rate<sup>18</sup>, give notice in writing of the estimated amount,

cost or rate, as the case may be, to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>19</sup>.

In relation to an RTB tenant<sup>20</sup> and a particular qualifying long term agreement, nothing in the above provisions requires a landlord to comply with any of the consultation requirements applicable to that agreement that arise before the thirty-first day of the RTB tenancy<sup>21</sup>.

1 For the meaning of 'public notice' see PARA 347 note 1 ante.

2 For the meaning of 'the relevant matters' see PARA 347 note 2 ante.

3 For the meaning of 'qualifying long term agreement' see PARA 345 note 2 ante.

4 For the purposes of the Landlord and Tenant Act 1985 ss 20, 20ZA (as substituted): see PARA 345 ante.

5 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(2).

6 For the meaning of 'landlord' see PARA 325 note 4 ante.

7 For the meaning of 'tenant' see PARA 325 note 3 ante.

8 For the meaning of 'recognised tenants' association' see PARA 327 ante.

9 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(2), Sch 2 para 1(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(2), Sch 2 para 1(1). The notice must (1) describe, in general terms, the relevant matters or specify the place and hours at which a description of the relevant matters may be inspected; (2) state the landlord's reasons for considering it necessary to enter into the agreement; (3) where the relevant matters consist of or include qualifying works, state the landlord's reasons for considering it necessary to carry out those works; (4) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for the relevant matters is that public notice of the relevant matters is to be given; (5) invite the making, in writing, of observations in relation to the relevant matters; and (6) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 1(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 1(2). For the meaning of 'the relevant period' see PARA 347 note 12 ante; and for the meaning of 'qualifying works' see PARA 345 note 1 ante.

10 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 2(1). If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord must provide to any tenant, on request and free of charge, a copy of the description: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 2(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 2(2).

11 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 3; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 3.

12 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(1). The proposal must contain a statement of the name and address of every party to the proposed agreement (other than the landlord); and of any connection (apart from the proposed agreement) between the landlord and any other party; and for these purposes it is to be assumed that there is a connection between the landlord and a party: (1) where the landlord is a company, if the party is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (2) where the landlord is a company, and the party is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (3) where both the landlord and the party are companies, if any director or manager of one company is, or is to be, a director or manager of the other company; (4) where the party is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or (5) where the party is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(2)-(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(2)-(3). For the meaning of 'close relative' see PARA 347 note 24 ante.

Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the relevant contribution to be incurred by the tenant attributable to the relevant matters to which the proposed agreement relates, the proposal must contain a statement of that contribution: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(4). Where (a) it is not reasonably practicable for the landlord to make that estimate; and (b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed agreement relates, the total amount of his expenditure under the proposed agreement, the proposal must contain a statement of the amount of that estimated expenditure; and where (i) it is not reasonably practicable for the landlord to make the estimate referred to in head (a) supra or the estimate mentioned in head (b) supra; and (ii) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the relevant matters to which the proposed agreement relates, the proposal must contain a statement of that cost or rate: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(5)-(6); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(5)-(6). Where it is not reasonably practicable for the landlord to make the estimate mentioned in head (ii) supra, the proposal must contain a statement of the reasons why he cannot comply and the date by which he expects to be able to provide an estimate, cost or rate: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(7); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(7).

Where the relevant matters comprise or include the proposed appointment by the landlord of an agent to discharge any of the landlord's obligations to the tenants which relate to the management by him of premises to which the agreement relates, each proposal must contain a statement: (A) that the person whose appointment is proposed is or, as the case may be, is not, a member of a professional body or trade association and subscribes or, as the case may be, does not subscribe, to any code of practice or voluntary accreditation scheme relevant to the functions of managing agents; and (B) if the person is a member of a professional body or trade association, of the name of the body or association: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(8); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(8). Each proposal must contain a statement of the intended duration of the proposed agreement; and where the landlord has received observations to which (in accordance with head (3) in the text) he is required to have regard, the proposal must contain a statement summarising the observations and setting out the landlord's response to them: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(9)-(10); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 4(9)-(10).

13 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 5(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 5(1). The notice must (1) be accompanied by a copy of each proposal or specify the place and hours at which the proposals may be inspected; (2) invite the making, in writing, of observations in relation to the proposals; and (3) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 5(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 5(2). Head (2) in the text applies to proposals so made available for inspection as it applies to a description of the relevant matters made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 5(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 5(3).

14 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 6; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 6.

15 Ie in accordance with head (6) in the text.

16 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 7; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 7.

17 Ie such a statement as is mentioned in the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(7) or the corresponding provision applying in Wales: see note 12 supra.

18 Ie the amount, cost or rate referred to in the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 4(4), (5) or (6) or the corresponding provision applying in Wales: see note 12 supra.

19 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 2 para 8; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 2 para 8.

20 For the meaning of 'RTB tenant' see PARA 347 note 30 ante.

21 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 5(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 5(3). For the meaning of 'RTB tenancy' see PARA 347 note 31 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/D. LIMITATION OF SERVICE CHARGES/ (B) Consultation Requirements in respect of Qualifying Works or Long Term Agreements/349. Consultation requirements for qualifying works which are the subject of a qualifying long term agreement or similar agreement.

**349. Consultation requirements for qualifying works which are the subject of a qualifying long term agreement or similar agreement.**

Where qualifying works<sup>1</sup>:

- 599 (1) are the subject, whether alone or with other matters, of a qualifying long term agreement<sup>2</sup> to which the relevant statutory provisions apply<sup>3</sup>; or
- 600 (2) are carried out at any time on or after the date that falls two months after the date on which the relevant regulations came into force<sup>4</sup>, under an agreement entered into, by or on behalf of the landlord<sup>5</sup> or a superior landlord, before the coming into force of those regulations; or
- 601 (3) for which public notice<sup>6</sup> has been given before the date on which the relevant regulations came into force<sup>7</sup> are carried out at any time on or after that date under an agreement for a term of more than 12 months entered into, by or on behalf of the landlord or a superior landlord,

the consultation requirements as regards those works for the statutory purposes<sup>8</sup> are as follows<sup>9</sup>:

- 602 (a) the landlord must give notice in writing of his intention to carry out qualifying works to each tenant<sup>10</sup> and, where a recognised tenants' association<sup>11</sup> represents some or all of the tenants, to the association<sup>12</sup>;
- 603 (b) where a notice under head (a) above specifies a place and hours for inspection:
- 43
- 53. (i) the place and hours so specified must be reasonable; and
- 54. (ii) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours<sup>13</sup>;
- 44
- 604 (c) where, within the relevant period, observations are made in relation to the proposed works or the landlord's estimated expenditure by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>14</sup>;
- 605 (d) where the landlord receives observations to which he is required<sup>15</sup> to have regard, he must, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations<sup>16</sup>.

In relation to an RTB tenant<sup>17</sup> and particular qualifying works, nothing in the above provisions requires a landlord to comply with any of the consultation requirements applicable to those works that arise before the thirty-first day of the RTB tenancy<sup>18</sup>.



- 1 For the meaning of 'qualifying works' see PARA 345 note 1 ante.
- 2 For the meaning of 'qualifying long term agreement' see PARA 345 note 2 ante.
- 3 le to which the Landlord and Tenant Act 1985 s 20 (as substituted) applies: see PARA 345 ante.
- 4 le 31 October 2003 in England and 31 March 2004 in Wales: see PARA 345 note 10 ante.
- 5 For the meaning of 'landlord' see PARA 325 note 4 ante.
- 6 For the meaning of 'public notice' see PARA 347 note 1 ante.
- 7 See note 4 supra.
- 8 le for the purposes of the Landlord and Tenant Act 1985 ss 20, 20ZA (as substituted): see PARA 345 ante.
- 9 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(1)-(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(1)-(3).
- 10 For the meaning of 'tenant' see PARA 325 note 3 ante.
- 11 For the meaning of 'recognised tenants' association' see PARA 327 ante.
- 12 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(1)-(3), Sch 3 para 1(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(1)-(3), Sch 3 para 1(1). The notice must (1) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected; (2) state the landlord's reasons for considering it necessary to carry out the proposed works; (3) contain a statement of the total amount of the expenditure estimated by the landlord as likely to be incurred by him on and in connection with the proposed works; (4) invite the making, in writing, of observations in relation to the proposed works or the landlord's estimated expenditure; and (5) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 3 para 1(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 3 para 1(2). For the meaning of 'the relevant period' see PARA 347 note 12 ante.
- 13 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 3 para 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 3 para 2(1). If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord must provide to any tenant, on request and free of charge, a copy of the description: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 3 para 2(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 3 para 2(2).
- 14 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 3 para 3; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 3 para 3.
- 15 le in accordance with head (c) in the text.
- 16 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 3 para 4; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 3 para 4.
- 17 For the meaning of 'RTB tenant' see PARA 347 note 30 ante.
- 18 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(5); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(5). For the meaning of 'RTB tenancy' see PARA 347 note 31 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/D. LIMITATION OF SERVICE CHARGES/ (B) Consultation Requirements in respect of Qualifying Works or Long Term

Agreements/350. Consultation requirements for qualifying works not the subject of a qualifying long term agreement or similar agreement.

**350. Consultation requirements for qualifying works not the subject of a qualifying long term agreement or similar agreement.**

Where qualifying works<sup>1</sup> are not the subject of a qualifying long term agreement<sup>2</sup> or similar agreement<sup>3</sup>, the consultation requirements for the statutory purposes<sup>4</sup> as regards those works are, in a case where public notice<sup>5</sup> of those works is required to be given, those specified in heads (1) to (7) below, and in any other case are those specified in heads (i) to (vi) below<sup>6</sup>.

Where public notice is required to be given:

- 606 (1) the landlord<sup>7</sup> must give notice in writing of his intention to carry out qualifying works to each tenant<sup>8</sup> and, where a recognised tenants' association<sup>9</sup> represents some or all of the tenants, to the association<sup>10</sup>;
- 607 (2) where a notice under head (1) above specifies a place and hours for inspection:
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- 55. (a) the place and hours so specified must be reasonable; and
- 56. (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours<sup>11</sup>;
- 46
- 608 (3) where, within the relevant period, observations are made in relation to the proposed works by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>12</sup>;
- 609 (4) the landlord must prepare, in accordance with the prescribed requirements, a statement in respect of the proposed contract under which the proposed works are to be carried out<sup>13</sup>;
- 610 (5) the landlord must give notice in writing of his intention to enter into the proposed contract to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>14</sup>;
- 611 (6) where, within the relevant period, the landlord receives observations in response to the invitation in the notice under head (5) above, he must, within 21 days of their receipt, by notice in writing to the person by whom the observations were made, state his response to the observations<sup>15</sup>;
- 612 (7) where a proposal prepared under head (4) above sets out the landlord's reasons for being unable to make the specified estimate<sup>16</sup>, the landlord must, within 21 days of receiving sufficient information to enable him to estimate the specified amount, cost or rate<sup>17</sup>, give notice in writing of the estimated amount, cost or rate, as the case may be, to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>18</sup>.

Where public notice is not required to be given:

- 613 (i) the landlord must give notice in writing of his intention to carry out qualifying works to each tenant and, where a recognised tenants' association represents some or all of the tenants, to the association<sup>19</sup>;
- 614 (ii) where a notice under head (i) above specifies a place and hours for inspection:
- 47
- 57. (A) the place and hours so specified must be reasonable; and
- 58. (B) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours<sup>20</sup>;

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615 (iii) where, within the relevant period, observations are made in relation to the proposed works by any tenant or recognised tenants' association, the landlord must have regard to those observations<sup>21</sup>;

616 (iv) where, within the relevant period:

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59. (A) a nomination is made<sup>22</sup> by a recognised tenants' association, whether or not a nomination is made by any tenant, the landlord must try to obtain an estimate<sup>23</sup> from the nominated person<sup>24</sup>;

60. (B) a nomination is made by only one of the tenants, whether or not a nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from the nominated person<sup>25</sup>;

61. (C) a single nomination is made by more than one tenant, whether or not a nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from the person who received the most nominations, or, if there is no such person, but two or more persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two or more persons, or in any other case, from any nominated person<sup>26</sup>;

62. (D) more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord must try to obtain an estimate from at least one person nominated by a tenant<sup>27</sup> and from at least one person<sup>28</sup> nominated by the association<sup>29</sup>;

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617 (v) where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord must have regard to those observations<sup>30</sup>;

618 (vi) where the landlord enters into a contract for the carrying out of qualifying works, he must, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association, if any:

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63. (A) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

64. (B) where he has received observations to which he was required<sup>31</sup> to have regard, summarise the observations and set out his response to them<sup>32</sup>;

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619 but this does not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate<sup>33</sup>.

In relation to an RTB tenant<sup>34</sup> and particular qualifying works, nothing in the above provisions requires a landlord to comply with any of the consultation requirements applicable to those works that arise before the thirty-first day of the RTB tenancy<sup>35</sup>.

1 For the meaning of 'qualifying works' see PARA 345 note 1 ante.

2 For the meaning of 'qualifying long term agreement' see PARA 345 note 2 ante.

3 le to which the Landlord and Tenant Act 1985 s 20 (as substituted) applies: see PARA 345 ante.

4 le for the purposes of ibid ss 20, 20ZA (as substituted): see PARA 345 ante.

5 For the meaning of 'public notice' see PARA 347 note 1 ante.

6 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(4).

7 For the meaning of 'landlord' see PARA 325 note 4 ante.

8 For the meaning of 'tenant' see PARA 325 note 3 ante.

9 For the meaning of 'recognised tenants' association' see PARA 327 ante.

10 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(4), Sch 4 para 1(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(4), Sch 4 para 1(1). The notice must (1) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected; (2) state the landlord's reasons for considering it necessary to carry out the proposed works; (3) state that the reason why the landlord is not inviting recipients of the notice to nominate persons from whom he should try to obtain an estimate for carrying out the works is that public notice of the works is to be given; (4) invite the making, in writing, of observations in relation to the proposed works; and (5) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 1(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 1(2). For the meaning of 'the relevant period' see PARA 347 note 12 ante.

11 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 2(1). If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord must provide to any tenant, on request and free of charge, a copy of the description: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 2(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 2(2).

12 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 3; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 3.

13 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(1). The statement must set out the name and address of the person with whom the landlord proposes to contract and particulars of any connection between them (apart from the proposed contract); and for these purposes it is to be assumed that there is a connection between a person and the landlord (1) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (2) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (3) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company; (4) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or (5) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(2), (3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(2), (3).

Where, as regards each tenant's unit of occupation, it is reasonably practicable for the landlord to estimate the amount of the relevant contribution to be incurred by the tenant attributable to the works to which the proposed contract relates, that estimated amount must be specified in the statement: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(4); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(4). Where (a) it is not reasonably practicable for the landlord to make that estimate; and (b) it is reasonably practicable for the landlord to estimate, as regards the building or other premises to which the proposed contract relates, the total amount of his expenditure under the proposed contract, that estimated amount must be specified in the statement; and where (i) it is not reasonably practicable for the landlord to make the estimate referred to in head (a) supra or mentioned in head (b) supra; and (ii) it is reasonably practicable for the landlord to ascertain the current unit cost or hourly or daily rate applicable to the works to which the proposed contract relates, that cost or rate must be specified in the statement: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(5), (6); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(5), (6). Where it is not reasonably practicable for the landlord to make the estimate mentioned in head (ii) supra, the reasons why he cannot comply and the date by which he expects to be able to provide an estimated amount, cost or rate must be specified in the statement: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(7); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(7).

Where the landlord has received observations to which (in accordance with head (3) in the text) he is required to have regard, the statement must summarise the observations and set out his response to them: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(8); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 4(8).

14 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 5(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 5(1). The notice must (1) comprise, or be accompanied by, the statement prepared in accordance with head (4) in the text ('the paragraph 4 statement') or specify the place and hours at which that statement may be inspected; (2) invite the making, in writing, of observations in relation to any matter mentioned in the paragraph 4 statement; (3) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 5(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 5(2). Where the paragraph 4 statement is made available for inspection, head (2) in the text applies in relation to that statement as it applies in relation to a description of proposed works made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 5(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 5(3).

15 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 6; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 6.

16 In his reasons for being unable to comply with the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(6) or the corresponding provision applying in Wales; see note 13 supra.

17 In the amount, cost or rate referred to in the Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 4(4), (5) or (6) or the corresponding provision applying in Wales; see note 13 supra.

18 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 7; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 7.

19 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 8(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 8(1). The notice must (1) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected; (2) state the landlord's reasons for considering it necessary to carry out the proposed works; (3) invite the making, in writing, of observations in relation to the proposed works; and (4) specify (a) the address to which such observations may be sent; (b) that they must be delivered within the relevant period; and (c) the date on which the relevant period ends; and must also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 8(2), (3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 8(2), (3).

20 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 9(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 9(1). If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord must provide to any tenant, on request and free of charge, a copy of the description: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 9(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 9(2).

21 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 10; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 10.

22 For these purposes, 'nominated person' means a person whose name is proposed in response to an invitation made as mentioned in note 19 supra; and 'nomination' means any such proposal: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 2(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 2(1).

23 VAT must be included in any estimate where applicable: see PARA 347 note 15 ante.

24 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(1).

25 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(2).

26 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(3).

27 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(4)(a); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(4)(a).

28 Ie other than a person from whom a nomination is sought as mentioned in the text to note 27 supra.

29 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(4)(b); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(4)(b).

The landlord must (1) obtain estimates for the carrying out of the proposed works; (2) supply, free of charge, a statement ('the paragraph (b) statement') setting out: (a) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and (b) where the landlord has received observations to which (in accordance with head (iii) in the text) he is required to have regard, a summary of the observations and his response to them; and (3) make all of the estimates available for inspection: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(5); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(5). At least one of the estimates must be that of a person wholly unconnected with the landlord; and for these purposes, it is to be assumed that there is a connection between a person and the landlord (i) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (ii) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager; (iii) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company; (iv) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or (v) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(6), (7); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(6), (7). Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(8); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(8). The paragraph (b) statement must be supplied to, and the estimates made available for inspection by, each tenant and the secretary of the recognised tenants' association (if any); and the landlord must, by notice in writing to each tenant and the association (if any): (A) specify the place and hours at which the estimates may be inspected; (B) invite the making, in writing, of observations in relation to those estimates; (C) specify the address to which such observations may be sent, that they must be delivered within the relevant period and the date on which the relevant period ends: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(9), (10); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(9), (10). Head (ii) in the text applies to estimates made so available for inspection as it applies to a description of proposed works made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 11(11); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 11(11).

30 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 12; Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 12.

31 Ie in accordance with head (v) in the text.

32 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 13(1); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 13(1). Head (ii) in the text applies to a statement made so available for inspection as it applies to a description of proposed works made available for inspection under that head: Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 13(3); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 13(3).

33 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, Sch 4 para 13(2); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, Sch 4 para 13(2).

34 For the meaning of 'RTB tenant' see PARA 347 note 30 ante.

35 Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987, reg 7(5); Service Charges (Consultation Requirements) (Wales) Regulations 2004, SI 2004/684, reg 7(5). For the meaning of 'RTB tenancy' see PARA 347 note 31 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/E. LIABILITY TO PAY SERVICE CHARGES; JURISDICTION/351. Determination of liability to pay service charges.

## ***E. LIABILITY TO PAY SERVICE CHARGES; JURISDICTION***

### **351. Determination of liability to pay service charges.**

An application may be made to a leasehold valuation tribunal for a determination whether a service charge<sup>1</sup> is payable and, if it is, as to:

- 620 (1) the person by whom it is payable;
- 621 (2) the person to whom it is payable;
- 622 (3) the amount which is payable;
- 623 (4) the date at or by which it is payable; and
- 624 (5) the manner in which it is payable<sup>2</sup>;

and this applies whether or not any payment has been made<sup>3</sup>.

An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to:

- 625 (a) the person by whom it would be payable;
- 626 (b) the person to whom it would be payable;
- 627 (c) the amount which would be payable;
- 628 (d) the date at or by which it would be payable; and
- 629 (e) the manner in which it would be payable<sup>4</sup>.

No application may, however, be made under any of the above provisions in respect of a matter which:

- 630 (i) has been agreed or admitted by the tenant<sup>5</sup>;
- 631 (ii) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement<sup>6</sup> to which the tenant is a party;
- 632 (iii) has been the subject of determination by a court; or
- 633 (iv) has been the subject of determination by an arbitral tribunal<sup>7</sup> pursuant to a post-dispute arbitration agreement<sup>8</sup>;

but the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment<sup>9</sup>.

An agreement by the tenant of a dwelling<sup>10</sup>, other than a post-dispute arbitration agreement, is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question which may be the subject of an application under the above provisions<sup>11</sup>.

The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of these provisions is in addition to any jurisdiction of a court in respect of the matter<sup>12</sup>. A leasehold valuation tribunal has jurisdiction to determine a claim for damages for breach of covenant so far as such a claim constitutes a defence to a claim for payment of a service

charge and this may extend to determining a claim for loss of amenity or loss of health arising from a breach of a repairing covenant<sup>13</sup>; but the tribunal may decline to exercise this jurisdiction in a matter where the nature of the issues makes a court procedure more appropriate<sup>14</sup>.

1 For the meaning of 'service charge' see PARA 326 ante.

2 Landlord and Tenant Act 1985 s 27A(1) (s 27A added by the Commonhold and Leasehold Reform Act 2002 s 155(1)). There is no justification for implying any restriction into the entirely general words of the Landlord and Tenant Act 1985 s 27A (as so added); in most cases the applicant for a determination as to the proper amount of service charge payable will be the party who is liable to pay the service charge the subject of the challenge, and the respondent to the application will be the party who is seeking to levy it on the applicant; but there is no reason why that should inevitably be the case: *Ruddy v Oakfern Properties Ltd* [2006] EWCA Civ 1389, [2006] All ER (D) 290 (Oct).

A fee is payable for making an application under the Landlord and Tenant Act 1985 s 27A (as added): see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(1)(a), (2), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(1)(a), (2), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by the name and address of the secretary of any recognised tenants' association and a copy of the lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(b), Sch 2 para 2(1), (3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(b), Sch 2 para 2(1), (3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

3 Landlord and Tenant Act 1985 s 27A(2) (as added: see note 2 supra).

4 Ibid s 27A(3) (as added: see note 2 supra).

5 For the meaning of 'tenant' see PARA 325 note 3 ante.

6 'Post-dispute arbitration agreement', in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen; and 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1209 et seq); Landlord and Tenant Act 1985 s 38 (definition added by the Housing Act 1996 s 83(5); amended by the Commonhold and Leasehold Reform Act 2002 s 155(2)).

7 'Arbitral tribunal' has the same meaning as in the Arbitration Act 1996 Pt I (see ARBITRATION vol 2 (2008) PARA 1226); Landlord and Tenant Act 1985 s 38 (definition as added and amended: see note 6 supra).

8 Ibid s 27A(4) (as added: see note 2 supra).

9 Ibid s 27A(5) (as added: see note 2 supra).

10 For the meaning of 'dwelling' see PARA 52 note 2 ante.

11 Landlord and Tenant Act 1985 s 27A(6) (as added: see note 2 supra).

12 Ibid s 27A(7) (as added: see note 2 supra).

13 See *Continental Property Ventures Inc v White* [2006] 1 EGLR 85 at [15], [2006] 16 EG 148, Lands Tribunal (had the landlord complied with its repairing covenant and repaired a leaking pipe within a reasonable time, the costs would have been less; held that this provided a defence to recovery of the full costs of the repairs actually expended).

14 *Canary Riverside Pte v Schilling* (LRX/65/2005, 16 December 2005, unreported), Lands Tribunal.

## UPDATE

### 351 Determination of liability to pay service charges



NOTE 2--*Ruddy*, cited, reported at [2007] 1 All ER 337.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/F. MANNER IN WHICH SERVICE CHARGE CONTRIBUTIONS TO BE HELD/352. Service charge contributions to be held in trust.

## ***F. MANNER IN WHICH SERVICE CHARGE CONTRIBUTIONS TO BE HELD***

### **352. Service charge contributions to be held in trust.**

The following provisions apply where:

- 634 (1) the tenants<sup>1</sup> ('the contributing tenants') of two or more dwellings<sup>2</sup> may be required under the terms of their leases<sup>3</sup> to contribute to the same costs; or
- 635 (2) the tenant ('the sole contributing tenant') of a dwelling may be required under the terms of his lease to contribute to costs to which no other tenant of a dwelling may be required to contribute,

by the payment of service charges<sup>4</sup>. For these purposes, 'tenant' does not, however, include a tenant of an exempt landlord<sup>5</sup>.

Any sums paid to the payee<sup>6</sup> by the contributing tenants or the sole contributing tenant by way of relevant service charges<sup>7</sup>, (and, until a day to be appointed<sup>8</sup>, any investments representing those sums), must, together with any income accruing thereon, be held by the payee either as a single fund or, if he thinks fit, in two or more separate funds<sup>9</sup>.

The payee must hold any trust fund<sup>10</sup>:

- 636 (a) on trust to defray costs incurred in connection with the matters for which the relevant service charges were payable, whether incurred by himself or by any other person; and
- 637 (b) subject thereto, on trust for the persons who are the contributing tenants for the time being or the person who is the sole contributing tenant for the time being<sup>11</sup>;

and the contributing tenants are to be treated<sup>12</sup> as entitled by virtue of head (2) above to such shares in the residue of any such fund as are proportionate to their respective liabilities to pay relevant service charges, or the sole contributing tenant is to be treated as so entitled to the residue of any such fund<sup>13</sup>.

On the termination of the lease of any of the contributing tenants, the tenant is not entitled to any part of any trust fund; and any part of any such fund which is attributable to relevant service charges paid under the lease accordingly continues to be held<sup>14</sup> on the statutory trusts<sup>15</sup>. On the termination of the lease of the last of the contributing tenants, or of the lease of the sole contributing tenant, any trust fund must be dissolved as at the date of the termination of the lease; and any assets comprised in the fund immediately before the dissolution must:

- 638 (i) if the payee is the landlord, be retained by him for his own use and benefit; and
- 639 (ii) in any other case, be transferred to the landlord by the payee<sup>16</sup>.

The above provisions prevail<sup>17</sup> over the terms of any express or implied trust<sup>18</sup> created by a lease so far as inconsistent with those provisions, other than an express trust so created before 1 April 1989<sup>19</sup> in the case of a lease of any of the contributing tenants or, in the case of the lease of the sole contributing tenant, before the appointed day<sup>20</sup>.

1 For the meaning of 'tenant' generally see PARA 53 note 1 ante; and see the text and note 5 infra.

2 For the meaning of 'dwelling' see PARA 53 note 2 ante.

3 For the meaning of 'lease' see PARA 53 note 1 ante.

4 Landlord and Tenant Act 1987 s 42(1) (s 42(1)-(4), (6)-(9) amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 15, with effect from 28 February 2005 in relation to England (see the Commonhold and Leasehold Reform Act 2002 (Commencement No 5 and Saving and Transitional Provision) Order 2004, SI 2004/3056, art 3(b)); and with effect from 31 May 2005 in relation to Wales (see the Commonhold and Leasehold Reform Act 2002 (Commencement No 3 and Saving and Transitional Provision) (Wales) Order 2005, SI 2005/1353, art 2(b)).

For these purposes, 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante), except that it does not include a service charge payable by the tenant of a dwelling the rent of which is registered under the Rent Act 1977 Pt IV (ss 62-75) (as amended) (see PARA 909 et seq post), unless the amount registered is, in pursuance of s 71(4) (as amended) (see PARA 922 post), entered as a variable amount: Landlord and Tenant Act 1987 s 42(1).

5 Ibid s 42(1). For the meaning of 'exempt landlord' see PARA 354 post. Where the premises are managed by an RTM company (see PARA 367 et seq post), this definition of 'tenant' does not apply; and references to a tenant of a dwelling include a person who is landlord under a lease of the whole or any part of the premises. see the Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 11(1), (3), (4).

6 For these purposes, 'the payee' means the landlord or other person to whom any such charges are payable by the contributing tenants under the terms of their leases, or by the sole contributing tenant under the terms of his lease: Landlord and Tenant Act 1987 s 42(1) (as amended: see note 4 supra). Where the premises are managed by an RTM company, references to the payee are to that company: Commonhold and Leasehold Reform Act 2002 Sch 7 para 11(1), (2).

7 For these purposes, 'relevant service charges' means any such charges as are payable by the contributing tenants or the sole contributing tenant under the terms of their leases or of his lease: Landlord and Tenant Act 1987 s 42(1) (as amended: see note 4 supra). See also note 9 infra.

8 Ie a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9 Landlord and Tenant Act 1987 s 42(2) (as amended (see note 4 supra); further prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 8 supra)). Where the premises are managed by an RTM company, the reference in the Landlord and Tenant Act 1987 s 42(2) (as so amended) to sums paid to the payee by the contributing tenants by way of relevant service charges includes payments made to the RTM company under the Commonhold and Leasehold Reform Act 2002 s 94 or s 103 (see PARAS 389, 395 post): Sch 7 para 11(1), (5).

If the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister by order so provides, any sums standing to the credit of any trust fund may, instead of being invested in any other manner authorised by law, be invested in such manner as may be specified in the order; and any such order may contain such incidental, supplemental or transitional provisions as the Secretary of State or the Assembly or minister considers appropriate in connection with the order: Landlord and Tenant Act 1987 s 42(5) (prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 8 supra)). Any power of the Secretary of State or the Assembly to make an order or regulations under the Landlord and Tenant Act 1987 is exercisable by statutory instrument and may be exercised so as to make different provision for different cases, including different provision for different areas: s 53(1). A statutory instrument containing (1) an order under s 1(5) (see PARA 1746 post), s 25(6) (see PARA 1783 post), s 42(5) (as so repealed) or s 55 (application to Isles of Scilly); or (2) any regulations made under s 20(4) (see PARA 1752 note 8 post), or 35(2)(g) (as added) (see PARA 149 ante) is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 53(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

In exercise of the power conferred by s 42(5) (as so repealed) and prior to the transfer of functions in relation to Wales, the Secretary of State made the Service Charge Contributions (Authorised Investments) Order 1988, SI 1988/1284, which came into force on 1 April 1989: art 1. Any sums standing to the credit of any trust fund to which the Landlord and Tenant Act 1987 s 42 (as amended) applies may be (1) deposited at interest with the Bank of England; or (2) deposited in the United Kingdom at interest with (a) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to accept deposits; or (b) an EEA firm of the kind mentioned in Sch 3 para 5(b) (as substituted) who has permission under Sch 3 para 15 (as amended) (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits; and where a person of a kind mentioned in head (2)(a) supra is a building society within the meaning of the Building Societies Act 1986, any such sums may also be invested in shares in that building society: Service Charge Contributions (Authorised Investments) Order 1988, SI 1988/1284, art 2(1), (2) (amended by SI 2001/3649). Heads (1)-(2) supra must be read with (i) the Financial Services and Markets Act 2000 s 22; (ii) any relevant order under s 22; and (iii) Sch 22 (as amended): Service Charge Contributions (Authorised Investments) Order 1988, SI 1988/1284, art 2(3) (added by SI 2001/3649).

10 For these purposes, 'trust fund' means the fund or, as the case may be, any of the funds mentioned in the Landlord and Tenant Act 1987 s 42(2)(as amended): s 42(1).

11 Ibid s 42(3) (as amended: see note 4 supra).

12 Ie subject to ibid s 42(6)-(8) (as amended): see the text and notes 13-16 infra.

13 Ibid s 42(4) (as amended: see note 4 supra). Section 42(4) (as amended) and s 42(6), (7) (as amended) (see the text and notes 14-16 infra) have effect in relation to any of the contributing tenants, or a sole contributing tenant, subject to any express terms of his lease, whenever it was granted, which relate to the distribution, either before or, as the case may be, at the termination of the lease, of amounts attributable to relevant service charges paid under its terms: s 42(8) (as so amended; further prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 8 supra); at the date at which this title states the law, no such day had been appointed). Until that amendment comes into force, the words 'whenever it was granted' are omitted and the words 'paid under its terms' are followed by the words 'whether the lease was granted before or after the commencement of this section'.

A landlord may establish a reserve fund and apply a year end service charge surplus to it, but only in accordance with the terms of the lease; as such, only such reasonable part of expenses, outgoings and other expenditure as are of a periodically recurring nature may be applied: see *St Mary's Mansions Ltd v Limegate Investment Co (Sarruf, Pt 20 defendants)* [2002] EWCA Civ 1491, [2003] HLR 319, [2002] All ER (D) 169 (Oct).

14 Ie continues to be held on the trusts referred to in the Landlord and Tenant Act 1987 s 42(3) (as amended): see the text and notes 10-11 supra.

15 Ibid s 42(6) (as amended: see note 4 supra). See also note 13 supra.

16 Ibid s 42(7) (as amended). See also note 13 supra.

17 Ie subject to ibid s 42(8) (as amended): see note 13 supra.

18 As to the creation of, and distinction between, express and implied trusts see TRUSTS vol 48 (2007 Reissue) PARA 624 et seq; as to express trusts see *Gordon v Selico Co Ltd* (1986) 18 HLR 219, [1986] 1 EGLR 71, CA and *Holding and Management Ltd v Property Holding and Investment Trust plc* [1990] 1 All ER 938, [1989] 1 WLR 1313, CA; and as to implied trusts see *Re Chelsea Cloisters Ltd (in liquidation)* (1980) 41 P & CR 98, CA and *Frobisher (Second Investments) Ltd v Kiloran Trust Co* [1980] 1 All ER 488, [1980] 1 WLR 425.

19 Ie the commencement date of the Landlord and Tenant Act 1987 s 42 (now as amended): see the Landlord and Tenant Act 1987 (Commencement No 3) Order 1988, SI 1988/1283, art 2.

20 Landlord and Tenant Act 1987 s 42(9) (as amended: see note 4 supra). The appointed day so far as relating to the lease of the sole contributing tenant is the date of the commencement of the Commonhold and Leasehold Reform Act 2002 Sch 10 para 15: see note 4 supra.

## UPDATE

### 352 Service charge contributions to be held in trust

NOTE 9--Landlord and Tenant Act 1987 s 53 further amended: Housing and Regeneration Act 2008 Sch 12 para 13 (partly in force: SI 2008/3068).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/8. SERVICE AND ADMINISTRATION CHARGES; INSURANCE/(1) SERVICE CHARGES/(ii) The Statutory Regime relating to Dwellings/F. MANNER IN WHICH SERVICE CHARGE CONTRIBUTIONS TO BE HELD/353. Service charge contributions to be held in designated account.

### **353. Service charge contributions to be held in designated account.**

As from a day which, except for the purposes of making relevant regulations, is to be appointed<sup>1</sup>, the following provisions have effect. The payee<sup>2</sup> must hold any sums standing to the credit of any trust fund<sup>3</sup> in a designated account at a relevant financial institution<sup>4</sup>; and an account is a designated account in relation to sums standing to the credit of a trust fund if:

- 640 (1) the relevant financial institution has been notified in writing that sums standing to the credit of the trust fund are to be, or are, held in it; and
- 641 (2) no other funds are held in the account,

and the account is an account of a description specified in regulations made by the Secretary of State<sup>5</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>6</sup>.

Any of the contributing tenants<sup>7</sup>, or the sole contributing tenant<sup>8</sup>, may by notice in writing<sup>9</sup> require the payee:

- 642 (a) to afford him reasonable facilities for inspecting documents evidencing that the duty to hold service charge contributions in a designated account is complied with<sup>10</sup> and for taking copies of or extracts from them; or
- 643 (b) to take copies of or extracts from any such documents and either send them to him or afford him reasonable facilities for collecting them, as he specifies<sup>11</sup>.

If the tenant is represented by a recognised tenants' association<sup>12</sup> and he consents, the notice may be served by the secretary of the association instead of by the tenant, and in that case any requirement imposed by it is to afford reasonable facilities, or to send copies or extracts, to the secretary<sup>13</sup>. The payee must comply with a requirement imposed by a notice under these provisions within the period of 21 days beginning with the day on which he receives the notice<sup>14</sup>. To the extent that such a notice requires the payee to afford facilities for inspecting documents he must do so free of charge, but he may treat as part of his costs of management any costs incurred by him in doing so<sup>15</sup>. The payee may make a reasonable charge for doing anything else in compliance with a requirement imposed by such a notice<sup>16</sup>.

Any of the contributing tenants, or the sole contributing tenant, may withhold payment of a service charge<sup>17</sup> if he has reasonable grounds for believing that the payee has failed to comply with the duty imposed on him to hold service charge contributions in a designated account<sup>18</sup>, and any provisions of his tenancy relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it<sup>19</sup>.

Nothing in the above provisions, however, applies to the payee if the circumstances are such as are specified in regulations made by the Secretary of State or the Assembly or minister<sup>20</sup>.

If a person fails, without reasonable excuse, to comply with a duty imposed on him by or by virtue of the above provisions he commits an offence<sup>21</sup> and is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>22</sup>. Where such an offence committed by a body

corporate is proved to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in such a capacity, or to be due to any neglect on the part of such an officer or person, he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly<sup>23</sup>. Proceedings for an offence under these provisions may be brought by a local housing authority<sup>24</sup>.

1 le partly as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1).

2 For the meaning of 'payee' see PARA 352 note 6 ante (definition applied by the Landlord and Tenant Act 1987 s 42A(11) (s 42A, 42B added by the Commonhold and Leasehold Reform Act 2002 s 156(1), partly as from a day to be appointed (see note 1 supra)). At the date at which this title states the law, the Landlord and Tenant Act 1987 s 42A (as so added) was in force only for the purpose of making regulations (see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(c); the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(c)); and the Landlord and Tenant Act 1987 s 42B (as so added) was not in force.

3 For the meaning of 'trust fund' see PARA 352 note 10 ante (definition as applied: see note 2 supra).

4 Landlord and Tenant Act 1987 s 42A(1) (as added: see note 2 supra). For these purposes, 'relevant financial institution' has the meaning given by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister: s 42(11) (as so added). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

5 As to the Secretary of State see PARA 27 note 3 ante.

6 Landlord and Tenant Act 1987 s 42A(2) (as added: see note 2 supra).

7 For the meaning of 'contributing tenant' see PARA 352 ante (definition as applied: see note 2 supra).

8 For the meaning of 'sole contributing tenant' see PARA 352 ante (definition as applied: see note 2 supra).

9 A notice under the Landlord and Tenant Act 1987 s 42A (as added) is duly served on the payee if it is served on (1) an agent of the payee named as such in the rent book or similar document; or (2) the person who receives the rent on behalf of the payee; and a person on whom such a notice is so served must forward it as soon as may be to the payee: s 42A(5) (as added: see note 2 supra). Where the premises are managed by an RTM company (see PARA 367 et seq post), s 42A(5) (as so added) applies as if head (1) supra were omitted and the person referred to in head (2) supra were a person who receives service charges on behalf of the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 11(1), (6).

10 le that the Landlord and Tenant Act 1987 s 42A(1) (as added) is complied with: see the text and notes 1-4 supra.

11 Ibid s 42A(3) (as added: see note 2 supra).

12 For these purposes, 'recognised tenants' association' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 327 ante): Landlord and Tenant Act 1987 s 42A(11) (as added: see note 2 supra).

13 Ibid s 42A(4) (as added: see note 2 supra).

14 Ibid s 42A(6) (as added: see note 2 supra).

15 Ibid s 42A(7) (as added: see note 2 supra).

16 Ibid s 42A(8) (as added: see note 2 supra).

17 For the meaning of 'service charge' for these purposes see PARA 352 note 4 ante (definition as applied: see note 2 supra).

18 le the duty imposed by the Landlord and Tenant Act 1987 s 42A(1) (as added): see the text and notes 1-4 supra.

19 Ibid s 42A(9) (as added: see note 2 supra).

20 Ibid s 42A(10) (as added: see note 2 supra).

21 Ibid s 42B(1) (as added: see note 2 supra).

22 Ibid s 42B(2) (as added: see note 2 supra). As to the standard scale see PARA 52 note 6 ante.

23 Ibid s 42B(3) (as added: see note 2 supra). Where the affairs of a body corporate are managed by its members, s 42B(3) (as so added) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 42B(4) (as so added).

24 Ibid s 42B(5) (as added: see note 2 supra). For these purposes, 'local housing authority' has the same meaning as in the Housing Act 1985 s 1 (as amended) (see PARA 1311 note 4 post): Landlord and Tenant Act 1987 s 42B(5) (as so added).

## UPDATE

### 353 Service charge contributions to be held in designated account

TEXT AND NOTES 1-20--Landlord and Tenant Act 1987 s 42A amended: Housing and Regeneration Act 2008 Sch 12 para 12 (partly in force: SI 2008/3068).

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### 354. Meaning of 'exempt landlord'.

'Exempt landlord' means<sup>1</sup> a landlord<sup>2</sup> who is one of the following bodies, namely:

- 644 (1) a district, county, county borough<sup>3</sup> or London borough<sup>4</sup> council, the Common Council of the City of London<sup>5</sup>, the London Fire and Emergency Planning Authority<sup>6</sup>, the Council of the Isles of Scilly<sup>7</sup>, a police authority<sup>8</sup> or a joint authority established by Part IV of the Local Government Act 1985<sup>9</sup>;
- 645 (2) the Commission for the New Towns<sup>10</sup> or a development corporation<sup>11</sup>;
- 646 (3) an urban development corporation<sup>12</sup>;
- 647 (4) a housing action trust<sup>13</sup>;
- 648 (5) the Broads Authority<sup>14</sup>;
- 649 (6) a National Park authority<sup>15</sup>;
- 650 (7) the Housing Corporation<sup>16</sup>;
- 651 (8) a housing trust<sup>17</sup> which is a charity<sup>18</sup>;
- 652 (9) a registered social landlord<sup>19</sup> or a fully mutual housing association<sup>20</sup> which is not a registered social landlord; or
- 653 (10) an authority established<sup>21</sup> to exercise waste disposal functions<sup>22</sup>.

Although exempt landlords are not required to hold service charge contributions in trust<sup>23</sup>, in practice many do so. With effect from 6 April 2006, where registered social landlords and other exempt landlords hold such contributions in trust, any income accumulating qualifies for relief from the special rates for income tax normally applicable to trust income and instead is chargeable at no more than the basic rate of tax<sup>24</sup>.

1 le for the purposes of the Landlord and Tenant Act 1987: see PARAS 352-353 ante, PARA 1783 et seq post.

2 For the meaning of 'landlord' see PARA 53 note 1 ante.

3 As to the counties and districts in England and their councils and the counties and county boroughs in Wales see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq.

4 As to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT 29(2) (Reissue) PARA 31 et seq.

5 See note 4 supra.

6 As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

7 As to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

8 Ie a police authority established under the Police Act 1996 s 3: see POLICE vol 36(1) (2007 Reissue) PARA 139.

9 Ie established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

10 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

11 Ie established by an order made, or having effect as if made, under the New Towns Act 1981. As to new town development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

12 Ie within the meaning of the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172) (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1426 et seq.

13 Ie established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING (2006 Reissue) PARA 319 et seq.

14 As to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

15 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

16 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

17 Ie as defined in the Housing Act 1985 s 6: see HOUSING vol 22 (2006 Reissue) PARA 12.

18 For these purposes, 'charity' means a charity within the meaning of the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 1): Landlord and Tenant Act 1987 s 60(1) (amended by the Charities Act 1993 s 98(1), Sch 6 para 30).

19 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1985 (see s 5(4), (5) (as substituted and amended); and HOUSING vol 22 (2006 Reissue) PARA 67): Landlord and Tenant Act 1987 s 58(1A) (added by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 17(3)).

20 For these purposes, 'fully mutual housing association' has the same meaning as in the Housing Associations Act 1985 (see s 1(1), (2) (as amended); para 885 post; and HOUSING vol 22 (2006 Reissue) PARA 11): Landlord and Tenant Act 1987 s 58(1A) (as added: see note 19 supra).

21 Ie established under the Local Government Act 1985 s 10 (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 17; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 620.

22 Landlord and Tenant Act 1987 s 58(1) (amended by the Housing Act 1988 ss 119, 140(1), Sch 13 para 7, Sch 17 Pt II para 114; the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 28; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 8; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 para 61; the Environment Act 1995 s 78, Sch 10 para 26; the Police Act 1996 s 103, Sch 7 para 1(2)(z); the Police Act 1997 s 134(1), Sch 9 para 52; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 48; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 3 para 70, Sch 7 Pt 5(1); the Government of Wales Act 1998, s 152, Sch 18 Pt IV; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 17(2)); Landlord and Tenant Act 1987 s 60(1).

23 Ie the requirements of *ibid* ss 42-42B (as amended) (see PARAS 352-353 ante) do not apply.

24 See HMRC BN 34 (22 March 2006); and the Income and Corporation Taxes Act 1988 s 686(2)(ba) (added by the Finance Act 2006 s 90(1), (2) with effect for the year 2006-07 and subsequent years of assessment: see s 90(4)).

## UPDATE

### 354 Meaning of 'exempt landlord'

TEXT AND NOTE 16--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

TEXT AND NOTE 22--Definition of 'exempt landlord' in Landlord and Tenant Act 1987 s 58(1) further amended: Housing and Regeneration Act 2008 Sch 8 para 40, Sch 16; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 72.

NOTE 24--Income and Corporation Taxes Act 1988 s 686(2)(ba) now Income Tax Act 2007 s 480(3)(c) (amended by the Finance Act 2007 s 66(2)) having effect for the year 2007-08 and subsequent years of assessment and applying to dwellings in the United Kingdom.

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## (2) ADMINISTRATION CHARGES IN RELATION TO DWELLINGS

### 355. Meanings of 'administration charge' and 'variable administration charge'.

For the statutory purposes<sup>1</sup>, 'administration charge' means an amount payable by a tenant<sup>2</sup> of a dwelling<sup>3</sup> as part of or in addition to the rent which is payable, directly or indirectly:

- 654 (1) for or in connection with the grant of approvals under his lease, or applications for such approvals;
- 655 (2) for or in connection with the provision of information or documents by or on behalf of the landlord<sup>4</sup> or a person who is party to his lease otherwise than as landlord or tenant;
- 656 (3) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant; or
- 657 (4) in connection with a breach, or alleged breach, of a covenant or condition in his lease<sup>5</sup>.

An amount payable by the tenant of a dwelling the rent of which is registered under Part IV of the Rent Act 1977<sup>6</sup> is not, however, an administration charge, unless the amount registered is entered<sup>7</sup> as a variable amount<sup>8</sup>.

An order amending heads (1) to (4) above may be made by the appropriate national authority<sup>9</sup>.

'Variable administration charge' means an administration charge payable by a tenant which is neither:



- 658 (a) specified in his lease; nor  
 659 (b) calculated in accordance with a formula specified in his lease<sup>10</sup>.

The statutory provisions regarding the reasonableness of administration charges<sup>11</sup> apply in relation to Crown land<sup>12</sup> as they apply in relation to other land<sup>13</sup>.

- 1 le for the purposes of the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11: see PARA 356 et seq post.
- 2 For these purposes, 'tenant' includes a statutory tenant; and 'statutory tenant' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 1 ante): Commonhold and Leasehold Reform Act 2002 Sch 11 para 6(1)-(3).
- 3 For these purposes, 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante): Commonhold and Leasehold Reform Act 2002 Sch 11 para 6(3).
- 4 For these purposes, 'landlord', in relation to a statutory tenancy, has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 1 ante): Commonhold and Leasehold Reform Act 2002 Sch 11 para 6(3). Where the premises are managed by an RTM company (as so which see PARA 374 post), Sch 11 has effect as if references to the landlord (or a party to a lease) included the RTM company: s 102(1), Sch 7 para 16.
- 5 Ibid Sch 11 para 1(1).
- 6 le under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq post.
- 7 le in pursuance of ibid s 71(4): see PARA 922 post.
- 8 Commonhold and Leasehold Reform Act 2002 Sch 11 para 1(2).
- 9 Ibid Sch 11 para 1(4). 'The appropriate national authority' means the Secretary of State, as respects England, and the National Assembly for Wales or the relevant Welsh minister, as respects Wales: s 179(1); and see PARA 27 notes 3-4 ante. An order under any provision of Pt 2 (ss 71-179) (as amended) (1) may include incidental, supplementary, consequential and transitional provision; (2) may make provision generally or only in relation to specified cases; and (3) may make different provision for different purposes: s 178(1). Any power to make such an order is exercisable by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 178(3), (5).
- 10 Ibid Sch 11 para 1(3).
- 11 le ibid Sch 11 Pt 1 (paras 1-6): see the text and notes 1-10 supra; and PARA 356 et seq post.
- 12 For the meaning of 'Crown land' see PARA 24 note 8 ante.
- 13 See the Commonhold and Leasehold Reform Act 2002 s 172(1)(h); and PARA 24 ante.

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### **356. Notice in connection with demands for administration charges.**

A demand for the payment of an administration charge<sup>1</sup> must be accompanied by a summary of the rights and obligations of tenants<sup>2</sup> of dwellings<sup>3</sup> in relation to administration charges<sup>4</sup>. The appropriate national authority<sup>5</sup> may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations<sup>6</sup>.

A tenant may withhold payment of an administration charge which has been demanded from him if the above requirement is not complied with in relation to the demand<sup>7</sup>. Where a tenant so withholds an administration charge, any provisions of the lease relating to non-payment or late payment of administration charges do not have effect in relation to the period for which he so withholds it<sup>8</sup>.

1 For the meaning of 'administration charge' see PARA 355 ante.

2 For the meaning of 'tenant' see PARA 355 note 2 ante.

3 For the meaning of 'dwelling' see PARA 355 note 3 ante.

4 Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 4(1).

5 For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

6 Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 4(2). At the date at which this title states the law, no such regulations had been made.

7 Ibid Sch 11 para 4(3).

8 Ibid Sch 11 para 4(4).

## **UPDATE**

### **356 Notice in connection with demands for administration charges**

NOTE 6--See the Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007, SI 2007/1258 (amended by SI 2009/1307); and the Administration Charges (Summary of Rights and Obligations) (Wales) Regulations 2007, SI 2007/3162.

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### **357. Reasonableness of administration charges.**

A variable administration charge<sup>1</sup> is payable only to the extent that the amount of the charge is reasonable<sup>2</sup>. Any party to a lease<sup>3</sup> of a dwelling<sup>4</sup> may apply to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application on the grounds that:

660 (1) any administration charge specified in the lease is unreasonable; or

661 (2) any formula specified in the lease in accordance with which any administration charge is calculated is unreasonable<sup>5</sup>.

If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the lease in such manner as is specified in the order<sup>6</sup>. The variation so specified may be:

662 (a) the variation specified in the application; or

663 (b) such other variation as the tribunal thinks fit<sup>7</sup>.

The tribunal may, instead of making an order varying the lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified<sup>8</sup>.

The tribunal may by order direct that a memorandum of any variation of a lease effected by virtue of these provisions is to be indorsed on such documents as are specified in the order<sup>9</sup>.

Any such variation of a lease is binding not only on the parties to the lease for the time being but also on other persons, including any predecessors in title, whether or not they were parties to the proceedings in which the order was made<sup>10</sup>.

1 For the meanings of 'administration charge' and 'variable administration charge' see PARA 355 ante.

2 Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 2.

3 Ie including, where the premises are managed by an RTM company, that company: see PARA 355 note 4 ante.

4 For the meaning of 'dwelling' see PARA 355 note 3 ante.

5 Commonhold and Leasehold Reform Act 2002 Sch 11 para 3(1). A fee is payable for making an application under Sch 11 para 3: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(1)(c), (2), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(1)(c), (2), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by a copy of the lease and a draft of the proposed variation: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(e), Sch 2 para 2(2), (3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(e), Sch 2 para 2(2), (3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

6 Commonhold and Leasehold Reform Act Sch 11 para 3(2).

7 Ibid Sch 11 para 3(3).

8 Ibid Sch 11 para 3(4).

9 Ibid Sch 11 para 3(5).

10 Ibid Sch 11 para 3(6).

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### **358. Liability to pay administration charges; jurisdiction.**

An application may be made to a leasehold valuation tribunal for a determination whether an administration charge<sup>1</sup> is payable and, if it is, as to:

- 664 (1) the person by whom it is payable;
- 665 (2) the person to whom it is payable;
- 666 (3) the amount which is payable;

- 667 (4) the date at or by which it is payable; and
- 668 (5) the manner in which it is payable<sup>2</sup>;

and this applies whether or not any payment has been made<sup>3</sup>.

The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of the above provisions is in addition to any jurisdiction of a court in respect of the matter<sup>4</sup>; but no such application may be made in respect of a matter which:

- 669 (a) has been agreed or admitted by the tenant<sup>5</sup>;
- 670 (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement<sup>6</sup> to which the tenant is a party;
- 671 (c) has been the subject of determination by a court; or
- 672 (d) has been the subject of determination by an arbitral tribunal<sup>7</sup> pursuant to a post-dispute arbitration agreement<sup>8</sup>.

The tenant is not, however, to be taken to have agreed or admitted any matter by reason only of having made any payment<sup>9</sup>.

An agreement by the tenant of a dwelling<sup>10</sup>, other than a post-dispute arbitration agreement, is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question which may be the subject matter of an application under these provisions<sup>11</sup>.

1 For the meaning of 'administration charge' see PARA 355 ante.

2 Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 5(1). A fee is payable for making an application under Sch 11 para 5: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(1)(d), (2), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(1)(d), (2), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by a copy of the lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(f), Sch 2 para 2(3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(f), Sch 2 para 2(3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

3 Commonhold and Leasehold Reform Act 2002 Sch 11 para 5(2).

4 Ibid Sch 11 para 5(3).

5 For the meaning of 'tenant' see PARA 355 note 2 ante.

6 For these purposes, 'post-dispute arbitration agreement', in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen; and 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1213); Commonhold and Leasehold Reform Act 2002 Sch 11 para 6(4), (5).

7 'Arbitral tribunal' has the same meaning as in the Arbitration Act 1996 Pt I (see ARBITRATION vol 2 (2008) PARA 1226 et seq); Commonhold and Leasehold Reform Act 2002 Sch 11 para 6(5).

8 Ibid Sch 11 para 5(4).

9 Ibid Sch 11 para 5(5).

10 For the meaning of 'dwelling' see PARA 355 note 3 ante.

11 Commonhold and Leasehold Reform Act 2002 Sch 11 para 5(6).

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### **(3) INSURANCE IN RELATION TO DWELLINGS**

#### **359. In general.**

In certain circumstances a tenant<sup>1</sup> has the right:

- 673 (1) to request a summary of insurance cover<sup>2</sup>;
- 674 (2) to request to inspect the insurance policy<sup>3</sup>;
- 675 (3) to notify insurers of possible claims<sup>4</sup>; and
- 676 (4) to challenge a landlord's choice of insurers<sup>5</sup>.

Those rights<sup>6</sup> do not apply to a tenant of a local authority<sup>7</sup>, a National Park authority<sup>8</sup> or a new town corporation<sup>9</sup> unless the tenancy is a long tenancy<sup>10</sup>. They do, however, apply in relation to Crown land<sup>11</sup> as in relation to other land; but no failure by the Crown to perform a duty imposed by or by virtue of any of those provisions makes the Crown criminally liable<sup>12</sup>.

It is a summary offence, punishable on conviction by a fine not exceeding level 4 on the standard scale, for a person to fail, without reasonable excuse, to perform a duty imposed on him by or by virtue of the statutory provisions conferring the rights described in heads (1) and (2) above<sup>13</sup>.

A tenant of a house under a long lease also has a statutory right to effect the insurance of the house with any authorised insurer, provided that certain conditions are satisfied<sup>14</sup>.

1 For these purposes, 'tenant' includes a statutory tenant: Landlord and Tenant Act 1985 s 30A, Schedule para 1 (s 30A, Schedule added by the Landlord and Tenant Act 1987 s 43(1), (2), Sch 3). Where the premises are managed by an RTM company (see PARA 367 et seq post), references to a tenant include a person who is landlord under a lease of the whole or any part of the premises and has to make payments under the Commonhold and Leasehold Reform Act 2002 s 103 (see PARA 395 post): s 102(1), Sch 7 para 5(1), (3)). For the meanings of 'tenant' generally and of 'statutory tenant' see PARA 52 note 1 ante.

2 See PARAS 360, 362 post.

3 See PARAS 361-362 post.

4 See PARA 364 post.

5 See PARA 365 post.

6 I.e. the rights conferred by the Landlord and Tenant Act 1985 Schedule paras 2-8 (as added and amended): see PARA 360 et seq post.

7 For the meaning of 'local authority' see PARA 248 note 3 ante.

8 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

9 For the meaning of 'new town corporation' see PARA 248 note 3 ante.

10 Landlord and Tenant Act 1985 Schedule para 9(1) (as added (see note 1 supra); amended by the Environment Act 1995 s 78, Sch 10 para 25(1); the Government of Wales Act 1998 ss 129, 152, Sch 15 para 14, Sch 18 Pt IV). Where the tenancy is a long tenancy, the Landlord and Tenant Act 1985 Schedule paras 2-5, 7, 8

(as amended) (see PARA 360 et seq post) apply but Schedule para 6 (as added and amended) (see the text and note 13 infra) does not: Schedule para 9(1) (as so added).

Section 26(2), (3) (as amended) (meaning of 'long tenancy': see PARA 325 ante) applies for the purposes of Schedule para 9(1) (as so added and amended) as it applies for the purposes of s 26(1) (as amended) (see PARA 325 ante): Schedule para 9(2) (as so added).

11 For the meaning of 'Crown land' for these purposes see PARA 24 note 8 ante.

12 See the Commonhold and Leasehold Reform Act 2002 s 172(1)(a), (3); and PARA 24 ante.

13 Landlord and Tenant Act 1985 Schedule para 6(1), (2) (as added (see note 1 supra); amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 13). As to the standard scale see PARA para 52 note 6 ante. As to offences by bodies corporate see the Landlord and Tenant Act 1985 s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

14 See the Commonhold and Leasehold Reform Act 2002 s 164; and PARA 366 post.

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### **360. Summary of insurance cover.**

Where a service charge<sup>1</sup> is payable by the tenant<sup>2</sup> of a dwelling<sup>3</sup> which consists of or includes an amount payable directly or indirectly for insurance, the tenant may by notice in writing require the landlord<sup>4</sup> to supply him with a written summary of the insurance for the time being effected in relation to the dwelling<sup>5</sup>. If the tenant is represented by a recognised tenants' association<sup>6</sup> and he consents, the notice may be served by the secretary of the association instead of by the tenant and may then be for the supply of the summary to the secretary<sup>7</sup>.

A notice under these provisions is duly served on the landlord if it is served on:

- 677 (1) an agent of the landlord named as such in the rent book or similar document;  
or
- 678 (2) the person who receives the rent on behalf of the landlord;

and a person on whom such a notice is so served must forward it as soon as may be to the landlord<sup>8</sup>.

The landlord must, within the period of 21 days beginning with the day on which he receives the notice, comply with it by supplying to the tenant or the secretary of the recognised tenants' association, as the case may require, such a summary as is mentioned above<sup>9</sup>, which must include:

- 679 (a) the insured amount or amounts<sup>10</sup> under any relevant policy<sup>11</sup>;
- 680 (b) the name of the insurer under any such policy; and
- 681 (c) the risks in respect of which the dwelling or, as the case may be, the building containing it is insured under any such policy<sup>12</sup>.

The landlord is taken to have complied with the notice if, within the specified period<sup>13</sup>, he instead supplies to the tenant or the secretary, as the case may be, a copy of every relevant policy<sup>14</sup>.

In a case where two or more buildings are insured under any relevant policy, the summary or copy supplied<sup>15</sup> so far as relating to that policy need only be of such parts of the policy as relate to the dwelling and, if the dwelling is a flat, to the building containing it<sup>16</sup>.

It is an offence for a person to fail without reasonable excuse to perform a duty imposed on him by or by virtue of the above provisions<sup>17</sup>.

1 For the meaning of 'service charge' see PARA 326 ante.

2 For the meaning of 'tenant' see PARA 359 note 1 ante.

3 For the meaning of 'dwelling' see PARA 52 note 2 ante.

4 For these purposes, 'landlord', in relation to a tenant by whom a service charge is payable which includes an amount payable directly or indirectly for insurance, includes any person who has a right to enforce payment of that service charge: Landlord and Tenant Act 1985 s 30A, Schedule para 1 (s 30A, Schedule added by the Landlord and Tenant Act 1987 s 43(1), (2), Sch 3). Where the premises are managed by an RTM company (see PARA 367 et seq post), references to the landlord are to that company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 5(1), (2). For the meaning of 'landlord' generally see PARA 52 note 1 ante.

5 Landlord and Tenant Act 1985 Schedule para 2(1) (as added (see note 4 supra); Schedule para 2(1)-(4), (6) amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 8). As to the effect of a change of landlord or of assignment by the tenant see PARA 363 post.

6 For the meaning of 'recognised tenants' association' see PARA 327 ante.

7 Landlord and Tenant Act 1985 Schedule para 2(2) (as added and amended: see notes 4-5 supra).

8 Ibid Schedule para 2(3) (as added and amended: see notes 4-5 supra). Where the premises are managed by an RTM company (see PARA 367 et seq post), Schedule para 2(3) (as added and amended) applies as if head (1) in the text were omitted and the person referred to in head (2) in the text were a person who receives service charges on behalf of the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 5(1), (4).

9 Ie such a summary as is mentioned in the Landlord and Tenant Act 1985 Schedule para 2(1) (as added and amended): see the text and notes 1-5 supra.

10 For these purposes, 'the insured amount or amounts', in relation to a relevant policy, means (1) in the case of a dwelling other than a flat, the amount for which the dwelling is insured under the policy; and (2) in the case of a flat, the amount for which the building containing it is insured under the policy and, if specified in the policy, the amount for which the flat is insured under it: ibid Schedule para 2(5) (as added: see note 4 supra). For the meaning of 'relevant policy' see note 11 infra.

11 For these purposes, 'relevant policy', in relation to a dwelling, means any policy of insurance under which the dwelling is insured, being, in the case of a flat, a policy covering the building containing it: ibid Schedule para 1 (as added: see note 4 supra).

12 Ibid Schedule para 2(4) (as added and amended: see notes 4-5 supra).

13 Ie the period mentioned in ibid Schedule para 2(4) (as added and amended).

14 Ibid Schedule para 2(6) (as added and amended: see notes 4-5 supra).

15 Ie under ibid Schedule para 2(4) or (6) (as added and amended): see the text and notes 9-14 supra.

16 Ibid Schedule para 2(7) (as added: see note 4 supra).

17 See ibid Schedule para 6 (as added and amended); and PARA 359 the text and note 13 ante.

### 361. Inspection of insurance policy etc.

Where a service charge<sup>1</sup> is payable by the tenant<sup>2</sup> of a dwelling<sup>3</sup> which consists of or includes an amount payable directly or indirectly for insurance, the tenant may by notice in writing require the landlord<sup>4</sup>:

- 682 (1) to afford him reasonable facilities for inspecting any relevant policy<sup>5</sup> or associated documents<sup>6</sup> and for taking copies of or extracts from them; or
- 683 (2) to take copies of or extracts from any such policy or documents and either send them to him or afford him reasonable facilities for collecting them, as he specifies<sup>7</sup>.

If the tenant is represented by a recognised tenants' association<sup>8</sup> and he consents, the notice may be served by the secretary of the association instead of by the tenant, and in that case any requirement imposed by it is to afford reasonable facilities, or to send copies or extracts, to the secretary<sup>9</sup>.

A notice under these provisions is duly served on the landlord if it is served on:

- 684 (a) an agent of the landlord named as such in the rent book or similar document;  
or
- 685 (b) the person who receives the rent on behalf of the landlord;

and a person on whom such a notice is so served must forward it as soon as may be to the landlord<sup>10</sup>.

The landlord must comply with a requirement imposed by a notice under these provisions within the period of 21 days beginning with the day on which he receives the notice<sup>11</sup>. To the extent that such a notice requires the landlord to afford facilities for inspecting documents he must do so free of charge, but he may treat as part of his costs of management any costs incurred by him in doing so<sup>12</sup>. The landlord may make a reasonable charge for doing anything else in compliance with a requirement imposed by such a notice<sup>13</sup>.

It is an offence for a person to fail without reasonable excuse to perform a duty imposed on him by or by virtue of the above provisions<sup>14</sup>.

1 For the meaning of 'service charge' see PARA 326 ante.

2 For the meaning of 'tenant' see PARA 359 note 1 ante.

3 For the meaning of 'dwelling' see PARA 52 note 2 ante.

4 For the meaning of 'landlord' see PARA 360 note 4 ante.

5 For these purposes, 'relevant policy' includes a policy of insurance under which the dwelling was insured for the period of insurance immediately preceding that current when the notice is served (being, in the case of a flat, a policy covering the building containing it): Landlord and Tenant Act 1985 s 30A (as added), Schedule para 3(7) (Schedule para 3 substituted by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 9). For the meaning of 'relevant policy' generally see PARA 360 note 11 ante.

6 For these purposes, 'associated documents' means accounts, receipts or other documents which provide evidence of payment of any premiums due under a relevant policy in respect of the period of insurance which is current when the notice is served or the period of insurance immediately preceding that period: Landlord and Tenant Act 1985 Schedule para 3(7) (as substituted: see note 5 supra).

7 Ibid Schedule para 3(1) (as substituted: see note 5 supra). As to the effect of a change of landlord or of assignment by the tenant see PARA 363 post.



- 8 For the meaning of 'recognised tenants' association' see PARA 327 ante.
- 9 Landlord and Tenant Act 1985 Schedule para 3(2) (as substituted: see note 5 supra).
- 10 Ibid Schedule para 3(3) (as substituted: see note 5 supra). Where the premises are managed by an RTM company (see PARA 367 et seq post), Schedule para 3(3) (as so substituted) applies as if head (a) in the text were omitted and the person referred to in head (b) in the text were a person who receives service charges on behalf of the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 5(1), (4).
- 11 Landlord and Tenant Act 1985 Schedule para 3(4) (as substituted: see note 5 supra).
- 12 Ibid Schedule para 3(5) (as substituted: see note 5 supra).
- 13 Ibid Schedule para 3(6) (as substituted: see note 5 supra).
- 14 See ibid Schedule para 6 (as added and amended); and PARA 359 the text and note 13 ante.

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### **362. Insurance effected by superior landlord.**

If a notice is served requiring a summary of insurance cover<sup>1</sup> in a case where a superior landlord<sup>2</sup> has effected, in whole or in part, the insurance of the dwelling<sup>3</sup> in question and the landlord on whom the notice is served is not in possession of the relevant information:

- 686 (1) he must in turn by notice in writing require the person who is his landlord to give him the relevant information (and so on, if that person is not himself the superior landlord);
- 687 (2) the superior landlord must comply with the notice within a reasonable time; and
- 688 (3) the immediate landlord must then comply with the tenant's<sup>4</sup> or secretary's notice in the specified manner<sup>5</sup> within the time allowed<sup>6</sup> or such further time, if any, as is reasonable in the circumstances<sup>7</sup>.

If, in a case where a superior landlord has effected, in whole or in part, the insurance of the dwelling in question, a notice requiring facilities for inspection<sup>8</sup> imposes a requirement relating to any policy of insurance effected by the superior landlord:

- 689 (a) the landlord on whom the notice is served must forthwith inform the tenant or secretary of that fact and of the name and address of the superior landlord; and
- 690 (b) the provisions relating to inspection of insurance policies<sup>9</sup> then apply to the superior landlord in relation to that policy as they apply to the immediate landlord<sup>10</sup>.

It is an offence for a person to fail without reasonable excuse to perform a duty imposed on him by or by virtue of the above provisions<sup>11</sup>.

1 If a notice is served under the Landlord and Tenant Act 1985 s 30A, Schedule para 2 (as added and amended): see PARA 360 ante.

2 For the meaning of 'landlord' see PARA 360 note 4 ante.

- 3 For the meaning of 'dwelling' see PARA 52 note 2 ante.
- 4 For the meaning of 'tenant' see PARA 359 note 1 ante.
- 5 Ie the manner provided by the Landlord and Tenant Act 1985 Schedule para 2(4)-(7) (as added and amended): see PARA 360 ante.
- 6 Ie the time allowed by ibid Schedule para 2 (as added and amended): see PARA 360 ante.
- 7 Ibid Schedule para 4(1) (Schedule para 4 added by the Landlord and Tenant Act 1987 s 43(2), Sch 3; amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 10). As to the effect of a change of landlord or of assignment by the tenant see PARA 363 post.
- 8 Ie a notice under the Landlord and Tenant Act 1985 Schedule para 3 (as substituted): see PARA 361 ante.
- 9 Ie ibid Schedule para 3 (as substituted).
- 10 Ibid Schedule para 4(2) (as added and amended: see note 7 supra).
- 11 See ibid Schedule para 6 (as added and amended); and PARA 359 the text and note 13 ante.

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### **363. Effect of change of landlord or of assignment by tenant.**

Where, at a time when a duty imposed on the landlord<sup>1</sup> or a superior landlord by virtue of any of the statutory provisions relating to the tenant's rights to a summary of insurance cover, the inspection of the insurance policy, or the position where the insurance is effected by a superior landlord<sup>2</sup> remains to be discharged by him, he disposes of the whole or part of his interest as landlord or superior landlord, the following provisions apply<sup>3</sup>. If the landlord or superior landlord is, despite the disposal, still in a position to discharge the duty to any extent, he remains responsible for discharging it to that extent<sup>4</sup>; and if the other person is in a position to discharge the duty to any extent, he is responsible for discharging it to that extent<sup>5</sup>. It is an offence for a person to fail without reasonable excuse to perform a duty imposed on him by or by virtue of the above provisions<sup>6</sup>.

The assignment of a tenancy does not affect any duty imposed by virtue of the above provisions or of any of the statutory provisions referred to therein<sup>7</sup>, but a person is not required to comply with more than a reasonable number of requirements imposed by any one person<sup>8</sup>.

- 1 For the meaning of 'landlord' see PARA 360 note 4 ante.
- 2 Ie by virtue of any of the Landlord and Tenant Act 1985 s 30A, Schedule paras 2-4 (as added and amended): see PARAS 360-362 ante.
- 3 Ibid Schedule para 4A(1) (Schedule para 4A added by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 11).
- 4 Landlord and Tenant Act 1985 Schedule para 4A(2) (as added: see note 3 supra).
- 5 Ibid Schedule para 4A(3) (as added: see note 3 supra). Where the other person is responsible for discharging the duty to any extent (whether or not the landlord or superior landlord is also responsible for discharging it to that or any other extent): (1) references to the landlord or superior landlord in Schedule paras 2-4 (as added and amended) are to, or include, the other person so far as is appropriate to reflect his responsibility for discharging the duty to that extent; but (2) in connection with its discharge by that person, Schedule paras 2(4) (as added and amended), 3(4) (as substituted) apply as if the reference to the day on

which the landlord receives the notice were to the date of the disposal referred to in Schedule para 4A(1) (as added) (see the text and notes 1-3 supra): Schedule para 4A(4) (as so added).

6 See *ibid* Schedule para 6 (as added and amended); and PARA 359 the text and note 13 ante.

7 The any duty imposed by virtue of any of *ibid* Schedule paras 2-4A (as added and amended).

8 *Ibid* Schedule para 5 (added by the Landlord and Tenant Act 1987 s 43(2), Sch 3; amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 12).

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### **364. Tenant's right to notify insurers of possible claim.**

The following provisions apply to any dwelling<sup>1</sup> in respect of which the tenant<sup>2</sup> pays to the landlord<sup>3</sup> a service charge<sup>4</sup> consisting of or including an amount payable directly or indirectly for insurance<sup>5</sup>.

Where:

- 691 (1) it appears to the tenant of any such dwelling that damage has been caused to the dwelling or, if the dwelling is a flat, to the dwelling or to any other part of the building containing it, in respect of which a claim could be made under the terms of a policy of insurance; and
- 692 (2) it is a term of that policy that the person insured under the policy should give notice of any claim under it to the insurer within a specified period,

the tenant may, within that specified period, serve on the insurer a notice in writing stating that it appears to him that damage has been caused as mentioned in head (1) above and describing briefly the nature of the damage<sup>6</sup>.

Where:

- 693 (a) any such notice is served on an insurer by a tenant in relation to any such damage; and
- 694 (b) the specified period referred to in head (2) above would expire earlier than the period of six months beginning with the date on which the notice is served,

the policy in question has effect as regards any claim subsequently made in respect of that damage by the person insured under the policy as if for the specified period there were substituted that period of six months<sup>7</sup>.

Where the tenancy of such a dwelling is held by joint tenants, a single notice may be given by any one or more of those tenants<sup>8</sup>.

1 For the meaning of 'dwelling' see PARA 52 note 2 ante.

2 For the meaning of 'tenant' see PARA 359 note 1 ante.

3 For the meaning of 'landlord' see PARA 360 note 4 ante.

4 For the meaning of 'service charge' see PARA 326 ante.

5 Landlord and Tenant Act 1985 s 30A, Schedule para 7(1) (s 30A, Schedule para 7 added by the Landlord and Tenant Act 1987 s 43(1), (2), Sch 3).

6 Landlord and Tenant Act 1985 Schedule para 7(2) (as added: see note 5 supra). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by regulations prescribe the form of notices under Schedule para 7 (as so added) and the particulars which such notices must contain: Schedule para 7(5) (as so added). Any such regulations (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument: Schedule para 7(6) (as so added). At the date at which this title states the law, no such regulations had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Ibid Schedule para 7(3) (as added: see note 6 supra).

8 Ibid Schedule para 7(4) (as added: see note 6 supra).

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### **365. Right to challenge landlord's choice of insurers.**

The following provisions apply where a tenancy of a dwelling<sup>1</sup> requires the tenant<sup>2</sup> to insure the dwelling with an insurer nominated or approved by the landlord<sup>3</sup>.

The tenant or landlord may apply to a county court or leasehold valuation tribunal for a determination whether:

- 695 (1) the insurance which is available from the nominated or approved insurer for insuring the tenant's dwelling is unsatisfactory in any respect; or
- 696 (2) the premiums payable in respect of any such insurance are excessive<sup>4</sup>.

No such application may, however, be made in respect of a matter which:

- 697 (a) has been agreed or admitted by the tenant;
- 698 (b) under an arbitration agreement<sup>5</sup> to which the tenant is a party is to be referred to arbitration; or
- 699 (c) has been the subject of determination by a court or arbitral tribunal<sup>6</sup>.

On such an application the court or tribunal may make:

- 700 (i) an order requiring the landlord to nominate or approve such other insurer as is specified in the order; or
- 701 (ii) an order requiring him to nominate or approve another insurer who satisfies such requirements in relation to the insurance of the dwelling as are specified in the order<sup>7</sup>.

An agreement by the tenant of a dwelling, other than an arbitration agreement, is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question which may be the subject of such an application<sup>8</sup>.

1 For the meaning of 'dwelling' see PARA 52 note 2 ante.

2 For the meaning of 'tenant' see PARA 359 note 1 ante.

3 Landlord and Tenant Act 1985 s 30A (as added), Schedule para 8(1) (Schedule para 8 substituted by the Housing Act 1996 s 83(2); the Landlord and Tenant Act 1985 Schedule para 8(1), (2), (4) amended by the Commonhold and Leasehold Reform Act 2002 s 165(1)-(2)). For the meaning of 'landlord' see PARA 360 note 4 ante.

4 Landlord and Tenant Act 1985 Schedule para 8(2) (as substituted and amended: see note 3 supra). At common law there is no implied term obliging a landlord to shop around for the most economical insurance: *Bandar Property Holdings Ltd v JS Darwen (Successors) Ltd* [1968] 2 All ER 305, 19 P & CR 785; approved in *Havenridge Ltd v Boston Dyers Ltd* [1994] 2 EGLR 73, [1994] 49 EG 111, CA.

A fee is payable for making an application to a leasehold valuation tribunal under the Landlord and Tenant Act 1985 Schedule para 8(2)(a) (as substituted and amended) (see head (1) in the text) (see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(3)(b), (4), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(3)(b), (4), (5)) or under the Landlord and Tenant Act 1985 Schedule para 8(2)(b) (as substituted) (see head (2) in the text) (see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(1)(b), (2), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(1)(b), (2), (5)). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

The application must be accompanied by a copy of the lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(c), Sch 2 para 2(3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(c), Sch 2 para 2(3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

5 For the meaning of 'arbitration agreement' see PARA 351 note 6 ante.

6 Landlord and Tenant Act 1985 Schedule para 8(3) (as substituted: see note 3 supra). For the meaning of 'arbitral tribunal' see PARA 351 note 7 ante.

7 Ibid Schedule para 8(4) (as substituted and amended: see note 3 supra).

8 Ibid Schedule para 8(6) (as substituted: see note 3 supra).

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### **366. Insurance of house otherwise than with landlord's insurer.**

The following provisions apply where a long lease<sup>1</sup> of a house<sup>2</sup> requires the tenant<sup>3</sup> to insure the house with an insurer nominated or approved by the landlord<sup>4</sup> ('the landlord's insurer')<sup>5</sup>. The tenant is not required to effect the insurance with the landlord's insurer if:

- 702 (1) the house is insured under a policy of insurance issued by an authorised insurer<sup>6</sup>;
- 703 (2) the policy covers the interests of both the landlord and the tenant;
- 704 (3) the policy covers all the risks which the lease requires be covered by insurance provided by the landlord's insurer;
- 705 (4) the amount of the cover is not less than that which the lease requires to be provided by such insurance; and
- 706 (5) the tenant satisfies the requirements of heads (a) and (b) below<sup>7</sup>.

To satisfy the requirements referred to in head (5) above, the tenant:

- 707 (a) must have given a notice of cover<sup>8</sup> to the landlord before the end of the period of 14 days beginning with the relevant date<sup>9</sup>; and
- 708 (b) if, after that date, he has been requested to do so by a new landlord, must have given a notice of cover to him within the period of 14 days beginning with the day on which the request was given<sup>10</sup>.

These provisions apply in relation to Crown land<sup>11</sup> as they apply in relation to other land<sup>12</sup>.

1 For these purposes, 'long lease' has the meaning given by the Commonhold and Leasehold Reform Act 2002 ss 76, 77 (see PARA 371 post): s 164(10).

2 For these purposes, 'house' has the same meaning as for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1390 post): Commonhold and Leasehold Reform Act 2002 s 164(10).

3 For these purposes, 'tenant' has the same meaning as in *ibid* Pt 2 Ch 1 (ss 71-113) (as amended) (see PARA 369 note 8 post): s 164(10).

4 For these purposes, 'landlord' has the same meaning as in *ibid* Pt 2 Ch 1 (ss 71-113) (as amended) (see PARA 369 note 8 post): s 164(10).

5 *Ibid* s 164(1).

6 'Authorised insurer', in relation to a policy of insurance, means a person who may carry on in the United Kingdom the business of effecting or carrying out contracts of insurance of the sort provided under the policy without contravening the prohibition imposed by the Financial Services and Markets Act 2000 s 19 (see INSURANCE vol 25 (2003 Reissue) PARA 22): Commonhold and Leasehold Reform Act 2002 s 164(10).

7 *Ibid* s 164(2).

8 A notice of cover is a notice specifying (1) the name of the insurer; (2) the risks covered by the policy; (3) the amount and period of the cover; and (4) such further information as may be prescribed: *ibid* s 164(5). A notice of cover must be in the prescribed form and may be sent by post: s 164(6). If a notice of cover is sent by post, it may be addressed to the landlord at the address specified in s 164(8): s 164(7). That address is (a) the address last furnished to the tenant as the landlord's address for service in accordance with the Landlord and Tenant Act 1987 s 48 (as amended) (notification of address for service of notices on landlord: see PARA 53 ante); or (b) if no such address has been so furnished, the address last furnished to the tenant as the landlord's address in accordance with s 47 (as amended) (landlord's name and address to be contained in demands for rent: see PARA 257 ante); but the tenant may not give a notice of cover to the landlord at the address so specified if he has been notified by the landlord of a different address in England and Wales at which he wishes to be given any such notice: Commonhold and Leasehold Reform Act 2002 s 164(8), (9). 'Prescribed' means prescribed by regulations made by the appropriate national authority: s 164(10). For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

A notice of cover must specify, in addition to the particulars referred to in s 164(5)(a)-(c) (see heads (1)-(3) supra), the following particulars (see the Leasehold Houses (Notice of Insurance Cover) (England) Regulations 2004, SI 2004/3097, reg 3; the Leasehold Houses (Notice of Insurance Cover) (Wales) Regulations 2005, SI 2005/1354, reg 2), ie:

- 11 (i) the address of the house insured under the policy;
- 12 (ii) the registered office of the authorised insurer or, if the authorised insurer has no registered office, its head office;
- 13 (iii) the number of the policy;
- 14 (iv) the frequency with which premiums are payable under the policy;
- 15 (v) the amount of any excess payable by the tenant under the policy;
- 16 (vi) where an excess is payable, whether it is payable in respect of every claim made under the policy or only in particular circumstances and, if the latter, a brief description of those circumstances;
- 17 (vii) whether the policy has been renewed and, if so, the date on which it was last renewed;

- 18 (viii) if the policy has not been renewed, the date on which it took effect;
- 19 (ix) that the tenant is satisfied that the policy covers his or her interests; and
- 20 (x) that the tenant has no reason to believe that the policy does not cover the interests of the landlord.

For the prescribed form of notice of cover see the Leasehold Houses (Notice of Insurance Cover) (England) Regulations 2004, SI 2004/3097, reg 4, Schedule (amended by SI 2005/177); the Leasehold Houses (Notice of Insurance Cover) (Wales) Regulations 2005, SI 2005/1354, reg 3, Schedule.

9 For these purposes: (1) if the policy has not been renewed the relevant date is the day on which it took effect and if it has been renewed it is the day from which it was last renewed; and (2) a person is a new landlord on any day if he acquired the interest of the previous landlord under the lease on a disposal made by him during the period of one month ending with that day: Commonhold and Leasehold Reform Act 2002 s 164(4).

10 Ibid s 164(3).

11 For the meaning of 'Crown land' see PARA 24 note 8 ante.

12 See the Commonhold and Leasehold Reform Act 2002 s 172(1)(h); and PARA 24 ante.

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## **9. MANAGEMENT OF PREMISES**

### **(1) MANAGEMENT BY RTM COMPANIES**

#### **(i) Introduction**

#### **367. The right to manage; in general.**

The relevant provisions of the Commonhold and Leasehold Reform Act 2002<sup>1</sup> make provision for the acquisition and exercise of rights in relation to the management of premises to which they apply<sup>2</sup> by a company which, in accordance with those provisions, may acquire and exercise those rights (referred to as an 'RTM company')<sup>3</sup>. The rights are to be acquired and exercised subject to and in accordance with the relevant statutory provisions<sup>4</sup> and are referred to in those provisions as the right to manage<sup>5</sup>.

1 I.e the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 368 et seq post.

2 As to the premises to which ibid Pt 2 Ch 1 (as amended) applies see PARAS 368-369 post.

3 Ibid s 71(1).

4 See note 1 supra.

5 Commonhold and Leasehold Reform Act 2002 s 71(2).

## **UPDATE**

### **367 The right to manage; in general**

TEXT AND NOTES--The Land Registration Rules 2003, SI 2003/1417, r 79A applies where a RTM company applies for an entry to be made in an individual register of a registered estate to the effect that the RTM company has acquired the right to manage: r 79A(1) (r 79A added by SI 2008/1919). An application for such an entry must be accompanied by evidence to satisfy the registrar that (1) the applicant is a RTM company; (2) the right to manage is in relation to premises comprised in the registered estate; (3) the registered proprietor of the registered estate is the landlord under a lease of the whole or part of the premises; and (4) the right to manage the premises has been acquired, and remains exercisable, by the RTM company: SI 2003/1417 r 79A(2) (r 79A as so added). If the registrar is so satisfied, he must make an appropriate entry in the proprietorship register of the registered estate: r 79A(3) (r 79A as so added). In r 79A, 'right to manage' and 'RTM company' have the same meanings as in the Commonhold and Leasehold Reform Act 2002 ss 71, 73: SI 2003/1417 r 79A(4) (r 79A as so added).

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### **368. Premises to which the right to manage applies.**

The right to manage<sup>1</sup> applies to premises if:

- 709 (1) they consist of a self-contained building or part of a building, with or without appurtenant property<sup>2</sup>;
- 710 (2) they contain two or more flats<sup>3</sup> held by qualifying tenants<sup>4</sup>; and
- 711 (3) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises<sup>5</sup>.

A building is a self-contained building if it is structurally detached<sup>6</sup>; and a part of a building is a self-contained part of the building if:

- 712 (a) it constitutes a vertical division of the building;
- 713 (b) the structure of the building is such that it could be redeveloped independently of the rest of the building; and
- 714 (c) the condition set out below applies in relation to it<sup>7</sup>.

That condition applies in relation to a part of a building if the relevant services<sup>8</sup> provided for occupiers of it:

- 715 (i) are provided independently of the relevant services provided for occupiers of the rest of the building; or
- 716 (ii) could be so provided without involving the carrying out of works likely to result in a significant interruption in the provision of any relevant services for occupiers of the rest of the building<sup>9</sup>.

Certain premises are, however, excluded from the right to manage<sup>10</sup>.

The statutory provisions conferring the right to manage<sup>11</sup> apply in relation to premises in which there is a Crown interest<sup>12</sup>; and there is a Crown interest in premises if there is in the premises an interest or estate:



- 717 (A) which is comprised in the Crown Estate;
- 718 (B) which belongs to Her Majesty in right of the Duchy of Lancaster;
- 719 (C) which belongs to the Duchy of Cornwall; or
- 720 (D) which belongs to a government department or is held on behalf of Her Majesty for the purposes of a government department<sup>13</sup>.

1     le the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 ante, PARA 369 et seq post.

2     For these purposes, 'appurtenant property', in relation to a building or part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat: *ibid* s 112(1).

3     For these purposes, 'flat' means a separate set of premises (whether or not on the same floor) (1) which forms part of a building; (2) which is constructed or adapted for use for the purposes of a dwelling; and (3) either the whole or a material part of which lies above or below some other part of the building; and 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling: *ibid* s 112(1).

4     For the meaning of 'qualifying tenant' see PARA 370 post.

5     Commonhold and Leasehold Reform Act 2002 s 72(1).

6     *Ibid* s 72(2).

7     *Ibid* s 72(3).

8     Relevant services are services provided by means of pipes, cables or other fixed installations: *ibid* s 72(5).

9     *Ibid* s 72(4).

10    See *ibid* s 72(6), Sch 6 (as amended); and PARA 369 post.

11    See note 1 *supra*.

12    *Ibid* s 108(1).

13    *Ibid* s 108(2). Any sum payable under Pt 2 Ch 1 (as amended) to an RTM company by the Chancellor of the Duchy of Lancaster may be raised and paid under the Duchy of Lancaster Act 1817 s 25 as an expense incurred in improvement of land belonging to Her Majesty in right of the Duchy; and any sum payable under those provisions to an RTM company by the Duke of Cornwall (or any other possessor for the time being of the Duchy of Cornwall) may be raised and paid under the Duchy of Cornwall Management Act 1863 s 8 as an expense incurred in permanently improving the possessions of the Duchy: Commonhold and Leasehold Reform Act 2002 s 108(3), (4). For the meaning of 'RTM company' see PARA 374 post.

## UPDATE

### 368 Premises to which the right to manage applies

NOTE 7--The requirement for a vertical division of the building is unqualified; it follows that a part of a building does not constitute a self-contained part even where only a comparatively small area falls outside the vertical line, unless the deviation is de minimis: *Holding and Management (Solitare) Ltd v Finland Street 1-16 RTM Co Ltd* [2008] EGCS 152.

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### 369. Premises excluded from the right to manage.

The right to manage<sup>1</sup> does not apply to premises otherwise meeting the statutory criteria<sup>2</sup>:

- 721 (1) if the internal floor area:  
 53  
 65. (a) of any non-residential part<sup>3</sup>; or  
 66. (b) where there is more than one such part, of those parts, taken together,  
 54  
 722 exceeds 25 per cent of the internal floor area of the premises<sup>4</sup>, taken as a whole<sup>5</sup>;  
 723 (2) where different persons own the freehold of different parts of the premises, if any of those parts is a self-contained part of a building<sup>6</sup>;  
 724 (3) if the premises have a resident landlord<sup>7</sup> and do not contain more than four units<sup>8</sup>;  
 725 (4) if a local housing authority<sup>9</sup> is the immediate landlord of any of the qualifying tenants<sup>10</sup> of flats contained in the premises<sup>11</sup>;  
 726 (5) at any time if:  
 55  
 67. (a) the right to manage the premises is at that time exercisable by an RTM company<sup>12</sup>; or  
 68. (b) that right has been so exercisable but has ceased to be so exercisable<sup>13</sup> less than four years before that time<sup>14</sup>;  
 56  
 727 but a leasehold valuation tribunal may, on an application made by an RTM company, determine that head (b) above is not to apply in any case if it considers that it would be unreasonable for it to apply in the circumstances of the case<sup>15</sup>.

1 The Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARAS 367-368 ante, PARA 370 et seq post.

2 The premises falling within *ibid* s 72(1): see PARA 368 ante.

3 A part of premises is a non-residential part if it is neither (1) occupied, or intended to be occupied, for residential purposes; nor (2) comprised in any common parts of the premises; and where in the case of any such premises any part of the premises (such as, eg, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it is to be taken to be occupied, or intended to be occupied, for residential purposes: *ibid* s 72(6), Sch 6 para 1(2), (3).

4 For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part are to be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part is to be disregarded: *ibid* Sch 6 para 1(4).

5 *Ibid* Sch 6 para 1(1).

6 *Ibid* Sch 6 para 2.

7 Premises have a resident landlord if (1) the premises are not, and do not form part of, a purpose-built block of flats (ie, a building which, as constructed, contained two or more flats); (2) a relevant freeholder, or an adult member of a relevant freeholder's family, occupies a qualifying flat as his only or principal home; and *ibid* Sch 6 para 3(4) or (5) is satisfied: Sch 6 para 3(2). A person is a relevant freeholder, in relation to any premises, if he owns the freehold of the whole or any part of the premises: Sch 6 para 3(3).

Schedule 6 para 3(4) is satisfied if the relevant freeholder, or the adult member of his family, has throughout the last 12 months occupied the flat as his only or principal home; and Sch 6 para 3(5) is satisfied if (a) immediately before the date when the relevant freeholder acquired his interest in the premises, the premises were premises with a resident landlord; and (b) he, or an adult member of his family, entered into occupation of

the flat during the period of 28 days beginning with that date and has occupied the flat as his only or principal home ever since: Sch 6 para 3(4), (5). 'Qualifying flat', in relation to any premises and a relevant freeholder or an adult member of his family, means a flat or other unit used as a dwelling which is contained in the premises, and the freehold of the whole of which is owned by the relevant freeholder: Sch 6 para 3(6). Where the interest of a relevant freeholder in any premises is held on trust, the references in Sch 6 para 3(2), (4) and (5)(b) to a relevant freeholder are to a person having an interest under the trust (whether or not also a trustee): Sch 6 para 3(7).

A person is an adult member of another's family for these purposes if he is (i) the other's spouse or civil partner; (ii) a son, daughter, son-in-law or daughter-in-law of the other, or of the other's spouse or civil partner, who has attained the age of 18; or (iii) the father or mother of the other or of the other's spouse or civil partner; and 'son' and 'daughter' include stepson and stepdaughter ('son-in-law' and 'daughter-in-law' being construed accordingly): Sch 6 para 3(8) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 66). For the meaning of 'flat' see PARA 368 note 3 ante; and for the meanings of 'unit' and 'landlord' see note 8 infra.

8 Commonhold and Leasehold Reform Act 2002 Sch 6 para 3(1). 'Unit' means (1) a flat; (2) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or (3) a separate set of premises let, or intended for letting, on a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (business tenancies: see PARA 701 et seq post) applies: Commonhold and Leasehold Reform Act 2002 s 112(1). For the purposes of the right to manage, 'lease' and 'tenancy' have the same meaning and both expressions include (where the context permits) (a) a sublease or subtenancy; and (b) an agreement for a lease or tenancy (or for a sublease or subtenancy), but do not include a tenancy at will or at sufferance: s 112(2). The expressions 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or the terms of a lease, are to be construed accordingly: s 112(3). Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in Pt 2 Ch 1 (as amended) to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require: s 112(5).

9 'Local housing authority' has the meaning given by the Housing Act 1985 s 1 (as amended) (see PARA 1311 note 4 post): Commonhold and Leasehold Reform Act 2002 Sch 6 para 4(2).

10 For the meaning of 'qualifying tenant' see PARA 370 post.

11 Commonhold and Leasehold Reform Act 2002 Sch 6 para 4(1).

12 For the meaning of 'RTM company' see PARA 374 post.

13 Ie unless the right to manage the premises ceased to be exercisable by virtue of the Commonhold and Leasehold Reform Act 2002 s 73(5) (see PARA 374 post): Sch 6 para 5(2).

14 Ibid Sch 6 para 5(1).

15 Ibid Sch 6 para 5(3). The application must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; (3) a copy of the memorandum and articles of association of the RTM company; and (4) the date and circumstances in which the right to exercise the right to manage has ceased within the past four years: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(f), Sch 2 para 4(1)-(3), (8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(f), Sch 2 para 4(1)-(3), (8). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

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### **370. Qualifying tenants.**

The following provisions specify whether there is a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> for the purposes of the right to manage<sup>3</sup> and, if so, who it is<sup>4</sup>. A person is<sup>5</sup> the qualifying tenant of a flat if he is tenant of the flat under a long lease<sup>6</sup>; but this does not apply where the lease is a business tenancy to which Part II of the Landlord and Tenant Act 1954<sup>7</sup> applies<sup>8</sup>. Nor does it apply where:

- 728 (1) the lease was granted by sub-demise out of a superior lease other than a long lease;  
 729 (2) the grant was made in breach of the terms of the superior lease; and  
 730 (3) there has been no waiver of the breach by the superior landlord<sup>9</sup>.

No flat has more than one qualifying tenant at any one time<sup>10</sup>; and where a flat is being let:

- 731 (a) under two or more long leases, a tenant under any of those leases which is superior to that held by another is not the qualifying tenant of the flat<sup>11</sup>;  
 732 (b) to joint tenants under a long lease, the joint tenants are, subject to head (a) above, to be regarded as jointly being the qualifying tenant of the flat<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 369 note 8 ante.

2 For the meaning of 'flat' see PARA 368 note 3 ante.

3 le for the purposes of the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 371 et seq post.

4 Ibid ss 75(1), 113.

5 le subject to ibid s 75(3)-(7): see the text and notes 7-12 infra.

6 Ibid s 75(2). For the meaning of 'long lease' see PARA 371 post.

7 le the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

8 Commonhold and Leasehold Reform Act 2002 s 75(3).

9 Ibid s 75(4).

10 Ibid s 75(5). Section 75(5), (6) applies accordingly: s 75(5).

11 Ibid s 75(6).

12 Ibid s 75(7). See also s 112(5), cited in PARA 369 note 8 ante.

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### 371. Long leases.

The following provisions specify what is a long lease for the purposes of the right to manage<sup>1</sup>.

A lease<sup>2</sup> is<sup>3</sup> a long lease if:

- 733 (1) it is granted for a term of years certain exceeding 21 years, whether or not it is, or may become, terminable before the end of that term by notice given by or to the tenant<sup>4</sup>, by re-entry or forfeiture or otherwise<sup>5</sup>;  
 734 (2) it is for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, but is not a lease by sub-demise from one which is not a long lease<sup>6</sup>;

- 735 (3) it takes effect<sup>7</sup> as a lease for 90 years terminable by notice after a death or marriage or the formation of a civil partnership<sup>8</sup>;
- 736 (4) it was granted in pursuance of the right to buy<sup>9</sup> or in pursuance of the right<sup>10</sup> to acquire on rent to mortgage terms<sup>11</sup>;
- 737 (5) it is a shared ownership lease<sup>12</sup> where the tenant's total share is 100 per cent<sup>13</sup>; or
- 738 (6) it was granted in pursuance of the right to acquire<sup>14</sup> conferred by the Housing Act 1996<sup>15</sup>.

A lease terminable by notice after a death, a marriage or the formation of a civil partnership is not, however, a long lease if:

- 739 (a) the notice is capable of being given at any time after the death or marriage of, or the formation of a civil partnership by, the tenant;
- 740 (b) the length of the notice is not more than three months; and
- 741 (c) the terms of the lease preclude both its assignment otherwise than by way of exchange<sup>16</sup> and the subletting of the whole of the demised premises<sup>17</sup>.

Where the tenant of any property under a long lease, on the coming to an end of the lease, becomes or has become tenant of the property or part of it under any subsequent tenancy, whether by express grant or by implication of law, that tenancy is a long lease irrespective of its terms<sup>18</sup>.

A lease:

- 742 (i) granted for a term of years certain not exceeding 21 years, but with a covenant or obligation for renewal without payment of a premium, but not for perpetual renewal; and
- 743 (ii) renewed on one or more occasions so as to bring to more than 21 years the total of the terms granted, including any interval between the end of a lease and the grant of a renewal,

is to be treated as if the term originally granted had been one exceeding 21 years<sup>19</sup>.

Where a long lease is or was continued for any period under the specified statutory provisions<sup>20</sup>, it remains a long lease during that period<sup>21</sup>.

Where in the case of a flat<sup>22</sup> there are at any time two or more separate leases, with the same landlord<sup>23</sup> and the same tenant, and:

- 744 (A) the property comprised in one of those leases consists of either the flat or a part of it, in either case with or without appurtenant property<sup>24</sup>; and
- 745 (B) the property comprised in every other lease consists of either a part of the flat, with or without appurtenant property, or appurtenant property only,

there is taken to be a single long lease of the property comprised in such of those leases as are long leases<sup>25</sup>.

1 Commonhold and Leasehold Reform Act 2002 s 76(1). For the meaning of 'the right to manage' see PARA 367 ante.

2 For the meaning of 'lease' see PARA 369 note 8 ante.

3 The subject to the Commonhold and Leasehold Reform Act 2002 s 77 (as amended): see the text and notes 16-25 infra.

4 For the meaning of 'tenant' see PARA 369 note 8 ante.

5 Commonhold and Leasehold Reform Act 2002 s 76(2)(a). As to the termination of leases see PARA 600 et seq post.

6 Ibid s 76(2)(b). As to covenants for perpetual renewal see PARA 541 post.

7 Ie under the Law of Property Act 1925 s 149(6) (as amended): see PARA 240 ante.

8 Commonhold and Leasehold Reform Act 2002 s 76(2)(c) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 64).

9 Ie the right conferred by the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.

10 Ie the right conferred by ibid Pt V (as amended): see PARA 1872 et seq post. That right is now only exercisable if claimed before 18 July 2005: see PARA 1872 post.

11 Commonhold and Leasehold Reform Act 2002 s 76(2)(d).

12 Ie whether granted in pursuance of the Housing Act 1985 Pt V (as amended) or otherwise. There is now no statutory right to be granted a shared ownership lease under Pt V (as amended): see PARA 1795 ante. For these purposes, 'shared ownership lease' means a lease (1) granted on payment of a premium calculated by reference to a percentage of the value of the demised premises or the cost of providing them; or (2) under which the tenant (or his personal representatives) will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of those premises: Commonhold and Leasehold Reform Act 2002 s 76(3).

13 Ibid s 76(2)(e). 'Total share', in relation to the interest of a tenant under a shared ownership lease, means his initial share plus any additional share or shares in the demised premises which he has acquired: s 76(4).

14 Ie in pursuance of the Housing Act 1985 Pt V (as amended) as it has effect by virtue of the Housing Act 1996 s 17: see PARAS 1804-1807 post.

15 Commonhold and Leasehold Reform Act 2002 s 76(2)(f).

16 Ie by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 post.

17 Commonhold and Leasehold Reform Act 2002 s 77(1) (amended by the Civil Partnership Act 2004 Sch 8 para 65).

18 Commonhold and Leasehold Reform Act 2002 s 77(2).

19 Ibid s 77(3).

20 Ie is or was continued under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) or was continued under the Leasehold Property (Temporary Provisions) Act 1951 (repealed).

21 Commonhold and Leasehold Reform Act 2002 s 77(4).

22 For the meaning of 'flat' see PARA 368 note 3 ante.

23 For the meaning of 'landlord' see PARA 369 note 8 ante.

24 For the meaning of 'appurtenant property' see PARA 368 note 2 ante.

25 Commonhold and Leasehold Reform Act 2002 s 77(5). In the case of a lease which derives, in accordance with s 77(5), from two or more separate leases, any reference in Pt 2 Ch 1 (ss 71-113) (as amended) (see PARA 367 et seq ante, PARA 372 et seq post) to the date of the commencement of the term for which the lease was granted has effect, if the terms of the separate leases commenced at different dates, as a reference to the date of the commencement of the term of the lease with the earliest date of commencement: s 112(6).

PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(i) Introduction/372. Powers of trustees in relation to right to manage.

### **372. Powers of trustees in relation to right to manage.**

Where trustees are the qualifying tenant<sup>1</sup> of a flat<sup>2</sup> contained in any premises, their powers under the instrument regulating the trusts include power to be a member of an RTM company<sup>3</sup> for the purpose of the acquisition and exercise of the right to manage the premises<sup>4</sup>; but this does not apply where the instrument regulating the trusts contains an explicit direction to the contrary<sup>5</sup>.

The power so conferred is exercisable with the same consent or on the same direction, if any, as may be required for the exercise of the trustees' powers, or ordinary powers, of investment<sup>6</sup>.

The purposes authorised by the Settled Land Act 1925 for the application of capital money<sup>7</sup> and as purposes for which moneys may be raised by mortgage<sup>8</sup> include the payment of any expenses incurred by a tenant for life<sup>9</sup> or statutory owner<sup>10</sup> as a member of an RTM company<sup>11</sup>.

1 For the meaning of 'qualifying tenant' see PARA 370 ante.

2 For the meaning of 'flat' see PARA 368 note 3 ante.

3 For the meaning of 'RTM company' see PARA 374 post.

4 Commonhold and Leasehold Reform Act 2002 s 109(1).

5 Ibid s 109(2).

6 Ibid s 109(3).

7 Ie authorised by the Settled Land Act 1925 s 73 (as amended): see SETTLEMENTS vol 42 (Reissue) PARA 808.

8 Ie authorised by ibid s 71 (as amended): see SETTLEMENTS vol 42 (Reissue) PARAS 849-850.

9 As to the tenant for life where there is a strict settlement see SETTLEMENTS vol 42 (Reissue) PARA 761. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

10 As to the statutory owner where there is a strict settlement see SETTLEMENTS vol 42 (Reissue) PARA 766.

11 Commonhold and Leasehold Reform Act 2002 s 109(4).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(i) Introduction/373. Notices.

### **373. Notices.**

Any notice under the provisions conferring the right to manage<sup>1</sup> must be in writing and may be sent by post<sup>2</sup>.

A company which is an RTM company<sup>3</sup> in relation to premises may give a notice under those provisions:

- 746 (1) to a person who is landlord<sup>4</sup> under a lease<sup>5</sup> of the whole or any part of the premises at the address specified<sup>6</sup> for these purposes<sup>7</sup>, unless it has been notified by him of a different address in England and Wales at which he wishes to be given any such notice<sup>8</sup>;
- 747 (2) to a person who is the qualifying tenant<sup>9</sup> of a flat<sup>10</sup> contained in the premises at the flat unless it has been notified by the qualifying tenant of a different address in England and Wales at which he wishes to be given any such notice<sup>11</sup>.

1 le under the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 374 et seq post.

2 Ibid s 111(1).

3 For the meaning of 'RTM company' see PARA 374 post.

4 For the meaning of 'landlord' see PARA 369 note 8 ante.

5 For the meaning of 'lease' see PARA 369 note 8 ante.

6 le at the address specified in the Commonhold and Leasehold Reform Act 2002 s 111(3). That address is (1) the address last furnished to a member of the RTM company as the landlord's address for service in accordance with the Landlord and Tenant Act 1987 s 48 (as amended) (notification of address for service of notices on landlord: see PARA 53 ante); or (2) if no such address has been so furnished, the address last furnished to such a member as the landlord's address in accordance with s 47 (as amended) (landlord's name and address to be contained in demands for rent etc: see PARA 257 ante); Commonhold and Leasehold Reform Act 2002 s 111(3).

7 Ibid s 111(2).

8 Ibid s 111(4).

9 For the meaning of 'qualifying tenant' see PARA 370 ante.

10 For the meaning of 'flat' see PARA 368 note 3 ante.

11 Commonhold and Leasehold Reform Act 2002 s 111(5).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(ii) RTM Companies/374. Companies which are RTM companies.

## **(ii) RTM Companies**

### **374. Companies which are RTM companies.**

A company is an RTM company in relation to premises if:

- 748 (1) it is a private company limited by guarantee; and
- 749 (2) its memorandum of association states that its object, or one of its objects, is the acquisition and exercise of the right to manage the premises<sup>1</sup>.

A company is not an RTM company:

- 750 (a) if it is a commonhold association<sup>2</sup>:



751 (b) in relation to premises if another company is already an RTM company in relation to the premises or to any premises containing or contained in the premises<sup>3</sup>.

If the freehold of any premises is conveyed or transferred to a company which is an RTM company in relation to the premises, or any premises containing or contained in the premises, it ceases to be an RTM company when the conveyance or transfer is executed<sup>4</sup>.

1 Commonhold and Leasehold Reform Act 2002 s 73(1), (2).

2 Ibid s 73(1), (3). The reference in head (a) in the text to a commonhold association is to such an association within the meaning of Pt 1 (ss 1-70) (as amended) (see COMMONHOLD vol 13 (2009) PARA 305); see s 73(3).

3 Ibid s 73(1), (4).

4 Ibid s 73(1), (5).

## UPDATE

### 374 Companies which are RTM companies

TEXT AND NOTE 1--Commonhold and Leasehold Reform Act 2002 s 73(2) amended: SI 2009/1941.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(ii) RTM Companies/375. Membership; prohibition on contracting out of membership rights.

### 375. Membership; prohibition on contracting out of membership rights.

The persons who are entitled to be members of a company which is an RTM company<sup>1</sup> in relation to premises are:

- 752 (1) qualifying tenants<sup>2</sup> of flats<sup>3</sup> contained in the premises; and
- 753 (2) from the date on which it acquires the right to manage<sup>4</sup> (referred to as the 'acquisition date'), landlords<sup>5</sup> under leases<sup>6</sup> of the whole or any part of the premises<sup>7</sup>.

Any agreement relating to a lease, whether contained in the instrument creating the lease or not and whether made before the creation of the lease or not, is void in so far as it:

- 754 (a) purports to exclude or modify the right of any person to be, or do any thing as, a member of an RTM company;
- 755 (b) provides for the termination or surrender of the lease if the tenant becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing; or
- 756 (c) provides for the imposition of any penalty or disability if the tenant becomes, or does any thing as, a member of an RTM company or if an RTM company does any thing<sup>8</sup>.

- 1 For the meaning of 'RTM company' see PARA 374 ante.
- 2 For the meaning of 'qualifying tenant' see PARA 370 ante.
- 3 For the meaning of 'flat' see PARA 368 note 3 ante.
- 4 For the meaning of 'the right to manage' see PARA 367 ante.
- 5 For the meaning of 'landlord' see PARA 369 note 8 ante.
- 6 For the meaning of 'lease' see PARA 369 note 8 ante.
- 7 Commonhold and Leasehold Reform Act 2002 s 74(1).
- 8 Ibid s 106.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(ii) RTM Companies/376. Regulations; memorandum and articles.

### **376. Regulations; memorandum and articles.**

The appropriate national authority<sup>1</sup> must make regulations<sup>2</sup> about the content and form of the memorandum of association and articles of association of RTM companies<sup>3</sup>; and an RTM company may adopt provisions of the regulations for its memorandum or articles<sup>4</sup>. The regulations may include provision which is to have effect for an RTM company whether or not it is adopted by the company<sup>5</sup>.

A provision of the memorandum or articles of an RTM company has no effect to the extent that it is inconsistent with the regulations<sup>6</sup>; and the regulations have effect in relation to a memorandum or articles:

- 757 (1) irrespective of the date of the memorandum or articles; but
- 758 (2) subject to any transitional provisions of the regulations<sup>7</sup>.

Certain provisions of the Companies Act 1985 relating to the memorandum and articles of a company<sup>8</sup> do not apply to an RTM company<sup>9</sup>.

The memorandum of association of an RTM company, and its articles, must take the form, and include the provisions, prescribed in the relevant regulations<sup>10</sup>; and those prescribed provisions have effect for an RTM company whether or not they are adopted by the company<sup>11</sup>.

- 1 For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.
- 2 As to the power to make regulations generally see the Commonhold and Leasehold Reform Act 2002 s 178; and PARA 59 note 2 ante.
- 3 Ibid s 74(2). For the meaning of 'RTM company' see PARA 374 ante. In the exercise of this power, the Secretary of State has made the RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003, SI 2003/2120, which came into force on 30 September 2003 and apply to RTM companies in relation to premises in England (reg 1(1), (2)); and the National Assembly for Wales has made the RTM Companies (Memorandum and Articles of Association) (Wales) Regulations 2004, SI 2004/675, which came into force on 31 March 2004 and apply to RTM companies in relation to premises in Wales (reg 1(1), (2)). See further the text and notes 10-11 infra.
- 4 Commonhold and Leasehold Reform Act 2002 s 74(3).

5 Ibid s 74(4).

6 Ibid s 74(5).

7 Ibid s 74(6).

8 In the Companies Act 1985 ss 2(7), 3 (memorandum: see COMPANIES vol 14 (2009) PARA 104) and s 8 (articles: see COMPANIES vol 14 (2009) PARA 104).

9 Commonhold and Leasehold Reform Act 2002 s 74(7).

10 See the RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003, SI 2003/2120, reg 2(1), (2), Schedule Pts 1, 2; the RTM Companies (Memorandum and Articles of Association) (Wales) Regulations 2004, SI 2004/675, reg 2(1), (2), (4), Sch 1 Pts 1, 2 (amended by SI 2005/3302) (provisions in English), Sch 2 Pts 1, 2 (provisions in Welsh).

11 RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003, SI 2003/2120, reg 2(3); RTM Companies (Memorandum and Articles of Association) (Wales) Regulations 2004, SI 2004/675, reg 2(3), (4). For transitional provisions see the RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003, SI 2003/2120, reg 2(4); the RTM Companies (Memorandum and Articles of Association) (Wales) Regulations 2004, SI 2004/675, reg 2(5).

## UPDATE

### 376 Regulations; memorandum and articles

TEXT AND NOTES 3, 10, 11--SI 2003/2120 replaced: SI 2009/2767.

TEXT AND NOTES 3-9--Commonhold and Leasehold Reform Act 2002 s 74(2)-(6) amended, s 74(7) substituted: SI 2009/1941.

NOTE 10--SI 2004/675 Sch 1 Pt 2 further amended, Sch 2 Pt 2 amended: SI 2007/2194.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/377. Notice inviting participation.

### (iii) Claim to Acquire the Right to Manage

#### 377. Notice inviting participation.

Before making a claim to acquire the right to manage any premises, an RTM company<sup>1</sup> must give notice<sup>2</sup> to each person who at the time when the notice is given:

- 759 (1) is the qualifying tenant<sup>3</sup> of a flat<sup>4</sup> contained in the premises; but
- 760 (2) neither is nor has agreed to become a member of the RTM company<sup>5</sup>.

A notice so given (a 'notice of invitation to participate') must:

- 761 (a) state that the RTM company intends to acquire the right to manage the premises;
- 762 (b) state the names of the members of the RTM company;
- 763 (c) invite the recipients of the notice to become members of the company; and

- 764 (d) contain such other particulars, if any, as may be required to be contained in notices of invitation to participate by regulations<sup>6</sup> made by the appropriate national authority<sup>7</sup>.

A notice of invitation to participate must also comply with such requirements, if any, about the form of notices of invitation to participate as may be prescribed by regulations so made<sup>8</sup>.

A notice of invitation to participate must either:

- 765 (i) be accompanied by a copy of the memorandum of association and articles of association of the RTM company<sup>9</sup>; or  
 766 (ii) include a statement about inspection and copying of that company's memorandum of association and articles of association<sup>10</sup>; and that statement must:
- 57
69. (A) specify a place, in England or Wales, at which the memorandum of association and articles of association may be inspected;
70. (B) specify as the times at which they may be inspected periods of at least two hours on each of at least three days, including a Saturday or Sunday or both, within the seven days beginning with the day following that on which the notice is given;
71. (C) specify a place, in England or Wales, at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered; and
72. (D) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it<sup>11</sup>.

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Where a notice given to a person includes such a statement, the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement<sup>12</sup>.

A notice of invitation to participate is not invalidated by any inaccuracy in any of the particulars required by or by virtue of the above provisions<sup>13</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 As to the giving of notices see PARA 373 ante.

3 For the meaning of 'qualifying tenant' see PARA 370 ante.

4 For the meaning of 'flat' see PARA 368 note 3 ante.

5 Commonhold and Leasehold Reform Act 2002 s 78(1).

6 As to the making of regulations see *ibid* s 178; and PARA 59 note 2 ante.

7 *Ibid* s 78(2). A notice of invitation to participate must contain (in addition to the statements and invitation referred to in heads (a)-(c) in the text), the following particulars (see the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 3(1), (2); the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 3(1), (2)), ie:

21 (1) the RTM company's registered number, the address of its registered office and the names of its directors and secretary;

22 (2) the names of the landlord and any third party;

23 (3) a statement that, subject to the exclusions mentioned in head (5) *infra*, if the right to manage is acquired by the RTM company, the company will be responsible for the discharge of the landlord's duties under the lease and the exercise of his powers under the lease, with respect to services, repairs, maintenance, improvements, insurance and management;

- 24 (4) a statement that, subject to the exclusion relating to re-entry or forfeiture mentioned in head (5) *infra*, if the right to manage is acquired by the RTM company, the company may enforce untransferred tenant covenants;
- 25 (5) a statement that, if the right to manage is acquired by the RTM company, the company will not be responsible for the discharge of the landlord's duties or the exercise of his powers under the lease with respect to a matter concerning only a part of the premises consisting of a flat or other unit not subject to a lease held by a qualifying tenant, or relating to re-entry or forfeiture;
- 26 (6) a statement that, if the right to manage is acquired by the RTM company, the company will have functions under the statutory provisions referred to in the Commonhold and Leasehold Reform Act 2002 s 102, Sch 7;
- 27 (7) a statement that the RTM company intends or, as the case may be, does not intend, to appoint a managing agent within the meaning of the Landlord and Tenant Act 1985 s 30B(8) (as added) (see PARA 398 note 4 *post*) and if it does so intend, a statement of the name and address of the proposed managing agent (if known) and, if it be the case, that the person is the landlord's managing agent; or if it does not so intend, the qualifications or experience (if any) of the existing members of the RTM company in relation to the management of residential property;
- 28 (8) a statement that, where the company gives a claim notice, a person who is or has been a member of the company may be liable for costs incurred by the landlord and others in consequence of the notice;
- 29 (9) a statement that, if the recipient of the notice (of invitation to participate) does not fully understand its purpose or implications, he is advised to seek professional help; and
- 30 (10) the information provided in the notes to the prescribed form set out in Sch 1 to the relevant regulations.

8 Commonhold and Leasehold Reform Act 2002 s 78(3). For the prescribed form of notice see Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 8(1), Sch 1; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 8(1), Sch 1.

9 As to the memorandum and articles see PARA 376 *ante*.

10 Commonhold and Leasehold Reform Act 2002 s 78(4).

11 *Ibid* s 78(5).

12 *Ibid* s 78(6).

13 *Ibid* s 78(7).

## UPDATE

### 377 Notice inviting participation

TEXT AND NOTES 9-11--Commonhold and Leasehold Reform Act 2002 s 78(4), (5) amended: SI 2009/1941.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/378. Notice of claim to acquire right.

### 378. Notice of claim to acquire right.

A claim to acquire the right to manage<sup>1</sup> any premises is made by giving notice of the claim (a 'claim notice'); and the 'relevant date', in relation to any claim to acquire the right to manage,

means the date on which notice of the claim is given<sup>2</sup>. The claim notice may not be given unless each person required to be given a notice of invitation to participate<sup>3</sup> has been given such a notice at least 14 days before<sup>4</sup>.

The claim notice must be given by an RTM company<sup>5</sup> which complies with either of the following conditions<sup>6</sup>:

- 767 (1) if on the relevant date there are only two qualifying tenants<sup>7</sup> of flats<sup>8</sup> contained in the premises, both must be members of the RTM company<sup>9</sup>;
- 768 (2) in any other case, the membership of the RTM company must on the relevant date include a number of qualifying tenants of flats contained in the premises which is not less than one-half of the total number of flats so contained<sup>10</sup>.

The claim notice must be given to each person who on the relevant date is:

- 769 (a) landlord<sup>11</sup> under a lease<sup>12</sup> of the whole or any part of the premises;
- 770 (b) party to such a lease otherwise than as landlord or tenant; or
- 771 (c) a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>13</sup> to act in relation to the premises, or any premises containing or contained in the premises<sup>14</sup>;

but this does not require the claim notice to be given to a person who cannot be found or whose identity cannot be ascertained<sup>15</sup>.

A copy of the claim notice must be given to each person who on the relevant date is the qualifying tenant of a flat contained in the premises<sup>16</sup>; and where a manager has been appointed as described in head (c) above, a copy of the claim notice must also be given to the leasehold valuation tribunal or court by which he was appointed<sup>17</sup>.

Where any premises have been specified in a claim notice, no subsequent claim notice which specifies the premises, or any premises containing or contained in the premises, may be given so long as the earlier claim notice continues in force<sup>18</sup>.

Where a claim notice is given by an RTM company it continues in force from the relevant date until the right to manage is acquired by the company unless it has previously been withdrawn or deemed to be withdrawn<sup>19</sup> or has ceased<sup>20</sup> to have effect<sup>21</sup>.

1 For the meaning of 'the right to manage' see PARA 367 ante.

2 Commonhold and Leasehold Reform Act 2002 s 79(1). As to the giving of notices see PARA 373 ante.

3 As to notice of invitation to participate see PARA 377 ante.

4 Commonhold and Leasehold Reform Act 2002 s 79(2).

5 For the meaning of 'RTM company' see PARA 374 ante.

6 Commonhold and Leasehold Reform Act 2002 s 79(3).

7 For the meaning of 'qualifying tenant' see PARA 370 ante.

8 For the meaning of 'flat' see PARA 368 note 3 ante.

9 Commonhold and Leasehold Reform Act 2002 s 79(4).

10 Ibid s 79(5).

11 For the meaning of 'landlord' see PARA 369 note 8 ante.

12 For the meaning of 'lease' see PARA 369 note 8 ante.

13 Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.

14 Commonhold and Leasehold Reform Act 2002 s 79(6).

15 Ibid s 79(7). If, however, s 79(7) means that the claim notice is not required to be given to anyone at all, s 85 (see PARA 384 post) applies: s 79(7).

16 Ibid s 79(8).

17 Ibid s 79(9).

18 Ibid s 81(3).

19 Ie by virtue of any provision of ibid Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 379 et seq post.

20 Ie by reason of any other provision of ibid Pt 2 Ch 1 (as amended).

21 Ibid s 81(4).

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### **379. Contents of claim notice.**

The claim notice must comply with the following requirements<sup>1</sup>. It must:

772 (1) specify the premises and contain a statement of the grounds on which it is claimed that they are premises to which the right to manage<sup>2</sup> applies<sup>3</sup>;

773 (2) state the full name of each person who is both:

59

73. (a) the qualifying tenant<sup>4</sup> of a flat<sup>5</sup> contained in the premises; and

74. (b) a member of the RTM company<sup>6</sup>,

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774 and the address of his flat<sup>7</sup>;

775 (3) contain, in relation to each such person, such particulars of his lease<sup>8</sup> as are sufficient to identify it, including:

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75. (a) the date on which it was entered into;

76. (b) the term for which it was granted; and

77. (c) the date of the commencement of the term<sup>9</sup>;

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776 (4) state the name and registered office of the RTM company<sup>10</sup>;

777 (5) specify a date, not earlier than one month after the relevant date<sup>11</sup>, by which each person who was given the notice of claim<sup>12</sup> may respond to it by giving<sup>13</sup> a counter-notice<sup>14</sup>;

778 (6) specify a date, at least three months after that specified under head (5) above, on which the RTM company intends to acquire the right to manage the premises<sup>15</sup>;

779 (7) also contain such other particulars, if any, as may be required to be contained in claim notices by regulations<sup>16</sup> made by the appropriate national authority<sup>17</sup>;

780 (8) comply with such requirements, if any, about the form of claim notices as may be prescribed by regulations so made<sup>18</sup>.

A claim notice is not invalidated by any inaccuracy in any of the particulars required by or by virtue of the above provisions<sup>19</sup>. Where any of the members of the RTM company whose names are stated in the claim notice was not the qualifying tenant of a flat contained in the premises on the relevant date, the claim notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company on that date; and for this purpose a 'sufficient number' is a number, greater than one, which is not less than one-half of the total number of flats contained in the premises on that date<sup>20</sup>.

A company which is an RTM company in relation to any premises may give to any person a notice requiring him to provide the company with any information which is in his possession or control, and which the company reasonably requires for ascertaining the particulars required by or by virtue of the above provisions to be included in a claim notice for claiming to acquire the right to manage the premises<sup>21</sup>. Where the information is recorded in a document<sup>22</sup> in the person's possession or control, the RTM company may give him a notice requiring him:

- 781 (i) to permit any person authorised to act on behalf of the company at any reasonable time to inspect the document, or, if the information is recorded in the document in a form in which it is not readily intelligible, to give any such person access to it in a readily intelligible form; and
- 782 (ii) to supply the company with a copy<sup>23</sup> of the document containing the information in a readily intelligible form on payment of a reasonable fee<sup>24</sup>.

A person to whom a notice is so given must comply with it within the period of 28 days beginning with the day on which it is given<sup>25</sup>.

1 Commonhold and Leasehold Reform Act 2002 s 80(1). For the meaning of 'claim notice' see PARA 378 ante.

2 *Ibid* Pt 2 Ch 1 (ss 71-13) (as amended): see PARA 367 et seq ante, PARA 380 et seq post.

3 *Ibid* s 80(2).

4 For the meaning of 'qualifying tenant' see PARA 370 ante.

5 For the meaning of 'flat' see PARA 368 note 3 ante.

6 For the meaning of 'RTM company' see PARA 374 ante.

7 Commonhold and Leasehold Reform Act 2002 s 80(3).

8 For these purposes, any reference, however expressed, to the lease held by the qualifying tenant of a flat is a reference to a lease held by him under which the demised premises consist of or include the flat, whether with or without one or more other flats: *ibid* s 112(4). For the meaning of 'lease' generally see PARA 369 note 8 ante.

9 *Ibid* s 80(4).

10 *Ibid* s 80(5).

11 For the meaning of 'the relevant date' see PARA 378 ante.

12 *Ie* notice under the Commonhold and Leasehold Reform Act 2002 s 79(6): see PARA 378 ante.

13 *Ie* under *ibid* s 84: see PARA 381 post.

14 *Ibid* s 80(6).

15 *Ibid* s 80(7).



16 As to the power to make regulations see *ibid* s 178; and PARA 59 note 2 ante.

17 *Ibid* s 80(8). For the meaning of 'appropriate national authority' see PARA 355 note 9 ante.

In addition to the particulars required by s 80(2)-(7) (see heads (1)-(6) in the text), a claim notice must contain the following prescribed particulars (see the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 4; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 4), ie:

- 31 (1) a statement that a person who does not dispute the RTM's company's entitlement to acquire the right to manage, and is the manager party under a management contract subsisting immediately before the date specified in the claim notice under head (5) in the text, must, in accordance with the Commonhold and Leasehold Reform Act 2002 s 92 (duties to give notice of contracts: see PARA 387 post), give a notice in relation to the contract to the person who is the contractor party in relation to the contract and to the RTM company;
- 32 (2) a statement that, from the acquisition date, landlords under leases of the whole or any part of the premises to which the claim notice relates are entitled to be members of the RTM company;
- 33 (3) a statement that the notice is not invalidated by any inaccuracy in any of the particulars required by heads (1)-(6) in the text or by reg 4 of the relevant regulations, but that a person who is of the opinion that any of the particulars contained in the claim notice are inaccurate may identify the particulars in question to the RTM company by which the notice was given and indicate the respects in which they are considered to be inaccurate;
- 34 (4) a statement that a person who receives the notice but does not fully understand its purpose, is advised to seek professional help; and
- 35 (5) the information provided in the notes to the form set out in Sch 2 to the relevant regulations.

18 Commonhold and Leasehold Reform Act 2002 s 80(9). For the prescribed form of claim notice see the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 8(2), Sch 2; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 8(2), Sch 2.

19 Commonhold and Leasehold Reform Act 2002 s 81(1).

20 *Ibid* s 81(2).

21 *Ibid* s 82(1).

22 'Document' means anything in which information is recorded: *ibid* s 112(1).

23 'Copy', in relation to a document in which information is recorded, means anything onto which the information has been copied by whatever means and whether directly or indirectly: *ibid* s 112(1).

24 *Ibid* s 82(2).

25 *Ibid* s 82(3).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/380. Right of access.

### **380. Right of access.**

Where an RTM company<sup>1</sup> has given a claim notice<sup>2</sup> in relation to any premises, each of the persons specified below has a right of access to any part of the premises if that is reasonable in connection with any matter arising out of the claim to acquire the right to manage<sup>3</sup>. Those persons are:

- 783 (1) any person authorised to act on behalf of the RTM company;  
 784 (2) any person who is landlord<sup>4</sup> under a lease<sup>5</sup> of the whole or any part of the premises and any person authorised to act on behalf of any such person;  
 785 (3) any person who is party to such a lease otherwise than as landlord or tenant<sup>6</sup> and any person authorised to act on behalf of any such person; and  
 786 (4) any manager appointed under Part II of the Landlord and Tenant Act 1987<sup>7</sup> to act in relation to the premises, or any premises containing or contained in the premises, and any person authorised to act on behalf of any such manager<sup>8</sup>.

The right so conferred is exercisable, at any reasonable time, on giving not less than ten days' notice to the occupier of any premises to which access is sought, or, if those premises are unoccupied, to the person entitled to occupy them<sup>9</sup>.

- 1 For the meaning of 'RTM company' see PARA 374 ante.  
 2 For the meaning of 'claim notice' see PARA 378 ante.  
 3 Commonhold and Leasehold Reform Act 2002 s 83(1). For the meaning of 'the right to manage' see PARA 367 ante.  
 4 For the meaning of 'landlord' see PARA 369 note 8 ante.  
 5 For the meaning of 'lease' see PARA 369 note 8 ante.  
 6 For the meaning of 'tenant' see PARA 369 note 8 ante.  
 7 Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.  
 8 Commonhold and Leasehold Reform Act 2002 s 83(2).  
 9 Ibid s 83(3). As to the giving of notices see PARA 373 ante.

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### **381. Counter-notices.**

A person who is given a claim notice<sup>1</sup> by an RTM company<sup>2</sup> may give a notice (a 'counter-notice') to the company no later than the date specified<sup>3</sup> in the claim notice<sup>4</sup>. A counter-notice is a notice containing a statement either:

- 787 (1) admitting that the RTM company was on the relevant date<sup>5</sup> entitled to acquire the right to manage the premises specified in the claim notice; or  
 788 (2) alleging that, by reason of a specified statutory provision<sup>6</sup>, the RTM company was on that date not so entitled,

and containing such other particulars, if any, as may be required to be contained in counter-notices, and complying with such requirements, if any, about the form of counter-notices, as may be prescribed by regulations<sup>7</sup> made by the appropriate national authority<sup>8</sup>.

Where the RTM company has been given one or more counter-notices containing a statement such as is mentioned in head (2) above, the company may apply to a leasehold valuation tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises<sup>9</sup>. Such an application must be made not later than the end of the period of two months beginning with the day on which the counter-notice, or, where more than one, the last of the counter-notices, was given<sup>10</sup>. Where the RTM company has been given one or more counter-notices containing such a statement, that company does not acquire the right to manage the premises unless:

- 789 (a) on an application under the above provisions it is finally determined<sup>11</sup> that the company was on the relevant date entitled to acquire the right to manage the premises; or
- 790 (b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled<sup>12</sup>.

If on an application under the above provisions it is finally determined that the company was not on the relevant date entitled to acquire the right to manage the premises, the claim notice ceases to have effect<sup>13</sup>.

1    Ie under the Commonhold and Leasehold Reform Act 2002 s 79(6): see PARA 378 ante.

2    For the meaning of 'RTM company' see PARA 374 ante.

3    Ie specified under the Commonhold and Leasehold Reform Act 2002 s 80(6): see PARA 379 ante.

4    Ibid s 84(1). As to the giving of notices see PARA 373 ante.

5    For the meaning of 'the relevant date' see PARA 378 ante.

6    Ie a specified provision of the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 382 et seq post.

7    As to the making of regulations see ibid s 178; and PARA 59 note 2 ante.

8    Ibid s 84(2). For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

In addition to the statement referred to in head (1) or head (2) in the text, a counter-notice must contain the following prescribed particulars (see the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 5; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 5), ie:

36    (1) a statement that, where the RTM company has been given one or more counter-notices containing such a statement as is mentioned in head (2) in the text, the company may apply to a leasehold valuation tribunal for a determination that, on the date on which notice of the claim was given, the company was entitled to acquire the right to manage the premises specified in the claim notice;

37    (2) a statement that, where the RTM company has been given one or more counter-notices containing such a statement as is mentioned in head (2) in the text, the company does not acquire the right to manage the premises specified in the claim notice unless:

1. (a) on an application to a leasehold valuation tribunal, it is finally determined that the company was entitled to acquire the right to manage the premises; or

1

2. (b) the person by whom the counter-notice was given agrees, or the persons by whom the counter-notices were given agree, in writing that the company was so entitled; and

2

38    (3) the information provided in the notes to the form set out in Sch 3 to the relevant regulations.

For the prescribed form of counter-notice see the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 8(3), Sch 3; the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, reg 8(3), Sch 3.

9 Commonhold and Leasehold Reform Act 2002 s 84(3). The application must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; (3) a copy of the memorandum and articles of association of the RTM company; and (4) a copy of the claim notice and a copy of the counter-notice received: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(a), Sch 2 para 4(1)-(4); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(a), Sch 2 para 4(1)-(4). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

10 Commonhold and Leasehold Reform Act 2002 s 84(4).

11 A determination on an application under *ibid* s 84(3) becomes final (1) if not appealed against, at the end of the period for bringing an appeal; or (2) if appealed against, at the time when the appeal (or any further appeal) is disposed of; and an appeal is disposed of (a) if it is determined and the period for bringing any further appeal has ended; or (b) if it is abandoned or otherwise ceases to have effect: s 84(7), (8).

12 *Ibid* s 84(5).

13 *Ibid* s 84(6).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/382. Withdrawal or deemed withdrawal of claim notice.

### **382. Withdrawal or deemed withdrawal of claim notice.**

A RTM company<sup>1</sup> which has given a claim notice<sup>2</sup> in relation to any premises may, at any time before it acquires the right to manage the premises, withdraw the claim notice by giving a notice to that effect (a 'notice of withdrawal')<sup>3</sup>. A notice of withdrawal must be given to each person who is:

- 791 (1) landlord<sup>4</sup> under a lease<sup>5</sup> of the whole or any part of the premises;
- 792 (2) party to such a lease otherwise than as landlord or tenant<sup>6</sup>;
- 793 (3) a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>7</sup> to act in relation to the premises, or any premises containing or contained in the premises; or
- 794 (4) the qualifying tenant<sup>8</sup> of a flat<sup>9</sup> contained in the premises<sup>10</sup>.

If an RTM company has been given one or more counter-notices<sup>11</sup> containing a statement alleging that, by reason of a specified statutory provision, that company was not on the relevant date<sup>12</sup> entitled to acquire the right to manage the premises<sup>13</sup> but either:

- 795 (a) no application for a determination as to its entitlement<sup>14</sup> is made within the specified period<sup>15</sup>; or
- 796 (b) such an application is so made but is subsequently withdrawn,

the claim notice is deemed to be withdrawn<sup>16</sup>. The withdrawal is taken to occur:

- 797 (i) if head (a) above applies, at the end of the period specified in that head; and
- 798 (ii) if head (b) above applies, on the date of the withdrawal of the application<sup>17</sup>.

The claim notice is not, however, so deemed to be withdrawn<sup>18</sup> if the person by whom the counter-notice was given has, or the persons by whom the counter-notices were given have, before the time when the withdrawal would be taken to occur, agreed in writing that the RTM company was on the relevant date entitled to acquire the right to manage the premises<sup>19</sup>.

The claim notice is also deemed to be withdrawn if:

- 799 (A) a winding-up order is made, or a resolution for voluntary winding up is passed, with respect to the RTM company, or the RTM company enters administration;
- 800 (B) a receiver or a manager of the RTM company's undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the RTM company comprised in or subject to the charge;
- 801 (C) a voluntary arrangement proposed in the case of the RTM company for the purposes of Part I of the Insolvency Act 1986<sup>20</sup> is approved<sup>21</sup>; or
- 802 (D) the RTM company's name is struck off<sup>22</sup> the register<sup>23</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 For the meaning of 'claim notice' see PARA 378 ante.

3 Commonhold and Leasehold Reform Act 2002 s 86(1). As to the giving of notices see PARA 373 ante.

4 For the meaning of 'landlord' see PARA 369 note 8 ante.

5 For the meaning of 'lease' see PARA 369 note 8 ante.

6 For the meaning of 'tenant' see PARA 369 note 8 ante.

7 Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.

8 For the meaning of 'qualifying tenant' see PARA 370 ante.

9 For the meaning of 'flat' see PARA 368 note 3 ante.

10 Commonhold and Leasehold Reform Act 2002 s 86(2).

11 For the meaning of 'counter-notice' see PARA 381 ante.

12 For the meaning of 'the relevant date' see PARA 378 ante.

13 Ie a statement such as is mentioned in the Commonhold and Leasehold Reform Act 2002 s 84(2)(b): see PARA 381 ante at head (2) in the text.

14 Ie no application for a determination under ibid s 84(3): see PARA 381 ante.

15 Ie the period specified in ibid s 84(4): see PARA 381 ante.

16 Ibid s 87(1).

17 Ibid s 87(2).

18 Ie ibid s 87(1) does not apply.

19 Ibid s 87(3).

20 Ie for the purposes of the Insolvency Act 1986 Pt I (ss 1-7B) (as amended): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 71 et seq.

21 Ie under ibid Pt I (as amended).

22 le under the Companies Act 1985 s 652 (defunct companies: see COMPANIES vol 15 (2009) PARA 1521) or s 652A (as added) (private companies: see COMPANIES vol 15 (2009) PARA 1525).

23 Commonhold and Leasehold Reform Act 2002 s 87(4) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 4, Schedule Pt 1 paras 38, 39).

## UPDATE

### 382 Withdrawal or deemed withdrawal of claim notice

TEXT AND NOTES 22-23--Commonhold and Leasehold Reform Act 2002 s 87(4) amended: SI 2009/1941.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/383. Costs.

### 383. Costs.

An RTM company<sup>1</sup> is liable for reasonable costs incurred by a person who is:

- 803 (1) landlord<sup>2</sup> under a lease<sup>3</sup> of the whole or any part of any premises;
- 804 (2) party to such a lease otherwise than as landlord or tenant<sup>4</sup>; or
- 805 (3) a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>5</sup> to act in relation to the premises, or any premises containing or contained in the premises,

in consequence of a claim notice<sup>6</sup> given by the company in relation to the premises<sup>7</sup>. Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs<sup>8</sup>. Further, an RTM company is liable for any costs which such a person incurs as party to any proceedings<sup>9</sup> before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises<sup>10</sup>.

Where a claim notice given by an RTM company is at any time withdrawn or deemed to be withdrawn<sup>11</sup>, or at any time ceases to have effect<sup>12</sup>, the liability of the RTM company under the above provisions for costs incurred by any person is a liability for costs incurred by him down to that time<sup>13</sup>. Each person who is or has been a member of the RTM company is also liable for those costs, jointly and severally with the RTM company and each other person who is so liable<sup>14</sup>; but this does not make a person liable if:

- 806 (a) the lease by virtue of which he was a qualifying tenant<sup>15</sup> has been assigned to another person<sup>16</sup>; and
- 807 (b) that other person has become a member of the RTM company<sup>17</sup>.

Any question arising in relation to the amount of any costs payable by an RTM company must, in default of agreement, be determined by a leasehold valuation tribunal<sup>18</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

- 2 For the meaning of 'landlord' see PARA 369 note 8 ante.
- 3 For the meaning of 'lease' see PARA 369 note 8 ante.
- 4 For the meaning of 'tenant' see PARA 369 note 8 ante.
- 5 Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.
- 6 For the meaning of 'claim notice' see PARA 378 ante.
- 7 Commonhold and Leasehold Reform Act 2002 s 88(1).
- 8 Ibid s 88(2).
- 9 Ie any proceedings under ibid Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 384 et seq post.
- 10 Ibid s 88(3).
- 11 Ie by virtue of any provision of ibid Pt 2 Ch 1 (as amended).
- 12 Ie by reason of any other provision of ibid Pt 2 Ch 1 (as amended).
- 13 Ibid s 89(1), (2).
- 14 Ibid s 89(3).
- 15 For the meaning of 'qualifying tenant' see PARA 370 ante; and for the meaning of references to the lease held by such a tenant see PARA 379 note 8 ante.
- 16 The reference in head (a) in the text to an assignment includes (1) an assent by personal representatives; and (2) assignment by operation of law where the assignment is to a trustee in bankruptcy or to a mortgagee under the Law of Property Act 1925 s 89(2) (foreclosure of leasehold mortgage: see MORTGAGE vol 77 (2010) PARA 607): Commonhold and Leasehold Reform Act 2002 s 89(5).
- 17 Ibid s 89(4).
- 18 Ibid s 88(4). An application under s 88 must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; and (3) a copy of the memorandum and articles of association of the RTM company: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(c), Sch 2 para 4(1)-(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(c), Sch 2 para 4(1)-(3). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/ (iii) Claim to Acquire the Right to Manage/384. Position where landlords etc not traceable.

### **384. Position where landlords etc not traceable.**

The following provisions apply where an RTM company<sup>1</sup> wishing to acquire the right to manage premises:

- 808 (1) complies with the statutory requirements as to membership<sup>2</sup>; and
- 809 (2) would not have been precluded from giving a valid claim notice<sup>3</sup> with respect to the premises,

but cannot find, or ascertain the identity of, any of the persons to whom the claim notice would be required<sup>4</sup> to be given<sup>5</sup>.

The RTM company may apply to a leasehold valuation tribunal for an order that the company is to acquire the right to manage the premises<sup>6</sup>. Such an order may be made only if the company has given notice of the application to each person who is the qualifying tenant<sup>7</sup> of a flat<sup>8</sup> contained in the premises<sup>9</sup>.

Before an order is made the company may be required to take such further steps by way of advertisement or otherwise as is determined proper for the purpose of tracing the persons who are:

- 810 (a) landlords<sup>10</sup> under leases<sup>11</sup> of the whole or any part of the premises; or
- 811 (b) parties to such leases otherwise than as landlord or tenant<sup>12</sup>.

If any of those persons is traced after an application for an order is made, but before the making of an order, no further proceedings may be taken with a view to the making of an order<sup>13</sup>. Where that happens:

- 812 (i) the rights and obligations of all persons concerned are to be determined as if the company had, at the date of the application, duly given notice<sup>14</sup> of its claim to acquire the right to manage the premises; and
- 813 (ii) the leasehold valuation tribunal may give such directions as it thinks fit as to the steps to be taken for giving effect to their rights and obligations, including directions modifying or dispensing with any of the statutory<sup>15</sup> requirements<sup>16</sup>.

An application for an order may be withdrawn at any time before an order is made and, after it is withdrawn, head (i) above does not apply<sup>17</sup>; but where any step is taken for the purpose of giving effect to head (i) above in the case of any application, the application may not afterwards be withdrawn except with the consent of the person or persons traced, or by permission of the leasehold valuation tribunal<sup>18</sup>. Permission is to be given only where it appears just that it should be given by reason of matters coming to the knowledge of the RTM company in consequence of the tracing of the person or persons traced<sup>19</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 It complies with the Commonhold and Leasehold Reform Act 2002 s 79(4) or (5): see PARA 378 ante.

3 It is a valid notice under *ibid* s 79: see PARA 378 ante.

4 It is by *ibid* s 79(6): see PARA 378 ante.

5 *Ibid* s 85(1).

6 *Ibid* s 85(2). An application under s 85(2) must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; (3) a copy of the memorandum and articles of association of the RTM company; and (4) the following particulars: (a) a statement that the requirements of s 78 (notice inviting participation: see PARA 377 ante) and s 79 (notice of claim: see PARA 378 ante) are fulfilled; (b) a copy of the notice given under s 85(3) (see the text and notes 7-9 *infra*) together with a statement that such notice has been served on all qualifying tenants; (c) a statement describing the circumstances in which the landlord cannot be identified or traced: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(b), Sch 2 para 4(1)-(3), (5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(b), Sch 2 para 4(1)-(3), (5). As to the other particulars to be included, and the procedure on such an application, see PARA 59 *et seq* ante.

7 For the meaning of 'qualifying tenant' see PARA 370 ante.

8 For the meaning of 'flat' see PARA 368 note 3 ante.



- 9 Commonhold and Leasehold Reform Act 2002 s 85(3).
- 10 For the meaning of 'landlord' see PARA 369 note 8 ante.
- 11 For the meaning of 'lease' see PARA 369 note 8 ante.
- 12 Commonhold and Leasehold Reform Act 2002 s 85(4).
- 13 Ibid s 85(5).
- 14 Ie under ibid s 79.
- 15 Ie any of the requirements imposed by or by virtue of ibid Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 385 et seq post.
- 16 Ibid s 85(6).
- 17 Ibid s 85(7).
- 18 Ibid s 85(8).
- 19 Ibid s 85(9).

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### **385. Power to prescribe procedure.**

Where a claim to acquire the right to manage any premises is made by the giving of a claim notice<sup>1</sup>, except as otherwise provided<sup>2</sup>:

- 814 (1) the procedure for giving effect to the claim notice; and
- 815 (2) the rights and obligations of all parties in any matter arising in giving effect to the claim notice,

are to be such as may be prescribed by regulations<sup>3</sup> made by the appropriate national authority<sup>4</sup>. Regulations so made may, in particular, make provision for a person to be discharged from performing any obligations arising out of a claim notice by reason of the default or delay of some other person<sup>5</sup>.

- 1 For the meaning of 'claim notice' see PARA 378 ante.
- 2 Ie by the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 386 et seq post.
- 3 As to the making of regulations see ibid s 178; and PARA 59 note 2 ante.
- 4 Ibid s 110(1). For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.
- 5 Ibid s 110(2). At the date at which this title states the law, no such regulations had been made.

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PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(1) MANAGEMENT BY RTM COMPANIES/(iv) Acquisition of the Right to Manage/386. The acquisition date.

#### **(iv) Acquisition of the Right to Manage**

##### **386. The acquisition date.**

The following provisions have effect about the date which is the acquisition date where an RTM company<sup>1</sup> acquires the right to manage any premises<sup>2</sup>.

Where there is no dispute about entitlement, the acquisition date is the date specified<sup>3</sup> in the claim notice<sup>4</sup>; and for these purposes there is no dispute about entitlement if:

- 816 (1) no counter-notice is given under the relevant statutory provision<sup>5</sup>; or
- 817 (2) the counter-notice so given<sup>6</sup>, or, where more than one is so given, each of them, contains a statement<sup>7</sup> admitting that the RTM company was, on the relevant date<sup>8</sup>, entitled to acquire the right to manage the specified premises<sup>9</sup>.

Where the right to manage the premises is acquired by the company by virtue of a determination by a leasehold valuation tribunal<sup>10</sup>, the acquisition date is the date three months after the determination becomes final<sup>11</sup>.

Where the right to manage the premises is acquired by the company by virtue of the person or persons who gave counter-notices agreeing that the company was entitled to acquire the right to manage on the relevant date<sup>12</sup>, the acquisition date is the date three months after the day on which the person, or the last person, by whom a counter-notice containing a statement alleging that the company was not so entitled<sup>13</sup> was given agrees in writing that the company was on the relevant date entitled to acquire the right to manage the premises<sup>14</sup>.

Where an order is made in circumstances where any of the persons to whom the claim notice was required to be given are not traceable<sup>15</sup>, the acquisition date is, subject to any appeal, the date specified in the order<sup>16</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 Commonhold and Leasehold Reform Act 2002 s 90(1).

3 I.e. under *ibid* s 80(7): see PARA 379 ante.

4 *Ibid* s 90(2). For the meaning of 'claim notice' see PARA 378 ante.

5 I.e. under *ibid* s 84: see PARA 381 ante.

6 See note 5 *supra*.

7 I.e. a statement such as is mentioned in the Commonhold and Leasehold Reform Act 2002 s 84(2)(a): see PARA 381 ante.

8 For the meaning of 'the relevant date' see PARA 378 ante.

9 Commonhold and Leasehold Reform Act 2002 s 90(3).

10 I.e. a determination under *ibid* s 84(5)(a): see PARA 381 ante.

11 *Ibid* s 90(4). As to when the determination becomes final see PARA 381 note 11 ante.

12 I.e. by virtue of *ibid* s 84(5)(b): see PARA 381 ante.

13 I.e. a statement such as is mentioned in *ibid* s 84(2)(b): see PARA 381 ante.

14 Ibid s 90(5).

15 ie an order is made under ibid s 85: see PARA 384 ante.

16 Ibid s 90(6).

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### **387. Duties to give notice of contracts.**

The following provisions<sup>1</sup> apply where:

- 818 (1) the right to manage premises is to be acquired by an RTM company<sup>2</sup>, otherwise than by virtue of an order made in circumstances where any of the persons to whom the claim notice was required to be given are not traceable<sup>3</sup>; and
- 819 (2) there are one or more existing management contracts<sup>4</sup> relating to the premises<sup>5</sup>.

The person who is the manager party<sup>6</sup> in relation to an existing management contract must give a notice in relation to the contract:

- 820 (a) to the person who is the contractor party<sup>7</sup> in relation to the contract (a 'contractor notice'); and
- 821 (b) to the RTM company (a 'contract notice')<sup>8</sup>.

A contractor notice and a contract notice must be given:

- 822 (i) in the case of a contract subsisting immediately before the determination date<sup>9</sup>, on that date or as soon after that date as is reasonably practicable; and
- 823 (ii) in the case of a contract entered into during the period beginning with the determination date and ending with the acquisition date<sup>10</sup>, on the date on which it is entered into or as soon after that date as is reasonably practicable<sup>11</sup>.

A contractor notice must:

- 824 (A) give details sufficient to identify the contract in relation to which it is given;
- 825 (B) state that the right to manage the premises is to be acquired by an RTM company;
- 826 (C) state the name and registered office of the RTM company;
- 827 (D) specify the acquisition date; and
- 828 (E) contain such other particulars, if any, as may be required to be contained in contractor notices by regulations<sup>12</sup> made by the appropriate national authority<sup>13</sup>,

and must also comply with such requirements, if any, about the form of contractor notices as may be prescribed by regulations so made<sup>14</sup>. Where a person who receives a contractor notice<sup>15</sup> is party to an existing management sub-contract<sup>16</sup> with another person (the 'sub-contractor party'), the person who received the notice must send a copy of the contractor notice to the

sub-contractor party, and give to the RTM company a contract notice in relation to the existing management sub-contract<sup>17</sup>. This duty must be complied with, in the case of a contract entered into before the contractor notice is received, on the date on which it is received or as soon after that date as is reasonably practicable, and, in the case of a contract entered into after the contractor notice is received, on the date on which it is entered into or as soon after that date as is reasonably practicable<sup>18</sup>.

A contract notice must give particulars of the contract in relation to which it is given and of the person who is the contractor party, or sub-contractor party, in relation to that contract, and contain such other particulars, if any, as may be required to be contained in contract notices by regulations made by the appropriate national authority<sup>19</sup>. It must also comply with such requirements, if any, about the form of contract notices as may be prescribed by such regulations so made<sup>20</sup>.

1    Ie the Commonhold and Leasehold Reform Act 2002 s 92: see the text and notes 6-20 infra.

2    For the meaning of 'RTM company' see PARA 374 ante.

3    Ie an order under the Commonhold and Leasehold Reform Act 2002 s 85: see PARA 384 ante.

4    A management contract is a contract between (1) an existing manager of the premises (the 'manager party'); and (2) another person (the 'contractor party'), under which the contractor party agrees to provide services, or do any other thing, in connection with any matter relating to a function which will be a function of the RTM company once it acquires the right to manage; and 'existing management contract' means a management contract which: (a) is subsisting immediately before the determination date; or (b) is entered into during the period beginning with the determination date and ending with the acquisition date: *ibid* s 91(2), (3). An existing manager of the premises is any person who is (i) landlord under a lease relating to the whole or any part of the premises; (ii) party to such a lease otherwise than as landlord or tenant; or (iii) a manager appointed under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (see PARA 399 et seq post) to act in relation to the premises, or any premises containing or contained in the premises: Commonhold and Leasehold Reform Act 2002 s 91(4). For the meanings of 'landlord', 'lease' and 'tenant' see PARA 369 note 8 ante; and for the meaning of 'determination date' see note 9 infra.

5    *Ibid* s 91(1).

6    For the meaning of 'manager party' see note 4 supra.

7    For the meaning of 'contractor party' see note 4 supra.

8    Commonhold and Leasehold Reform Act 2002 s 92(1). As to the giving of notices see PARA 373 ante.

9    For these purposes, 'determination date' means: (1) where there is no dispute about entitlement, the date specified in the claim notice under *ibid* s 80(6) (see PARA 379 ante); (2) where the right to manage the premises is acquired by the company by virtue of a determination under s 84(5)(a) (see PARA 381 ante), the date when the determination becomes final; and (3) where the right to manage the premises is acquired by the company by virtue of 84(5)(b) (see PARA 381 ante), the day on which the person (or the last person) by whom a counter-notice containing a statement such as is mentioned in s 84(2)(b) was given agrees in writing that the company was on the relevant date entitled to acquire the right to manage the premises: s 91(5).

10   For the meaning of 'the acquisition date' see PARA 386 ante.

11   Commonhold and Leasehold Reform Act 2002 s 92(2).

12   As to the making of regulations see *ibid* s 178; and PARA 59 note 2 ante.

13   For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

14   Commonhold and Leasehold Reform Act 2002 s 92(3). A contractor notice in relation to premises in England must contain, in addition to the particulars referred to in s 92(3)(a)-(d), the statement that, should the person to whom the notice is given wish to provide to the RTM company services which, as the contractor party, it has provided to the manager party under the contract of which details are given in the notice, it is advised to contact the RTM company at the address given in the notice: Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 6. There is no prescribed form for such a notice.

A contractor notice in relation to premises in Wales must contain the like particulars but, additionally, the information provided in the notes to the form set out in the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, Sch 4, and must be in the form prescribed by Sch 4: see regs 6, 8(4), Sch 4.

15     le including one who receives a copy by virtue of the Commonhold and Leasehold Reform Act 2002 s 92(4).

16     An existing management sub-contract is a contract under which the sub-contractor party agrees to provide services, or do any other thing, in connection with any matter relating to a function which will be a function of the RTM company once it acquires the right to manage and which (1) is subsisting immediately before the determination date; or (2) is entered into during the period beginning with the determination date and ending with the acquisition date: *ibid* s 92(5).

17     *Ibid* s 92(4).

18     *Ibid* s 92(6).

19     *Ibid* s 92(7)(a), (b). A contract notice in relation to premises in England must contain, in addition to the particulars referred to in s 92(7)(a), (b): (1) the address of the person who is the contractor party, or sub-contractor party, under the contract of which particulars are given in the notice; and (2) a statement that, should the RTM company wish to avail itself of the services which the contractor party, or sub-contractor party, has provided to the manager party under that contract, it is advised to contact the contractor party, or sub-contractor party, at the address given in the notice: Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988, reg 7.

A contract notice in relation to premises in Wales must contain the like particulars and also the information provided in the notes to the form set out in the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, Sch 5: see reg 7.

20     Commonhold and Leasehold Reform Act 2002 s 92(7). There is no prescribed form for such a notice in relation to premises in England; but in relation to premises in Wales, a contract notice must be in the form set out in the Right to Manage (Prescribed Particulars and Forms) (Wales) Regulations 2004, SI 2004/678, Sch 5: see reg 8(5), Sch 5.

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### **388. Duty to provide information.**

Where the right to manage premises is to be acquired by an RTM company<sup>1</sup>, the company may give notice to a person who is;

- 829 (1)     landlord<sup>2</sup> under a lease<sup>3</sup> of the whole or any part of the premises;
- 830 (2)     party to such a lease otherwise than as landlord or tenant<sup>4</sup>; or
- 831 (3)     a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>5</sup> to act in relation to the premises, or any premises containing or contained in the premises,

requiring him to provide the company with any information which is in his possession or control and which the company reasonably requires in connection with the exercise of the right to manage<sup>6</sup>.

Where the information is recorded in a document<sup>7</sup> in his possession or control the notice may require him:

- 832 (a) to permit any person authorised to act on behalf of the company at any reasonable time to inspect the document or, if the information is recorded in the document in a form in which it is not readily intelligible, to give any such person access to it in a readily intelligible form; and
- 833 (b) to supply the company with a copy<sup>8</sup> of the document containing the information in a readily intelligible form<sup>9</sup>.

A notice may not require a person to do anything under these provisions before the acquisition date<sup>10</sup> but, subject to that, a person who is required by a notice to do anything under these provisions must do it within the period of 28 days beginning with the day on which the notice is given<sup>11</sup>.

- 1 For the meaning of 'RTM company' see PARA 374 ante.
- 2 For the meaning of 'landlord' see PARA 369 note 8 ante.
- 3 For the meaning of 'lease' see PARA 369 note 8 ante.
- 4 For the meaning of 'tenant' para 369 note 8 ante.
- 5 le under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.
- 6 Commonhold and Leasehold Reform Act 2002 s 93(1). As to the giving of notices see PARA 373 ante.
- 7 For the meaning of 'document' see PARA 379 note 22 ante.
- 8 For the meaning of 'copy' see PARA 379 note 23 ante.
- 9 Commonhold and Leasehold Reform Act 2002 s 93(2).
- 10 Ibid s 93(3). For the meaning of 'the acquisition date' see PARA 386 ante.
- 11 Ibid s 93(4).

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### **389. Duty to pay accrued uncommitted service charges.**

Where the right to manage premises is to be acquired by an RTM company<sup>1</sup>, a person who is:

- 834 (1) landlord<sup>2</sup> under a lease<sup>3</sup> of the whole or any part of the premises;
- 835 (2) party to such a lease otherwise than as landlord or tenant<sup>4</sup>; or
- 836 (3) a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>5</sup> to act in relation to the premises, or any premises containing or contained in the premises,

must make to the company a payment equal to the amount of any accrued uncommitted service charges<sup>6</sup> held by him on the acquisition date<sup>7</sup>.

The amount of any accrued uncommitted service charges is the aggregate of:

- 837 (a) any sums which have been paid to the person by way of service charges in respect of the premises; and  
 838 (b) any investments which represent such sums, and any income which has accrued on them,

less so much, if any, of that amount as is required to meet the costs incurred before the acquisition date in connection with the matters for which the service charges were payable<sup>8</sup>. The person or the RTM company may make an application to a leasehold valuation tribunal to determine the amount of any payment which so falls to be made<sup>9</sup>.

The duty imposed by these provisions must be complied with on the acquisition date or as soon after that date as is reasonably practicable<sup>10</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 For the meaning of 'landlord' see PARA 369 note 8 ante.

3 For the meaning of 'lease' see PARA 369 note 8 ante.

4 For the meaning of 'tenant' para 369 note 8 ante.

5 le under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.

6 For these purposes, 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18 (as amended) (see PARA 326 ante): Commonhold and Leasehold Reform Act 2002 s 112(1).

7 Ibid s 94(1). For the meaning of 'the acquisition date' see PARA 386 ante.

8 Ibid s 94(2).

9 Ibid s 94(3). An application under s 94 must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; (3) a copy of the memorandum and articles of association of the RTM company; and (4) an estimate of the amount of the accrued uncommitted service charges: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(d), Sch 2 para 4(1)-(3), (6); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(d), Sch 2 para 4(1)-(3), (6). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

10 Commonhold and Leasehold Reform Act 2002 s 94(4). As to the enforcement of this requirement see PARA 396 post.

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## **(v) Exercising the Right to Manage**

### **390. Introduction.**

Where the right to manage premises has been acquired by an RTM company<sup>1</sup>, and has not ceased to be exercisable by it<sup>2</sup>, the provisions listed in heads (1) to (5) below apply<sup>3</sup>, that is the statutory provisions:

- 839 (1) relating to management functions under leases<sup>4</sup>;  
 840 (2) setting out functions relating to approvals<sup>5</sup>;

- 841 (3) providing for the enforcement, monitoring and reporting of tenant covenants<sup>6</sup>;  
 842 (4) modifying certain specified enactments<sup>7</sup> and providing for prescribed modifications to be made to other enactments relating to leases<sup>8</sup>; and  
 843 (5) providing for landlord contributions to service charges<sup>9</sup>.

1 For the meaning of 'RTM company' see PARA 374 ante.

2 As to the cessation of management see PARA 397 post.

3 Commonhold and Leasehold Reform Act 2002 s 95.

4 *le ibid* ss 96, 97: see PARA 391 post.

5 *le ibid* ss 98, 99: see PARA 392 post.

6 *le ibid* ss 100, 101: see PARAS 393-394 post.

7 See *ibid* s 102(1), Sch 7, which modifies (1) the Landlord and Tenant Act 1927 s 19 (as amended) (covenants not to assign etc: see PARA 486 et seq post); (2) the Defective Premises Act 1972 s 4 (see PARA 475 post); (3) the Landlord and Tenant Act 1985 ss 11, 12 (as amended) (repairing obligations: see PARA 416 et seq post); (4) ss 18-30 (as amended) (service charges: see PARA 325 et seq ante); (5) s 30A, Schedule (as added and amended) (information on insurance: see PARA 359 et seq ante); (6) s 30B (as added) (managing agents: see PARA 398 post); (7) the Landlord and Tenant Act 1987 s 5 (as substituted) (right of first refusal: see PARA 1752 post); (8) Pt II (ss 21-24) (as amended) (appointment of manager: see PARA 399 et seq post); and (9) ss 35, 36, 38, 39 (as amended) (variation of long leases relating to flats: see PARA 149 et seq ante); and which disappplies the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) (right to acquire landlord's interest: see PARA 1783 et seq post).

8 Other enactments relating to leases, (including enactments contained in the Commonhold and Leasehold Reform Act 2002 or any Act passed after that Act) have effect with any such modifications as are prescribed by regulations made by the appropriate national authority: s 102(2). As to the making of regulations see s 178; and PARA 59 note 2 ante; and for the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

9 *le ibid* s 103: see PARA 395 post.

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### **391. Management functions under leases.**

The following provisions apply<sup>1</sup> in relation to management functions<sup>2</sup> relating to the whole or any part of the premises<sup>3</sup>.

Management functions which a person who is landlord<sup>4</sup> under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company<sup>5</sup>; and where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company<sup>6</sup>. Accordingly, any provisions of the lease making provision about the relationship of:

- 844 (1) a person who is landlord under the lease; and  
 845 (2) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect<sup>7</sup>.



Any obligation owed by the RTM company by virtue of these provisions<sup>8</sup> to a tenant under a lease of the whole or any part of the premises is also owed to each person who is landlord under the lease<sup>9</sup>.

A person who is:

- 846 (a) landlord under a lease of the whole or any part of the premises;
- 847 (b) party to such a lease otherwise than as landlord or tenant; or
- 848 (c) a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>10</sup> to act in relation to the premises, or any premises containing or contained in the premises,

is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of the above provisions<sup>11</sup>, except in accordance with an agreement made by him and the RTM company<sup>12</sup>; but this does not prevent any person from insuring the whole or any part of the premises at his own expense<sup>13</sup>.

So far as any function of a tenant under a lease of the whole or any part of the premises:

- 849 (i) relates to the exercise of any function under the lease which is a function of the RTM company by virtue of the above provisions; and
- 850 (ii) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant,

it is instead exercisable in relation to the RTM company<sup>14</sup>; but this does not require or permit the payment to the RTM company of so much of any service charges<sup>15</sup> payable by a tenant under a lease of the whole or any part of the premises as is required to meet costs incurred before the right to manage was acquired by the RTM company in connection with matters for which the service charges are payable<sup>16</sup>.

1    Ie in the circumstances described in the Commonhold and Leasehold Reform Act 2002 s 95: see PARA 390 ante.

2    'Management functions' are functions with respect to services, repairs, maintenance, improvements, insurance and management; but *ibid* s 96 (see the text and notes 3-7 *infra*) does not apply in relation to (1) functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant; or (2) functions relating to re-entry or forfeiture: s 96(5), (6). An order amending s 96(5) or (6) may be made by the appropriate national authority: s 96(7). At the date at which this title states the law, no such order had been made. As to the making of orders generally see PARA 355 note 9 ante. For the meaning of 'flat' see PARA 368 note 3 ante; for the meanings of 'unit', 'lease' and 'tenant' see PARA 369 note 8 ante; for the meaning of 'qualifying tenant' see PARA 370 ante; and for the meaning of references to leases held by such tenants see PARA 379 note 8 ante. For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

3    *Ibid* s 96(1).

4    For the meaning of 'landlord' see PARA 369 note 8 ante.

5    *Ibid* s 96(2). For the meaning of 'RTM company' see PARA 374 ante.

6    *Ibid* s 96(3).

7    *Ibid* s 96(4).

8    Ie by virtue of *ibid* s 96: see the text and notes 1-7 *supra*.

9    *Ibid* s 97(1).

10   Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 *et seq post*.

- 11 See note 8 *supra*.
- 12 Commonhold and Leasehold Reform Act 2002 s 97(2).
- 13 *Ibid* s 97(3).
- 14 *Ibid* s 97(4).
- 15 For the meaning of 'service charge' see PARA 389 note 6 *ante*.
- 16 *Ibid* s 97(5).

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### **392. Functions relating to approvals.**

The following provisions apply<sup>1</sup> in relation to the grant of approvals<sup>2</sup> under long leases<sup>3</sup> of the whole or any part of the premises; but nothing in them applies in relation to an approval concerning only a part of the premises consisting of a flat<sup>4</sup> or other unit<sup>5</sup> not held under a lease by a qualifying tenant<sup>6</sup>.

Where a person who is:

- 851 (1) landlord<sup>7</sup> under a long lease of the whole or any part of the premises; or
- 852 (2) party to such a lease otherwise than as landlord or tenant<sup>8</sup>,

has functions in relation to the grant of approvals to a tenant under the lease, the functions are instead functions of the RTM company<sup>9</sup>. Accordingly, any provisions of the lease making provision about the relationship of a person who is landlord under the lease and a person who is party to the lease otherwise than as landlord or tenant in relation to such functions do not have effect<sup>10</sup>.

The RTM company must not grant an approval by virtue of the above provisions<sup>11</sup> without having given:

- 853 (a) in the case of an approval relating to assignment, underletting, charging, parting with possession, the making of structural alterations or improvements or alterations of use, 30 days' notice; or
- 854 (b) in any other case, 14 days' notice<sup>12</sup>,

to the person who is, or each of the persons who are, landlord under the lease<sup>13</sup>. If a person to whom notice is so given objects to the grant of the approval<sup>14</sup> before the time when the RTM company would first be entitled to grant it, the RTM company may grant it only:

- 855 (i) in accordance with the written agreement of the person who objected; or
- 856 (ii) in accordance with a determination of, or on an appeal from, a leasehold valuation tribunal<sup>15</sup>.

So far as any function of a tenant under a long lease of the whole or any part of the premises:

- 857 (A) relates to the exercise of any function which is a function of the RTM company by virtue the above provisions; and  
 858 (B) is exercisable in relation to a person who is landlord under the lease or party to the lease otherwise than as landlord or tenant,

it is instead exercisable in relation to the RTM company<sup>16</sup>.

1 le in the circumstances described in the Commonhold and Leasehold Reform Act 2002 s 95: see PARA 390 ante.

2 For these purposes, 'approval' includes consent or licence and 'approving' is to be construed accordingly; and an approval required to be obtained by virtue of a restriction entered on the register of title kept by the Chief Land Registrar is, so far as relating to a long lease of the whole or any part of any premises, to be treated for the purposes of *ibid* Pt 2 Ch 1 (ss 71-113) (as amended) (see PARA 367 et seq ante, PARA 393 et seq post) as an approval under the lease: s 98(7). For the meaning of 'lease' see PARA 369 note 8 ante.

3 For the meaning of 'long lease' see PARA 371 ante.

4 For the meaning of 'flat' see PARA 368 note 3 ante.

5 For the meaning of 'unit' see PARA 369 note 8 ante.

6 Commonhold and Leasehold Reform Act 2002 s 98(1). For the meaning of 'qualifying tenant' see PARA 370 ante; and for the meaning of references to a lease held by such a tenant see PARA 379 note 8 ante.

7 For the meaning of 'landlord' see PARA 369 note 8 ante.

8 For the meaning of 'tenant' see PARA 369 note 8 ante.

9 Commonhold and Leasehold Reform Act 2002 s 98(2).

10 *Ibid* s 98(3).

11 le by virtue of *ibid* s 98(2): see the text and notes 7-9 supra.

12 Regulations increasing the period of notice to be given under *ibid* s 98(4)(b) (see head (b) in the text) in the case of any description of approval may be made by the appropriate national authority: s 98(5). As to the making of regulations generally see s 178; and PARA 59 note 2 ante; and for the meaning of 'the appropriate national authority' see PARA 355 note 9 ante. At the date at which this title states the law, no such regulations had been made.

13 *Ibid* s 98(4). As to the giving of notices see PARA 373 ante.

14 An objection to the grant of the approval may not be made by a person unless he could withhold the approval if the function of granting it were exercisable by him (and not by the RTM company); and a person may not make an objection operating only if a condition or requirement is not satisfied unless he could grant the approval subject to the condition or requirement being satisfied if the function of granting it were so exercisable: *ibid* s 99(2), (3). An objection to the grant of the approval is made by giving notice of the objection (and of any condition or requirement which must be satisfied if it is not to operate) to the RTM company and the tenant, and, if the approval is to a tenant approving an act of a subtenant, to the subtenant: s 99(4).

15 *Ibid* s 99(1). An application to a leasehold valuation tribunal for a determination under s 99(1)(b) may be made by (1) the RTM company; (2) the tenant; (3) if the approval is to a tenant approving an act of a subtenant, the subtenant; or (4) any person who is landlord under the lease: s 99(5).

An application under s 99(1) must be accompanied by: (1) the name and address for service of the RTM company; (2) the name and address of the freeholder, any intermediate landlord and any manager; (3) a copy of the memorandum and articles of association of the RTM company; and (4) a description of the approval sought and a copy of the relevant lease: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(5), Sch 1 para 4(e), Sch 2 para 4(1)-(3), (7); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(5), Sch 1 para 4(e), Sch 2 para 4(1)-(3), (7). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

16 Commonhold and Leasehold Reform Act 2002 s 98(6).

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### **393. Enforcement of tenant covenants.**

These provisions apply<sup>1</sup> in relation to the enforcement of untransferred tenant covenants<sup>2</sup> of a lease of the whole or any part of the premises<sup>3</sup>. Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are otherwise enforceable<sup>4</sup>, in the same manner as they are enforceable by any other such person<sup>5</sup>. The RTM company may not, however, exercise any function of re-entry or forfeiture<sup>6</sup>.

Any power under a lease of a person who is:

- 859 (1) landlord<sup>7</sup> under the lease; or
- 860 (2) party to the lease otherwise than as landlord or tenant,

to enter any part of the premises to determine whether a tenant is complying with any untransferred tenant covenant is exercisable by the RTM company, as well as by the landlord or party<sup>8</sup>.

<sup>1</sup> Ie in the circumstances described in the Commonhold and Leasehold Reform Act 2002 s 95: see PARA 390 ante.

<sup>2</sup> For these purposes, 'tenant covenant', in relation to a lease, means a covenant falling to be complied with by a tenant under the lease; and a tenant covenant is untransferred if, apart from *ibid* s 100, it would not be enforceable by the RTM company: s 100(4). For the meanings of 'lease' and 'tenant' see PARA 369 note 8 ante; and for the meaning of 'RTM company' see PARA 374 ante.

<sup>3</sup> *Ibid* s 100(1).

<sup>4</sup> Ie enforceable apart from *ibid* s 100.

<sup>5</sup> *Ibid* s 100(2).

<sup>6</sup> *Ibid* s 100(3). As to re-entry and forfeiture see PARA 603 et seq post.

<sup>7</sup> For the meaning of 'landlord' see PARA 369 note 8 ante.

<sup>8</sup> Commonhold and Leasehold Reform Act 2002 s 100(5).

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### **394. Monitoring and reporting in relation to tenant covenants.**

These provisions apply<sup>1</sup> in relation to failures to comply with tenant covenants<sup>2</sup> of leases<sup>3</sup> of the whole or any part of the premises<sup>4</sup>. The RTM company<sup>5</sup> must:

- 861 (1) keep under review whether tenant covenants of leases of the whole or any part of the premises are being complied with; and
- 862 (2) report to any person who is landlord<sup>6</sup> under such a lease any failure to comply with any tenant covenant of the lease<sup>7</sup>.

The report must be made before the end of the period of three months beginning with the day on which the failure to comply comes to the attention of the RTM company<sup>8</sup>; but the RTM company need not report to a landlord a failure to comply with a tenant covenant if:

- 863 (a) the failure has been remedied;
- 864 (b) reasonable compensation has been paid in respect of the failure; or
- 865 (c) the landlord has notified the RTM company that it need not report to him failures of the description of the failure concerned<sup>9</sup>.

1 le in the circumstances described in the Commonhold and Leasehold Reform Act 2002 s 95: see PARA 390 ante.

2 For the meaning of 'tenant covenant' see PARA 393 note 2 ante.

3 For the meaning of 'lease' see PARA 369 note 8 ante.

4 Commonhold and Leasehold Reform Act 2002 s 101(1).

5 For the meaning of 'RTM company' see PARA 374 ante.

6 For the meaning of 'landlord' see PARA 369 note 8 ante.

7 Commonhold and Leasehold Reform Act 2002 s 101(2).

8 Ibid s 101(3).

9 Ibid s 101(4).

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### **395. Landlord contributions to service charges.**

These provisions apply<sup>1</sup> where:

- 866 (1) the premises contain at least one flat<sup>2</sup> or other unit<sup>3</sup> not subject to a lease held by a qualifying tenant<sup>4</sup> (an 'excluded unit');
- 867 (2) the service charges<sup>5</sup> payable under leases of flats contained in the premises which are so subject fall to be calculated as a proportion of the relevant costs<sup>6</sup>; and
- 868 (3) the proportions of the relevant costs so payable, when aggregated, amount to less than the whole of the relevant costs<sup>7</sup>.

Where the premises contain only one excluded unit, the person who is the appropriate person in relation to the excluded unit<sup>8</sup> must pay to the RTM company<sup>9</sup> the difference between:

- 869 (a) the relevant costs; and

870 (b) the aggregate amount payable in respect of the relevant costs under leases of flats contained in the premises which are held by qualifying tenants<sup>10</sup>.

Where the premises contain more than one excluded unit, each person who is the appropriate person in relation to an excluded unit must pay to the RTM company the appropriate proportion of that difference<sup>11</sup>; and the appropriate proportion in the case of each such person is the proportion of the internal floor area of all of the excluded units which is internal floor area of the excluded unit in relation to which he is the appropriate person<sup>12</sup>.

1 le in the circumstances described in the Commonhold and Leasehold Reform Act 2002 s 95: see PARA 390 ante.

2 For the meaning of 'flat' see PARA 368 note 3 ante.

3 For the meaning of 'unit' see PARA 369 note 8 ante.

4 For the meaning of 'qualifying tenant' see PARA 370 ante; and for the meaning of references to a lease held by such a tenant see PARA 379 note 8 ante.

5 For the meaning of 'service charge' see PARA 389 note 6 ante.

6 For these purposes, 'relevant costs' has the meaning given by the Landlord and Tenant Act 1985 s 18 (as amended) (see PARA 326 ante): Commonhold and Leasehold Reform Act 2002 s 112(1).

7 Ibid s 103(1).

8 The appropriate person in relation to an excluded unit: (1) if it is subject to a lease, is the landlord under the lease; (2) if it is subject to more than one lease, is the immediate landlord under whichever of the leases is inferior to all the others; and (3) if it is not subject to any lease, is the freeholder: ibid s 103(5).

9 For the meaning of 'RTM company' see PARA 374 ante.

10 Commonhold and Leasehold Reform Act 2002 s 103(2).

11 Ibid s 103(3).

12 Ibid s 103(4).

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## **(vi) Enforcement of Obligations**

### **396. County court's power to enforce obligations.**

A county court may, on the application of any person interested, make an order requiring a person who has failed to comply with a requirement imposed on him by, under or by virtue of any statutory provision relating to the right to manage<sup>1</sup> to make good the default within such time as is specified in the order<sup>2</sup>. An application may not be made under this provision unless:

871 (1) a notice has been previously given<sup>3</sup> to the person in question requiring him to make good the default; and

872 (2) more than 14 days have elapsed since the date of the giving of that notice without his having done so<sup>4</sup>.

1     le any provision of the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (as amended): see PARA 367 et seq ante, PARA 397 post.

2     Ibid s 107(1).

3     As to the giving of notices see PARA 373 ante.

4     Commonhold and Leasehold Reform Act 2002 s 107(2).

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## **(vii) Cessation of Management**

### **397. Cessation of management by RTM company.**

The following provisions apply with regard to the circumstances in which, after an RTM company<sup>1</sup> has acquired the right to manage any premises, that right ceases to be exercisable by it<sup>2</sup>.

Provision may be made by an agreement made between:

873 (1)     the RTM company; and

874 (2)     each person who is landlord<sup>3</sup> under a lease<sup>4</sup> of the whole or any part of the premises,

for the right to manage the premises to cease to be exercisable by the RTM company<sup>5</sup>.

The right to manage the premises ceases to be exercisable by the RTM company:

875 (a)     if:

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78. (i)     a winding-up order is made, or a resolution for voluntary winding up is passed, with respect to the RTM company, or the RTM company enters administration;

79. (ii)     a receiver or a manager of the RTM company's undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the RTM company comprised in or subject to the charge;

80.     (iii)     a voluntary arrangement proposed in the case of the RTM company<sup>6</sup> is approved<sup>7</sup>; or

81.     (iv)     the RTM company's name is struck off<sup>8</sup> the register<sup>9</sup>;

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876 (b)     if a manager appointed under Part II of the Landlord and Tenant Act 1987<sup>10</sup> to act in relation to the premises, or any premises containing or contained in the premises, begins so to act or an order under that Part of that Act that the right to manage the premises is to cease to be exercisable by the RTM company takes effect<sup>11</sup>;

877 (c)     if it ceases to be an RTM company in relation to the premises<sup>12</sup>.

1     For the meaning of 'RTM company' see PARA 374 ante.

- 2 Commonhold and Leasehold Reform Act 2002 s 105(1).
- 3 For the meaning of 'landlord' see PARA 369 note 8 ante.
- 4 For the meaning of 'lease' see PARA 369 note 8 ante.
- 5 Commonhold and Leasehold Reform Act 2002 s 105(2).
- 6 le for the purposes of the Insolvency Act 1986 Pt I (ss 1-7B) (as amended): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 71 et seq.
- 7 le under ibid Pt I (as amended).
- 8 le under the Companies Act 1985 s 652 (defunct companies: see COMPANIES vol 15 (2009) PARA 1521) or s 652A (as added) (private companies: see COMPANIES vol 15 (2009) PARA 1525).
- 9 Commonhold and Leasehold Reform Act 2002 s 105(3) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 4, Schedule Pt 1 paras 38, 40).
- 10 le under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq post.
- 11 Commonhold and Leasehold Reform Act 2002 s 105(4).
- 12 Ibid s 105(5).

## **UPDATE**

### **397 Cessation of management by RTM company**

NOTES 8, 9--Commonhold and Leasehold Reform Act 2002 s 105(3) amended: SI 2009/1941.

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## **(2) TENANTS' OTHER MANAGEMENT RIGHTS**

### **(i) Appointment of Managing Agents**

#### **398. Consultation about appointment.**

A recognised tenants' association<sup>1</sup> may at any time serve a notice on the landlord<sup>2</sup> requesting him to consult the association<sup>3</sup> on matters relating to the appointment or employment by him of a managing agent<sup>4</sup> for any relevant premises<sup>5</sup>.

Where, at the time when any such notice is served by a recognised tenants' association, the landlord does not employ any managing agent for any relevant premises, the landlord must, before appointing such a managing agent, serve on the association a notice specifying:

- 878 (1) the name of the proposed managing agent;
- 879 (2) the landlord's obligations to the tenants represented by the association which it is proposed that the managing agent should be required to discharge on his behalf; and



880 (3) a period of not less than one month beginning with the date of service of the notice within which the association may make observations on the proposed appointment<sup>6</sup>.

Where, at the time when a notice is so served by a recognised tenants' association, the landlord employs a managing agent for any relevant premises, the landlord must, within the period of one month beginning with the date of service of that notice, serve on the association a notice specifying:

- 881 (a) the landlord's obligations to the tenants represented by the association which the managing agent is required to discharge on his behalf; and
- 882 (b) a reasonable period within which the association may make observations on the manner in which the managing agent has been discharging those obligations, and on the desirability of his continuing to discharge them<sup>7</sup>.

A landlord who has been so served with a notice by an association must, so long as he employs a managing agent for any relevant premises:

- 883 (i) serve on that association at least once in every five years a notice specifying:  
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  - 82. (A) any change occurring since the date of the last notice served by him on the association in the obligations which the managing agent has been required to discharge on his behalf; and
  - 83. (B) a reasonable period within which the association may make observations on the manner in which the managing agent has discharged those obligations since that date, and on the desirability of his continuing to discharge them;
- 66  
884 (ii) serve on that association, whenever he proposes to appoint any new managing agent for any relevant premises, a notice specifying the matters mentioned in heads (1) to (3) above<sup>8</sup>.

Where a recognised tenants' association has so served a notice with respect to any relevant premises and the interest of the landlord in those premises becomes vested in a new landlord, that notice ceases to have effect with respect to those premises, without prejudice to the service by the association on the new landlord of a fresh notice<sup>9</sup> with respect to those premises<sup>10</sup>.

Any notice served by a landlord under the above provisions must specify the name and the address in the United Kingdom<sup>11</sup> of the person to whom any observations made in pursuance of the notice are to be sent; and the landlord must have regard to any such observations that are received by that person within the period specified in the notice<sup>12</sup>.

1 For the meaning of 'recognised tenants' association' see PARA 327 ante.

2 For these purposes, 'landlord', in relation to a recognised tenants' association, means the immediate landlord of the tenants represented by the association or a person who has a right to enforce payment of service charges payable by any of those tenants: Landlord and Tenant Act 1985 s 30B(8) (s 30B added by the Landlord and Tenant Act 1987 s 44). 'Tenant' includes a statutory tenant: Landlord and Tenant Act 1985 s 30B(8) (as so added). For the meaning of 'statutory tenant' see PARA 52 note 1 ante; and for the meaning of 'service charge' see PARA 326 ante.

Where the premises are managed by an RTM company (see PARA 367 et seq ante), s 30B (as so added) has effect as if references to the landlord were to the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 6.

3 ie in accordance with the Landlord and Tenant Act 1985 s 30B (as added: see note 2 supra).

4 For these purposes, 'managing agent', in relation to any relevant premises, means an agent of the landlord appointed to discharge any of the landlord's obligations to the tenants represented by the recognised tenants' association in question which relate to the management by him of those premises; and any premises, whether a building or not, are relevant premises in relation to a recognised tenants' association if any of the tenants represented by the association may be required under the terms of their leases to contribute by the payment of service charges to costs relating to those premises: *ibid* s 30B(8) (as added: see note 2 *supra*). For the meaning of 'lease' see PARA 52 note 1 *ante*.

5 *Ibid* s 30B(1) (as added: see note 2 *supra*).

6 *Ibid* s 30B(2) (as added: see note 2 *supra*).

7 *Ibid* s 30B(3) (as added: see note 2 *supra*).

8 *Ibid* s 30B(4) (as added: see note 2 *supra*). A landlord is not, however, by virtue of a notice served by an association under s 30B(1) (as so added), required to serve on the association a notice under s 30B(4)(a) or (b) (as so added) if the association subsequently serves on the landlord a notice withdrawing its request under s 30B(1) (as so added) to be consulted by him: s 30B(5) (as added: see note 2 *supra*).

9 *Ie* under *ibid* s 30B(1) (as added: see note 2 *supra*).

10 *Ibid* s 30B(6) (as added: see note 2 *supra*). Where the premises are managed by an RTM company, s 30B(6) (as so added) is omitted: Commonhold and Leasehold Reform Act 2002 Sch 7 para 6.

11 For the meaning of 'United Kingdom' see PARA 25 note 18 *ante*.

12 Landlord and Tenant Act 1985 s 30B(7) (as added: see note 2 *supra*).

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## **(ii) Appointment of Manager**

### **399. Tenant's right to apply to leasehold valuation tribunal for appointment of manager.**

The tenant<sup>1</sup> of a flat<sup>2</sup> contained in any premises consisting of the whole or part of a building where the building or part contains two or more flats may apply<sup>3</sup> to a leasehold valuation tribunal for an order<sup>4</sup> appointing a manager to act in relation to those premises<sup>5</sup>. Such an application may not be made at a time when:

885 (1) the interest of the landlord<sup>6</sup> in the premises is held:

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84. (a) by an exempt landlord<sup>7</sup>; or

85. (b) a resident landlord<sup>8</sup>, unless at least one-half of the flats contained in the premises are held on long leases<sup>9</sup> which are not business tenancies<sup>10</sup>; or

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886 (2) the premises are included within the functional land<sup>11</sup> of any charity<sup>12</sup>.

An application for such an order may be made:

887 (i) jointly by tenants of two or more flats if they are each entitled<sup>13</sup> to make such an application<sup>14</sup>; and

888 (ii) in respect of two or more premises to which these provisions<sup>15</sup> apply<sup>16</sup>.

Where the tenancy of a flat contained in any such premises is held by joint tenants, an application for such an order in respect of those premises may be made by any one or more of those tenants<sup>17</sup>.

An application to the court for it to exercise, in relation to any premises, any jurisdiction to appoint a receiver or manager may not be made by a tenant, in his capacity as such, in any circumstances in which an application could be made by him to a leasehold valuation tribunal for an order appointing a manager to act in relation to those premises<sup>18</sup>.

1 For the meaning of 'tenant' see PARA 53 note 1 ante. For these purposes, however, references to a tenant do not include references to a tenant under a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Landlord and Tenant Act 1987 s 21(7). Further, where the premises are managed by an RTM company (see PARA 367 et seq ante), references to a tenant of a flat contained in the premises include a person who is landlord under a lease of the whole or any part of the premises: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 8(1), (3).

2 For the meaning of 'flat' see PARA 149 note 2 ante.

3 Ie subject to the Landlord and Tenant Act 1987 ss 21(2)-(7), 22-24 (as amended): see the text and notes 4-18 infra; and PARAS 400-403 post.

4 Ie under the Landlord and Tenant Act 1987 s 24 (as amended): see PARA 402 post.

5 Ibid s 21(1), (2) (amended by the Housing Act 1996 s 86). The Landlord and Tenant Act 1987 s 21(2) (as so amended) is subject to s 21(3) (see heads (1)-(2) in the text): s 21(2).

6 For the meaning of 'landlord' see PARA 53 note 1 ante. Where the premises are managed by an RTM company (see PARA 367 et seq ante), references in ibid Pt II (ss 21-24) (as amended) to the landlord are to the RTM company: Commonhold and Leasehold Reform Act 2002 Sch 7 para 8(1), (2).

7 For the meaning of 'exempt landlord' see PARA 354 ante.

8 For these purposes, the landlord of any premises consisting of the whole or part of a building is a resident landlord of those premises at any time if (1) the premises are not, and do not form part of, a purpose-built block of flats; and (2) at that time the landlord occupies a flat contained in the premises as his only or principal residence; and (3) he has so occupied such a flat throughout a period of not less than 12 months ending with that time: Landlord and Tenant Act 1987 ss 58(2), 60(1). 'Purpose-built block of flats' means a building which contained as constructed, and contains, two or more flats: s 58(3).

9 For the meaning of 'long lease' see PARA 149 note 1 ante.

10 Ie long leases which are not tenancies to which the Landlord and Tenant Act 1954 Pt II (as amended) applies: see the Landlord and Tenant Act 1987 s 21(3A) (added by the Commonhold and Leasehold Reform Act 2002 s 161).

11 For these purposes, 'functional land', in relation to a charity, means land occupied by the charity, or by trustees of it, and wholly or mainly used for charitable purposes: Landlord and Tenant 1987 s 60(1). 'Charitable purposes', in relation to a charity, means charitable purposes whether of that charity or of that charity and other charities: s 60(1). For the meaning of 'charity' see PARA 354 note 18 ante.

12 Ibid s 21(3). Where the premises are managed by an RTM company (see PARA 367 et seq ante), s 21(3) does not apply: Commonhold and Leasehold Reform Act 2002 Sch 7 para 8(1), (4).

13 Ie by virtue of the Landlord and Tenant Act 1987 s 21 (as amended).

14 In relation to any such joint application, references in ibid Pt II (as amended) to a single tenant are to be construed accordingly: s 21(4).

15 Ie ibid Pt II (as amended): see the text and notes 1-14 supra; and PARAS 400-403 post.

16 Ibid s 21(4).

17 Ibid s 21(5).

18 Ibid s 21(6) (amended by the Housing Act 1996 s 86). There is no limitation on the prohibition in this provision, which confers on the leasehold valuation tribunal exclusive jurisdiction over matters affecting the appointment of a receiver over blocks of flats: see *Stylli v Hamberton Properties Inc* [2002] EWHC 394 (Ch), [2002] All ER (D) 28 (Mar).

## UPDATE

### **399 Tenant's right to apply to leasehold valuation tribunal for appointment of manager**

TEXT AND NOTE 12--Landlord and Tenant Act 1987 s 21(3) amended: Housing and Regeneration Act 2008 Sch 8 para 38.

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#### **400. Preliminary notice by tenant.**

Before an application for an order appointing a manager<sup>1</sup> is made in respect of any premises<sup>2</sup> by a tenant<sup>3</sup> of a flat<sup>4</sup> contained in those premises, a notice must be served<sup>5</sup> by the tenant on the landlord<sup>6</sup> and on any person, other than the landlord, by whom obligations relating to the management of the premises or any part of them are owed to the tenant under his tenancy<sup>7</sup>. Such a notice must:

- 889 (1) specify the tenant's name, the address of his flat and an address in England and Wales, which may be the address of his flat, at which any person on whom the notice is served may serve notices, including notices in proceedings<sup>8</sup>, on him in connection with such an appointment<sup>9</sup>;
- 890 (2) state that the tenant intends to make an application for an order appointing a manager<sup>10</sup> to be made by a leasehold valuation tribunal in respect of such premises as are specified in the notice but, if head (4) below is applicable, that he will not do so if the requirement specified in pursuance of that head is complied with;
- 891 (3) specify the grounds on which the tribunal would be asked to make such an order and the matters that would be relied on by the tenant for the purpose of establishing those grounds;
- 892 (4) where those matters are capable of being remedied by any person on whom the notice is served, require him, within such reasonable period as is specified in the notice, to take such steps for the purpose of remedying them as are so specified; and
- 893 (5) contain such information, if any, as the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may prescribe by regulations<sup>11</sup>.

A leasehold valuation tribunal may, whether on the hearing of an application for such an order or not, by order dispense with the requirement to serve a notice under the above provisions on a person in a case where it is satisfied that it would not be reasonably practicable to serve such a notice on the person; but the tribunal may, when doing so, direct that such other notices are served, or such other steps are taken, as it thinks fit<sup>12</sup>.

In a case where a notice has been so served on the landlord and his interest in the premises specified in pursuance of head (2) above is subject to a mortgage<sup>13</sup>, the landlord must, as soon as is reasonably practicable after receiving the notice, serve on the mortgagee a copy of the notice<sup>14</sup>.

- 1    le an order under the Landlord and Tenant Act 1987 s 24 (as amended): see PARA 402 post.
- 2    le any premises to which ibid Pt II (ss 21-24) (as amended) (see PARA 399 ante; the text and notes 3-16 infra; and PARAS 401-403 post) applies.
- 3    For the meaning of 'tenant' see PARA 399 note 1 ante.
- 4    For the meaning of 'flat' see PARA 149 note 2 ante.
- 5    le subject to the Landlord and Tenant Act 1987 s 22(3)(as amended): see the text and note 12 infra.
- 6    For the meaning of 'landlord' see PARA 53 note 1 ante. See also PARA 399 note 6 ante.
- 7    Landlord and Tenant Act 1987 s 22(1) (s 22(1)-(3) amended by the Commonhold and Leasehold Reform Act 2002 s 160(1), (2)). As to service of notices see PARA 53 note 4 ante. The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by regulations prescribe the form of any notices required or authorised to be served under or in pursuance of any provision of Pt II (ss 21-24) (as amended); and the particulars which any such notices must contain, whether in addition to, or in substitution for, any particulars required by virtue of the provision in question: s 54(3). At the date at which this title states the law, no such regulations had been made. As to the making of regulations generally see PARA 352 note 9 ante; as to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 8    For the meaning of 'notices in proceedings' see PARA 53 note 5 ante.
- 9    le in connection with the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended).
- 10   See note 1 supra.
- 11   Landlord and Tenant Act 1987 s 22(2) (as amended (see note 7 supra); s 22(2), (3) also amended by the Housing Act 1996 s 86(2)). At the date at which this title states the law, no regulations had been made prescribing such information.
- 12   Landlord and Tenant Act 1987 s 22(3) (as amended: see notes 7, 11 supra). As to the procedure on such an application see PARA 401 post.
- 13   For these purposes, 'mortgage' includes any charge or lien; and references to a mortgagee are to be construed accordingly: ibid s 60(1).
- 14   Ibid s 22(4).

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#### **401. Application to leasehold valuation tribunal for appointment of manager.**

No application for an order appointing a manager<sup>1</sup> may be made to a leasehold valuation tribunal unless:

- 894 (1)    in a case where a preliminary notice has been served by the tenant<sup>2</sup> either:

86. (a) the specified period<sup>3</sup> has expired without the person required to take steps to remedy the specified matters having taken the steps that he was required to take<sup>4</sup>; or
87. (b) no person was required to take such steps<sup>5</sup>; or
- 70 895 (2) in a case where the requirement to serve such a notice has been dispensed with by an order<sup>6</sup> of the tribunal, either:
- 71 88. (a) any notices required to be served, and any other steps required to be taken by virtue of the order have been served or, as the case may be, taken; or
89. (b) no direction was given by the tribunal when making the order<sup>7</sup>.
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An application for such an order must, unless the service of such a notice has been dispensed with, be accompanied by a copy of the preliminary notice served<sup>8</sup>. A fee is payable for the application<sup>9</sup>.

1    Ie an order under the Landlord and Tenant Act 1987 s 24 (as amended): see PARA 402 post.

2    Ie under the Landlord and Tenant Act 1987 s 22 (as amended): see PARA 400 ante.

3    Ie the period specified in pursuance of *ibid* s 22(2)(d) (as amended): see PARA 400 ante at head (4) in the text.

4    Ie in pursuance of *ibid* s 22(2)(d) (as amended).

5    Ie *ibid* s 22(2)(d) (as amended) was not applicable in the circumstance of the case.

6    Ie under *ibid* s 22(3) (as amended): see PARA 400 ante.

7    *Ibid* s 23(1) (amended by the Housing Act 1996 s 86(2); the Commonhold and Leasehold Reform Act 2002 s 160(1), (3)).

8    Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(6), Sch 1 para 5, Sch 2 para 5(1); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(6), Sch 1 para 5, Sch 2 para 5(1). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

9    See the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(3)(c), (4), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(3)(c), (4), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

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#### **402. Appointment of manager by leasehold valuation tribunal.**

A leasehold valuation tribunal may, on an application for an order appointing a manager<sup>1</sup>, by order<sup>2</sup> appoint a manager to carry out in relation to any premises<sup>3</sup> such functions in connection with the management of the premises<sup>4</sup> or such functions of a receiver, or both, as the tribunal

thinks fit<sup>5</sup>. A leasehold valuation tribunal may, however, make such an order only in the following circumstances, namely:

896 (1) where the tribunal is satisfied:

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90. (a) that any relevant person<sup>6</sup> either is in breach of any obligation owed by him to the tenant<sup>7</sup> under his tenancy and relating to the management of the premises in question or any part of them or, in the case of an obligation dependent on notice, would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice; and

91. (b) that it is just and convenient to make the order in all the circumstances of the case<sup>8</sup>;

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897 (2) where the tribunal is satisfied:

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92. (a) that unreasonable service charges<sup>9</sup> have been made, or are proposed or likely to be made; and

93. (b) that it is just and convenient to make the order in all the circumstances of the case<sup>10</sup>;

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898 (3) where the tribunal is satisfied:

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94. (a) that unreasonable variable administration charges<sup>11</sup> have been made, or are proposed or likely to be made; and

95. (b) that it is just and convenient to make the order in all the circumstances of the case<sup>12</sup>;

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899 (4) as from a day to be appointed<sup>13</sup>, where the tribunal is satisfied:

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96. (a) that there has been a failure to comply with a duty imposed by or by virtue of the statutory provisions regarding the manner in which service charge contributions are to be held<sup>14</sup>; and

97. (b) that it is just and convenient to make the order in all the circumstances of the case<sup>15</sup>;

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900 (5) where the tribunal is satisfied:

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98. (a) that any relevant person has failed to comply with any relevant provision of a code of management practice approved<sup>16</sup> by the Secretary of State<sup>17</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>18</sup>; and

99. (b) that it is just and convenient to make the order in all the circumstances of the case<sup>19</sup>; or

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901 (6) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made<sup>20</sup>.

The premises in respect of which an order is so made may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made<sup>21</sup>.

Such an order may make provision with respect to such matters relating to the exercise by the manager of his functions under the order and such incidental or ancillary matters as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager,

the tribunal may give him directions with respect to any such matters<sup>22</sup>. Such an order may provide:

- 902 (i) for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;
- 903 (ii) for the manager to be entitled to prosecute claims in respect of causes of action, whether contractual or tortious, accruing before or after the date of his appointment;
- 904 (iii) for remuneration to be paid to the manager by any relevant person, or by the tenants of the premises in respect of which the order is made or by all or any of those persons;
- 905 (iv) for the manager's functions to be exercisable by him<sup>23</sup> either during a specified period or without limit of time<sup>24</sup>.

Any such order may be granted subject to such conditions as the court thinks fit; and in particular its operation may be suspended on terms fixed by the tribunal<sup>25</sup>.

In a case where an application for an order was preceded by the service of a preliminary notice by the tenant<sup>26</sup>, the tribunal may, if it thinks fit, make such an order notwithstanding that any period specified<sup>27</sup> in the notice was not a reasonable period or that the notice failed in any other respect to comply with any statutory requirement<sup>28</sup> or any requirement contained in any regulations applying<sup>29</sup> to the notice<sup>30</sup>.

1    le an order under the Landlord and Tenant Act 1987 s 24 (as amended): see the text and notes 2-30 infra.

2    The statutory wording is 'by order, whether interlocutory or final', but the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099 (as amended) and the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681 (as amended) make no mention of interlocutory (interim) orders. An interim order under the Landlord and Tenant Act 1987 s 24 (as originally enacted) was made by the court in *Howard v Midrome Ltd* [1991] 1 EGLR 58, [1991] 03 EG 135, where the roof was leaking and the landlords were in breach of their repairing covenants.

3    le any premises to which the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (see PARA 399 et seq ante) applies.

4    For these purposes, references to the management of any premises include references to the repair, maintenance, improvement or insurance of those premises: *ibid* s 24(11) (amended by the Commonhold and Leasehold Reform Act 2002 ss 150, 160(1), (4)(e), Sch 9 para 8).

5    *Ibid* s 24(1) (s 24(1)-(4), (6), (7) amended by the Housing Act 1996 s 86(2)). As to joint applications see PARA 399 ante. The Land Charges Act 1972 (see LAND CHARGES) and the Land Registration Act 2002 (see LAND REGISTRATION) apply in relation to an order made under the Landlord and Tenant Act 1987 s 24 (as amended) as they apply in relation to an order appointing a receiver or sequestrator of land: s 24(8) (amended by the Land Registration Act 2002 s 133, Sch 11 para 20).

Where the premises are managed by an RTM company (see PARA 367 et seq ante), the power in the Landlord and Tenant Act 1987 s 24 (as amended) to make an order appointing a manager to carry out functions includes a power (in the circumstances specified in heads (1)-(6) in the text) to make an order that the right to manage the premises is to cease to be exercisable by the RTM company; and such an order may include provision with respect to incidental and ancillary matters (including, in particular, provision about contracts to which the RTM company is a party and the prosecution of claims in respect of causes of action, whether tortious or contractual, accruing before or after the right to manage ceases to be exercisable): Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 8(1), (7), (8).

6    For these purposes, 'relevant person' means a person (1) on whom a notice has been served under the Landlord and Tenant Act 1987 s 22 (as amended) (see PARA 400 ante); or (2) in the case of whom the requirement to serve such a notice has been dispensed with by an order under s 22(3) (as amended): s 24(2ZA) (added by the Commonhold and Leasehold Reform Act 2002 s 160(1), (4)(b)).

7    For the meaning of 'tenant' see PARA 399 note 1 ante.



8 Landlord and Tenant Act 1987 s 24(2)(a)(i) (as amended) (see note 5 supra); further amended by the Housing Act 1996 ss 85(2), (3), 227, Sch 19 Pt III; the Commonhold and Leasehold Reform Act 2002 s 160(1), (4)(a)). Where the premises are managed by an RTM company (see PARA 367 et seq ante), the references in head (1) in the text to any obligation owed by the RTM company to the tenant under his tenancy include any obligations of the RTM company under the Commonhold and Leasehold Reform Act 2002: Sch 7 para 8(1), (5).

9 For the purposes of head (2) in the text, a service charge is to be taken to be unreasonable (1) if the amount is unreasonable having regard to the items for which it is payable; (2) if the items for which it is payable are of an unnecessarily high standard; or (3) if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred; and 'service charge' means a service charge within the meaning of the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante), other than one excluded from s 18 (as amended) by s 27 (as amended) (rent of dwelling registered and not entered as variable: see PARA 325 ante): Landlord and Tenant Act 1987 s 24(2A) (added by the Housing Act 1996 s 85(4)).

10 Landlord and Tenant Act 1987 s 24(2)(ab) (added by the Housing Act 1996 s 85(2), (3); amended by s 86(2)).

11 For the purposes of head (3) in the text, 'variable administration charge' has the meaning given by the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 para 1 (see PARA 355 ante): Landlord and Tenant Act 1987 s 24(2B) (added by the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 Pt 2 paras 7, 8(1), (3)).

12 Landlord and Tenant Act 1987 s 24(2)(aba) (added by the Commonhold and Leasehold Reform Act 2002 Sch 11 Pt 2 paras 7, 8(1), (2)).

13 *Ie* as from a day to be appointed under *ibid* s 181(1). At the date at which this title states the law, no such day had been appointed.

14 *Ie* by or by virtue of the Landlord and Tenant Act 1987 s 42 (as amended) (see PARA 352 ante) or s 42A (as added) (see PARA 353 ante).

15 *Ibid* s 24(2)(abb) (prospectively added by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 14, as from a day to be appointed (see note 13 supra)).

16 *Ie* under the Leasehold Reform, Housing and Urban Development Act 1993 s 87 (as amended): see PARA 411 post.

17 As to the Secretary of State see PARA 27 note 3 ante.

18 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

19 Landlord and Tenant Act 1987 s 24(2)(ac) (added by the Housing Act 1996 s 85(2), (3); amended by s 86(2); and by the Commonhold and Leasehold Reform Act 2002 s 160(1), (4)(a)).

20 Landlord and Tenant Act 1987 s 24(2)(b) (as amended: see note 5 supra). Where the premises are managed by an RTM company (see PARA 367 et seq ante), the circumstances in which a leasehold valuation tribunal may make an order under head (6) in the text include any in which the RTM company no longer wishes the right to manage the premises to be exercisable by it: Commonhold and Leasehold Reform Act 2002 Sch 7 para 8(1), (6).

21 Landlord and Tenant Act 1987 s 24(3) (as amended: see note 5 supra).

22 *Ibid* s 24(4) (as amended: see note 5 supra).

23 *Ie* subject to *ibid* s 24(9) (as amended): see PARA 403 post.

24 *Ibid* s 24(5) (amended by the Commonhold and Leasehold Reform Act 2002 s 160(1), (4)(c)). Heads (i)-(iv) in the text are without prejudice to the generality of the Landlord and Tenant Act 1987 s 24(4) (as amended): s 24(5).

25 *Ibid* s 24(6) (as amended: see note 5 supra).

The purpose of Pt II (as amended) is to provide a scheme for the appointment of a manager who will carry out the functions required by the court in relation to a tenanted property; he is not appointed as the manager of the landlord, or even of the landlord's obligations under the lease. Thus where such a manager claims payment of service charges from a tenant and the tenant claims damages for breach of covenant from the landlord, the doctrine of equitable set-off does not apply and there can be no set-off as there is no mutuality between the two claims: see *Taylor v Blaquiere* [2002] EWCA Civ 1633, [2003] 1 WLR 379, [2002] All ER (D) 190 (Nov).

- 26   le a notice under the Landlord and Tenant Act 1987 s 22 (as amended): see PARA 400 ante.
- 27   le in pursuance of *ibid* s 22(2)(d) (as amended): see PARA 400 ante at head (4) in the text.
- 28   le any requirement contained in *ibid* s 22(2) (as amended): see PARA 400 ante at heads (1)-(5) in the text.
- 29   le any regulations applying to the notice under *ibid* s 54(3): see PARA 400 note 7 ante.
- 30   *ibid* s 24(7) (as amended: see note 5 *supra*). For an example of the exercise of the power under s 24(7) (as originally enacted) by the court see *Howard v Midrome Ltd* [1991] 1 EGLR 58, [1991] 03 EG 135.

## UPDATE

### 402 Appointment of manager by leasehold valuation tribunal

NOTE 3--A leasehold valuation tribunal's power to appoint a manager extends to the grant of management functions over amenity land or other land outside the leased buildings and their curtilages: *Cawsand Fort Management Co Ltd v Stafford* [2007] EWCA Civ 1187, [2008] 3 All ER 353.

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### 403. Variation or discharge of order appointing a manager.

On the application of any person interested<sup>1</sup>, a leasehold valuation tribunal may vary or discharge, whether conditionally or unconditionally, an order<sup>2</sup> for the appointment of a manager<sup>3</sup>. The tribunal may not, however, so vary or discharge an order on the application of any relevant person<sup>4</sup> unless it is satisfied:

- 906 (1)   that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made; and
- 907 (2)   that it is just and convenient in all the circumstances of the case to vary or discharge the order<sup>5</sup>.

An order for the appointment of a manager<sup>6</sup> may not be discharged by a leasehold valuation tribunal by reason only that the premises in respect of which the order was made have ceased<sup>7</sup> to be premises in respect of which a manager may be appointed<sup>8</sup>.

1   The application must be accompanied by a copy of the management order: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(6), Sch 1 para 5, Sch 2 para 5(2); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(6), Sch 1 para 5, Sch 2 para 5(2). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante. A fee is payable for the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 3(3)(c), (4), (5); the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 3(3)(c), (4), (5). A fee is also payable for the hearing of the application: see the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003, SI 2003/2098, reg 5; the Leasehold Valuation Tribunals (Fees) (Wales) Regulations 2004, SI 2004/683, reg 5. As to the payment of such fees see further PARA 69 ante.

2   le an order made under the Landlord and Tenant Act 1987 s 24 (as amended): see PARA 402 ante.

3 Ibid s 24(9) (amended by the Housing Act 1996 s 86(2)). If the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 2002, the tribunal may by order direct that the entry shall be cancelled: Landlord and Tenant Act 1987 s 24(9) (as so amended; further amended by the Land Registration Act 2002 s 133, Sch 11 para 20).

The Landlord and Tenant Act 1987 s 24(9) (as so amended) does not embody the various criteria set out in s 24(2) (as amended) (see PARA 402 ante) and does not require the s 24(2) tests to be met all over again on an application to extend the term of an appointment: see *Orchard Court Residents' Association v St Anthony's Homes Ltd* [2003] EWCA Civ 1049, [2003] 2 EGLR 28, [2003] 33 EG 64.

4 For the meaning of 'relevant person' see PARA 402 note 6 ante.

5 Landlord and Tenant Act 1987 s 24(9A) (added by the Housing Act 1996 s 85(6); amended by the Commonhold and Leasehold Reform Act 2002 ss 160(1), (4)(d), 176, Sch 13 para 9).

6 See note 2 supra.

7 Ie by virtue of the Landlord and Tenant Act 1987 s 21(3): see PARA 399 ante.

8 Ibid s 24(10) (amended by the Housing Act 1996 s 86(2)).

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### **(iii) Management Audits**

#### **404. Right to management audit.**

The following provisions<sup>1</sup> have effect:

- 908 (1) to confer on two or more qualifying tenants<sup>2</sup> of dwellings<sup>3</sup> held on leases<sup>4</sup> from the same landlord<sup>5</sup> the right<sup>6</sup> to have an audit carried out on their behalf which relates to the management of the relevant premises<sup>7</sup> and any appurtenant property<sup>8</sup> by or on behalf of the landlord<sup>9</sup>;
- 909 (2) to confer on a single qualifying tenant of a dwelling the right<sup>10</sup> to have an audit carried out on his behalf which relates to the management of the relevant premises<sup>11</sup> and any appurtenant property<sup>12</sup> by or on behalf of the landlord<sup>13</sup>.

That right is exercisable:

- 910 (a) where the relevant premises consist of or include:
  - 83 100. (i) two dwellings ('the constituent dwellings') let to qualifying tenants of the same landlord, by either or both of those tenants; and
  - 101. (ii) three or more dwellings ('the constituent dwellings') let to qualifying tenants of the same landlord, by not less than two-thirds of those tenants<sup>14</sup>; and
  - 84 911 (b) by a single qualifying tenant of a dwelling where the relevant premises contain no other dwelling let to a qualifying tenant apart from that let to him<sup>15</sup>.

1 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch V (ss 76-84) (as amended): see the text and notes 2-15 infra; and PARA 405 et seq post.

2 For the meaning of 'qualifying tenant' see PARA 405 post.

3 For the meaning of 'dwelling' see PARA 50 note 3 ante.

4 For the meaning of 'lease' see PARA 50 note 2 ante.

5 For these purposes, 'landlord' means immediate landlord: Leasehold Reform, Housing and Urban Development Act 1993 s 84. Where the premises are managed by an RTM company (see PARA 367 et seq ante), then except for the reference in the text to the 'same landlord', references to the landlord for these purposes are to the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 14(1), (2).

6 le exercisable subject to and in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch V (as amended).

7 In relation to an audit on behalf of two or more qualifying tenants, 'the relevant premises' means so much of the building or buildings containing the dwellings let to those tenants and any other building or buildings as constitutes premises in relation to which management functions are discharged in respect of the costs of which common service charge contributions are payable under the leases of those qualifying tenants: *ibid* s 76(3)(a). Common service charge contributions are payable by two or more persons under their leases if they may be required under the terms of those leases to contribute to the same costs by the payment of service charges: s 76(8). 'Management functions' includes functions with respect to the provision of services or the repair, maintenance, improvement or insurance of property (s 84 (definition amended by the Commonhold and Leasehold Reform Act 2002 s 150, Sch 9 para 10)); and 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante) (Leasehold Reform, Housing and Urban Development Act 1993 s 84).

8 In relation to an audit on behalf of two or more qualifying tenants, 'appurtenant property' means so much of any property not contained in the relevant premises as constitutes property in relation to which any management functions are discharged in respect of the costs of which common service charge contributions are payable under the leases of those qualifying tenants: *ibid* s 76(3)(b).

9 *Ibid* s 76(1).

10 See note 6 supra.

11 In relation to an audit on behalf of a single qualifying tenant, 'the relevant premises' means so much of the building containing the dwelling let to him, and any other building or buildings, as constitutes premises in relation to which management functions are discharged in respect of the costs of which a service charge is payable under his lease, whether as a common service charge contribution or otherwise: Leasehold Reform, Housing and Urban Development Act 1993 s 76(6)(a).

12 In relation to an audit on behalf of a single qualifying tenant, 'appurtenant property' means so much of any property not contained in the relevant premises as constitutes property in relation to which any management functions are discharged in respect of the costs of which a service charge is payable under his lease, whether as a common service charge contribution or otherwise: *ibid* s 76(6)(b).

13 *Ibid* s 76(4). The provisions of ss 78-83 (as amended) (see PARA 406 et seq post) have effect, with any necessary modifications, in relation to an audit on behalf of a single qualifying tenant as they have effect in relation to an audit on behalf of two or more qualifying tenants: s 76(7).

14 *Ibid* s 76(2).

15 *Ibid* s 76(5).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(2) TENANTS' OTHER MANAGEMENT RIGHTS/(iii) Management Audits/405. Meaning of 'qualifying tenant'.

#### **405. Meaning of 'qualifying tenant'.**

A tenant is a qualifying tenant<sup>1</sup> of a dwelling<sup>2</sup> if:

- 912 (1) he is a tenant of the dwelling under a long lease<sup>3</sup> other than a business lease<sup>4</sup>; and  
 913 (2) any service charge<sup>5</sup> is payable under the lease<sup>6</sup>.

No dwelling may have more than one qualifying tenant at any one time<sup>7</sup>. Accordingly:

- 914 (a) where a dwelling is for the time being let under two or more leases falling within heads (1) and (2) above<sup>8</sup>, any tenant under any of those leases which is superior to that held by any other such tenant is not a qualifying tenant of the dwelling for the statutory purposes; and  
 915 (b) where a dwelling is for the time being let to joint tenants under such a lease, the joint tenants are regarded<sup>9</sup>, subject to head (a) above, as jointly constituting the qualifying tenant of the dwelling<sup>10</sup>.

A person can, however, be or be among those constituting the qualifying tenant of each of two or more dwellings at the same time, whether he is tenant of those dwellings under one lease or under two or more separate leases<sup>11</sup>.

1 He for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch V (ss 76-84) (as amended): see PARA 404 ante; the text and notes 2-11 infra; and PARA 406 et seq post. For the meaning of 'tenant' generally see PARA 50 note 2 ante. Where, however, the premises are managed by an RTM company (see PARA 367 et seq ante), then for the purposes of Pt I Ch V (as amended) references to a tenant include a person who is landlord under a lease of the whole or any part of the premises and has to make payments under the Commonhold and Leasehold Reform Act 2002 s 103 (see PARA 395 ante): s 102(1), Sch 7 para 14(1), (3).

2 For the meaning of 'dwelling' see PARA 50 note 3 ante.

3 For these purposes, a lease is a long lease if (1) it is a lease falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 7(1)(a), (b) or (c) (as amended) (see PARA 1558 post at heads (1)-(3) in the text); or (2) it is a shared ownership lease, within the meaning of s 7 (as amended) (see PARA 1558 note 8 post), whether granted in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post) or otherwise and whatever the share of the tenant under it: Leasehold Reform, Housing and Urban Development Act 1993 s 77(2). For the meaning of 'lease' see PARA 50 note 2 ante. As to the abolition of the statutory right to a shared ownership lease under the Housing Act 1985 Pt V (as amended) see PARA 1795 post.

4 For these purposes, 'business lease' means a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Leasehold Reform, Housing and Urban Development Act 1993 s 101(1).

5 For the meaning of 'service charge' see PARA 404 note 7 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 77(1).

7 Ibid s 77(3).

8 He lease falling within ibid s 77(1): see the text and notes 1-6 supra.

9 See note 1 supra.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 77(4). Where two or more persons constitute the qualifying tenant of a dwelling in accordance with s 77(4)(b) (see head (b) in the text), any one or more of those persons may sign a notice under s 80 (as amended) (see PARA 408 post) on behalf of both or all of them: s 77(6).

11 Ibid s 77(5).

PARAS 1386-2000)/9. MANAGEMENT OF PREMISES/(2) TENANTS' OTHER MANAGEMENT RIGHTS/(iii) Management Audits/406. Meaning of 'management audit'.

#### **406. Meaning of 'management audit'.**

A 'management audit'<sup>1</sup> is an audit carried out for the purposes of ascertaining:

- 916 (1) the extent to which the obligations of the landlord<sup>2</sup> which:  
85
- 102. (a) are owed to the qualifying tenants<sup>3</sup> of the constituent dwellings<sup>4</sup>; and
- 103. (b) involve the discharge of management functions<sup>5</sup> in relation to the relevant premises<sup>6</sup> or any appurtenant property<sup>7</sup>,  
86
- 917 are being discharged in an efficient and effective manner; and
- 918 (2) the extent to which sums payable by those tenants by way of service charges<sup>8</sup> are being applied in an efficient and effective manner<sup>9</sup>.

In determining whether any such obligations as are mentioned in head (1) above are being discharged in an efficient and effective manner, regard must be had to any applicable provisions of any code of practice for the time being approved<sup>10</sup> by the Secretary of State<sup>11</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>12</sup>.

A management audit must be carried out by a person ('the auditor') who is qualified for appointment<sup>13</sup> and is appointed<sup>14</sup> by either or both of the qualifying tenants of the constituent dwellings or is appointed<sup>15</sup> by not less than two-thirds of the qualifying tenants of the constituent dwellings<sup>16</sup>; and the auditor may appoint such persons to assist him in carrying out the audit as he thinks fit<sup>17</sup>.

1     I.e. the audit referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 76(1): see PARA 404 ante.

2     For the meaning of 'landlord' see PARA 404 note 5 ante.

3     For the meaning of 'qualifying tenant' see PARA 405 ante.

4     For the meaning of 'the constituent dwellings' see PARA 404 ante; and for the meaning of 'dwelling' see PARA 50 note 3 ante.

5     For the meaning of 'management functions' see PARA 404 note 7 ante.

6     For the meaning of 'the relevant premises' see PARA 404 notes 7, 11 ante.

7     For the meaning of 'appurtenant property' see PARA 404 notes 8, 12 ante.

8     For the meaning of 'service charge' see PARA 404 note 7 ante.

9     Leasehold Reform, Housing and Urban Development Act 1993 s 78(1).

10    I.e. under *ibid* s 87 (as amended): see PARA 411 post.

11    As to the Secretary of State see PARA 27 note 3 ante.

12    Leasehold Reform, Housing and Urban Development Act 1993 s 78(2). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

13    A person is so qualified for appointment if (1) he has the necessary qualification, within the meaning of the Landlord and Tenant Act 1985 s 28(1) (as amended) (see PARA 328 ante), or he is a qualified surveyor; (2) he is not disqualified from acting, within the meaning of s 28(1) (as amended); and (3) he is not a tenant of any premises contained in the relevant premises: Leasehold Reform, Housing and Urban Development Act 1993 s 78(4). For the purposes of head (1) *supra*, a person is a qualified surveyor if he is a fellow or professional

associate of the Royal Institution of Chartered Surveyors or of the Incorporated Society of Valuers and Auctioneers or satisfies such other requirement or requirements as may be prescribed by regulations made by the Secretary of State or, in relation to Wales, by the Assembly or minister: s 78(5). As to the making of regulations generally see PARA 1537 post. A requirement prescribed for these purposes is that a person is a member or fellow of the Architects and Surveyors Institute: Collective Enfranchisement and Tenants' Audit (Qualified Surveyors) Regulations 1994, SI 1994/1263, reg 2.

14     le in the circumstances mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 76(2)(a): see PARA 404 ante at head (a)(i) in the text.

15     le in the circumstances mentioned in *ibid* s 76(2)(b): see PARA 404 ante at head (a)(ii) in the text.

16     Ibid s 78(3). As to the application of s 78 in relation to an audit on behalf of a single qualifying tenant see PARA 404 note 13 ante.

17     Ibid s 78(6).

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#### **407. Rights exercisable in connection with management audits.**

Where the qualifying tenants<sup>1</sup> of any dwellings<sup>2</sup> exercise<sup>3</sup> their right to have a management audit<sup>4</sup> carried out on their behalf, the following rights conferred on the auditor<sup>5</sup> are exercisable by him in connection with the audit<sup>6</sup>.

As from a day to be appointed<sup>7</sup>, those rights are:

919 (1)     a right to require the landlord<sup>8</sup>:  
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104.     (a)     to afford him reasonable facilities for inspecting accounts, receipts or other documents relevant to the matters which must be shown in any statement of account required to be supplied<sup>9</sup> to the qualifying tenants of the constituent dwellings<sup>10</sup> and for taking copies of or extracts from them; or

105.     (b)     to take copies of or extracts from any such accounts, receipts or other documents and either send them to him or afford him reasonable facilities for collecting them, as he specifies<sup>11</sup>;

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920 (2)     a right to require the landlord or any relevant person<sup>12</sup>:  
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106.     (a)     to afford him reasonable facilities for inspecting any other documents sight of which is reasonably required by him for the purpose of carrying out the audit and for taking copies of or extracts from them; or

107.     (b)     to take copies of or extracts from any such documents and either send them to him or afford him reasonable facilities for collecting them, as the auditor specifies<sup>13</sup>.

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To the extent that a requirement imposed under heads (1) and (2) above on the landlord or any relevant person requires him to afford facilities for inspecting documents, he must do so free of charge; but the landlord may treat as part of his costs of management any costs incurred by

him in doing so<sup>14</sup>. The landlord or a relevant person may make a reasonable charge for doing anything else in compliance with such a requirement<sup>15</sup>.

Until the provisions set out in heads (1) and (2) above are brought into force, the rights conferred on the auditor are:

- 921 (i) a right to require the landlord to supply him with a summary of relevant costs<sup>16</sup> in connection with any service charges<sup>17</sup> payable by the qualifying tenants of the constituent dwellings, and to afford him reasonable facilities for inspecting, or taking copies of or extracts from, the accounts, receipts and other documents supporting any such summary;
- 922 (ii) a right to require the landlord or any relevant person to afford him reasonable facilities for inspecting any other documents sight of which is reasonably required by him for the purposes of carrying out the audit; and
- 923 (iii) a right to require the landlord or any relevant person to afford him reasonable facilities for taking copies of or extracts from any documents falling within head (ii) above<sup>18</sup>.

The landlord or, as the case may be, any relevant person, must, where facilities for the inspection of any documents are so required<sup>19</sup>, make those facilities available free of charge and is entitled, where any documents are so required to be supplied<sup>20</sup> or facilities for the taking of copies or extracts are so required<sup>21</sup>, to supply those documents or, as the case may be, make those facilities available on payment of such reasonable charge as he may determine<sup>22</sup>.

The rights conferred on the auditor by heads (1) and (2) above are to be exercisable by him, and until those heads apply the rights conferred on him by heads (i) to (iii) above are exercisable by him:

- 924 (A) in relation to the landlord, by means of a notice given<sup>23</sup> by him; and
- 925 (B) in relation to any relevant person, by means of a notice given to that person at, so far as is reasonably practicable, the same time as a notice is given<sup>24</sup> by the auditor to the landlord;

and, where a notice is given to any relevant person in accordance with head (B) above, a copy of that notice must be given to the landlord by the auditor<sup>25</sup>.

The auditor is also entitled, on giving notice<sup>26</sup>, to carry out an inspection of any common parts<sup>27</sup> comprised in the relevant premises<sup>28</sup> or any appurtenant property<sup>29</sup>.

Where a notice has been given to a relevant person under these provisions and, at a time when any obligations arising out of the notice remain to be discharged by him, he ceases to be a relevant person but he is, despite ceasing to be a relevant person, still in a position to discharge those obligations to any extent, he nevertheless remains responsible for discharging those obligations to that extent<sup>30</sup>. Where a notice has been so given to a relevant person, then, during the period of 12 months beginning with the date of that notice, no subsequent such notice may be given to that person on behalf of any persons who, in relation to the earlier notice, were qualifying tenants of the constituent dwellings<sup>31</sup>.

1 For the meaning of 'qualifying tenant' see PARA 405 ante.

2 For the meaning of 'dwelling' see PARA 50 note 3 ante.

3 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 80 (as amended): see PARA 408 post.

4 For the meaning of 'management audit' see PARA 406 ante.



5 For the meaning of 'the auditor' see PARA 406 ante. For these purposes, references to the auditor (1) as from a day to be appointed, in the context of a requirement imposed under the Leasehold Reform, Housing and Urban Development Act 1993 s 79(2) or (2A) (as prospectively substituted) (see heads (1)-(2) in the text) or (2) until that day, in the context of being afforded any such facilities as are mentioned in s 79(2) (as originally enacted) (see heads (i)-(iii) in the text); or (3) in the context of the carrying out of any inspection under s 79(4) (see the text and notes 26-29 infra) are to be read as including a person appointed by the auditor under s 78(6) (see PARA 406 ante): s 79(8) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 16(1), (6), as from a day to be appointed (see note 7 infra)).

6 Leasehold Reform, Housing and Urban Development Act 1993 s 79(1) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 16(1), (2), as from a day to be appointed (see note 7 infra)).

7 Ie under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8 For the meaning of 'landlord' see PARA 404 note 5 ante.

9 Ie under the Landlord and Tenant Act 1985 s 21 (as prospectively substituted): see PARA 329 ante.

10 For the meaning of 'the constituent dwellings' see PARA 404 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 79(2) (s 79(2), (2A), (5), (6) prospectively substituted by the Commonhold and Leasehold Reform Act 2002 Sch 10, PARA 16(1), (3), (5), as from a day to be appointed (see note 7 infra)).

12 'Relevant person' means a person, other than the landlord, who (1) is charged with responsibility for the discharge of any such obligations as are mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 78(1)(a) (see PARA 406 ante at head (1) in the text) or for the application of any such service charges as are mentioned in s 78(1)(b) (see PARA 406 ante at head (2) in the text); or (2) has a right to enforce payment of any such service charges: ss 79(7), 84.

13 Ibid s 79(2A) (as substituted: see note 11 supra).

14 Ibid s 79(5) (as substituted: see note 11 supra).

15 Ibid s 79(6) (as substituted: see note 11 supra).

16 Ie such a summary as is referred to in the Landlord and Tenant Act 1985 s 21(1) (as originally enacted): see PARA 329 ante.

17 For the meaning of 'service charge' see PARA 404 note 7 ante.

18 Ibid s 79(2) (as originally enacted).

19 Ie required under ibid s 79(2)(a)(ii) or (b) (as originally enacted).

20 Ie required to be supplied under ibid s 79(2)(a)(i) (as originally enacted).

21 Ie required under ibid s 79(2)(a)(ii) or (c) (as originally enacted).

22 Ibid s 79(5)(b) (as originally enacted). The requirement so imposed on the landlord to make any facilities available free of charge is not to be construed as precluding the landlord from treating as part of his costs of management any costs incurred by him in connection with making those facilities so available: s 79(6) (as originally enacted).

23 Ie a notice under ibid s 80 (as amended): see PARA 408 post.

24 See note 23 supra.

25 Leasehold Reform, Housing and Urban Development Act 1993 s 79(3). As to the giving of notices and the statutory power to prescribe the form and content of notices see PARA 1541 post.

26 Ie in accordance with ibid s 80 (as amended).

27 For the meaning of 'common parts' see PARA 411 note 3 post.

28 For the meaning of 'the relevant premises' see PARA 404 notes 7, 11 ante.

29 Leasehold Reform, Housing and Urban Development Act 1993 s 79(4). For the meaning of 'appurtenant property' see PARA 404 notes 8, 12 ante.

30 Ibid s 83(4). Section 81 (as amended) (see PARA 409 post) accordingly continues to apply to him as if he were still a relevant person: s 83(4).

31 Ibid s 83(5)(b).

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#### **408. Exercise of right to have a management audit.**

The right of any qualifying tenants<sup>1</sup> to have a management audit<sup>2</sup> carried out on their behalf is exercisable by the giving of a notice under these provisions<sup>3</sup>. A notice so given:

- 926 (1) must be given to the landlord<sup>4</sup> by the auditor<sup>5</sup>; and
- 927 (2) must be signed by each of the tenants on whose behalf it is given<sup>6</sup>.

Any such notice must:

- 928 (a) state the full name of each of those tenants and the address of the dwelling<sup>7</sup> of which he is a qualifying tenant;
  - 929 (b) state the name and address of the auditor;
  - 930 (c) specify:
- 91
- 108. (i) as from a day to be appointed<sup>8</sup>, any documents or description of documents in respect of which a requirement is imposed<sup>9</sup> on him; or
  - 109. (ii) until that day, any documents or description of documents which the landlord is required<sup>10</sup> to supply to the auditor or in respect of which he is required<sup>11</sup> to afford the auditor facilities for inspection or for taking copies or extracts; and
- 92
- 931 (d) if the auditor proposes to carry out an inspection<sup>12</sup>, state the date<sup>13</sup> on which he proposes to carry out the inspection<sup>14</sup>.

A notice is duly given under the above provisions to the landlord of any qualifying tenants if it is given to a person who receives on behalf of the landlord the rent payable by any such tenants; and a person to whom such a notice is so given must forward it as soon as may be to the landlord<sup>15</sup>.

Where a notice has been so given to a landlord and at a time when any obligations arising out of the notice remain to be discharged by him:

- 932 (A) he disposes<sup>16</sup> of the whole or part of his interest as landlord of the qualifying tenants of the constituent dwellings<sup>17</sup>; and
- 933 (B) the person acquiring any such interest of the landlord is in a position to discharge any of those obligations to any extent,

that person is responsible for discharging those obligations to that extent, as if he had been given the notice under the above provisions<sup>18</sup>.

Where a notice has been so given to a landlord, then, during the period of 12 months beginning with the date of that notice, no subsequent such notice may be given to the landlord on behalf of any persons who, in relation to the earlier notice, were qualifying tenants of the constituent dwellings<sup>19</sup>.

1 For the meaning of 'qualifying tenant' see PARA 405 ante.

2 For the meaning of 'management audit' see PARA 406 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 s 80(1).

4 For the meaning of 'landlord' see PARA 404 note 5 ante.

5 For the meaning of 'the auditor' see PARA 406 ante; and for the meaning of references to the auditor in the specified contexts see PARA 407 note 5 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 80(2).

7 For the meaning of 'dwelling' see PARA 50 note 3 ante.

8 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such had been appointed.

9 Ie imposed under the Leasehold Reform, Housing and Urban Development Act 1993 s 79(2) or (2A) (as prospectively substituted): see PARA 407 ante at heads (1)-(2) in the text.

10 Ie required under the Leasehold Reform, Housing and Urban Development Act 1993 s 79(2)(a)(i) (as originally enacted): see PARA 407 ante at head (i) in the text.

11 Ie required under any other provision of *ibid* s 79(2) (as originally enacted): see PARA 407 ante at heads (i)-(iii) in the text.

12 Ie under *ibid* s 79(4): see PARA 407 ante.

13 The date so specified must be a date falling not less than one month nor more than two months after the date of the giving of the notice: *ibid* s 80(4).

14 *Ibid* s 80(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 17, as from a day to be appointed (see note 8 *supra*)).

15 Leasehold Reform, Housing and Urban Development Act 1993 s 80(5). Where the premises are managed by an RTM company (see PARA 367 *et seq* ante), s 80(5) applies as if the reference to a person who receives rent were to a person who receives service charges: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 14(1), (4).

16 For these purposes, 'disposal' means a disposal whether by the creation or the transfer of an interest, and includes the surrender of a lease and the grant of an option or right of pre-emption; and 'acquisition' is to be construed accordingly, as are expressions related to either of these expressions (Leasehold Reform, Housing and Urban Development Act 1993 s 101(1)); and 'interest' includes estate (s 101(1)). For the meaning of 'lease' see PARA 50 note 2 ante.

17 For the meaning of 'the constituent dwellings' see PARA 404 ante.

18 Leasehold Reform, Housing and Urban Development Act 1993 s 83(1). If the landlord is, despite any such disposal, still in a position to discharge those obligations to the extent referred to in s 83(1), he remains responsible for so discharging them; but otherwise the person referred to in s 83(1) is responsible for so discharging them to the exclusion of the landlord: s 83(2). Where a person is so responsible for discharging any such obligations, whether with the landlord or otherwise (1) references to the landlord in s 81 (as amended) (see PARA 409 *post*) are to be read as including, or as, references to that person to such extent as is appropriate to reflect his responsibility for discharging those obligations; but (2) in connection with the discharge of any such obligations by that person s 81 (as amended) applies as if any reference to the date of the giving of the notice under s 80 (as amended) were a reference to the date of the disposal referred to in s 83(1): s 83(3).

19 Ibid s 83(5)(a).

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#### **409. Procedure following giving of notice.**

Where the landlord<sup>1</sup> is given a notice requiring the carrying out of a management audit<sup>2</sup>, then, within the period of one month beginning with the date of the giving of the notice, he must, if a date is specified in the notice<sup>3</sup>, either approve that date or propose another date<sup>4</sup> for the carrying out<sup>5</sup> of an inspection<sup>6</sup>. He must also:

934 (1) as from a day to be appointed<sup>7</sup>:

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110. (a) comply with it so far as it relates to documents relevant to the matters which must be shown in any statement of account required to be supplied to the qualifying tenants of the constituent dwellings<sup>8</sup>;

111. (b) either comply with it, or give the auditor<sup>9</sup> a notice stating that he objects to doing so for such reasons as are specified in the notice, so far as it relates to other<sup>10</sup> documents<sup>11</sup>;

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935 (2) until that appointed day:

95

112. (a) supply the auditor with any document he is required to supply<sup>12</sup> and afford him in respect of any specified document<sup>13</sup> any facilities for inspection or for taking copies or extracts<sup>14</sup>;

113. (b) in the case of every other document or description of documents specified in the notice<sup>15</sup>, either afford the auditor facilities for inspection or, as the case may be, taking copies or extracts in respect of that document or those documents or give the auditor a notice stating that he objects to doing so for such reasons as are specified in the notice<sup>16</sup>.

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Where a relevant person<sup>17</sup> is given:

936 (i) as from a day to be appointed<sup>18</sup>, a notice by the auditor<sup>19</sup>, then within the period of one month beginning with the date of the giving of the notice, he must either comply with it, or give the auditor a notice stating that he objects to doing so for such reasons as are specified in the notice, in the case of every document or description of document specified in the notice<sup>20</sup>;

937 (ii) until that day, a notice requiring him to afford the auditor facilities for inspection or taking copies or extracts in respect of any documents or description of documents specified in the notice, then within the period of one month beginning with the date of the giving of the notice, he must, in the case of every such document or description of document, either afford the auditor the facilities required by him or give the auditor a notice stating that he objects to doing so for such reasons as are specified in the notice<sup>21</sup>.

If, by the end of the period of two months beginning with the date of the giving of the notice requiring a management audit<sup>22</sup> or the date of the giving of a notice to a relevant person<sup>23</sup>, the landlord or, as the case may be, a relevant person has failed to comply with any requirement of the notice, the court<sup>24</sup> may, on the application of the auditor, make an order requiring the landlord or, as the case may be, the relevant person to comply with that requirement within such period as is specified in the order<sup>25</sup>.

If, by the end of the specified period<sup>26</sup> of two months, no inspection<sup>27</sup> has been carried out by the auditor, the court may, on the application of the auditor, make an order providing for such an inspection to be carried out on such date as is specified in the order<sup>28</sup>.

1 For the meaning of 'landlord' see PARAS 404 note 5, 408 note 18 ante.

2 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 80 (as amended): see PARA 408 ante.

3 Ie under ibid s 80(3)(d): see PARA 408 ante.

4 Any date so proposed by the landlord must be a date falling not later than the end of the period of two months beginning with the date of the giving of the notice under ibid s 80 (as amended): s 81(2).

5 Ie the carrying out of an inspection under ibid s 79(4): see PARA 407 ante.

6 Ibid s 81(1)(c).

7 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8 Ie documents within the Leasehold Reform, Housing and Urban Development Act 1993 s 79(2) (as prospectively substituted): see PARA 407 ante at head (1) in the text.

9 For the meaning of 'the auditor' see PARA 406 ante; and for the meaning of references to the auditor in the specified contexts see PARA 407 note 5 ante.

10 Ie documents within the Leasehold Reform, Housing and Urban Development Act 1993 s 79(2A) (as prospectively substituted): see PARA 407 ante at head (2) in the text.

11 Ibid s 81(1)(a), (b) (prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 18(1), (2), as from a day to be appointed (see note 7 supra)).

12 Ie any document specified under the Leasehold Reform, Housing and Urban Development Act 1993 s 80(3)(c)(i) (as originally enacted): see PARA 408 ante.

13 Ie any document falling within ibid s 79(2)(a)(ii) (as originally enacted): see PARA 407 ante at head (i) in the text.

14 Ie facilities specified in relation to it under ibid s 80(3)(c)(ii) (as originally enacted): see PARA 408 ante.

15 Ie under ibid s 80(3)(c)(ii) (as originally enacted).

16 Ibid s 81(1)(a), (b) (as originally enacted).

17 For the meaning of 'relevant person' see PARA 407 note 12 ante.

18 See note 7 supra.

19 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 79 (as prospectively amended): see PARA 407 ante.

20 Ibid s 81(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 10 para 18(1), (3), as from a day to be appointed (see note 7 supra)).

21 Leasehold Reform, Housing and Urban Development Act 1993 s 81(3) (as originally enacted).

22 Ie the notice under ibid s 80 (as amended): see PARA 408 ante.

23 le such a notice under *ibid* s 79 (as amended) as is mentioned head (i) or head (ii) in the text.

24 For these purposes, 'the court', unless the context otherwise requires, means, by virtue of *ibid* s 90(1), a county court: s 101(1). As to the jurisdiction of the court under Pt I (ss 1-103) (as amended) see PARA 1742 post.

25 *Ibid* s 81(4). Any application for an order under s 81(4) or s 81(6) must be made before the end of the period of four months beginning with (1) in the case of an application made in connection with a notice given under s 80 (as amended), the date of the giving of that notice; or (2) in the case of an application made in connection with such a notice under s 79 (as amended) as is mentioned in head (i) or head (ii) in the text, the date of the giving of that notice: s 81(7).

The court may not, however, so make an order under s 81(4) in respect of any document or documents unless it is satisfied that the document or documents falls or fall within s 79(2)(a) or (b) (as originally enacted) (see PARA 407 ante at heads (a)-(b) in the text) or, as from a day to be appointed (see note 7 *supra*), within s 79(2) or (2A) (as prospectively substituted) (see PARA 407 ante at heads (1)-(2) in the text): s 81(5) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 10 para 18(1), (4), as from such a day).

26 le the period of two months specified in the Leasehold Reform, Housing and Urban Development Act 1993 s 81(2): see note 4 *supra*.

27 le under *ibid* s 79(4). See also note 25 *supra*.

28 *Ibid* s 81(6).

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#### **410. Requirement relating to information etc held by superior landlord.**

As from a day to be appointed<sup>1</sup>, the following provisions have effect. Where the landlord<sup>2</sup> is given a notice<sup>3</sup> imposing on him a requirement relating to any documents which are held by a superior landlord, he must inform the auditor<sup>4</sup> as soon as may be of that fact and of the name and address of the superior landlord<sup>5</sup>. The auditor may then give the superior landlord a notice requiring him to comply with the requirement<sup>6</sup>.

Until the appointed day, the following provisions have effect instead of those set out above. Where the landlord is required by a notice<sup>7</sup> to supply a summary of relevant costs<sup>8</sup> and any information necessary for complying with the notice so far as relating to any such summary is in the possession of a superior landlord:

938 (1) the landlord must make a written request for the relevant information to the person who is his landlord, and so on, if that person is himself not the superior landlord;

939 (2) the superior landlord must comply with that request within the period of one month beginning with the date of the making of the request; and

940 (3) the landlord who received the notice must then comply with it so far as relating to any such summary within the specified time<sup>9</sup> or such further time, if any, as is reasonable<sup>10</sup>.

Where:

- 941 (a) the landlord is required by a notice<sup>11</sup> to afford the auditor facilities for inspection or taking copies or extracts in respect of any documents or description of documents specified in the notice; and
- 942 (b) any of the documents in question is in the custody or under the control of a superior landlord,

the landlord must, on receiving the notice, inform the auditor as soon as may be of that fact and of the name and address of the superior landlord; and the auditor may then give the superior landlord a notice requiring him to afford the facilities in question in respect of the document<sup>12</sup>.

1 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2 For the meaning of 'landlord' see PARA 404 note 5 ante.

3 le a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 80 (as amended): see PARA 408 ante.

4 For the meaning of 'the auditor' see PARA 406 ante; and for the meaning of references to the auditor in the specified contexts see PARA 407 note 5 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 82(1) (s 82(1), (2) prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 157, Sch 10 para 19, as from a day to be appointed (see note 1 supra)).

6 Leasehold Reform, Housing and Urban Development Act 1993 s 82(2) (as substituted: see note 5 supra). Section 81(3)-(5), (7) (as amended) (see PARA 409 ante) has effect, with any necessary modifications, in relation to a notice given to a superior landlord under s 82(2) (as so substituted) as it has effect in relation to any such notice given to a relevant person as is mentioned in s 81(3) (as prospectively substituted) (see PARA 409 ante): s 82(3).

7 le a notice under ibid s 80 (as originally enacted): see PARA 408 ante.

8 le any summary falling within ibid s 79(2)(a) (as originally enacted): see PARA 407 ante at head (a) in the text.

9 le the time allowed by ibid s 81(1) (as originally enacted): see PARA 409 ante.

10 Ibid s 82(1) (as originally enacted).

11 See note 7 supra.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 82(2) (as originally enacted). Section 81(3)-(5), (7) (as originally enacted) (see PARA 409 ante) has effect, with any necessary modifications, in relation to a notice given to a superior landlord under s 82(2) (as originally enacted) as it has effect in relation to any such notice given to a relevant person as is mentioned in s 81(3) (as originally enacted) (see PARA 409 ante): s 82(3).

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### **(3) CODES OF PRACTICE AND LOCAL AUTHORITY MANAGEMENT ORDERS**

**411. Approval of codes of practice for management of residential property.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may, if he or it considers it appropriate to do so, by order:

- 943 (1) approve any code of practice:  
97
  - 114. (a) which appears to him or to the Assembly or minister to be designed to promote desirable practices in relation to any matter or matters directly or indirectly concerned with the management of residential property<sup>3</sup> by relevant persons<sup>4</sup>; and
  - 115. (b) which has been submitted to him or to it for his approval;  
98
- 944 (2) approve any modifications of any such code which have been so submitted;  
or
- 945 (3) withdraw his or its approval for any such code or modifications<sup>5</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister may not, however, approve any such code or any modifications of any such code unless satisfied that arrangements have been made for the text of the code or the modifications to be published in such manner as he or it considers appropriate for bringing the provisions of the code or the modifications to the notice of those likely to be affected by them, which, in the case of modifications of a code, may include publication of a text of the code incorporating the modifications<sup>6</sup>.

The power of the Secretary of State or the Assembly or minister so to approve a code of practice which has been submitted to him or to it for approval includes power to approve a part of any such code<sup>7</sup>.

At any one time there may be two or more codes of practice for the time being so approved<sup>8</sup>; and a code of practice so approved may make different provision with respect to different cases or descriptions of cases, including different provision for different areas<sup>9</sup>.

Without prejudice to the generality of the above provisions:

- 946 (i) a code of practice so approved may, in relation to any such matter as is referred to in heads (1) to (3) above, make provision in respect of relevant persons who are under an obligation to discharge any function in connection with that matter as well as in respect of relevant persons who are not under such an obligation; and
- 947 (ii) any such code may make provision with respect to the resolution of disputes with respect to residential property between relevant persons and the tenants of such property, competitive tendering for works in connection with such property and the administration of trusts in respect of amounts paid by tenants by way of service charges<sup>10</sup>.

A failure on the part of any person to comply with any provision of a code of practice for the time being so approved does not of itself render him liable to any proceedings; but in any proceedings before a court or tribunal:

- 948 (A) any code of practice so approved is admissible in evidence; and
- 949 (B) any provision of any such code which appears to the court or tribunal to be relevant to any question arising in the proceedings must be taken into account in determining that question<sup>11</sup>.



Codes of management practice for residential property generally<sup>12</sup> and for private retirement housing<sup>13</sup> have been approved under these provisions.

The appropriate national authority<sup>14</sup> also has power by order to approve a code of practice (whether prepared by that authority or another person) laying down standards of conduct and practice to be followed with regard to the management of houses in multiple occupation<sup>15</sup> or of excepted accommodation<sup>16</sup>, to approve a modification of such a code or to withdraw the authority's approval of such a code or modification<sup>17</sup>. These powers are discussed in detail elsewhere in this work<sup>18</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For these purposes, 'residential property' means any building or part of a building which consists of one or more dwellings let on leases; but references to residential property include (1) any garage, outhouse, garden, yard and appurtenances belonging to or usually enjoyed with such dwellings; (2) any common parts of any such building or part; and (3) any common facilities which are not within any such building or part: Leasehold Reform, Housing and Urban Development Act 1993 s 87(8)(b). 'Common parts', in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it: s 101(1). For the meaning of 'dwelling' see PARA 50 note 3 ante; and for the meaning of 'lease' see PARA 50 note 2 ante.

4 For these purposes, 'relevant person' means any landlord of residential property or any person who discharges management functions in respect of such property; and 'management functions' includes functions with respect to the provision of services or the repair, maintenance, improvement or insurance of such property: *ibid* s 87(8)(a) (amended by the Commonhold and Leasehold Reform Act 2002 s 150, Sch 9 para 11(a)). For the meaning of 'landlord' see PARA 50 note 2 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 87(1). Section 87 (as amended) applies in relation to dwellings let on licences to occupy as it applies in relation to dwellings let on leases; and references in s 87 (as amended) to landlords and tenants of residential property accordingly include references to licensors and licensees of such property: s 87(9).

6 *Ibid* s 87(2).

7 *Ibid* s 87(3). References in s 87 (as amended) to a code of practice may accordingly be read as including a reference to a part of a code of practice: s 87(3).

8 *Ibid* s 87(4).

9 *Ibid* s 87(5).

10 *Ibid* s 87(6). For these purposes, 'service charge' means an amount payable by a tenant of a dwelling as part of or in addition to the rent (1) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or any relevant person's costs of management; and (2) the whole or part of which varies or may vary according to the costs or estimated costs incurred or to be incurred by any relevant person in connection with the matters mentioned in head (1) *supra*: s 87(8)(c) ((amended by the Commonhold and Leasehold Reform Act 2002 Sch 9 para 11(b))).

11 Leasehold Reform, Housing and Urban Development Act 1993 s 87(7).

12 See (1) the Approval of Codes of Management Practice (Residential Property) Order 1996, SI 1996/2839, art 2; (2) the Approval of Codes of Management Practice (Residential Property) (England) Order 2004, SI 2004/1802, art 2; (3) the Approval of Codes of Management Practice (Residential Property) (Wales) Order 2006, SI 2006/178, art 2.

13 See (1) the Approval of Code of Management Practice (Private Retirement Housing) (England) Order 2005, SI 2005/3307, art 2; (2) the Approval of Codes of Management Practice (Residential Property) (No 2) Order 1995, SI 1995/3149, art 2 and the Approval of Codes of Management Practice (Residential Property) Order 1998, SI 1998/106, art 2 (both revoked in relation to England but continuing to apply in relation to sheltered leasehold accommodation in Wales).

14 For the meaning of 'the appropriate national authority' see HOUSING vol 22 (2006 Reissue) PARA 187 note 4.

15 For the meaning of 'house in multiple occupation' see HOUSING vol 22 (2006 Reissue) PARA 461.

16 For the meaning of 'excepted accommodation' see HOUSING vol 22 (2006 Reissue) PARA 490 note 3.

17 See the Housing Act 2004 s 233(1). As to the codes that have been approved see the Housing (Approval of Codes of Management Practice) (Student Accommodation) (England) Order 2006, SI 2006/646; the Housing (Approval of Codes of Management Practice) (Student Accommodation) (Wales) Order 2006, SI 2006/1709.

18 See HOUSING vol 22 (2006 Reissue) PARA 490.

## UPDATE

### **411 Approval of codes of practice for management of residential property**

NOTE 12--See also the Approval of Code of Management Practice (Residential Management) (Service Charges) (England) Order 2009, SI 2009/512, which, in relation to the management of residential properties in England, approves the new Service Charge Residential Management Code in place of the former Code.

NOTE 13--Head (2). SI 1995/3149, SI 1998/106 replaced: Approval of Code of Practice (Private Retirement Housing) (Wales) Order 2007, SI 2007/578.

NOTE 17--SI 2006/646 amended: SI 2008/2345.

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### **412. Management orders under the Housing Act 2004.**

Chapter 1 of Part 4 the Housing Act 2004<sup>1</sup> introduces provisions which enable a local housing authority<sup>2</sup> to make an interim management order<sup>3</sup>, or a final management order<sup>4</sup>, in respect of a house in multiple occupation (an 'HMO'<sup>5</sup>) or a Part 3 house<sup>6</sup>.

An interim management order is an order (expiring not more than 12 months after it is made) which is made for the purpose of securing that the following steps are taken in relation to the house<sup>7</sup>:

- 950 (1) any immediate steps which the authority considers necessary to protect the health, safety or welfare of persons occupying the house, or persons occupying or having an estate or interest in any premises in the vicinity<sup>8</sup>; and
- 951 (b) any other steps which the authority thinks appropriate with a view to the proper management of the house pending the grant of a licence under Part 2 or Part 3 of the Housing Act 2004<sup>9</sup> in respect of the house or the making of a final management order in respect of it (or, if appropriate, the revocation of the interim management order)<sup>10</sup>.

A final management order is an order (expiring not more than five years after it is made) which is made for the purpose of securing the proper management of the house on a long-term basis in accordance with a management scheme contained in the order<sup>11</sup>.

Interim and final management orders under these provisions are discussed in detail elsewhere in this work<sup>12</sup>.

- 1   le the Housing Act 2004 Pt 4 Ch 1 (ss 101-131): see HOUSING vol 22 (2006 Reissue) PARA 513 et seq.
- 2   For the meaning of 'local housing authority' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 200 note 1.
- 3   See the Housing Act 2004 s 102; and HOUSING vol 22 (2006 Reissue) PARA 514. Section 103 deals with the making of a special interim management order in respect of a house to which that provision applies: see s 101(2); and HOUSING vol 22 (2006 Reissue) PARAS 513 note 3, 515.
- 4   See *ibid* s 113; and HOUSING vol 22 (2006 Reissue) PARA 523.
- 5   For the meaning of 'HMO' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 513 note 5.
- 6   Housing Act 2004 s 101(1). For the meaning of 'Part 3 house' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 513 note 6.
- 7   *Ibid* s 101(3).
- 8   See *ibid* s 101(3)(a); and HOUSING vol 22 (2006 Reissue) PARA 513 the text and note 8.
- 9   The reference to the grant of a licence under *ibid* Pt 2 or Pt 3 in respect of the house includes a reference to serving a temporary exemption notice under s 62 (see HOUSING vol 22 (2006 Reissue) PARA 474) or s 86 (see HOUSING vol 22 (2006 Reissue) PARA 504) in respect of it (whether or not a notification is given under s 62(1) or s 86(1)): s 106(6).
- 10   See *ibid* s 101(3)(b); and HOUSING vol 22 (2006 Reissue) PARA 513.
- 11   *Ibid* s 101(4). As to management schemes see HOUSING vol 22 (2006 Reissue) PARA 528.
- 12   See HOUSING vol 22 (2006 Reissue) PARA 513 et seq.

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## **10. REPAIR, FITNESS AND ALTERATION**

### **(1) LANDLORD'S OBLIGATIONS TOWARDS THE TENANT**

#### **(i) Liability to Repair**

##### **A. IN GENERAL**

##### **413. Landlord's liability to repair.**

In the absence of express stipulation<sup>1</sup>, or of an obligation imposed by statute<sup>2</sup>, the landlord is generally under no liability towards the tenant<sup>3</sup> to put the demised premises into repair at the commencement of the tenancy, or to do repairs during the continuance of the tenancy<sup>4</sup>. This rule applies equally whether the letting is from year to year<sup>5</sup> or for a term of years<sup>6</sup>. The fact that the tenant has covenanted to repair, 'fair wear and tear excepted'<sup>7</sup>, or 'damage by fire and tempest excepted'<sup>8</sup>, does not imply a covenant by the landlord to make such fair wear and tear or damage good. The fact that the landlord has carried out repairs when the responsibility for repair lay upon the tenant does not prove that there has been any transfer of burden<sup>9</sup> and provisions in the lease indicating the parties' contemplation that in practice the landlord will do repairs and conferring on him express rights of entry for this purpose do not cause any obligation to do the repairs to be implied<sup>10</sup>.

The general rule is, however, subject to the following exceptions:

- 952 (1) where the landlord retains in his possession some part of the building the maintenance of which in proper repair is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, he is under an obligation to take reasonable care that the premises retained are not in such a condition as to cause damage to the tenant or to the demised premises<sup>11</sup>; and this obligation is properly to be regarded as an implied term rather than an independent tortious duty<sup>12</sup>, and so does not arise where the lease contains a comprehensive code for dealing with repairs<sup>13</sup>;
- 953 (2) where the landlord agrees to let or lets premises which are to be constructed or are in the course of construction, an obligation on his part is implied that the work will be completed in a good and workmanlike manner using good and proper materials and so as to be reasonably fit for human habitation<sup>14</sup>;
- 954 (3) where the landlord has designed or built the demised premises, he owes a duty to take reasonable care to ensure that the building is free from any defect likely to cause injury to any person whom he ought reasonably to have in contemplation as likely to be affected by such defect, including the tenant<sup>15</sup>; but this liability is restricted to damage to the claimant's property or person and does not extend to the cost of rectifying defects in the building discovered before causing any damage nor to purely economic loss<sup>16</sup>;
- 955 (4) a landlord developer of a dwelling owes a statutory duty to every person who acquires an interest therein to see that any work done for or in connection with the provision of the dwelling is done in a workmanlike or professional manner with proper materials and so that, as regards that work, the dwelling will be fit for habitation when completed<sup>17</sup>;
- 956 (5) where the implication of a term that the landlord will undertake certain repairs is necessary to give business efficacy to the transaction or to complete the terms of the tenancy such a term may be implied<sup>18</sup>, but a term will not be so implied where there is a comprehensive code dealing with repairs<sup>19</sup> and will be more readily implied where the tenancy is of an informal kind and it can be inferred that some or all of the terms intended have not been recorded<sup>20</sup>; a term may also be implied on this ground on the basis that it is necessarily correlative to some express obligation on the part of the tenant<sup>21</sup>.

Nevertheless, subject to the above exceptions and to those created by statute, a 'bare' landlord<sup>22</sup> is not liable for letting a house in a defective or dangerous condition<sup>23</sup>.

1 The fact that the landlord has raised the rent by the amount permitted by the Rent Act 1977 (see PARA 891 et seq post) in cases where the landlord undertakes repairs does not import an agreement to repair that was not in the original letting: *Morgan v Liverpool Corp* [1927] 2 KB 131 at 138, CA; *Wilchick v Marks and Silverstone* [1934] 2 KB 56 at 63.

2 As to the covenants to repair implied by statute see the Defective Premises Act 1972; and PARA 475 post; the Landlord and Tenant Act 1985 s 8; and PARAS 424-425 post; s 11 (as amended) and PARAS 416-417 post; and the Agricultural Holdings Act 1986 s 7; and AGRICULTURAL LAND vol 1 (2008) PARA 332. As to the landlord's duty to ensure that gas fittings are maintained in a safe condition see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 943.

3 There may be liability towards the occupants of neighbouring property, or passers-by, if injury or damage is sustained in consequence of the defective state of the premises and, even if he is not under an express stipulation or a statutory duty to repair, the landlord has an implied right to enter to do repairs, and such a right will be implied readily in regard to weekly tenancies: see *Mint v Good* [1951] 1 KB 517, [1950] 2 All ER 1159, CA. See also the Defective Premises Act 1972; and PARAS 415, 474-475 post.

4 *Gott v Gandy* (1853) 2 E & B 845. Apart from any covenant on his behalf the landlord is under no liability to repair fences: *Cheetham v Hampson* (1791) 4 Term Rep 318. As to the landlord's duty if he retains adjoining

land see BOUNDARIES vol 4(1) (2002 Reissue) PARA 948. In so far as damage to the structure results from an insured risk, there is no ground for importing any implied obligation to do more than lay out any insurance moneys coming into the hands of the lessor in making good that damage; the lessor is not required to carry out works of repair from causes which are not covered by an insurance policy effected pursuant to the terms of the lease, in particular damage which may result from the gradual deterioration of the structure during the term of the lease: see *Adami v Lincoln Grange Management Ltd* (1997) 30 HLR 982, [1998] 1 EGLR 58, CA. See also *Long v Southwark London Borough Council* [2002] EWCA Civ 403, [2002] LGR 530, [2002] HLR 983 (obligation in tenancy agreement to keep refuse collection facilities in repair did not require the landlord to install new facilities or to modify the existing ones).

5 *Gott v Gandy* (1853) 2 E & B 845 at 847.

6 *Arden v Pullen* (1842) 10 M & W 321. Where the landlord fails to perform a covenant to repair, and the tenant has entered, the tenant should not quit but sue for the breach: *Hunt v Silk* (1804) 5 East 449.

7 See *Arden v Pullen* (1842) 10 M & W 321.

8 *Weigall v Waters* (1795) 6 Term Rep 488.

9 *London Hospital, Board of Governors v Jacobs* [1956] 2 All ER 603 at 609-610, [1956] 1 WLR 662 at 673, CA.

10 *Sleafer v Lambeth Borough Council* [1960] 1 QB 43, [1959] 3 All ER 378, CA.

11 *Duke of Westminster v Guild* [1985] QB 688 at 701, [1984] 3 All ER 144 at 152, CA; *Hargroves, Aronson & Co v Hartopp* [1905] 1 KB 472, DC; approved in *Fairman v Perpetual Investment Building Society* [1923] AC 74, HL; *Cockburn v Smith* [1924] 2 KB 119, CA; and see PARA 476 post. A landlord is not, however, liable to keep adjoining premises in repair as such, as opposed to taking care to keep them in a condition which will not cause damage (*Colebeck v Girdlers Co* (1876) 1 QBD 234) or for damage not caused by negligence (*Carstairs v Taylor* (1871) LR 6 Exch 217) or for damage caused by the dilapidated condition of premises belonging to him but not in his possession (*Scales v Vandeleur* (1913) 48 ILT 36; affd (1914) 48 ILT 38, CA).

12 *Gordon v Selico Co Ltd* (1986) 18 HLR 219, [1986] 1 EGLR 71, CA; but see *Tennant Radiant Heat Ltd v Warrington Development Corpn* [1988] 1 EGLR 41, CA (landlord held liable in nuisance but not in contract).

13 *Gordon v Selico Co Ltd* (1986) 18 HLR 219, [1986] 1 EGLR 71, CA; *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA.

14 *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA; and see the cases cited in PARA 422 notes 5, 12 post.

15 *Rimmer v Liverpool City Council* [1985] QB 1, [1984] 1 All ER 930, CA; *Targett v Torfaen Borough Council* [1992] 3 All ER 27, [1992] 1 EGLR 275, CA, where it was held that *Rimmer v Liverpool City Council* supra was not overruled by *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL.

16 *D & F Estates Ltd v Church Comrs for England* [1989] AC 177, [1988] 2 All ER 992, HL; *Department of the Environment v Thomas Bates and Son Ltd* [1991] 1 AC 499, [1990] 2 All ER 943, HL; *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL; and see NEGLIGENCE.

17 See PARA 422 post; the Defective Premises Act 1972 s 1; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 77.

18 *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL (implied term in letting of council flats in a high-rise block that landlord would take reasonable care to maintain the common parts, ie the stairs, lifts, lighting and rubbish chutes, in a state of reasonable repair and efficiency). It was pointed out in *Duke of Westminster v Guild* [1985] QB 688 at 698, [1984] 3 All ER 144 at 150, CA, that the term implied in *Liverpool City Council v Irwin* supra was regarded by the House of Lords on the facts of that case as a legal incident of the relationship of landlord and tenant rather than justified by the business efficacy test. *Liverpool City Council v Irwin* supra was followed in *King v South Northamptonshire District Council* (1991) 64 P & CR 35, [1992] 1 EGLR 53, CA (implied obligation on landlord of terraced council house to maintain rear footpath necessary for rubbish removal and coal deliveries) but was distinguished in *Duke of Westminster v Guild* supra where the letting was of commercial premises, there was a lease containing a comprehensive set of terms as to repair and the general principle that the servient owner is not under any liability to keep the servient tenement in repair for the benefit of the owner of an easement was affirmed. The operation of the business efficacy test may also give rise indirectly to an implied obligation to maintain if it results in an implied reservation of a right of entry so as to bring into operation the Defective Premises Act 1972 s 4 (see PARA 475 post): *McAuley v Bristol City Council* [1992] QB 134, [1992] 1 All ER 749, CA.

19 le as in *Gordon v Selico Co Ltd* (1986) 18 HLR 219, [1986] 1 EGLR 71, CA, and *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA. See also *Hafton Properties v Camp* [1994] 1 EGLR 67, [1994] 03 EG 129.

20 le as in *Liverpool City Council v Irwin* [1977] AC 239, [1976] 2 All ER 39, HL.

21 *Edmonton Corp v WM Knowles & Son Ltd* (1961) 60 LGR 124 (obligation to redecorate implied as correlative to tenant's covenant to pay for periodic redecoration), distinguished in *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA (no obligation to repair drains and party walls implied from tenant's covenant to contribute to cost); *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, [1989] 1 All ER 351, CA (obligation to repair exterior implied as correlative to tenant's obligation to repair interior), distinguished in *Demetriou v Robert Andrews (Estate Agents) Ltd* (1990) 62 P & CR 536, sub nom *Demetriou v Poolaction Ltd* [1991] 1 EGLR 100, CA (no tenant's obligation to repair interior) and in *Adami v Lincoln Grange Management Ltd* (1997) 30 HLR 982, [1998] 1 EGLR 58, CA (cited in note 4 supra); cf *Murphy v Hurly* [1922] 1 AC 369, HL (landlord's acceptance of rent fixed on basis of his obligation to repair sea-wall strong evidence that he had agreed to such a term).

22 le a landlord who was not responsible for the design, construction or development.

23 *Cavalier v Pope* [1906] AC 428 at 430, HL, per Lord MacNaghten, followed and held still to be good law in *McNery v London Borough of Lambeth* (1988) 21 HLR 188, CA.

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#### **414. Landlord's liability in the event of fire.**

Except to the extent that the landlord has assumed an obligation to rebuild, as, for example, by covenanting to repair, he need not rebuild the premises if they are destroyed by fire during the term<sup>1</sup>, and a covenant on his part for quiet enjoyment does not require him to reinstate the premises<sup>2</sup>. The fact that the tenant has covenanted to repair with an exception for damage by fire does not of itself imply an obligation on the landlord's part to rebuild<sup>3</sup>. Moreover, the fact that the landlord has insured and has received the insurance money does not impose an obligation on him to rebuild<sup>4</sup> unless the insurance was effected at the expense of the tenant<sup>5</sup>; but the tenant may take advantage of the Fires Prevention (Metropolis) Act 1774<sup>6</sup>, which requires the governors of an insurance office upon the request of any person interested to cause insurance money to be laid out towards rebuilding<sup>7</sup>.

A covenant by the landlord that, in case of fire, he will reinstate the premises in the same condition as before the fire does not, subject to the wording of the particular covenant, bind him to restore additions made by the tenant<sup>8</sup>.

1 *Bayne v Walker* (1815) 3 Dow 233, HL.

2 *Brown v Quilter* (1764) Amb 619 at 620.

3 *Weigall v Waters* (1795) 6 Term Rep 488.

4 *Leeds v Cheetham* (1827) 1 Sim 146; *Lofft v Dennis* (1859) 1 E & E 474.

5 *Mumford Hotels Ltd v Wheler* [1964] Ch 117, [1963] 3 All ER 250.

6 See the Fires Prevention (Metropolis) Act 1774 s 83; and INSURANCE vol 25 (2003 Reissue) PARAS 637-638. The Act applies to property in England and is not limited to the metropolis: see PARA 428 note 4 post.

7 See *Wimbledon Park Golf Club Ltd v Imperial Insurance Co Ltd* (1902) 18 TLR 815; *Sun Insurance Office v Galinsky* [1914] 2 KB 545 at 559, CA, per Kennedy LJ; and see INSURANCE vol 25 (2003 Reissue) PARA 637.

8 *Loader v Kemp* (1826) 2 C & P 375.

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#### **415. Right of entry.**

By the granting of a lease, the landlord deprives himself of the right to possession of the premises during its currency; and, if he enters without the tenant's permission, or without reserving to himself the right to do so, he is liable to be treated as a trespasser. Hence, in the absence of a special stipulation<sup>1</sup> or a right given by statute<sup>2</sup>, he may not enter to do repairs<sup>3</sup>. In the case of weekly tenancies, where neither the landlord nor the tenant is expressly bound, a reservation by the landlord of a right to enter to carry out repairs is a term which the court will readily imply<sup>4</sup>. It makes no difference that he is himself a tenant, and is liable to forfeiture for breach of the covenant to repair in the head lease, or that he has the consent of the subtenant's tenants<sup>5</sup>.

Where the landlord has covenanted with the tenant to repair, a licence by the tenant is implied for him to enter at a reasonable time to do the repairs<sup>6</sup>. Generally, however, a right to enter and view the state of repair is expressly reserved by the lease, and the landlord is entitled to have this inserted when the lease is granted in pursuance of an agreement to grant a lease with the 'usual provisions'<sup>7</sup>.

The fact that the landlord has a right of entry to view the premises does not free the tenant from the obligation to give notice to the landlord of want of repair before he can hold the landlord liable for breach of covenant to repair; but the landlord may be liable for breach of the covenant if it is proved that he or his agents had actual knowledge of the want of repair<sup>8</sup>.

Where a tenant is granted an easement over land retained by the landlord, he is entitled to enter on the landlord's land in order to carry out repairs necessary to the enjoyment of the easement<sup>9</sup>.

1 *Barker v Barker* (1829) 3 C & P 557.

2 See PARAS 416-417 post. Rights of entry are also given under the Rent Act 1977 s 148 (see PARA 828 post), the Landlord and Tenant Act 1985 s 8(2) (see PARA 424 post) and s 11(6) (see PARAS 416-417 post) and the Housing Act 1988 s 16 (see PARA 1064 post). For other examples of rights of entry given by statute see the Public Health Act 1936 s 289; and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 124; the Party Wall etc Act 1996 s 8; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 984.

3 See *Neale v Wyllie* (1824) 3 B & C 533; *Regional Properties Ltd v City of London Real Property Co Ltd, Sedgwick Forbes Bland Payne Group Ltd v Regional Properties Ltd* (1979) 257 Estates Gazette 64.

4 *Mint v Good* [1951] 1 KB 517 at 521, 528, [1950] 2 All ER 1159 at 1162, 1167, CA; applied in *McAuley v Bristol City Council* [1992] QB 134, [1992] 1 All ER 749, CA. See also *Smith v Bradford Metropolitan Council* (1982) 44 P & CR 171, 4 HLR 86, CA.

5 *Stocker v Planet Building Society* (1879) 27 WR 877, CA (subtenants were weekly tenants; landlord's entry restrained by injunction).

6 *Saner v Bilton* (1878) 7 ChD 815; *Edmonton Corp v WM Knowles & Son Ltd* (1961) 60 LGR 124; and see *Boldack v East Lindsey District Council* (1998) 31 HLR 41, CA (right of entry limited to carrying out repairs and maintenance; the removal of a hazardous paving slab leaning against a wall was not a repair).

7 If the landlord is to enter 'at convenient times' to view the state of repair, he should give notice of his coming, otherwise he cannot complain of being excluded from some of the rooms: *Doe d Wetherell v Bird* (1833) 6 C & P 195. As to 'usual covenants' see PARA 83 ante.

8 See PARA 453 post.

9 *Newcomen v Coulson* (1877) 5 ChD 133, CA (to make up a road); *Bond v Nottingham Corp* [1940] Ch 429, [1940] 2 All ER 12, CA (to restore support); *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA (to unblock a drain). It has been suggested that by analogy with this principle a tenant may have an implied right to enter upon property retained by the landlord to carry out repairs which the landlord should have done: *Loria v Hammer* [1989] 2 EGLR 249 obiter, sed quaere; such an implication would appear inconsistent with the cases cited in notes 3, 5 supra.

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## **B. COVENANTS IMPLIED BY STATUTE**

### **416. Lessor's statutory obligation to repair; whole buildings.**

In a lease of a dwelling house<sup>1</sup> granted on or after 24 October 1961 for a term of less than seven years<sup>2</sup>, there is implied a covenant<sup>3</sup> by the lessor<sup>4</sup>:

- 957 (1) to keep in repair the structure and exterior<sup>5</sup> of the dwelling house including drains, gutters and external pipes<sup>6</sup>;
- 958 (2) to keep in repair and proper working order the installations in the dwelling house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity)<sup>7</sup>; and
- 959 (3) to keep in repair and proper working order the installations in the dwelling house for space heating and heating water<sup>8</sup>.

A covenant by the lessee<sup>9</sup> for the repair of the premises<sup>10</sup> is of no effect<sup>11</sup> so far as it relates to the matters mentioned in heads (1) to (3) above<sup>12</sup>.

The covenant so implied ('the lessor's repairing covenant') is not, however, to be construed as requiring the lessor:

- 960 (a) to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenantlike manner, or would be so liable but for an express covenant on his part;
- 961 (b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident; or
- 962 (c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling house<sup>13</sup>.

In determining the standard of repair required by the lessor's repairing covenant, regard must be had to the age, character and prospective life of the dwelling house and the locality in which it is situated<sup>14</sup>. In a lease in which the lessor's repairing covenant is implied, there is also implied a covenant by the lessee that the lessor, or any person authorised by him in writing,



may at reasonable times of the day and on giving 24 hours' notice in writing to the occupier enter the premises comprised in the lease for the purpose of viewing their condition and state of repair<sup>15</sup>.

The implied obligation to repair extends only to cases where the lessor has knowledge of the defect; but it is sufficient if he has information about the existence of a defect which would put a reasonable person on inquiry as to whether repairs were needed<sup>16</sup>.

Where the premises are managed by an RTM company<sup>17</sup>:

- 963 (i) the obligations imposed on a lessor by virtue of the above provisions, so far as relating to any lease of any flat<sup>18</sup> or other unit<sup>19</sup> contained in the premises, are instead obligations of the RTM company<sup>20</sup>;
- 964 (ii) the obligations imposed on the RTM company by virtue of head (i) above in relation to any lease are owed to the lessor, as well as to the lessee<sup>21</sup>; and
- 965 (iii) the RTM company owes to any person who is in occupation of a flat or other unit contained in the premises otherwise than under a lease the same obligations as would be imposed on it by virtue of the above provisions if that person were a lessee under a lease of the flat or other unit<sup>22</sup>;

but head (i) above does not apply to an obligation to the extent that it relates to a matter concerning only the flat or other unit concerned<sup>23</sup>.

1 For these purposes, 'lease of a dwelling house' means a lease by which a building or part of a building is let wholly or mainly as a private residence and 'dwelling house' means that building or part of a building (Landlord and Tenant Act 1985 s 16(a)); but 'lease' does not include a mortgage term (s 16(b)). For the meaning of 'lease' generally see PARA 52 note 1 ante. As to the leases to which s 11 (as amended) applies see PARA 418 post; as to the leases to which s 11 (as amended) does not apply see PARA 419 post; and as to leases of parts of buildings see PARA 417 post. The statutory obligation does not extend to parts of the building in which the landlord has no interest: *Niazi Services Ltd v Van der Loo* [2004] EWCA Civ 53, [2004] 1 WLR 1254, [2004] All ER (D) 139 (Feb). An express covenant can extend the obligation: *Welsh v Greenwich London Borough Council* (2000) 81 P & CR 144, [2000] 3 EGLR 41, CA (covenant 'to maintain in good condition and repair' extending to cover severe condensation which was caused by lack of insulation, not by disrepair).

2 See the Landlord and Tenant Act 1985 s 13. As to leases which are treated for this purpose as being for a term of less than seven years see PARA 418 post. Since 'lease' includes an agreement for a lease (see PARA 52 note 1 ante), the question whether there is a lease for a term of less than seven years falls to be determined as at the date when a binding agreement for a lease comes into existence: *Brikom Investments Ltd v Seaford* [1981] 2 All ER 783, [1981] 1 WLR 863, CA.

3 For the meaning of references to covenants see PARA 52 note 1 ante.

4 For these purposes, 'lessor' means the person for the time being entitled to the reversion expectant on the lease: Landlord and Tenant Act 1985 s 16(c). See also note 15 infra.

5 The meaning of 'structure and exterior' is a question of fact and degree: *Hopwood v Cannock Chase District Council* [1975] 1 All ER 796, [1975] 1 WLR 373, CA (landlord not obliged to repair slabs in back yard); cf *Brown v Liverpool Corp* [1969] 3 All ER 1345, CA (landlord obliged to repair steps leading to the dwelling house). The exterior of a flat in a block includes the outside walls of the flat, even though these walls are not included in the demised premises (*Campden Hill Towers Ltd v Gardner* [1977] QB 823, [1977] 1 All ER 739, CA) and in the case of a top-floor flat may include the roof, unless it is separated from the flat by a void or loft (*Douglas-Scott v Scorgie* [1984] 1 All ER 1086, [1984] 1 WLR 716, CA).

6 Landlord and Tenant Act 1985 s 11(1)(a). The duty under s 11 (as amended) extends to the reinstatement of decorations damaged by the work of repair (*McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA; *Bradley v Chorley Borough Council* [1985] 2 EGLR 49, CA) but not to damage to decorations and furnishings caused by condensation which was not due to structural damage (*Quick v Taff-Ely Borough Council* [1986] QB 809, [1985] 2 EGLR 50, CA). Saturation of the plaster is damage to the structure: *Staves v Leeds City Council* (1990) 23 HLR 107, [1992] 2 EGLR 37, CA. 'The structure of the dwelling house' has been said to 'consist of those elements which give it its essential appearance, stability and shape' but not to extend to 'the many and various ways in which the dwelling house will be fitted out, equipped, decorated and generally made to be habitable'; it is not limited to loadbearing elements; it does not include a separate garage, gates, internal

plaster and door furniture but does include windows, including their sashes, cords, frames and essential furniture: *Irvine v Moran* (1990) 24 HLR 1, [1991] 1 EGLR 261; applied in *Marlborough Park Services Ltd v Rowe* [2006] EWCA Civ 436, [2006] 23 EG 166, [2006] All ER (D) 91 (Mar), CA (floor joists included in the lease of the flat were part of the 'main structure' of the building and so within the landlord's repairing obligations).

The manner in which the courts have consistently interpreted the Landlord and Tenant Act 1985 s 11(1)(a) is not incompatible with the Human Rights Act 1998 and the Convention rights to respect for private and family life: *Lee v Leeds City Council*, *Ratcliffe v Sandwell Metropolitan Borough Council* [2002] EWCA Civ 06, [2002] 1 WLR 1488, [2002] LGR 305. As to Convention rights see PARA 46 ante.

7 Landlord and Tenant Act 1985 s 11(1)(b). The installations must be kept in repair and be capable, so far as their own structural and mechanical condition is concerned, of working properly: *Campden Hill Towers Ltd v Gardner* [1977] QB 823 at 835, [1977] 1 All ER 739 at 746, CA, per Megaw LJ. Thus, the landlord is not obliged to lag an unlagged water pipe or to replace a blown fuse but the position would be different if a pipe rusted through or the insulation on the wiring deteriorated: *Wycombe Health Authority v Barnett* (1982) 5 HLR 84, 47 P & CR 394, CA.

An installation cannot be said to be in proper working order if, by reason of a defect in construction or design, it is incapable of working properly; and in so far as installations for the supply of gas, water and electricity are concerned, an installation is in proper working order if it is able to function under those conditions of supply that it is reasonable to anticipate will prevail: *O'Connor v Old Etonian Housing Association Ltd* [2002] EWCA Civ 150, [2002] Ch 295, [2002] 2 All ER 1015.

8 Landlord and Tenant Act 1985 s 11(1)(c). In the case of leases entered into before 15 January 1989 the obligation to repair installations in the dwelling house is limited to installations within the physical confines of the dwelling house and does not extend to installations outside the flat, eg a central heating boiler, the functioning of which may be necessary to enable the installations within the dwelling house to function properly: *Campden Hill Towers Ltd v Gardner* [1977] QB 823, [1977] 1 All ER 739, CA. In the case of leases entered into after that date, the obligation extends to certain installations outside the dwelling house: see the Landlord and Tenant Act 1985 s 11(1A)(b) (as added); and PARA 417 post. See also *Passley v Wandsworth London Borough Council* (1996) 30 HLR 165, CA (where disrepair is caused to installations outside the dwelling house, the liability for disrepair arises immediately and not only after notice is given), applying *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, [1995] 4 All ER 44, CA.

9 For these purposes, 'lessee' means the person for the time being entitled to the term of the lease: Landlord and Tenant Act 1985 s 16(c).

10 For these purposes, the reference to a covenant by the lessee for the repair of the premises includes a covenant (1) to put in repair or deliver up in repair; (2) to paint, point or render; (3) to pay money in lieu of repairs by the lessee; or (4) to pay money on account of repairs by the lessor: *ibid* s 11(5). See also note 23 *infra*.

11 *Ie* except so far as it imposes on the lessee any of the requirements mentioned in *ibid* s 11(2)(a) or (c): see heads (a), (c) in the text.

12 *Ibid* s 11(4). See also note 23 *infra*.

13 *Ibid* s 11(2). Nor is the lessor's repairing covenant to be construed so as to imply a duty to give the tenant advice on preventing damp and condensation, eg by not using a cupboard containing hot pipes for drying clothes: see *Southwark London Borough Council v McIntosh* [2002] 1 EGLR 25, [2001] All ER (D) 133 (Nov).

14 Landlord and Tenant Act 1985 s 11(3). Accordingly, a landlord may not be obliged to carry out repairs which are wasteful or useless (*Newham London Borough v Patel* [1979] JPL 303, CA) but, if the house has a limited life left, the landlord may be in breach of his obligation if there is disrepair of the relevant kind (*McClean v Liverpool City Council* (1987) 20 HLR 25, CA). The standard of repair required is the same for local authority and private sector lettings: *Wainwright v Leeds City Council* (1984) 13 HLR 117, 270 Estates Gazette 1289, CA. Replacement is not required if a piecemeal repair is a practical proposition: *Murray v Birmingham City Council* (1987) 20 HLR 39, [1987] 2 EGLR 53, CA. Radical remedial measures which (1) affect substantially the whole structure; (2) produce a building of a different character; and (3) prolong the life of the house and substantially increase its value may fall outside the meaning of 'repair', though in these circumstances the landlord would be liable to carry out repeated temporary repairs: *McDougall v Easington District Council* (1989) 58 P & CR 201, [1989] 1 EGLR 93, CA.

15 Landlord and Tenant Act 1985 s 11(6). The right of entry is limited to that which is strictly necessary to do the work of repair; it does not oblige the tenant to give the landlord exclusive occupation or access to all parts of the house at the same time unless this is essential for the execution of the repairs: *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA.

Where the premises are managed by an RTM company (see PARA 367 et seq ante), the references in the Landlord and Tenant Act 1985 s 11(6) to the lessor include the RTM company; and a person who is in occupation of a flat or other unit contained in the premises otherwise than under a lease has, in relation to the flat or other unit, the same obligation as that imposed on a lessee by virtue of s 11(6): Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 3(6). See further the text and notes 17-23 infra.

16 *O'Brien v Robinson* [1973] AC 912, [1973] 1 All ER 583, HL. See also *Sheldon v West Bromwich Corp* (1973) 25 P & CR 360, CA. The fact that defects were observed by an official of the landlord council's environmental health department inspecting for another purpose and that further defects were reported to the council by the district valuer is sufficient notice to make the council liable for those defects; it is not necessary for the landlord to be told the exact position or extent of the defects; it is enough that he is put on inquiry as to whether repairs are needed: *Dinefwr Borough Council v Jones* (1987) 19 HLR 445, [1987] 2 EGLR 58, CA. Sending to the landlords a valuation report obtained for a different purpose, namely in connection with a proposed purchase of the reversion, is sufficient notice (*Hall v Howard* (1988) 57 P & CR 226, [1988] 2 EGLR 75, CA); but a letter telling the landlord that the tenant will have the repairs done and deduct the cost from the rent is not a good notice (*Al Hassani v Merrigan* (1987) 20 HLR 238, [1988] 1 EGLR 93, CA). The necessary repairs should be carried out properly within a reasonable time of the landlord's receiving notice of the defect: *Morris v Liverpool City Council* (1987) 20 HLR 498, [1988] 1 EGLR 47, CA; *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA.

17 See PARA 367 et seq ante. For the meaning of 'RTM company' see PARA 374 ante.

18 For the meaning of 'flat' for these purposes see PARA 368 note 3 ante.

19 For the meaning of 'unit' for these purposes see PARA 369 note 8 ante.

20 Commonhold and Leasehold Reform Act 2002 Sch 7 para 3(1).

21 Ibid Sch 7 para 3(4).

22 Ibid Sch 7 para 3(2).

23 Ibid Sch 7 para 3(3). The Landlord and Tenant Act 1985 s 11(3A) (as added) (see PARA 417 post), s 11(4) (see the text and note 12 supra) and s 11(5) (see note 10 supra) has effect with the modifications that are appropriate in consequence of the Commonhold and Leasehold Reform Act 2002 Sch 7 para 3(1)-(3): Sch 7 para 3(5).

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#### **417. Lessor's statutory obligation to repair; parts of buildings.**

If a lease granted on or after 15 January 1989, other than a lease entered into pursuant to a contract made before that date<sup>1</sup>, for a term of less than seven years<sup>2</sup> is a lease of a dwelling house<sup>3</sup> which forms part only of a building, the implied covenant to repair<sup>4</sup> has effect as if:

966 (1) the reference<sup>5</sup> to the dwelling house included a reference to any part of the building in which the lessor<sup>6</sup> has an estate or interest; and

967 (2) any reference<sup>7</sup> to an installation in the dwelling house included a reference to an installation which, directly or indirectly, serves the dwelling house and which either forms part of any part of a building in which the lessor has an estate or interest or is owned by the lessor or under his control<sup>8</sup>.

Nothing in the above provisions is, however, to be construed as requiring the lessor to carry out any works or repairs unless the disrepair, or failure to maintain in working order, is such as to

affect the lessee's<sup>9</sup> enjoyment of the dwelling house or of any common parts<sup>10</sup>, which the lessee, as such, is entitled to use<sup>11</sup>.

In any case where:

- 968 (a) the lessor's repairing covenant so has effect<sup>12</sup>; and
- 969 (b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling house; and
- 970 (c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs,

then, in any proceedings relating to a failure to comply with the landlord's repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it is a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs<sup>13</sup>.

1 See the Housing Act 1988 ss 116(4), 141(3).

2 Ie a lease to which the Landlord and Tenant Act 1985 s 11 (as amended) applies: see PARA 418 post.

3 For the meaning of 'lease of a dwelling house' see PARA 416 note 1 ante.

4 Ie the covenant implied by the Landlord and Tenant Act 1985 s 11(1): see PARA 416 ante.

5 Ie the reference in *ibid* s 11(1)(a): see PARA 416 ante at head (1) in the text.

6 For the meaning of 'lessor' see PARA 416 notes 4, 15 ante.

7 Ie any reference in the Landlord and Tenant Act 1985 s 11(1)(b) or (c): see PARA 416 ante at heads (2)-(3) in the text.

8 *Ibid* s 11(1A) (s 11(1A), (1B), (3A) added by the Housing Act 1988 s 116). As to the implied covenant to allow entry for the purpose of viewing the condition and state of repair of the demised property see the Landlord and Tenant Act 1985 s 11(6); and PARA 416 ante.

On the proper construction of s 11(1A)(b)(i) (as so added), a landlord's liability for maintenance and repair extends only to an installation, or the defective portion of an installation, in that part of the building in which the landlord has an estate or interest, and the implied covenant to repair does not extend to installations located in parts of a building in which he does not have an estate or interest, even if he has an estate or interest in other parts of the same building: *Niazi Services Ltd v Van der Loo* [2004] EWCA Civ 53, [2004] 1 WLR 1254, [2004] All ER (D) 139 (Feb).

9 For the meaning of 'lessee' see PARA 416 note 9 ante.

10 Ie as defined in the Landlord and Tenant Act 1987 s 60(1): see PARA 149 note 5 ante.

11 Landlord and Tenant Act 1985 s 11(1B) (as added: see note 8 supra).

12 Ie has effect as mentioned in the Landlord and Tenant Act 1985 s 11(1A) (as added: see note 8 supra).

13 *Ibid* s 11(3A) (as added: see note 8 supra). As to the position where the premises are managed by an RTM company see PARA 416 the text and notes 17-23 ante.

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#### 418. Leases to which the statutory obligation applies.

The statutory provisions implying a covenant by the lessor to repair<sup>1</sup> apply only to leases of a dwelling house<sup>2</sup> granted on or after 24 October 1961 for a term of less than seven years<sup>3</sup>. In determining whether a lease is one to which the statutory provisions apply:

- 971 (1) any part of the term which falls before the grant must be left out of account and the lease is treated as a lease for a term commencing with the grant;
- 972 (2) a lease which is determinable at the option of the lessor before the expiration of seven years from the commencement of the term is treated as a lease for a term of less than seven years; and
- 973 (3) a lease, other than a lease to which head (2) above applies, is not treated as a lease for a term of less than seven years if it confers on the lessee<sup>4</sup> an option for renewal for a term which, together with the original term, amounts to seven years or more<sup>5</sup>.

1 The Landlord and Tenant Act 1985 s 11 (as amended); see PARAS 416-417 ante. For the meaning of 'lessor' see PARA 416 note 4 ante.

2 For the meaning of 'lease of a dwelling house' see PARA 416 note 1 ante.

3 Landlord and Tenant Act 1985 s 13(1). Section 13 had effect subject to s 14 (as amended) (see PARA 419 post) and s 32(2) (see PARA 419 post): s 13(3).

In the case of a time-sharing agreement the length of the term is determined by adding together the periods during which the tenant is entitled to possession with the result that the Landlord and Tenant Act 1985 s 11 (as amended) is likely to apply: *Cottage Holiday Associates Ltd v Customs and Excise Comrs* [1983] QB 735, [1983] STC 278.

4 For the meaning of 'lessee' see PARA 416 note 9 ante.

5 Landlord and Tenant Act 1985 s 13(2). Where rent for the dwelling house had been registered under the Rent Act 1977 on the basis that the implied obligation applied, the lessor was held to be estopped from asserting that the term was not less than seven years: *Brikom Investments Ltd v Seaford* [1981] 2 All ER 783, [1981] 1 WLR 863, CA. A lease which, by reason of the death of a party to it, may become determinable before the expiration of seven years at the lessor's option is not so determinable within the meaning of the Landlord and Tenant Act 1985 s 13(2): *Parker v O'Connor* [1974] 3 All ER 257, [1974] 1 WLR 1160, CA.

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#### 419. Leases to which the statutory obligation does not apply.

The statutory provisions implying a covenant by the lessor to repair<sup>1</sup> do not apply to:

- 974 (1) a new lease granted to an existing tenant<sup>2</sup>, or to a former tenant still in possession<sup>3</sup>, if the previous lease<sup>4</sup> was not a lease to which those statutory provisions applied and, in the case of a lease granted before 24 October 1961, would not have been if it had been granted on or after that date<sup>5</sup>;
- 975 (2) a lease of a dwelling house which is a tenancy of an agricultural holding<sup>6</sup> or to a farm business tenancy<sup>7</sup>;
- 976 (3) a lease granted on or after 3 October 1980 to:

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- 116. (a) a local authority<sup>8</sup>;
- 117. (b) a National Park authority<sup>9</sup>;
- 118. (c) a new town corporation<sup>10</sup>;
- 119. (d) an urban development corporation<sup>11</sup>;
- 120. (e) a registered social landlord<sup>12</sup>;
- 121. (f) a co-operative housing association<sup>13</sup>;
- 122. (g) an educational institution or other specified<sup>14</sup> body<sup>15</sup>;

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977 (4) a lease granted on or after 15 January 1989, other than a lease entered into in pursuance of a contract made before that date, to a housing action trust established<sup>16</sup> under the Housing Act 1988<sup>17</sup>;

978 (5) a lease granted on or after 3 October 1980 to:

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- 123. (a) Her Majesty in right of the Crown, unless the lease is under the management of the Crown Estate Commissioners<sup>18</sup>; or
- 124. (b) a government department or a person holding in trust for Her Majesty for the purposes of a government department<sup>19</sup>;

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979 (6) a new lease granted to an existing tenant<sup>20</sup>, or to a former tenant<sup>21</sup> still in possession, if the new lease is a tenancy to which Part II of the Landlord and Tenant Act 1954<sup>22</sup> applies and the previous lease<sup>23</sup> either is such a tenancy or would be but for the fact that the tenancy has been renewed by agreement<sup>24</sup> between the parties<sup>25</sup>.

1 le the Landlord and Tenant Act 1985 s 11 (as amended): see PARAS 416-417 ante.

2 For these purposes, 'existing tenant' means a person who is when, or immediately before, the new lease is granted, the lessee under another lease of the dwelling house: *ibid* s 14(2). For the meaning of 'lessee' see PARA 416 note 9 ante; and for the meaning of 'lease of the dwelling house' see PARA 416 note 1 ante.

3 For these purposes, 'former tenant still in possession' means a person who (1) was the lessee under another lease of the dwelling house which terminated at some time before the new lease was granted; and (2) between the termination of that other lease and the grant of the new lease was continuously in possession of the dwelling house or of the rents and profits of the dwelling house: *ibid* s 14(2).

4 For these purposes, 'the previous lease' means the other lease referred to in the definitions of 'existing tenant' and 'former tenant still in possession' (see notes 2-3 supra): *ibid* s 14(2).

5 *Ibid* s 14(1).

6 le within the meaning of the Agricultural Holdings Act 1986 and in relation to which that Act applies: see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

7 Landlord and Tenant Act 1985 s 14(3) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 64; the Agricultural Tenancies Act 1995 s 40, Schedule para 31). 'Farm business tenancy' means a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): see the Landlord and Tenant Act 1985 s 14(3) (as so amended).

8 For the meaning of 'local authority' see PARA 248 note 3 ante.

9 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

10 For the meaning of 'new town corporation' see PARA 248 note 3 ante.

11 For these purposes, 'urban development corporation' has the same meaning as in the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq): Landlord and Tenant Act 1985 s 38.

12 For the meaning of 'registered social landlord' see PARA 325 note 17 ante. As to the register of social landlords see HOUSING vol 22 (2006 Reissue) PARA 67.

13 For these purposes, 'co-operative housing association' has the same meaning as in the Housing Associations Act 1985 (see PARA 885 note 8 post; and HOUSING vol 22 (2006 Reissue) PARA 11): Landlord and Tenant Act 1985 s 38.

14 Ie a body specified, or of a class specified, by regulations under the Rent Act 1977 s 8 (see PARA 874 post) or the Housing Act 1988 s 1(2), Sch 1 para 8 (see PARA 1033 post).

15 Landlord and Tenant Act 1985 s 14(4) (amended for these purposes by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 89; the Environment Act 1995 s 78, Sch 10 para 25(1); and the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2, PARA 16(2)).

16 Ie established under the Housing Act 1988 (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

17 Landlord and Tenant Act 1985 s 14(4) (amended for these purposes by the Housing Act 1988 s 116(3), (4)).

18 As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

19 Landlord and Tenant Act 1985 s 14(5); and see *Department of Transport v Egoroff* (1986) 18 HLR 326, [1986] 1 EGLR 89, CA.

20 For these purposes, 'existing tenant' has the same meaning as in the Landlord and Tenant Act 1985 s 14(2) (see note 2 supra): s 32(2).

21 For these purposes, 'former tenant still in possession' has the same meaning as in ibid s 14(2) (see note 3 supra): s 32(2).

22 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

23 For these purposes, 'previous lease' has the same meaning as in the Landlord and Tenant Act 1985 s 14(2) (see note 4 supra): s 32(2).

24 Ie but for the Landlord and Tenant Act 1954 s 28: see PARA 713 post.

25 Landlord and Tenant Act 1985 s 32(2).

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#### **420. Exclusion or modification of repairing obligation.**

A covenant or agreement, whether contained in a lease to which the statutory provisions implying a covenant by the lessor to repair apply<sup>1</sup> or in an agreement collateral to such a lease, is void in so far as it purports:

980 (1) to exclude or limit the implied obligations of the lessor<sup>2</sup> or the implied immunities of the lessee<sup>3</sup>; or

981 (2) to authorise any forfeiture or impose on the lessee any penalty, disability or obligation in the event of his enforcing or relying upon those obligations or immunities,

unless the inclusion of the provision was authorised by the court<sup>4</sup>.

The county court may, however, by order made with the consent of the parties, authorise the inclusion in a lease, or in an agreement collateral to a lease, of provisions excluding or

modifying, in relation to the lease, those statutory provisions with respect to the repairing obligations of the parties if it appears to the court that it is reasonable to do so, having regard to all the circumstances of the case, including the other terms and conditions of the lease<sup>5</sup>.

The county court has jurisdiction to make a declaration that the repairing obligations apply, or do not apply, to a lease, whatever the net annual value of the property in question and notwithstanding that no other relief is sought other than a declaration<sup>6</sup>.

1   le a lease to which the Landlord and Tenant Act 1985 s 11 (as amended) applies: see PARAS 416-419 ante. For the meaning of 'lease' see PARA 416 note 1 ante.

2   For the meaning of 'lessor' see PARA 416 note 4 ante. where the premises are managed by an RTM company (see PARA 367 et seq ante), the reference in head (1) in the text to the lessor includes the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 3(7).

3   For the meaning of 'lessee' see PARA 416 note 9 ante.

4   Landlord and Tenant Act 1985 s 12(1). Thus, a landlord's obligation to reinstate decoration following electrical work is not overridden by a tenant's covenant to decorate: *Bradley v Chorley Borough Council* (1985) 17 HLR 305, [1985] 2 EGLR 49, CA. In *Irvine v Moran* (1990) 24 HLR 1, [1991] 1 EGLR 261 it was held that a tenant's covenant to paint the exterior was totally nullified and even a tenant's covenant to paint internal installations was so cut down as to have 'little practical significance'; see *quaere*.

5   Landlord and Tenant Act 1985 s 12(2).

6   Landlord and Tenant Act 1985 s 15.

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## **(ii) Fitness for Habitation**

### **421. Enforcement of housing standards by local authorities.**

The Housing Act 2004 introduces a new system for assessing housing conditions and enforcing housing standards<sup>1</sup> which replaces the previous system based on fitness for human habitation<sup>2</sup>. The new system is discussed in detail elsewhere in this work<sup>3</sup>, as are other local authority powers in relation to overcrowding<sup>4</sup> and houses in multiple occupation<sup>5</sup>.

1   See the Housing Act 2004 Pt 1 (ss 1-54) which largely came into force on 6 April 2006.

2   le under the Housing Act 1985 Pt VI (ss 189-208) (repealed).

3   See HOUSING vol 22 (2006 Reissue) PARA 359 et seq.

4   See the Housing Act 1985 Pt X (ss 324-344); and HOUSING vol 22 (2006 Reissue) PARA 443 et seq.

5   See the Housing Act 2004 Pt 4 Ch 3 (ss 139-144); and HOUSING vol 22 (2006 Reissue) PARA 492 et seq.

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TOWARDS THE TENANT/(ii) Fitness for Habitation/422. Warranty of fitness for habitation; the common law position.

#### 422. Warranty of fitness for habitation; the common law position.

At common law, there is in general no implied warranty on the part of a landlord that the demised premises are fit for the purpose for which they are taken<sup>1</sup>; and, therefore, on the letting of an unfurnished dwelling house or flat<sup>2</sup> there is no implied warranty on the part of the landlord that it is in a reasonably fit state for habitation<sup>3</sup>, or that it may lawfully be used for the purpose for which it was let<sup>4</sup>. The intending tenant is presumed to make his own inquiries as to its condition, and, in the absence of a special stipulation, he takes the house as it stands<sup>5</sup>. This is so notwithstanding that the house is, to the landlord's knowledge, required for immediate occupation<sup>6</sup>. If the house is, in fact, uninhabitable, then, after accepting the lease, the tenant is without remedy<sup>7</sup> except where he has obtained a warranty of fitness, or where he has been induced to take the lease by misrepresentation on the part of the landlord, in which case the tenant may be entitled to rescission or damages<sup>8</sup>. The mere omission of the landlord to disclose defects is not such misrepresentation<sup>9</sup> but the deliberate concealment of some defects may be conduct equivalent to a fraudulent misrepresentation<sup>10</sup>. If, however, the contract is still executory, it will not be enforced if the condition of the house is such that it is dangerous to health or otherwise uninhabitable<sup>11</sup>. A warranty of fitness will probably be implied where the tenancy agreement or the lease is entered into before the completion of the house by the landlord<sup>12</sup>.

1 *Sutton v Temple* (1843) 12 M & W 52; *Cheater v Cater* [1918] 1 KB 247, CA; and see *Lynch v Thorne* [1956] 1 All ER 744 at 745, [1956] 1 WLR 303 at 305, CA. As to the effect of a misrepresentation by the landlord generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701 et seq; and as to leases of, or agreements to lease, uncompleted buildings see PARA 413 ante at head (2) in the text. In relation to licences it was held in *Morris-Thomas v Petticoat Lane Rentals* (1986) 53 P & CR 238, CA, that it was not an implied term of a licence of an old bacon-curing oven that it should be fit for the sale and storage of antiques, doubting *Wettern Electric Ltd v Welsh Development Agency* [1983] QB 796, [1983] 2 All ER 629 (term to be implied into a licence of a newly constructed factory unit that it was of sound construction and reasonably suited for the intended purpose).

2 *Cruse v Mount* [1933] Ch 278.

3 *Hart v Windsor* (1844) 12 M & W 68 at 86; *Bottomley v Bannister* [1932] 1 KB 458, CA; *Davis v Fooks* [1940] 1 KB 116, [1939] 4 All ER 4, CA. An agreement to supply power for a machine on the demised premises is not within the general rule, because such an agreement will be construed separately from the tenancy agreement, and the power supplied must be reasonably fit for the purpose: *Bentley Bros v Metcalf & Co* [1906] 2 KB 548, CA. As to the implied conditions on the letting of small houses see PARA 424 post; and as to the letting of furnished houses see PARA 426 post.

4 *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692; approved in *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA.

5 *Chappell v Gregory* (1863) 34 Beav 250. 'Fraud apart, there is no law against letting a tumbledown house': *Robbins v Jones* (1863) 15 CBNS 221 at 240; applied in *McNerny v London Borough of Lambeth* (1988) 21 HLR 188, [1989] 1 EGLR 81, CA. Where, however, a person takes on work for or in connection with the provision of a dwelling (whether by the erection or by the conversion or enlargement of a building), he owes a duty to every person who acquires an interest in the dwelling to see that as regards that work the dwelling will be fit for habitation when completed: see the Defective Premises Act 1972 s 1(1); and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 77. Any duty of care with respect to work done on premises is not abated by the subsequent disposal of the premises by the person who owed the duty (see s 3(1); and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(2) (Reissue) PARA 79), but this does not apply, in the case of premises which are let, where the relevant tenancy began before 1 January 1974 (s 3(2)(a)). See also *Shirvell v Hackwood Estates Co Ltd* [1938] 2 KB 577, [1938] 2 All ER 1, CA (landlord not liable where overhanging dead branch of tree on landlord's adjoining land caused injury to tenant's employee); cf *Taylor v Liverpool Corp'n* [1939] 3 All ER 329 (landlord, as owner of a defective chimney-stack which was not part of the demised premises, liable to injury to tenant's daughter). See also PARA 413 ante at heads (3)-(4) in the text; para 475 et seq post; and NEGLIGENCE vol 78 (2010) PARA 39.

6 *Hart v Windsor* (1844) 12 M & W 68; *Bottomley v Bannister* [1932] 1 KB 458, CA. In *Bunn v Harrison* (1886) 3 TLR 146, CA, this seems to have been treated as an open question.

7 *Angel v Jay* [1911] 1 KB 666, DC; *Edler v Auerbach* [1950] 1 KB 359, [1949] 2 All ER 692. The rule that the equitable right to rescind for innocent misrepresentation ceased at completion was, however, abolished by the Misrepresentation Act 1967 s 1 but the court has a discretion to declare the contract subsisting and to award damages in lieu: see s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834.

8 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 755 et seq, 789 et seq. If the landlord is in breach of covenant, remedies will be available for the breach.

9 *Keates v Earl of Cadogan* (1851) 10 CB 591. To give rise to a claim for fraudulent misrepresentation, the misstatement must be intentionally false or must be made recklessly: *Bartram v Aldous* (1886) 2 TLR 237; *Saunders v Pawley* (1886) 2 TLR 590, CA; *Butler v Goundry* (1888) 4 TLR 711, CA; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 757.

10 *Ridge v Crawley* (1958) 172 Estates Gazette 637 (affd (1959) 173 Estates Gazette 159, CA (concealment of cracks indicating settlement)); *Gordon v Selico Co Ltd* [1985] 2 EGLR 79 (affd (1986) 18 HLR 219, [1986] 1 EGLR 71, CA).

11 *Chester v Powell, Powell v Chester* (1885) 52 LT 722.

12 See *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113, DC; *Perry v Sharon Development Co Ltd* [1937] 4 All ER 390, CA; *Lawrence v Cassell* [1930] 2 KB 83, CA; *Hancock v B W Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA; and see PARA 413 ante at head (2) in the text. As to the landlord's liability for injury to third persons see note 5 supra.

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#### **423. Express and implied warranties of fitness.**

A warranty at or before the making of a lease that a house is in a fit state for habitation, whether as regards repair or drainage, may be given as an express contract, or may be implied from a representation as to the state of the house. A representation by the landlord ceases to be a mere representation and constitutes a warranty if it is intended to be the basis of the contractual relation between the parties<sup>1</sup>. If, therefore, the intending tenant declines to take the lease unless the landlord gives an assurance that the drains are in order, and the landlord gives this assurance in consideration of his taking the lease, the landlord is bound by the warranty<sup>2</sup>. The warranty is both a warranty and a condition; hence a breach gives the tenant a claim for damages, and also entitles him to repudiate the lease within a reasonable time<sup>3</sup>. Such a warranty is collateral to the lease; and it is no objection that it is not contained in the lease, or is oral, unless the lease also deals with the same matter, in which case the contract contained in the lease may not be varied by an oral agreement<sup>4</sup>.

1 *De Lassalle v Guildford* [1901] 2 KB 215 at 222, CA; *Heilbut, Symons & Co v Buckleton* [1913] AC 30; *Best v Edwards* (1895) 60 JP 9; *Otto v Bolton and Norris* [1936] 2 KB 46, [1936] 1 All ER 960. Statements as to the condition of the house were held to be mere representations in *Kennard v Ashman* (1894) 10 TLR 213, and in *Green v Symons* (1897) 13 TLR 301, CA. In *Best v Edwards* supra the jury found to the same effect. As to the evidence required to prove a warranty see *Terrene Ltd v Nelson* [1937] 3 All ER 739; and see also *Buswell v Goodwin* [1971] 1 All ER 418, [1971] 1 WLR 92, CA.

2 *De Lassalle v Guildford* [1901] 2 KB 215, CA; applied in *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853.

3 *Bunn v Harrison* (1886) 3 TLR 146, CA.

4 *De Lassalle v Guildford* [1901] 2 KB 215, CA. Previously it had been considered that the tenant could not sue on the warranty unless it was contained in the lease: *Burtsal v Bianchi* (1891) 65 LT 678 at 679; *Longman v Blount* (1896) 12 TLR 520. As to collateral oral agreements see CONTRACT vol 9(1) (Reissue) PARA 753; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 196. A collateral contract is not caught by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 79 ante) unless it is itself a contract for the sale of land: *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853.

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#### **424. Implied condition and undertaking on letting of small houses.**

In certain contracts for the letting of a house<sup>1</sup> for human habitation there is implied, notwithstanding any stipulation to the contrary:

- 982 (1) a condition that the house is fit for human habitation<sup>2</sup> at the commencement of the tenancy<sup>3</sup>; and
- 983 (2) an undertaking that the house will be kept by the landlord<sup>4</sup> fit for human habitation during the tenancy<sup>5</sup>.

The condition and undertaking are so implied if the rent<sup>6</sup> does not exceed the following amounts:

- 984 (a) where the contract was made before 31 July 1923:  
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  - 125. (i) in the case of premises situated in London<sup>7</sup>, £40;
  - 126. (ii) in the case of premises situated in a borough or urban district which at the date of the contract had according to the last published census a population of 50,000 or more, £26;
  - 127. (iii) in the case of premises situated elsewhere, £16;
- 104 985 (b) where the contract was made on or after 31 July 1923 but before 6 July 1957, in the case of premises situated in London, £40, and elsewhere, £26;
- 986 (c) where the contract was made on or after 6 July 1957, in the case of premises situated in London, £80, and elsewhere £52<sup>8</sup>.

The condition and undertaking are not, however, implied where a house is let for a term of three years or more, the lease not being determinable at the option of either party before the expiration of three years, upon terms that the tenant<sup>9</sup> puts the premises into a condition reasonably fit for human habitation<sup>10</sup>.

Where under the contract of employment of a worker employed in agriculture the provision of a house for his occupation forms part of his remuneration and the implied terms as to fitness for human habitation<sup>11</sup> are inapplicable by reason only of the house not being let to him:

- 987 (A) there are implied as part of the contract of employment, notwithstanding any stipulation to the contrary, the like condition and undertaking as would be implied<sup>12</sup> if the house were so let; and
- 988 (B) the implied terms as to fitness for human habitation<sup>13</sup> apply<sup>14</sup> accordingly<sup>15</sup>;

but this does not affect any obligation of a person other than the employer to repair such a house, or any remedy for enforcing such an obligation<sup>16</sup>.

Where the statutory condition and undertaking are so implied, the landlord, or a person authorised by him in writing, may at reasonable times of the day, on giving 24 hours' notice in writing to the tenant or occupier, enter premises for the purpose of viewing their state and condition<sup>17</sup>.

1 For these purposes, 'house' includes a part of a house and any yard, garden, outhouses and appurtenances belonging to the house or usually enjoyed with it: Landlord and Tenant Act 1985 ss 8(6), 9(3).

2 In determining for these purposes whether a house is unfit for human habitation, regard must be had to its condition in respect of the following matters: repair; stability; freedom from damp; internal arrangement; natural lighting; ventilation; water supply; drainage and sanitary conveniences; and facilities for preparation and cooking of food and for the disposal of waste water; and the house is to be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition: *ibid* s 10.

3 For the meaning of 'tenancy' see PARA 52 note 1 ante.

4 For the meaning of 'landlord' see PARA 52 note 1 ante.

5 Landlord and Tenant Act 1985 s 8(1). It appears that the landlord's obligation under s 8(1) is limited to cases where the house is capable of being made fit for human habitation at reasonable expense: *Buswell v Goodwin* [1971] 1 All ER 418, [1971] 1 WLR 92, CA; *Kenny v Royal Borough of Kingston-upon-Thames* (1985) 17 HLR 344, [1985] 1 EGLR 26, CA. For the meaning of 'reasonable expense' see *Hillbank Properties Ltd v Hackney London Borough Council* [1978] QB 998, [1978] 3 All ER 343, CA. As to the statutory duty imposed on all persons taking on work for or in connection with the provision of a dwelling see the Defective Premises Act 1972 s 1; and PARA 422 note 5 ante.

Apart from the special provision for agricultural workers (see the text and notes 11-16 *infra*) the Landlord and Tenant Act 1985 s 8(1) does not apply to licences: *Bomford v South Worcestershire Assessment Committee* [1947] KB 575, [1947] 1 All ER 299, CA.

6 The rent referred to is the annual contractual rent (*Rousou v Photi* [1940] 2 KB 379, [1940] 2 All ER 528, CA); and in the case of a weekly tenancy the annual rent is computed by multiplying the weekly rent by 52 (*Whitcombe v Pollock* (1956) 106 L Jo 554). The failure to revalorise the rent means that hardly any properties now fall within this provision, which is largely irrelevant in practice.

7 For these purposes, the references to 'London' are, in relation to contracts made before 1 April 1965, to the administrative county of London and, in relation to contracts made on or after that date, to Greater London exclusive of the outer London boroughs: Landlord and Tenant Act 1985 s 8(4), Table note 2. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29; and as to the London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30.

8 Landlord and Tenant Act 1985 s 8(3), (4), Table note 1.

9 For the meaning of 'tenant' see PARA 52 note 1 ante.

10 Landlord and Tenant Act 1985 s 8(5).

11 *Ie* *ibid* s 8: see the text and notes 1-10 *supra*.

12 *Ie* under *ibid* s 8.

13 See note 11 *supra*.

14 *Ie* with the substitution of 'employer' for 'landlord' and such other modifications as may be necessary.

15 Landlord and Tenant Act 1985 s 9(1).

16 *Ibid* s 9(2).

17 *Ibid* s 8(2).

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#### **425. Breach of the implied obligation.**

Breach of the condition and undertaking implied by statute on the letting of a small house<sup>1</sup> not only gives the tenant a right of action for damages<sup>2</sup>, but also, it would seem, entitles him to abandon his tenancy<sup>3</sup>; and it may also give other persons who are injured or whose property is damaged as a result of defects in the premises a right of action for damages<sup>4</sup>. The factors to be considered by the court in determining whether the landlord is in breach of his obligation are limited to those listed in the statute<sup>5</sup>. On rather different provisions of earlier statutes and under the common law, defective ceilings<sup>6</sup>, broken sashcords<sup>7</sup>, defective steps inside the house<sup>8</sup>, infestation with bugs<sup>9</sup> or vermin<sup>10</sup> and recent infectious disease<sup>11</sup> have been held to render houses unfit for human habitation, but not occasional incursions of rats<sup>12</sup>, defective steps leading to the premises but not forming part of them<sup>13</sup> and a defective hot water system<sup>14</sup>. The standard of repair is not as high as that imposed by a covenant to keep the premises in good and tenantable repair, fair wear and tear excepted<sup>15</sup>.

Damages may be recovered for injury suffered as a result of a breach of the implied obligation only if the landlord had notice of the want of repair before the injury was suffered<sup>16</sup>.

1    Ie the condition and undertaking implied by the Landlord and Tenant Act 1985 ss 8, 9: see PARA 424 ante.

2    *Walker v Hobbs & Co* (1889) 23 QBD 458.

3    It has always been assumed that the use of the words 'condition' and 'undertaking' in contrast with each other give the word 'condition' its strict (and now obsolescent) meaning, in relation to a lease, that is to say a term entitling the party who is not in breach to treat the other party's breach as a repudiation of the contract, and to determine the contract by accepting that repudiation: see CONTRACT vol 9(1) (Reissue) PARA 1002 et seq. In *Walker v Hobbs & Co* (1889) 23 QBD 458, that was accepted as the situation, and in *Wilson v Finch Hatton* (1877) 2 Ex D 336 (furnished letting where such a condition is implied at common law), it was held that the tenant could so determine the tenancy, and no distinction was drawn between cases where the tenancy had commenced (such as that case) and cases where there was merely an agreement for a lease. The doctrine of 'conditions' as applied to leases has principally been applied so as to permit landlords to determine leases, ie as if to imply a proviso for re-entry; and the principle that a tenant may treat breach of the statutory condition as a repudiation must now be open to some doubt in view of the decision in *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA, where Lord Denning MR observed at 324 and at 1229 that a lease does not come to an end like an ordinary contract on repudiation and acceptance.

4    See the Defective Premises Act 1972 s 4; and PARA 475 post.

5    Ie in the Landlord and Tenant Act 1985 s 10: see PARA 424 note 2 ante.

6    *Walker v Hobbs & Co* (1889) 23 QBD 458; *Fisher v Walters* [1926] 2 KB 315, DC.

7    *Summers v Salford Corpn* [1943] AC 283, [1943] 1 All ER 68, HL; but see *Morgan v Liverpool Corpn* [1927] 2 KB 131, CA.

8    *McCarrick v Liverpool Corpn* [1947] AC 219, [1946] 2 All ER 646, HL.

9    *Smith v Marrable* (1843) 11 M & W 5.

10   *Campbell v Lord Wenlock* (1866) 4 F & F 716.

11   *Chester v Powell* (1885) 52 LT 722; *Collins v Hopkins* [1923] 2 KB 617; *Bird v Lord Greville* (1884) Cab & El 317.

12 *Stanton v Southwick* [1920] 2 KB 642; but see *Summers v Salford Corpn* [1943] AC 283 at 295, [1943] 1 All ER 68 at 73, HL, per Lord Wright.

13 *Dunster v Hollis* [1918] 2 KB 795.

14 *Daly v Elstree RDC* [1948] 2 All ER 13, CA.

15 *Jones v Geen* [1925] 1 KB 659, DC; and see PARAS 441-442 post.

16 *Morgan v Liverpool Corpn* [1927] 2 KB 131, CA; *McCarrick v Liverpool Corpn* [1947] AC 219, [1946] 2 All ER 646, HL. As to notice generally see PARA 416 the text and note 16 ante, PARA 453 post. See also the Defective Premises Act 1972 s 4(2); and PARA 475 post.

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#### 426. Furnished houses.

On the letting of a furnished house, there is an implied condition that it is in a fit state for habitation at the commencement of the tenancy; and, if this condition is not fulfilled, the tenant is entitled to repudiate the contract at once<sup>1</sup>. He need not wait to give the landlord an opportunity for effecting repairs<sup>2</sup>. It is a breach of the condition if there are substantial defects in the drainage<sup>3</sup>; or if the house or any part of it is so infested with vermin as to be a source of serious inconvenience to the occupants<sup>4</sup>; or if there has been recent infectious illness, and the house has not been properly disinfected<sup>5</sup>; but not if there are merely ordinary defects of repair which may be easily remedied<sup>6</sup>. To fulfil the condition it is not enough that the landlord believes the house to be in a fit state for habitation; it must in fact be reasonably habitable<sup>7</sup>. The implied condition may be treated also as a warranty, and the tenant may recover damages for the breach<sup>8</sup>. The condition and warranty relate, however, only to the state of the premises at the commencement of the tenancy; and there is no implied condition or warranty that they are to continue fit for habitation throughout the term<sup>9</sup>.

Furniture supplied by a landlord must satisfy the statutory standards of fire safety<sup>10</sup> but those standards do not apply to furniture made before 1 January 1950<sup>11</sup>.

1 *Smith v Marrable* (1843) 11 M & W 5; *Wilson v Finch Hatton* (1877) 2 Ex D 336. It seems that the implied condition arises from the intention of the parties, to be inferred from the circumstances of the letting: *Wilson v Finch Hatton* supra. The rule in *Smith v Marrable* supra is now well established, although in *Hart v Windsor* (1844) 12 M & W 68 at 87 Parke B doubted his own decision in *Smith v Marrable* supra and held that there is no such implied condition in 'a lease of real estate merely'. Possibly the rule does not apply to a furnished house and grounds taken for a substantial term, such as five years (*Chester v Powell, Powell v Chester* (1885) 52 LT 722); but in *Harrison v Malet* (1886) 3 TLR 58, there was held to be an implied warranty that 'the house was at the time of letting in good condition', on the letting of a furnished house for two years. See also PARA 425 note 3 ante.

2 *Wilson v Finch Hatton* (1877) 2 Ex D 336.

3 *Wilson v Finch Hatton* (1877) 2 Ex D 336; *Harrison v Malet* (1886) 3 TLR 58.

4 *Campbell v Lord Wenlock* (1866) 4 F & F 716 (where, however, the jury found against the tenant, despite strong evidence of the presence of vermin); *Harrison v Malet* (1886) 3 TLR 58; *Smith v Marrable* (1843) 11 M & W 5.

5 *Bird v Lord Greville* (1884) Cab & El 317 (measles); *Collins v Hopkins* [1923] 2 KB 617 (pulmonary tuberculosis). There is no corresponding warranty on the part of the intending tenant that he is not suffering from an infectious disease: *Humphreys v Miller* [1917] 2 KB 122, CA. Where a person has recently suffered from

a notifiable disease in a house, it is a criminal offence (1) to conceal that fact from a prospective tenant who makes relevant inquiries; and (2) to fail to have the house properly disinfected before letting or reletting it or any part of it: see the Public Health (Control of Disease) Act 1984 s 29 (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 907.

6 *Maclean v Currie* (1884) Cab & El 361 (plaster of ceilings cracked and partly fallen).

7 *Charsley v Jones* (1889) 53 JP 280.

8 *Harrison v Malet* (1886) 3 TLR 58; *Charsley v Jones* (1889) 53 JP 280; *Collins v Hopkins* [1923] 2 KB 617.

9 *Sarson v Roberts* [1895] 2 QB 395, CA; and see *Maclean v Currie* (1884) Cab & El 361; *Dawson v Clementson* (1885) 1 TLR 295. It has been said that there is force in the argument that this condition should also be implied in a letting of an unfurnished house but that it is for parliament and not the courts to introduce such a development in the law: *McNerny v London Borough of Lambeth* (1988) 21 HLR 188 at 194, CA, per Dillon LJ.

10 In the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324 (amended by SI 1989/2358; SI 1993/207). Those regulations: (1) prescribe a cigarette test for upholstery (see the Furniture and Furnishings (Fire) (Safety) Regulations 1988, SI 1988/1324, reg 5, Sch 4 (as respectively substituted and amended)); (2) prescribe ignitability tests for filling material (see reg 6, Schs 1, 2); (3) prescribe fire safety tests for loose fillings (see reg 7, Sch 1 (reg 7 as substituted)); (4) prescribe match tests for permanent covers (see reg 8, Schs 3, 5 (as respectively substituted and amended)); (5) prescribe match tests for other covers (see reg 9, Sch 5 (Sch 5 as amended)); (6) prescribe labelling and information requirements (see regs 10-13, Schs 6-8 (as amended)); (7) make special and transitional provision with regard to second-hand furniture (see reg 14 (as amended)); and (8) prohibit the supply of furniture not meeting their requirements (see reg 15).

11 See *ibid* reg 4; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 617.

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## (2) TENANT'S OBLIGATIONS TOWARDS THE LANDLORD

### (i) Repair and Rebuilding

#### 427. Tenant's liability for repair.

In the absence of an express stipulation, the tenant's liability for the maintenance of the premises depends partly on the doctrine of waste<sup>1</sup>, and partly on an implied obligation to use the premises in a tenantlike manner<sup>2</sup>. The liability for waste is not founded on contract and accordingly is not excluded on the ground that there is an express contract dealing with the same matter<sup>3</sup>. The implied obligation to use the premises in a tenantlike manner is, however, excluded where there is an express contract to repair<sup>4</sup>. It has been said that a tenant from year to year is bound to keep the premises wind and water tight<sup>5</sup> and to make fair and tenantable repairs<sup>6</sup>, but it is doubtful whether this liability extends beyond the implied obligation to use the premises in a tenantlike manner<sup>7</sup>.

1 See PARA 431 et seq post.

2 *Horsefall v Mather* (1815) Holt NP 7; *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, CA. The extent of this obligation is not entirely clear, but the tenant is certainly under a continuing obligation to repair acts which would amount to voluntary waste: *Marsden v Edward Heyes Ltd* supra at 8 per Atkin LJ. In *Warren v Keen* [1954] 1 QB 15 at 20, [1953] 2 All ER 1118 at 1121, CA, Denning LJ said that the obligation to use the premises in a tenantlike manner meant that the tenant 'must take proper care of the place' and 'must do the little jobs about the place which a reasonable tenant would do'. It is not a breach of the obligation for a tenant to fail to lag

water-pipes or to turn off the mains and drain the system when going away for two nights: *Wycombe Health Authority v Barnett* (1982) 47 P & CR 394, 5 HLR 84, CA.

3 *Kinlyside v Thornton* (1776) 2 Wm Bl 1111; *Marker v Kenrick* (1853) 13 CB 188. Similarly, the liability for waste cannot be ascertained by reference to an express covenant: *Jones v Hill* (1817) 7 Taunt 392.

4 *Standen v Christmas* (1847) 10 QB 135; *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, CA. The effect of an express contract in excluding an implied contract was overlooked in *White v Nicholson* (1842) 4 Man & G 95.

5 *Auworth v Johnson* (1832) 5 C & P 239; *Leach v Thomas* (1835) 7 C & P 327; *Wedd v Porter* [1916] 2 KB 91, CA.

6 *Ferguson v -* (1797) 2 Esp 590; *Cheetham v Hampson* (1791) 4 Term Rep 318; and see *Gregory v Mighell* (1811) 18 Ves 328.

7 *Warren v Keen* [1954] 1 QB 15, [1953] 2 All ER 1118, CA. As to liability for permissive waste see PARA 434 post.

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#### 428. Tenant's liability to rebuild after fire.

At common law, the tenant was liable to rebuild or repair if the house was destroyed or damaged by fire unless the burning was by lightning or act of God, because, unless the tenant repaired the damage within a convenient time, he committed waste<sup>1</sup>. No distinction was made between accidental fires and fires caused by negligence<sup>2</sup>. By statute, however, no claim may be maintained against any person in whose house or other building any fire accidentally<sup>3</sup> begins, but this is without prejudice to any contract between landlord and tenant<sup>4</sup>; and consequently, where the fire is accidental and there is no contractual liability on the tenant to rebuild, he is not obliged to do so<sup>5</sup>.

A tenant may himself bring a claim against an undertenant for the negligent destruction of the premises by fire<sup>6</sup>; but to maintain a claim he must have had a reversionary interest in the house at the time of the fire; and where the tenant has assigned his interest, he may not maintain such a claim against an assignee<sup>7</sup>.

1 *Rook v Worth* (1750) 1 Ves Sen 460 at 462 per Lord Hardwicke LC.

2 According to Sir E Coke, burning of the house by negligence or mischance is waste: Co Litt 53b.

3 'Accidentally' in the statute is opposed to 'negligently'; and the statute does not apply where the fire is the result of negligence: *Balfour v Barty-King* [1957] 1 QB 496, [1957] 1 All ER 156, CA. Nor does it apply where a fire is lighted intentionally and mischief results to the demised buildings or to buildings or other property on adjoining premises: *Filliter v Phippard* (1847) 11 QB 347. See also *Musgrove v Pandelis* [1919] 2 KB 43, CA; *Job Edwards Ltd v Birmingham Navigations* [1924] 1 KB 341, CA; *Sturge v Hackett* [1962] 3 All ER 166, [1962] 1 WLR 1257, CA. As to liability for fire see further NEGLIGENCE vol 78 (2010) PARA 39.

4 See the Fires Prevention (Metropolis) Act 1774 s 86 (amended by the Statute Law Revision Act 1888; the Statute Law Revision Act 1948; the Statute Law Revision Act 1958). Although the Fires Prevention (Metropolis) Act 1774 (now repealed except for ss 83, 86 (as amended)) originally applied mainly to the metropolis, ss 83, 86 (as amended) are of general application: *Richards v Easto* (1846) 15 M & W 244 at 251; *Filliter v Phippard* (1847) 11 QB 347 at 354; and see INSURANCE vol 25 (2003 Reissue) PARAS 663-665.

5 As to the position where the tenant is under covenant to repair see PARA 443 post.

6 *Cudlip v Rundli* (1691) 1 Show 310.



7 *Hicks v Downing (alias Smith v Baker)* (1696) 1 Ld Raym 99, sub nom *Wheeler v Baker* 3 Salk 10.

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#### **429. Obligation to repair fences.**

Tenants for years are liable for permissive waste, but not tenants at will or tenants from year to year<sup>1</sup>. Notwithstanding this distinction, however, it is the duty of the actual occupier of land to repair the fences; and for this purpose he may take sufficient wood<sup>2</sup>. Without any agreement to that effect the landlord may bring a claim against his tenant for not repairing, on the ground of the injury done to the reversion<sup>3</sup>. Moreover, if injury is caused to a third person through non-repair of the fences, the remedy is against the occupier and not the owner, unless the fences were out of repair when the land was let<sup>4</sup>, or unless the owner has undertaken to repair the fences<sup>5</sup>. Where damage is caused as a result of the escape of animals from one farm to another, it is no defence for the owner of the animals to show that the person who has suffered the damage was under a covenant with his landlord to repair the fences between the two farms<sup>6</sup>.

Where on land adjoining a highway there is a fence made with barbed wire, or having barbed wire in or on it, and the wire is a nuisance to the highway, the highway authority and, where it is not the highway authority, the local authority for the area in which the highway is situated may require the occupier of the land to abate the nuisance<sup>7</sup>.

1 See PARA 434 post.

2 Co Litt 53b; and see PARA 187 ante; *Whitfield v Weedon* (1772) 2 Chit 685. As to the common law, statutory and prescriptive liabilities to fence see ANIMALS vol 2 (2008) PARA 754 et seq; BOUNDARIES vol 4(1) (2002 Reissue) PARA 948 et seq; HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 332; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 284, 508, 530.

3 *Cheetham v Hampson* (1791) 4 Term Rep 318. If damage to fences has been caused by excavations made in breach of a covenant in the lease, a mandatory injunction will be granted to restore them: *Newton v Nock* (1880) 43 LT 197.

4 *Cheetham v Hampson* (1791) 4 Term Rep 318. As to liability for the repair of walls near highways see *Mint v Good* [1951] 1 KB 517, [1950] 2 All ER 1159, CA; and see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 281. Cf the Animals Act 1971 s 5(6); and ANIMALS vol 2 (2008) PARA 755.

5 See PARA 475 post.

6 *Holgate v Bleazard* [1917] 1 KB 443; *Parke v J Jobson & Son* [1945] 1 All ER 222, CA; and see ANIMALS vol 2 (2008) PARAS 752, 755.

7 See the Highways Act 1980 s 164; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 373.

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#### **430. Obligation to preserve boundaries.**

The relation of landlord and tenant imposes on the tenant as part of the contract an obligation to preserve boundaries and not to permit them to be destroyed so that the landlord's land can no longer be distinguished<sup>1</sup>. If, therefore, the tenant has allowed a boundary to become indistinct, the landlord is entitled during the term to have the boundary ascertained by the court<sup>2</sup>; and, where the tenant's own land lies alongside that of the landlord and at the end of the tenancy the tenant is unable to render up specifically the landlord's land as the true boundary cannot be ascertained, he must restore to the landlord land of the same value as the demised premises<sup>3</sup>.

1 *A-G v Fullerton* (1813) 2 Ves & B 263; and see BOUNDARIES vol 4(1) (2002 Reissue) PARA 917 (fences), PARA 918 (presumption of ownership of hedges and ditches).

2 *Spike v Harding* (1878) 7 ChD 871. The practice is to direct an inquiry in chambers to ascertain the boundaries: see BOUNDARIES vol 4(1) (2002 Reissue) PARA 914; EQUITY vol 16(2) (Reissue) PARA 466.

3 *A-G v Fullerton* (1813) 2 Ves & B 263; *Aston v Lord Exeter* (1801) 6 Ves 288 at 293; *A-G v Stephens* (1855) 6 De GM & G 111. For this purpose, the land will be valued fairly, but 'to the utmost as against the tenant who has rendered it impossible for the landlord to have his own': *A-G v Fullerton* supra at 265 per Lord Eldon.

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## **(ii) Liability for Waste**

### **431. Nature of waste.**

Waste consists of any act or omission which causes a lasting alteration to the nature of the land in question to the prejudice of the person who has the remainder or reversion of the land<sup>1</sup>. The obligation not to commit waste is an obligation in tort, and is independent of contract or implied covenant<sup>2</sup>.

Waste is either voluntary or permissive. Voluntary waste implies the doing of some act which tends to the destruction of the premises, as, for example, by pulling down houses, or removing fixtures which the tenant is not entitled to remove or removing fixtures which the tenant is entitled to remove without making good the damage<sup>3</sup>; or to the changing of their nature<sup>4</sup>, as, for example, the conversion of pasture land into arable<sup>5</sup>, or pulling down buildings and erecting new buildings, even though of greater value<sup>6</sup>. Permissive waste implies an omission through which damage results to the premises, as, for example, where houses are allowed to fall into decay<sup>7</sup>.

In order to constitute voluntary waste by destruction of the premises, the destruction must be wilful or negligent; but the destruction of a building in the course of using it in what was apparently a reasonable and proper manner, having regard to its character and to the purposes for which it was intended to be used, is not waste<sup>8</sup>.

1 2 Bl Com (14th Edn) 281.

2 The obligation is, therefore, not excluded if there is an express covenant dealing with the same matter: *Kinlyside v Thornton* (1776) 2 Wm Bl 1111; *Marker v Kenrick* (1853) 13 CB 188; sed quaere: see the judgment of Kerr LJ in *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, [1986] 1 All ER 449, CA. One consequence of the liability being tortious is that a company director may be vicariously liable for acts of waste carried out on his directions: *Mancetter Developments Ltd v Garmanson Ltd* supra.

3 *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, [1986] 1 All ER 449, CA; Co Litt 53a; *Buckland v Butterfield* (1820) 2 Brod & Bing 54 at 58; and see *Edge v Pemberton* (1843) 12 M & W 187. There can be no partition of a leasehold house, since this would require interference with doors and walls: *North v Guinan* (1829) Beat 342. Similarly, sowing pernicious crops is waste: *Pratt v Brett* (1817) 2 Madd 62. As to the liability of a tenant for life for waste, and the nature of equitable waste, see EQUITY vol 16(2) (Reissue) PARA 603; SETTLEMENTS vol 42 (Reissue) PARA 997.

4 *Lord Darcy v Askwith* (1618) Hob 234; *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624 at 635.

5 This changes both the course of the husbandry and the evidence of title: Co Litt 53b; *Simmons v Norton* (1831) 7 Bing 640 at 647-648; and see *Goring v Goring* (1676) 3 Swan 661; *Martin v Coggan* (1824) 1 Hog 120; *Carden v Butler* (1832) Hayes & Jo 112; *Murphy v Daly* (1860) 13 ICLR 239, Ir CA; *Rush v Lucas* [1910] 1 Ch 437. Similarly, as to the conversion of arable land to wood (Co Litt 53b), or the inclosing of waste land (*Provost etc of Queen's College, Oxford v Hallett* (1811) 14 East 489), or turning a corn-mill into a fulling-mill (*City of London v Greyme* (1607) Cro Jac 181). See also *Lord Grey de Wilton v Saxon* (1801) 6 Ves 106 (ploughing up meadow for building); *Doe d Hopkinson v Ferrand* (1851) 20 LJCP 202 (allotments); *Hunt v Browne* (1837) Sau & Sc 178 (cemetery). As to destruction of evidence of title see further PARA 432 note 2 post.

6 *Cole v Green* (1672) 1 Lev 309 (sub nom *Cole v Forth* 1 Mod Rep 94); *City of London v Greyme* (1607) Cro Jac 181.

7 2 Co Inst 145; *Herne v Bembow* (1813) 4 Taunt 764. It is not waste, however, to leave land uncultivated (*Hutton v Warren* (1836) 1 M & W 466 at 472); and, if a house is in a ruinous condition at the commencement of the lease, as, for example, when it is roofless, it is not waste to leave it to fall down (Co Litt 53a). As to committing waste by destroying timber see PARA 187 et seq ante.

8 *Saner v Bilton* (1878) 7 ChD 815; *Manchester Bonded Warehouse Co v Carr* (1880) 5 CPD 507. In both these cases a warehouse was damaged or destroyed by the weight of goods placed in it.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/10. REPAIR, FITNESS AND ALTERATION/(2) TENANT'S OBLIGATIONS TOWARDS THE LANDLORD/(ii) Liability for Waste/432. Meliorating waste.

### 432. Meliorating waste.

Although changing the nature of the demised premises is technically waste, this is not so if the change has been expressly sanctioned by the landlord<sup>1</sup>. It seems that an act does not constitute waste unless it is in fact injurious to the inheritance, either by diminishing the value of the estate, or by increasing the burden upon it, or by impairing the evidence of title<sup>2</sup>. At any rate, in the case of acts which may be technically waste but in fact improve the inheritance ('meliorating waste'), the court will not interfere to restrain them by injunction<sup>3</sup>, nor will they be a ground of forfeiture under a proviso for re-entry on commission of waste<sup>4</sup>. Apart, however, from acts done in exercise of statutory authority<sup>5</sup>, a substantial alteration in the character of the demised premises will be treated as waste and restrained by injunction, notwithstanding that the value may be thereby increased<sup>6</sup>; and the tenant is not entitled to pull down a house and build another which the landlord dislikes<sup>7</sup>, or to convert a dwelling house into a shop<sup>8</sup>.

1 *Meux v Copley* [1892] 2 Ch 253 at 262. In general, the consent of the landlord to an act of waste saves the tenant from the consequences of waste, such as forfeiture, even though the tenant has failed to comply with a condition that he should repair the damage due to the waste: *Doe d Wood v Morris* (1809) 2 Taunt 52.

2 *Doe d Grubb v Earl Burlington* (1833) 5 B & Ad 507 at 517 (pulling down a barn held not to be waste); approved in *Jones v Chappell* (1875) LR 20 Eq 539 (erection of new buildings held not to be waste); but see the text and notes 3-8 infra. The evidence of title is affected if the identity of the property is destroyed; but this has been said to be 'a very peculiar head of the law, which has not been extended in modern times': *Jones v Chappell* supra at 542. Indeed, having regard to the improved means of identifying a property by plans, the supposed injury to title is now a 'theoretical absurdity' (*Doherty v Allman* (1878) 3 App Cas 709 at 735, HL, per

Lord Blackburn) and can have no application in the case of registered land. As to the register of title see LAND REGISTRATION vol 26 (2004 Reissue) PARA 811 et seq.

3 *Doherty v Allman* (1878) 3 App Cas 709 at 722, HL (conversion of store buildings into dwelling houses under a lease for 999 years); *Meux v Cobley* [1892] 2 Ch 253 (conversion of arable and pasture land near London into a market garden and erection of glasshouses); and see *Grand Canal Co v M'Namee* (1891) 29 LR Ir 131, Ir CA (acts complained of were partly meliorative and partly trivial; injunction refused). As to the remedy of injunction generally see CIVIL PROCEDURE vol 11 (2009) PARAS 439-441.

4 *Doe d Earl of Darlington v Bond* (1826) 5 B & C 855. Even though the premises are not improved, there is no forfeiture if the damage is very small: *Doe d Grubb v Earl of Burlington* (1833) 5 B & Ad 507 at 516.

5 See eg the statutory right of the tenant of an agricultural holding to practise, subject to certain safeguards, any method of cropping the land he wishes; and AGRICULTURAL LAND vol 1 (2008) PARA 344.

6 *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624.

7 *Smyth v Carter* (1853) 18 Beav 78.

8 *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, CA (where the court was unanimously of the opinion that waste had been committed, apparently on the grounds that the character of the demised premises had been completely altered). It would seem that the question whether waste has been committed is, in the end, a question of fact and degree: see *Hyman v Rose* [1912] AC 623 at 632, HL, per Earl Loreburn LC. As to breach of express covenant against making alterations see PARA 469 et seq post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/10. REPAIR, FITNESS AND ALTERATION/(2) TENANT'S OBLIGATIONS TOWARDS THE LANDLORD/(ii) Liability for Waste/433. Accidental injury.

### 433. Accidental injury.

As the liability for waste is a liability created by law, the tenant is not liable for loss caused by inevitable accident, as, for example, where a house is destroyed by accidental fire or tempest; but, where the liability arises by contract, the tenant in such cases is liable<sup>1</sup>. Notwithstanding any contract to the contrary, the tenant is not liable to repair war damage<sup>2</sup>.

1 *Paradine v Jane* (1647) Aleyn 26 at 27; *Carstairs v Taylor* (1871) LR 6 Exch 217 at 223; and see PARA 428 ante.

2 See the Landlord and Tenant (War Damage) Act 1939 s 1; and PARA 479 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/10. REPAIR, FITNESS AND ALTERATION/(2) TENANT'S OBLIGATIONS TOWARDS THE LANDLORD/(ii) Liability for Waste/434. Extent of tenant's liability for waste.

### 434. Extent of tenant's liability for waste.

The liability of a tenant for waste, apart from covenant, depends upon the nature of his tenancy<sup>1</sup>. A tenant at will is not liable for either voluntary or permissive waste as such<sup>2</sup>, although as voluntary waste terminates the tenancy, and renders him liable in trespass<sup>3</sup>, he is in fact liable for damage to the premises caused by his own wilful act<sup>4</sup>.

Tenants for years, or from year to year, or for any other period, are liable for voluntary waste, whether committed by themselves or any other person, since, if it is committed by another, they are presumed to be able to prevent it, and it is their duty to do so<sup>5</sup>.

It has also been held that a tenant for years is liable for permissive waste<sup>6</sup> and, therefore, is apparently obliged to do such repairs as are necessary to preserve the premises in as good a state as at the beginning of the tenancy; but it is doubtful whether a tenant from year to year is so liable<sup>7</sup>. His liability probably extends only as far as the duty to use the premises in a tenantlike manner<sup>8</sup>. Certainly a tenant from year to year must not commit any waste<sup>9</sup>; but he is not liable to do substantial repairs, such as to reroof the house, or to renew main timbers<sup>10</sup>, nor need he make good the results of ordinary wear and tear, as, for example, by replacing doors, windows or stairs worn out with age<sup>11</sup>. A weekly tenant is not liable for permissive waste<sup>12</sup>.

1 At common law there was no action for waste, either voluntary or permissive, against a tenant, whether for life, or years, or from year to year or at will, the reason being that the tenant took the land by the act of the landlord, and it was the folly of the landlord not to restrain the waste by express covenant: *Countess of Shrewsbury's Case* (1600) 5 Co Rep 13b, 2 Co Inst 300. The liability for waste in the case of tenants was first imposed by 52 Hen 3 (Statute of Marlborough) (1267) c 23, frequently referred to as the Statute of Marlbridge, and the writ of waste, under which the tenant was liable to forfeiture and treble damages, was introduced by 6 Edw 1 (Statute of Gloucester) (1278) c 5 (repealed by the Civil Procedure Acts Repeal Act 1879). An action on the case was in practice substituted for the writ of waste, which was abolished by the Real Property Limitation Act 1833 s 36 (repealed); but it was only the remedy that was changed, the rights and liabilities of the parties remaining as before (see notes to 2 Wms Saund (1871 Edn) 644, 651; *Bacon v Smith* (1841) 1 QB 345). Apparently the above statutes extended to permissive, as well as voluntary waste: see note 6 infra.

2 52 Hen 3 (Statute of Marlborough) (1267) c 23 applies to 'fermors during their term'. The word 'fermors' is equivalent to tenants, but in the case of a tenant at will there is no term: see PARA 198 ante.

3 *Countess of Shrewsbury's Case* (1600) 5 Co Rep 13b. There is no modern case in which a tenancy has been held to have been determined in this manner, and this aspect of the law of waste is so feudal in its concepts as to make it doubtful whether a tenancy does so determine under the modern law of landlord and tenant.

4 Thus a tenant at will is not liable for permissive waste: see *Panton v Isham* (1701) 3 Lev 359 (destruction by negligently keeping fire); *Harnett v Maitland* (1847) 16 M & W 257.

5 See *Attersoll v Stevens* (1808) 1 Taunt 183 at 196; 2 Wms Saund (1871 Edn) 658 note (m). The liability on a covenant to repair and the liability for voluntary waste are distinct: *Edge v Pemberton* (1843) 12 M & W 187.

6 This is in accordance with 52 Hen 3 (Statute of Marlborough) (1267) c 23, if Sir E Coke was right in saying that that statute applied to permissive waste (2 Co Inst 145); and it seems to be the better opinion (*Harnett v Maitland* (1847) 16 M & W 257; *Yellowly v Gower* (1855) 11 Exch 274 at 294; *Davies v Davies* (1888) 38 ChD 499; contra *Jones v Hill* (1817) 7 Taunt 392). The same reasoning would, however, make tenants for life liable (*Yellowly v Gower* supra; *Barnes v Dowling* (1881) 44 LT 809, DC), but it has been held that they are not liable (*Re Cartwright*, *Avis v Newman* (1889) 41 ChD 532; and see *Powys v Blagrove* (1854) 4 De GM & G 448). If, however, a tenancy for life is created on condition of keeping the premises in repair, the tenant is liable for permissive waste by reason of the condition apart from the statute: *Woodhouse v Walker* (1880) 5 QBD 404; and see SETTLEMENTS vol 42 (Reissue) PARA 995.

7 In *Torriano v Young* (1833) 6 C & P 8 it was held that a tenant from year to year was not liable for permissive waste. Cf *Yellowly v Gower* (1855) 11 Exch 274 where it was, however, stated that the liability of the tenant was 'much limited'. See also *Martin v Gilham* (1837) 7 Ad & El 540.

8 See *Warren v Keen* [1954] 1 QB 15, [1953] 2 All ER 1118, CA; and PARA 427 ante.

9 *Ferguson v -* (1797) 2 Esp 590; *Wedd v Porter* [1916] 2 KB 91, CA.

10 *Ferguson v -* (1797) 2 Esp 590; *Horsefall v Mather* (1815) Holt NP 7; *Leach v Thomas* (1835) 7 C & P 327.

11 *Auworth v Johnson* (1832) 5 C & P 239; and see *Torriano v Young* (1833) 6 C & P 8; *Martin v Gilham* (1837) 7 Ad & El 540; *Dixon v Mowbray & Co* (1908) 52 Sol Jo 616; *Wedd v Porter* [1916] 2 KB 91, CA.

12 *Warren v Keen* [1954] 1 QB 15, [1953] 2 All ER 1118, CA.

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#### **435. Remedies.**

Whether the liability of the tenant is founded on waste or on implied contract, it may be enforced either by an injunction or damages. Damages may be given for waste completed at the time of the beginning of the proceedings; and an injunction may be granted against further waste<sup>1</sup>. An injunction may be obtained at the suit of the landlord against an undertenant, but, unless given in lieu of an injunction, damages may, it seems, be recovered only against the immediate tenant<sup>2</sup>. To obtain an injunction against waste, it is necessary to show that the waste will cause substantial injury to the reversion<sup>3</sup>, although damages may be given in a case where an injunction would be refused<sup>4</sup>.

A claim for waste is a claim in respect of a tort<sup>5</sup>. The measure of damages is accordingly the injury to the reversioner<sup>6</sup>, and it is measured by considering the depreciation of the selling value of the reversioner's interest<sup>7</sup>. A claim may be brought after the expiration of the term for waste done during the term<sup>8</sup>; and, where a tenant holds over after the expiration of notice to quit and commits waste, the landlord's reversionary estate is treated as continuing, so as to entitle him to sue for the waste<sup>9</sup>.

1 See CIVIL PROCEDURE vol 11 (2009) PARA 439.

2 See CIVIL PROCEDURE vol 11 (2009) PARA 440.

3 See PARA 432 ante.

4 See CIVIL PROCEDURE vol 11 (2009) PARAS 364, 366. If, however, the damages are merely nominal, judgment will be entered for the defendant: *Governors etc of Harrow School v Alderton* (1800) 2 Bos & P 86; *Doherty v Allman* (1878) 3 App Cas 709 at 725, 733. In cases on 6 Edw 1 (Statute of Gloucester) (1278) c 5 (repealed), a judgment for the plaintiff would have involved a forfeiture, and this seems to have been the reason for refusing him judgment; but the fact that the injury was nominal would seem to show that there was no actionable waste: *Rigg v Parsons* (1801) cited in 2 East at 156.

5 *Defries v Milne* [1913] 1 Ch 98, CA. The action (now known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) must be supported by specific evidence as to the particulars of dilapidations: *Smith v Douglas* (1855) 16 CB 31.

6 *Whitham v Kershaw* (1886) 16 QBD 613 at 617, 618, CA. Cf paras 459-460 post. Even where the premises have themselves not been damaged, as, for example, where a new outer door is built without weakening the house, the possibility of injury to the reversion must still be considered: see *Young v Spencer* (1829) 10 B & C 145 (where, however, the only injury specified was injury to the evidence of title). As to injury to evidence of title see PARA 432 note 2 ante.

7 See DAMAGES vol 12(1) (Reissue) PARA 869.

8 *Kinlyside v Thornton* (1776) 2 Wm Bl 1111.

9 *Burchell v Hornsby* (1808) 1 Camp 360. As to holding over see PARA 212 ante.

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### (3) CONSTRUCTION OF COVENANTS TO REPAIR

#### 436. Covenant construed with reference to original condition of premises.

Every covenant to repair must be construed primarily according to the words used<sup>1</sup>, but having regard to the age and nature of the premises at the commencement of the lease<sup>2</sup>. In the case, however, of a covenant by the tenant for general repair, such as a covenant to repair the demised premises and to yield them up in good and substantial repair and condition<sup>3</sup>, or to keep and leave them in good and tenantable order and repair<sup>4</sup>, or as often as occasion requires well and substantially to repair, uphold and keep them, and the same so well and substantially repaired, upheld and kept to yield up at the end of the term<sup>5</sup>, the particular form of words used is immaterial so long as it plainly expresses the intention that the premises are to be repaired, kept in repair and yielded up in repair<sup>6</sup>. In each case the obligation upon the tenant is to keep and deliver up the premises he has taken in a state of repair proper for such premises<sup>7</sup>; and the tenant may, therefore, be liable to put the premises into a better condition than they were in at the time of the letting<sup>8</sup>.

Where the premises were old at the time of the demise, the tenant must keep and deliver them up in a fit state of repair as old premises. He is under no duty under his covenant to bring the premises up to date<sup>9</sup>; but the fact that the premises happen to be old in no way relieves him from the burden of his covenant. If, in order to comply with his covenant, it is necessary that he should replace part after part until the whole is replaced, he is obliged to do so<sup>10</sup>; but, provided that he keeps the premises in a habitable condition, he is not responsible for such deterioration as the premises may suffer as a result of the natural operation of the elements and the passage of time<sup>11</sup>. It is not, however, an absolute rule that a covenant to repair carries with it a duty not to destroy the subject matter of the lease<sup>12</sup>.

Even if statutory regulations prevent a tenant from complying with his repairing covenant, he remains liable, unless they provide to the contrary, in damages for breach of covenant<sup>13</sup>; but, if the illegality is supervening, that is say, the regulations were not in force at the date the covenant was entered into, the tenant may be able to rely on the doctrine of frustration by way of defence<sup>14</sup>.

The test of material compliance with a covenant to repair is an objective one; and materiality is to be assessed by reference to the ability of the landlord to relet or sell the property without delay or additional expenditure. There is no justification for attributing to the parties an intention that the insertion of the word 'material' in a break clause allowing for notice of termination by the tenants if they have materially complied with their covenants is intended to permit only trivial or trifling breaches; and in this context 'material compliance' and 'substantial compliance' may be regarded as interchangeable, whereas 'reasonable' connotes a different test<sup>15</sup>.

1 'The sole duty of the court is to give proper and full effect to each word used': *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 915, CA, per Fletcher Moulton LJ; approved in *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 at 713, CA, per Atkin LJ. Thus 'amend', 'renew' and 'keep in good condition' are capable of going beyond repair: (*Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, [1994] 1 EGLR 76); and 'good condition' in a repairing obligation is intended to mark a separate concept and to make a significant addition to that conveyed by the word 'repair', and is not restricted to good structural condition (*Welsh v Greenwich London Borough Council* (2000) 81 P & CR 144, [2000] 3 EGLR 41, CA). See also *Mason v TotalFinaElf UK Ltd* [2003] EWHC 1604 (Ch), [2003] 3 EGLR 91, [2003] All ER (D) 191 (Jul). In *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 a covenant 'to rebuild, reconstruct or replace when necessary' the demised premises in a 150-year lease was held to impose a heavier obligation than a mere covenant to repair; as was a covenant 'to renew or replace whenever necessary' in *New England Properties v Portsmouth New Shops, Sterling Surveys v New England Properties, New England Properties v Ex-Electronics (UK) Ltd* (1993) 67 P & CR 141, [1993] 1 EGLR 84. See also *Dickinson v St Aubyn* [1944] KB 454, [1944] 1 All ER 370, CA (covenant to repair in last quarter inoperative because of exercise of option to break).

Where a lease appears to give rise to mutual repairing covenants, which is deeply impractical, it ought to be construed to avoid any such overlap unless it is impossible to do so: *Petersson v Pitt Place (Epsom) Ltd* [2001] EWCA Civ 86, (2001) 82 P & CR 276, [2001] All ER (D) 114 (Jan) (roof terraces excluded from the 'main structure' of the premises in order to give repairing covenants a meaning which avoided dual liability); and see *Ibrahim v Dovecorn Reversions Ltd* (2001) 82 P & CR 362, [2001] 2 EGLR 46; cf *Delgable Ltd v Perinpanathan* [2005] EWCA Civ 1724, [2006] 1 EGLR 78, [2005] All ER (D) 208 (Dec) (cost of roof repair correctly apportioned between parties).

2 *Harris v Jones* (1832) 1 Mood & R 173; *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 915-916, CA, per Fletcher Moulton LJ; *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA. For an example of the impact of the age of a building on the standard of repair see *Trustees of the Dame Margaret Hungerford Charity v Beazley* (1993) 26 HLR 269, [1993] 2 EGLR 143, CA. See also *Creska Ltd v Hammersmith and Fulham London Borough Council* [1998] 3 EGLR 35, [1998] 37 EG 165, CA (defective underfloor heating system would be difficult but not impossible to repair; the fact that repairs would incorporate some improvements in design did not mean that they ceased to be works of repair that the tenants were liable to perform). In order to undertake the repairs in that case, the tenants would have had to move their mainframe computer; they wished to carry out the repairs at the end of the tenancy and refused access to the landlord in order to carry out the repairs; in subsequent proceedings the court refused to grant an injunction to the landlord and awarded damages as the appropriate remedy: see *Hammersmith and Fulham London Borough Council v Creska Ltd* (1999) 78 P & CR D46, [1999] All ER (D) 644. As to the application of the rule that the standard of repair is determined at the commencement of the lease in the context of rent review see *Ladbroke Hotels Ltd v Sandhu* (1995) 72 P & CR 498, [1995] 2 EGLR 92.

3 *Stanley v Towgood* (1836) 3 Bing NC 4; *Mantz v Goring* (1838) 4 Bing NC 451; *Woolcock v Dew* (1858) 1 F & F 337.

4 *Lister v Lane and Nesham* [1893] 2 QB 212, CA.

5 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 916, CA, per Fletcher Moulton LJ; *Walker v Hatton* (1842) 10 M & W 249 at 258; *Burdett v Withers* (1837) 7 Ad & El 136.

6 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 at 722-723, CA, per Bankes LJ. For an example of what Hoffmann J in *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at 138 called 'a torrential style of drafting' repairing covenants see *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

See also *Chorley Borough Council v Ribble Motor Services Ltd* (1996) 74 P & CR 182, CA (lease to tenant bus company on condition that the tenant undertake and complete the construction of a bus station and public lavatories required, inter alia, that the tenant cause the station, including the lavatories, to be 'properly cleaned repaired and maintained'; tenant later decided to close the lavatories permanently; held that in the absence of an express covenant requiring the tenant to keep the station open at any particular time of the day, or to keep the lavatories open, the repairing covenant did not imply any obligation to keep them open).

7 *Scales v Lawrence* (1860) 2 F & F 289; *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA.

8 See PARA 441 post.

9 *Harris v Jones* (1832) 1 Mood & R 173 at 175; *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA; *Scales v Lawrence* (1860) 2 F & F 289. In the absence of evidence to the contrary, the premises are presumed to have been in a tenantable condition when the tenant went in: *Brown v Trumper* (1858) 26 Beav 11.

10 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 916-917, CA, per Fletcher Moulton LJ.

11 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA. This does not, however, mean that a tenant may never be liable for anything which is said to be due to lapse of time and the elements: *Lurcott v Wakely and Wheeler* supra at 912 per Cozens-Hardy MR. It would seem that under the ordinary repairing covenant the tenant is liable for damage done by burglars, unless his liability is expressly excepted: *Phillimore v Lane* (1925) 133 LT 268. To allow a house to become infested with vermin constitutes a breach of the covenant to keep it in repair: *Jones v Joseph* (1918) 87 LKB 510.

12 *British Glass Manufacturers Confederation v University of Sheffield* [2003] EWHC 3108 (Ch), [2004] 1 EGLR 41, [2003] All ER (D) 380 (Nov) (in the context of a lease for 1,000 years at a nominal rent, the repairing covenant did not prevent the demolition of existing buildings and erection of new ones as it could not be contemplated that the original buildings be kept in repair for the whole term).

13 *Eyre v Johnson* [1946] KB 481, [1946] 1 All ER 719; *Maud v Sandars* [1943] 2 All ER 783. A tenant is relieved by statute from any express or implied obligation to repair war damage: see PARA 479 post. As to the execution of works for civil defence purposes see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 453, 539.



14 *Sturcke v SW Edwards Ltd* (1971) 23 P & CR 185 at 188 per Goff J; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 233-234, [1945] 1 All ER 252 at 258, HL, per Lord Russell of Killowen (applied in *John Lewis Properties plc v Viscount Chelsea* (1993) 67 P & CR 120, [1993] 2 EGLR 77). As to supervening illegality see PARA 21 ante.

15 *Fitzroy House Epworth Street (No 1) Ltd v Financial Times Ltd* [2006] EWCA Civ 329, [2006] 2 All ER 776, [2006] 1 WLR 2207.

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### **437. Meaning of 'repair'; inherent defects; improvements.**

Before liability can arise under a repairing covenant, the subject matter of the covenant must have deteriorated so as to be in a condition worse than it was at some earlier time<sup>1</sup>. Repair has been said to connote the idea of making good damage<sup>2</sup>. Thus, a covenant to repair the structure does not oblige the covenantor to remedy a design fault which does not result in damage to the structure<sup>3</sup>; and an element in a building may not perform its function but nevertheless not be out of repair<sup>4</sup>. If the building is in no worse condition than when it was built, it will not be held to be in disrepair<sup>5</sup>.

A design defect of the above kind, that is to say, one which does not result in damage to the subject matter of the covenant, must be distinguished from a defect which does cause such damage<sup>6</sup>. There is no rule in English law by which a tenant is excused from liability to repair merely because the need for the work results from an inherent defect<sup>7</sup>. If the covenant bites, repairing the damage often involves curing the cause of the defect, and in so doing improving the property to some extent, if to do so would accord with proper building practice or be required by modern building standards or be necessary to do the job properly once and for all<sup>8</sup>.

Where, however, the defects in the property are serious and the remedial works required very expensive, the question can arise whether the works fall within the scope of the repairing covenant or whether they are to be categorised as improvements rather than repair. It has been said that, however large the words of the covenant might be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant<sup>9</sup>. The dividing line is difficult to draw in theoretical and general terms. It has been said that the question is one of fact and degree and that the correct approach is to look at the particular building, to look at the precise terms of the lease, and then to come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant is, it must not be looked at in isolation<sup>10</sup>.

1 *Quick v Taff-Ely Borough Council* [1986] QB 809 at 821, [1985] 3 All ER 321 at 328, CA, per Lawton LJ; *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, 54 P & CR 61, CA; and see *Janet Reger International Ltd v Tiree Ltd* [2006] EWHC 1743 (Ch), [2006] All ER (D) 226 (Jul). It may be otherwise in the case of a covenant to keep in good condition or to amend or renew: see *Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, [1994] 1 EGLR 76 (cited in PARA 436 note 1 ante).

2 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 at 734, CA, per Atkin LJ.

3 *Quick v Taff-Ely Borough Council* [1986] QB 809 at 822, [1985] 3 All ER 321 at 328, CA, per Lawton LJ (condensation causing damage only to decorations and furnishings and not to the structure); *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, 54 P & CR 61, CA (defectively designed kicker joint allowing basement to flood). See also *Lee v Leeds City Council*, *Ratcliffe v Sandwell Metropolitan Borough Council* [2002] EWCA Civ 06, [2002] 1 WLR 1488, [2002] LGR 305.

- 4 *Stent v Monmouth District Council* (1987) 54 P & CR 193, 19 HLR 269, CA (door not weatherproof; landlord liable to repair it because it had rotted).
- 5 *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, 54 P & CR 61, CA; cf *Smedley v Chumley and Hawkes Ltd (Warrell, third party)* (1981) 44 P & CR 50, [1982] 1 EGLR 47, CA.
- 6 *Stent v Monmouth District Council* (1987) 54 P & CR 193, CA.
- 7 *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.
- 8 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA; *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929; *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63, [1984] 1 EGLR 47, CA.
- 9 *Lister v Lane and Nesham* [1893] 2 QB 212, CA.
- 10 *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612 at 640, [1970] 1 All ER 587 at 602, CA, per Sachs LJ.

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#### **438. Factors distinguishing repairs from improvements.**

To assist in drawing the distinction between works which amount to repair and those which do not, the courts have identified a number of factors. Repair has been said to be restoration by renewal or replacement of subsidiary parts of a whole; whereas renewal, as distinct from repair, is reconstruction of the entirety, meaning by entirety not necessarily the whole but substantially the whole subject matter under discussion<sup>1</sup>. Thus, where the demised building is erected on inherently defective foundations, the tenant is not liable to substitute new foundations<sup>2</sup>. Similarly, where a drain is unsuitable and the local authority constructs a new one, this is not an expense which falls on the tenant under a covenant to repair drains<sup>3</sup>; and in general he is not liable for the cost of improvements in the original structure of a house, such as the mode of laying joists, which the landlord effects in making repairs<sup>4</sup> nor, where he has undertaken to repair a road of one kind, is he liable if the landlord converts it into a road requiring repairs of a different nature<sup>5</sup> and regard must always be had to the condition of the road in estimating the tenant's liability<sup>6</sup>. Although under his covenant to repair the tenant is not bound to improve the building so as to give the landlord something different from what he demised, the tenant must, however, do such repairs as are suitable for the building having regard to its age and class at the time of the demise<sup>7</sup>; and he must replace any parts, including the floors or roof or external walls, which become defective or dangerous owing to the lapse of time or the effect of the elements<sup>8</sup>.

Three different tests may be discerned from the authorities, which may be applied separately or concurrently as the circumstances of the individual case may demand; but all are to be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation and the other express terms of the tenancy<sup>9</sup>:

- 989 (1) whether the alterations go to the whole or substantially the whole of the structure or only to a subsidiary part<sup>10</sup>;
- 990 (2) whether the effect of the alterations is to produce a building of a wholly different character from that which had been let<sup>11</sup>;
- 991 (3) what was the cost of the works in relation to the previous value of the building, and what was their effect upon the value and lifespan of the building<sup>12</sup>.

Relevant factors have been said to include:

- 992 (a) the nature of the building;
- 993 (b) the terms of the lease;
- 994 (c) the state of the building at the date of the lease;
- 995 (d) the nature and extent of the defect sought to be remedied;
- 996 (e) the nature, extent and cost of the proposed remedial works;
- 997 (f) at whose expense the proposed remedial works are to be done;
- 998 (g) the value of the building and its expected lifespan;
- 999 (h) the effect of the works on such value and lifespan;
- 1000 (i) current building practice;
- 1001 (j) the likelihood of a recurrence if one remedy rather than another is adopted;  
and
- 1002 (k) the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by the occupants<sup>13</sup>.

1 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905 at 924, CA, per Buckley LJ (cause of the dilapidations is irrelevant).

2 *Lister v Lane and Nesham* [1893] 2 QB 212, CA; *Wright v Lawson* (1903) 19 TLR 510, CA. Both these cases were commented upon and explained in *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA (cost of new foundations to comply with byelaw requirements recovered). See also *Sotheby v Grundy* [1947] 2 All ER 761; *Pembrey v Lamdin* [1940] 2 All ER 434, CA (landlord not liable under a repairing covenant to waterproof old porous walls); *Collins v Flynn* [1963] 2 All ER 1068 (tenant not liable under a repairing covenant to rebuild premises which had subsided due to inadequate foundations). This decision was doubted in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

3 *Lyon v Greenhow* (1892) 8 TLR 457. Similarly, the tenant is not bound to remedy structural defects in the drains but only to keep the existing drains in repair: *Hugall v McKean* (1884) Cab & El 391; affd sub nom *Hugall v M'Lean* (1885) 53 LT 94, CA.

4 *Soward v Leggatt* (1836) 7 C & P 613.

5 *London Corpn v Barnes* (1896) 12 TLR 135, CA; *Barton v Alliance Economic Investment Co Ltd* (1935) 179 LT Jo 256 (macadam road made up as tarmac road). A covenant to contribute to repairing a road does not extend to entire reconstruction: *Scott v Brown* (1904) 69 JP 89, CA.

6 *Scott v Brown* (1904) 69 JP 89, CA.

7 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, CA, explaining *Proudfoot v Hart* (1890) 25 QBD 42, CA and following *Morgan v Hardy* (1886) 17 QBD 770; affd on appeal on this point as reported in 35 WR 588, CA. See also *Collins v Flynn* [1963] 2 All ER 1068; *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

8 *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA; and see *Proudfoot v Hart* (1890) 25 QBD 42 at 54, CA. As to maintenance of the sub-structure of a large building such as a market see *Re London Corpn, London Corpn v Great Western and Metropolitan Rlys* [1910] 2 Ch 314.

9 *McDougall v Easington District Council* (1989) 58 P & CR 201, [1989] 1 EGLR 93, CA.

10 See the text and note 1 supra. This can raise the question of what constitutes the whole or a part: see *Brown (Inspector of Taxes) v Burnley Football and Athletic Co Ltd* [1980] 3 All ER 244 (tax case) and the other cases therein cited.

11 *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA; *Lister v Lane and Nesham* [1893] 2 QB 212, CA; cf *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929; *Smedley v Chumley and Hawkes Ltd* (1981) 44 P & CR 50, [1982] 1 EGLR 47, CA.

12 The relevance of the works to the lifespan of the building was invoked in *ACT Construction Ltd v Customs and Excise Comrs* [1979] 2 All ER 691, [1979] 1 WLR 870; on appeal [1981] 1 All ER 324, [1981] 1 WLR 49, CA; affd [1982] 1 All ER 84, [1981] 1 WLR 1542, HL. See also *Newham London Borough Council v Patel* (1978) 13

BLR 77, CA; *McClean v Liverpool City Council* (1987) 20 HLR 25, CA. As to the relevance of the relation of cost and value see *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA; *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

13 *Holding and Management Ltd v Property Holding and Investment Trust plc* [1990] 1 All ER 938, [1989] 1 WLR 1313, CA; applied in *New England Properties v Portsmouth New Shops*, *Sterling Surveys v New England Properties*, *New England Properties v Ex-Electronics (UK) Ltd* (1993) 67 P & CR 141, [1993] 1 EGLR 84.

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### 439. Examples of improvements.

Examples of works held on the facts of particular cases not to fall within a repairing covenant are:

- 1003 (1) the construction of damp-proof basement walls<sup>1</sup>;
- 1004 (2) the installation of a damp proof course<sup>2</sup>;
- 1005 (3) the construction of newly designed foundations<sup>3</sup>;
- 1006 (4) underpinning<sup>4</sup>;
- 1007 (5) reconstructing a house on better foundations<sup>5</sup>;
- 1008 (6) rebuilding the jerry-built wall of a back extension<sup>6</sup>;
- 1009 (7) rebuilding a bay window using a different method of construction<sup>7</sup>;
- 1010 (8) rebuilding the front and rear walls<sup>8</sup>;
- 1011 (9) reinforcing substantially the whole of the steel frame of an office building<sup>9</sup>;
- 1012 (10) recladding a 12-storey block of flats from second-floor level with new stainless steel angles, expansion and compression joints and weepholes<sup>10</sup>;
- 1013 (11) replacing leaking wooden frame windows in a block of flats with maintenance-free double glazed units<sup>11</sup>;
- 1014 (12) replacing timber elevations with brick and a flat roof with a pitched tiled roof<sup>12</sup>; and
- 1015 (13) replacement of an air conditioning system which involved relocation of the pipework and the fan coils<sup>13</sup>.

These examples do not purport to be an exhaustive list.

1 *Pembery v Lamdin* [1940] 2 All ER 434, CA.

2 *Wainwright v Leeds v City Council* (1984) 13 HLR 117, CA; *Trustees of the Eyre Estate v McCracken* (2000) 80 P & CR 220, CA (where it was stressed that it is always a matter of fact and degree in the context of the particular repairing covenant; in the context of a lease for just over seven years, the covenant could not extend to installation of a damp proof course where none had existed before); cf *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63, [1984] 1 EGLR 47, CA (not cited in *Wainwright v Leeds City Council* supra).

3 *Collins v Flynn* [1963] 2 All ER 1068; doubted in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

4 *Sotheby v Grundy* [1947] 2 All ER 761; *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA; *ACT Construction Ltd v Customs and Excise Comrs* [1982] 1 All ER 84, [1981] 1 WLR 1542, HL.

5 *Lister v Lane and Nesham* [1893] 2 QB 212, CA.

6 *Halliard Property Co v Nicholas Clarke Investments* [1984] 1 EGLR 45, (1983) 269 Estates Gazette 1257.

7     le the original method of construction being prohibited: *Wright v Lawson* (1903) 19 TLR 510, CA.

8     *Torrens v Walker* [1906] 2 Ch 166.

9     *Plough Investments Ltd v Manchester City Council, Plough Investments Ltd v Eclipse Radio and Television Services Ltd* [1989] 1 EGLR 244.

10    *Holding and Management Ltd v Property Holding and Investment Trust plc* [1900] 1 All ER 938, [1989] 1 WLR 1313, CA.

11    *Mullaney v Maybourne Grange (Croydon) Management Co Ltd* [1986] 1 EGLR 70; cf *Sutton (Hastoe) Housing Association v Williams* (1988) 20 HLR 321, [1988] 1 EGLR 56, CA; but see *Minja Properties Ltd v Cussins Property Group plc* [1998] 2 EGLR 52, [1998] 30 EG 114 (where the instalment of double-glazed units instead of rusted single-glazed windows was held not to constitute a renewal but to be a repair, as the additional cost of installing double rather than single glazing was a comparatively trivial amount); and *Wandsworth London Borough Council v Griffin* [2000] 2 EGLR 105, [2000] 26 EG 147, Lands Tribunal.

12    *McDougall v Easington District Council* (1989) 58 P & CR 201, [1989] 1 EGLR 93, CA.

13    *Gibson Investments Ltd v Chesterton plc* [2003] All ER (D) 322 (May).

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#### 440. Examples of repairs.

Examples of works held on the facts of particular cases to amount to repairs are:

- 1016 (1) rebuilding the front wall of a house and its foundations so as to comply with the byelaws<sup>1</sup>;
- 1017 (2) reinforcing one section of the steel frame of an office building<sup>2</sup>;
- 1018 (3) replacing a defective wooden front door with a self-sealing aluminium door<sup>3</sup>;
- 1019 (4) refixing the cladding on a block of flats and inserting new expansion joints<sup>4</sup>;
- 1020 (5) replacing the whole of a galvanised metal factory roof with vinyl-coated corrugated sheets<sup>5</sup>;
- 1021 (6) rewiring the whole of a farmhouse<sup>6</sup>;
- 1022 (7) installing double-glazed units instead of rusted single-glazed windows<sup>7</sup>; and
- 1023 (8) removing and replacing cracked stone and brickwork, and sections adjoining it, along the line of steelwork in an office building, as opposed to more limited removal and the sealing of cracks<sup>8</sup>.

These examples do not purport to be an exhaustive list.

1     *Lurcott v Wakely & Wheeler* [1911] 1 KB 905, CA.

2     *Plough Investments Ltd v Manchester City Council, Plough Investments Ltd v Eclipse Radio and Television Services Ltd* [1989] 1 EGLR 244.

3     *Stent v Monmouth District Council* (1987) 54 P & CR 193, 19 HLR 269, CA.

4     *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, [1979] 1 All ER 929.

5 *Elite Investments Ltd v TI Bainbridge Silencers* [1986] 2 EGLR 43; cf *Murray v Birmingham City Council* (1987) 20 HLR 39, [1987] 2 EGLR 53, CA.

6 *Roper v Prudential Assurance Co Ltd* [1992] 1 EGLR 5.

7 *Minja Properties Ltd v Cussins Property Group plc* [1998] 2 EGLR 52, [1998] 30 EG 114; *Wandsworth London Borough Council v Griffin* [2000] 2 EGLR 105, [2000] 26 EG 147, Lands Tribunal.

8 *Gibson Investments Ltd v Chesterton plc* [2002] EWHC 19 (Ch), [2003] 1 EGLR 142, [2002] All ER (D) 67 (Jan).

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#### **441. Standard of repair.**

If he has expressly covenanted to put a house into tenantable repair and to keep it in such repair, and it is not in tenantable repair at the commencement of the tenancy, the tenant must do the necessary repairs, notwithstanding that the building is thereby put in a better condition than when the landlord let it<sup>1</sup>. The effect is the same if, without expressly covenanting to put it into repair, the tenant covenants only to keep the house in tenantable repair. Such a covenant presupposes putting the housing in such repair, and keeping it in repair during the term<sup>2</sup>. The construction of the covenant is the same whether the covenant specifies 'tenantable' or 'habitable' or 'good' repair<sup>3</sup>. A general covenant to repair without any such words is satisfied if the premises are kept in a substantial state of repair<sup>4</sup>.

The repairs which must be done in order to keep a house in tenantable repair vary according to the circumstances of the building. Good tenantable repair is such a repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant who would be likely to take it<sup>5</sup>; accordingly the tenant must do such repairs as are necessary to preserve the premises and to make them suitable for a new tenant; he is not, however, relieved from his liabilities by reason of a deterioration in the neighbourhood since the time of the demise. He has to do such repairs as will make the house reasonably fit for occupation by a tenant who would have been likely to occupy it at the time of the demise<sup>6</sup>.

The tenant must do both outside and inside painting at suitable times<sup>7</sup>, but he is not necessarily bound to repaper and paint throughout the house at the end of the term<sup>8</sup>, or to leave the house in the same state of decorative repair as when he took it<sup>9</sup>. Where the landlord is liable to carry out structural repairs and, in doing so, he damages the decorations, he is liable to make good the damage to the decorations<sup>10</sup>.

Covenants of this nature must be reasonably construed. The landlord may not claim for slight defects<sup>11</sup>, and, under a covenant to repair and paint, the tenant is not bound to fill up cracks in plaster and holes made by nails within the period for redecorating<sup>12</sup>. An actual omission to repair is not excused because the tenant has employed persons upon whom in good faith he relied to do the repairs<sup>13</sup>. In general it is for the covenantor to decide how to carry out the repair<sup>14</sup>. Thus, if the landlord covenants to repair a roof and it can reasonably be done either by patching or replacing it, the tenant cannot complain at the method chosen<sup>15</sup>.

1 A covenant to put premises into repair 'forthwith' is performed if the repairs are done with reasonable speed: *Doe d Pittman v Sutton* (1841) 9 C & P 706; *Belcher v M'Intosh* (1839) 8 C & P 720 (habitable repair).

- 2 *Payne v Haine* (1847) 16 M & W 541 ('good repair'); *Woolcock v Dew* (1858) 1 F & F 337; *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA.
- 3 *Proudfoot v Hart* (1890) 25 QBD 42 at 51, CA. Under a covenant to do 'necessary repairs', the tenant must do all repairs which are necessary during the term (*Truscott v Diamond Rock Boring Co* (1882) 20 ChD 251, CA). In *Firstcross Ltd v Teasdale* (1982) 47 P & CR 228, 8 HLR 112 a distinction was drawn between 'good habitable repair' and 'good tenantable condition' which in a letting for three months of a furnished flat was held to impose a duty merely to use the premises in a tenantlike manner as in *Warren v Keen* [1954] 1 QB 15, [1953] 2 All ER 1118, CA.
- 4 *Harris v Jones* (1832) 1 Mood & R 173.
- 5 *Proudfoot v Hart* (1890) 25 QBD 42 at 52, CA; *Belcher v M'Intosh* (1839) 8 C & P 720; *Payne v Haine* (1847) 16 M & W 541; *Saner v Bilton* (1878) 7 ChD 815 at 821; *Re Romford Guardians and Withers* (1918) 144 LT Jo 197.
- 6 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, CA (character of the neighbourhood had deteriorated since the demise; tenant contended unsuccessfully that he had only to leave the house in a condition fit for the class of tenant who would then be likely to reside in it). There is no support in the decided authorities for the 'commercial life' concept in construing, and therefore limiting, a tenant's repairing obligations: *Ladbroke Hotels Ltd v Sandhu* (1995) 72 P & CR 498, [1995] 2 EGLR 92.
- 7 *Monk v Noyes* (1824) 1 C & P 265 (covenant 'substantially to repair, uphold and maintain' requires inside painting to be done). Leases often contain provision that the tenant is to paint the premises at specified times; and, where the covenant specifies that the premises are to be painted in a certain year if the lease last so long, the tenant must paint if the lease is subsisting at the beginning of that year, even though the lease is determined in the course of the year: *Kirklington v Wood* [1917] 1 KB 332.
- 8 *Moxon v Marquis Townshend* (1886) 2 TLR 717; affd (1887) 3 TLR 392, CA.
- 9 *Crawford v Newton* (1886) 36 WR 54, CA. Under a covenant to keep a house in tenantable repair, the tenant must repaint as necessary in order to preserve internal woodwork from decay (*Crawford v Newton* supra); but it seems that the obligation may go further than this and include certain internal repainting or decoration according to the character of the house concerned and the neighbourhood in which it is situated (*Proudfoot v Hart* (1890) 25 QBD 42 at 54, CA). The tenant is not bound to repaper merely because the old paper has worn out, the position being different if it has peeled off the walls; and, if he repapers, he need not put up paper of the same quality as that which he found on the walls (*Proudfoot v Hart* supra at 53-54).
- 10 *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA; *Bradley v Chorley Borough Council* (1985) 17 HLR 305, [1985] 2 EGLR 49, CA; *McDougall v Easington District Council* (1989) 58 P & CR 201, [1989] 1 EGLR 93, CA.
- 11 *Scales v Lawrence* (1860) 2 F & F 289.
- 12 *Perry v Chotzner* (1893) 9 TLR 488.
- 13 *Nokes v Gibbon* (1856) 3 Drew 681.
- 14 *Plough Investments Ltd v Manchester City Council*, *Plough Investments Ltd v Eclipse Radio and Television Service Ltd* [1989] 1 EGLR 244 at 247; *Riverside Property Investments Ltd v Blackhawk Automotive* [2004] EWHC 3052 (TCC), [2005] 1 EGLR 114, [2004] All ER (D) 264 (Dec).
- 15 *Manor House Drive Ltd v Shahbazian* (1965) 195 Estates Gazette 283 (replacement); cf *Murray v Birmingham City Council* (1987) 20 HLR 39, [1987] 2 EGLR 53, CA (patching); *Trustees of the Dame Margaret Hungerford Charity v Beazley* (1993) 26 HLR 269, [1993] 2 EGLR 143, CA (running repairs sufficient). See, however, *Riverside Property Investments Ltd v Blackhawk Automotive* [2004] EWHC 3052 (TCC), [2005] 1 EGLR 114, [2004] All ER (D) 264 (Dec) (tenant carried out repairs to roof; soon after the surrender of the tenancy, the landlord replaced the whole roof and brought proceedings to recover the cost of so doing and incidental costs from the tenant; held that on the evidence, the roof could have been put into the covenanted condition without complete replacement and the roof had not been handed over to the landlord in breach of the covenant to repair; landlord none the less entitled to recover some specific items of cost that would have been incurred in any event in the preparation of a schedule of dilapidations).

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#### **442. Exception of fair wear and tear.**

The effect of an exception of damage or dilapidations resulting from fair wear and tear from a covenant to keep in good repair and condition depends upon the particular words of the covenant to be construed<sup>1</sup>, and, if proof is given that the premises are not in good repair and condition, the onus is on the tenant to prove that the matters complained of result from the fair wear and tear excepted<sup>2</sup>. If fair or reasonable wear and tear are excepted, the tenant is not bound to make good dilapidations caused by the friction of the air and by exposure and ordinary use<sup>3</sup>; but the exception does not mean that, if there is a defect originally proceeding from fair wear and tear, he is released from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. The tenant is bound to do such repairs as may be required to prevent the consequences flowing originally from fair wear and tear from producing others which wear and tear would not directly produce<sup>4</sup>.

The question whether wear and tear is fair or reasonable is not affected by the amount of the dilapidation<sup>5</sup>. If the passage of time and the operation of the elements have a more deteriorating effect than usual because of the original unsoundness of the premises, the tenant is not liable for the resulting dilapidations<sup>6</sup>.

1 See *Brown v Davies* [1958] 1 QB 117 at 126, [1957] 3 All ER 401 at 406, CA, per Lord Evershed MR and at 130 and at 408 per Romer LJ. The exception is really of the nature of a proviso: see PARA 133 ante.

2 *Brown v Davies* [1958] 1 QB 117 at 127, [1957] 3 All ER 401 at 406, CA.

3 *Terrell v Murray* (1901) 17 TLR 570, DC; *Manchester Bonded Warehouse Co v Carr* (1880) 5 CPD 507 at 513; *Scales v Lawrence* (1860) 2 F & F 289.

4 See *Regis Property Co Ltd v Dudley* [1959] AC 370 at 393, [1958] 3 All ER 491 at 498, HL, per Viscount Simonds, expressly approving the dicta of Talbot J in *Haskell v Marlow* [1928] 2 KB 45 at 58-59, DC, and overruling on this point *Taylor v Webb* [1937] 2 KB 283, [1937] 1 All ER 590, CA. See also *Cutteridge v Munyard* (1834) 1 Mood & R 334 at 336; *Brown v Davies* [1958] 1 QB 117, [1957] 3 All ER 401, CA.

5 *Taylor v Webb* [1937] 2 KB 283, [1937] 1 All ER 590, CA.

6 *Miller v Burt* (1918) 63 Sol Jo 117. Nor will the tenant be liable for damage done through the bursting of an outside waterpipe which the landlord had notice to repair: *Citron v Cohen* (1920) 36 TLR 560.

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#### **443. Destruction of premises.**

If the lease contains a covenant by the tenant to repair, without exception of damage by fire or other exceptional cause, he is bound to rebuild or repair the premises should they be destroyed or injured during the term<sup>1</sup>. In the absence of words expressly or impliedly fixing a time for the performance of the covenant, the tenant has such time as is reasonable in all the circumstances of the case for performance of the covenant, whether this time does or does not extend beyond the term of the tenancy<sup>2</sup>.



If the tenant's liability on the covenant requires him only to leave the premises in the same state as when he entered, and the rebuilding will increase the value, the damages will be assessed by deducting the amount of such increase from the cost of rebuilding<sup>3</sup>. An exception of damage by fire in the covenant to repair exempts the tenant from liability to rebuild, but does not exempt him from payment of rent<sup>4</sup>.

It is common to find a provision in the lease that rent is to be suspended in the event of the premises becoming unusable by virtue of destruction by fire<sup>5</sup>.

1 *Earl of Chesterfield v Duke of Bolton* (1739) 2 Com 627; *Pym v Blackburn* (1796) 3 Ves 34 at 38; *Bullock v Dommitt* (1796) 6 Term Rep 650; *Digby v Atkinson* (1815) 4 Camp 275; *Clark v Glasgow Assurance Co* (1854) 1 Macq 668 at 678, HL; *Morrogh v Alleyne* (1873) 7 IR Eq 487; *Gregg v Coates*, *Hodgson v Coates* (1856) 23 Beav 33; *Manchester Bonded Warehouse Co v Carr* (1880) 5 CPD 507 at 513; *Brecknock and Abergavenny Canal Navigation Co v Pritchard* (1796) 6 Term Rep 750 (all cases of destruction by fire); *Green v Eales* (1841) 2 QB 225 (act of stranger); *Paradine v Jane* (1647) Aleyn 26 (enemy action); *Redmond v Dainton* [1920] 2 KB 256 (enemy action); but special provision is now made by statute to exempt a tenant from liability to repair war damage: see PARA 479 post. The liability on the covenant to repair is not limited by a covenant by the tenant to insure, and he may have to expend a greater sum than the amount of the insurance: *Digby v Atkinson* supra. It has been held that destruction of the premises before the tenant could take possession would be no defence to a claim on the agreement to take a lease (see *Phillipson v Leigh* (1795) 1 Esp 398) but it would seem that the doctrine of frustration might now apply (see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL; and PARAS 274-276 ante). As to the landlord's liability in the event of fire see PARA 414 ante.

2 *Matthey v Curling* [1922] 2 AC 180 at 240, HL, per Lord Atkinson. A reasonable time should be determined by reference to the circumstances existing at the time the lease was made: *Re King, Robinson v Gray* [1962] 2 All ER 66 at 77, [1962] 1 WLR 632 at 664 per Buckley J (revsd on another point [1963] Ch 459, [1963] 1 All ER 781, CA).

3 *Yates v Dunster* (1855) 11 Exch 15.

4 *Belfour v Weston* (1786) 1 Term Rep 310.

5 As to the effect on rent of damage by fire see further PARA 275 ante.

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#### **444. Repair of buildings erected subsequent to demise.**

A covenant to repair may expressly extend to buildings erected subsequently to the demise<sup>1</sup>; but, even without express mention of such buildings, a covenant to repair the demised premises extends to all things which are for the time being a part of the premises included in the lease<sup>2</sup>. Consequently the covenant extends to additional buildings<sup>3</sup> and to fixtures<sup>4</sup>. The words used in the lease may, however, show a contrary intention, so that a covenant to repair 'the demised buildings' applies only to buildings existing at the time of the demise<sup>5</sup>, and a covenant to leave the demised premises with all new erections well repaired applies only to the new erections<sup>6</sup>. A covenant to repair and yield up in repair, expressed in such terms that it extends to all fixtures, deprives the tenant of his ordinary right to remove tenant's fixtures<sup>7</sup>.

1 *Hudson v Williams* (1878) 39 LT 632.

2 *Pyot v Lady St John* (1613) Cro Jac 329 (pavement of a courtyard); and see notes 3-4 infra. See also *British Glass Manufacturers Confederation v University of Sheffield* [2003] EWHC 3108 (Ch), [2004] 1 EGLR 41, [2003] All ER (D) 380 (Nov).

3 *Cornish v Cleife* (1864) 34 LJ Ex 19 at 22; *Brown v Blunden* (1683) Skin 121; *Douse v Earle* (1688) 3 Lev 263; *Field v Curnick* [1926] 2 KB 374 (tenant held liable to repair six houses erected by him on the demised property when he had covenanted to erect only two); *Rose v Spicer*, *Rose v Hyman* [1911] 2 KB 234 at 248, CA, per Fletcher Moulton LJ (revsd on other grounds sub nom *Hyman v Rose* [1912] AC 623, HL). The covenant extends to a farmhouse erected by permission of the landlord, who is lord of the manor, on adjoining waste: *White v Wakley* (1858) 26 Beav 17.

4 Eg the mill wheel of a mill (*Openshaw v Evans* (1884) 50 LT 156), or a verandah attached to posts fixed in the ground (*Penry's Administratrix v Brown* (1818) 2 Stark 403). See also *Thresher v East London Water Works Co* (1824) 2 B & C 608.

5 *Doe d Worcester Trustees v Rowlands* (1841) 9 C & P 734 at 740; *Smith v Mills* (1899) 16 TLR 59; *Cornish v Cleife* (1864) 3 H & C 446.

6 *Lant v Norris* (1757) 1 Burr 287.

7 See PARA 185 ante.

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#### **445. Repair of buildings encroached upon.**

Where the tenant encroaches on property of the landlord which adjoins the demised premises, the tenant becomes liable to repair the property on which he has encroached, just as if it were included under the covenant to repair contained in the lease<sup>1</sup>.

1 *JF Perrott & Co Ltd v Cohen* [1951] 1 KB 705, [1950] 2 All ER 939, CA, applied in *Smirk v Lyndale Developments Ltd* [1975] Ch 317, [1975] 1 All ER 690, CA, and in *Kensington Pension Developments Ltd v Royal Garden Hotel (Oddenino's) Ltd* [1990] 2 EGLR 117 (rent review case). As to encroachments by the tenant see further PARAS 195-197 ante.

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#### **446. Covenant to rebuild.**

A covenant which binds the tenant specifically to rebuild is not satisfied by merely repairing; and so, where such a covenant extends to several houses, it is not sufficient for the tenant to rebuild some and repair others<sup>1</sup>. If, however, the covenant is a general covenant to repair houses and to rebuild within a specified time as occasion may require, it is enough if the tenant repairs so as to make the houses substantially as good as new<sup>2</sup>. A covenant to pull down a house and build a new one does not require that the new one should be similar in construction and elevation to the old one<sup>3</sup>.

1 *City of London v Nash* (1747) 3 Atk 512.

2 *Evelyn v Raddish* (1817) 7 Taunt 411.

3 *Low v Innes* (1864) 4 De GJ & Sm 286.

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#### **447. Covenant conditional upon landlord's putting premises in repair.**

The liability of the tenant to repair may be made conditional upon the landlord's first putting the premises in repair<sup>1</sup>, or upon his doing some other act, such as providing materials for repair<sup>2</sup>. In the former case the complete performance of the condition by the landlord is essential to make the tenant liable for the repair of any part of the premises<sup>3</sup>; and in the latter case it is sufficient if the landlord is ready to supply the materials when required<sup>4</sup>. If the putting of the premises in repair or the provision of materials by the landlord is expressed in the lease in such a way as merely to qualify the tenant's liability to repair, the tenant has no right of action against the landlord for failure either to put the premises in repair or to provide materials<sup>5</sup>.

The lease may, however, be so expressed that the landlord has covenanted to put the premises in repair or to provide materials, in which case the tenant may sue for breach of covenant on the landlord's default<sup>6</sup>.

Whether the landlord has so covenanted or the tenant's liability is merely qualified depends in each case on the wording of the lease, but the lease may be expressed in such words as to amount both to a qualification of the tenant's liability and to a covenant by the landlord<sup>7</sup>.

1 *Slater v Stone* (1622) Cro Jac 645; *Neale v Ratcliff* (1850) 15 QB 916; *Henman v Berliner* [1918] 2 KB 236; *Howe v Botwood* [1913] 2 KB 387.

2 *Thomas v Cadwallader* (1744) Willes 496; *Mucklestone v Thomas* (1739) Willes 146; *Westacott v Hahn* [1918] 1 KB 495, CA.

3 *Neale v Ratcliff* (1850) 15 QB 916; and see *Counter v Macpherson* (1845) 5 Moo PCC 83; *Cannock v Jones* (1849) 3 Exch 233 (affd sub nom *Jones v Cannock* (1850) 5 Exch 713, Ex Ch) (cited in PARA 448 note 3 post); *Coward v Gregory* (1866) LR 2 CP 153; *Henman v Berliner* [1918] 2 KB 236; *Westacott v Hahn* [1918] 1 KB 495, CA.

4 *Martyn v Clue* (1852) 18 QB 661.

5 *Westacott v Hahn* [1918] 1 KB 495 CA; *Tucker v Linger* (1882) 21 ChD 18, CA. As to the construction of words of condition as covenants, and as to when such covenants are independent, and when the performance of the landlord's covenant is a condition for the liability on the tenant's covenant, see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 252, 257, 266 et seq.

6 The landlord's failure to perform his covenant may be taken into account in assessing the damages on the breach of the tenant's covenant to leave the buildings in repair: *Haldane v Newcomb* (1863) 12 WR 135.

7 See note 5 supra.

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#### 448. Repair to surveyor's satisfaction.

If the tenant covenants to do work, whether of repair<sup>1</sup> or of building<sup>2</sup>, to the satisfaction of a surveyor to be appointed by the landlord, such appointment is a condition precedent to the tenant's liability; but it has been held that, where work is to be done subject to the superintendence of specified persons, such superintendence is not a condition precedent<sup>3</sup>. Where a surveyor is appointed and expresses dissatisfaction, there is no breach of the covenant on the tenant's part if in fact the surveyor ought to have been satisfied<sup>4</sup>. Any term which provides that a surveyor's decision or certificate is to be binding on a question of law is void as being contrary to public policy, as it purports to oust the jurisdiction of the courts<sup>5</sup>.

The requirement that repair work is to be done to the satisfaction of the landlord's surveyor means that the surveyor can prescribe what work is to be done, provided that he exercises his own judgment and comes to an honest view of what is required to make good a want of repair or absence of good condition; and if the tenant makes no attempt to ascertain the requirements of the landlord's surveyor before the expiry of the tenancy, it cannot object to the communication of the surveyor's requirements after that date<sup>6</sup>.

1 *Coombe v Green* (1843) 11 M & W 480.

2 *Hunt v Bishop* (1853) 8 Exch 675 at 679.

3 *Cannock v Jones* (1849) 3 Exch 233; *affd sub nom Jones v Cannock* (1850) 5 Exch 713, Ex Ch. See also BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 101.

4 *Doe d Baker v Jones* (1848) 2 Car & Kir 743; *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA (surveyor's certificate of expenditure subject to implication that costs claimed are fair and reasonable; the person giving the certificate cannot validly be a person who is the landlord's alter ego). Where the tenant is to retain out of rent the expenses of improvements executed to the landlord's approval, such approval is not a condition precedent to the retention of the expenses: *Dallman v King* (1837) 4 Bing NC 105.

5 *Re Davstone Estates Ltd's Leases, Manprop Ltd v O'Dell* [1969] 2 Ch 378, [1969] 2 All ER 849.

6 *Mason v Totalfinaelf UK Ltd* [2003] EWHC 1604 (Ch), [2003] 3 EGLR 91, [2003] All ER (D) 191 (Jul).

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#### 449. Notice of breach of covenant to repair.

Formerly it was usual to insert in the lease a general covenant by the tenant to repair, and also a covenant to repair on notice; that is, to do within a prescribed time repairs covered by the general covenant, of which the landlord should give notice<sup>1</sup>. Such covenants, if grammatically separate, were construed as independent covenants<sup>2</sup>, the first being broken by the mere want of repair<sup>3</sup>, and the second by the failure to comply with the notice. A notice given in accordance with the second covenant, that is, to repair specified defects within the prescribed time, operated as a waiver of any forfeiture for breach of the general covenant<sup>4</sup>; but, if the notice departed from the terms of the second covenant, and required repair 'forthwith'<sup>5</sup>, or 'in accordance with the covenants of the lease'<sup>6</sup>, it was deemed to be given under the general covenant, although not strictly necessary, and there was no waiver. Where the covenant is a covenant to repair on notice and to leave in repair at the end of the term, these constitute distinct liabilities and notice is not necessary to enable the landlord to sue on the covenant at the end of the term<sup>7</sup>.

Modern leases commonly contain a term entitling the landlord to enter to inspect the state of the premises, to give notice to the tenant of any want of repair so found, to enter to execute the necessary works if the tenant does not do so and to recover the costs thereof as a debt. A landlord's claim for reimbursement under such a clause is a claim in debt for reimbursement of sums spent in carrying out the repairs himself and not a claim for damages<sup>8</sup> and is not therefore subject to the statutory restrictions applicable to damages for breach of a repairing covenant<sup>9</sup>.

The landlord is now precluded by statute<sup>10</sup> from enforcing any right of re-entry or forfeiture for breach of a covenant to repair unless he has first given to the tenant<sup>11</sup> notice specifying the nature of the breach and has allowed a reasonable time for the execution of repairs<sup>12</sup>; and a right of re-entry or forfeiture for breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is express or implied, and whether general or specific, is not enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice<sup>13</sup> had been served on the lessee was known either:

- 1024 (1) to the lessee; or
- 1025 (2) to an underlessee holding under an underlease which reserved a nominal reversion only to the lessee; or
- 1026 (3) to the person who last paid the rent due under the lease either on his own behalf or as agent for the lessee or underlessee<sup>14</sup>.

Negotiations by the tenant for the sale of his interest in the premises to the landlord suspend the notice during their currency unless a contrary intention is clearly demonstrated<sup>15</sup>.

1 There is no breach of this covenant until the prescribed time has elapsed: *Williams v Williams* (1874) LR 9 CP 659.

2 *Horsefall v Testar* (1817) 7 Taunt 385 at 388; *Baylis v Le Gros* (1858) 4 CBNS 537.

3 *Baylis v Le Gros* (1858) 4 CBNS 537.

4 *Doe d Morecroft v Meux* (1825) 4 B & C 606; and see *Doe d Baron and Baroness de Rutzen v Lewis* (1836) 5 Ad & El 277.

5 *Roe d Goatly v Paine* (1810) 2 Camps 20.

6 *Few v Perkins* (1867) LR 2 Exch 92.

7 *Harflet v Butcher* (1622) Cro Jac 644.

8 *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA, overruling *Swallow Securities Ltd v Brand* (1981) 45 P & CR 328. See also *Hamilton v Martell Securities Ltd* [1984] Ch 266, [1984] 1 All ER 665; *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, [1984] 2 All ER 601; *Elite Investments Ltd v TI Bainbridge Silencers Ltd* [1986] 2 EGLR 43.

9 In the Landlord and Tenant Act 1927 s 18 and the Leasehold Property (Repairs) Act 1938: see the text and notes 13-14 *infra*; and PARAS 455-460 *post*.

10 See PARA 619 *et seq post*.

11 For these purposes, 'the tenant' means a tenant who is in possession or has a subsisting tenancy at the time when proceedings are taken: *Cusack-Smith v Gold* [1958] 2 All ER 361, [1958] 1 WLR 611. If a notice is properly served on a tenant who later assigns, then, so far as the particular breaches are concerned, no further notice need be served on the assignee before beginning a claim for re-entry or forfeiture as against the assignee: *Kanda v Church Comrs for England* [1958] 1 QB 332, sub nom *Church Comrs for England v Kanda* [1957] 2 All ER 815, CA. Although a mortgagee by way of legal charge is a lessee for the purposes of the Law of Property Act 1925 s 146 (as amended), there is no obligation to serve notice upon a mortgagee: *Church Comrs for England v Ve-Ri-Best Manufacturing Co Ltd* [1957] 1 QB 238, [1956] 3 All ER 777. As to the circumstances entitling a tenant to serve a counter-notice claiming the benefit of the Leasehold Property (Repairs) Act 1938,

and as to the extent of the protection afforded by that Act to the tenant against claims by the landlord for forfeiture or damages, see PARA 455 post.

12 See the Law of Property Act 1925 s 146(1); and PARA 619 et seq post. As to circumstances in which a lessee may serve a counter-notice claiming the benefit of the Leasehold Property (Repairs) Act 1938 see PARAS 455-457 post.

13 See a notice under the Law of Property Act 1925 s 146 (as amended).

14 Landlord and Tenant Act 1927 s 18(2). Section 18 applies whether the lease was created before, on, or after 25 March 1928: s 18(3). Where a notice is sent by special delivery or the recorded delivery service addressed to a person at his last-known place of abode in the United Kingdom, then that person is deemed, for these purposes, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post: s 18(2); and see the Recorded Delivery Service Act 1962 s 1 (as amended); and POST OFFICE vol 36(2) (Reissue) PARAS 116, 119. For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

The Landlord and Tenant Act 1927 s 18(2) is to be construed as one with the Law of Property Act 1925 s 146 (as amended): Landlord and Tenant Act 1927 s 18(2).

15 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL; and see *Doe d Rankin v Brindley* (1832) 4 B & Ad 84; *Doe d Baron and Baroness de Rutzen v Lewis* (1836) 5 Ad & El 277.

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#### **450. Court's power to grant relief.**

After a notice is served on a lessee<sup>1</sup> relating to the internal decorative repairs to a house or other building, he may apply to the court for relief; and, if the court is satisfied that the notice is unreasonable, having regard to all the circumstances of the case including in particular the length of the lessee's term or interest remaining unexpired, it may by order wholly or partially relieve the lessee from liability for such repairs<sup>2</sup>. The above provisions do not, however, apply:

- 1027 (1) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;
- 1028 (2) to any matter necessary or proper for putting or keeping the property in a sanitary condition, or for the maintenance or preservation of the structure;
- 1029 (3) to any statutory liability to keep a house in all respect reasonably fit for human habitation;
- 1030 (4) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term<sup>3</sup>.

The county court has jurisdiction under the above provisions<sup>4</sup>.

1 For these purposes, 'lease' includes an underlease and an agreement for a lease; and 'lessee' has a corresponding meaning and includes any person liable to effect the repairs: Law of Property Act 1925 s 147(3).

2 Ibid s 147(1). Section 147(1) applies whether the notice was served before, on or after 1 January 1926, and has effect notwithstanding any stipulation to the contrary: s 147(4). This special right to apply for relief is separate from the general right to apply for relief against forfeiture: see PARA 622 post.

3 Ibid s 147(2).

4 Ibid s 147(5) (added by the County Courts Act 1984 s 148(1), Sch 2 para 6; amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(a), (8), Schedule Pt I).

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#### 451. Covenants to put into and keep in repair.

While a covenant to put premises into repair admits of only a single breach for which, when damages have been recovered, there is no further remedy on the covenant<sup>1</sup>, a breach of a covenant to keep in repair, if not made good, is a continuing breach<sup>2</sup>; and the recovery of damages in one claim does not prevent the recovery of damages in a subsequent claim, although in assessing damages in the subsequent claim the amount recovered in the first must be taken into account<sup>3</sup>. Under a covenant to keep in repair, the tenant is bound to have the premises at all times in proper repair; and, if they are out of repair, a claim may be brought at any time during the term<sup>4</sup>. If a breach is of a continuing nature, the landlord is not precluded from forfeiting a lease merely because he has in the past waived the right to forfeit by accepting rent with knowledge of that breach<sup>5</sup> nor, provided that there has been no significant change in the condition of the property, by the acceptance of rent after the service of the statutory notice<sup>6</sup>.

Where there is an express covenant to build within a fixed period and the tenant does not do so, there is only a single breach, which may be waived by the subsequent acceptance of rent<sup>7</sup>. Such a breach is, however, capable of remedy<sup>8</sup>. Where, in addition to such a covenant, there is a covenant to keep the buildings to be erected in repair, it cannot be claimed that the failure to build is a breach of the covenant to repair<sup>9</sup>.

1 *Coward v Gregory* (1866) LR 2 CP 153. Similarly a covenant by the landlord to make a new road within a year is finally broken on default at the end of the year: *Morris v Kennedy* [1896] 2 IR 247, Ir CA.

2 Where, after the notice to repair, the premises are condemned by the local authority and pulled down, there is a continuing breach until the demolition: *Re Serle, Gregory v Serle* [1898] 1 Ch 652. As to damages where the demised premises are compulsorily purchased in a dilapidated state see *Re King, Robinson v Gray* [1962] 2 All ER 66, [1962] 1 WLR 632; on appeal [1963] Ch 459, [1963] 1 All ER 781, CA.

3 *Coward v Gregory* (1866) LR 2 CP 153. In order that the claim for non-repair under the general covenant may be maintained, the premises must be out of repair at the beginning of the claim; hence, if the landlord does the repairs himself, he is unable to recover damages: *Williams v Williams* (1874) LR 9 CP 659; and see *SEDAC Investments Ltd v Tanner* [1982] 3 All ER 646, [1982] 1 WLR 1342. He may, however, be able to recover the expenses of repair if there is a special covenant to repair on notice, provided that proper notice has been given: *Williams v Williams* supra (underlandlord did repairs to avoid forfeiture of the head lease and then sued the undertenant). As to the recovery of the expenses of such repairs see *Colley v Streeton* (1823) 2 B & C 273; *Joyner v Weeks* [1891] 2 QB 31 (revsd on the facts [1891] 2 QB 31 at 43, CA). If the lease provides for the landlord to do the repairs and to recover the expenses of them, he waives his right to forfeit the lease if he demands the payment of such expenses: *Doe d Baron and Baroness de Rutzen v Lewis* (1836) 5 Ad & El 277. As to damages generally see PARAS 459-460 post.

4 *Luxmore v Robson* (1818) 1 B & Ald 584 at 585; and see the cases cited in PARA 441 note 2 ante. Where, however, a tenant is bound to repair and deliver up in repair at the end of the term, the removal of fixtures which he does not immediately replace is not a breach of the covenant if they can be replaced before the end of the term: *Doe d Burrell v Davies* (1851) 15 Jur 155.

A covenant in a lease to keep the demised premises in 'complete good and substantial repair and condition' which extends to the building as a whole obliges the landlord to keep the other parts of the building in which the demised premises were situated in repair at all times so that there is a breach of the repairing obligation in respect of those other parts immediately a defect occurs, and not (as is the case with the demised premises) at the later time when he has information about the existence of the defect and has failed to carry out the

necessary works with reasonable expedition: *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, [1995] 4 All ER 44, CA. It may be otherwise if there is a specific term in the covenants that requires notice of disrepair to be given to the covenantor: see *Ladsky v TSB Bank plc* (1996) 74 P & CR 372, CA.

5 See PARA 617 post. As to waiver of forfeiture see PARA 615 post.

6 le the notice required by the Law of Property Act 1925 s 146 (as amended) (see PARA 619 et seq post): see *Greenwich London Borough Council v Discreet Selling Estates Ltd* (1990) 61 P & CR 405, [1990] 2 EGLR 65, CA.

7 *Stephens v Junior Army and Navy Stores Ltd* [1914] 2 Ch 516, CA.

8 le for the purposes of the Law of Property Act 1925 s 146 (as amended): *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA.

9 *Stephens v Junior Army and Navy Stores Ltd* [1914] 2 Ch 516, CA (express covenant to build held to exclude any implied obligation to build arising from the covenant to keep the buildings to be erected in repair). In *Jacob v Down* [1900] 2 Ch 156, Stirling J expressed the opinion obiter that in such circumstances there was a breach of the covenant to repair, but his opinion was the subject of criticism and not followed in *Stephens v Junior Army and Navy Stores Ltd* supra. In *Bennett v Herring* (1857) 3 CBNS 370 it was held that breach of a covenant to complete the erection of certain buildings was also a breach of a covenant to repair those buildings, but, in view of the decision in *Stephens v Junior Army and Navy Stores Ltd* supra, this case would seem of doubtful authority.

An assignor of a lease who by non-compliance with a notice to repair has rendered the lease liable to forfeiture is unable to make a good title under an open contract, even if the assignee has paid and the landlord has accepted rent from him after the contract but before completion: *Re Martin, ex p Dixon (Trustee) v Tucker* (1912) 106 LT 381.

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#### **452. Covenant by landlord to repair.**

The liability of a landlord under a covenant on his part to repair is subject to the same rules of construction as a covenant by the tenant<sup>1</sup>. It has to be construed with reference to the state of the premises at the commencement of the demise; and the landlord is not bound to give to the tenant during the term a different thing from that which the tenant took from him at the commencement of the tenancy. Consequently, he is not bound to make good defects which affect the stability of the premises as a whole, and are due to some inherent fault<sup>2</sup>, although he may be liable to do repairs which were necessary at the date of the demise<sup>3</sup>. In the case of a building which was new when let, it has been held that the right comparison is between the premises contemplated by the parties at the date of the lease, as opposed to the premises as defectively designed, and the premises as damaged by the works<sup>4</sup>. The non-payment of rent<sup>5</sup> or service charge<sup>6</sup> does not absolve the landlord from his obligation to repair. Where the landlord covenants to repair but the sums so expended are recoverable by way of service charge, the standard of work must be such as the tenants, given the remaining length of their leases, can fairly be expected to pay for<sup>7</sup>.

A covenant by the landlord to repair the external parts of the demised premises extends to a partition wall<sup>8</sup> but not to parts of the building or installations which are not demised<sup>9</sup>; and a covenant to do structural work of a substantial nature requires the landlord to do repairs to the roof and make good rendering and brickwork<sup>10</sup>. The structure of a dwelling house has been said to consist of those elements which give it its essential appearance, stability and shape but not to extend to the many and various ways in which the house is fitted out, equipped, decorated and generally made to be habitable; it is not limited to load-bearing elements; and it does not include a separate garage, gates, internal plaster and door furniture but does include windows,



including their sashes, cords, frames and essential furniture<sup>11</sup>. A landlord who has covenanted to repair the main walls of a building is not generally liable to repair windows<sup>12</sup>. A covenant by the landlord to put premises into repair does not bind him to put them in repair for a special purpose not mentioned in the agreement<sup>13</sup>.

1 As to such rules of construction see PARA 436 et seq ante; as to the necessity of notice see PARA 453 post; as to the tenant's remedies for breach of covenant see PARAS 462-466 post; and as to the landlord's covenants to repair implied by statute see PARA 416 et seq ante.

2 *Torrens v Walker* [1906] 2 Ch 166; *Pembrey v Lamdin* [1940] 2 All ER 434, CA. *Torrens v Walker* supra was considered and explained in *Lurcott v Wakely and Wheeler* [1911] 1 KB 905, CA, but the ruling of Warrington J that similar principles were to be applied with regard to covenants by landlords as with regard to those by tenants was not challenged.

3 See *Uniproducs (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 All ER 146, [1956] 1 WLR 45 (landlord escaped liability because he had neither notice of nor prior knowledge of the defect).

4 *Smedley v Chumley and Hawke Ltd (Warrell, third party)* (1981) 44 P & CR 50, [1982] 1 EGLR 47, CA (landlord held liable under covenant to keep walls and roof in repair to provide extra piles).

5 *Taylor v Webb* [1937] 2 KB 283, [1936] 2 All ER 763; revsd on other grounds [1937] 2 KB 283 at 290, [1937] 1 All ER 590, CA.

6 *Yorkbrook Investments Ltd v Batten* (1985) 52 P & CR 51, [1985] 2 EGLR 100, CA (landlord covenanted to repair part of a block of flats subject to payment of a service charge); cf *CIN Properties Ltd v Barclays Bank plc* [1986] 1 EGLR 59, CA (submission of estimates to the tenants held to be a condition precedent to the landlord's right to recover service charges). See also *Princes House Ltd v Distinctive Clubs Ltd* [2006] All ER (D) 117 (Sep) (landlord covenanted to use 'all reasonable endeavours' to procure repairs and maintenance to building of which demised premises formed part; service charge subject to cap until end of 2003; landlord evinced intention to effect repairs to roof in 2003 but delayed commencement of works until after the period in which the cap applied; held that tenant could recover the relevant element of the service charge in respect of the works).

Where, however, a tenant evinces a fixed intention not to be bound by its obligation to pay service charges, it has been argued that *Yorkbrook Investments Ltd v Batten* supra is distinguishable, and the landlord is not then liable to perform the repairing obligations: *Bluestorm Ltd v Portvale Holdings Ltd* [2004] EWCA Civ 289 at [48]-[49], [2004] HLR 939, [2004] 2 EGLR 38 per Sir Martin Nourse. Maurice Kay LJ, however, declined to follow that suggestion, notwithstanding the 'conceptual imperfections' of *Yorkbrook Investments Ltd v Batten* supra (see *Bluestorm Ltd v Portvale Holdings Ltd* supra at [41]) and Buxton LJ, while considering that a provision like that in *Yorkbrook Investments Ltd v Batten* supra might deprive the non-payer of a right to complain of the landlord's breach when there is a direct connection between the non-payment and the breach, preferred that the point should be left to be considered, or repudiated, when it becomes essential to a decision, as it was not in *Bluestorm Ltd v Portvale Holdings Ltd* supra (see *Bluestorm Ltd v Portvale Holdings Ltd* supra at [32] et seq).

7 *Fluor Daniel Properties Ltd v Shortlands Investments Ltd* [2001] 2 EGLR 103, [2001] All ER (D) 36 (Jan) (the fact that an item of plant has reached the end of its recommended lifespan as suggested by industry guidelines does not mean that it is reasonable for the landlord to want to replace it at the tenants' expense).

8 *Green v Eales* (1841) 2 QB 225 (adjoining premises were demolished under a local Act, but this did not prevent the landlord from being liable).

9 *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1943] KB 73, [1942] 2 All ER 533, CA; *Rapid Results College Ltd v Angell* [1986] 1 EGLR 53, CA; cf the extended meaning given to 'structure and exterior of the dwelling house' in the Landlord and Tenant Act 1985 s 11 (as amended) (see PARA 416 note 5 ante).

10 *Granada Theatres Ltd v Freehold Investments (Leytonstone) Ltd* [1959] Ch 592, [1959] 2 All ER 176, CA; and see *Hallisey v Petmoor Developments Ltd* [2000] All ER (D) 1632, (2000) Times, 7 November ('main structure' included entirety of roof terrace); applied in *Ibrahim v Dovecorn Reversions Ltd* (2001) 82 P & CR 362, [2001] 2 EGLR 46.

11 *Irvine v Moran* (1990) 24 HLR 1, [1991] 1 EGLR 261; cf *Staves and Staves v Leeds City Council* (1990) 23 HLR 107, [1992] 2 EGLR 37, CA (saturation of area of plaster held to amount to disrepair of the structure); *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) 15 HLR 63, [1984] 1 EGLR 47, CA (where it was conceded that the landlord was liable to repair saturated plaster under a covenant to repair main walls).

12 *Holiday Fellowship Ltd v Viscount Hereford* [1959] 1 All ER 433, [1959] 1 WLR 211, CA; cf *Boswell v Crucible Steel Co* [1925] 1 KB 119, CA; *Taylor v Webb* [1937] 2 KB 283, [1936] 2 All ER 763 (revsd on other grounds [1937] 2 KB 283 at 290, [1937] 1 All ER 590, CA); *Reston Ltd v Hudson* [1990] 2 EGLR 51.

13 *McClure v Little* (1868) 19 LT 287. An agreement by the landlord to repair the demised premises does not bind him to cleanse ornamental water (*Bird v Elwes* (1868) LR 3 Exch 225); but a covenant to keep pleasure grounds in good order includes ornamental lakes, and the covenantor may be liable for the expense of removing mud and for deterioration of the fishing (*Horlick v Scully* [1927] 2 Ch 150).

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#### 453. Requirement of notice to landlord of want of repair.

A covenant by a landlord to repair the demised premises is construed as a covenant to repair on notice<sup>1</sup>; and, until he has received notice, or has actual knowledge of the want of repair<sup>2</sup>, he is not guilty of any breach of his covenant<sup>3</sup>. The fact that the landlord has a right of entry upon the premises does not relieve the tenant of the obligation to give such notice before he may hold his landlord liable for breach of covenant<sup>4</sup> but may give rise to a duty to take reasonable care that the premises are safe under the Defective Premises Act 1972<sup>5</sup>. Directly the landlord has been given notice or he or his agents have knowledge of the defect, it is his duty, if permanent repair is not immediately possible, to take immediate steps to render the premises temporarily safe<sup>6</sup>.

The requirement of notice does not, however, apply where the covenant relates to parts of the building not demised to the tenant. In such a case, the liability for breach of the covenant does not depend on notice and arises as soon as the disrepair occurs<sup>7</sup>.

1 *Torrens v Walker* [1906] 2 Ch 166; *McCarrick v Liverpool Corpn* [1947] AC 219, [1946] 2 All ER 646, HL; *Uniproducs (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 All ER 146, [1956] 1 WLR 45.

2 *Griffin v Pillet* [1926] 1 KB 17. In *Torrens v Walker* [1906] 2 Ch 166 at 172, Warrington J expressed the opinion that notice had to be given by the tenant and that it would not suffice if the landlord learnt of the non-repair from another source; and in *Hugall v M'Lean* (1885) 53 LT 94, CA, Brett LJ expressed a similar opinion. In *Griffin v Pillet* supra, however, Wright J followed the opinion expressed by Lord Sumner in *Murphy v Hurly* [1922] 1 AC 369, HL, to the contrary effect; and in *O'Brien v Robinson* [1973] AC 912 at 926, [1973] 1 All ER 583 at 589, HL, Lord Morris of Borth-y-Gest observed obiter that the landlord's obligation arises whenever he acquires knowledge of disrepair, whether or not that knowledge is shared by the tenant. For cases on what constitutes sufficient notice in the context of the landlord's repairing obligation imposed by the Landlord and Tenant Act 1985 s 11 (as amended) see PARA 416 note 16 ante.

3 *Makin v Watkinson* (1870) LR 6 Exch 25; *London and South Western Rly Co v Flower* (1875) 1 CPD 77 at 85; *Manchester Bonded Warehouse Co v Carr* (1880) 5 CPD 507; *Hugall v M'Lean* (1885) 53 LT 94, CA; *Torrens v Walker* [1906] 2 Ch 166; *Tredway v Mechin* (1904) 53 WR 136, CA; *Fisher v Walters* [1926] 2 KB 315; *Morgan v Liverpool Corpn* [1927] 2 KB 131, CA; *Murphy v Hurly* [1922] 1 AC 369, HL; *Griffin v Pillet* [1926] 1 KB 17. The rule applies whether or not the want of repair existed when the tenancy began: *Uniproducs (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 All ER 146, [1956] 1 WLR 45. No breach arises if the landlord carries out the necessary repairs within a reasonable time of receiving notice: *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759 at 769, [1984] 1 WLR 287 at 298, CA, per Griffiths LJ; *Morris v Liverpool City Council* (1987) 20 HLR 498, [1988] 1 EGLR 47, CA.

4 See PARA 475 post.

5 *McCarrick v Liverpool Corpn* [1947] AC 219, [1946] 2 All ER 646, HL. If the part of the property which becomes defective is not in the exclusive possession of the tenant, there may be no necessity for the notice, as, for example, where the defect is in a sea wall over which the landlord keeps control: *Murphy v Hurly* [1922] 1 AC 369, HL; and see PARA 476 post.

6 *Griffin v Pillet* [1926] 1 KB 17.

7 *British Telecommunications plc v Sun Life Assurance Society plc* [1996] Ch 69, [1995] 4 All ER 44, CA (landlord in breach of covenant immediately upon the exterior wall cladding falling into disrepair), applied in *Passley v Wandsworth London Borough Council* (1996) 30 HLR 165, CA. See also *Marshall v Rubypoint Ltd* (1997) 29 HLR 850, [1997] 1 EGLR 69, CA; *Earle v Charalambous* [2006] All ER (D) 147 (Oct), CA.

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## **(4) REMEDIES FOR BREACH**

### **(i) Landlord's Remedies**

#### **454. In general.**

The landlord's remedies for breach by the tenant of his repairing covenant are:

- 1031 (1) forfeiture<sup>1</sup>; and/or
- 1032 (2) a claim for damages<sup>2</sup>; or
- 1033 (3) entry to carry out the repairs and recovery of the cost of doing so if the terms of the lease so provide<sup>3</sup>.

In rare cases, specific performance is also available as the appropriate remedy<sup>4</sup>.

1 See PARA 603 et seq post.

2 See PARAS 455-460 post. Damages are recoverable only from the tenant or an assignee; a beneficiary in occupation is not liable: *Ramage v Womack* [1900] 1 QB 116.

3 See PARA 449 the text and notes 8-9 ante.

4 See *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860, where Lawrence Collins QC, sitting as a deputy judge of the High Court, granted specific performance of repairing covenants relating to a listed building, stating that the lack of any serious alternative remedy, the absence of any real dispute about the repairs required, the scope of the repairs and the deterioration of the state of the property and the notices served by the district council together strongly pointed to specific performance being the appropriate remedy. Cf *Fenton Properties Inc v 41 Arundel Gardens Ltd* [2005] All ER (D) 266 (Dec) (works required by local authority as outlined in preliminary assessment letter not sufficiently precise to found an order for specific performance). See further PARA 461 post.

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#### **455. Notice by landlord before claim for damages.**

Where in the case of a tenancy<sup>1</sup>, whether of a house or of other property, and without regard to rateable value<sup>2</sup>, where the following conditions are fulfilled, namely:

- 1034 (1) the tenancy was granted for a term of years certain of not less than seven years;
- 1035 (2) three years or more of the term remain unexpired at the date of the service of the notice of dilapidations<sup>3</sup> or, as the case may be, the claim for damages; and
- 1036 (3) the tenancy is neither a tenancy of an agricultural holding in relation to which the Agricultural Holdings Act 1986 applies nor a farm business tenancy<sup>4</sup>,

a lessor<sup>5</sup> serves on a lessee<sup>6</sup> a notice<sup>7</sup> that relates to a breach of covenant or agreement to keep or put in repair<sup>8</sup> during the currency of the lease all or any of the property comprised in the lease<sup>9</sup>, the lessee may within 28 days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of the Leasehold Property (Repairs) Act 1938<sup>10</sup>.

A right to damages for a breach of such a covenant is not enforceable by a claim commenced at any time at which three years or more of the term of the lease remain unexpired unless the lessor has served on the lessee a notice<sup>11</sup> not less than one month before the commencement of the claim, and, where a notice is so served, the lessee may, within 28 days from the date of service of it, serve on the lessor a counter-notice to the effect that he claims the benefit of the 1938 Act<sup>12</sup>.

A notice so served by a lessor is not valid unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled to serve on the lessor a counter-notice claiming the benefit of the 1938 Act, and a statement in the like characters specifying the time within which and the manner in which a counter-notice may be served and specifying the name and address for service of the lessor<sup>13</sup>.

1 For these purposes, 'tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or in pursuance of any enactment, including the Landlord and Tenant Act 1954, but does not include a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee: s 69(1). 'Mortgage' includes a charge or lien and 'mortgagor' and 'mortgagee' are to be construed accordingly: s 69(1).

2 As to the abolition of domestic rates see PARA 521 post.

3 For these purposes, 'notice of dilapidations' means a notice under the Law of Property Act 1925 s 146(1) (see PARA 619 post): Landlord and Tenant Act 1954 s 51(6).

4 Ibid s 51(1) (amended by the Agricultural Tenancies Act 1995 s 40, Schedule para 11). For these purposes, 'agricultural holding' has the same meaning as in the Agricultural Holdings Act 1986 (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323); and 'farm business tenancy' has the same meaning as in the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Landlord and Tenant Act 1954 s 69(1) (amended for these purposes by the Agricultural Holdings Act 1986 s 100, Sch 14 para 22; the Agricultural Tenancies Act 1995 Schedule para 12).

5 For these purposes, 'lessor' has the meaning assigned to it by the Law of Property Act 1925 s 146 (as amended) (see PARA 619 note 3 post) except that it does not include any reference to the person making such a grant as is mentioned in s 146 (as amended) or persons deriving title under such a person: Leasehold Property (Repairs) Act 1938 s 7(1).

6 For these purposes, 'lessee' has the meaning assigned to it by the Law of Property Act 1925 s 146 (as amended) (see PARA 619 note 1 post) except that it does not include any reference to the grantee under such a grant as is mentioned in s 146 (as amended) or to persons deriving title under such a person: Leasehold Property (Repairs) Act 1938 s 7(1). 'Lessee' means a lessee who is in possession or who has a subsisting tenancy at the date when proceedings were taken: *Cusack-Smith v Gold* [1958] 2 All ER 361, [1958] 1 WLR 611; cf *Baker v Sims* [1959] 1 QB 114 at 129, [1958] 3 All ER 326 at 335, CA, per Lord Evershed MR. A mortgagee in possession is not a lessee for these purposes: *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983, [2003] 1 All ER 509.

7 le a notice under the Law of Property Act 1925 s 146(1): see PARA 619 post. The notice is valid only if served before work has been done such as would remedy the breach: *SEDAC Investments Ltd v Tanner* [1982] 3 All ER 646, [1982] 1 WLR 1342; considered in *Hamilton v Martell Securities Ltd* [1984] Ch 266, [1984] 1 All ER 665.

8 This requirement does not, however, necessarily apply to every obligation imposed by a compendious repairing covenant such as an obligation to clean a lavatory (*Starokate Ltd v Burry* [1983] 1 EGLR 56, (1982) 265 Estates Gazette 871, CA) or to an obligation to lay out insurance moneys on rebuilding (*Farimani v Gates* [1984] 2 EGLR 66, (1984) 271 Estates Gazette 887, CA).

9 For these purposes, 'lease' (1) has the meaning assigned to it by the Law of Property Act 1925 s 146 (as amended) (see PARA 619 note 1 post) except that it does not include any reference to such a grant as is mentioned in s 146 (as amended); and (2) means a lease for a term of seven years or more, not being a lease of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 which is a lease in relation to which that Act applies and not being a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995: Leasehold Property (Repairs) Act 1938 s 7(1) (amended by the Landlord and Tenant Act 1954 s 51(2) (g); the Agricultural Holdings Act 1986 s 100, Sch 14 para 17; the Agricultural Tenancies Act 1995 Schedule para 8). As to the necessity of a notice before action is taken to forfeit a lease for breach of covenant see PARA 619 post.

10 Leasehold Property (Repairs) Act 1938 s 1(1) (s 1(1), (2) amended by the Landlord and Tenant Act 1954 s 51(2), (5)). As to the leases to which the Leasehold Property (Repairs) Act 1938 does not apply see PARA 457 post. A mortgagee in possession is not entitled to serve a counter-notice under this provision: *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983, [2003] 1 All ER 509, disapproving *Target Home Loans Ltd v Iza Ltd* [2000] 1 EGLR 23, [2000] 02 EG 117, Central London county court.

The provisions of the Law of Property Act 1925 s 196 (as amended) (see PARA 621 post) extend to notices and counter-notices required or authorised by the Leasehold Property (Repairs) Act 1938 (s 7(2)); and the Landlord and Tenant Act 1927 s 23(2) (see PARA 703 post) applies in relation to any counter-notice to be served under the Leasehold Property (Repairs) Act 1938 (Landlord and Tenant Act 1954 s 51(4)). A tenant may not rely on a counter-notice served by his mortgagees: *Church Comrs for England v Ve-Ri-Best Manufacturing Co Ltd* [1957] 1 QB 238, [1956] 3 All ER 777.

The Leasehold Property (Repairs) Act 1938 applies where there is an interest belonging to Her Majesty in right of the Crown, or to a government department, or held on behalf of Her Majesty for the purposes of a government department, in like manner as if that interest were an interest not so belonging or held: Landlord and Tenant Act 1954 s 51(3). The provisions of the Leasehold Property (Repairs) Act 1938 apply to claims for forfeiture or damages in respect of breaches of covenants to repair, but not to claims for debts due under a lease: *Middlegate Properties Ltd v Gidlow Jackson* (1977) 34 P & CR 4, CA (claim by the landlord under the terms of the lease for the costs of preparing a notice under the Law of Property Act 1925 s 146 (as amended) relating to breaches of repairing covenants). Cf the Leasehold Property (Repairs) Act 1938 s 2; and note 13 infra. See also *Hamilton v Martell Securities Ltd* [1984] Ch 266, [1984] 1 All ER 665, followed in *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80, [1984] 2 All ER 601 (expenses of executing repairs pursuant to express right to enter to do so and recover the cost as a debt); and see PARA 449 note 8 ante.

11 See note 7 supra.

12 Leasehold Property (Repairs) Act 1938 s 1(2) (as amended: see note 10 supra).

13 Ibid s 1(4). In *Sidnell v Wilson* [1966] 2 QB 67, [1966] 1 All ER 681, CA (overruled on other grounds by *Associated British Ports v CH Bailey plc* [1990] 2 AC 703, [1990] 1 All ER 929, HL), it was held that a notice which did not comply with the provisions of the Leasehold Property (Repairs) Act 1938 could be read together with a subsequent letter from the landlord, so that the two documents together constituted a valid notice. The notice need not specify all the ways in which service of a counter-notice may be effected, and the requirement that the statement of the tenant's right to serve a counter-notice should be in 'characters not less conspicuous than those used in any other part of the notice' means that the statement must be equally readable or equally sufficient to inform the tenant of his right: *Middlegate Properties Ltd v Messimeris* [1973] 1 All ER 645, [1973] 1 WLR 168, CA. Cf *BL Holdings Ltd v Marcolt Investments Ltd* [1979] 1 EGLR 97, (1978) 249 Estates Gazette 849, CA.

A lessor on whom a counter-notice is served under the Leasehold Property (Repairs) Act 1938 s 1 (as amended) is not entitled to the benefit of the Law of Property Act 1925 s 146(3) (see PARA 623 post) so far as regards any costs or expenses incurred in reference to the breach in question, unless he makes an application for leave for the purposes of the Leasehold Property (Repairs) Act 1938 s 1 (as amended); and on such an application the court has power to direct whether and to what extent the lessor is to be entitled to the benefit thereof: s 2.

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#### **456. Effect of counter-notice by tenant.**

Where a counter-notice is served by a lessee<sup>1</sup>, then, notwithstanding anything in any enactment or rule of law, no legal proceedings<sup>2</sup> may be taken by the lessor<sup>3</sup> for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease<sup>4</sup>, for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court<sup>5</sup>. Where the landlord has obtained leave to commence proceedings against the tenant, and the tenant subsequently assigns the lease, the landlord may not bring a claim against the assignee without obtaining fresh leave<sup>6</sup>.

Leave may not, however, be so given unless the lessor proves:

- 1037 (1) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach<sup>7</sup>;
- 1038 (2) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision;
- 1039 (3) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of the premises or of part thereof;
- 1040 (4) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or
- 1041 (5) special circumstances which, in the opinion of the court, render it just and equitable<sup>8</sup> that leave should be given<sup>9</sup>.

The above grounds are alternatives and leave may be given if the landlord proves one of them<sup>10</sup>. The relevant date upon which the landlord has to prove one or more of those grounds is the date of the hearing of the application for leave to bring forfeiture proceedings<sup>11</sup>. He must prove both the breach and the ground according to the ordinary civil standard of proof, namely on the balance of probabilities; and it is not sufficient to establish merely a *prima facie* case<sup>12</sup>. The court has a discretion to refuse leave even if the landlord has made out his ground<sup>13</sup>. In granting or refusing leave, the court may impose such terms and conditions on the lessor or the lessee as the court may think fit<sup>14</sup>.

1 le under the Leasehold Property (Repairs) Act 1938 s 1 (as amended): see PARA 455 ante. For the meaning of 'lessee' see PARA 455 note 6 ante.

2 The statutory wording is 'no proceedings, by action or otherwise'. An 'action' is now generally known as a claim: see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 For the meaning of 'lessor' see PARA 455 note 5 ante.

4 For the meaning of 'lease' see PARA 455 note 9 ante.

5 Leasehold Property (Repairs) Act 1938 s 1(3). The prohibition ceases to apply where there are less than three years of the term to run: *Baker v Sims* [1959] 1 QB 114, [1958] 3 All ER 326, CA. Where a tenant fails to

comply with a repairing covenant in a lease which expressly confers on a landlord the right to enter on the demised premises, carry out the repairs himself and recover the cost from the tenant, a claim by the landlord to recover the cost of the repairs is a claim in debt for reimbursement of sums spent in carrying out the repairs himself rather than a claim for damages for breach of the covenant to repair within the Leasehold Property (Repairs) Act 1938 s 1 (as amended), and accordingly the landlord does not require leave under s 1(3) to bring the claim against the tenant: *Jervis v Harris* [1996] Ch 195, [1996] 1 All ER 303, CA.

For these purposes, 'the court' means the county court except in a case where the claim for which leave may be given would have to be taken in a court other than the county court and means in such excepted case that other court: Leasehold Property (Repairs) Act 1938 s 6(1). Where appropriate, the court may give leave even where the landlord has failed to ascertain the name of the tenant: *Pascall v Galinski* [1970] 1 QB 38, [1969] 3 All ER 1090, CA.

A landlord's application for leave to commence proceedings which are intended to include a claim for forfeiture is registrable under the Land Charges Act 1972 s 5(1) (see LAND CHARGES vol 26 (2004 Reissue) PARA 647) as a pending land action: *Selim Ltd v Bickenhall Engineering Ltd* [1981] 3 All ER 210, [1981] 1 WLR 1318. It is doubtful, however, whether a claim for damages alone is a pending action.

6 *Kanda v Church Comrs for England* [1958] 1 QB 332, sub nom *Church Comrs for England v Kanda* [1957] 2 All ER 815, CA.

7 Even if the premises are in substantial disrepair or completely destroyed by fire, the landlord may be unable to demonstrate substantial diminution in the value of the reversion: see *Associated British Ports v CH Bailey plc* [1990] 2 AC 703, [1990] 1 All ER 929, HL; *Landmaster Properties Ltd v Thackeray Property Services Ltd* [2003] EWHC 959 (QB), [2003] 2 EGLR 30, [2003] All ER (D) 86 (Apr).

8 See *Landmaster Properties Ltd v Thackeray Property Services Ltd* [2003] EWHC 959 (QB), [2003] 2 EGLR 30, [2003] All ER (D) 86 (Apr) (special circumstances existing where the premises had been destroyed by fire started by a trespasser after tenant had left property unoccupied and allowed it to be vandalised).

9 Leasehold Property (Repairs) Act 1938 s 1(5) (amended by the Landlord and Tenant Act 1954 s 51(2)(c), (d), (5)).

10 *Phillips v Price* [1959] Ch 181, [1958] 3 All ER 386.

11 *Landmaster Properties Ltd v Thackeray Property Services Ltd* [2003] EWHC 959 (QB), [2003] 2 EGLR 30, [2003] All ER (D) 86 (Apr) (not following *Re Metropolitan Film Studios Ltd v Twickenham A Film Studios Ltd (Intended Action)* [1962] 3 All ER 508, [1962] 1 WLR 1315).

12 *Associated British Ports v CH Bailey plc* [1990] 2 AC 703, [1990] 1 All ER 929, HL, overruling *Sidnell v Wilson* [1966] 2 QB 67, [1966] 1 All ER 681, CA. It would seem that matters proved at the leave stage may not be relitigated in the subsequent proceedings: *Associated British Ports v CH Bailey plc* supra at 714 and at 936, per Lord Templeman.

13 *Land Securities plc v Metropolitan Police District Comr* [1983] 2 All ER 254, [1983] 1 WLR 439 (leave refused on the ground that the questions which the landlord wanted resolved could be resolved more conveniently, quickly and cheaply in existing proceedings for declaratory relief); *Re Metropolitan Film Studios Ltd v Twickenham Film Studios Ltd* [1962] 3 All ER 508, [1962] 1 WLR 1315 (where it was suggested that the discretion should be exercised in the landlord's favour unless the court was clearly convinced that it would be wrong to do so; sed quaere).

14 Leasehold Property (Repairs) Act 1938 s 1(6). The court might eg adjourn or dismiss the application on terms that certain repairs are carried out: *Associated British Ports v CH Bailey plc* [1990] 2 AC 703 at 713, [1990] 1 All ER 929 at 936, HL, per Lord Templeman. In practice 'unless' orders are often made, giving leave unless specified works have been executed by a specified date.

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#### **457. Breaches of covenant to which restrictions do not apply.**

The statutory restrictions on the enforcement of covenants to repair<sup>1</sup> apply to leases created and to breaches occurring before or after the commencement of the Acts by which they were imposed<sup>2</sup>; but those restrictions do not apply to a breach of a covenant or agreement in so far as it imposes on the lessee<sup>3</sup> an obligation to put premises into repair which is to be performed upon the lessee taking possession of the premises or within a reasonable time thereafter<sup>4</sup>.

1 The Leasehold Property (Repairs) Act 1938: see PARAS 455-456 ante.

2 See *ibid* s 5; the Landlord and Tenant Act 1954 s 51(5); and *National Real Estate and Finance Co Ltd v Hassan* [1939] 2 KB 61, [1939] 2 All ER 154, CA.

3 For the meaning of 'lessee' see PARA 455 note 6 ante.

4 Leasehold Property (Repairs) Act 1938 s 3 (amended by the Landlord and Tenant Act 1954 s 51(2)(c)).

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#### 458. Other provisions protecting tenants.

So long as land is requisitioned in the exercise of emergency powers, the tenant is in general relieved from liability for breach of a covenant to repair<sup>1</sup>. The obligation of a tenant to repair may be modified, suspended or extinguished by the occurrence of war damage; and in such a case all rights or remedies arising from that obligation will be modified, suspended or extinguished accordingly<sup>2</sup>.

Although, in some circumstances, the doctrine of frustration may be applied to particular covenants<sup>3</sup>, the tenant may be liable for breach of a repairing covenant even though he is unable to obtain planning permission to do the necessary repairs<sup>4</sup>, or is otherwise prevented by regulations from complying with the covenant<sup>5</sup>.

In certain circumstances, where a tenancy is subject to the statutory protection for long residential tenancies<sup>6</sup>, the tenant, by giving notice to his landlord, may render an order for possession for breach of his covenant to repair of no effect<sup>7</sup>; and the service of a notice of claim for the freehold or an extended lease<sup>8</sup> or a notice claiming to exercise the right to collective enfranchisement<sup>9</sup> or the right to acquire a new lease<sup>10</sup> prevents the landlord from taking forfeiture proceedings except with the leave of the court<sup>11</sup>.

1 See the Landlord and Tenant (Requisitioned Land) Act 1944 s 1; and PARA 480 post.

2 See PARA 479 post.

3 See *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL; *Sturcke v SW Edwards Ltd* (1971) 23 P & CR 185; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL; *John Lewis Properties plc v Viscount Chelsea* (1993) 67 P & CR 120, [1993] 2 EGLR 77.

4 *Sturcke v SW Edwards Ltd* (1971) 23 P & CR 185.

5 *Eyre v Johnson* [1946] KB 481, [1946] 1 All ER 719; *Maud v Sandars* [1943] 2 All ER 783.

6 The protection under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) and the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post).



7 See the Landlord and Tenant Act 1954 s 16; and PARA 1233 post; the Local Government and Housing Act 1989 Sch 10 para 20(1); and PARA 1238 post.

8 le under the Leasehold Reform Act 1967: see PARA 1389 et seq post.

9 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

10 le under ibid Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq post.

11 See the Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 4(1); and PARA 1434 post; the Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 7 (as amended); and PARA 1596 post; s 42(9), Sch 12 para 6; and PARA 1687 post. For a case in which leave was given see *Liverpool Corp v Husan* [1972] 1 QB 48, [1971] 3 All ER 651, CA.

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#### **459. Claim for damages during term.**

Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease<sup>1</sup>, whether such covenant or agreement is expressed or implied, and whether general or specific, may in no case exceed the amount, if any, by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of that covenant or agreement<sup>2</sup>. The reversion to be considered is that expectant upon the existing lease and not that expectant on a reversionary lease to take effect on a future day<sup>3</sup>. In practice the damages are generally the amount by which the saleable value of the premises has been diminished by reason of the non-repair of the premises<sup>4</sup>. If the damages are claimed during the subsistence of the term, the amount of the diminution depends in part upon the length of the unexpired term<sup>5</sup>; but, where the term is forfeited by reason of the breach of covenant, the damages are assessed as if the term had expired, so that the acceleration of the landlord's reversion by reason of the forfeiture does not reduce or discount the damages then recoverable<sup>6</sup>.

Where the landlord is the freeholder, and is entitled to the reversion free from any liability on his part, the diminution caused to the saleable value of his estate furnishes the proper measure of damages<sup>7</sup>. Where the landlord is himself a tenant, the reversion may be notional only; but this does not prevent it from being valued and damages from being assessed<sup>8</sup>. Further, if the landlord is under a covenant with his superior landlord to repair, and the tenant has notice of the existence of a head lease, the landlord's liability under the covenant in the head lease must be taken into account in assessing the damages<sup>9</sup>. Where the tenant covenants to spend a certain sum each year on repairs or pay the difference in money, the difference in money is recoverable as a debt and not as damages for failure to repair, and the amount is not limited to the diminution in value of the reversion<sup>10</sup>.

1 For these purposes, 'lease' means a lease, underlease or other tenancy, assignment operating as a lease or underlease, or an agreement for such a lease, underlease, tenancy or assignment: Landlord and Tenant Act 1927 s 25(1).

2 Ibid s 18(1). In an appropriate case the court can infer the damage to the reversion from the evidence as to the estimated cost of the repairs: see eg *Latimer v Carney* [2006] EWCA Civ 1417, [2006] All ER (D) 347 (Oct). If none of the repairs can realistically be expected to survive the refurbishment, or if only such an insignificant proportion can be expected to survive as to fall within the 'de minimis' concept, the landlord's interest at the term date will not be diminished in any way by reason of the disrepair: *Firle Investments Ltd v Datapoint International Ltd* [2000] All ER (D) 634 (judge's order as to costs varied on appeal [2001] EWCA Civ

1106, [2001] NPC 106, [2001] All ER (D) 258 (Jun)). See also *Ultraworth Ltd v General Accident Fire and Life Assurance Corp plc* [2000] 2 EGLR 115, [2000] All ER (D) 100 (no diminution in value of reversion).

3 *Terroni and Necchi v Corsini* [1931] 1 Ch 515; *Hanson v Newman* [1934] Ch 298 at 304, 305, CA.

4 *Smith v Peat* (1853) 9 Exch 161; cf *Metge v Kavanagh* (1877) IR 11 CL 431; and as to the identity of the premises see *Mapleton v Rawlings* (1854) 3 CLR 237.

5 *Turner v Lamb* (1845) 14 M & W 412; *Ebbetts v Conquest* [1895] 2 Ch 377, CA (affd sub nom *Conquest v Ebbetts* [1896] AC 490, HL).

6 *Hanson v Newman* [1934] Ch 298, CA. It follows that different sums may be recoverable in respect of the same dilapidations, according to whether the landlord (1) sues for damages during the continuance of the term; or (2) forfeits the lease and sues for damages.

7 *Ebbetts v Conquest* [1895] 2 Ch 377 at 386, CA.

8 See *Lloyds Bank Ltd v Lake* [1961] 2 All ER 30, [1961] 1 WLR 884, distinguishing *Espir v Basil Street Hotel Ltd* [1936] 3 All ER 91, CA. See also *P & O Property Holdings Ltd v Secretary of State for the Environment* [2000] All ER (D) 205 (repairs undertaken by underlessees; diminution in value to be considered was the difference in value between the underleases in and out of repair and was assessed by reference to what a willing purchaser would pay a willing vendor for the reversion in each state).

9 *Ebbetts v Conquest* [1895] 2 Ch 377, CA; affd sub nom *Conquest v Ebbetts* [1896] AC 490, HL (if the underlease has only a short time to run, and the underlandlord has only a nominal reversion, the measure is properly applied by ascertaining the sum which the repairs will cost, and then allowing a discount for present payment). See also *Williams v Williams* (1874) LR 9 CP 659.

10 *Moss' Empires Ltd v Olympia (Liverpool) Ltd* [1939] AC 544, [1939] 3 All ER 460, HL.

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#### **460. Claim for damages after determination of term.**

After a lease has terminated, the landlord may bring a claim on the covenant to yield up the premises in repair. Damages for breach of a covenant or agreement to leave or put premises in repair at the termination of a lease<sup>1</sup>, whether such covenant or agreement is expressed or implied, and whether general or specific, may in no case exceed the amount, if any, by which the value of the reversion, whether immediate or not, in the premises is diminished owing to the breach of that covenant or agreement<sup>2</sup>. In particular, no damages may be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease if it is shown that the premises, in whatever state of repair they might be, would have been or would be pulled down at or shortly after the termination of the tenancy, or such structural alterations would have been or would be made to them as would render valueless the repairs covered by the covenant or agreement<sup>3</sup>. In such a case the tenant must show that at the termination of the lease the landlord had formed a definite intention to demolish or reconstruct the premises<sup>4</sup>.

At common law the measure of damages was the sum which it would take to put the premises in the state of repair in which the tenant ought, under the covenant, to leave them<sup>5</sup>. The proper cost of repairs may still be prima facie evidence of the extent of the damage to the reversion<sup>6</sup> but it is wrong to treat undiscounted costs of repair as a safe guide, especially where there is no finding that the landlord is going to undertake the repairs<sup>7</sup>. The fact that the premises can immediately be relet without any substantial expenditure due to a shortage of housing, is, of itself, irrelevant when assessing the damage to the reversion<sup>8</sup>, as is the fact that the landlord has taken a covenant from a new tenant to put the premises into repair, while agreeing to pay

over to him any damages for dilapidations recovered from the previous tenant<sup>9</sup>. It seems that the landlord is entitled, as part of his damages, to a sum for loss of rent during the time the repairs are being effected, as long as this sum and the cost of repairs do not exceed the diminution in the value of the reversion<sup>10</sup>, but the cost of drawing up a schedule of dilapidations is not recoverable, unless there is special provision for it in the lease<sup>11</sup>. Where damages are assessed by reference to the cost of repairs, the landlord is entitled to recover a sum equal to the VAT chargeable on the cost of repairs if he is not registered for VAT and is not going to deal with the premises in such a way as to enable him to recover the VAT as input tax<sup>12</sup>.

Where at the determination of the tenancy the premises are occupied for the purpose of their business by subtenants, holding on terms which include repairing obligations which correspond with those in the head lease, who are entitled and intend to renew<sup>13</sup> their tenancies, there is likely to be no diminution in the value of the reversion, because the rents on renewal will be fixed on the assumption that the premises are in repair<sup>14</sup>.

If the landlord has, during the term, already recovered damages for breach of covenant to keep in repair, these will be deducted from the sum which the tenant would otherwise pay as damages for breach of the covenant to leave in repair<sup>15</sup>.

Where the landlord has re-entered for breach of the covenant to repair, the damages to which he is entitled will not be diminished by the fact that he has obtained possession of the premises at an earlier date than if the lease had run its full period. In such a case the proper measure of damages is the difference in value between the premises as they were at the time of re-entry and the premises as they would have been had the covenant been performed<sup>16</sup>. The tenant is not liable on the repairing covenant for damage arising after the date of forfeiture<sup>17</sup>.

1 For the meaning of 'lease' see PARA 459 note 1 ante.

2 Landlord and Tenant Act 1927 s 18(1). For the meaning of 'reversion' see PARA 459 the text to note 3 ante. There may be damage to a reversion even though it is only notional and momentary: *Lloyds Bank Ltd v Lake* [1961] 2 All ER 30, [1961] 1 WLR 884.

3 Landlord and Tenant Act 1927 s 18(1).

4 *Cunliffe v Goodman* [1950] 2 KB 237, [1950] 1 All ER 720, CA. The material time is the date of the termination of the lease; and it does not matter if the landlord abandons his intention to demolish at some subsequent date: *Salisbury v Gilmore* [1942] 2 KB 38, [1942] 1 All ER 457, CA; *Keats v Graham* [1959] 3 All ER 919, [1960] 1 WLR 30, CA. See also *Hibernian Property Co Ltd v Liverpool Corp* [1973] 2 All ER 1117, [1973] 1 WLR 751.

5 *Joyner v Weeks* [1891] 2 QB 31 at 43, CA. This measure of damages was applied even if, owing to changes in the character of the neighbourhood, repairs of a less expensive nature would be equally effective to secure the letting of the property: *Morgan v Hardy* (1886) 17 QBD 770 (affd (1887) as reported in 35 WR 588, CA, per Lord Esher MR; affd sub nom *Hardy v Fothergill* (1888) 13 App Cas 351, HL); *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, CA. See also *Clare v Dobson* [1911] 1 KB 35 (underlandlord who, after breach of covenant to repair, executed the repairs and obtained relief from forfeiture, failed to recover from his undertenant, who failed to do the repairs, the cost of the proceedings for relief).

6 *Jones v Herxheimer* [1950] 2 KB 106, [1950] 1 All ER 323, CA; *Smiley v Townshend* [1950] 2 KB 311, [1950] 1 All ER 530, CA. In the latter case Denning LJ said that, where it is plain that the repairs are not going to be done by the landlord, the cost of them is little or no guide to the diminution in value of the reversion; nonetheless it does not follow that in such a case the diminution must be nominal: *Culworth Estates Ltd v Society of Licensed Victuallers* (1991) 62 P & CR 211, [1991] 2 EGLR 54, CA (diminution in value exceeded the cost of repairs; damages therefore limited to the cost of repairs plus professional fees plus loss of rent). The tenant may be able to show that the cost of repairs exceeds the diminution in value of the landlord's reversion at the termination of the lease: *Portman v Latta* [1942] WN 97; *London County Freehold and Leasehold Properties Ltd v Wallis-Whiddett* [1950] WN 180. For a case where the landlord failed to prove any diminution in the value of the reversion and where the onus did not shift to the tenant see *Mather v Barclays Bank plc* [1987] 2 EGLR 254. See also *Lintott Property Developments Ltd v Bower* [2005] All ER (D) 454 (May) (former landlord entitled to damages in the sum of £37,000, taking into account (1) the grand total for the cost of the works was in the region of £35,300; (2) a hypothetical buyer intending to let the premises might suffer some loss of rental income whilst the works were undertaken, or a hypothetical purchaser who would be an owner occupier might have a disruption of business for some weeks; (3) there was some difference between the sale price realised by

the claimant and that which might have been achieved had all the relevant repairs and decorations been carried out); *Mason v TotalFinaElf UK Ltd* [2003] EWHC 1604 (Ch), [2003] 3 EGLR 91, [2003] All ER (D) 191 (Jul).

7 *Crewe Services & Investment Corp v Silk* (1997) 79 P & CR 500, [1998] 2 EGLR 1, CA (a case concerning damages for breach of covenant under a continuing annual agricultural tenancy protected by the Agricultural Holdings Act 1986).

8 *Jaquin v Holland* [1960] 1 All ER 402, [1960] 1 WLR 258, CA. It would seem, however, that, if premises can be sold at the same price, whether or not in disrepair, there can be no diminution in the value of the reversion: see *Landeau v Marchbank* [1949] 2 All ER 172.

9 *Haviland v Long (Dunn Trust Ltd, third parties)* [1952] 2 QB 80, [1952] 1 All ER 463, CA.

10 See *Woods v Pope* (1835) 6 C & P 782; *Birch v Clifford* (1891) 8 TLR 103; *Culworth Estates Ltd v Society of Licensed Victuallers* (1991) 62 P & CR 211, [1991] 2 EGLR 54, CA (professional fees also recovered).

11 *Maud v Sandars* [1943] 2 All ER 783; *Lloyds Bank Ltd v Lake* [1961] 2 All ER 30, [1961] 1 WLR 884; *Bader Properties Ltd v Linley Property Investments Ltd* (1968) 19 P & CR 620. Reasonable costs properly incurred in the employment of the solicitor and surveyor or valuer may, however, be recovered as a debt in addition to damages if breach gave rise to a right of forfeiture which is waived at the request of the lessee or against which the lessee is granted relief: see the Law of Property Act 1925 s 146(3); and PARA 623 post.

12 *Drummond v S & U Stores Ltd* (1980) 258 Estates Gazette 1293 (VAT added to damages); *Elite Investments Ltd v TI Bainbridge Silencers Ltd (No 2)* [1987] 2 EGLR 50 (VAT not added to damages); *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1992] 2 EGLR 252 (VAT not added to damages where company's turnover such that company required to be registered for VAT). The landlord is now able generally to charge VAT on rent so that VAT is deductible as input tax: see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 217 et seq.

13 See under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

14 *Family Management v Gray* [1980] 1 EGLR 46, (1979) 253 Estates Gazette 369, CA; applied in *Crown Estate Comrs v Town Investments Ltd (National Westminster Bank plc, third party)* [1992] 1 EGLR 61, [1992] 08 EG 111.

15 *Henderson v Thorn* [1893] 2 QB 164; *Ebbetts v Conquest* (1900) 82 LT 560, DC.

16 *Hanson v Newman* [1934] Ch 298, CA.

17 *Associated Deliveries Ltd v Harrison* (1984) 50 P & CR 91, [1984] 2 EGLR 76, CA (damage caused after service of writ claiming possession but before landlord recovered possession).

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#### **461. Specific performance.**

It was the traditional view that specific performance of a tenant's repairing covenant would not be granted<sup>1</sup>. However, following development of the jurisdiction to grant specific performance of contracts to do building works, specific performance of repairing covenants began to be granted by analogy in cases where the works were sufficiently defined<sup>2</sup>. It has now been held that a modern law of remedies requires specific performance of a tenant's repairing covenant to be available in appropriate circumstances, and there are no constraints of principle or binding authority against the availability of the remedy, on the grounds that:

1042 (1) even if want of mutuality were any longer a decisive factor, the availability of the remedy against the tenant would restore mutuality as against the landlord;

- 1043 (2) the problems of defining the work and the need for supervision can be overcome by ensuring that there is sufficient definition of what has to be done in order to comply with the order of the court;
- 1044 (3) the court ought not be constrained by the supposed rule that the court will not enforce the defendants' obligation in part<sup>3</sup>.

There is, however, a need for great caution in granting the remedy against a tenant, and it will be a rare case in which the remedy of specific performance will be the appropriate one; in the case of commercial leases, the landlord will normally have the right to forfeit<sup>4</sup> or to enter and do the repairs at the expense of the tenant<sup>5</sup> and in residential leases, the landlord will normally have the right to forfeit in appropriate cases. Furthermore, the remedy ought not to be sought as a means of circumventing the statutory restrictions<sup>6</sup> on the recovery of damages<sup>7</sup>.

The Law Commission has recommended legislation to give the court power to decree specific performance of a repairing obligation in any lease or tenancy<sup>8</sup>.

1 See *Hill v Barclay* (1810) 16 Ves 402 at 406 obiter; *Jeune v Queens Cross Properties Ltd* [1974] Ch 97 at 100, [1973] 3 All ER 97 at 99-100, obiter per Pennycuik V-C.

2 See eg *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43, (1981) 259 Estates Gazette 860, CA (tenant responsible for servicing a lift; interlocutory (interim) mandatory injunction to use best endeavours to put lift into working order).

3 See *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860. Cf *Fenton Properties Inc v 41 Arundel Gardens Ltd* [2005] All ER (D) 266 (Dec) (works required by local authority as outlined in preliminary assessment letter not sufficiently precise to found an order for specific performance).

4 See PARA 603 et seq post.

5 See PARA 449 the text and notes 8-9 ante.

6 See PARAS 455-458 ante.

7 *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860.

8 See *Landlord and Tenant: Responsibility for State and Condition of Property* (Law Com No 238) (1996).

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## **(ii) Tenant's Remedies**

### **462. In general.**

The tenant's remedies for breach by the landlord of his repairing covenant are:

- 1045 (1) a claim for damages<sup>1</sup>;
- 1046 (2) an order for specific performance<sup>2</sup>;
- 1047 (3) the right to deduct the cost of repairs which he has actually carried out from the rent<sup>3</sup>;
- 1048 (4) a right to set off a claim for damages against sums owing to the landlord<sup>4</sup>; and
- 1049 (5) a right to apply for the appointment of a receiver<sup>5</sup>.

- 1 See PARA 463 post.
- 2 See PARA 464 post.
- 3 See PARA 463 the text and note 16 post.
- 4 See PARA 266 ante, PARA 463 the text and note 17 post.
- 5 See PARA 466 post.

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### **463. Damages for breach of covenant by landlord.**

Where the landlord is guilty of a breach of covenant to repair the demised premises, he is not liable for any damage suffered prior to the receipt by him of the notice to repair or to the time at which he has actual knowledge of the want of repair<sup>1</sup>.

The object of an award of damages is not to punish the landlord but to restore the tenant to the position he would have been in had there been no breach<sup>2</sup>. The facts of each case must be looked at carefully to see what damage the tenant has suffered and how he may be fairly compensated by a monetary award<sup>3</sup>. It is not necessary in every case to obtain evidence of the diminution in the value to the tenant<sup>4</sup>. Thus, if, after notice of the defect, the landlord neglects the property for so long that it becomes uninhabitable and the tenant moves into temporary accommodation and sues for specific performance of the landlord's repairing obligation, the measure of damages is:

- 1050 (1) the cost of redecorating<sup>5</sup>;
- 1051 (2) the cost of taking alternative accommodation<sup>6</sup>;
- 1052 (3) general damages for the unpleasantness of occupying the property as it deteriorated until it became uninhabitable and for any ill-health attributable to the disrepair<sup>7</sup>.

A tenant may also recover damages for personal injury or for damage to his property during the period when the landlord was in default<sup>8</sup> and for loss of profits<sup>9</sup>. If, however, the tenant chose to sell the dilapidated property and to move elsewhere, the proper measure of damages might be, subject to questions of remoteness, the diminution in the price attributable to the disrepair<sup>10</sup> and any abortive costs incurred in attempting to sell<sup>11</sup>. If the tenant had rented the property with a view to subletting it and the landlord was aware of this, the measure of damages would be the loss of rent attributable to the landlord's breach<sup>12</sup>.

The fact that the tenancy is protected and that the rent officer has fixed a fair rent, taking into account the state of disrepair, does not preclude the tenant from recovering damages<sup>13</sup>.

In assessing such damages, damage due to defects which the landlord is not bound to remedy must be excluded; and consideration of the question whether the execution of the repairs is to the commercial advantage or disadvantage of the landlord is irrelevant<sup>14</sup>.

It is not a condition precedent to the landlord's liability that the tenant should expend money in the execution of the repairs<sup>15</sup>; but, if the tenant does expend money in executing repairs which come within the landlord's express or implied obligations, the tenant may recoup himself out of

future rents<sup>16</sup>. Alternatively, the tenant may set off an unliquidated claim for damages for breach by the landlord of his repairing obligations against the liability to pay rent<sup>17</sup>.

The tenant is not to be regarded as disentitling himself to damages by continuing to use the premises pending the carrying out of repairs<sup>18</sup>; but he is not entitled to damages if he prevents the landlord from doing the necessary work<sup>19</sup>.

A tenant's damages may be reduced if he fails to mitigate his loss<sup>20</sup>.

A tenant may pursue a claim for any loss incurred as a result of his landlord's breach of his repairing covenant notwithstanding that the tenant has assigned the term<sup>21</sup>.

A tenant's claim for damages is not registrable as a pending land action<sup>22</sup>.

1 See PARA 453 ante. The landlord is not in breach until he has had notice and a reasonable time has elapsed for him to carry out the repair (unless the breach of covenant relates to parts of the building not demised to the tenant: see PARA 453 the text and note 7 ante): *Green v Eales* (1841) 2 QB 225, as explained in *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA; *Morris v Liverpool City Council* (1987) 20 HLR 498, [1988] 1 EGLR 47, CA; and see *Earle v Charalambous* [2006] All ER (D) 147 (Oct), CA.

2 *Wallace v Manchester City Council* [1998] 3 EGLR 38, [1998] All ER (D) 322, CA, where the Court of Appeal helpfully clarifies how damages for breach of repairing obligations by a landlord are to be assessed.

3 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA, explaining the dictum in *Hewitt v Rowlands* (1924) 93 LJB 1080, CA that prima facie the measure of damage is the difference in value to the tenant, from the date of the notice to repair to the date of the assessment of damages, between the premises in their condition at the time of assessment and their value if the landlord, on receipt of the notice, had fulfilled the obligations of his covenant. The factual examples in heads (1)-(3) in the text are all discussed in *Calabar Properties Ltd v Sticher* supra where the court applied the same general principle as was applied in *Dodd Properties (Kent) Ltd v Canterbury City Council* [1980] 1 All ER 928, [1980] 1 WLR 433 at 446, CA: see PARA 98 ante.

4 In *Wallace v Manchester City Council* [1998] 3 EGLR 38, [1998] All ER (D) 322, CA, it was stated that diminution in value is not a separate head of damages.

5 A landlord's obligation to repair carries with it an obligation to make good any damage to the decorations consequential upon the works of repair as well as damage to the decorations caused directly by the failure to repair: *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA; *Bradley v Chorley Borough Council* [1985] 2 EGLR 49, CA; *McDougall v Easington District Council* (1989) 58 P & CR 201, [1989] 1 EGLR 93, CA. It is not right to make a deduction for betterment: *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759 at 763, [1984] 1 WLR 287 at 291, CA, obiter, applying *Harbutt's 'Plasticine' Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447, [1970] 1 All ER 225, CA; *McGreal v Wake* supra.

6 This head of claim must be specifically pleaded: *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA, overruling *Green v Eales* (1841) 2 QB 225 in so far as it held that alternative accommodation was not a recoverable head of claim; and see *McGreal v Wake* (1983) 13 HLR 107, [1984] 1 EGLR 42, CA.

7 *Calabar Properties Ltd v Sticher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA (£3,000 general damages); *Wallace v Manchester City Council* [1998] 3 EGLR 38, [1998] All ER (D) 322, CA (the loss is the compensation for discomfort and inconvenience arising from the disrepair so the fact that the tenant is on housing benefit is not relevant); *Chiodi v de Marney* (1988) 21 HLR 6, [1988] 2 EGLR 64, CA (£1,500 for ill-health and £30 per week for discomfort etc, as against the rent of £8 per week, said to be at the very top of the proper range on the facts): cf *McCoy & Co v Clark* (1982) 13 HLR 87, CA; *Elmcroft Developments Ltd v Tankersley-Sawyer* (1984) (1984) 15 HLR 63, [1984] 1 EGLR 47, CA (£26 per week); *Taylor v Knowsley Borough Council* (1985) 17 HLR 376, CA; *Lubren v London Borough of Lambeth* (1987) 20 HLR 165, CA; *Davies v Peterson* (1988) 21 HLR 63, [1989] 1 EGLR 121, CA (award for 12 months' discomfort increased from £250 to £1,000 on appeal); *Sella House Ltd v Mears* (1988) 21 HLR 147, [1989] 1 EGLR 65, CA.

The judge is not obliged to assess damages falling within head (3) in the text separately under heads of both diminution in value and discomfort, because those heads of damage are alternative ways of expressing the same concept. If he assesses damages on a global basis he ought to cross-check by reference to the rent payable for the period of the breach of covenant: *Wallace v Manchester City Council* [1998] 3 EGLR 38, [1998] All ER (D) 322, CA; applied in *Shine v English Churches Housing Group* [2004] EWCA Civ 434, [2004] HLR 727, [2004] All ER (D) 125 (Apr) (award in favour of secure weekly tenant reduced as rent lower than if paying on

open market) and *Earle v Charalambous* [2006] EWCA Civ 1090, [2006] All ER (D) 430 (Jul) (further proceedings [2006] All ER (D) 147 (Oct), CA).

8 *Griffin v Pillet* [1926] 1 KB 17; *Porter v Jones* [1942] 2 All ER 570, CA. Where loss results partly from a breach of covenant by the landlord and partly from an intervening act of a third party, the party in breach will be liable for the loss if the intervening act was reasonably foreseeable by the parties at the time the lease was entered into: see *Marshall v Rubypoint Ltd* (1997) 29 HLR 850, [1997] 1 EGLR 69, CA (landlord covenanted to maintain, repair, redecorate and renew, inter alia, the common parts of a block of flats; front door of block fell into disrepair and tenant suffered a burglary; held that the landlord was liable in damages); *Long v Southwark London Borough Council* [2002] EWCA Civ 403, [2002] LGR 530, [2002] HLR 983 (failure to keep common parts of block clean and tidy; obligation not met by delegation to a contractor and award of damages upheld). Cf *Berryman v Hounslow London Borough Council* (1996) 30 HLR 567, (1996) Times, 18 December, CA (tenant of flat in high-rise block injured back after walking up four flights of stairs because the lift was unavailable; held that she was not entitled to damages for breach of the landlord's duty to keep the lift in working order).

9 *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1992] 2 EGLR 252; revsd on another point [1994] 4 All ER 834, [1994] 1 WLR 501, CA.

10 *Calabar Properties Ltd v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA.

11 *City and Metropolitan Properties Ltd v Greycroft* [1987] 3 All ER 839, [1987] 1 WLR 1085.

12 *Calabar Properties Ltd v Stitcher* [1983] 3 All ER 759, [1984] 1 WLR 287, CA; and see *Mira v Aylmer Square Investments Ltd* (1990) 22 HLR 182, [1990] 1 EGLR 45, CA; *Credit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, 69 P & CR 177 (lost premium and costs incurred in abortive attempts to dispose of underlease).

13 *Sturolson & Co v Mauroux* (1988) 20 HLR 332, [1988] 1 EGLR 66, CA.

14 *Hewitt v Rowlands* (1924) 93 LJB 1080, CA.

15 *Hewitt v Rowlands* (1924) 93 LJB 729 (affd 93 LJB 1080, CA); *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] Ch 592, [1959] 2 All ER 176, CA.

16 *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; and see *Asco Developments Ltd v Gordon* [1978] 2 EGLR 41, (1978) 248 Estates Gazette 683.

17 *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063; *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179, [1980] 1 EGLR 42; and see *Sharma v Joy* [2001] All ER (D) 328 (Oct).

18 *Porter v Jones* [1942] 2 All ER 570, CA; and see *Greene v Chelsea Borough Council* [1954] 2 QB 127, [1954] 2 All ER 318, CA.

19 *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] Ch 592, [1959] 2 All ER 176, CA.

20 *Minchburn Ltd v Peck* (1987) 20 HLR 392, [1988] 1 EGLR 53, CA (tenant's failure to report defects); *Sturolson & Co v Mauroux* (1988) 20 HLR 332, [1988] 1 EGLR 66, CA.

21 *City and Metropolitan Properties Ltd v Greycroft* [1987] 3 All ER 839, [1987] 1 WLR 1085.

22 *Regan & Blackburn Ltd v Rogers* [1985] 2 All ER 180, [1985] 1 WLR 870.

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#### **464. Specific performance; in general.**

Where the work which is to be done is sufficiently defined to enable a defendant landlord who is carrying out the order to give his contractors the proper instructions<sup>1</sup>, the court may order specific performance<sup>2</sup>. If the landlord does not comply with the order, the tenant may apply to



the court for a direction authorising the tenant to carry out the work at the landlord's expense<sup>3</sup>. The landlord's financial inability does not necessarily provide a defence to a claim for specific performance<sup>4</sup>.

The remedy remains available to a tenant after a forfeiture, if proceedings for relief are pending<sup>5</sup>.

A claim for specific performance of the landlord's repairing obligations is not registrable as a pending action<sup>6</sup>.

1 *Jeune v Queens Cross Properties Ltd* [1974] Ch 97 at 100, [1973] 3 All ER 97 at 99 (where Pennycuik J adopted this test from *Redland Bricks Ltd v Morris* [1970] AC 652 at 666, [1969] 2 All ER 576 at 580, HL, per Lord Upjohn). Pennycuik J did not confine his ratio to repairs to dwelling houses. As to specific performance of repairing covenants see also PARA 454 note 4 ante.

2 *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97; *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43, (1981) 259 Estates Gazette 860, CA (business premises; interlocutory (interim) order to use best endeavours to put the lift serving the premises into working order).

3 See *Parker v Camden London Borough Council* [1986] Ch 162, [1985] 2 All ER 141, CA.

4 *Francis v Cowcliffe Ltd* (1976) 33 P & CR 368 (specific performance ordered of obligation to provide lift to block of flats).

5 *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43, (1981) 259 Estates Gazette 860, CA.

6 *Regan & Blackburn Ltd v Rogers* [1985] 2 All ER 180, [1985] 1 WLR 870.

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#### **465. Specific performance available by statute to tenants of dwellings.**

In proceedings in which a tenant<sup>1</sup> of a dwelling<sup>2</sup> alleges a breach on the part of his landlord<sup>3</sup> of a repairing covenant<sup>4</sup> relating to any part of the premises in which the dwelling is comprised, the court may order specific performance of the covenant, whether or not the breach relates to a part of the premises let to the tenant<sup>5</sup> and notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise<sup>6</sup>.

The court is entitled to have regard to the practical consequences of an order for specific performance<sup>7</sup>.

1 For these purposes, 'tenant' includes a statutory tenant: Landlord and Tenant Act 1985 s 17(2)(a). For the meaning of 'tenant' and 'statutory tenant' see PARA 52 note 1 ante.

2 For the meaning of 'dwelling' see PARA 52 note 2 ante.

3 For these purposes, 'landlord', in relation to a tenant, includes any person against whom the tenant has a right to enforce a repairing covenant: Landlord and Tenant Act 1985 s 17(2)(c) (re-enacting the Housing Act 1974 s 125(2)). The Housing Act 1974 gave statutory force to the principle established in *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, [1973] 3 All ER 97 (cited in PARA 464 ante). For the meaning of 'landlord' in relation to a statutory tenant see PARA 52 note 3 ante; and for the meaning of 'repairing covenant' see note 4 infra.

4 For these purposes, 'repairing covenant' means a covenant to repair, maintain, renew, construct or replace any property: Landlord and Tenant Act 1985 s 17(2)(d).

5 For these purposes, in relation to a statutory tenant, any reference to the premises let to a tenant means the premises of which he is the statutory tenant: *ibid* s 17(2)(b).

6 *Ibid* s 17(1). The equitable rule referred to in the text is that supposed in *Hill v Barclay* (1810) 16 Ves 402 (see further SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 809-810); but see PARA 461 ante at head (1) in the text. The Landlord and Tenant Act 1985 s 17 does not, however, apply to a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies: Landlord and Tenant Act 1985 s 32(1).

7 See *Jan v Torrance* [2002] EWCA Civ 431, [2002] All ER (D) 267 (Mar).

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#### **466. Appointment of receiver or manager.**

The court has a general jurisdiction to make an interim or final order appointing a receiver and investing him with such powers as the court thinks necessary for the preservation of the property<sup>1</sup> whenever it appears to the court to be just and convenient to do so<sup>2</sup>. Additionally the tenant of a flat contained in premises consisting of the whole or part of a building containing two or more flats may in certain circumstances apply to a leasehold valuation tribunal for an order appointing a manager in relation to those premises<sup>3</sup>.

A receiver has been appointed where no attempt has been made by the landlord to collect the rents and service charges, the landlord's covenants to repair and insure were not being complied with and the property was deteriorating<sup>4</sup>; where the landlord had not abandoned the building but had failed to implement a programme of major repairs through lack of funds and the tenants were willing to put the receiver in funds<sup>5</sup>; where management by the landlords was nonexistent, the roof was leaking and there was no suggestion that the landlords would remedy any of these matters pending the hearing<sup>6</sup>; and where the balance of convenience favoured the appointment of a receiver to protect the tenants' interests in a case where the landlord had shown a disinclination to do repairs but had started work on the construction of additions to the building<sup>7</sup>; but not where the landlord was a local housing authority and the order sought might provoke an industrial dispute<sup>8</sup>. A court has no power to direct the landlord to remunerate the receiver and therefore he should not take office unless satisfied that the assets are sufficient to defray his remuneration or that he has an enforceable indemnity from a party to the litigation; moreover, the appointment of a receiver in a case where the moneys under his control are inadequate to meet the cost of the repairs is likely to prove ineffective<sup>9</sup>.

1 *Hart v Emelkirk Ltd, Howroyd v Emelkirk Ltd* [1983] 3 All ER 15, [1983] 1 WLR 1289.

2 Supreme Court Act 1981 s 37(1) (prospectively amended so as to be entitled the Senior Courts Act 1981 s 37(1) by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1, PARA 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed); County Courts Act 1984 s 38(1) (substituted by the Courts and Legal Services Act 1990 s 3). For an example of an order appointing a receiver and manager under this jurisdiction see *Clayhope Properties Ltd v Evans* [1986] 2 All ER 795, [1986] 1 WLR 1223, CA. An order for the appointment of a receiver may be registered under the Land Charges Act 1972 (see LAND CHARGES) or, in the case of registered land, protected by a notice under the Land Registration Act 2002 (see LAND REGISTRATION): *Clayhope Properties Ltd v Evans* supra.

3 See PARA 399 et seq ante. An application to the court for it to exercise in relation to any premises any jurisdiction to appoint a receiver or manager may not be made by a tenant, in his capacity as such, in any circumstances in which an application could be made by him to a leasehold valuation tribunal for an order under the Landlord and Tenant Act 1987 s 24 (as amended) (see PARA 402 ante) appointing a manager to act in relation to those premises: see s 21(6) (as amended); and PARA 399 ante.

- 4 *Hart v Emelkirk Ltd, Howroyd v Emelkirk Ltd* [1983] 3 All ER 15, [1983] 1 WLR 1289.
- 5 *Daiches v Bluelake Investments Ltd* (1985) 51 P & CR 51, [1985] 2 EGLR 67.
- 6 *Howard v Midrome Ltd* [1991] 1 EGLR 58.
- 7 *Blawdziewicz v Diadon Establishment* [1988] 2 EGLR 52.
- 8 *Parker v Camden London Borough Council* [1986] Ch 162, [1985] 2 All ER 141, CA.
- 9 *Evans v Clayhope Properties Ltd* [1988] 1 All ER 444, [1988] 1 WLR 358, CA. Where a manager is appointed by a leasehold valuation tribunal under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended) (see PARA 399 et seq ante), this problem is overcome by s 24(5)(c) (as amended): see PARA 402 ante at head (iii) in the text.

## UPDATE

### 466 Appointment of receiver or manager

NOTE 2--Appointed day is 1 October 2009: SI 2009/1604.

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### (iii) Procedure for Housing Disrepair Claims

#### 467. The pre-action protocol for tenants' claims.

There is a pre-action protocol<sup>1</sup> which covers housing disrepair claims<sup>2</sup> in England and Wales. The protocol is intended to encourage the exchange of information between parties at an early stage and to provide a clear framework within which parties in a housing disrepair claim can attempt to achieve an early and appropriate resolution of the issues. Before using the protocol tenants are expected to ensure that the landlord is aware of the disrepair and also to consider whether other options for having repairs carried out and/or for obtaining compensation are more appropriate<sup>3</sup>. Should a claim proceed to litigation, the court will expect all parties to have complied with the protocol as far as possible; parties who have unreasonably failed to do so may be ordered to pay costs or be subject to other sanctions<sup>4</sup>.

The pre-action protocol makes provision with regard to:

- 1053 (1) an early notification letter to be sent to the landlord<sup>5</sup>;
- 1054 (2) the letter of claim<sup>6</sup>;
- 1055 (3) limitation periods<sup>7</sup>;
- 1056 (4) the landlord's response<sup>8</sup>;
- 1057 (5) the use of experts<sup>9</sup>;
- 1058 (6) costs<sup>10</sup>;
- 1059 (7) alternative dispute resolution<sup>11</sup>; and
- 1060 (8) the form and content of specimen letters<sup>12</sup>.

<sup>1</sup> See the *Pre-action Protocol for Housing Disrepair Claims* (prepared by the Housing Disrepair Protocol Working Party and approved by the Head of Civil Justice). As to pre-action protocols generally see CIVIL PROCEDURE vol 11 (2009) PARA 107 et seq.

2 For these purposes, a disrepair claim is a civil claim arising from the condition of residential premises and may include a related personal injury claim, but does not include disrepair claims which originate as counterclaims or set-offs in other proceedings. The types of claim which the *Pre-action Protocol for Housing Disrepair Claims* is intended to cover include those brought under the Landlord and Tenant Act 1985 s 11 (as amended) (see PARAS 416-417 ante), the Defective Premises Act 1972 s 4 (see PARA 475 post), common law nuisance and negligence (see PARA 474 et seq post), and those brought under the express terms of a tenancy agreement or lease. It does not cover claims brought under the Environmental Protection Act 1990 s 82 (as amended) (statutory nuisances: see NUISANCE vol 78 (2010) PARA 226) which are heard in a magistrates' court. The protocol covers claims by any person with such a disrepair claim, including tenants, lessees and members of the tenant's family: see *Pre-action Protocol for Housing Disrepair Claims* para 3.1.

3 Examples of other options are set out in the *Pre-action Protocol for Housing Disrepair Claims* para 4.1(a).

4 *Pre-action Protocol for Housing Disrepair Claims* para 1. The specific aims of the protocol are: (1) to avoid unnecessary litigation; (2) to promote the speedy and appropriate carrying out of any repairs which are the landlord's responsibility; (3) to ensure that tenants receive any compensation to which they are entitled as speedily as possible; (4) to promote good pre-litigation practice, including the early exchange of information and to give guidance about the instruction of experts; and (5) to keep the costs of resolving disputes down: see PARA 2.

5 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.2.

6 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.3.

7 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.4.

8 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.5.

9 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.6.

10 See the *Pre-action Protocol for Housing Disrepair Claims* para 3.7.

11 See the *Pre-action Protocol for Housing Disrepair Claims* para 4.

12 See the *Pre-action Protocol for Housing Disrepair Claims* para 5, Annexes A-G.

## UPDATE

### 467 The pre-action protocol for tenants' claims

NOTE 10--See also *Lee v Birmingham City Council* [2008] EWCA Civ 891, [2008] All ER (D) 423 (Jul).

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### 468. Procedure for bringing claims; in general.

A landlord and tenant claim<sup>1</sup> must generally be started in the county court for the district in which the land is situated<sup>2</sup>. The general procedure for making claims and applications is discussed elsewhere in this work<sup>3</sup>.

1 'Landlord and tenant claim' means a claim under (1) the Landlord and Tenant Act 1927; (2) the Leasehold Property (Repairs) Act 1938; (3) the Landlord and Tenant Act 1954; (4) the Landlord and Tenant Act 1985; or (5) the Landlord and Tenant Act 1987: CPR 56.1(1). A practice direction may set out special provisions with regard

to any particular category of landlord and tenant claim: CPR 56.1(2). There is no particular provision made in the practice direction accompanying CPR Pt 56 with regard to housing disrepair claims.

2 See CPR 56.2; and PARA 57 ante.

3 See CPR Pt 7, CPR Pt 23; and CIVIL PROCEDURE vol 11 (2009) PARAS 116 et seq, 303 et seq.

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## (5) ALTERATIONS AND IMPROVEMENTS

### 469. Position at common law.

It is prima facie a breach of the covenant to repair if the tenant pulls down any part of the premises or makes alterations in them<sup>1</sup>, unless he is expressly or impliedly given power to do so by the lease<sup>2</sup>. Further, if the pulling down or alteration changes the nature of the demised premises, the tenant may be guilty of waste<sup>3</sup>.

In order to determine whether the pulling down or alteration constitutes a breach of the covenant, regard must, however, be had in each case to the user of the premises which is permitted by the lease<sup>4</sup>. It may be that the demised property may be used for a variety of purposes, for which without alteration and adaptation it is not suitable, in which case a right on the part of the tenant to adapt the premises for such use is to be inferred<sup>5</sup>.

An express covenant against making alterations or erecting new buildings is often found in leases; and a breach of any such covenant may be restrained by injunction<sup>6</sup>. Moreover, the court will grant a mandatory injunction requiring reinstatement where the tenant has interfered with the structure of the demised premises in breach of covenant<sup>7</sup>. In general the covenant will be construed so as only to forbid alterations which would affect the form or structure of the building<sup>8</sup>.

The tenant of a furnished house is not bound to keep the furniture and pictures in their original positions during the tenancy; and he is at liberty to store pictures or other articles in part of the house<sup>9</sup>.

1 Eg by opening a doorway in a wall (*Doe d Vickery v Jackson* (1817) 2 Stark 293; *Gange v Lockwood* (1860) 2 F & F 115) or pulling down a partition wall in the courtyard (*Doe d Wetherell v Bird* (1833) 6 C & P 195; and see *Borgnis v Edwards* (1860) 2 F & F 111). A change in the internal arrangements of the premises amounts to a change in 'layout' so as to be in breach of a covenant not to alter the plan, layout or elevation of the demised premises: *Waycourt Ltd v Viscount Chelsea* [2006] EWCA Civ 511, [2006] All ER (D) 295 (Mar) (vaults outside basement previously used for storage converted into a kitchen and dining area).

2 *Doe d Dalton v Jones* (1832) 4 B & Ad 126; *Hyman v Rose* [1912] AC 623, HL.

3 *Hyman v Rose* [1912] AC 623, HL. As to the restraint of waste by injunction see PARA 435 ante.

4 *Hyman v Rose* [1912] AC 623, HL, revsg *Rose v Spicer*, *Rose v Hyman* [1911] 2 KB 234, CA.

5 *Rose v Spicer*, *Rose v Hyman* [1911] 2 KB 234 at 254, CA, per Buckley LJ dissenting; followed on appeal sub nom *Hyman v Rose* [1912] AC 623, HL.

6 *Perry v Davis* (1858) 3 CBNS 769 (covenant not to make any external alterations or any internal alterations that might lessen the value of the premises without the landlord's consent in writing). Where there is such an express negative covenant, the court does not apparently have any discretion to refuse the injunction: *Doherty v Allman* (1878) 3 App Cas 709 at 720, HL; and see CIVIL PROCEDURE vol 11 (2009) PARA 453. The position is

different where there is no such covenant: *Hyman v Rose* [1912] AC 623, HL. The fact that the landlord stands by and sees the tenant making alterations in breach of covenant is not necessarily a waiver of the covenant: *Perry v Davis* supra.

7 *Viscount Chelsea v Muscatt* [1990] 2 EGLR 48, CA.

8 *Bickmore v Dimmer* [1903] 1 Ch 158, CA; *Haigh v Waterman* (1867) 16 LT 375 (breach of covenant not to erect new buildings by the erection of a greenhouse); *Pocock v Gilham* (1883) Cab & El 104 (breach by fixing advertisement hoardings to premises); cf *Joseph v LCC* (1914) 111 LT 276 (no breach of covenant not to alter elevation of building by the erection of an electric sign, as the alteration was only in the appearance and not in the fabric of the premises). In *LCC v Hutter* [1925] Ch 626, distinguishing *Joseph v LCC* supra, it was held that, by fixing brackets to the outside of premises for an electric advertisement, there had been a breach of the covenant not to cut or maim the principal walls, or damage the building or alter its elevation. See also *Wood v Cooper* [1894] 3 Ch 671 (breach by erection of permanent trellis work); *White v Ryan* [1932] IR 169 (removal of shop fittings not a breach of covenant).

In the absence of any such covenant, the tenant of an upper floor of a building is entitled to place window-boxes in brackets fixed into the outside wall (*Hope Bros Ltd v Cowan* [1913] 2 Ch 312; *Goldfoot v Welch* [1914] 1 Ch 213; and see PARA 162 note 5 ante), but the erection of a large sign may constitute a trespass on the forecourt (*Gifford v Dent* (1926) 71 Sol Jo 83; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 1 All ER 343).

9 *Miller v Stewart* (1899) 2 F 309, Ct of Sess.

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#### **470. Statutory provisions as to improvements.**

In all leases, whether made before, on or after 1 January 1926, containing a covenant, condition or agreement against the making of improvements without licence or consent, such covenant, condition or agreement is deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld<sup>1</sup>. Where the covenant prohibits the making of alterations or additions without consent, it is deemed to be subject to the same proviso, if the proposed alterations or additions do in fact constitute an improvement<sup>2</sup>. Whether an alteration or addition is an improvement to the demised premises is a question of fact, to be considered from the point of view of the tenant<sup>3</sup>. It may be an improvement to make openings in the main wall of a building, even if the lease contains an absolute covenant not to cut or maim the main walls<sup>4</sup>, or to pull down a wall and merge the demised premises with premises held under a lease from a different landlord<sup>5</sup> or to convert a loft into living accommodation by raising the level of the roof<sup>6</sup>. An alteration may be an improvement from the point of view of the tenant even though it produces damage or diminution in letting value from the point of view of the landlord, but the case may be different if the effect is to destroy the subject matter demised<sup>7</sup>.

The proviso so implied does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed<sup>8</sup>.

The onus of proving that the landlord's consent is unreasonably withheld is on the tenant; but, if the landlord gives no reason and merely refuses, he must show that his action was

reasonable<sup>9</sup>. He may object on aesthetic, artistic or sentimental grounds<sup>10</sup>; and he is entitled to withhold consent if the alteration necessarily entails trespassing on property retained by him<sup>11</sup> or if he has a reasonable objection to the use the tenant proposes to make of the altered property, whether that use is the same as or different from the use carried on in the remainder of the property<sup>12</sup>. He is entitled to take matters of estate management into account; but his interests must be weighed against the detriment which would be suffered by the tenant if consent were to be refused<sup>13</sup>.

1 Landlord and Tenant Act 1927 s 19(2). The purpose of the statutory (or similar express) covenant, and the relevant considerations to be taken into account by the court when considering the reasonableness of a landlord's refusal of consent to proposed alterations or additions, were considered in *Iqbal v Thakrar* [2004] EWCA Civ 592, [2004] 3 EGLR 21, [2004] All ER (D) 304 (Apr), where it was held that the principles in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, [1986] 1 All ER 321, CA, relating to consent by the landlord to an assignment (see PARA 492 post), can be applied with necessary changes. Those principles are: (1) the purpose of the covenant is to protect the landlord from the tenant effecting alterations and additions that could damage the property interests of the landlord; (2) a landlord is not entitled to refuse consent on grounds that have nothing to do with its property interests; (3) it is for the tenant to show that the landlord has unreasonably withheld its consent to the proposals that the tenant has put forward; implicit in that is the necessity for the tenant to make sufficiently clear what its proposals are, so that the landlord knows whether it should refuse or give consent to the alterations or additions; (4) it is not necessary for the landlord to prove that the conclusions that led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable landlord in the particular circumstances; (5) it might be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease, but whether such refusal would be reasonable or unreasonable will depend upon all the circumstances; eg, it might be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold; (6) although a landlord will usually need to consider only its own interests, there might be cases where it would be disproportionate for a landlord to refuse consent, having regard to the effects upon it and upon the tenant respectively; (7) consent cannot be refused on grounds of pecuniary loss alone; the proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment; and (8) in each case it will be a question of fact, dependent upon all the circumstances, as to whether the landlord, having regard to the actual reasons that impelled it to refuse consent, had acted unreasonably: see *Iqbal v Thakrar* supra at [26]. Those principles were also applied in *Sargeant v Macepark (Whittlebury) Ltd* [2004] EWHC 1333 (Ch), [2004] 4 All ER 662, [2004] 3 EGLR 26.

The Landlord and Tenant Act 1927 s 19(2) does not, however, apply to leases of agricultural holdings within the meaning of the Agricultural Holdings Act 1986 which are leases in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323), or to farm business tenancies within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302) or to mining leases: Landlord and Tenant Act 1927 s 19(4) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 15; the Agricultural Tenancies Act 1995 s 40, Schedule para 6). For the meaning of 'mining lease' see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 322.

Nor does the Landlord and Tenant Act 1927 s 19(2) apply to (a) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre; or (b) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation: see the Criminal Justice Act 1991 s 84(1), (3)(c) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532; the Criminal Justice and Public Order Act 1994 s 7(1), (3)(c); and PRISONS vol 36(2) (Reissue) PARA 658; the Immigration and Asylum Act 1999 s 149(3)(c) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

As to tenant's improvements in respect of protected tenancies and statutory tenancies see the Housing Act 1980 s 81 (as amended); and PARA 838 post; and as to tenant's improvements in respect of secure tenancies see the Housing Act 1985 s 97; and PARA 1330 post.

2 *Lilley and Skinner Ltd v Crump* (1929) 73 Sol Jo 366; *Balls Bros Ltd v Sinclair* [1931] 2 Ch 325; *FW Woolworth & Co Ltd v Lambert* [1937] Ch 37, [1936] 2 All ER 1523, CA; *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] Ch 883, [1938] 2 All ER 664, CA.

3 See the cases cited in note 2 supra.

4 *Lilley and Skinner Ltd v Crump* (1929) 73 Sol Jo 366.

5 *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] Ch 883, [1938] 2 All ER 664, CA.

6 *Davies v Yadegar* (1990) 22 HLR 232, [1990] 1 EGLR 71, CA; *Haines v Florensa* (1989) 59 P & CR 200, [1990] 1 EGLR 73, CA.

7 *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] Ch 883 at 901, [1938] 2 All ER 664 at 671, CA.

8 Landlord and Tenant Act 1927 s 19(2); and see *James v Hutton and J Cook & Sons Ltd* [1950] 1 KB 9, [1949] 2 All ER 243, CA. See also *Mount Eden Land Ltd v Prudential Assurance Co Ltd* (1996) 74 P & CR 377, sub nom *Prudential Assurance Co Ltd v Mount Eden Land Ltd* [1997] 1 EGLR 37, CA (consent to repair works subject to 'a formal licence' held to amount to unambiguous consent).

Where the premises are managed by an RTM company (see PARA 367 et seq ante), the Landlord and Tenant Act 1927 s 19(2) applies as if the reference to the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to the landlord were omitted: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 1(1), (3).

9 *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] Ch 883 at 906, [1938] 2 All ER 664 at 675, CA, per Slesser LJ; but see *Frederick Berry Ltd v Royal Bank of Scotland* [1949] 1 KB 619 at 662, [1949] 1 All ER 706 at 708, per Lord Goddard CJ. The cases relating to the refusal of consent to an assignment are in general applicable to the refusal of consent to improvement: *Cartwright v Russell* (1912) 56 Sol Jo 467; and see note 1 supra; and PARAS 486, 492 post. The court ought to have regard to the reasons that actually influenced the landlord's decision; if it transpires that the landlord made its decision for a reason which the court holds was not a permissible reason, it is nothing to the point for the landlord to show that other reasonable landlords could have withheld consent on other grounds, if those other grounds have not influenced the actual landlord in making its decision: *Redevco Properties v Mount Cook Land Ltd* [2002] All ER (D) 26 (Dec).

10 *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] Ch 883 at 911, [1938] 2 All ER 664 at 678, CA, per MacKinnon LJ.

11 *Tideway Investment and Property Holdings Ltd v Wellwood* [1952] Ch 791, [1952] 2 All ER 514, CA; and see *Taylor v Vectapike Ltd* [1990] 2 EGLR 12 at 14 per Morritt J.

12 *Sargeant v Macepark (Whittlebury) Ltd* [2004] EWHC 1333 (Ch), [2004] 4 All ER 662, [2004] 3 EGLR 26 (landlords entitled to protect themselves against perceived competition to their wedding and functions business but not entitled to protect the future possibility of their entering the conference business, which was already part of the tenant's business).

13 *Luzatto v Danzig* [2002] EWHC 1374 (Ch), [2002] All ER (D) 124 (Jun).

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#### **471. Tenant's remedy where consent is unreasonably refused.**

An unreasonable refusal of consent entitles the tenant either to make the improvements without any further request for consent<sup>1</sup>, or to bring proceedings for a declaration that the landlord has unreasonably withheld his consent<sup>2</sup>.

Where a landlord withholds his licence or consent to the making of an improvement on the demised property or any part thereof, and the High Court has jurisdiction to make a declaration that the licence or consent was unreasonably withheld, then, without prejudice to the jurisdiction of the High Court, the county court has the like jurisdiction whatever the net annual value for rating<sup>3</sup> of the demised property is to be taken to be for the purposes of the County Courts Act 1984 and notwithstanding that the tenant does not seek any relief other than the declaration<sup>4</sup>.

Where, on the making of an application to a county court for such a declaration, the court is satisfied that consent was unreasonably withheld, it must make a declaration accordingly<sup>5</sup>.



1 *Treloar v Bigge* (1874) LR 9 Exch 151; *Balls Bros Ltd v Sinclair* [1931] 2 Ch 325; applied in *Railways Comr v Avrom Investments Pty Ltd* [1959] 2 All ER 63, [1959] 1 WLR 389, PC.

2 As to the form of the declaration see *FW Woolworth & Co Ltd v Lambert* [1937] Ch 37 at 47, 53, [1936] 2 All ER 1523 at 1532, 1536, CA. As to declaratory judgments generally see JUDICIAL REVIEW vol 61 (2010) PARA 719.

3 For the meaning of 'net annual value' see PARA 522 post; and as to the abolition of domestic rates see PARA 521 post.

4 Landlord and Tenant Act 1954 s 53(1)(b) (amended by the County Courts Act 1984 s 148(1), Sch 2 Pt V para 23).

The Landlord and Tenant Act 1954 s 53(1)(b) (as so amended) and s 53(2) (see the text and note 5 infra) have effect whether the tenancy was created before or after 1 October 1954: s 53(3). Nothing in s 53 (as amended) is, however, to be construed as conferring jurisdiction on the county court to grant any relief other than a declaration under s 53 (as amended): s 53(4).

As to consent to assignment, subletting or charging premises see PARA 487 post; and as to consent to change of user see PARA 499 post.

5 Ibid s 53(2). See also note 4 supra.

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## **472. Modification of covenants by the court.**

Where a tenant of business premises serves notice on his landlord of his intention to make an improvement on the premises, and either the landlord does not serve notice of objection on him, or the court certifies that the improvement is a proper improvement, the tenant may lawfully execute the improvement notwithstanding anything to the contrary in any lease of the premises<sup>1</sup>. Certain statutes empower a county court to set aside or modify the terms of an agreement between landlord and tenant which prevent the tenant from making alterations to the premises, where those alterations are necessary for compliance with the provisions of those statutes<sup>2</sup>.

The local housing authority<sup>3</sup> or a person interested in any premises may apply to the county court where:

1061 (1) owing to changes in the character of the neighbourhood in which the premises are situated, they cannot readily be let as a single dwelling house but could readily be let for occupation if converted into two or more dwelling houses<sup>4</sup>;  
or

1062 (2) planning permission has been granted<sup>5</sup> for the use of the premises as converted into two or more separate dwelling houses instead of as a single dwelling house,

and the conversion is prohibited or restricted by the provisions of the lease of the premises, or by a restrictive covenant affecting the premises, or otherwise<sup>6</sup>. After giving any person interested an opportunity of being heard, the court may vary the terms of the lease or other instrument imposing the prohibition or restriction, subject to such conditions and upon such terms as the court may think just<sup>7</sup>.

1 See the Landlord and Tenant Act 1927 s 3; and PARA 788 et seq post. The court is not able to grant a certificate under s 3 if the landlord offers to do the works in return for a reasonable increase in the rent. If, however, the parties cannot agree upon the increase, the tenant is entitled to change its mind and unilaterally withdraw its notice: *Norfolk Capital Group Ltd v Cadogan Estates Ltd* [2004] EWHC 384 (Ch), [2004] 3 All ER 889, [2004] 1 WLR 1458.

2 See eg the Factories Act 1961 s 169; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 870; the Offices, Shops and Railway Premises Act 1963 s 73(1) (as amended); and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 875. See also PARA 473 post.

3 For the meaning of 'local housing authority' see PARA 1311 note 4 post.

4 Housing Act 1985 s 610(1)(a) (amended by the Local Government and Housing Act 1989 s 165(1), Sch 9 para 88). The conversion need not be into self-contained units: *Stack v Church Comrs for England* [1952] 1 All ER 1352, CA.

5 See under the Town and Country Planning Act 1990 Pt III (ss 55-106B) (as amended): see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 213 et seq.

6 Housing Act 1985 s 610(1)(b) (amended by the Local Government and Housing Act 1989 Sch 9 para 88; the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 71(5)). There is, however, no jurisdiction if the planning permission involves combining the flats with the building next door: *Josephine Trust Ltd v Champagne* [1963] 2 QB 160, [1962] 3 All ER 136, CA.

7 Housing Act 1985 s 610(2).

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#### **473. Alterations required by fire and rescue authority.**

The enforcing authority<sup>1</sup> with respect to fire safety may serve on the responsible person<sup>2</sup> in relation to premises<sup>3</sup> an alterations notice<sup>4</sup>, an enforcement notice<sup>5</sup> or a prohibitions notice<sup>6</sup> under the Regulatory Reform (Fire Safety) Order 2005. Domestic premises are, however, generally excluded from the provisions of that Order<sup>7</sup>. Fire safety is discussed elsewhere in this work<sup>8</sup>.

1 As to enforcing authorities for these purposes see the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, art 25. That authority is generally the fire and rescue authority for the area in which the premises are situated: art 25(a).

2 See (1) in relation to a workplace, the employer, if the workplace is to any extent under his control; (2) in relation to any other premises: (a) the person who has control of the premises (as occupier or otherwise) in connection with the carrying on by him of a trade, business or other undertaking (for profit or not); or (b) the owner, where the person in control of the premises does not have control in connection with the carrying on by that person of a trade, business or other undertaking: Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, art 3.

3 As to the premises to which the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541, applies see art 6.

4 See *ibid* art 29.

5 See *ibid* art 30.

6 See *ibid* art 31.

7 See *ibid* arts 6(a), 31(10).

8 See FIRE SERVICES.

## **UPDATE**

### **473 Alterations required by fire and rescue authority**

TEXT AND NOTES--Functions of the Secretary of State under SI 2005/1541, in relation to Wales, are transferred to the National Assembly for Wales: SI 2006/1458.

NOTE 1--SI 2005/1541 art 25 amended: SI 2007/320.

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## **(6) NUISANCE, NEGLIGENCE ETC**

### **474. Liability for nuisance.**

Prima facie the occupier of premises is the person liable to third persons for a nuisance existing on or arising from the premises<sup>1</sup>. The landlord is not liable for any nuisance caused by the tenant by reason of the manner in which the premises are used by the latter<sup>2</sup>; but, apart from a nuisance caused in that way, the landlord is liable for the existence of a nuisance upon premises which are in the occupation of his tenant where:

- 1063 (1) he has let the premises or bought the reversion with a nuisance existing upon them, of the existence of which he knew or ought to have known<sup>3</sup>, and in such a case he cannot divest himself of liability to third persons merely by taking a repairing covenant from a tenant<sup>4</sup>;
- 1064 (2) he has let the premises for a purpose which is likely to cause a nuisance of a particular character and such nuisance results<sup>5</sup>;
- 1065 (3) he has let the premises, taking from the tenant a covenant to do the act which results in the nuisance<sup>6</sup>; and
- 1066 (4) the nuisance arises during the tenancy from the dangerous state of the premises and he has contracted to repair<sup>7</sup>, or he has expressly reserved the right to enter and repair<sup>8</sup>, or he has an implied right to enter and repair<sup>9</sup>.

In the case of such a nuisance arising from want of repair under head (4) above, the landlord is liable whether or not he knew or ought reasonably to have known of the dangerous condition of the premises<sup>10</sup>; but, where the nuisance is created not by want of repair, but, for example, by the act of a trespasser, or a process of nature, neither the landlord nor the tenant is liable unless, with knowledge or means of knowledge, he allows the danger to continue<sup>11</sup>.

The fact that the landlord is liable for the existence of a nuisance does not exclude the tenant's liability as occupier<sup>12</sup>. The liability is the same whether the injury is caused to a member of the public on the highway or to the owner of adjoining property<sup>13</sup>, but the owner or occupier of dangerous premises cannot be liable in nuisance to persons injured while they are on those premises<sup>14</sup>.

The tenant may contract to indemnify the landlord<sup>15</sup>.

1 *Cheetham v Hampson* (1791) 4 Term Rep 318; *Payne v Rogers* (1794) 2 Hy BI 350; *Chauntler v Robinson* (1849) 4 Exch 163; *Pickard v Smith* (1861) 10 CBNS 470; *Hadley v Taylor* (1865) LR 1 CP 53; *Pretty v Bickmore* (1873) LR 8 CP 401; *Norris v Catmur* (1885) Cab & El 576; *Walker v Goe* (1859) 4 H & N 350, Ex Ch; *A-G v Kirk* (1896) 12 TLR 514, CA; *Nelson v Liverpool Brewery Co* (1877) 2 CPD 311. This principle applies notwithstanding that the occupier has employed competent persons to repair and that the injury is due to their neglect: *Tarry v Ashton* (1876) 1 QBD 314. Occupation while a lease is being prepared is occupation for this purpose: *Hadley v Taylor* supra. As to the liability where the tenant is insolvent and the lease is delivered to the landlord see *Bishop v Bedford Charity Trustees* (1859) 1 E & E 697 at 714 (judges in the Queen's Bench equally divided). An occupier is not relieved from liability by the fact that the nuisance was created by a preceding occupier: *M'Morrow v Layden* [1919] 2 IR 398. As to liability for nuisance generally see NUISANCE vol 78 (2010) PARA 101 et seq; and as regards liability for the acts of independent contractors see PARA 476 the text and note 8 post; and NEGLIGENCE vol 78 (2010) PARA 35.

2 *Cheetham v Hampson* (1791) 4 Term Rep 318; *Rich v Basterfield* (1847) 4 CB 783 (use of smoking chimneys); *Russell v Shenton* (1842) 3 QB 449 (neglect to clean drains); *A-G v Kirk* (1896) 12 TLR 514, CA (builder whose building agreement had been cancelled, but who was regarded as being in possession of the premises); *Smith v Scott* [1973] Ch 314, [1972] 3 All ER 645 (landlord not liable for noise nuisance caused by tenants, and owed no duty of care to his neighbours when selecting his tenants).

3 *Alston v Grant* (1854) 23 LJQB 163; *Todd v Flight* (1860) 9 CBNS 377; *St Anne's Well Brewery Co v Roberts* (1928) 140 LT 1, CA; and see *Grant v Heming & Co Ltd* 1914 51 SLR 187; *Sampson v Hudson-Pressinger* [1981] 3 All ER 710, 12 HLR 40, CA (landlord who bought reversion knowing of the nuisance held liable in damages, even though he did not create or authorise the nuisance). If a landlord relets premises after they have become a nuisance, he is similarly liable for damages caused by the nuisance (*R v Pedly* (1834) 1 Ad & El 822; *Roswell v Prior* (1701) 12 Mod Rep 635; *Winter v Baker* (1887) 3 TLR 569); but a tenancy from year to year (*Gandy v Jubber* (1865) 9 B & S 15, Ex Ch), and a weekly tenancy (*Bowen v Anderson* [1894] 1 QB 164, DC, disapproving *Sandford v Clarke* (1888) 21 QBD 398) are not regarded as recommencing at the end of each year or week so as to render the landlord liable for the state of non-repair existing at such times.

4 *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, [1970] 1 All ER 587, CA; applying *St Anne's Well Brewery Co v Roberts* (1928) 140 LT 1, CA; *Wilchick v Marks and Silverstone* [1934] 2 KB 56; *Heap v Ind Coope and Allsopp Ltd* [1940] 2 KB 476, [1940] 3 All ER 634, CA; *Mint v Good* [1951] 1 KB 517, [1950] 2 All ER 1159, CA; and not following *Pretty v Bickmore* (1873) LR 8 CP 401 on the question of the relevance of the tenant's repairing obligations.

5 *Harris v James* (1876) 45 LJQB 545 (letting premises to be worked as a lime quarry); *Jenkins v Jackson* (1888) 40 ChD 71 (letting room for dancing over offices); *Winter v Baker* (1887) 3 TLR 569 (letting premises for use for a noisy show); *Tetley v Chitty* [1986] 1 All ER 663 (letting land for go-karting). A person who lets premises for a school is not, however, liable for a nuisance caused by boys crowding and causing annoyance in the street (*Harrison v Good* (1871) LR 11 Eq 338; and see *Ayers v Hanson, Stanley and Prince* (1912) 56 Sol Jo 735 (letting a field for rabbit coursing; no evidence that that purpose must of necessity cause a nuisance)); nor is he liable for damage caused by smoke from fires which his tenant chooses to make (*Rich v Basterfield* (1847) 4 CB 783). An occupier is similarly liable for the acts of his licensee: *White v Jameson* (1874) LR 18 Eq 303.

6 *Burt v Victoria Graving Dock Co Ltd and London and St Katharine's Dock Co* (1882) 47 LT 378.

7 *Payne v Rogers* (1794) 2 Hy BI 350; *Pretty v Bickmore* (1873) LR 8 CP 401; *Gwinnell v Eamer* (1875) LR 10 CP 658, DC; *Mills v Temple-West* (1885) 1 TLR 503, DC; *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA; *Leslie v Pounds* (1812) 4 Taunt 649.

8 *Wilchick v Marks and Silverstone* [1934] 2 KB 56; *Heap v Ind Coope and Allsopp Ltd* [1940] 2 KB 476, [1940] 3 All ER 634, CA; *Spicer v Smea* [1946] 1 All ER 489.

9 *Mint v Good* [1951] 1 KB 517, [1950] 2 All ER 1159, CA. Such a right is implied in the case of small houses let on periodic tenancies: *Mint v Good* supra; and see the Landlord and Tenant Act 1985 s 11(6); and PARA 416 ante. The test seems to be who has the control of the premises: see *Laugher v Pointer* (1826) 5 B & C 547 at 576, per Abbott CJ; *Wilchick v Marks and Silverstone* [1934] 2 KB 56 at 68, per Goddard J.

10 *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA; *Heap v Ind Coope and Allsopp Ltd* [1940] 2 KB 476, [1940] 3 All ER 634, CA; and see *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 QB 182 at 198, [1954] 2 All ER 561 at 572, CA, per Denning LJ; revsd sub nom *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218, [1955] 3 All ER 864, HL. See also HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 338, 397.

11 *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA; *Cushing v Peter Walker & Son (Warrington and Burton) Ltd* [1941] 2 All ER 693 (occupier not liable for injury due to fall of slate loosened by bomb blast when reasonable inspection had not revealed looseness); *Slater v Worthington's Cash Stores (1930) Ltd* [1941] 1 KB 488, [1941] 3 All ER 28, CA (occupier liable for injury due to heavy falls of snow of which he must have been

aware). As to continuing a nuisance see further *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, [1940] 3 All ER 349, HL; and NUISANCE vol 78 (2010) PARAS 181-182.

12 *Wilchick v Marks and Silverstone* [1934] 2 KB 56, not following *Payne v Rogers* (1794) 2 Hy BI 350.

13 In *Mint v Good* [1951] 1 KB 517 at 526, [1950] 2 All ER 1159 at 1166, CA, Denning LJ stated that the principle of *Wringe v Cohen* [1940] 1 KB 229, [1939] 4 All ER 241, CA is confined to 'premises on a highway', but this seems to be incorrect: see *Jacobs v LCC* [1950] AC 361 at 373, [1950] 1 All ER 737 at 743, HL, per Lord Simonds; and see also *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612 at 638, [1970] 1 All ER 587 at 601, CA, per Sachs LJ. No difference in this respect exists between public and private nuisance: see *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 918, [1940] 3 All ER 349 at 374, HL, per Lord Porter; *Cunard v Antifyre* [1933] 1 KB 551 at 562, DC, per Talbot J; *Spicer v Smee* [1946] 1 All ER 489. As to nuisance in relation to a highway see further HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 322 et seq.

14 *Howard v Walker and Lake (Trustees) and Crisp* [1947] KB 860, [1947] 2 All ER 197; *Jacobs v LCC* [1950] AC 361 at 376, [1950] 1 All ER 737 at 745, HL, per Lord Simonds; *National Coal Board v Neath Borough Council* [1976] 2 All ER 478, sub nom *National Coal Board v Thorne* [1976] 1 WLR 543, DC. As to the remedy of the injured person in such a case see PARAS 475-476 post.

15 On the application of a clause indemnifying the landlord for loss etc 'which but for the tenancy ... would not have arisen' see *John Lee & Son (Grantham) Ltd v Railway Executive* [1949] 2 All ER 581, CA; cf *Warrellow v Chandler and Braddick* [1956] 3 All ER 305, [1956] 1 WLR 1272.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/10. REPAIR, FITNESS AND ALTERATION/(6) NUISANCE, NEGLIGENCE ETC/475. Landlord's liability for negligence.

#### **475. Landlord's liability for negligence.**

Where premises are let under a tenancy<sup>1</sup> which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury<sup>2</sup> or from damage to their property caused by a relevant defect<sup>3</sup>. This duty is owed if the landlord knows, whether as a result of being notified by the tenant or otherwise, or if he ought in all the circumstances to have known, of the relevant defect<sup>4</sup>.

Where premises are let under a tenancy which expressly or impliedly<sup>5</sup> gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he is to be treated, for the purposes of the above provisions<sup>6</sup>, but for no other purpose, as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord does not owe the tenant any duty by virtue of this provision in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy<sup>7</sup>.

The above provisions apply to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy<sup>8</sup>; and any duty imposed by those provisions is in addition to any duty a person may owe apart from those provisions<sup>9</sup>. The provisions bind the Crown<sup>10</sup>.

Any term of an agreement which purports to exclude or restrict, or has the effect of excluding or restricting, the operation of any of these provisions, or any liability arising by virtue of any of these provisions, is void<sup>11</sup>.

If the landlord does work on the premises after the commencement of the tenancy, he is under the same duty as any other person who is called in to carry out such work<sup>12</sup>, and is under a

general duty to use reasonable care for the safety of those who he knows or ought reasonably to know may be affected by or lawfully in the vicinity of his work<sup>13</sup>. Further, where work of construction, repair, maintenance or demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises created by the doing of the work is not abated by the subsequent disposal of the premises by the person who owed the duty<sup>14</sup>.

A person taking on work for or in connection with the provision of a dwelling, whether the dwelling is provided by the erection or by the conversion or enlargement of a building, owes a duty:

- 1067 (1) if the dwelling is provided to the order of any person, to that person; and
- 1068 (2) without prejudice to head (1) above, to every person who acquires an interest, whether legal or equitable, in the dwelling,

to see that the work which he takes on is done in a workmanlike or, as the case may be, professional manner, with proper materials and so that as regards that work the dwelling will be fit for habitation when completed<sup>15</sup>.

1 For these purposes, 'tenancy' means (1) a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but not including a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee; or (2) a tenancy at will or a tenancy on sufferance; or (3) a tenancy whether or not constituting a tenancy at common law, created by or in pursuance of any enactment; and cognate expressions are to be construed accordingly: Defective Premises Act 1972 s 6(1). See also the text and note 8 *infra*.

2 For these purposes, 'personal injury' includes any disease and any impairment of a person's physical or mental condition: *ibid* s 6(1).

3 *Ibid* s 4(1). For these purposes, 'relevant defect' means a defect in the state of the premises existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would, if he had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises (s 4(3)); and 'the material time' means (1) where the tenancy commenced before 1 January 1974, that date; and (2) in all other cases, the earliest of the following times: (a) the time when the tenancy commences; (b) the time when the tenancy agreement is entered into; (c) the time when possession is taken of the premises in contemplation of the letting (ss 4(3), 7(2)).

Failure to carry out remedial works required to remedy defects which pose a danger to health, if such works are not works of repair, does not necessarily give rise to liability under s 4(1); if the works that would be required in order to remedy the inherent defects in design are not within the expression 'any description of maintenance or repair of the premises', the defect is not a 'relevant defect' for the purposes of s 4(3), and there is no duty under s 4(1) to take care to see that persons are reasonably safe from injury caused by that defect: see *Lee v Leeds City Council, Ratcliffe v Sandwell Metropolitan Borough Council* [2002] EWCA Civ 06, [2002] 1 WLR 1488, [2002] LGR 305. Furthermore, the issue of causation must be determined in the normal way in deciding any liability for damage: see *Townsend v Achilleas* [2001] All ER (D) 221 (Oct) (tenant's property destroyed by fire; there was a faulty electrical installation in the premises but it was held on the evidence that although that installation was dangerously defective, it had not been the cause of the fire). Although a tenant suing under the Defective Premises Act 1972 s 4 is under no obligation to show that the landlord had notice of the defect, and merely has to show a failure on the part of the landlord 'to take such care as is reasonable in all the circumstances' to see that the tenant is reasonably safe from personal injury, his damages may be reduced by reason of his contributory negligence if he has not brought the defect to the landlord's attention, since a tenant in occupation, and in immediate control of the premises, is in the best position either to effect the necessary repairs or to bring them to the attention of the landlord: see *Sykes v Harry* [2001] EWCA Civ 167, [2001] QB 1014, [2001] 1 EGLR 53.

Where the premises are managed by an RTM company (see PARA 367 *et seq ante*), references to the landlord in the Defective Premises Act 1972 s 4 (apart from the first reference in s 4(1) and (4)) are to the RTM company and the reference to the material time is to the acquisition date: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 2(1)-(3).

4 Defective Premises Act 1972 s 4(2). The statutory protection is geared to the landlord's repairing, or deemed repairing, obligation and goes no wider than the repairing covenant: *McNerny v London Borough of Lambeth* (1988) 21 HLR 188, [1989] 1 EGLR 81, CA. As to the scope of the duty see *McDonagh v Kent Area Health Authority* (1981) 134 NLJ 567.

5 Eg of an implied right giving rise to liability under the Defective Premises Act 1972 s 4: see *Smith v Bradford Metropolitan Council* (1982) 44 P & CR 171, 4 HLR 86, CA (entry to repair concreted rear yard); *McAuley v Bristol City Council* [1992] QB 134, [1992] 1 All ER 749, CA (entry to repair garden step).

6 le for the purposes of the Defective Premises Act 1972 s 4(1)-(3): see the text and notes 1-4 supra.

7 Ibid s 4(4). The end of the tenancy extinguishes the landlord's right of entry and imputed obligation under s 4(4): *Boldack v East Lindsey District Council* (1998) 31 HLR 41, CA (no clause in the tenancy agreement which was operative at the time of the accident from which the obligation under the Defective Premises Act 1972 s 4(4) could be derived; the tenant could not rely on a right of entry which arose at the end of the previous tenant's tenancy).

8 Defective Premises Act 1972 s 4(6). 'Tenancy' and cognate expressions are to be construed accordingly: s 4(6). Obligations imposed or rights given by any enactment in virtue of a tenancy are treated as imposed or given by the tenancy: s 4(5).

9 Ibid s 6(2).

10 Ibid s 5. As regards the Crown's liability in tort the Crown is not, however, bound further than it is made liable in tort by the Crown Proceedings Act 1947 (see s 2 (as amended)); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 382: Defective Premises Act 1972 s 5.

11 Ibid s 6(3).

12 *Ball v LCC* [1949] 2 KB 159 at 167, [1949] 1 All ER 1056 at 1060, CA, per Tucker LJ.

13 *AC Billings & Sons Ltd v Riden* [1958] AC 240 at 263, 264, [1957] 3 All ER 1 at 13, HL, per Lord Somervell, overruling on this point *Ball v LCC* [1949] 2 KB 159, [1949] 1 All ER 1056, CA and *Malone v Laskey* [1907] 2 KB 141, CA.

14 See the Defective Premises Act 1972 s 3; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS AND SURVEYORS vol 4(3) (Reissue) PARA 79.

15 See ibid s 1; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 77. The duty includes both misfeasance and nonfeasance: *Andrews v Schooling* [1991] 3 All ER 723, [1991] 1 WLR 783, CA.

## UPDATE

### 475 Landlord's liability for negligence

NOTE 3--See *Alker v Collingwood Housing Association* [2007] EWCA Civ 343, [2007] 1 WLR 2230.

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### 476. Landlord in possession of part of the premises.

Where the landlord retains possession of part of the premises, such as the roof or one floor of a building, his liability for injury to persons or property on the demised premises resulting from the non-repair of that part depends, not upon any contractual obligation to repair, but upon negligence, namely, the ordinary duty of an occupier of property to take reasonable care that

his property does not become dangerous to adjoining property or to persons lawfully on it<sup>1</sup>. In order that a person injured may recover damages, it is not necessary that the landlord should have had notice of the want of repair<sup>2</sup>.

In the absence of negligence the landlord is not in general liable<sup>3</sup> for the escape of deleterious things from the landlord's part of the premises, as the tenant takes the property as he finds it and impliedly consents to their presence on the landlord's premises<sup>4</sup>; but the tenant's consent cannot be implied to an unusual danger unless he knows of it<sup>5</sup>.

Where the landlord is bound by the terms or conditions governing the tenancy to permit persons to enter or use a part of the premises of which he retains possession, such as a means of access, he owes to such persons the common duty of care imposed on an occupier of premises<sup>6</sup>. As regards persons other than the tenant, the common duty of care may not be excluded or restricted by the terms of the tenancy; while, in so far as the terms of a tenancy which is created or renewed on or after 1 January 1958 impose on the landlord any higher duty to the tenant, he owes this higher duty also to persons other than the tenant, unless the terms of the tenancy provide to the contrary<sup>7</sup>. Where injury is caused on premises, of which he retains possession, by a defect due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the landlord, the landlord is not liable to a visitor, in the absence of knowledge of the defect, if he acted reasonably in entrusting the work to an independent contractor, and took reasonable care to satisfy himself that the contractor was competent and the work had been properly done<sup>8</sup>.

Where the landlord supplies a lift suitably constructed in the first place, he is not liable for accidents due to the nature of the lift itself<sup>9</sup>, nor for accidents due to the management of the lift unless he has retained control of it<sup>10</sup>.

An occupier of premises<sup>11</sup> owes a duty to another, not being his visitor, in respect of any risk of his suffering injury<sup>12</sup> on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them if:

- 1069 (1) he is aware of the danger or has reasonable grounds to believe that it exists;
- 1070 (2) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in that vicinity or not); and
- 1071 (3) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection<sup>13</sup>.

Where an occupier so owes a duty to another in respect of such a risk, the duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned<sup>14</sup>. Any duty so owed in respect of a risk may, in an appropriate case, be discharged by taking such steps as are reasonable in all the circumstances of the case to give warning of the danger concerned or to discourage persons from incurring the risk<sup>15</sup>. No duty is so owed:

- 1072 (a) to any person in respect of risks willingly accepted as his by that person, the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another<sup>16</sup>;
- 1073 (b) to persons using the highway<sup>17</sup>; or
- 1074 (c) at any time when the public right of access<sup>18</sup> is exercisable in relation to land which is access land<sup>19</sup>, to any person in respect of:  
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128. (i) a risk resulting from the existence of any natural feature of the landscape<sup>20</sup>, or any river, stream, ditch or pond whether or not a natural feature; or



129. (ii) a risk of that person suffering injury when passing over, under or through any wall, fence or gate, except by proper use of the gate or of a stile<sup>21</sup>,

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1075 but this does not prevent an occupier from so owing a duty in respect of any risk where the danger concerned is due to anything done by the occupier with the intention of creating that risk, or being reckless as to whether that risk is created<sup>22</sup>.

1 *Cunard v Antifyre Ltd* [1933] 1 KB 551, DC; *Hargroves, Aronson & Co v Hartopp* [1905] 1 KB 472, DC; *Cockburn v Smith* [1924] 2 KB 119, CA, overruling *Hart v Rogers* [1916] 1 KB 646 (where it was wrongly held that the landlord was under an absolute duty); *Bishop v Consolidated London Properties Ltd* (1933) 102 LJBK 257; *Taylor v Liverpool Corp* [1939] 1 All ER 329.

It was held in *Akerib v Booth Ltd* [1960] 1 All ER 481, [1960] 1 WLR 454 (revsd on another ground [1961] 1 All ER 380, [1961] 1 WLR 367, CA) that a landlord might exclude his liability for negligence by the terms of the tenancy agreement. A person cannot, however, by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injuries resulting from negligence; and in the case of any other loss or damage a person cannot so exclude or restrict his liability for negligence except in so far as the term or notice satisfies the requirements of reasonableness: Unfair Contract Terms Act 1977 s 2(1), (2). Section 2 does not extend to any contract so far as it relates to the creation or transfer of an interest in land (see s 1(2), Sch 1 para 1(b)) and applies to business liability only (see s 1(3)). See further CONTRACT. The scope of the exemption in Sch 1 para 1(b) is unclear, but in *Electricity Supply Nominees Ltd v IAF Group plc* [1993] 3 All ER 372, [1993] 1 WLR 1059 it was held that the exemption covered not only the demise itself but all the covenants that were integral to the lease. *Akerib v Booth Ltd* supra may, therefore, still be good law on this point; sed quaere. See also the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083; para 131 ante; and CONTRACT vol 9(1) (Reissue) PARA 790 et seq.

2 *Melles & Co v Holme* [1918] 2 KB 100, DC; *Bishop v Consolidated London Properties Ltd* (1933) 102 LJBK 257.

3 Ie under the rule in *Rylands v Fletcher*: see *Fletcher v Rylands* (1866) LR 1 Exch 265; affd sub nom *Rylands v Fletcher* (1868) LR 3 HL 330; and NUISANCE vol 78 (2010) PARA 148 et seq.

4 *Carstairs v Taylor* (1871) LR 6 Exch 217; *Kiddle v City Business Properties Ltd* [1942] 1 KB 269, [1942] 2 All ER 216; *Peters v Prince of Wales Theatre (Birmingham) Ltd* [1943] KB 73, [1942] 2 All ER 533, CA; and see *Anderson v Oppenheimer* (1880) 5 QBD 602, CA; *Ross v Fedden* (1872) LR 7 QB 661; and NUISANCE vol 78 (2010) PARA 153.

5 *A Prosser & Son Ltd v Levy* [1955] 3 All ER 577, [1955] 1 WLR 1224, CA.

6 See the Occupiers' Liability Act 1957 s 3; and NEGLIGENCE vol 78 (2010) PARA 37. In so far as they decided that the landlord owed a lesser duty to such persons, *Fairman v Perpetual Investment Building Society* [1923] AC 74, HL, *Jacobs v LCC* [1950] AC 361, [1950] 1 All ER 737, HL, and similar cases are no longer good law. For these purposes, the landlord is the occupier of parts of premises retained by him and excluded from the demise, such as a common staircase, an entrance hall, a roof, a balcony or a forecourt: *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 1 All ER 582, CA; applied in *Jordan v Achera* (1988) 20 HLR 607, CA.

7 Occupiers' Liability Act 1957 s 3(1), (5).

8 Ibid s 2(4)(b) which restores the authority of *Haseldine v CA Daw & Son Ltd* [1941] 2 KB 343, [1941] 3 All ER 156, CA. In so far as it decided that an occupier was liable for the negligence of an independent contractor, *Thomson v Cremin* [1953] 2 All ER 1185, [1956] 1 WLR 103n, HL, is no longer good law. For the meaning of 'visitor' see the Occupiers' Liability Act 1957 s 1(2); and NEGLIGENCE vol 78 (2010) PARA 31.

9 *Powell v Thorndike* (1910) 102 LT 600.

10 *Mathieson v Pollock* 1910 SC 11, Ct of Sess; *Steer v St James's Residential Chambers Co* (1887) 3 TLR 500.

11 For these purposes, the persons who are to be treated respectively as an occupier of any premises (which, for those purposes, include any fixed or movable structure) and his visitors are (1) any person who owes in relation to the premises the duty referred to in the Occupiers' Liability Act 1957 s 2 (the common duty of care: see NEGLIGENCE vol 78 (2010) PARA 32); and (2) those who are his visitors for the purpose of that duty: Occupiers' Liability Act 1984 s 1(2). 'Movable structure' includes any vessel, vehicle or aircraft: s 1(9).

12 For these purposes, 'injury' means anything resulting in death or personal injury, including any disease and any impairment of physical or mental condition: ibid s 1(9).

13 Ibid s 1(1), (3). Where a person owes a duty by virtue of s 1 (as amended), he does not, by reason of any breach of the duty, incur any liability in respect of any loss of or damage to property: s 1(8).

Section 1 (as amended) binds the Crown, but as regards the Crown's liability in tort does not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947 (see s 2 (as amended)); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 382); Occupiers' Liability Act 1984 s 3.

14 Ibid s 1(4).

15 Ibid s 1(5).

16 Ibid s 1(6).

17 Ibid s 1(7). For these purposes, 'highway' means any part of a highway other than a ferry or waterway: s 1(9).

18 Ie the right conferred by the Countryside and Rights of Way Act 2000 s 2(1).

19 Ie for the purposes of ibid Pt I (ss 1-46): see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 580 et seq.

20 For these purposes, any plant, shrub or tree, of whatever origin, is to be regarded as a natural feature of the landscape: Occupiers' Liability Act 1984 s 1(6B) (s 1(6A)-(6C) added by the Countryside and Rights of Way Act 2000 s 13(2)).

21 Occupiers' Liability Act 1984 s 1(6A) (as added: see note 20 supra).

22 Ibid s 1(6C) (as added: see note 20 supra). In determining whether any, and if so what, duty is owed by virtue of s 1 (as amended) by an occupier of land at any time when the right conferred by the Countryside and Rights of Way Act 2000 s 2(1) is exercisable in relation to the land, regard is to be had, in particular, to (1) the fact that the existence of that right ought not to place an undue burden (whether financial or otherwise) on the occupier; (2) the importance of maintaining the character of the countryside, including features of historic, traditional or archaeological interest; and (3) any relevant guidance given under s 20: Occupiers' Liability Act 1984 s 1A (added by the Countryside and Rights of Way Act 2000 s 13(3)).

## UPDATE

### 476 Landlord in possession of part of the premises

NOTES 20-22--See also Occupiers' Liability Act 1984 s 1(6AA) (added by Marine and Coastal Access Act 2009 s 306).

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### 477. Remedies and procedure.

The pre-action protocol which covers housing disrepair claims by tenants<sup>1</sup> applies to claims brought under the Defective Premises Act 1972<sup>2</sup> and to claims in common law nuisance and negligence<sup>3</sup>. That protocol has already been discussed<sup>4</sup>, as has the general procedure for bringing landlord and tenant claims<sup>5</sup>.

1 Ie the *Pre-action Protocol for Housing Disrepair Claims* (prepared by the Housing Disrepair Protocol Working Party and approved by the Head of Civil Justice). As to pre-action protocols generally see CIVIL PROCEDURE vol 11 (2009) PARA 107 et seq.

2 Ie under the Defective Premises Act 1972 s 4: see PARA 475 ante.

3 See PARA 467 note 2 ante.

4 See PARA 467 ante.

5 See PARA 468 ante.

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#### **478. Duty to manage asbestos in non-domestic premises.**

For the purposes of the statutory duty to manage asbestos in non-domestic premises<sup>1</sup>, 'the duty holder' means:

- 1076 (1) every person who has, by virtue of a contract or tenancy, an obligation of any extent in relation to the maintenance or repair of non-domestic premises or any means of access thereto or egress therefrom; or
- 1077 (2) in relation to any part of non-domestic premises where there is no such contract or tenancy, every person who has, to any extent, control of that part of those non-domestic premises or any means of access thereto or egress therefrom;

and where there is more than one such duty holder, the relative contribution to be made by each such person in complying with the statutory requirements will be determined by the nature and extent of the maintenance and repair obligation owed by that person<sup>2</sup>.

In order to enable him to manage the risk from asbestos in non-domestic premises, the duty holder must ensure:

- 1078 (a) that a suitable and sufficient assessment is carried out as to whether asbestos is or is liable to be present in the premises<sup>3</sup>;
- 1079 (b) that the assessment is reviewed forthwith if there is reason to suspect that it is no longer valid or there has been a significant change in the premises to which it relates<sup>4</sup>;
- 1080 (c) that the conclusions of the assessment and every review are recorded<sup>5</sup>;
- 1081 (d) that, where the assessment shows that asbestos is or is liable to be present in any part of the premises:
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  - 130. (i) a determination of the risk from that asbestos is made;
  - 131. (ii) a written plan identifying those parts of the premises concerned is prepared; and
  - 132. (iii) the measures which are to be taken for managing the risk are specified in the written plan<sup>6</sup>;
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  - 1082 (e) that:
  - 109
    - 133. (i) the plan is reviewed and revised at regular intervals, and forthwith if there is reason to suspect that the plan is no longer valid, or if there has been a significant change in the premises to which the plan relates;
    - 134. (ii) the measures specified in the plan are implemented; and
    - 135. (iii) the measures taken to implement the plan are recorded<sup>7</sup>.

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Every person must co-operate with the duty holder so far as is necessary to enable the duty holder to comply with his duties under these provisions<sup>8</sup>.

The Health and Safety Executive<sup>9</sup> has power to grant exemptions from these requirements<sup>10</sup>.

Contravention of the above requirements is an offence<sup>11</sup>.

1 See for the purposes of the Control of Asbestos Regulations 2006, SI 2006/2739, reg 4: see HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 630.

2 Ibid reg 4(1).

3 See ibid reg 4(3)-(5).

4 See ibid reg 4(6).

5 See ibid reg 4(7).

6 See ibid reg 4(8)-(9).

7 See ibid reg 4(10).

8 Ibid reg 4(2).

9 As to the Health and Safety Executive see HEALTH AND SAFETY AT WORK vol 52 (2009) PARA 361 et seq.

10 See the Control of Asbestos Regulations 2006, SI 2006/2739, reg 32; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 630.

11 See ibid reg 37; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 630.

## UPDATE

### 478 Duty to manage asbestos in non-domestic premises

NOTE 10--SI 2006/2739 reg 32 amended: SI 2008/2852.

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## (7) WAR DAMAGE AND DAMAGE DURING REQUISITIONING

### 479. War damage.

Where, by virtue of the provisions, whether express or implied, of a disposition<sup>1</sup> or of any contract collateral thereto, an obligation (an 'obligation to repair') is imposed on any person to do any repairs in relation to the land<sup>2</sup> comprised in the disposition, those provisions are to be construed as not extending to the imposition of any liability on that person to make good any war damage<sup>3</sup> occurring to the land so comprised<sup>4</sup>.

Where war damage occurs to land comprised in a disposition, then, in so far as compliance with an obligation to repair as so modified is, having regard to the extent of the war damage:

- 1083 (1) impracticable, or only practicable at a cost which is unreasonable in view of all the circumstances; or  
 1084 (2) of no substantial advantage to the person who would otherwise be entitled to the benefit of the obligation,

the obligation is suspended until the war damage is made good to such an extent that compliance with the obligation is practicable at a reasonable cost and is of substantial advantage to the person entitled to the benefit thereof<sup>5</sup>.

Any disposition or contract collateral thereto containing a provision whereunder an obligation to make good war damage as such is imposed on any person has effect as if that provision were not contained therein<sup>6</sup>.

Where, by virtue of the provisions, whether express or implied, of any lease<sup>7</sup> or any contract collateral thereto, an obligation to repair is imposed on the tenant, the lease has effect as if there were contained therein covenants by the tenant<sup>8</sup> with the landlord<sup>9</sup> that, in the event of war damage occurring to the land comprised in the lease, the tenant will:

- 1085 (a) as soon as practicable after the damage has become known to him, serve a notice on the landlord stating that the damage has occurred and the general nature of the damage so far as it is known to him; and  
 1086 (b) permit the landlord or any person authorised by him, at such times as may be reasonable in the circumstances, to enter upon the land for the purpose of ascertaining the extent of the damage and making it good either temporarily or permanently<sup>10</sup>.

The statutory provisions relating to war damage<sup>11</sup> have effect in relation to any war damage notwithstanding any contract to the contrary made before that damage occurred<sup>12</sup>.

1 For these purposes, 'disposition' means any instrument, including an enactment, or oral transaction, whether made before, on or after 1 September 1939, creating or transferring any interest in land: Landlord and Tenant (War Damage) Act 1939 s 1(5). Where a disposition is made under or in pursuance of an enactment which imposes an obligation to repair in relation to the land the subject of the disposition, the obligation is deemed for these purposes to have been imposed by virtue of the provisions of the disposition: s 1(6).

2 For these purposes, 'land' means land of any tenure, and includes any buildings or works situated on, over or under land: *ibid* s 24.

3 For these purposes, 'war damage' has the meaning assigned to it by the War Damage Act 1941 s 80(1), (2) (repealed): Landlord and Tenant (War Damage) (Amendment) Act 1941 s 17(2). The definition of 'war damage' in the War Damage Act 1941 s 80(1), (2) was, however, replaced by the War Damage Act 1943 s 2(1) (repealed); and the War Damage Act 1943 was itself subsequently repealed by the Statute Law (Repeals) Act 1981 s 1(1), Sch 1 Pt XI.

4 Landlord and Tenant (War Damage) Act 1939 s 1(1). The provisions of s 1 have effect subject to the provisions of Pt II (ss 4-17) (as amended) (see PARA 645 et seq post): s 1(7).

5 *Ibid* s 1(2).

6 *Ibid* s 1(3). Where, under s 1(1)-(3) (see the text and notes 1-5 supra) an obligation to repair is modified or suspended or an obligation to make good war damage as such is extinguished, all rights and remedies, whether by way of damages, forfeiture, re-entry, sale, foreclosure or otherwise, arising out of the non-fulfilment of the obligation, including all rights against any person who has guaranteed the fulfilment of the obligation, are modified or extinguished accordingly: s 1(4).

7 For these purposes, 'lease' has the same meaning as in the Landlord and Tenant Act 1927 (see PARA 459 note 1 ante): Landlord and Tenant (War Damage) Act 1939 s 24.

8 For these purposes, 'tenant', in relation to a lease, means the person for the time being entitled to the term created by the lease: *ibid* s 24.

9 For these purposes, 'landlord', in relation to a lease, means the person who under the lease is, as between himself and the tenant, for the time being entitled to the rents and profits of the demised premises payable under the lease: *ibid* s 24.

10 *Ibid* s 2(1). Section 2(1) has effect as if references to a lease, tenant and landlord included respectively references to a mortgage, mortgagor and mortgagee; but it is not lawful for a mortgagee without leave of the court to enforce any right or remedy arising out of a breach of the covenant referred to in s 2(1)(a) (see head (a) in the text): s 2(2). For these purposes, 'mortgage' includes charge and debenture: s 24.

11 *Ie* the Landlord and Tenant (War Damage) Act 1939.

12 *Ibid* s 21.

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#### **480. Damage during requisitioning.**

Where, in the exercise of emergency powers<sup>1</sup>, possession of any land comprised in a lease<sup>2</sup> is taken on behalf of Her Majesty, then, during the period while possession so taken is retained, no remedy for breach of any repairing covenant<sup>3</sup> contained in the lease may be enforced, whether by action or otherwise, in respect of any damage<sup>4</sup> to the land occurring during that period; and, if the lease determines while possession of the land is so retained, or if upon possession of the land being given up, compensation in respect of the taking of possession thereof becomes payable for any such damage to the person entitled to the benefit of the covenant, no remedy for breach of the covenant may at any time be enforced in respect of that damage<sup>5</sup>.

Where possession of any such land so taken at any time after 24 August 1939 is or has at any time since that date been given up during the currency of the lease, and compensation in respect of the taking of possession thereof becomes or has become payable for any such damage to any person other than the tenant, then, if the tenant incurs expenditure in making good any of that damage, he may recover from that person an amount equal to the expenditure so incurred, not exceeding so much of the compensation payable to that person as may be agreed by the tenant and that person or, in default of agreement, as may be determined by the court, to be payable in respect of the damage<sup>6</sup>.

1 For these purposes, 'emergency powers' means any power conferred by the Transport Act 2000 ss 93, 94 (as amended) (see *AIR LAW* vol 2 (2008) PARA 44) or any power exercisable by virtue of the prerogative of the Crown: Landlord and Tenant (Requisitioned Land) Act 1944 s 5 (amended by the Statute Law (Repeals) Act 1976; Interpretation Act 1978 s 17(2)(a)).

2 For these purposes, 'lease' includes an underlease or other tenancy, an assignment operating as a lease or underlease, and an agreement for a lease, underlease or tenancy, or for such an assignment and the expression 'covenant' is to be construed accordingly: Landlord and Tenant (Requisitioned Land) Act 1944 s 5.

3 For these purposes, 'repairing covenant' means a covenant, whether express or implied, and whether general or specific, to keep in repair any premises comprised in a lease, or to leave or put any such premises in repair, or to pay a sum of money in lieu of leaving or putting the premises in repair, at the termination of the lease, but does not include a covenant to lay out in the reinstatement of any such premises money received under a policy of insurance: *ibid* s 5. See also note 2 *supra*.

4 For these purposes, 'damage' includes dilapidations, but does not include war damage within the meaning of the War Damage Act 1943 (repealed: see PARA 479 note 3 ante): Landlord and Tenant (Requisitioned Land) Act 1944 s 5.

5 Ibid s 1(1). The provisions of s 1 are deemed to have had effect as from 24 August 1939: s 1(2). Where the tenancy ends during the requisition, the liability of the tenant on the repairing covenant is assessed having regard to the state of the premises at the date of requisition: *Smiley v Townshend* [1950] 2 KB 311, [1950] 1 All ER 530, CA.

6 Landlord and Tenant (Requisitioned Land) Act 1944 s 2(1). The jurisdiction under s 2 is exercisable by the county court: see s 2(2).

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## 11. COVENANTS AS TO ALIENATION AND USE

### (1) COVENANTS AS TO ALIENATION

#### 481. Tenant's right to assign.

In the absence of provision to the contrary, a tenant for years or a tenant from year to year or other term has the right to assign his term or tenancy, or to create underleases or subtenancies<sup>1</sup>. A restraint on assignment or underletting is, however, valid, and may be created either by condition or by covenant. If it is created by a condition, the condition will express the lease to be void upon those events<sup>2</sup>, but it will be construed as making the lease subject to re-entry at the election of the landlord<sup>3</sup>. More usually the restraint will be imposed by the tenant's covenanting not to assign or underlet<sup>4</sup>. An assignment in breach of such a covenant or condition is not void but is effective subject to the landlord's rights to forfeit the lease<sup>5</sup>.

In relation to tenancies beginning on or after 1 January 1996, where a tenant does assign his tenancy, the benefit and burden of all covenants pass on the assignment and the assignee becomes bound by the tenant covenants to the extent that they previously bound the assignor<sup>6</sup>; but assignments that are in breach of covenant cannot release the assigning landlord or tenant from the covenants contained in the assigned tenancy<sup>7</sup>.

1 See *Doe d Mitchinson v Carter* (1798) 8 Term Rep 57 at 60; *Church v Brown* (1808) 15 Ves 258 at 264. Similarly an agreement for a lease is assignable in equity: see *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 423, HL, per Lord Lindley. An assignment by a tenant at will determines the tenancy, however, so soon as the landlord has notice: see PARA 204 ante. As to the assignment and devolution of leases generally see PARA 547 et seq post; as to the requirement that an assignment must be by deed see PARA 549 post; as to the assignment and subletting of assured tenancies see PARA 1063 post; and as to the assignment and subletting of secure tenancies see PARAS 1323-1328 post. A protected shorthold tenancy was not capable of being assigned except in pursuance of a court order: see PARA 1009 post.

2 See *Doe d Henniker v Watt* (1828) 8 B & C 308. As forfeiture is a matter of strict construction of law, an assignment which is void does not, however, give cause for forfeiture: *Doe d Lloyd v Powell* (1826) 5 B & C 308 at 313; but these cases antedate the requirements of the Law of Property Act 1925 s 146 (as amended): see PARA 619 post.

3 As to forfeiture see PARA 603 et seq post.

4 *Paul v Nurse* (1828) 8 B & C 486; and see *Re Johnson, ex p Blackett* (1894) 70 LT 381. The covenant may be binding notwithstanding that the landlord has re-entered on part of the land: *Collins v Sillye* (1651) Sty 265. A covenant not to assign without consent applies to a reassignment to the original tenant: *McEacharn v Colton* [1902] AC 104, PC.

5 See *Williams v Earle* (1868) LR 3 QB 739; *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA.

6 See the Landlord and Tenant (Covenants) Act 1995 s 3 (as amended), s 5; and PARAS 580, 582 post.

7 See *ibid* s 11; and PARA 588 post.

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#### 482. Covenant against assignment or parting with possession.

A covenant 'not to assign'<sup>1</sup>, or 'not to assign or otherwise part with'<sup>2</sup>, the premises is broken only by a legal assignment for the entire residue of the term. Consequently the covenant is not broken by a declaration of trust of the premises in favour of a third person<sup>3</sup>, or by the deposit of the lease as security for an advance<sup>4</sup>, or by the grant of an underlease of part of the premises<sup>5</sup>, or for part of the term<sup>6</sup>. A covenant 'not to assign or part with the possession of the premises' goes further and is broken as, for example, where the tenant makes an equitable assignment of the lease and places the assignee in possession; but a tenant who retains the legal possession of the whole of the premises at all material times does not commit a breach of the covenant by allowing other people to use the premises<sup>7</sup>. The retention of possession by one partner alone on a dissolution of the partnership is not a breach of a covenant against assignment contained in a lease to both<sup>8</sup>; but, if one executes a formal assignment to the other, that is a breach<sup>9</sup>. A covenant not to part with the possession of the premises is not broken by the tenant's parting with part of the premises<sup>10</sup> and, therefore, it is common to find in leases a covenant 'not to assign, underlet or part with possession of all or part of the demised premises'; but a covenant not to assign or underlet any part of the premises would be broken by an assignment or underletting of the whole<sup>11</sup>. The various provisions in such a covenant are not mutually exclusive so that breach of one provision may constitute breach of another<sup>12</sup>.

The fact that an overriding lease granted under the Landlord and Tenant (Covenants) Act 1995 to a former tenant or guarantor<sup>13</sup> takes effect subject to the relevant tenancy in respect of which it is created does not constitute a breach of any covenant of the lease against subletting or parting with possession of the premises demised by the lease or any part of them<sup>14</sup>.

1 *Gentle v Faulkner* [1900] 2 QB 267, CA, applied in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* [2001] Ch 733, [1997] 1 EGLR 39, CA (in the absence of a context showing an extended meaning, 'assignment' means an assignment of the legal estate, not the beneficial interest). The mortgaging of a greenhouse which the tenant is entitled to remove from the demised premises is not a breach of a covenant against 'any alienation of the premises': *Moss v James* (1877) 37 LT 715; *affd* (1878) 38 LT 595, CA. An agreement for a lease which is to be 'non-assignable' means only that the lease is not to be assigned and does not import a covenant against underletting or parting with possession: *Sweet and Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 699, [1964] 2 All ER 30, CA.

An assignment in breach of covenant cannot release the assignor from the covenants in the assigned tenancy: see the Landlord and Tenant (Covenants) Act 1995 s 11; and PARA 588 post.

2 *Doe d Pitt v Hogg* (1824) 4 Dow & Ry KB 226 at 229; also reported sub nom *Doe d Pitt v Laming* (1824) Ry & M 36. In a mining lease it is, however, a breach if the tenant gives to a third person the right to get and carry away part of the minerals: *Lord Mostyn v Manger* (1901) 17 TLR 199; *affd* 17 TLR 281, CA.

3 The declaration of trust is not converted into an assignment by the Supreme Court Act 1981 s 49(2); *Gentle v Faulkner* [1900] 2 QB 267, CA (decided under the Supreme Court of Judicature Act 1873 s 24(4) (repealed)); applied in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* [2001] Ch 733, [1997] 1 EGLR 39, CA). *Richards v Crawshay* (1892) 8 TLR 446, so far as to the contrary, is overruled. The



Supreme Court Act 1981 prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed.

4 *Doe d Pitt v Hogg* (1824) 4 Dow & Ry KB 226; *Re Hand, ex p Cocks* (1836) 2 Deac 14; *Ex p Drake* (1841) 1 Mont D & De G 539; *M'Kay v M'Nally* (1879) 4 LR Ir 438, CA; cf *Swanley Coal Co v Denton* [1906] 2 KB 873, CA.

5 *Russell v Beecham* [1924] 1 KB 525, CA.

6 *Crusoe d Blencowe v Bugby* (1771) 3 Wils 234.

7 *Peebles v Crosthwaite* (1897) 13 TLR 198, CA; *Chaplin v Smith* [1926] 1 KB 198, CA (sale of the business on the premises to a company, the tenant retaining possession of the premises); *Edwards v Barrington* (1901) 85 LT 650, HL (grant of 'front of house rights' by tenant of theatre); *Jackson v Simons* [1923] 1 Ch 373 (licence to sell tickets on the premises, held to amount to sharing possession, but not to parting with possession); *Stening v Abrahams* [1931] 1 Ch 470 (exclusive licence to use wall for advertisement held not to exclude tenant from possession of any part of the premises); *Abrahams v MacFisheries Ltd* [1925] 2 KB 18 (proposed undertenant let into possession before execution of underlease; tenant held to have parted with possession); *Harrison v Povey, London County Freehold and Leasehold Properties Ltd v Harrison and Povey* (1956) 168 Estates Gazette 613 (lease in the name of one of two partners; that partner left the premises and set up his own business elsewhere, but the other partner remained in possession and the partnership continued in existence; no parting with possession in breach of covenant); *Gian Singh & Co v Devraj Nahar* [1965] 1 All ER 768, [1965] 1 WLR 412, PC (tenant of business premises took partners, but the partnership deed did not constitute an assignment); *Lam Kee Ying Sdn Bhd v Lam Shes Tong* [1975] AC 247, [1974] 3 All ER 137, PC (tenant held, in all the circumstances, to have parted with possession of the demised premises when the business conducted from the premises was taken over by a company in which the tenant held a majority of the shares); *Wallace v Barratt & Son* (1997) 74 P & CR 408, [1997] 2 EGLR 1, CA (arable farm; farming operations were carried on by tenants' agents; only proper inference was that the holding was occupied by the tenant alone; something more than farming operations carried out by an independent contractor on arable land is required in order to amount to a sharing of occupation in breach of covenant). A covenant against parting with possession may, therefore, not be effective in preventing a tenant from allowing other persons to occupy the premises as licensees. If it is desired to restrict such occupation, the covenant should refer specifically to allowing others to occupy the premises. See also *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, HL (occupation by a company as agent of the tenants held not to exclude occupation by the tenants, so as to free them from liability for damage caused by an explosion on the premises); *Mean Fiddler Holdings Ltd v Islington London Borough Council* [2003] EWCA Civ 160, [2003] 2 P & CR 102, [2003] 2 EGLR 7 (operating a night club through promoters did not amount to sharing occupation but no agreed test to determine the issue); *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296, [2006] 2 All ER 872, [2006] 1 WLR 201 (covenant not to assign, sublet or part with possession of the premises, or to share possession, not breached by a sharing of occupation; on the facts the judge was entitled to conclude the lessee had shared possession). As to the distinction between a lease and a licence see PARA 6 et seq ante.

8 *Bristol Corp'n v Westcott* (1879) 12 ChD 461, CA.

9 *Varley v Coppard* (1872) LR 7 CP 505 (doubted in *Bristol Corp'n v Westcott* (1879) 12 ChD 461, CA); *Langton v Henson* (1905) 92 LT 805.

10 *Church v Brown* (1808) 15 Ves 258 at 265; *Grove v Portal* [1902] 1 Ch 727; *Cook v Shoemsmith* [1951] 1 KB 752, CA. As to the effect of the tenant's underletting the whole of the premises by separate lettings see PARA 484 post.

11 *Field v Barkworth* [1986] 1 All ER 362, [1986] 1 WLR 137.

12 *Marks v Warren* [1979] 1 All ER 29, 37 P & CR 275, (assignment of a lease held to constitute a breach of a covenant not to underlet or part with possession).

13 le granted under the Landlord and Tenant (Covenants) Act 1995 s 19: see PARA 290 ante.

14 See *ibid* s 20(5)(a); and PARA 290 ante.

## UPDATE

### 482 Covenant against assignment or parting with possession

NOTE 3--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 10--Allowing another party to occupy and use premises does not necessarily amount to a parting with possession in law: *Clarence House Ltd v National Westminster Bank plc* [2009] EWCA Civ 1311, [2010] 08 EG 106, [2009] All ER (D) 70 (Dec).

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### 483. Involuntary assignments.

A covenant against assignment is restricted in its operation to voluntary assignments<sup>1</sup>. It is, therefore, not broken where the lease is taken in execution<sup>2</sup>, provided the execution is bona fide<sup>3</sup>; nor where it vests in a trustee in bankruptcy<sup>4</sup>; nor where it passes on the death of the tenant, whether as part of his personal estate<sup>5</sup>, or under a specific bequest<sup>6</sup>; nor where it is acquired by a public body under powers of compulsory acquisition<sup>7</sup>; nor where the court makes a vesting order under the Trustee Act 1925<sup>8</sup>; but it is broken by an assignment of a company's leasehold by the liquidator in a voluntary or compulsory liquidation<sup>9</sup>. Involuntary assignments may be prohibited by express words in the lease; and it is common to find stipulations for forfeiture in the event of the tenant's becoming bankrupt or going into liquidation.

1 As to whether a covenant against assignment without consent and a covenant which absolutely prohibits assignment run with the land or are to be binding on the tenant's assigns in cases where the Landlord and Tenant (Covenants) Act 1995 does not apply see PARA 564 post.

2 *Doe d Mitchinson v Carter* (1798) 8 Term Rep 57.

3 *Doe d Mitchinson v Carter* (1799) 8 Term Rep 300.

4 *Doe d Goodbehere v Bevan* (1815) 3 M & S 353 at 360; and see *Weatherall v Geering* (1806) 12 Ves 504; *Doe d Cheere v Smith* (1814) 5 Taunt 795; and BANKRUPTCY AND INSOLVENCY vol 3(2) (2002 Reissue) PARA 414.

5 *Seers v Hind* (1791) 1 Ves 294.

6 *Crusoe d Blencowe v Bugby* (1771) 3 Wils 234 at 237; *Doe d Goodbehere v Bevan* (1815) 3 M & S 353 at 361; and see *Fox v Swann* (1655) Sty 482. Originally the covenant forbade a devise: *Lord Windsor v Burry* (1582) 1 Dyer 45b (n); *Parry v Harbert* (1539) 1 Dyer 45b.

7 *Slipper v Tottenham and Hampstead Junction Rly Co* (1867) LR 4 Eq 112; and see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 633.

8 *Marsh v Gilbert* [1980] 2 EGLR 44, (1980) 256 Estates Gazette 715. Where a trustee or personal representative has entered into an authorised guarantee agreement (see PARA 593 post) with respect to any lease comprised in the deceased's estate he may distribute the residuary estate without appropriating any part of it to meet any future liability under the agreement and, having satisfied all liabilities under it which may have accrued and been claimed up to the date of distribution and notwithstanding such distribution, he will not be liable in respect of any claim brought under any such agreement: see the Trustee Act 1925 s 26(1A) (added by the Landlord and Tenant (Covenants) Act 1995 s 30(1), Sch 1 para 1).

9 *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480 (voluntary liquidation); *Re Farrow's Bank Ltd* [1921] 2 Ch 164, CA (compulsory liquidation). Such an assignment is the act of the company acting through the liquidator. In *Re Birkbeck Permanent Benefit Building Society, Special Receiver v Licences Insurance Corp'n* [1913] 2 Ch 34, the society was an unregistered company and, therefore, all its property vested in the liquidator, and there was, moreover, a provision excepting assignments by operation of law, which expressly prevented the assignment in question from being such an assignment as to work a forfeiture. The position of the liquidator is different from that of a trustee in bankruptcy, who does not dispose of the bankrupt's property as such, all the property being vested in him: *Re Farrow's Bank Ltd* [1921] 2 Ch 164 at 174, CA.

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#### 484. Covenant against underletting.

A covenant against underletting is not broken by a letting of lodgings<sup>1</sup> or the grant of a licence; but it is broken whenever the tenant parts with the exclusive possession of the premises or, if the covenant is so worded, any part of the premises to a subtenant<sup>2</sup>. If the covenant is against underletting simply, however, an underletting of part is no breach<sup>3</sup>. A covenant not to underlet is broken by an underletting from year to year<sup>4</sup>. To constitute a covenant against underletting it is not necessary that words appropriate to underletting should be used; it is sufficient if the covenant prohibits a disposition for a part only of the term<sup>5</sup>. The court will be careful not to let a provision for forfeiture go beyond the proper meaning of the words; and, in the absence of reference to a mere change of occupancy, or to a disposition for part of the term, words primarily importing assignment will not include underletting<sup>6</sup>. Words which are appropriate to underletting may, however, have their scope widened, and may extend to assignment, if they are intended to be applicable to an alienation for the entire residue of the term<sup>7</sup>. A forfeiture will be incurred although the underletting is only a mortgage by way of sub-demise<sup>8</sup>.

<sup>1</sup> *Doe d Pitt v Laming* (1814) 4 Camp 73 at 77. As to letting cottages on the premises to labourers see *Browne v Marquis of Sligo* (1859) 10 I Ch R 1; and as to the nature of a service occupancy see PARA 15 ante.

<sup>2</sup> *Roe d Dingley v Sales* (1813) 1 M & S 297; cf *Greenslade v Tapscott* (1834) 1 Cr M & R 55 at 59; *Richards v Davies* [1921] 1 Ch 90 (letting of the grass keep of a farm held a breach). To constitute a breach there must be a substantial parting with a substantial part of the premises: *Mashiter v Smith* (1887) 3 TLR 673. A mere advertising for a tenant is not a breach: *Gourlay v Duke of Somerset* (1812) 1 Ves & B 68. A statutory body in which the term is vested is subject to the restriction of the covenant: *Metropolitan Water Board v Solomon* [1908] 2 Ch 214. The mere fact that a third person is in occupation who does not claim under the tenant is not evidence of a breach of covenant (*Doe v Payne* (1815) 1 Stark 86); but, if he appears to be subtenant to the tenant, this is prima facie evidence of underletting (*Doe d Hindly v Rickarby* (1803) 5 Esp 4).

<sup>3</sup> *Wilson v Rosenthal* (1906) 22 TLR 233; *Cottell v Baker* (1920) 36 TLR 208; *Cook v Shoesmith* [1951] 1 KB 752 CA; *Esdaile v Lewis* [1956] 2 All ER 357, [1956] 1 WLR 709, CA. If, having underlet part of the premises with the landlord's consent, the tenant subsequently underlets the remainder without obtaining the landlord's consent, a covenant against underletting the premises is broken, as the tenant has never obtained the landlord's consent to the underletting of the whole (*Chatterton v Terrell* [1923] AC 578, HL); but, if the effect of a covenant is such that it amounts to a covenant not to underlet the whole of the premises for a term of more than three years, the covenant is not broken by the tenant's underletting part to one subtenant for a period of less than three years and subsequently underletting the remainder to another subtenant for more than three years (*Roberts v Enlayde Ltd* [1924] 1 KB 335, CA). See also PARA 482 the text and note 10 ante.

<sup>4</sup> *Timms v Baker* (1883) 49 LT 106.

<sup>5</sup> *Doe d Holland v Worsley* (1807) 1 Camp 20 (proviso that the tenant should not assign or otherwise part with the premises or any part thereof for the whole or any part of the term); *Dymock v Showell's Brewery Co Ltd* (1898) 79 LT 329, CA (proviso for re-entry if the tenant did any act whereby the premises became vested for the whole or any part of the term in any person other than the tenant; this was held to include a subletting from year to year).

<sup>6</sup> *Crusoe d Blencowe v Bugby* (1771) 3 Wils 234 (covenant not to 'assign, transfer, or set over, or otherwise do or put away with' the lease or the demised premises); *Church v Brown* (1808) 15 Ves 258 at 265; cf *Kinnersley v Orpe* (1779) 1 Doug KB 56; *Russell v Beecham* [1924] 1 KB 525, CA. A sublease for one year from a future date is not a breach of a covenant not to sublet for more than one year: *Croft v Lumley* (1858) 6 HL Cas 672.

<sup>7</sup> *Greenaway v Adams* (1806) 12 Ves 395 (covenant not to 'let, set, or demise the premises for the whole or any part of the term'). The words 'set or let' alone, without reference to the whole of the term, forbid underletting only and leave the tenant free to assign: *Re Doyle and O'Hara's Contract* [1899] 1 IR 113.

8 *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA.

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#### **485. Conditions of landlord's consent to assignment.**

In all leases<sup>1</sup> containing a covenant, condition or agreement against assigning, underletting or parting with the possession<sup>2</sup>, or disposing of the land<sup>3</sup> or property<sup>4</sup> leased, without licence or consent, unless the lease contains an express provision to the contrary, such covenant, condition or agreement is deemed to be subject to a proviso to the effect that no fine<sup>5</sup> or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent<sup>6</sup>. The proviso so implied does not preclude the right to require payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent<sup>7</sup>, nor does it prevent the landlord from requiring the assignee to covenant to pay the rent and perform the tenant's covenants during the residue of the term<sup>8</sup>, or, in the case of a lease granted under a building contract, from requiring a deposit as security for the completion of the works<sup>9</sup>; but it does preclude him from demanding an increased rent<sup>10</sup>. If consent is refused except on payment, the tenant is entitled to assign without consent<sup>11</sup>; and, if he enters into a contract to pay a fine, the contract is not enforceable against him<sup>12</sup>. The proviso so implied does not, however, make payment of a fine for consent illegal and, therefore, if the tenant has paid such a fine, he may not require repayment<sup>13</sup>; and, if the assignee has covenanted to pay a sum in the nature of a fine, he is liable on the covenant<sup>14</sup>.

1 For the meaning of 'lease' see PARA 145 note 1 ante.

2 For these purposes, 'possession' includes receipt of rent and profits or the right to receive the same if any: Law of Property Act 1925 s 205(1)(xix).

3 For the meaning of 'land' see PARA 17 note 1 ante.

4 For these purposes, 'property' includes any interest in real property: see the Law of Property Act 1925 s 205(1)(xx).

5 For these purposes, 'fine' includes a premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift: *ibid* s 205(1)(xxiii). Thus it includes any valuable consideration given or required in such circumstances that, if it were money, it would be what is commonly known as a fine (*Waite v Jennings* [1906] 2 KB 11 at 18, CA), and includes a stipulation by a landlord, who is a brewer, that a free public house is to be a tied house for the remainder of the term assigned (*Gardner & Co v Cone* [1928] Ch 955). To take in advance the whole rent for the duration of a tenancy is to take a fine: see *Hughes v Waite* [1957] 1 All ER 603, [1957] 1 WLR 713.

6 Law of Property Act 1925 s 144. Section 144 applies to all lease whatever their date: see *West v Gwynne* [1911] 2 Ch 1, CA.

7 See note 6 *supra*.

8 See *Waite v Jennings* [1906] 2 KB 11, CA.

9 *Re Cosh's Contract* [1897] 1 Ch 9, CA.

10 *Jenkins v Price* [1907] 2 Ch 229; *revsd* on another point [1908] 1 Ch 10, CA.

11 *Andrew v Bridgman* [1908] 1 KB 596, CA; *Waite v Jennings* [1906] 2 KB 11 at 16, CA; *West v Gwynne* [1911] 2 Ch 1, CA; *Gardner & Co v Cone* [1928] Ch 955 at 965.

12 *Comber v Fleet Electrics Ltd* [1955] 2 All ER 161, [1955] 1 WLR 566. Such a contract may be enforceable if made by deed: *Comber v Fleet Electrics Ltd* supra at 165 and at 572 per Vaisey J.

13 *Andrew v Bridgman* [1908] 1 KB 596, CA; *West v Gwynne* [1911] 2 Ch 1, CA; and see *Jenkins v Price* [1907] 2 Ch 229.

14 *Waite v Jennings* [1906] 2 KB 11, CA.

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#### **486. Unreasonable withholding of consent.**

In all leases<sup>1</sup>, whether made before, on or after 1 January 1926, containing a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of the demised premises or any part thereof without licence or consent, such covenant, condition or agreement is deemed, notwithstanding any express provision to the contrary, to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld<sup>2</sup>. The proviso so implied does not, however, preclude the right of the landlord<sup>3</sup> to require payment of a reasonable sum for legal or other expenses incurred in connection with such licence or consent<sup>4</sup>. The proviso so implied does not apply if the lease requires pre-conditions to be met so that the circumstances in which the tenant can properly apply for assignment or subletting are restricted<sup>5</sup>. The tenant is bound to ask for the consent before he assigns, even though it could not properly be refused<sup>6</sup>, and to give the landlord a reasonable time in which to consider the matter<sup>7</sup>. If through forgetfulness he omits to do so, he becomes liable to forfeiture<sup>8</sup>. The landlord is entitled to be told the true nature of the transaction to which he is asked to consent, and to withhold his consent until the terms are disclosed<sup>9</sup>. A written consent given 'subject to licence' will be an unconditional consent for the purposes of the covenant<sup>10</sup>.

Where, however, the landlord and the tenant under a qualifying lease<sup>11</sup> have entered into an agreement<sup>12</sup> specifying for these purposes:

- 1087 (1) any circumstances in which the landlord may withhold his licence or consent to an assignment<sup>13</sup> of the demised premises or any part of them; or
- 1088 (2) any conditions subject to which any such licence or consent may be granted,

then the landlord:

- 1089 (a) is not to be regarded as unreasonably withholding his licence or consent to any such assignment if he withholds it on the ground, and it is the case, that any such circumstances exist; and
- 1090 (b) if he gives any such licence or consent subject to any such conditions, is not to be regarded as giving it subject to unreasonable conditions<sup>14</sup>.

1 For the meaning of 'lease' see PARA 459 note 1 ante. Certain leases, are, however, excluded: see note 2 supra.

2 Landlord and Tenant Act 1927 s 19(1)(a). For the grounds for refusal and the test of unreasonableness see PARA 492 post. The proviso so implied has no application where the lease expressly provides that in certain

circumstances consent will not be withheld (*Moat v Martin* [1950] 1 KB 175, [1949] 2 All ER 646, CA); but the parties to the lease may not restrict the operation of the Landlord and Tenant Act 1927 s 19(1)(a) by stipulating what is to be deemed unreasonable (*Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751; *Re Smith's Lease, Smith v Richards* [1951] 1 All ER 346). These decisions must, however, now be viewed in the context of the Landlord and Tenant Act 1927 s 19(1A)-(1E) (as added): see the text and notes 11-14 *infra*. It was held in *Adler v Upper Grosvenor Street Investment Ltd* [1957] 1 All ER 229, [1957] 1 WLR 227, and in *Bocardo SA v S and M Hotels Ltd* [1979] 3 All ER 737, [1980] 1 WLR 17, CA, that the Landlord and Tenant Act 1927 s 19(1)(a) does not invalidate a provision that before assigning the tenant must offer to surrender his lease; such a provision is an estate contract registrable under the Land Charges Act 1972: *Greene v Church Comrs for England* [1974] Ch 467, [1974] 3 All ER 609, CA.

The Landlord and Tenant Act 1927 s 19(1)(a) does not apply to leases of agricultural holdings within the meaning of the Agricultural Holdings Act 1986 which are leases in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323), or to farm business tenancies within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302) (Landlord and Tenant Act 1927 s 19(4) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 15; the Agricultural Tenancies Act 1995 s 40, Schedule para 6)) or to assured tenancies (see the Housing Act 1988 s 15(2); and PARA 1063 post); nor does it apply to any covenant entered into to give effect to the Leasehold Reform Act 1967 s 30(2) (see PARA 1478 post) (s 30(5)).

Nor does the Landlord and Tenant Act 1927 s 19(1)(a) apply to (1) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre; or (2) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation: see the Criminal Justice Act 1991 s 84(1), (3)(c) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532; the Criminal Justice and Public Order Act 1994 s 7(1), (3)(c); and PRISONS vol 36(2) (Reissue) PARA 658; the Immigration and Asylum Act 1999 s 149(3)(c) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

The Landlord and Tenant Act 1927 s 19(1)(a) also does not apply to absolute prohibitions against assigning, underletting, charging and parting with possession, although there have been dicta casting doubt on this: see *Property and Bloodstock Ltd v Emerton* [1968] Ch 94 at 119, [1967] 3 All ER 321 at 330, CA, per Danckwerts LJ; cf the observations of Romer LJ in *FW Woolworth & Co Ltd v Lambert* [1937] Ch 37 at 58, 59, [1936] 2 All ER 1523 at 1540, CA, where it is implicit in the judgment that he accepts the distinction between absolute and conditional covenants and that the Landlord and Tenant Act 1927 s 19 (as amended) does not apply to absolute covenants. That distinction is also implicit in the provisions of the Landlord and Tenant Act 1988: see PARAS 490-491 post.

3 For these purposes, 'landlord' means any person who under the lease is, as between himself and the tenant or other lessee, for the time being entitled to the rents and profits of the demised premises payable under the lease: Landlord and Tenant Act 1927 s 25(1). Where the premises are managed by an RTM company (see PARA 367 et seq ante), s 19(1) applies as if (1) the reference to the landlord; and (2) the final reference to the lessor, were to the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 1(1), (2).

4 See note 2 *supra*.

5 *Bocardo SA v S & M Hotels Ltd* [1979] 3 All ER 737, [1980] 1 WLR 17, CA; *Allied Dunbar Assurance plc v Homebase Ltd* [2002] EWCA Civ 666, [2003] 1 P & CR 75, [2002] 2 EGLR 23.

6 *Eastern Telegraph Co v Dent* [1899] 1 QB 835, CA. *Burford v Unwin* (1885) Cab & El 494 contra is overruled.

7 *Wilson v Fynn* [1948] 2 All ER 40.

8 *Barrow v Isaacs & Son* [1891] 1 QB 417, CA; *Lewis and Allenby (1909) Ltd v Pegge* [1914] 1 Ch 782 at 785; *Ellis v Allen* [1914] 1 Ch 904 at 909. As to relief from forfeiture see PARA 622 post.

9 *Fullers Theatre and Vaudeville Co Ltd v Rofe* [1923] AC 435, PC; *Isow's Restaurants Ltd v Greenhaven (Piccadilly) Properties Ltd* (1969) 213 Estates Gazette 505 (where no answer was given as to the proposed user, which was held to be relevant to the respectability of the proposed undertenant). If information as to the assignee's character comes to light, through no fault of the tenant, only after the landlord's consent to the assignment has been given, the landlord may not then withdraw his consent: *Mitten v Fagg* (1978) 247 Estates Gazette 901. See also *Hatfield v Anderson* [1980] 2 EGLR 48, (1980) 256 Estates Gazette 1099, CA (fictitious transaction; nominee proposed who never intended to be a genuine assignee); and *Allied Dunbar Assurance plc v Homebase Ltd* [2002] EWCA Civ 666, [2003] 1 P & CR 75, [2002] 2 EGLR 23 (terms of collateral deed must be revealed).

10 *Mount Eden Land Ltd v Prudential Assurance Co Ltd* (1996) 74 P & CR 377, sub nom *Prudential Assurance Co Ltd v Mount Eden Land Ltd* [1997] 1 EGLR 37, CA.

11 For these purposes, 'qualifying lease' means any lease which is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 1 (see PARA 578 post) other than a residential lease, namely a lease by which a building or part of a building is let wholly or mainly as a single private residence: Landlord and Tenant Act 1927 s 19(1E)(a) (s 19(1A)-(1E) added by the Landlord and Tenant (Covenants) Act 1995 s 22).

12 The Landlord and Tenant Act 1927 s 19(1A) (as added) (see the text and notes 11-12 infra) applies to such an agreement as is mentioned therein (1) whether it is contained in the lease or not; and (2) whether it is made at the time when the lease is granted or at any other time falling before the application for the landlord's licence or consent is made: s 19(1B) (as added: see note 9 supra). It does not, however, apply to any such agreement to the extent that any circumstances or conditions specified in it are framed by reference to any matter falling to be determined by the landlord or by any other person for the purposes of the agreement, unless under the terms of the agreement: (a) that person's power to determine that matter is required to be exercised reasonably; or (b) the tenant is given an unrestricted right to have any such determination reviewed by a person independent of both landlord and tenant whose identity is ascertainable by reference to the agreement; and in the latter case the agreement provides for the determination made by any such independent person on the review to be conclusive as to the matter in question: s 19(1C) (as so added).

13 For these purposes, references to assignment include parting with possession on assignment: *ibid* s 19(1E)(b) (as added: see note 9 supra).

14 *Ibid* s 19(1A) (as added: see note 9 supra). The Landlord and Tenant Act 1988 s 1 (qualified duty to consent to assignment etc: see PARA 490 post) has effect subject to the provisions of the Landlord and Tenant Act 1927 s 19(1A) (as so added): s 19(1A).

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#### **487. Tenant's remedy where consent is unreasonably refused.**

The implied proviso<sup>1</sup> that consent shall not be unreasonably withheld is not to be construed as implying a covenant on the part of the landlord not to refuse his consent arbitrarily or unreasonably<sup>2</sup>; but, if in fact it is so refused, the tenant is at liberty to assign without the landlord's consent<sup>3</sup> and may obtain a declaration by the court of his right to do so<sup>4</sup>.

Where a landlord withholds his licence or consent to an assignment of the tenancy or a subletting, charging or parting with the possession of the demised property or any part thereof, and the High Court has jurisdiction to make a declaration that the licence or consent was unreasonably withheld, then, without prejudice to the jurisdiction of the High Court, the county court has the like jurisdiction whatever the net annual value for rating<sup>5</sup> of the demised property is to be taken to be for the purposes of the County Courts Act 1984 and notwithstanding that the tenant does not seek any relief other than the declaration<sup>6</sup>.

Where, on the making of an application to a county court for such a declaration, the court is satisfied that consent was unreasonably withheld, it must make a declaration accordingly<sup>7</sup>.

1 The proviso implied by the Landlord and Tenant Act 1927 s 19(1)(a): see PARA 486 ante.

2 This is now subject to the qualified statutory duty to consent: see PARA 490 post.

3 *Treloar v Bigge* (1874) LR 9 Exch 151; *Hyde v Warden* (1877) 3 Ex D 72, CA; *Sear v House Property and Investment Society* (1880) 16 ChD 387; *Lewis and Allenby (1909) Ltd v Pegge* [1914] 1 Ch 782; *Ideal Film Renting Co Ltd v Nielsen* [1921] 1 Ch 575 (where the qualification was introduced, not by way of proviso, but in the shape of an express covenant by the landlord, and it was held that, consent having been refused, the

tenant could assign without it and also bring a claim for breach of the landlord's covenant). See also *Curtis Moffat Ltd v Wheeler* [1929] 2 Ch 224 at 236.

4 *Young v Ashley Gardens Properties Ltd* [1903] 2 Ch 112, CA; *Evans v Levy* [1910] 1 Ch 452; *Shanly v Ward* (1913) 29 TLR 714, CA. The tenant is entitled to the costs of the claim for this purpose: *Young v Ashley Gardens Properties Ltd* supra; *West v Gwynne* [1911] 2 Ch 1, CA, overruling on this point *Jenkins v Price* [1907] 2 Ch 229, and *Evans v Levy* supra. An assignee may seek a declaration without joining the assignor as party: *Theodorou v Bloom* [1964] 3 All ER 399n, [1964] 1 WLR 1152. In general, specific performance of a contract to assign a lease will not be granted if the landlord has refused his consent to the assignment and no such declaration has been obtained: see *Re Marshall and Salt's Contract* [1900] 2 Ch 202; cf *White v Hay* (1895) 72 LT 281. See also *Day v Singleton* [1899] 2 Ch 320, CA; and SPECIFIC PERFORMANCE. The tenant will not be entitled to damages for an unreasonable withholding of consent, at least if the covenant is worded in the conventional form: *Rendall v Roberts and Stacey Ltd* (1959) 175 Estates Gazette 265; *Rose v Cossman* (1966) 201 Estates Gazette 767, CA.

5 For the meaning of 'annual value' see PARA 522 post.

6 Landlord and Tenant Act 1954 s 53(1)(a) (amended by the County Courts Act 1984 s 148(1), Sch 2 Pt V para 23). As to the application of the Landlord and Tenant Act 1954 s 53 (as amended) see PARA 471 note 4 ante.

7 Ibid s 53(2). See also note 6 supra.

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#### **488. Unlawful withholding of consent.**

Where the licence or consent of the landlord or of any other person is required for the disposal<sup>1</sup> to any person of premises in Great Britain<sup>2</sup> comprised in a tenancy<sup>3</sup>, then subject to certain statutory exceptions<sup>4</sup> it is unlawful for the landlord or other person to discriminate against a person on grounds of sex, race, or disability by withholding the licence or consent for disposal of the premises to him or her<sup>5</sup>. Unlawful discrimination in the context of landlord and tenant law has already been discussed<sup>6</sup> and is dealt with in more detail elsewhere in this work<sup>7</sup>.

1 For the meaning of 'disposal' for these purposes see PARAS 48 note 14, 49 note 18, 50 note 6 ante.

2 For the meaning of 'Great Britain' see PARA 25 note 18 ante.

3 For meaning of 'tenancy' for these purposes see PARAS 48 note 14, 49 note 18, 50 note 6 ante.

4 See PARAS 48-50 ante.

5 See note 4 supra.

6 See PARAS 48-51 ante.

7 See DISCRIMINATION vol 13 (2007 Reissue) PARA 599 et seq.

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#### **489. Building leases.**



In all leases<sup>1</sup>, whether made before, on or after 1 January 1926, containing a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of the demised premises or any part thereof without licence or consent, such covenant, condition or agreement is deemed, notwithstanding any express provision to the contrary, to be subject, if the lease is for more than 40 years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration, of buildings, and the lessor is not a government department or a local or public authority or a statutory<sup>2</sup> or public utility<sup>3</sup> company, to a proviso to the effect that in the case of any assignment, underletting, charging or parting with the possession, whether by the holders of the lease or any undertenant, whether immediate or not, effected more than seven years before the end of the term, no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected<sup>4</sup>.

In its application to a qualifying lease<sup>5</sup>, however, the above provisions do not have effect in relation to any assignment<sup>6</sup> of the lease<sup>7</sup>.

1 For the meaning of 'lease' see PARA 459 note 1 ante.

2 For these purposes, the expression 'statutory company' means any company constituted by or under an Act of Parliament to construct, work or carry on any tramway, hydraulic power, dock, canal or railway undertaking: Landlord and Tenant Act 1927 s 25(1) (amended by the Gas Act 1986 s 67(4), Sch 9 Pt I; the Water Act 1989 s 109(3), Sch 27 Pt I; the Electricity Act 1989 s 112(4), Sch 18).

References in the Landlord and Tenant Act 1927 to a statutory company include references to (1) a gas transporter (see the Gas Act 1995 s 16(1), Sch 4 para 1(4)); (2) the Environment Agency, a water undertaker and a sewerage undertaker (see the Water Act 1989 s 190(1), Sch 25 para 1(3) (amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 3, Sch 2 para 4)); and (3) a holder of a licence under the Electricity Act 1989 s 6 (as substituted and amended) (see s 112(1), Sch 16 para 1(2)).

3 For these purposes, the expression 'public utility company' means any company within the meaning of the Companies Act 1985 (see COMPANIES vol 14 (2009) PARA 1) or a society registered under the Industrial and Provident Societies Act 1965 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2395, 2396) carrying on any such undertaking as is described in note 2 supra: Landlord and Tenant Act 1927 s 25(1); Interpretation Act 1978 s 17(2)(a).

4 Landlord and Tenant Act 1927 s 19(1)(b). Section 19(1)(b) does not, however, apply to leases of agricultural holdings within the meaning of the Agricultural Holdings Act 1986 which are leases in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323), or to farm business tenancies within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302) or to mining leases: Landlord and Tenant Act 1927 s 19(4) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 15; the Agricultural Tenancies Act 1995 s 40, Schedule para 6). For the meaning of 'mining lease' see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 322.

Nor does the Landlord and Tenant Act 1927 s 19(1)(b) apply to (1) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre; or (2) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation: see the Criminal Justice Act 1991 s 84(1), (3)(c) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532; the Criminal Justice and Public Order Act 1994 s 7(1), (3)(c); and PRISONS vol 36(2) (Reissue) PARA 658; the Immigration and Asylum Act 1999 s 149(3)(c) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

5 For the meaning of 'qualifying lease' see PARA 486 note 11 ante.

6 For the meaning of references to an assignment for these purposes see PARA 486 note 13 ante.

7 Landlord and Tenant Act 1927 s 19(1D) (added by the Landlord and Tenant (Covenants) Act 1995 s 22).

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#### **490. Qualified duty to consent to assignment etc.**

In any case where:

- 1091 (1) a tenancy<sup>1</sup> includes a covenant<sup>2</sup> on the part of the tenant<sup>3</sup> not to enter into one or more of the following transactions, that is to say assigning, underletting, charging or parting with the possession of, the premises comprised in the tenancy or any part of the premises without the consent<sup>4</sup> of the landlord<sup>5</sup> or some other person<sup>6</sup>; but
- 1092 (2) the covenant is subject to the qualification that the consent is not to be unreasonably withheld, whether or not it is also subject to any other qualification,

then, where there is served on the person who may consent to a proposed transaction<sup>7</sup> a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time<sup>8</sup>:

- 1093 (a) to give consent, except in a case where it is reasonable not to give consent<sup>9</sup>;
- 1094 (b) to serve on the tenant written notice of his decision whether or not to give consent specifying in addition, if the consent is given subject to conditions, the conditions and, if the consent is withheld, the reasons for withholding it<sup>10</sup>.

It is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant<sup>11</sup>.

It is for the person who owed any duty under heads (a) and (b) above:

- 1095 (i) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did;
- 1096 (ii) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was;
- 1097 (iii) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable;

and, if the question arises whether he served notice within a reasonable time, to show that he did<sup>12</sup>.

If, in a case to which the above provisions apply, any person receives a written application by the tenant for consent to a proposed transaction and that person:

- 1098 (A) is a person who may consent to the transaction or, though not such a person, is the landlord; and
- 1099 (B) believes that another person, other than a person who he believes has received the application or a copy of it, is a person who may consent to the transaction,

he owes a duty to the tenant, whether or not he owes him any duty under the above provisions, to take such steps as are reasonable to secure the receipt within a reasonable time by the other person of a copy of the application<sup>13</sup>.

A claim that a person has broken any duty under the above provisions may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty<sup>14</sup>.

1 For these purposes, 'tenancy' means any lease or other tenancy, whether made before, on or after 29 September 1988, and includes a subtenancy and an agreement for a tenancy; and references to the landlord and the tenant are to be interpreted accordingly: Landlord and Tenant Act 1988 s 5(1). The Landlord and Tenant Act 1988 does not, however, apply to a secure tenancy, defined in the Housing Act 1985 s 79 (see PARA 1300 post), or to an introductory tenancy within the meaning of the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) (see PARA 1285 et seq post): Landlord and Tenant Act 1988 s 5(3) (amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 5).

Nor does the Landlord and Tenant Act 1988 apply to (1) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre; or (2) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation: see the Criminal Justice Act 1991 s 84(1), (3)(c) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532; the Criminal Justice and Public Order Act 1994 s 7(1), (3)(c); and PRISONS vol 36(2) (Reissue) PARA 658; the Immigration and Asylum Act 1999 s 149(3)(c) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

2 For these purposes, 'covenant' includes condition and agreement: Landlord and Tenant Act 1988 s 5(1). See, however, note 6 infra.

3 For these purposes, 'tenant', where the tenancy is affected by a mortgage, within the meaning of the Law of Property Act 1925 (see MORTGAGE vol 77 (2010) PARA 101), and the mortgagee proposes to exercise his statutory or express power of sale, includes the mortgagee: Landlord and Tenant Act 1988 s 5(1). As to the interpretation of references to the tenant see note 1 supra.

4 For these purposes, 'consent' includes licence: *ibid* s 5(1).

5 For these purposes, 'landlord' includes any superior landlord from whom the tenant's immediate landlord directly or indirectly holds: *ibid* s 5(1). As to the interpretation of references to the landlord see note 1 supra.

6 For these purposes, references to the person who may consent to any assignment, underletting, charging or parting with possession to which the covenant relates are to the person who under the covenant may consent to the tenant entering into the proposed transaction: *ibid* s 1(2)(b). Where the premises are managed by an RTM company (see PARA 367 et seq ante), the reference in s 1(2)(b) to the covenant is to the covenant as it has effect subject to the Commonhold and Leasehold Reform Act 2002 s 98 (see PARA 392 ante): s 102(1), Sch 7 para 13(1), (2). For the meaning of references to a proposed transaction see note 7 infra.

7 The reference to the service of an application on a person who may consent to a proposed transaction includes a reference to the receipt by him of an application or a copy of an application, whether it is for his consent or that of another: Landlord and Tenant Act 1988 s 2(2). For these purposes, references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates: s 1(2)(a).

8 See *Midland Bank plc v Chart Enterprises Inc* [1990] 2 EGLR 59 (two and a half months' delay held to be unreasonable). The Landlord and Tenant Act 1988 interlinks with, and does not provide an entirely separate code from, the contractual covenant against alienation between landlord and tenant, and changes aspects of the law by necessary implication. Thus, if a landlord does not within a reasonable time give reasons in writing for refusing consent, it is not open to him subsequently to rely on reasons that have not been so specified, and it follows that reasons communicated orally will not suffice: *Footwear Corp'n Ltd v Amplight Properties Ltd* [1998] 3 All ER 52, [1999] 1 WLR 551, approved in *Go West Ltd v Spigarolo* [2003] EWCA Civ 17, [2003] QB 1140, [2003] 2 All ER 141. If the landlord raises no point which is outstanding at the expiry of the reasonable time and which could constitute a reasonable ground for refusing consent, it is his duty to give consent under the Landlord and Tenant Act 1988 s 1(3): *Norwich Union Life Insurance Society v Shopmoor Ltd* [1998] 3 All ER 32, [1999] 1 WLR 531. 'Reasonable time' expires on the landlord's service of written notice of his refusal to consent to assignment with reasons under the Landlord and Tenant Act 1988 s 1(3): *Go West Ltd v Spigarolo*

supra. See also *NCR Ltd v Riverland Portfolio No 1 Ltd* [2005] EWCA Civ 312, [2005] 2 EGLR 42, [2005] All ER (D) 343 (Mar).

9 Giving consent subject to any condition that is not a reasonable condition does not, however, satisfy the duty under this provision: Landlord and Tenant Act 1988 s 1(4). Section 1 has effect subject to the provisions of the Landlord and Tenant Act 1927 s 19(1A) (as added) (agreements by landlord and tenant under a qualifying lease specifying circumstances in which landlord may withhold his licence or consent to assignment and any conditions subject to which such licence or consent may be granted: see PARA 486 ante): s 19(1A) (added by the Landlord and Tenant (Covenants) Act 1995 s 22). Reasonableness under the Landlord and Tenant Act 1988 is to be judged by circumstances existing and known at the time of the refusal: *CIN Properties Ltd v Gill* (1992) 67 P & CR 288, [1993] 2 EGLR 97.

It is not reasonable for a landlord to seek to impose a condition which is designed to increase or enhance his rights under the head lease: *Mount Eden Land Ltd v Stradley Investments Ltd* (1997) 74 P & CR 306, [1996] NPC 138, CA. See also *Storehouse Properties Ltd v Ocobase Ltd* (1998) Times, 3 April (ignorance of landlord as to the circumstances surrounding the tenant's application irrelevant, where full disclosure would not have justified refusal); *Norwich Union Life Insurance Society v Shopmoor Ltd* [1998] 3 All ER 32, [1999] 1 WLR 531 (attempt to obtain a collateral advantage unrelated to the landlord and tenant relationship); *Footwear Corp'n Ltd v Amplight Properties Ltd* [1998] 3 All ER 52, [1999] 1 WLR 551 (an unreasonable view taken of the proposed assignee's accounts; there is no rule of thumb that a proposed assignee's post-tax profits must be three times the rent before it can be regarded as a satisfactory tenant); *Clinton Cards (Essex) Ltd v Sun Alliance & London Assurance Co Ltd* [2002] EWHC 1576 (Ch), [2002] 3 EGLR 19 [2002] All ER (D) 92 (Jul) (unreasonable for landlord to withhold consent to underlet at open market rent, albeit amount less than basic rent stipulated in lease); *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1, [2004] 1 EGLR 121 (unreasonable for landlord to behave obstructively to prevent an assignment for its own benefit).

Where a landlord required the tenants to be 'fully' responsible for 'all' the landlord's costs, rather than seeking only reasonable costs, before granting consent, this was held to be unreasonable: *Dong Bang Minerva (UK) Ltd v Davina Ltd* (1996) 73 P & CR 253, [1996] 2 EGLR 31, CA (where, however, it was agreed between the parties and accepted for the purposes of the decision that there is no breach of statutory duty provided the landlord's request for an undertaking as to his costs is limited to his reasonable costs).

A landlord who had failed to give consent was held to have no defence to a claim for breach of statutory duty where the tenant, who sought consent to sublet, had not revealed the proposed rent; although the lease contained a proviso that any subletting was to be at a full rack rent, it was for the landlord to respond requesting details of the rent: see *Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd* [2003] EWHC 3064 (Ch), [2004] 04 EG 109 (CS), [2003] All ER (D) 376 (Dec).

10 Landlord and Tenant Act 1988 s 1(1), (3); and see *Air India v Balabel* [1993] 2 EGLR 66, [1993] 30 EG 90, CA. For these purposes, an application or notice is to be treated as served if (1) served in any manner provided in the tenancy; and (2) in respect of any matter for which the tenancy makes no provision, served in any manner provided by the Landlord and Tenant Act 1927 s 23 (see PARA 703 post): Landlord and Tenant Act 1988 s 5(2).

Since, by virtue of the Landlord and Tenant Act 1927 s 19(1)(a) (see PARA 486 ante), such a qualification or proviso is imported into all covenants against assignment etc without licence or consent, it would appear that, subject to s 19(1A) (as added) (see note 9 supra; and PARA 486 ante), the Landlord and Tenant Act 1988 s 1 applies to all such covenants whether or not there is such an express qualification. The Landlord and Tenant Act 1988 has no application, however, and no duty can arise under s 1(3), if a precondition, set out in the lease, which must be satisfied before the tenant can properly apply for consent to assign or sublet has not been met: *Allied Dunbar Assurance plc v Homebase Ltd* [2002] EWCA Civ 666, [2003] 1 P & CR 75, [2002] 2 EGLR 23.

11 Landlord and Tenant Act 1988 s 1(5). As to when a tenant is in breach of covenant see PARA 492 post.

12 Ibid s 1(6).

13 Ibid s 2(1).

14 Ibid s 4. The tenant has the right to seek exemplary damages: *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324 (Ch), [2005] 1 WLR 1, [2004] 1 EGLR 121 (£25,000 awarded to mark court's disapproval of landlord's conduct).

The Landlord and Tenant Act 1988 binds the Crown; but as regards the Crown's liability in tort it does not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947 (see CROWN PROCEEDINGS AND CROWN PRACTICE): Landlord and Tenant Act 1988 s 6.

## UPDATE

### 490 Qualified duty to consent to assignment etc

NOTE 9--See also *Landlord Protect Ltd v St Anselm Development Co Ltd* [2009] EWCA Civ 99, [2009] 2 P & CR 150.

NOTE 10--See *R (on the application of McIntyre) v Gentoo Group Ltd* [2010] EWHC 5 (Admin), [2010] All ER (D) 01 (Jan) (condition to repay rent arrears owed on another property before mutual exchange of housing could occur meant consent had been unreasonably withheld).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/11. COVENANTS AS TO ALIENATION AND USE/(1) COVENANTS AS TO ALIENATION/491. Qualified duty to approve consent by another.

#### **491. Qualified duty to approve consent by another.**

In any case where:

- 1100 (1) a tenancy<sup>1</sup> includes a covenant<sup>2</sup> on the part of the tenant<sup>3</sup> not without the approval of the landlord<sup>4</sup> to consent to the subtenant's assigning, underletting, charging or parting with the possession of, the premises comprised in the tenancy or any part of the premises; but
- 1101 (2) the covenant is subject to the qualification that the approval is not to be unreasonably withheld, whether or not it is also subject to any other qualification,

then, where there is served on the landlord a written application by the tenant for approval or a copy of a written application to the tenant by the subtenant for consent to a transaction to which the covenant relates, the landlord owes a duty to the subtenant within a reasonable time:

- 1102 (a) to give approval, except in a case where it is reasonable not to give approval<sup>5</sup>;
- 1103 (b) to serve on the tenant and the subtenant written notice of his decision whether or not to give approval specifying in addition, if approval is given subject to conditions, the conditions and, if approval is withheld, the reasons for withholding it<sup>6</sup>.

It is reasonable for the landlord not to give approval only in a case where, if he withheld approval and the tenant gave his consent<sup>7</sup>, the tenant would be in breach of covenant<sup>8</sup>.

It is for a landlord who owed any duty under heads (a) and (b) above:

- 1104 (i) if he gave approval and the question arises whether he gave it within a reasonable time, to show that he did;
- 1105 (ii) if he gave approval subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was;
- 1106 (iii) if he did not give approval and the question arises whether it was reasonable for him not to do so, to show that it was reasonable;

and, if the question arises whether he served notice within a reasonable time, to show that he did<sup>9</sup>.

A claim that a person has broken any duty under the above provisions may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty<sup>10</sup>.

- 1 For the meaning of 'tenancy' see PARA 490 note 1 ante.
- 2 For the meaning of 'covenant' see PARA 490 note 2 ante.
- 3 For the meaning of 'tenant' see PARA 490 note 3 ante.
- 4 For the meaning of 'landlord' see PARA 490 note 5 ante. Where, however, the premises are managed by an RTM company (see PARA 367 et seq ante), references in the Landlord and Tenant Act 1988 s 3(2), (4) and (5) (see the text and notes 5-9 infra) to the landlord are to the RTM company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 13(1), (3).
- 5 Giving approval subject to any condition that is not a reasonable condition does not, however, satisfy the duty under head (a) in the text: Landlord and Tenant Act 1988 s 3(3).
- 6 Ibid s 3(1), (2). As to the mode of service see PARA 490 note 10 ante.
- 7 For the meaning of 'consent' see PARA 490 note 4 ante.
- 8 Landlord and Tenant Act 1988 s 3(4).
- 9 Ibid s 3(5).
- 10 Ibid s 4. See also PARA 490 note 14 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/11. COVENANTS AS TO ALIENATION AND USE/(1) COVENANTS AS TO ALIENATION/492. Grounds of refusal of consent; unreasonableness.

#### **492. Grounds of refusal of consent; unreasonableness.**

When a difference is to be resolved between landlord and tenant following the withholding of consent to an assignment, three principles may be derived from the authorities<sup>1</sup>:

- 1107 (1) a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease<sup>2</sup>;
- 1108 (2) in any case where the requirements of the first principle are met, the question of whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact<sup>3</sup>; and
- 1109 (3) the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable<sup>4</sup>.

Thus refusal of consent is unreasonable if the landlord's main object is to obtain some advantage for himself, as for example to obtain a surrender of the lease<sup>5</sup>, or to prevent the proposed assignee from giving up other premises of which he is also landlord<sup>6</sup>. Where a proposed assignee may acquire certain statutory rights, the landlord may have sufficient reason for refusing his consent, so that, for example, where the lease has only a short time to run, the landlord is entitled to refuse consent if the sole object of the assignment is to bring into existence a statutory tenancy<sup>7</sup> or other right<sup>8</sup> which would not otherwise arise<sup>9</sup>. The landlord is also entitled to consider the effect of the proposed assignment on the value of the lease<sup>10</sup> and on other property belonging to him<sup>11</sup>, and to have regard to any collateral contract

between himself and the tenant<sup>12</sup>. A limited company is capable of being a 'respectable and responsible person' within the meaning of a covenant, and the landlord is not entitled to withhold his consent to an assignment to a company without some other justification, unless the nature of the lease shows that it is to be held by an individual<sup>13</sup>. A landlord will not be unreasonable in refusing consent to an assignment on grounds of the tenant's breaches of covenant, provided that those breaches are sufficiently serious<sup>14</sup>. It may be reasonable for a landlord to refuse consent on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease<sup>15</sup>.

Whilst a landlord need usually consider only his own relevant interests, there may be instances where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent that it is unreasonable for the landlord to refuse consent<sup>16</sup>.

It is not unreasonable to withhold consent where the tenant's application for consent is not genuine<sup>17</sup>.

1 The principles set out in heads (1)-(3) in the text were described as 'overriding principles' by Lord Bingham of Cornhill in *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59 at [3]-[5], [2002] 1 All ER 377, [2001] 1 WLR 2180. On this point, Lord Bingham of Cornhill's speech was agreed to by Lords Hoffmann, Browne-Wilkinson and Scott of Foscote, although Lord Bingham of Cornhill dissented on another point. For other judgments that seek to distil the main principles see *Bickel v Duke of Westminster* [1977] QB 517 at 524, [1976] 3 All ER 801 at 805, CA, per Lord Denning MR, adopted by Lord Rodger of Earlsferry in *Ashworth Frazer Ltd v Gloucester City Council* supra at [67]; and *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 at 519-520, [1986] 1 All ER 321 at 325, CA, per Balcombe LJ.

2 It will generally be unreasonable for the landlord to refuse consent on grounds unconnected with the personality of the proposed assignee or the nature of the proposed user or occupation of the premises. In *Re Gibbs and Houlder Bros & Co Ltd's Lease, Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575, CA, these grounds were said to be exhaustive, but this was doubted in *Viscount Tredegar v Harwood* [1929] AC 72, HL, by Lord Dunedin and Lord Phillimore; but in *Bickel v Duke of Westminster* [1977] QB 517, [1976] 3 All ER 801, CA, the majority of the Court of Appeal followed *Re Gibbs and Houlder Bros & Co Ltd's Lease* supra. See also *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, [1986] 1 All ER 321, CA, applied in *Norwich Union Life Insurance Society v Shopmoor Ltd* [1998] 3 All ER 32, [1999] 1 WLR 531.

The personality of the proposed assignee was held to constitute a reasonable ground for refusal in *Governors of Bridewell Hospital v Fawkner and Rogers* (1892) 8 TLR 637 (general of the Salvation Army); *Shanly v Ward* (1913) 29 TLR 714, CA (references unsatisfactory); *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480 (no financial standing); *Whiteminster Estates Ltd v Hodges Menswear Ltd* (1974) 232 Estates Gazette 715 (assignee a business rival); *British Bakeries (Midlands) Ltd v Michael Testler & Co Ltd* [1986] 1 EGLR 64 (real doubts about financial standing); and *Ponderosa International Development Inc v Pengap Securities (Bristol) Ltd* [1986] 1 EGLR 66 (financial standing); but not in *Mills v Cannon Brewery Co Ltd* [1920] 2 Ch 38 (naturalised British subject of German origin); *Parker v Boggon* [1947] KB 346, [1947] 1 All ER 46 (person entitled to diplomatic privilege); *City Hotels Group Ltd v Total Property Investments Ltd* [1985] 1 EGLR 253 (tenant had given full financial information on proposed assignee); *Kened Ltd v Connie Investments Ltd* (1995) 70 P & CR 370, [1997] 1 EGLR 21, CA (proposed surety a company registered abroad; unreasonable to refuse consent if registered in a country that had signed the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels, 27 September 1968; EC 46 (1976); Cmnd 7395) ('the Brussels Convention')). As to unlawful discrimination against a proposed assignee see PARA 488 ante. In *Pimms Ltd v Tallow Chandlers in the City of London* [1964] 2 QB 547, [1964] 2 All ER 145, CA, it was held that a landlord was justified in objecting to a proposed assignee who hoped to force his way into a redevelopment scheme by utilising the nuisance value of the lease, and that this was an objection to the assignee's personality. See also *Rossi v Hestdrive Ltd* [1985] 1 EGLR 50. The proposed user of the premises was held to constitute a reasonable ground for refusal in *Harrison, Ainslie & Co v Barrow-in-Furness Corpn* (1891) 39 WR 250 (proposed assignee covenanted not to use the premises for the purpose for which they had been let); and in *Wilson v Fynn* [1948] 2 All ER 40, and *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751 (tenants had covenanted to use the premises 'as offices for the purpose of their business'). See also *Warren v Marketing Exchange for Africa Ltd* [1988] 2 EGLR 247. Where a superior landlord unreasonably refused his consent to a subtenant's assignment, it was held to be unreasonable for the sub-landlord to withhold his consent on that ground: *Vienit Ltd v W Williams & Son (Bread Street) Ltd* [1958] 3 All ER 621, [1958] 1 WLR 1267. See also *Rayburn v Wolf* (1985) 50 P & CR 463, 18 HLR 1, CA (unreasonable to refuse consent for fear of undesirable sublettings). Where there is a guarantor to the assignment, the guarantor's financial position must be taken into account by the landlord: see *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42. See also *Olympia & York Canary Wharf Ltd v Oil Property Investment Ltd* (1994) 69 P & CR 43, [1994] 2 EGLR 48, CA (a landlord's refusal of consent to

assignment for the purpose of enabling the original tenant to exercise its option to determine the lease not regarded as unreasonable)

3 What is or is not 'reasonable' is a question of fact to be decided in the light of the circumstances existing at the date the landlord is asked for his consent, which may have been wholly unforeseen at the date of the grant of the lease: *Bickel v Duke of Westminster* [1977] QB 517 at 524, [1976] 3 All ER 801 at 805, CA, per Lord Denning MR ('No one decision will be a binding precedent as a strict rule of law. The reasons given by the judges [in deciding such questions of reasonableness] are to be treated as propositions of good sense--in relation to the particular case--rather than propositions of law applicable to all cases'). In *Bickel v Duke of Westminster* supra at 525-526 and at 806 Orr LJ considered, however, that the court was bound by *Re Gibbs and Houlder Bros & Co Ltd's Lease, Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575, CA, but that the potential legal entitlement of the tenant to enfranchise was an 'attribute of the personality' of the proposed assignee, which gives that phrase a wide meaning; whilst Waller LJ based his decision on the nature of the proposed transaction, which was 'pregnant with future possibilities' (a phrase borrowed from *Lee v K Carter Ltd* [1949] 1 KB 85 at 96, [1948] 2 All ER 690 at 695, CA).

4 The landlord will not be held to have acted unreasonably if he acted as a reasonable person might have done in the circumstances: *Shanly v Ward* (1913) 29 TLR 714, CA; *Re Town Investments Ltd, Underlease, McLaughlin v Town Investments Ltd* [1954] Ch 301, [1954] 1 All ER 585. Cf *Lovelock v Margo* [1963] 2 QB 786, [1963] 2 All ER 13, CA. It is sufficient if a landlord has genuine, and not unfounded, concerns on matters relevant to the value of its interest in the property, even if the prospect of those concerns being realised is small (*NCR Ltd v Riverland Portfolio No 1 Ltd* [2005] EWCA Civ 312, [2005] 2 EGLR 42, [2005] All ER (D) 343 (Mar)); but it was not sufficient for a landlord to rely on a surveyor's valuation of the impact of the assignment on the reversionary value where it could be demonstrated that the surveyor's report was 'ill-informed, wrong-headed and unreasonable' (*Lumina Leisure Ltd v Apostole* [2001] 3 EGLR 23, [2001] All ER (D) 314 (May)). Where the lease imposes a heavy burden on the tenant, as, for example, where the rent is high, the grounds for refusing consent should be substantial: *Sheppard v Hong Kong and Shanghai Banking Corp* (1872) 20 WR 459.

5 *Lehmann v McArthur* (1867) LR 3 Eq 746 (on appeal (1868) 3 Ch App 496, where the court did not decide whether or not in the circumstances the refusal was unreasonable); *Bates v Donaldson* [1896] 2 QB 241, CA; *Re Winfrey and Chatterton's Agreement* [1921] 2 Ch 7. See also *Jaison Property Development Co Ltd v Roux Restaurants Ltd* (1997) 74 P & CR 357, CA (unreasonable of landlord to make consent conditional upon securing a deed of variation to incorporate a full repairing covenant in the lease); *First Penthouse Ltd v Channel Hotels & Properties (UK) Ltd, Channel Hotels & Properties (UK) Ltd v Tamimi* [2003] EWHC 2713 (Ch), [2004] 1 EGLR 16, [2003] All ER (D) 198 (Nov); affd [2004] EWCA Civ 1072, [2004] All ER (D) 568 (Jul) (unreasonable to seek to protect rights under an earlier agreement that had subsequently been postponed to the rights of the lessees). As to provision in the lease that the tenant is to offer a surrender before assigning see PARA 486 note 2 ante.

6 *Re Gibbs and Houlder Bros & Co Ltd's Lease, Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575, CA.

7 Is a statutory tenancy under the Rent Act 1977: see PARA 831 et seq post.

8 *Olympia & York Canary Wharf Ltd v Oil Property Investment Ltd* (1994) 69 P & CR 43, [1994] 2 EGLR 48, CA (landlord entitled to withhold consent where sole purpose of a proposed assignment to an original tenant was to take advantage of a break clause in the lease only available to that original tenant).

9 *Lee v K Carter Ltd* [1949] 1 KB 85, [1948] 2 All ER 690, CA (limited company assigning to director two months before end of lease); *Swanson v Forton* [1949] Ch 143, [1949] 1 All ER 135, CA (assignment 12 days before end of term by tenant not in occupation); *Dollar v Winston* [1950] Ch 236, [1949] 2 All ER 1088n (assignment one month before end of term). See, however, *Thomas Bookman Ltd v Nathan* [1955] 2 All ER 821, [1955] 1 WLR 815, CA (landlord held to be unreasonable in withholding consent to an assignment seven and a half months before the end of the term); *Oriel Property Trust v Kidd* (1949) 100 L Jo 6 (landlord's practice of withholding consent on the ground that they had a waiting list of applicants for the flats held unreasonable). See also *Leeward Securities Ltd v Lilyheath Properties Ltd* (1983) 17 HLR 35, [1984] 2 EGLR 54, CA; *Murray v Lloyd* [1990] 2 All ER 92, [1989] 1 WLR 1060.

The cases cited supra are mainly concerned with the proposed assignee's rights under the Rent Acts; different principles may apply, however, where, unlike the tenant, the proposed assignee would be able to enfranchise under the Leasehold Reform Act 1967, and in both *Norfolk Capital Group Ltd v Kitway Ltd* [1977] QB 506, [1976] 3 All ER 787, CA, and *Bickel v Duke of Westminster* [1977] QB 517, [1976] 3 All ER 801, CA, the landlords were held to be justified in withholding their consent to assignments in these circumstances, even though they might be described as 'normal assignments'. However, in *West Layton Ltd v Ford* [1979] QB 593, [1979] 2 All ER 657, CA, where it was held that a landlord had not acted unreasonably in refusing consent to the subletting of the upper floors of a shop which would create a protected tenancy under the Rent Act 1977, the Court of Appeal considered that there were no special and distinct rules applicable to 'Rent Act cases' and 'Leasehold Reform Act cases' and doubted the value of the distinction made in earlier cases between 'normal' and 'abnormal' transactions. See also *Welch v Birrane* (1974) 29 P & CR 102; *Re Cooper's Lease, Cowan v Beaumont Property Trusts Ltd* (1968) 19 P & CR 541, where the assignment would have given the assignee protection under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post), which the tenant did not



have, and refusal of consent was held not to be unreasonable. As to enfranchisement under the Leasehold Reform Act 1967 see PARA 1389 et seq post.

10 *Re Town Investments Ltd, Underlease, McLaughlin v Town Investments Ltd* [1954] Ch 301, [1954] 1 All ER 585 (tenant proposed to underlet at a reduced rent in consideration of a premium, thereby depreciating the value of the lease); cf *Blockbuster Entertainment Ltd v Leakcliff Properties Ltd* [1997] 1 EGLR 28, [1997] 08 EG 139 (not a reasonable ground of refusal to require the tenant to postpone the underletting until the market improved; if it were, any landlord who expected the market to rise could prevent an underletting). See also *Allied Dunbar Assurance plc v Homebase Ltd* [2002] EWCA Civ 666, [2003] 1 P & CR 75, [2002] 2 EGLR 23 (proposed subletting; tenant preparing private collateral agreement personal to the parties that contained terms by which the tenant would indemnify the proposed subtenant for the difference between the rents under the proposed underlease and the rent expressed to be payable under the lease, and also in respect of the more onerous repairing obligations; held that landlord's refusal of consent not unreasonable).

11 *Governors of Bridewell Hospital v Fawcner and Rogers* (1892) 8 TLR 637; *Re Spark's Lease, Berger v Jenkinson* [1905] 1 Ch 456 (landlord occupied part of the same premises); *Premier Confectionery (London) Co Ltd v London Commercial Sale Rooms Ltd* [1933] Ch 904 (tenant of a tobacconist's shop and adjoining kiosk wished to assign the kiosk). See also *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, [1986] 1 All ER 321, CA (where *Premier Confectionery (London) Co Ltd v London Commercial Sale Rooms Ltd* supra was doubted and the landlord's objections based on alleged damage to reversion were rejected); applied in *Norwich Union Life Insurance Society v Shopmoor Ltd* [1998] 3 All ER 32, [1999] 1 WLR 531; *FW Woolworth plc v Charlwood Alliance Properties Ltd* [1987] 1 EGLR 53; *Tollbench Ltd v Plymouth City Council* (1988) 56 P & CR 194, [1988] 1 EGLR 79, CA (proposed restaurant use), applied in *Iqbal v Thakrar* [2004] EWCA Civ 592, [2004] 3 EGLR 21, [2004] All ER (D) 304 (Apr) (conversion of premises into restaurant) and *GMD Developments Ltd v Leeds City Council* [2006] EWHC 1142 (Ch), [2006] All ER (D) 277 (May) (erection and use of building at the premises).

Consent is, however, unreasonably withheld if the landlord's refusal is designed to achieve a collateral purpose or benefit wholly unconnected with the terms of the lease and the bargain made between the landlord and the tenant, even if made for the purposes of good estate management: *Bromley Park Garden Estates Ltd v Moss* [1982] 2 All ER 890, [1982] 1 WLR 1019, CA.

12 *Wilson v Fynn* [1948] 2 All ER 40.

13 *Willmott v London Road Car Co Ltd* [1910] 2 Ch 525, CA, following *Re Jeffcock's Trusts* (1882) 51 LJ Ch 507, and overruling *Harrison, Ainslie & Co v Barrow-in-Furness Corpn* (1891) 39 WR 250; *Associated Omnibus Co Ltd v Idris & Co Ltd* (1919) 148 LT Jo 157; *Ideal Film Renting Co Ltd v Nielsen* [1921] 1 Ch 575; *Re Greater London Properties Ltd's Lease, Taylor Bros (Grocers) Ltd v Covent Garden Properties Co Ltd* [1959] 1 All ER 728, [1959] 1 WLR 503. If personal residence is required, the lease is not assignable to a company: *Jenkins v Price* [1908] 1 Ch 10, CA. In *Curtis Moffat Ltd v Wheeler* [1929] 2 Ch 224, it was held that, the vendor of leaseholds being always able to compel the landlord to assent to an assignment to any proper person, the purchaser, which was a company, was entitled, when the vendor was unable to perform his contract by assigning the lease to it, to call upon the vendor to assign the lease to a proper nominee.

14 *Goldstein v Sanders* [1915] 1 Ch 549; cf *Farr v Ginnings* (1928) 44 TLR 249; *Cosh v Fraser* (1964) 108 Sol Jo 116, CA. In *Re Davies' Agreement, Davies v Fagarazzi* (1969) 21 P & CR 328 it was held that the landlord was justified in requesting security to cover necessary works of repair as a condition of giving consent to an assignment. By contracting to purchase premises in a state of disrepair the proposed assignee may assume liability to indemnify the tenant against the cost of repairs required to be completed before the landlord will agree to the assignment: *Lockharts v Bernard Rosen & Co* [1922] 1 Ch 433. See also *FW Woolworth plc v Charlwood Alliance Properties Ltd* [1987] 1 EGLR 53 (it may be reasonable to withhold consent to an assignment to a person who intends to break a covenant to keep premises open for trading).

15 *Bates v Donaldson* [1896] 2 QB 241, CA; *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, [1986] 1 All ER 321, CA; and see *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2002] 1 All ER 377, [2001] 1 WLR 2180 (landlord's belief as to possible future breach of covenant by proposed assignee could justify withholding consent to assign).

16 *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513, [1986] 1 All ER 321, CA.

17 *Hatfield v Anderson* [1980] 2 EGLR 48, (1980) 256 Estates Gazette 1099, CA.

PARAS 1386-2000)/11. COVENANTS AS TO ALIENATION AND USE/(1) COVENANTS AS TO ALIENATION/493. Unreasonable conditions attached to consent.

#### **493. Unreasonable conditions attached to consent.**

It is not an unreasonable withholding of consent to an assignment to impose reasonable conditions in giving consent<sup>1</sup>; but, if a reasonable condition is imposed without an apparent 'consent', the landlord will be unreasonably withholding his consent. It is unreasonable for the landlord to seek to impose a condition which would in effect alter the terms of the lease for the remainder of the term and diminish the value of the assignee's property<sup>2</sup>, or to require the subtenant to enter into a direct covenant with the landlord to pay the rent reserved by the head lease, even if the rent under the head lease and the sublease are the same<sup>3</sup>. In the case of a proposed reassignment by an assignee, it is unreasonable to require him to covenant to pay the rent and perform the covenants for the residue of the lease<sup>4</sup>.

1 For an example see *Orlando Investments Ltd v Grosvenor Estate Belgravia* (1989) 59 P & CR 21, [1989] 2 EGLR 74, CA; and see the Landlord and Tenant Act 1988 s 3(5); and PARA 491 ante.

2 *Young v Ashley Gardens Properties Ltd* [1903] 2 Ch 112, CA (condition transferring the burden of rates to the tenant); *Premier Rinks Ltd v Amalgamated Cinematograph Theatres Ltd* (1912) 56 Sol Jo 536 (attempt to extort a new term restricting the use of the premises during the residue of the underlease); *Mills v Cannon Brewery Co Ltd* [1920] 2 Ch 38 (where, as no condition of residence or personal conduct of a licensed victualler's business could be imposed, a refusal to grant a licence to assign, on the ground that the proposed assignee did not intend to reside on the premises and personally carry on the business of a licensed victualler there, was held unreasonable).

3 *Balfour v Kensington Gardens Mansions Ltd* (1932) 49 TLR 29 (rent payable under the sublease less than that payable under the head lease, and the rental value of the property had decreased since the granting of the head lease); but see *Re Town Investments Ltd, Underlease, McLaughlin v Town Investments Ltd* [1954] Ch 301, [1954] 1 All ER 585 (where it was held to be reasonable to refuse consent in similar circumstances).

4 *Evans v Levy* [1910] 1 Ch 452. It may be reasonable, however, to require such a covenant limited to the time during which the assignee holds the lease: *Evans v Levy* supra. As to the statutory restriction on liability for rent after assignment see PARA 289 ante.

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#### **494. Remedy for breach of the covenant.**

Where a covenant against assignment or underletting, with a proviso for re-entry on breach of covenant, is broken, the landlord may either re-enter for the forfeiture or sue for damages for the breach<sup>1</sup>. If he sues on the covenant, the damages will be measured by the loss naturally flowing from the assignment<sup>2</sup> or underletting<sup>3</sup>. Breach of a covenant against assigning or underletting may be restrained by injunction<sup>4</sup>.

1 *Silcock v Farmer* (1882) 46 LT 404; *Works Comrs v Hull* [1922] 1 KB 205. Where an assignment takes place in breach of such a covenant, the landlord must serve notice under the Law of Property Act 1925 s 146 (as amended) (see PARA 619 post) on the assignee and not the assignor: *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales & Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA. As to relief from forfeiture see PARA 622 post. In relation to tenancies beginning on or after 1 January 1996, when part of a property which is let is assigned by a tenant, any right of entry or forfeiture exercised by the landlord as a result of a breach of covenant relating to one part of the property affects only the part of which the defaulter is tenant: see the Landlord and Tenant (Covenants) Act 1995 s 21(1); and PARA 611 post.

2 When made by an assignee, the assignment puts an end to his liability on the covenants in the lease; and, if it is made to one of inferior pecuniary liability, the measure of damages will be such a sum as would, as far as money can, put the landlord in the same position as if he still had the original assignee's liability for breaches of covenant, past and future: *Williams v Earle* (1868) LR 3 QB 739; *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480.

3 If the premises are destroyed by reason of special risk attaching to the purposes for which they are sublet, the damages will be the loss thus caused: *Lepia v Rogers* [1893] 1 QB 31; cf *Chapman v Mason and Liniline Co* (1910) 103 LT 390.

4 *McEacharn v Colton* [1902] AC 104, PC; *Whelan v McKinley* (1921) 56 ILT 21; and see PARA 134 ante. In *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057 the assignee was ordered to reassign the lease.

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#### **495. Position of unlawful assignee.**

While an assignee or subtenant is in possession, he is subject to the stipulations of the lease notwithstanding that the landlord's consent was not given to the assignment<sup>1</sup>. Even if the landlord contends that the assignment was unlawful<sup>2</sup>, it still operates to vest the term in the assignee, who is, therefore, the person to whom any necessary notice has to be given before forfeiture proceedings may be commenced<sup>3</sup> and who must be made a defendant<sup>4</sup>.

1 *Silcock v Farmer* (1882) 46 LT 404.

2 Ie in breach of covenant.

3 *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA. Where an assignment is in breach of covenant, an assigning tenant is not released from the tenant covenants of the tenancy, but may be released on the next assignment that is not excluded; consequently such covenants do not pass to the assignee tenant: see the Landlord and Tenant (Covenants) Act 1995 s 11; and PARA 588 post.

4 If the assignee is not sued, there cannot be an effective forfeiture; and, although a claim for breach of covenant against the assignor could be sustained, the measure of damages would be problematical, given that ex hypothesi the term continued.

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#### **496. Acceptance by landlord of assignee as tenant.**

The landlord is debarred from insisting on the necessity of consent if he has accepted the assignee as tenant in the place of the assignor, but this acceptance is not to be inferred merely from the fact that possession has been given to the assignee with the knowledge of the landlord and without objection on his part; this, while an important element, is not conclusive where the facts show that the landlord did not intend to accept the assignee<sup>1</sup>. Further, the landlord is not bound to assent to the assignment on the ground that he stood by while the

assignee was spending money on the property, unless the circumstances are such as to estop him from setting up the breach of covenant<sup>2</sup>.

1 *Lord Elphinstone v Monkland Iron and Coal Co* (1886) 11 App Cas 332 at 345, HL.

2 *Willmott v Barber* (1880) 15 ChD 96; cf *Burke v Prior* (1863) 15 I Ch R 106; and see ESTOPPEL vol 16(2) (Reissue) PARA 1091.

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## **(2) USER COVENANTS**

### **497. Covenants restricting the user of premises.**

Leases of buildings, whether dwelling houses or trade premises, usually contain a covenant by the tenant restricting their use<sup>1</sup>. This may be a covenant designed either to protect neighbouring occupiers from annoyance, or to confine the use of trade premises to certain trades, or to require that a house shall be used only as a private dwelling house, or only for residential or professional purposes<sup>2</sup>, or for the purposes of a named company or organisation<sup>3</sup>. Whatever the contents of the lease, a tenant generally has to obtain planning permission from the local planning authority before making any material change in the use of the premises; and, in addition to the covenants as to user so mentioned, leases commonly contain a covenant by the tenant to comply with the provisions of the planning legislation<sup>4</sup>. Such covenants may be enforced by injunction<sup>5</sup>, or breaches of them may be compensated by damages<sup>6</sup>, or, if there is a right of re-entry, the landlord may forfeit the lease<sup>7</sup>. Moreover, if land is let for a specified purpose, its use for other purposes will be restrained by injunction<sup>8</sup>; but otherwise the tenant is not prohibited, as between him and his landlord, from using the premises for any lawful purpose, notwithstanding that it is different from the purpose originally contemplated<sup>9</sup>, provided there is no fraud on the landlord in taking the lease in an unrestricted form<sup>10</sup>. A covenant not to carry on any trade other than a particular trade does not imply a positive obligation to carry on that trade<sup>11</sup>; but the lease may impose such a positive obligation on the tenant<sup>12</sup>.

Where the covenant is against permitting or suffering the premises to be used for certain purposes, and the tenant has sublet the premises, the tenant is guilty of a breach of covenant if he either gives leave to the subtenant to commit the breach or abstains from taking reasonable steps to prevent the breach by the subtenant where it is within his power to prevent it<sup>13</sup>; and he is also liable for breach by the subtenant if the covenant is an absolute covenant against the doing of the prohibited act<sup>14</sup>.

If a covenant in a lease is restrictive of the use of the premises and is also one of a series of such covenants in leases of adjoining properties from the same landlord which are absolute and identical in form and constructed to dovetail together, then a letting scheme can be created permitting enforceability of such covenants by the other tenants<sup>15</sup>.

An agreement relating to the lease of any property which comprises or includes a dwelling may not prohibit or restrict its occupation by, or the provision in it of accommodation for, persons with mental disorders<sup>16</sup>.

Where a covenant restrictive of user is ambiguous, a wider rather than a narrower meaning will be favoured<sup>17</sup>.

In considering whether to grant consent a landlord can legitimately take into account considerations relating to adjoining property of his own, whether let or not, and a landlord is not restricted to considering only that property and those uses that existed at the time of the grant of the lease<sup>18</sup>.

1 A tenant may also be liable to observe restrictive covenants which bind the demised premises in equity but are not contained in the lease under which he holds: see PARA 559 et seq post; and EQUITY vol 16(2) (Reissue) PARA 616 et seq.

2 The restrictions may be even more severe eg the tenant may agree not to sell or distribute goods other than those supplied by the landlord, such a restriction being held to be reasonable in *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116, CA.

3 See *Law Land Co v Consumers' Association* [1980] 2 EGLR 109, (1980) 255 Estates Gazette 617, CA; *Sterling Land Office Developments Ltd v Lloyds Bank plc* [1984] 2 EGLR 135, (1984) 271 Estates Gazette 894.

4 For an example of such a covenant see *Horwitz v Rowson* [1960] 2 All ER 881, [1960] 1 WLR 803. As to the statutory restrictions on the change of use of land see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 222.

5 See PARA 134 ante.

6 As to the necessity for proving damage see CIVIL PROCEDURE vol 11 (2009) PARAS 453-459. A covenant may be in such vague terms as to be unenforceable: see *Murray v Dunn* [1907] AC 283, HL (covenant not to erect 'any building of an unseemly description').

7 As to the remedies for breach of covenant see PARA 134 ante. The landlord is entitled to an injunction, notwithstanding that he has a power of re-entry for forfeiture: *Barret v Blagrove* (1800) 5 Ves 555; and see *Whall v Bulman* [1953] 2 QB 198, [1953] 2 All ER 306, CA (no right of re-entry reserved).

8 *Kehoe v Marquess of Lansdowne* [1893] AC 451; *Ramuz v Leigh-on-Sea Conservative and Unionist Club* (1915) 31 TLR 174. Where the tenant has sublet, the injunction, if granted, will not extend to restrain the subtenant unless he is a party to the claim: *Metropolitan District Rly Co v Earl's Court Ltd* (1911) 55 Sol Jo 807. As to the binding effect on subtenants see PARAS 108-109 ante; and as to the effect on assignees see PARA 559 et seq post.

9 *Grand Canal Co v M'Namee* (1891) 29 LR Ir 131, Ir CA.

10 *Bonnett v Sadler* (1808) 14 Ves 526.

11 *Doe d Marquis of Bute v Guest* (1846) 15 M & W 160.

12 See *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751; cf *Levermore v Jobey* [1956] 2 All ER 362, [1956] 1 WLR 697, CA; *Basildon Development Corp v Mactro Ltd* [1986] 1 EGLR 137, CA; *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136, 23 HLR 174; *Montross Associated Investments SA v Moussaieff* (1991) 63 P & CR 31, [1992] 1 EGLR 55, CA. As to covenants to keep demised premises open see PARA 502 post. A covenant 'but to use' does not impose a positive obligation but is of a permissive or protective nature: see *JT Sydenham & Co Ltd v Enichem Elastomers Ltd* [1989] 1 EGLR 257.

13 *Toleman v Portbury* (1870) LR 5 QB 288, Ex Ch; *Toleman v Portbury* (1872) LR 7 QB 344, Ex Ch (discussed in *Atkin v Rose* [1923] 1 Ch 522); *Tritton v Bankart* (1887) 56 LT 306 (underlease expressly authorised a breach); *Prothero v Bell* (1906) 22 TLR 370; *Berton v Alliance Economic Investment Co* [1922] 1 KB 742, CA; *Atkin v Rose* supra; *Barton v Reed* [1932] 1 Ch 362; *Borthwick-Norton v Romney Warwick Estates Ltd* [1950] 1 All ER 798, CA (tenants wilfully shut their eyes to the use of premises as a brothel). It would seem that 'suffer' is wider in meaning than 'permit': *Barton v Reed* supra at 375 per Luxmore J; and see *St Marylebone Property Co Ltd v Tesco Stores Ltd* [1988] 2 EGLR 40. Such a breach of covenant by a tenant may be capable of remedy: *Glass v Kencakes Ltd* [1966] 1 QB 611, [1964] 3 All ER 807.

In relation to a tenancy granted on or after 1 January 1996, a covenant which is restrictive of the user of land is enforceable against an assignee and any other owner or occupier of demised premises to which the covenant relates, even though there is no express provision in the tenancy to that effect: see the Landlord and Tenant (Covenants) Act 1995 s 3(5); and PARA 580 post. As to the meaning of 'demised premises' see *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234, [2000] 1 All ER 975.

14 *Prothero v Bell* (1906) 22 TLR 370. As to evidence of the landlord's consent to user in violation of the restriction see *Toleman v Portbury* (1870) LR 5 QB 288, Ex Ch.

15 *Williams v Kiley (t/a CK Supermarkets Ltd)* [2002] EWCA Civ 1645, [2003] 1 EGLR 46, [2002] All ER (D) 301 (Nov) (parade of shops with clear evidence of intention to create a mutually enforceable letting scheme). See further EQUITY vol 16(2) (Reissue) PARA 626.

16 See the Leasehold Reform, Housing and Urban Development Act 1993 s 89; and PARA 50 ante.

17 *Skillion plc v Keltec Industrial Research Ltd* [1992] 1 EGLR 123. Meticulous analysis of the words in covenants may be unhelpful in determining what the parties intended; the court's task is to construe the lease so as to ascertain the parties' intention at the time at which the lease was entered into and it ought to look at the substance of the covenants and read them in context: see *Blumenthal v Church Comrs for England* [2004] EWCA Civ 1688 at [33], [2005] 1 EGLR 78, [2004] All ER (D) 174 (Dec) per Sir William Aldous.

18 *Sportoffer Ltd v Erewash Borough Council* [1999] 3 EGLR 136, [1999] 11 LS Gaz R 71.

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#### **498. Statutory provisions as to alterations of user.**

In all leases<sup>1</sup>, whether made before, on or after 1 January 1926, containing a covenant, condition or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant, condition or agreement is, if the alteration does not involve any structural alteration of the premises, deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine<sup>2</sup>, whether by way of an increase of rent or otherwise, shall be payable for or in respect of the licence or consent<sup>3</sup>. The proviso so implied does not, however, preclude the right of the landlord<sup>4</sup> to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him, and of any legal or other expenses incurred in connection with such licence or consent<sup>5</sup>.

It is not implied in a covenant against the alteration of the user of the demised premises without consent that consent is not to be unreasonably withheld<sup>6</sup>.

Where a landlord refuses to consent to a change of use save on payment of a fine within the meaning of the statute, the tenant is thereby relieved from obtaining that consent<sup>7</sup>. A landlord may, however, achieve the desired result by refusing consent, subject to any express requirement of reasonableness, and offering to accept a surrender and regrant incorporating not only the required change of use but also the desired more advantageous terms benefiting the landlord<sup>8</sup>.

If the tenant agrees to pay a fine in consideration of the landlord's granting his consent to an alteration of user, that agreement is unenforceable, but it seems that the tenant cannot recover money paid under the agreement<sup>9</sup>. Where the landlord's consent is withheld only by reason of a dispute as to the amount of a reasonable sum payable for damages or expenses, the dispute may be determined by a court of competent jurisdiction<sup>10</sup>, and where such a dispute has been so determined the landlord is bound to grant a licence or consent on payment of the sum so determined to be reasonable<sup>11</sup>.

1 For the meaning of 'lease' see PARA 459 note 1 ante.

2 There is no statutory definition of 'fine or sum of money in the nature of a fine' for these purposes (cf the Law of Property Act 1925 s 205(1)(xxiii); and PARA 485 note 5 ante) but the term is to be given a wide meaning: see *Gardner & Co v Cone* [1928] Ch 955 at 964 (benefit of beer-tie stipulation was a fine); approved in *Barclays Bank plc v Daejan Investments (Grove Hall) Ltd* [1995] 1 EGLR 68 (required variation of rent review clause,

imposition of full service charge and payment of reasonable legal costs and surveyor's fee all amounted to sums of money in the nature of a fine).

3 Landlord and Tenant Act 1927 s 19(3). The Landlord and Tenant Act 1927 s 19(3) does not apply to leases of agricultural holdings within the meaning of the Agricultural Holdings Act 1986 which are leases in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323), or to farm business tenancies within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302) or to mining leases: Landlord and Tenant Act 1927 s 19(4) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 15; the Agricultural Tenancies Act 1995 s 40, Schedule para 6)). For the meaning of 'mining lease' see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 322.

Nor does the Landlord and Tenant Act 1927 s 19(3) apply to (1) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre; or (2) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation: see the Criminal Justice Act 1991 s 84(1), (3)(c) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532; the Criminal Justice and Public Order Act 1994 s 7(1), (3)(c); and PRISONS vol 36(2) (Reissue) PARA 658; the Immigration and Asylum Act 1999 s 149(3)(c) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

As to the tenant's remedy where consent is unreasonably refused see PARA 499 post.

4 For the meaning of 'landlord' see PARA 486 note 3 ante. Where, however, the premises are managed by an RTM company (see PARA 367 et seq ante), the Landlord and Tenant Act 1927 s 19(3) applies as if (1) the first and final references to the landlord were to the RTM company; and (2) the reference to the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to him were omitted: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 1(1), (4).

5 See note 3 supra.

6 *Guardian Assurance Co Ltd v Gants Hill Holdings Ltd* [1983] 2 EGLR 36, (1983) 267 Estates Gazette 678; approved in *Pearl Assurance plc v Shaw* [1985] 1 EGLR 92.

7 *West v Gwynne* [1911] 2 Ch 1, CA (decided under previous legislation), followed in *Barclays Bank plc v Daejan Investments (Grove Hall) Ltd* [1995] 1 EGLR 68.

8 *Barclays Bank plc v Daejan Investments (Grove Hall) Ltd* [1995] 1 EGLR 68 at 71 per Judge Rich QC, sitting as a judge of the Chancery Division of the High Court.

9 *Comber v Fleet Electrics Ltd* [1955] 2 All ER 161, [1955] 1 WLR 566.

10 Although the Landlord and Tenant Act 1954 s 53 (as amended) (see PARA 499 post) does not confer jurisdiction on the county court in this case, county courts now have power to make any order which could be made by the High Court if the proceedings were in the High Court, including the granting of a bare declaration: see the County Courts Act 1984 s 38 (as substituted and amended); and COURTS vol 10 (Reissue) PARA 711.

11 Landlord and Tenant Act 1927 s 19(3).

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#### **499. Tenant's remedy where consent is unreasonably refused.**

Where a landlord withholds his licence or consent to a change in the use of the demised property or any part thereof, or to the making of a specified use of that property, and the High Court has jurisdiction to make a declaration that the licence or consent was unreasonably withheld, then, without prejudice to the jurisdiction of the High Court, the county court has the like jurisdiction whatever the net annual value for rating<sup>1</sup> of the demised property is to be taken

to be for the purposes of the County Courts Act 1984 and notwithstanding that the tenant does not seek any relief other than the declaration<sup>2</sup>.

Where, on the making of an application to a county court for such a declaration, the court is satisfied that the licence or consent was unreasonably withheld, it must make a declaration accordingly<sup>3</sup>.

The court will not grant a declaration with reference to a hypothetical situation<sup>4</sup>.

1 For the meaning of 'net annual value' see PARA 522 post.

2 Landlord and Tenant Act 1954 s 53(1)(c) (amended by the County Courts Act 1984 s 148(1), Sch 2 para 23). As to the application of the Landlord and Tenant Act 1954 s 53 (as amended) see PARA 471 note 4 ante.

3 Ibid s 53(2). The court may grant such a declaration even where that will put the landlord in breach of covenants in other leases to which he is a party: *Rose v Stavrou* [1999] All ER (D) 589, (1999) Times, 23 June.

4 See eg *A & P Birkenhead Properties Ltd v Northwestern Shiprepairers and Shipbuilders Ltd* [2006] All ER (D) 402 (May).

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## 500. Nuisance or annoyance.

A covenant against causing a 'nuisance' to the landlord or to adjoining<sup>1</sup> occupiers is perhaps broken only by a nuisance in the technical sense<sup>2</sup>. While the exhibition of advertisements in a business neighbourhood is not a breach of such a covenant<sup>3</sup>, such exhibition may in certain circumstances amount to a breach of a covenant not to carry on any offensive trade or calling<sup>4</sup>. Where the covenant is against any act which may lead to 'annoyance, nuisance or damage', it is wider, and is broken by anything which disturbs the reasonable peace of mind of an adjoining occupier. The disturbance need not amount to physical detriment to comfort, nor need the adjoining occupier be a tenant of the same landlord<sup>5</sup>.

Where a covenant refers to 'detriment', the detriment is not necessarily limited to financial considerations<sup>6</sup>. A covenant against the use of the demised premises for illegal purposes may be breached in the absence of a criminal prosecution<sup>7</sup>; and, where the covenant extends to immoral purposes, the use of a flat by an unmarried couple is not immoral<sup>8</sup> but its use for prostitution may be<sup>9</sup>.

1 Premises may be adjoining even though separated from the demised premises by a narrow strip of land: *Foster v Lyons & Co* [1927] 1 Ch 219. It would seem, however, that they must be next door to or physically adjoining the demised premises (*Vale & Sons v Moorgate Street and Broad Street Buildings Ltd and Albert Baker & Co Ltd* (1899) 80 LT 487; *Derby Motor Cab Co v Crompton and Evans' Union Bank* (1913) 57 Sol Jo 701) but this may be too strict a view; and in *Cave v Horsell* [1912] 3 KB 533, CA, the phrase 'adjoining shops' was held to cover all the six shops in a terrace. See also the observations on the meaning of 'adjoining or contiguous' in *Haynes v King* [1893] 3 Ch 439 at 448 per North J, which were relied upon in *Norton v Charles Deane Productions Ltd* (1969) 214 Estates Gazette 559.

2 *Harrison v Good* (1871) LR 11 Eq 338 (establishment of a school held not to be a breach). This restriction of the word was, however, doubted in *Tod-Heatly v Benham* (1888) 40 ChD 80, CA. In *Errington v Birt* (1911) 105 LT 373 it was held that the conduct of a fried fish shop was not sufficient to constitute a nuisance, but sufficient to cause annoyance, and so a breach of covenant. For the technical meaning of 'nuisance' see *Walter v Selfe* (1851) 4 De G & Sm 315 at 322; and NUISANCE vol 78 (2010) PARA 124.



3 *Our Boys' Clothing Co Ltd v Holborn Viaduct Land Co Ltd* (1896) 12 TLR 344.

4 *Nussey v Provincial Bill Posting Co and Eddison* [1909] 1 Ch 734, CA. To let the ends of a house for bill posting is a breach of a covenant not to permit trade to be carried on on the premises (*Tubbs v Esser* (1909) 26 TLR 145); and such use of premises constitutes a breach of a covenant not to carry on any other than a specified trade, and may amount to a breach of a covenant not to assign or part with possession (*Heard v Stuart* (1907) 24 TLR 104). As to the statutory restrictions on the display of advertisements see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 769 et seq.

5 *Tod-Heatly v Benham* (1888) 40 ChD 80 at 98-99, CA; and see *Macher v Foundling Hospital* (1813) 1 Ves & B 188; *Errington v Birt* (1911) 105 LT 373; *Collins v Slade* (1874) 23 WR 199 (conversion of part of a factory into a place of entertainment held to be breach of a covenant against annoyance or damage); *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch 248, [1968] 3 All ER 545 (interlocutory (interim) injunction granted to restrain the playing of music so as to be a nuisance and annoyance). The establishment of a hospital for outdoor patients is a breach if sensible people feel a reasonable apprehension of risk of infection and interference with the pleasurable enjoyment of their houses for ordinary purposes (*Tod-Heatly v Benham* supra; *Bramwell v Lacy* (1879) 10 ChD 691), but the conduct of a properly equipped and well managed hospital is not per se a noisy, noisome or offensive business (*Frost v King Edward VII Welsh etc Association* [1918] 2 Ch 180, where it was held that there was no risk of infection or danger to neighbours). In *Burford Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891 the use of flats in Soho for prostitution was held not of itself to cause a nuisance to neighbours. See also *Commercial General Administration Ltd v Thomsett* (1979) 250 Estates Gazette 547, CA, where the tenant had done all she reasonably could to abate the nuisance. To sublet parts of the premises to various tenants may amount to a breach of a covenant not to do anything which might in the landlord's judgment be or grow to be to his injury or annoyance or that of his tenants or occupiers: *Barton v Keeble* [1928] Ch 517; *Day v Waldron* (1919) 88 LJKB 937 (conversion into flats to the injury of the landlord). Where a landlord takes a covenant from one tenant not to cause nuisance or annoyance, there is not necessarily an implied term that he will enforce such an obligation against other tenants from whom he has taken a similar covenant: see *O'Leary v London Borough of Islington* (1983) 9 HLR 83, CA.

6 *C & G Homes Ltd v Secretary of State for Health* [1991] Ch 365, [1991] 2 All ER 841, CA.

7 *Dunraven Securities Ltd v Holloway* [1982] 2 EGLR 47, (1982) 264 Estates Gazette 709, CA.

8 *Heglibiston Establishment v Heyman* (1977) 36 P & CR 351, CA.

9 *British Petroleum Pension Trust Ltd v Behrendt* (1985) 52 P & CR 117, [1985] 2 EGLR 97, CA.

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## 501. Trade or business.

A covenant not to carry on any 'trade' refers only to a business conducted by buying and selling<sup>1</sup>. The word 'business' extends the covenant to all cases where work, involving the recourse of numerous persons to the premises, is done for payment<sup>2</sup>, or even without payment where the result is in effect the same as if a charge were made<sup>3</sup>. The making of profit is not essential to constitute a business; nor does payment necessarily constitute one<sup>4</sup>. A covenant against affixing any outward mark of business is broken by exhibiting the name of a firm carrying on business on the premises<sup>5</sup>.

A covenant against the exercise of a particular trade forbids the carrying on of any part of that trade<sup>6</sup>, and the trade may not be carried on as an accessory to the tenant's main business, even if this is for the convenience of customers<sup>7</sup>. The covenant is not broken, however, where a tenant who carries on a business of a class different from that which is prohibited merely sells, as incident to his own business, some articles which are sold in the prohibited business<sup>8</sup>. Where the covenant is not to carry on a business similar to the specified business of another person, it is broken if the businesses are sufficiently alike to compete<sup>9</sup>. A covenant to use the premises

for showrooms, workrooms and offices means only that the demised premises may not be used as a dwelling house<sup>10</sup>.

A covenant not to use premises for certain specified trades 'but [the tenant] will use the demised premises for the business of high-class retailers of jewellery' and other specified purposes is not broken by the use of only part of the premises for the storage of jewellery for sale elsewhere<sup>11</sup>.

1 *Doe d Wetherell v Bird* (1834) 2 Ad & El 161 (setting up of a private asylum held not to be a breach); cf *Westripp v Baldock* [1939] 1 All ER 279, CA (jobbing builder held to be carrying on trade). A covenant against carrying on a particular trade may be restricted to the covenantor personally notwithstanding it is entered into in consideration of a periodical payment to him and his executors: *Cooke v Colcraft* (1773) 2 Wm Bl 856.

2 Eg the business of a school (*Doe d Bish v Keeling* (1813) 1 M & S 95 at 99; *Kemp v Sober* (1852) 19 LTOS 308; *Wickenden v Webster* (1856) 6 E & B 387; *Johnstone v Hall* (1856) 2 K & J 414; *German v Chapman* (1877) 7 ChD 271, CA; *Hobson v Tulloch* [1898] 1 Ch 424; *Wauton v Coppard* [1899] 1 Ch 92); or a hospital for poor persons who pay according to their means (*Bramwell v Lacy* (1879) 10 ChD 691); or the taking of friends as paying guests (*Thorn v Madden* [1925] Ch 847; *Tendler v Sproule* [1947] 1 All ER 193, CA); or the subletting of premises in apartments (*Barton v Reed* [1932] 1 Ch 362); cf *Lewis v Weldcrest Ltd* [1978] 3 All ER 1226, [1978] 1 WLR 1107, CA (tenant who took in lodgers held, as a matter of fact and degree, not to be occupying premises for the purposes of a business within the meaning of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post)). As to the use of premises for advertising see PARA 500 ante; and as to teaching music see *Tritton v Bankart* (1887) 56 LT 306. A covenant not to carry on any business except that of a school is broken by the use of the premises as a school of music: *Lawrence v South County Freeholds Ltd* [1939] Ch 656, [1939] 2 All ER 503.

3 Thus a 'home' where working girls were boarded without payment was held in effect to be the business of a lodging house: *Rolls v Miller* (1884) 27 ChD 71, CA.

4 *Rolls v Miller* (1884) 27 ChD 71, CA; *Portman v Home Hospitals Association* (1879) 27 ChD 81n; *Florent v Horez* (1983) 48 P & CR 166, 12 HLR 1, CA.

5 *Evans v Davis* (1878) 10 ChD 747; *Wilkinson v Rogers* (1863) 12 WR 119. A covenant which prohibits the tenant from placing signs on the landlord's land without consent does not operate as a grant of an easement over that land, even in a case where consent has been given before the grant of lease: *William Hill (Southern) Ltd v Cabras Ltd* [1987] 1 EGLR 37 at 39, CA, per Nourse LJ. Apparently conversion of a private dwelling house into a shop may be effected by user without structural alteration: *Wilkinson v Rogers* (1864) 2 De GJ & Sm 62; but see *Milch v Coburn* (1911) 55 Sol Jo 441, CA. A sale by auction is allowable in a shop if not specially prohibited: *Keith v Reid* (1870) LR 2 Sc & Div 39, HL.

6 *Doe d Gaskell v Spry* (1818) 1 B & Ald 617 at 619; *Doe d Davis v Elsam* (1828) Mood & M 189 at 191. The conduct of a fried fish shop does not, however, constitute a breach of a covenant not to carry on business as a fishmonger, though it may be a breach of a covenant not to use the premises otherwise than as a restaurant (*Errington v Birt* (1911) 105 LT 373), and a covenant not to use premises as a garage and office is not broken by letting them for the storage only of cars (*Derby Motor Car Co v Crompton and Evans' Union Bank Ltd and Guest* (1915) 31 TLR 185). Similarly, a covenant not to let for the sale of souvenirs is not broken by letting to a tobacconist, tailor, perfumer or embroiderer (*LSG Ltd v TB Lawrence Ltd* (1925) 42 TLR 85, CA); a covenant not to carry on business as a draper is not infringed by the sale of furs (*Wills v Adams* (1908) 25 TLR 85); and a covenant not to carry on any business other than that of a butcher is not broken by the sale of poultry (*Hartshorn v Angliss* [1951] 1 TLR 1043). A covenant not to use premises except for the business of a hosier or hatter and mercer, including the sale of fancy waistcoats and mackintoshes, was, however, held as a matter of construction to be broken by the sale of overcoats (not being mackintoshes) and sports jackets: *Wartski v Meaker* (1914) 110 LT 473. Premises which are to be used only for a post office may be used for business ordinarily carried on by Post Office officials in connection with revenue: *Wadham v Postmaster General* (1871) LR 6 QB 644. Premises may be a 'supermarket' even though not all the goods sold are portable: *Calabar (Woolwich) Ltd v Tesco Stores Ltd* (1977) 245 Estates Gazette 479, CA. A covenant by the landlord not to use retained land for the operation of a pleasure ground for games and recreation was held not to be breached by the grant of a lease to a company wishing to construct a large public house and restaurant which would include a children's outdoor play area and an enclosed 'Fun Factory': see *Harbour Park Ltd v Arun District Council* [1998] EGCS 150. A covenant by a landlord not to permit a gift shop to be operated was broken by a 'Football Hall of Fame' that might sell gifts such as football shirts: *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234, [2000] 1 All ER 975.

7 *Fitz v Iles* [1893] 1 Ch 77, CA (supply of light refreshments by a grocer held to be a breach of a covenant against user as a coffee house); cf *Property Developments (Commercial) Ltd v Fugaccia* (1971) 221 Estates Gazette 964 (distinguishing *Fitz v Iles* supra) (covenant to use premises only as a 'high-class coffee bar and

lounge' held not to be broken by the service of three-course meals in the middle of the day). See also *Atwal v Courts Garage* [1989] 1 EGLR 63, CA (covenant prohibited any business except that of a garage with car sales and vehicle repairs and there were increasing sales of accessories); *Joint London Holdings Ltd v Mount Cook Land Ltd* [2005] EWCA Civ 1171, [2005] 3 EGLR 119, [2005] All ER (D) 77 (Oct) (covenant by the tenant not to use the premises for the business of a 'victualler' or 'coffee house keeper' would be breached by proposed use as a self-service retail outlet offering sandwiches and non-alcoholic drinks, including coffee, but having limited facilities for consumption on the premises; 'victualler' in a commercial lease does not mean 'licensed victualler' and 'coffee house' means a place where coffee and light refreshments are served and is no longer limited to its 17th century historic meaning).

8 *Stuart v Diplock* (1889) 43 ChD 343, CA (hosier selling ladies' vests); *Lumley v Metropolitan Rly Co* (1876) 34 LT 774 (grocer selling sweetmeats); *HE Randall Ltd v Summers* 1919 SC 396, Ct of Sess (naval outfitter selling boots and shoes); *A Lewis & Co (Westminster) Ltd v Bell Property Trust Ltd* [1940] Ch 345, [1940] 1 All ER 570 (tea shop selling cigarettes); *Labone v Litherland UDC* [1956] 2 All ER 215, [1956] 1 WLR 522 (grocer selling bread and confectionery). Such restrictive covenants are, however, construed strictly: see *Rother v Colchester Corp* [1969] 2 All ER 600, [1969] 1 WLR 720 (landlord covenanted not to let any other shop on his estate for a specified purpose).

9 *Drew v Guy* [1894] 3 Ch 25, CA.

10 *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733; cf *Macmillan & Co Ltd v Rees* [1946] 1 All ER 675, CA.

11 *Montross Associated Investments SA v Moussaieff* (1991) 63 P & CR 31, [1992] 1 EGLR 55, CA.

## UPDATE

### 501 Trade or business

NOTES--See *Shah v Colvia Management Co Ltd* [2007] All ER (D) 217 (Dec) (reasonableness of scheme to charge tenants of industrial park for use of car park).

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### 502. Covenant to keep premises open.

Where a covenant requires a tenant to keep the demised premises open for the permitted uses, damages rather than an injunction or an order for specific performance are usually the appropriate remedy for any breach, since it is the settled practice of the court not to make an order requiring a person to carry on a business<sup>1</sup>.

1 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1, [1997] 3 All ER 297, HL (covenant in a lease of retail premises to keep open for trade during the usual hours of business is not, other than in exceptional circumstances, specifically enforceable). See also *Braddon Towers Ltd v International Stores Ltd* (1979) reported in [1987] 1 EGLR 209; *Costain Property Developments Ltd v Finlay & Co Ltd* (1989) 57 P & CR 345, [1989] 1 EGLR 237; *FW Woolworth plc v Charwood Alliance Properties Ltd* [1987] 1 EGLR 53; *Transworld Land Co Ltd v J Sainsbury plc* [1990] 2 EGLR 255; cf *Bristol and West Building Society v Marks & Spencer plc* [1991] 2 EGLR 57 (regulations made by landlord of shopping centre stipulating opening hours).

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### 503. Noisome or offensive trades.

A covenant against carrying on a noisome or offensive trade or business is not broken by carrying on a dangerous trade which is neither noisome nor offensive<sup>1</sup>. Whether a particular business is prohibited by the covenant depends to some extent upon whether it was carried on upon the premises at the time of the demise<sup>2</sup>.

1 *Hickman v Isaacs* (1861) 4 LT 285. The carrying on of a dangerous trade which will result in the insurance premium being increased will in certain circumstances be restrained (*Teape v Douse* (1905) 92 LT 319; *Chapman v Mason and Liniline Co* (1910) 103 LT 390); and an injunction will be granted where the tenant sublets for such a trade in breach of covenant (see *Chapman v Mason and Liniline Co* supra).

2 *Gutteridge v Munyard* (1834) 7 C & P 129. Lime burning may be a noisome business: *Wiltshire v Cosslett* (1889) 5 TLR 410. A fried fish business (*Duke of Devonshire v Brookshaw* (1899) 81 LT 83; cf *Errington v Birt* (1911) 105 LT 373, where such a shop was held not to be a nuisance, but an annoyance), and the carrying on of mock auctions (*Moses v Taylor* (1862) 11 WR 81), may be offensive; so may a private hospital (*Earl of Pembroke v Warren* [1896] 1 IR 76 at 104, CA); but not a well conducted and properly managed hospital for tuberculosis (*Frost v King Edward VII Welsh etc Association* [1918] 2 Ch 180). A boys' school is within the words 'injurious, offensive or disagreeable noise or nuisance' (*Wauton v Coppard* [1899] 1 Ch 92), but not the mere use of blinds for a business purpose so as to be inconvenient to others (see *Gresham Life Assurance Society v Ranger* (1899) 15 TLR 454, CA), although the erection of a trellis screen may be an annoyance (*Wood v Cooper* [1894] 3 Ch 671). The sale of pornographic literature has been held to be an offensive trade (*DR Evans & Co Ltd v Chandler* (1969) 211 Estates Gazette 1381); and in Canada the use of topless waitresses and nude dancing in a restaurant has been held to be offensive (*Re Koumoudouros and Marathon Realty Co Ltd* (1978) 89 DLR (3d) 551 (Ont)).

The opening of a public house was held not to be a breach of a covenant against trades that may be offensive or lead to annoyance (*Jones v Thorne* (1823) 1 B & C 715); but a restriction on carrying on the trade of a public house is good in law and capable of running with the land (*Earl of Zetland v Hislop* (1882) 7 App Cas 427, HL).

As to enforcing an agreement for an underlease when the intended user may prove to be a violation of a covenant in the head lease against noxious businesses see *Reeves v Greenwich Tanning Co Ltd* (1864) 2 Hem & M 54; *Teape v Douse* (1905) 92 LT 319; and as to the exhibition of advertisements see PARA 500 ante.

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### 504. Private dwelling house.

Any user of the premises for trade or business purposes is a breach of a covenant to use them solely as a private dwelling house<sup>1</sup>. The exhibition of a blind bearing a trade name<sup>2</sup>; the addition of a studio<sup>3</sup>; the conversion of the premises into flats<sup>4</sup>; the subletting of part of the premises, even if the subtenant is bound to use the part sublet as a private residence<sup>5</sup>, unless the lease envisages the subletting of a part as distinct from the whole<sup>6</sup>; the carrying on of a guest-house<sup>7</sup>; the provision of supervised housing for former hospital patients who have suffered from mental disability<sup>8</sup>; and the taking in of friends as paying guests<sup>9</sup> may constitute breaches of covenant<sup>10</sup>. In the absence of an express covenant preventing it<sup>11</sup>, the sale by auction of furniture belonging to the premises does not involve a breach<sup>12</sup>. A covenant by the tenant that he will personally reside on the premises is valid<sup>13</sup>; and, where the tenancy becomes vested in trustees, it is not satisfied by the residence of a beneficiary under the trust<sup>14</sup>.

A covenant not to use or occupy a flat otherwise than as a single private residence in one occupation only is breached by the grant of occupational licences to reside in the flat for payment<sup>15</sup> but not by a single tenancy to four persons jointly and severally liable even though the four occupied separate study bedrooms<sup>16</sup>.

1 *German v Chapman* (1877) 7 ChD 271, CA; *Hobson v Tulloch* [1898] 1 Ch 424. A covenant to build a house as a private dwelling house requires also that it is to be kept as such: *Bray v Fogarty* (1870) 4 IR Eq 544.

2 *Wilkinson v Rogers* (1863) 12 WR 119.

3 *Patman v Harland* (1881) 17 ChD 353.

4 *Day v Waldron* (1919) 88 LJB 937. The measure of damages for such a breach of the covenant is such sum as reasonably represents the damage sustained by the landlord: *Duke of Westminster v Swinton* [1948] 1 KB 524, [1948] 1 All ER 248. Where the landlord has forfeited the lease and intends to reinstate the premises at once, the measure of damages may be the cost of reinstatement: *Duke of Westminster v Swinton* supra at 534 and at 251; *Eyre v Rea* [1947] KB 567, [1947] 1 All ER 415. Cf *Wrotham Park Settled Estates v Naylor* (1990) 62 P & CR 233, [1991] 1 EGLR 274 (conversion of cowshed into cottage for household staff not breach of covenant).

5 *Barton v Keeble* [1928] Ch 517; *Dobbs v Linford* [1953] 1 QB 48, [1952] 2 All ER 827, CA.

6 *Downie v Turner* [1951] 2 KB 112, [1951] 1 All ER 416, CA, as explained in *Dobbs v Linford* [1953] 1 QB 48, [1952] 2 All ER 827, CA.

7 *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224.

8 *C & G Home Ltd v Secretary of State for Health* [1991] Ch 365, [1991] 2 All ER 841, CA. Cf, however, the Leasehold Reform, Housing and Urban Development Act 1993 s 89; and PARA 50 ante.

9 *Thorn v Madden* [1925] Ch 847; *Tendler v Sproule* [1947] 1 All ER 193, CA.

10 The question whether there has been a breach of such a covenant by eg the taking in of paying guests is a question of fact and degree. In *Segal Securities Ltd v Thoseby* [1963] 1 QB 887 at 894, [1963] 1 All ER 500 at 503, Sachs J observed that the mere taking in of a single paying guest who shared the family life as far as possible would not, save in exceptional circumstances, constitute a breach of such a covenant and nothing in a covenant to use the premises 'for the purposes of a private residence in the occupation of one household only' would preclude a true sharing between the tenant and friends. See also *Heglibiston Establishment v Heyman* (1977) 36 P & CR 351, CA (approach of Sachs J approved). A covenant to use a property as a private dwelling house is distinct from a covenant to reside personally in the property and is not broken by letting to another who uses it as a home: *Roberts v Howlett* [2002] 1 P & CR 234 (no breach where covenantor let property to group of students who used it as a single private dwelling house, dining communally and sharing use of the lounge). As to use as a dwelling house for planning control purposes see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 233.

11 *Toleman v Portbury* (1872) LR 7 QB 344, Ex Ch.

12 *Reeves v Cattell* (1876) 24 WR 485.

13 *Tatem v Chaplin* (1793) 2 Hy BI 133.

14 *Lloyds Bank Ltd v Jones* [1955] 2 QB 298, [1955] 2 All ER 409, CA.

15 *Falgor Commercial SA v Alsabahia Inc* (1985) 18 HLR 123, [1986] 1 EGLR 41, CA.

16 *Roberts v Howlett* [2002] 1 P & CR 234, distinguishing *Falgor Commercial SA v Alsabahia Inc* (1985) 18 HLR 123, [1986] 1 EGLR 41, CA, cited in note 15 supra, on the basis that use in that case was for service accommodation and not residence at all.

### 505. Public house or tavern.

A covenant against the use of premises as a 'public house, tavern or beershop' is broken by the sale under an off-licence of beer not to be drunk on the premises<sup>1</sup>; and a covenant against carrying on the trade of an innkeeper, publican or seller by retail of wine, spirits or beer is broken by the sale of those liquors by a grocer in the course of his trade<sup>2</sup>, or by the tenant of a theatre<sup>3</sup>. A covenant against the use of premises as a 'public house or beershop', where the premises are used as a private hotel and no beer is sold, does not, however, prevent the supply of wines and spirits to visitors only<sup>4</sup>; and a covenant against the business of alehouse keeper, beerhouse keeper, tavern keeper or licensed victualler does not prevent the carrying on of a restaurant with a restaurant licence<sup>5</sup>. A covenant against use as a 'victualler' in a commercial lease is not to be read as a covenant against use as a 'licensed victualler' and will be breached by use as a self-service retail outlet offering sandwiches and non-alcoholic drinks<sup>6</sup>.

1 *Bishop of St Albans v Battersby* (1878) 3 QBD 359; *London and Suburban Land and Building Co v Field* (1881) 16 ChD 645, CA; *Nicoll v Fenning* (1881) 19 ChD 258; *Sood v Barker* [1991] 1 EGLR 87, CA. As to 'beerhouse' cf, however, *Bishop of St Albans v Battersby* supra; *London and North Western Ry Co v Garnett* (1869) LR 9 Eq 26; *Holt & Co v Collyer* (1881) 16 ChD 718; and as to 'public house' cf *Pease v Coats* (1866) LR 2 Eq 688. A sale to members of a members' club for consumption on the premises is not a breach of a covenant against the sale of liquors: *Ranken v Hunt* (1894) 10 R 249. As to the supply of intoxicating liquor by clubs see LICENSING AND GAMBLING vol 67 (2008) PARA 85 et seq.

2 *Feilden v Slater* (1869) LR 7 Eq 523. A covenant not to carry on the trade of a vintner is not restricted to the sale of wine to be consumed on the premises: *Wells v Attenborough* (1871) 24 LT 312.

3 *Buckle v Fredericks* (1890) 44 ChD 244, CA. The circumstances may not, however, be such as to call for an injunction: *Jones v Bone* (1870) LR 9 Eq 674, as explained in *Buckle v Fredericks* supra at 248.

4 *Duke of Devonshire v Simmons* (1894) 11 TLR 52.

5 *Lorden v Brooke-Hitching* [1927] 2 KB 237.

6 *Joint London Holdings Ltd v Mount Cook Land Ltd* [2005] EWCA Civ 1171, [2005] 3 EGLR 119, [2005] All ER (D) 77 (Oct).

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### 506. Waiver of covenant restricting user.

A covenant restricting the user of premises is a continuing covenant, and there is a new breach every day while the premises are used in violation of it<sup>1</sup>; but the landlord may waive the covenant partially, so as to allow of the carrying on of a particular trade<sup>2</sup>. The landlord does not waive the benefit of the covenant by permitting other premises held under a similar lease to be used for the prohibited purpose<sup>3</sup>. A release of the covenant need not be express. If the landlord is aware of a continuing breach and acquiesces in it for a long period, as, for example, where, with full knowledge, he receives rent, it will be presumed that he has either released the covenant or granted a licence for the user<sup>4</sup>. If the landlord's conduct is not wholly inconsistent with the continued existence of the covenant, it will not be presumed that he has totally released it<sup>5</sup>. Where a number of houses are held under identical leases containing a covenant against user otherwise than as a private dwelling house without the consent in writing of the

landlord having been first obtained, a tenant may not prevent the landlord's authorising another tenant to use his premises for other purposes<sup>6</sup>.

1 *Doe d Ambler v Woodbridge* (1829) 9 B & C 376 at 378. Therefore, a landlord who accepts rent with knowledge of past breaches waives his right to forfeit the lease on account of those breaches; but his right to forfeit the lease on account of future continuing breaches is unaffected: see PARA 617 post.

2 *Macher v Foundling Hospital* (1813) 1 Ves & B 188. As to the effect of the tenant entering into the covenant after a licence for a particular trade has been given and not acted upon see *Doe d Governors and Guardians of Foundling Hospital v Evans* (1825) 4 LJOSKB 231.

3 *Kemp v Sober* (1851) 1 Sim NS 517 (affd (1852) 19 LTOS 308); *Meredith v Wilson* (1893) 69 LT 336. If by his acts he leads a reasonable person justifiably to conclude that the covenants are no longer enforced, the landlord will not be permitted to enforce the covenant: *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224.

4 *Gibson v Doeg* (1857) 2 H & N 615 (20 years); *Re Summerson, Downie v Summerson* [1900] 1 Ch 112n (30 years); *Hepworth v Pickles* [1900] 1 Ch 108 (24 years); *Chelsea Estates Ltd v Kadri* (1970) 214 Estates Gazette 1356 (nearly 50 years); cf *Russell v Archdale* (1962) 185 Estates Gazette 913, CA (grant of a revocable licence by the landlord held not to be capable of amounting to acquiescence for these purposes). These are exceptional cases, however; and the mere acceptance of rent with knowledge of the change of user, even if it continues for some time, does not by itself amount to a release: *Wolfe v Hogan* [1949] 2 KB 194, [1949] 1 All ER 570, CA; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733. As to extinguishment of covenants through change in the character of an estate see EQUITY vol 16(2) (Reissue) PARAS 629, 907; para 507 post; and *Craig v Greer* [1899] 1 IR 258, CA; and as to acquiescence in the breach of covenant see *Bray v Fogarty* (1870) 4 IR Eq 544; *London, Chatham and Dover Rly Co v Bull* (1882) 47 LT 413; *Gibbon v Payne* (1907) 23 TLR 250, CA. There can be no acquiescence without knowledge of the breach on the part of the landlord: *Ashcombe v Mitchell* (1895) 12 TLR 17, CA.

5 *Lloyds Bank Ltd v Jones* [1955] 2 QB 298, [1955] 2 All ER 409, CA.

6 *Pearce v Maryon-Wilson* [1935] Ch 188. It may be otherwise if a letting scheme is implied: see PARA 520 post.

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## 507. Discharge and modification of restrictive covenants.

Where the use of land or the right to build on it is restricted by covenant, the Lands Tribunal has power to discharge or modify the restriction under certain conditions<sup>1</sup>; and this power extends to restrictions affecting leasehold land let for more than 40 years after 25 years have expired<sup>2</sup>.

Where the buildings comprised in a ground lease<sup>3</sup> or a multiple lease<sup>4</sup> have been rendered unfit<sup>5</sup> by war damage, the statutory provisions relating to the discharge and modification of restrictive covenants<sup>6</sup> have effect in relation to the land comprised in the lease, subject to the following modifications<sup>7</sup>:

1110 (1) in addition to the statutory grounds for the exercise of the powers of the Lands Tribunal<sup>8</sup>, those powers may be exercised, in relation to restrictions affecting the interest created by the lease, on the tribunal being satisfied that the proposed discharge or modification is desirable in order to permit the economical use or development of the land comprised in the lease, or is otherwise desirable in the national interest<sup>9</sup>;

1111 (2) where any restriction affecting the interest created by the lease is wholly or partially discharged or modified on any of the additional grounds specified in

- head (1) above, the powers of the tribunal may be exercised on any of those additional grounds in relation to any similar restriction affecting the freehold out of which that interest is derived<sup>10</sup>;
- 1112 (3) those provisions<sup>11</sup> apply<sup>12</sup> to restrictions affecting interests created by the lease in like manner as they would have applied to restrictions affecting the land had the land been freehold, whatever the term of the lease and whatever period of the term has expired<sup>13</sup>.

The county court has authority in certain circumstances to vary the terms of a lease or a restrictive covenant so as to permit the conversion of any premises into two or more dwelling houses<sup>14</sup>. Apart from statute, a restrictive covenant ceases to be enforceable if, owing to a change in the character of the neighbourhood, it is no longer possible to attain the object for which the covenant was imposed<sup>15</sup>.

Where the tenant has covenanted not to alter the user of premises without the landlord's consent, and a proposed alteration does not involve any structural alteration of the premises, the landlord is prohibited from taking a fine as a condition of giving his consent<sup>16</sup>.

1 See the Law of Property Act 1925 s 84 (as amended); and EQUITY vol 16(2) (Reissue) PARA 630 et seq. In determining whether a covenant is restrictive, the lease must be construed so as to ascertain the parties' intention at the time at which it was entered into and the covenants must be read in context: see *Blumenthal v Church Comrs for England* [2004] EWCA Civ 1688, [2005] 1 EGLR 78, [2004] All ER (D) 174 (Dec).

2 See the Law of Property Act 1925 s 84(12) (as amended); and EQUITY vol 16(2) (Reissue) PARA 631.

3 For these purposes, 'ground lease' means a lease at a rent or, where the rent varies, at a maximum rent, which does not substantially exceed the rent which a tenant might reasonably have been expected, at the commencement of the term created by the lease, to pay for the land comprised in the lease, excluding any buildings, for a term equal to the term created by the lease: Landlord and Tenant (War Damage) Act 1939 s 24. For the meaning of 'tenant' see PARA 479 note 8 ante; and for the meaning of 'land' see PARA 479 note 2 ante.

4 For these purposes, 'multiple lease' means a lease comprising buildings which are used or adapted for use as two or more separate tenements: *ibid* s 24.

5 For these purposes, 'unfit' means (1) in relation to buildings or works, or to land of which three-quarters or more of the value is attributable to buildings or works, unfit for the purpose for which those buildings or works were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit for that purpose, to the standard of accommodation available at the material time, and to all other circumstances; and (2) in relation to other land, unfit for any purpose for which the tenant can be reasonably expected to use the land, having regard to the terms of the lease under which it is held: *ibid* s 24. For the meaning of 'war damage' see PARA 479 note 3 ante; and for the meaning of 'lease' see PARA 479 note 7 ante.

6 *Ie* the Law of Property Act 1925 s 84 (as amended).

7 Landlord and Tenant (War Damage) Act 1939 s 18(1). No application which could not have been entertained by the Lands Tribunal if s 18 had not been passed may, however, be made to the tribunal after the buildings have been rendered fit: s 18(1) proviso; Lands Tribunal Act 1949 s 1(4) (amended by the Land Compensation Act 1961 s 40(3), Sch 5).

8 *Ie* the grounds specified in the Law of Property Act 1925 s 84(1)(a)-(c) (as amended): see EQUITY vol 16(2) (Reissue) PARA 632.

9 Landlord and Tenant (War Damage) Act 1939 s 18(2); Lands Tribunal Act 1949 s 1(4) (as amended: see note 7 *supra*).

10 Landlord and Tenant (War Damage) Act 1939 s 18(3); Lands Tribunal Act 1949 s 1(4) (as amended: see note 7 *supra*).

11 See note 6 *supra*.

12 *Ie* notwithstanding anything in the Law of Property Act 1925 s 84(12) (as amended).



- 13 Landlord and Tenant (War Damage) Act 1939 s 18(4); and see EQUITY vol 16(2) (Reissue) PARA 631.
- 14 See the Housing Act 1985 s 610 (as amended); and PARA 472 ante.
- 15 See EQUITY vol 16(2) (Reissue) PARA 629.
- 16 See the Landlord and Tenant Act 1927 s 19(3); and PARA 498 ante.

## **UPDATE**

### **507 Discharge and modification of restrictive covenants**

TEXT AND NOTES--References to the Lands Tribunal are now to the Upper Tribunal: Law of Property Act 1925 s 84 (amended by SI 2009/1307); Lands Tribunal Act 1949 s 1(4) (amended by SI 2009/1307) see EQUITY vol 16(2) (Reissue) PARAS 630-641.

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## **12. OTHER COVENANTS**

### **(1) COVENANT FOR QUIET ENJOYMENT**

#### **508. Usual form of covenant.**

An express covenant for quiet enjoyment may be a qualified covenant, namely a covenant that the tenant is peaceably to hold and enjoy the demised premises during the term<sup>1</sup> without interruption by the landlord or persons claiming through or under him; or it may be an absolute covenant, in which case it extends also to interruption by persons claiming by title paramount<sup>2</sup>. The qualified form is usually adopted, and under it the landlord is not liable for acts of persons claiming by title paramount<sup>3</sup>, even though those acts are the consequences of his own default. Hence in the case of a sublease, if the superior landlord evicts the subtenant for non-payment of the head rent<sup>4</sup>, or for non-observance by him of a covenant of which he had received no notice from the sub-landlord<sup>5</sup>, this is not a breach of the covenant for quiet enjoyment; but it is a breach if the sub-landlord submits to judgment in a claim for recovery of possession by a person who has no title to sue, and the subtenant is in consequence evicted<sup>6</sup>. Similarly, where a landlord grants a lease to A with rights over a forecourt and then sells the reversion to B who grants a lease of the forecourt to C, the exercise of A's rights is not a breach of B's qualified covenant to C because A claims his title under the original landlord and not under B<sup>7</sup>; but, where the covenant expressly defines 'landlord' as including superior landlord and the superior landlord obstructs the subtenant's premises, the sub-landlord may be liable for the superior landlord's unlawful as well as lawful acts<sup>8</sup>.

An act occurring prior to the date of the covenant cannot amount to a breach<sup>9</sup>; and, where a landlord takes possession under an order for possession which is subsequently reversed on appeal, there is no breach of covenant<sup>10</sup>.

Where a lessor covenants to allow quiet enjoyment and to keep the building in repair, he must take all reasonable precautions to avoid disturbing the lessee's quiet enjoyment while undertaking repairs<sup>11</sup>.

1 le during the term which the landlord purports to grant, not the term which he has power to grant: *Evans v Vaughan* (1825) 4 B & C 261 at 268. A clause whereby the landlord binds himself to 'warrant and defend' the tenant against all persons lawfully claiming the premises during the term operates as an express covenant for quiet enjoyment: *Williams v Burrell* (1845) 1 CB 402.

2 See *Foster v Pierson* (1792) 4 Term Rep 617. The operation and enforceability of an absolute covenant for quiet enjoyment which is akin to a covenant for title is not diminished because the purchaser is aware of some defect in the title: *Brennan v Kettell (Royal Bank of Scotland, Pt 20 defendants)* [2003] EWCA Civ 1186, [2004] 2 P & CR 47, [2003] All ER (D) 447 (Jul) (landlord letting larger area than it owned; liable to tenants on eviction by true owners). 'Quiet' has long been understood as meaning 'without interference'; it does not mean the absence of noise: *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1 at 22, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council* [1999] 4 All ER 449 at 466, HL, per Lord Millett.

3 *Woodhouse v Jenkins* (1832) 9 Bing 431; *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680 at 684; *Line v Stephenson* (1838) 7 Scott 69. 'Claiming' means a lawful right to interrupt the tenant's occupation: see *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

4 *Kelly v Rogers* [1892] 1 QB 910, CA; contra see *Stevenson v Powell* (1612) 1 Bulst 182.

5 *Spencer v Marriott* (1823) 1 B & C 457; *Dennett v Atherton* (1872) LR 7 QB 316, Ex Ch. There was no breach where the landlord omitted to pay land tax and distress for arrears was levied on the tenant: *Stanley v Hayes* (1842) 3 QB 105.

6 *Cohen v Tannar* [1900] 2 QB 609, CA. If, however, the landlord has agreed to give an absolute covenant for quiet enjoyment, the tenant is entitled to have such a covenant inserted in the lease, notwithstanding that the landlord has no title to part of the premises: *Onions v Cohen* (1865) 2 Hem & M 354.

7 *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

8 *Queensway Marketing Ltd v Associated Restaurants Ltd* [1988] 2 EGLR 49, CA (where the superior landlord was named).

9 *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

10 *Hillgate House Ltd v Expert Clothing Service & Sales Ltd* [1987] 1 EGLR 65.

11 *Goldmile Properties Ltd v Lechouritis* [2003] EWCA Civ 49, [2003] 2 P & CR 1, [2003] 1 EGLR 60.

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### 509. Effect of qualified covenant.

The covenant usually provides for quiet enjoyment 'without interruption by the landlord or any persons rightfully claiming under or in trust for him' or 'without any lawful interruption by the landlord or any persons claiming under or in trust for him'. Whichever of these forms is used, the covenant protects only against the acts of persons claiming under the landlord so far as they are successors in title to the landlord, or actually have authority from him to do the acts<sup>1</sup>; and the effect is the same even if the words 'rightfully' or 'lawful' are not inserted<sup>2</sup>. The covenant does not extend to acts of a stranger, notwithstanding that he purports to claim under the landlord<sup>3</sup>; nor does it extend to unlawful acts of persons who in fact derive title under the landlord<sup>4</sup>. It does, however, extend to all acts of the landlord himself which interrupt the enjoyment whether they are lawful or not<sup>5</sup>. An act may constitute a breach of the covenant even where, apart from the covenant, the landlord has the right to do the act complained of<sup>6</sup>.

Although in general the covenantor is not taken to covenant against the wrongful acts of strangers<sup>7</sup>, it is otherwise if a person is specified in the covenant, as the covenantor then knows against whose acts he covenants<sup>8</sup>.

It follows that it is no breach if the interruption is caused by an adjoining tenant whose lease, although granted by the same landlord, does not authorise the act causing the interruption<sup>9</sup>; and there is no breach, in the case of a lease of sporting rights over a farm with a covenant for quiet enjoyment, if the farm tenant interferes with the sporting rights in breach of the terms of his own lease<sup>10</sup>. Where, however, a landlord grants a lease to a tenant which necessarily involves a nuisance to an adjoining tenant, and the landlord's reversion is acquired by an assignee, the assignee is liable for the nuisance to the adjoining tenant if he purchases with knowledge of the nuisance and allows and authorises its continuance<sup>11</sup>.

Where a lease granted by the Crown contains an express covenant for quiet enjoyment, the covenant must by necessary implication be read so as to exclude those measures affecting the nation as a whole which the Crown takes for the public good<sup>12</sup>.

1 *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680 at 684, CA; and see *Sanderson v Berwick-upon-Tweed Corp* (1884) 13 QBD 547 at 551, CA; cf *Fox v Waters* (1840) 12 Ad & El 43. The following persons have been held to 'claim under' the landlord within the meaning of the covenant: a person claiming under a settlement made by the settlor under a power (*Carpenter v Parker* (1857) 3 CBNS 206); a remainderman under a settlement made by the landlord before the lease (*Hurd v Fletcher* (1778) 1 Doug KB 43; *Evans v Vaughan* (1825) 4 B & C 261); the landlord's widow claiming under a fine levied before the lease to the landlord, his wife, and his heirs (*Butler v Lady Swinnerton* (1623) Cro Jac 656); a person claiming under a prior appointment by the landlord and another (*Calvert v Sebright* (1852) 15 Beav 156). Where the landlord has been a party to a prior lease as trustee, the prior tenant claims under him (*Markham v Paget* [1908] 1 Ch 697 at 711); but a tenant under a prior lease to which a landlord of the lease in question was not party does not claim under him (*Re Griffiths, Griffiths v Riggs* (1917) 61 Sol Jo 268); and an assignee of the reversion, who becomes owner of adjoining land by an independent title, does not claim under the landlord as to such adjoining land so as to be restricted in the use of it by the covenant (*Davis v Town Properties Investment Corp Ltd* [1903] 1 Ch 797, CA). Where before the assignment of a reversion the assignor grants to A a lease and rights over a forecourt, the assignee is not in breach of covenant if he grants a lease to B of the forecourt and A then seeks to exercise his rights: see *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

2 *Williams v Gabriel* [1906] 1 KB 155. The statement of claim must exclude the possibility that the disturbance may be by a person deriving title from the tenant himself: see *Brookes v Humphreys* (1838) 5 Bing NC 55. Where a local authority enters and carries out work necessary to comply with a dangerous structure notice with which the landlord has failed to comply, the landlord is not in breach of his covenant for quiet enjoyment (*Popular Catering Association Ltd v Romagnoli* [1937] 1 All ER 167); but, where the landlord carried out the work himself, without serving on the tenant a statutory notice of his intention to do so, the tenant recovered damages for breach of the covenant (*Trotter v Louth* (1931) 47 TLR 335).

3 It is otherwise if the covenant extends to persons 'claiming or pretending to claim': *Chaplain v Southgate* (1717) 10 Mod Rep 383.

4 *Tisdale v Essex* (1616) Hob 34; *Hayes v Bickerstaff* (1675) Vaugh 118; notes to 2 Wms Saund (1871 Edn) 524, 525 note (3); *Dudley v Folliott* (1790) 3 Term Rep 584; and see *Anon* (1774) Lofft 460.

5 As against the party himself the court will not consider the word 'lawful' or drive the tenant to proceedings for trespass (*Cross v Young* (1685) 2 Show 425 at 427; *Andrews v Paradise* (1724) 8 Mod Rep 318; cf *Corus v --* (1597) Cro Eliz 544); but the disturbance must be under a claim of right by the landlord (*Lloyd v Tomkies* (1787) 1 Term Rep 671).

6 *Andrews v Paradise* (1724) 8 Mod Rep 318; *Yeomans Row Management Ltd v Bodentian-Meyrick* [2002] EWCA Civ 860, [2002] 2 EGLR 39, [2002] All ER (D) 492 (May) (right of entry 'to execute any repairs or work to the flat' did not permit entry to carry out extensive improvements since the right had to be read in the light of the covenant for quiet enjoyment).

7 *Nash v Palmer* (1816) 5 M & S 374 at 379; and see *King v Liverpool City Council* [1986] 3 All ER 544, [1986] 1 WLR 890, CA (local authority landlord not liable to tenant in negligence for damage caused by vandals; claim for breach of covenant abandoned at trial below).

8 *Foster v Mapes* (1590) Cro Eliz 212 at 213; *Nash v Palmer* (1816) 5 M & S 374 at 380; *Fowle v Welsh* (1822) 1 B & C 29; *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

9 *Sanderson v Berwick-upon-Tweed Corp* (1884) 13 QBD 547, CA. This sentence was cited with approval by Slesser LJ in *Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd* [1936] 2 All ER 633 at 642, CA.

10 *Jeffryes v Evans* (1865) 19 CBNS 246.

11 *Sampson v Hodson-Pressinger* [1981] 3 All ER 710, 12 HLR 40, CA.

12 *Crown Lands Comrs v Page* [1960] 2 QB 274 at 292, [1960] 2 All ER 726 at 736, CA per Devlin LJ.

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### **510. Payment of rent not condition precedent.**

The landlord's covenant for quiet enjoyment usually provides that the tenant, paying the rent and performing the covenants, is quietly to enjoy the demised premises; but under such words the payment of the rent is not a condition precedent to the performance of the covenant<sup>1</sup>.

1 *Dawson v Dyer* (1833) 5 B & Ad 584; *Edge v Boileau* (1885) 16 QBD 117.

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### **511. Implied covenant for quiet enjoyment.**

It has long been established that, if a landlord demises property to a tenant and does not enter into express covenants for title or for quiet enjoyment, certain promises are implied by him by the use of the word 'demise', namely that he is entitled to grant some term in the demised premises and that the tenant is to have quiet enjoyment of the premises<sup>1</sup>. Such promises are also implied by the use of equivalent words of letting<sup>2</sup>.

In a formal lease, and in an oral letting or an agreement for a lease which operates as a present demise<sup>3</sup>, there is implied<sup>4</sup> one single covenant for quiet enjoyment, under which the tenant is entitled to be put into possession of the premises which are leased to him at the outset of his tenancy<sup>5</sup>, and to remain quietly in possession of them throughout the term. This covenant may be broken either by want of title or by the eviction of the tenant<sup>6</sup>. An express covenant for quiet enjoyment excludes an implied covenant to the same effect<sup>7</sup>.

1 *Miller v Emcer Products Ltd* [1956] Ch 304 at 318, [1956] 1 All ER 237 at 242, CA; *Iggulden v May* (1804) 9 Ves 325 at 330; *Mostyn v West Mostyn Coal and Iron Co* (1876) 1 CPD 145. It has been said that the principle applies only where there is an actual demise and not a mere agreement for demise (*Brashier v Jackson* (1840) 6 M & W 549); but an agreement is now frequently equivalent to a demise (*Walsh v Lonsdale* (1882) 21 ChD 9, CA; and see PARA 76 ante; and notes 2-3 infra). See also *Burnett v Lynch* (1826) 5 B & C 589 at 609; *Line v Stephenson* (1838) 5 Bing NC 183, Ex Ch. The judgments in *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA, contain dicta to the contrary, but that case is a reliable authority only for the particular point decided. As to implied covenants generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 250 et seq.

2 *Mostyn v West Mostyn Coal and Iron Co* (1876) 1 CPD 145 at 152; and see *Hart v Windsor* (1844) 12 M & W 68 at 85; *Markham v Paget* [1908] 1 Ch 697 (where the previous decisions are considered and reviewed); *Granger v Collins* (1840) 6 M & W 458; *Messent v Reynolds* (1846) 3 CB 194; *Bandy v Cartwright* (1853) 8 Exch 913; *Hall v City of London Brewery Co* (1862) 2 B & S 737; *Robinson v Kilvert* (1889) 41 ChD 88, CA; *Hoare v Chambers* (1895) 11 TLR 185; *Budd-Scott v Daniell* [1902] 2 KB 351, DC. The dicta to the contrary in *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA, discussed in *Jones v Lavington* [1903] 1 KB 253, CA, have not been accepted as correct: see *Markham v Paget* supra.

Where the erection of machinery by the landlord in parts of the premises below those demised for the purpose of hotel bedrooms is contemplated by the parties, the use of the machinery causing more noise than anticipated does not constitute a breach of the implied covenant for quiet enjoyment, as effect will not be given to the intention to use part of the premises as bedrooms at the expense of the intention to use the machinery in the other part: *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476, PC. As to the extent of the landlord's obligation as to title see also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 255.

3 See *Markham v Paget* [1908] 1 Ch 697. The tenant may not, however, sue on an agreement to grant a lease unless it is equivalent to an actual demise: see *Drury v Macnamara* (1855) 5 E & B 612; and PARA 117 ante.

4 It has been held that, apart from any implied covenant for title, a landlord, by granting a lease, undertakes to put the tenant into possession: see *Coe v Clay* (1829) 5 Bing 440; *Jinks v Edwards* (1856) 11 Exch 775; *Smart v Jones* (1864) 15 CBNS 717 at 724; *Milch v Coburn* (1911) 27 TLR 372, CA. These cases were decided, however, when it was doubtful whether a covenant for quiet enjoyment could be implied in an informal letting: see *Miller v Emcer Products Ltd* [1956] Ch 304 at 321, [1956] 1 All ER 237 at 243, CA, per Romer LJ.

5 *Ludwell v Newman* (1795) 6 Term Rep 458. It seems, however, that the tenant is not entitled to be put into possession of any part of the demised premises of which he is not granted exclusive possession: see *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA.

6 *Line v Stephenson* (1838) 4 Bing NC 678 (affd on appeal 5 Bing NC 183, Ex Ch); *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA (where the previous decisions are considered and reviewed).

7 *Nokes' Case* (1599) 4 Co Rep 80b; *Merrill v Frame* (1812) 4 Taunt 329; *Stannard v Forbes* (1837) 6 Ad & El 572; *Line v Stephenson* (1838) 5 Bing NC 183, Ex Ch; *Clayton v Leech* (1889) 41 ChD 103 at 107, CA; *Malzy v Eicholz* [1916] 2 KB 308, CA; *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA; and see *Murphy v Bandon Co-operative Agricultural and Dairy Society Ltd* [1909] 2 IR 510. Even where there is an express covenant, the landlord may still be liable for acts not covered by it on the principle that he may not derogate from his own grant: see PARA 520 post.

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## 512. Scope of implied covenant for quiet enjoyment.

Like the usual express covenant, the implied covenant for quiet enjoyment is restricted to the acts of the landlord and persons claiming under him<sup>1</sup>, and protects the tenant against all disturbance by the landlord whether lawful or not, except under a right of re-entry<sup>2</sup>. As against other persons it protects the tenant only against lawful disturbance<sup>3</sup>.

1 This is clearly the case where the word used is 'let': *Jones v Lavington* [1903] 1 KB 253, CA; *Markham v Paget* [1908] 1 Ch 697. Where 'demise' is used, it is doubtful whether the covenant extends to the acts of persons claiming by title paramount. Some earlier cases decided that the covenant was an absolute one (*Nokes' Case* (1599) 4 Co Rep 80b; *Merrill v Frame* (1812) 4 Taunt 329) and that a landlord was, therefore, bound to protect the tenant from distress by the superior landlord for rent due under the head lease (*Hancock v Caffyn* (1832) 8 Bing 358 at 366), unless the subtenant had undertaken to pay such rent (*Upton v Fergusson* (1833) 3 Moo & S 88); but in *Baynes & Co v Lloyd & Sons* [1895] 2 QB 610, CA, it was regarded as an open question, and in *Markham v Paget* supra Swinfen Eady J apparently took the view that the covenant was a qualified one whatever words were used.

2 *Andrews' Case* (1591) Cro Eliz 214.

3 A 'covenant in law', ie an implied covenant, protects against lawful, not tortious, interruptions; and the reason is that in the case of tortious acts the tenant has a proper remedy against the wrongdoers: *Hayes v Bickerstaff* (1675) Vaugh 118; *Wallis v Hands* [1893] 2 Ch 75 at 83. See also *Granger v Collins* (1840) 6 M & W 458; and TORT vol 45(2) (Reissue) PARA 518 et seq.

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Duration of implied covenant.

### 513. Duration of implied covenant.

The implied covenant for quiet enjoyment does not ensure the possession of the tenant during the whole term. It is operative only during the continuance of the landlord's estate by virtue of which he was able to give possession to the tenant; and, if this estate ceases during the currency of the term, the liability on the covenant, other than for disturbance already suffered, also ceases. Consequently, where a lease is granted by a tenant for life which does not bind the remainderman, and the tenant is evicted after the death of the tenant for life, the tenant has no remedy on the implied covenant<sup>1</sup>; and an undertenant for a term longer than the residue of the head term has no remedy if he is evicted at the expiration of the head term<sup>2</sup>.

1 *Swan v Stransham and Searles* (1566) 3 Dyer 257a; *Adams v Gibney* (1830) 6 Bing 656; *Penfold v Abbott* (1862) 32 LQB 67.

2 *Schwartz v Lockett* (1889) 61 LT 719; *Baynes & Co v Lloyd & Sons* [1895] 1 QB 820 (affd [1895] 2 QB 610, CA). As to the position of subtenants under the Rent Act 1977 see PARA 974 et seq post.

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Breach of covenant for quiet enjoyment.

### 514. Breach of covenant for quiet enjoyment.

The covenant for quiet<sup>1</sup> enjoyment operates according to its terms to secure the tenant, not merely in the possession, but in the enjoyment of the premises for all usual purposes; and, where the ordinary and lawful enjoyment of the demised premises is substantially interfered with by the acts or omissions<sup>2</sup> of the landlord or those lawfully claiming under him<sup>3</sup>, the covenant is broken, even if neither the title to, nor the possession of, the land is otherwise affected<sup>4</sup>. Whether this interference has taken place is, in each case, a question of fact<sup>5</sup>. The covenant may be broken by the lawful or unlawful act of the landlord, but in the case of a covenant against interruption by a class of persons, it is broken only by lawful acts of such persons<sup>6</sup>.

It was once considered that for there to be a breach of covenant there had to be some physical interference with the enjoyment of the demised premises<sup>7</sup>. There is, however, modern authority to the effect that the covenant is not confined to direct physical interference but may be broken by any conduct of the landlord or his agents which interferes with the tenant's freedom of action in exercising his rights as tenant; but there must be substantial interference with the tenant's possession, that is, his ability to use the premises in an ordinary lawful way<sup>8</sup>. Noise or disorderly conduct on adjoining premises, even if it amounts to a nuisance, may not constitute

a breach of the covenant<sup>9</sup> and the landlord is not liable merely for failing to prevent it, although he may have power to do so under an agreement with the tenant of those premises<sup>10</sup>. Although regular excessive noise is capable of amounting to a substantial interference with the enjoyment of premises, the covenant is prospective in operation and does not extend to interference consequent upon the condition of the property before the grant of the tenancy<sup>11</sup>.

The covenant is not broken by the erection of an outside staircase to adjoining premises which interferes with the privacy of the demised premises, but does not render them materially less fit for occupation<sup>12</sup>, nor by the incorporation into a hotel of the remainder of the building of which the demised premises form part<sup>13</sup>; nor by an invasion of vermin where the landlord has done nothing which might attract them or let them escape onto the demised premises<sup>14</sup>.

In a lease by the Crown the exercise by the Crown of powers for the general public good, such as the power to requisition land, is not a breach of the covenant<sup>15</sup>.

Disturbance of enjoyment which is merely temporary and which does not interfere with the title or possession of the tenant is generally not a breach of the covenant<sup>16</sup>. Even where such a disturbance does constitute a breach, an injunction will not be granted where there is no likelihood of repetition, the tenant being left to his remedy in damages<sup>17</sup>. It is uncertain whether there is a breach of the covenant for quiet enjoyment where the tenant is deprived of possession by fraud<sup>18</sup>.

Neither the express covenant for quiet enjoyment nor the implied covenant against derogation from grant can impose on the landlord positive obligations to repair which he would not otherwise be obliged to perform<sup>19</sup>.

1 'Quiet' has long been understood as meaning 'without interference'; it does not mean the absence of noise: *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1 at 22, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council* [1999] 4 All ER 449 at 466, HL, per Lord Millett.

2 *Booth v Thomas* [1926] Ch 397, CA (landlord omitted to repair a culvert in adjoining land, with the result that the escape of water damaged some of the demised buildings); *Cohen v Tannar* [1900] 2 QB 609, CA (sub-landlord submitted to judgment in an action for forfeiture to which he had a good defence; subtenant in consequence evicted); and see *Penn v Gatenex Co Ltd* [1958] 2 QB 210, [1958] 1 All ER 712, CA; and *PARA* 132 note 8 ante; cf *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA (cited in note 19 infra).

3 Tenants who obtained an injunction restraining a tenant from erecting a car wash derived their title from the landlord's predecessor in title and accordingly did not 'claim under the landlord': see *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA.

4 *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council* [1999] 4 All ER 449, HL; *Sanderson v Berwick-upon-Tweed Corp* (1884) 13 QBD 547 at 551, CA; and see *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680 at 685, CA; *Manchester, Sheffield and Lincolnshire Rly Co v Anderson* [1898] 2 Ch 394, CA; *Williams v Gabriel* [1906] 1 KB 155. Formerly the covenant was described as a covenant to secure title and possession (*Dennett v Atherton* (1872) LR 7 QB 316 at 326, Ex Ch); but later decisions have given it the wider scope indicated in the text (*Robinson v Kilvert* (1889) 41 ChD 88 at 96, CA).

5 *Sanderson v Berwick-upon-Tweed Corp* (1884) 13 QBD 547, CA; *Allport v Securities Corp* (1895) 64 LJ Ch 491; *Owen v Gadd* [1956] 2 QB 99, [1956] 2 All ER 28, CA. The mere likelihood of interruption is not enough; and thus it is no breach if a judgment is obtained subjecting land to a right of common, but there is no entry on, or actual disturbance of, the tenant: *Howard v Maitland* (1883) 11 QBD 695, CA. A claim for waste is not a disturbance: *Morgan v Hunt* (1690) 2 Vent 213.

6 See *Nash v Palmer* (1816) 5 M & S 374; *Sanderson v Berwick-upon-Tweed Corp* (1884) 13 QBD 547, CA; *Williams v Gabriel* [1906] 1 KB 155; *Queensway Marketing Ltd v Associated Restaurants Ltd* [1988] 2 EGLR 49, CA.

7 *Browne v Flower* [1911] 1 Ch 219 at 228 per Parker J; *Owen v Gadd* [1956] 2 QB 99, [1956] 2 All ER 28, CA.

8 *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1 at 10, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council*

[1999] 4 All ER 449 at 455-456, HL, per Lord Hoffmann and at 22 and 466 per Lord Millett; and see also *Kenny v Preen* [1963] 1 QB 499 at 513, [1963] 3 All ER 814 at 820, CA (letters and shouted threats by the landlord held to constitute a breach of covenant). The covenant for quiet enjoyment is not confined to direct physical interference by the landlord but extends to any conduct of the landlord or his agent which interferes with the tenant's freedom of action in exercising his rights as tenant: *McCall v Abelesz* [1976] QB 585 at 594, [1976] 1 All ER 727 at 730-731, CA, per Lord Denning MR. It is sufficient if the tenant is driven to leave the premises not by a direct physical act of eviction but because he is put in fear and is intimidated: *Sampson v Floyd* [1989] 2 EGLR 49, CA. Cf, however para 519 the text and note 5 post.

9 *Jenkins v Jackson* (1888) 40 ChD 71; *Jaeger v Mansions Consolidated Ltd* (1902) 87 LT 690 (on appeal (1903) 87 LT 694, CA); *Phelps v City of London Corp* [1916] 2 Ch 255. The words 'peaceably and quietly enjoy' have no reference to noise; they mean 'without interference, without interruption of possession': *Jenkins v Jackson* supra at 74; and see *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council* [1999] 4 All ER 449, HL (the landlord is not obliged by the covenant to alter or improve inadequate soundproofing fitted at the premises; the ordinary use of premises for a purpose for which the premises were built cannot constitute a nuisance for which a landlord might be liable). See also *Southwark London Borough Council v Long* [2002] EWCA Civ 403, [2002] HLR 983, [2002] 3 EGLR 37 (design defects in refuse facilities did not breach covenant where defects existed at the grant of tenancy).

10 *Southwark London Borough Council v Tanner, Baxter v Camden London Borough Council (No 2)* [2001] 1 AC 1, sub nom *Southwark London Borough Council v Mills, Baxter v Camden London Borough Council* [1999] 4 All ER 449, HL (excessive noise due to structural defects inherent when the properties were let).

11 *Malzy v Eichholz* [1916] 2 KB 308, CA; and see *Matania v National Provincial Bank Ltd and Elevenist Syndicate Ltd* [1936] 2 All ER 633, CA.

12 *Browne v Flower* [1911] 1 Ch 219.

13 *Kelly v Battershell* [1949] 2 All ER 830, CA.

14 *Belbridge Property Trust Ltd v Milton* (1934) 78 Sol Jo 489.

15 See *Crown Lands Comrs v Page* [1960] 2 QB 274, [1906] 2 All ER 726, CA.

16 *Manchester, Sheffield and Lincolnshire Rly Co v Anderson* [1898] 2 Ch 394 at 401, CA; *Phelps v City of London Corp* [1916] 2 Ch 255.

17 *Leader v Moody* (1875) LR 20 Eq 145; and see eg *Lunn Poly Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 25 EG 210, [2006] All ER (D) 264 (Mar).

18 See *Mafo v Adams* [1970] 1 QB 548, [1969] 3 All ER 1404, CA.

19 See *Duke of Westminster v Guild* [1985] QB 688, [1984] 3 All ER 144, CA, distinguishing *Booth v Thomas* [1926] Ch 397, CA.

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### 515. Acts done off the premises.

An act may be a breach of the covenant for quiet enjoyment notwithstanding that it is done off the premises. Even at the time when actual physical interference with the demised premises was considered to be an essential element of any breach of the covenant<sup>1</sup>, an act done off the premises could be a breach if it caused physical interference with the demised premises; as, for example, where a lower stratum of minerals had been demised, and the landlord worked the upper stratum so as to cause the roof of the lower stratum to fall in and the mine to be flooded<sup>2</sup>; or where, by a heating apparatus off the premises, the premises were overheated so as to become unsuitable for the use contemplated when the lease was granted<sup>3</sup>; or where the



landlord cut off the gas and electricity supplies to the premises<sup>4</sup> or erected scaffolding in front of the door and windows of a demised shop in such a way as to interfere with the tenant's trade<sup>5</sup>. If, however, the disturbance is due to an act done off the premises, there is no breach of covenant unless it was either foreseen in fact, or ought by reasonable care to have been foreseen, that the interruption would follow as a consequence of the act<sup>6</sup>.

1 See PARA 514 ante. The modern authorities are against such a restrictive interpretation of the covenant.

2 *Shaw v Stenton* (1858) 2 H & N 858; *Re Griffiths, Griffiths v Riggs* (1917) 61 Sol Jo 268.

3 *Robinson v Kilvert* (1889) 41 ChD 88, CA.

4 *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; *Thompson v Vandiyar* (1953) 162 Estates Gazette 456, CA. If the tenant has not paid the landlord the cost of the gas, he should sue him for the amount: *Hersey v White* (1893) 9 TLR 335.

5 *Owen v Gadd* [1956] 2 QB 99, [1956] 2 All ER 28, CA. An interference with the tenant's access to the demised premises may be a breach: *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 EGLR 44, (1979) 251 Estates Gazette 1063, CA.

6 Thus, where a mine is demised, and an adjoining mine is held under the same landlord, the fact that the working of the demised mine is disturbed by an unforeseen rush of water into the adjoining mine does not constitute a breach of the covenant: *Harrison, Ainslie & Co v Muncaster* [1891] 2 QB 680 at 689, CA.

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### **516. Covenant does not enlarge grant.**

By means of the covenant for quiet enjoyment, the tenant cannot obtain over adjoining property an easement or right which would not otherwise be included in the demise. The covenant does not enlarge what was previously granted, but gives an additional remedy if the tenant cannot get or is deprived of that which has been previously professed to be granted<sup>1</sup>. Consequently, where the tenant has not acquired a right to light or to the access of air, he may not complain of interference with light or air as a breach of the covenant<sup>2</sup>; and the covenant for quiet enjoyment does not prevent the ordinary user of adjoining premises of the landlord unless this is detrimental to the purpose for which the demised premises were let<sup>3</sup>.

1 *Leech v Schweder* (1874) 9 Ch App 463; *Potts v Smith* (1868) LR 6 Eq 311 at 317; *Davis v Town Properties Investment Corpn Ltd* [1903] 1 Ch 797, CA.

2 *Davis v Town Properties Investment Corpn Ltd* [1903] 1 Ch 797, CA. As to the landlord's obligation not to derogate from his grant see PARA 520 post. In *Tebb v Cave* [1900] 1 Ch 642, it was held that building by the landlord on adjoining premises so as to deprive the demised premises of a current of air and cause the chimneys to smoke was a breach of the covenant for quiet enjoyment; but this was disapproved in *Davis v Town Properties Investment Corpn Ltd* supra. The covenant does not confer a right to light so as to prevent the landlord from building on adjoining premises: see *Booth v Alcock* (1873) 8 Ch App 663. Where the demised premises form part of a building estate, the circumstances existing at the date of the lease and known to both parties show that the landlord was not to be deprived of the right of building; and this forms a further reason for not construing the covenant so as to deprive him of the right (*Potts v Smith* (1868) LR 6 Eq 311), especially if the tenant has obtained the premises at a reduced rent on account of the probable erection of adjoining buildings (*Robson v Palace Chambers, Westminster Co Ltd* (1897) 14 TLR 56).

3 *Robinson v Kilvert* (1889) 41 ChD 88, CA; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437 at 444; *Browne v Flower* [1911] 1 Ch 219. The fact that such user of adjoining premises increases the expense of the user of the demised premises does not constitute a breach: *O'Cedar Ltd v Slough Trading Co Ltd* [1927] 2 KB

123. Where a lease of shooting and sporting rights over a farm contains a covenant for quiet enjoyment, this does not prevent the tenant of the farm from using the land in the ordinary way, or from destroying furze and underwood in the ordinary course (*Jeffryes v Evans* (1865) 19 CBNS 246; and see *Newton v Wilmot* (1841) 8 M & W 711); nor in the case of a lease of corporate property does the covenant prevent the corporation from exercising a statutory right, such as the establishment of a market (*Spurling v Bantoft* [1891] 2 QB 384, DC).

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### 517. Acts before demise.

The act or omission which causes the disturbance of enjoyment must be subsequent to the grant of the lease; but, if it is the act or omission of a person claiming under the landlord<sup>1</sup>, the title or authority under which he claims to do the act may have been created or given before the lease<sup>2</sup>. Where the landlord acquires adjoining land after the lease, he is not restricted by the covenant<sup>3</sup> in the user of this land.

1 As to persons 'claiming under the landlord' see PARA 509 note 1 ante.

2 *Anderson v Oppenheimer* (1880) 5 QBD 602, CA; *Markham v Paget* [1908] 1 Ch 697; but see *Blatchford v Plymouth Corpn* (1837) 3 Bing NC 691.

3 *Davis v Town Properties Investment Corpn Ltd* [1903] 1 Ch 797, CA.

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### 518. Claim for breach before entry.

Before 1 January 1926 it was doubtful whether an action<sup>1</sup> could be brought on the covenant for quiet enjoyment before the tenant had entered<sup>2</sup>. The tenant may now bring a claim without actual entry<sup>3</sup> but not before he is entitled to possession<sup>4</sup>.

1 An action is now generally known as a claim: see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 *Ludwell v Newman* (1795) 6 Term Rep 458 (action allowed); *Wallis v Hands* [1893] 2 Ch 75 (action refused).

3 *Miller v Emcer Products Ltd* [1956] Ch 304, [1956] 1 All ER 237, CA; and see PARA 118 ante.

4 *Ireland v Bircham* (1835) 2 Bing NC 90.

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## 519. Measure of damages.

The damages in a claim for breach of the covenant for quiet enjoyment are measured by the loss resulting from the breach and are to be assessed on the basis of the sum that a willing lessee and a willing lessor would have agreed upon for the lease<sup>1</sup>. If the tenant is evicted because of the invalidity of the lease, he may recover the value of the term, and the pecuniary loss he has suffered by the proceedings to evict him, that is to say the costs of defending the proceedings, and any sum recovered against him in the proceedings, as mesne profits<sup>2</sup>. Similarly, if the tenant has been compelled to leave the demised premises, he may recover the expense of removal, since this is loss which normally flows from the breach of covenant<sup>3</sup>. Where subletting was likely to arise naturally and in the ordinary course of events, loss of rental for subletting was recoverable by the tenant<sup>4</sup>.

A claim for breach of the covenant for quiet enjoyment is a claim in contract; and accordingly damages for breach of contract do not normally comprise or include an element for mental distress<sup>5</sup>. The wrongful conduct of the landlord may also amount to a tort<sup>6</sup>, in which case aggravated damages or even exemplary damages may be awarded in an appropriate case<sup>7</sup>.

Where a landlord is in breach of the statutory provisions protecting residential occupiers from unlawful eviction and harassment<sup>8</sup>, the basis for the assessment of damages is the difference in value between the value of the landlord's interest subject to the residential occupier's right of occupation and its value without such right<sup>9</sup>, such damages replacing those inevitably smaller sums which the tenant would otherwise recover at common law<sup>10</sup>.

1 *Lawson v Hartley-Brown* (1995) 71 P & CR 242, CA.

2 *Williams v Burrell* (1845) 1 CB 402; *Rolph v Crouch* (1867) LR 3 Exch 44; *Sutton v Baillie* (1891) 65 LT 528. If the tenant takes a substituted lease from the lawful owner, the measure of damages is the difference in value between the invalid lease and the substituted lease (*Lock v Furze* (1866) LR 1 CP 441, Ex Ch); and those damages may be only nominal (*Jones v Hawkins* (1886) 3 TLR 59). See also *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA (damages awarded in respect of an unlawful revocation of a contractual licence).

3 *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836, CA (damages given for the tort caused by nuisance, the express covenant for quiet enjoyment not applying).

4 *Mira v Aylmer Square Investments Ltd* (1990) 22 HLR 182, [1990] 1 EGLR 45, CA.

5 *Branchett v Beaney*, *Branchett v Swale Borough Council* [1992] 3 All ER 910, [1992] 2 EGLR 33, CA, applying *Watts v Morrow* [1991] 4 All ER 937 at 959-960, [1991] 1 WLR 1421 at 1445, CA, per Bingham LJ and following *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA; *Kenny v Preen* [1963] 1 QB 499, [1962] 3 All ER 814, CA; distinguishing *Jarvis v Swans Tours Ltd* [1973] QB 233, [1973] 1 All ER 71, CA; *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92, [1975] 1 WLR 1468; disapproving *McCall v Abelesz* [1976] QB 585 at 594, [1976] 1 All ER 727 at 730, 731, CA per Denning MR; and doubting *Sampson v Floyd* [1989] 2 EGLR 49, CA. See also DAMAGES vol 12(1) (Reissue) PARA 1113.

6 Eg the tort of trespass as in *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA, and *Lavender v Betts* [1942] 2 All ER 72.

7 *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA; and see *Guppys (Bridport) Ltd v Brookling*, *Guppys (Bridport) Ltd v James* (1983) 14 HLR 1, [1984] 1 EGLR 29, CA; *McMillan v Singh* (1984) 17 HLR 120. As to the principles governing the award of aggravated damages in tort claims see DAMAGES vol 12(1) (Reissue) PARA 1114 et seq. Such damages may not, however, be awarded in contract claims. In a case of unlawful eviction, payment of exemplary damages could not be ordered against a defendant acting as the landlord's agent unless it was established that he himself stood to benefit from the eviction: *Ramdath v Oswald Daley (t/a D & E Auto Spares)* (1993) 25 HLR 273, [1993] 1 EGLR 82, CA.

8 Ie the Housing Act 1988 s 27: see PARA 654 post.

9 See *ibid* s 28 (as amended); and PARA 655 post.

10 As to the effect of *ibid* ss 27, 28 (as amended) see *Tagro v Cafane* [1991] 2 All ER 235, [1991] 1 WLR 378, CA (£31,000 award of damages upheld in addition to special damage of £15,538). It seems that a tenant who has left as the result of relevant harassment is entitled to decline to accept reinstatement and instead to pursue a claim for damages under the Housing Act 1988 s 28 (as amended): *Tagro v Cafane* *supra* at 239-240 and at 383. Damages awarded at common law fall to be set off against damages awarded under the Housing Act 1988 ss 27, 28 (as amended): *Mason v Nworie* (1993) 26 HLR 60, [1994] 1 EGLR 59, CA.

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## 520. Obligation not to derogate from grant.

In addition to any obligation to give quiet enjoyment, the landlord is under an obligation not to derogate from his grant; and this obligation is not excluded by an express covenant for quiet enjoyment<sup>1</sup>. Thus, where a lease is made for a particular purpose, the landlord is under an obligation not to use adjoining land retained by him in such a way as to render the demised premises unfit or materially less fit for that purpose<sup>2</sup>. For the court to give relief on this ground the interference must be substantial<sup>3</sup>. User of adjoining land which merely makes the user of the demised premises more expensive is not a breach of the obligation<sup>4</sup>; nor is it a derogation from the demise of a shop to let adjoining premises to a trade rival<sup>5</sup>. Similarly, where a profit à prendre, such as a right of shooting or fishing, is granted for a term of years, the grantor may not fundamentally change the character of the land subject to the profit<sup>6</sup>, although acts done in the ordinary management of the land which interfere with the tenant's rights will not constitute a derogation from the grant<sup>7</sup>.

The obligation binds persons claiming under the landlord<sup>8</sup> but it does not extend to property acquired by him after the date of the lease<sup>9</sup>; nor does it prevent a corporation which has granted a lease from exercising a statutory right for the benefit of the public, such as the establishment of a market<sup>10</sup>.

Where the tenants of a block of flats are required to use their flats for private residential purposes only, a letting scheme (binding in equity as a restrictive covenant) may be implied<sup>11</sup>; and the landlord, and his assigns with notice of the scheme, will be restrained from infringing the scheme by converting part of the block into a club<sup>12</sup>, or a hotel<sup>13</sup>, or government offices<sup>14</sup>, or business premises<sup>15</sup>. The same acts may also amount to a derogation from the grant<sup>16</sup>.

1 *Grosvenor Hotel Co v Hamilton* [1894] 2 QB 836, CA. The principle is one which applies to all grants and not merely to leases: see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 58. In relation to modern leases, it has been described as a 'rule of common honesty' (see *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225, CA, per Younger LJ); it involves identifying what obligations can be regarded as implicit, having regard to the particular purpose of the transaction at the time it was entered into: *Petra Investments Ltd v Jeffrey Rogers plc* (2000) 81 P & CR 267, [2000] 3 EGLR 120 (insufficient evidence to find an enduring obligation to maintain a particular tenant mix).

2 *Browne v Flower* [1911] 1 Ch 219; *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437 (erection of building which obstructed passage of air to drying sheds); *Frederick Betts Ltd v Pickfords Ltd* [1906] 2 Ch 87 (conversion of external wall into party wall so that tenant was obliged to block up his windows); *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200, CA (erection of buildings close to tenant's explosives magazine, which would cause a forfeiture of his licence under the Explosives Act 1875); *Newman v Real Estate Debenture Corp Ltd and Flower Decorations Ltd* [1940] 1 All ER 131 (obstruction of access to flat); *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334, [1957] 2 All ER 343 (advertisement sign on adjoining building projecting into air space above plaintiff's shop); *Hilton v James Smith & Sons (Norwood) Ltd* [1979] 2 EGLR 46, (1979) 251 Estates Gazette 1063, CA (interference with access to demised premises); and see *Karagianis v Malltown Property Ltd* (1979) 21 SASR 381, S Aust SC.

3 *Browne v Flower* [1911] 1 Ch 219; *Kelly v Battershell* [1949] 2 All ER 830, CA. See also *Lawson v Hartley-Brown* (1996) 71 P & CR 242, CA (derogation from grant where landlord erected two additional floors to premises demised to tenant).

4 *O'Cedar Ltd v Slough Trading Co Ltd* [1927] 2 KB 123.

5 *Port v Griffith* [1938] 1 All ER 295; *Clark's-Gamble of Canada Ltd v Grant Park Plaza Ltd* [1967] SCR 614, Can SC.

6 *Peech v Best* [1931] 1 KB 1, CA (shooting rights infringed by sale of land for building); cf *Mason v Clarke* [1955] AC 778 at 796, [1955] 1 All ER 914 at 921, HL, per Viscount Simonds. As to profits à prendre generally see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 254 et seq.

7 *Jeffryes v Evans* (1865) 19 CBNS 246 (destruction of furze and underwood); *Gearns v Baker* (1875) 10 Ch App 355, CA (felling of part of the timber on the land).

8 *Rigby v Bennett* (1882) 21 ChD 559, CA; *Newman v Real Estate Debenture Corpn Ltd and Flower Decorations Ltd* [1940] 1 All ER 131.

9 *Quicke v Chapman* [1903] 1 Ch 659, CA; *Financial Times Ltd v Bell* (1903) 19 TLR 433.

10 *Spurling v Bantoft* [1891] 2 QB 384, DC.

11 *Newman v Real Estate Debenture Corpn Ltd and Flower Decorations Ltd* [1940] 1 All ER 131. A letting scheme will not be implied where the building was not erected as a block of flats, but has been converted into flats which are not self contained: see *Kelly v Battershell* [1949] 2 All ER 830, CA. Additional flats may be incorporated into an existing letting scheme by building them within the geographical boundaries of that scheme: *Hannon v 169 Queen's Gate Ltd* [2000] 1 EGLR 40, [1999] All ER (D) 1158. As to letting schemes see further PARA 594 post. The principles applicable to the enforcement of restrictive covenants where there is a building scheme are applicable where a building is let out as flats: see EQUITY vol 16(2) (Reissue) PARA 624. As to building schemes generally see EQUITY vol 16(2) (Reissue) PARAS 624-625.

12 *Hudson v Cripps* [1896] 1 Ch 265.

13 *Alexander v Mansions Proprietary Ltd* (1900) 16 TLR 431.

14 *Gedge v Bartlett* (1900) 17 TLR 43, CA.

15 *Newman v Real Estate Debenture Corpn Ltd and Flower Decorations Ltd* [1940] 1 All ER 131.

16 See note 15 supra.

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## **(2) RATES, TAXES ETC**

### **(i) Liability in the Absence of Agreement**

#### **521. General liability for rates, taxes etc.**

Rates, taxes, and other burdens on land and buildings imposed by public authority are either taxes imposed directly by Parliament<sup>1</sup>, or rates and charges imposed by local authorities acting under statutory powers.

Until 31 March 1990 a general rate was, subject to certain exemptions and reliefs, leviable under the General Rate Act 1967 on every occupier of (inter alia) land and houses; but in certain cases the owner of property was rated in place of the occupier. From 1 April 1990 to 31 March 1993 a personal, standard or collective community charge was levied, subject to certain

exemptions, in respect of domestic properties by the relevant charging authority<sup>2</sup>; but the community charge was itself replaced by the council tax with effect from 1 April 1993<sup>3</sup>. The council tax is payable by a person specified for the purpose of each dwelling<sup>4</sup>; but the owner may be made liable in cases specified by statutory instrument<sup>5</sup>.

From 1 April 1990, in the case of non-domestic properties, the uniform business rate is leviable upon and payable by the occupier<sup>6</sup>. Part 4 of the Local Government Act 2003<sup>7</sup> now provides for the payment of an additional levy by non-domestic ratepayers to fund business improvement district arrangements made by local authorities with respect to business improvement districts comprising all or part of the areas of the authorities concerned<sup>8</sup>. The Environment Agency<sup>9</sup> may raise and levy on occupiers of chargeable land in a local flood defence district a general drainage charge at an amount per hectare of that land<sup>10</sup>.

The grant, assignment or surrender of any interest in or right over land or of any licence<sup>11</sup> to occupy land is, with certain exceptions<sup>12</sup>, an exempt supply for the purposes of VAT<sup>13</sup>, but an election may be made to waive the exemption save in the case of buildings used for residential or charitable purposes, residential caravans or facilities for the mooring of a residential houseboat<sup>14</sup>.

1 See generally INCOME TAXATION. As to the scope of the charge to tax under the Income and Corporation Taxes Act 1988 s 15(1), Schedule A (as amended), and as to the persons chargeable see INCOME TAXATION vol 23(1) (Reissue) PARA 45 et seq. Land tax was abolished by the Finance Act 1963 s 68. As to the circumstances in which a tenant may deduct tax paid by him from the rent payable see PARA 267 ante.

2 A landlord who granted a periodic tenancy remained liable to the standard community charge. It is apprehended, however, that the case law relating to the rating system in force prior to 31 March 1990 had little or no relevance to the community charge.

3 See the Local Government Finance Act 1992 s 100; and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2. As to the council tax see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 227 et seq.

4 See *ibid* s 6 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

5 See *ibid* s 8; and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 239.

6 See the Local Government Finance Act 1988 s 43 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 60.

7 See the Local Government Act 2003 Pt 4 (ss 41-59): see RATING AND COUNCIL TAX.

8 See *ibid* Pt 4; and RATING AND COUNCIL TAX.

9 As to the Environment Agency see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 68 et seq.

10 See the Water Resources Act 1991 s 134, Sch 15 (as amended); and WATER AND WATERWAYS vol 100 (2009) PARA 614.

11 As to the exemption of licences see also Case C-284/03 *Belgium v Temco Europe SA* [2005] STC 1451, [2004] All ER (D) 297 (Nov), ECJ.

12 The exceptions include a supply made pursuant to a developmental tenancy, developmental lease or developmental licence.

13 See the Value Added Tax Act 1994 s 31, Sch 9 Pt II, Group 1 (as amended); and VALUE ADDED TAX.

14 See *ibid* s 51, Sch 10 para 2 (as amended); and VALUE ADDED TAX.

PARAS 1386-2000)/12. OTHER COVENANTS/(2) RATES, TAXES ETC/(i) Liability in the Absence of Agreement/522. Net annual value for rating purposes.

## **522. Net annual value for rating purposes.**

In specified enactments<sup>1</sup>, and in any other enactment relating to the jurisdiction of county courts, references to the net annual value for rating or rateable value are to be construed as references to a sum equivalent to the last such value of the property concerned immediately before 1 April 1990<sup>2</sup>.

In enactments to which the above provisions apply, references to the net annual value for rating or rateable value of a property which did not have such a value immediately before 1 April 1990 are to be construed as references to:

- 1113 (1) the rateable value immediately before that date of a hereditament of which the property concerned forms or formed part; or
- 1114 (2) where there is no such hereditament, or where it had no such value, the value by the year of the property concerned at the time when the relevant proceedings are commenced<sup>3</sup>.

1 le (1) the Tithe Act 1891 (repealed); (2) the Law of Property Act 1925 s 3(7) (as added and amended), s 49(4) (as added and amended), s 66(4) (as added and amended) (see REAL PROPERTY), s 146 (as amended) (see PARA 619 et seq post), s 147(5) (as added and amended) (see PARA 450 ante) and s 39, Sch 1 (as amended) (see REAL PROPERTY); (3) the Settled Land Act 1925 s 113 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 792); (4) the Landlord and Tenant Act 1954 s 43A (as added) (see PARA 722 post), s 53 (as amended) (see PARAS 471, 487, 499 ante) and s 63 (as amended) (see PARAS 722, 1197 post); (5) the Land Charges Act 1972 s 1 (as amended) (see LAND CHARGES); (6) the Matrimonial Homes Act 1983 s 1 (repealed and replaced: see now the Family Law Act 1996 s 30 (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285); (7) the County Courts Act 1984 s 21 (as amended), s 22 (repealed), s 139 (as amended) and s 144, Sch 1 (as amended) (see COURTS); and (8) the Housing Act 1985 s 456, Sch 18 para 6(5) (see HOUSING vol 22 (2006 Reissue) PARA 686 note 6).

2 Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, art 4(1).

3 Ibid art 4(2).

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## **523. Certification of rateable value.**

Where (1) a tenancy was entered into before 1 April 1990; (2) the house, premises or other property was capable of beneficial occupation immediately before that date; and (3) either:

- 1115 (a) no rateable value was assigned to the property immediately before 1 April 1990 for the purposes of the General Rate Act 1967 and no proposal to enter the property in a valuation list maintained for those purposes was outstanding at that time; or
- 1116 (b) an entry appeared in a valuation list in force immediately before 1 April 1990, structural alterations were completed between the date on which that entry was made and 1 April 1990 and immediately before that date no proposal was

outstanding in respect of the alteration of that entry consequent upon the completion of the alterations,

then, on the application<sup>1</sup> of the landlord or the tenant of the property, the valuation officer must certify the amount which, but for the repeal of the General Rate Act 1967, he would have proposed<sup>2</sup>:

- 1117 (i) where the requirements of head (a) above are satisfied, as the amount to be entered in a valuation list maintained immediately before 1 April 1990 for the purposes of the General Rate Act 1967 as the rateable value of the property in question; or
- 1118 (ii) where the requirements of head (b) above are satisfied, by way of alteration of the valuation list<sup>3</sup>,

and the amount specified in any certificate so issued is to be treated<sup>4</sup> as the amount entered in a valuation list in force immediately before 1 April 1990 as the rateable value of the property in question<sup>5</sup>.

1 Such an application must be accompanied by particulars of the name and address of the person, other than the applicant, who is then the landlord or, as the case may be, the tenant of the property and of any other person who is known to the applicant to have an interest in the property: Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, art 5(6). For these purposes, 'tenant' includes a statutory tenant within the meaning of the Rent Act 1977 (see PARA 831 post) or the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 post); and 'landlord', in relation to a statutory tenant, means the person who, apart from the statutory tenancy, would be entitled to possession of the property: Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, art 5(9).

2 ie in accordance with the General Rate Act 1967 s 69(2) (repealed).

3 Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, art 5(1)-(5). Before providing the certificate so required, the valuation officer must (1) give not less than four weeks' notice in writing to the applicant and to every person whose name and address have been provided as mentioned in art 5(6) (see note 1 supra) of the amount that he proposes to certify; and (2) consider the representations, if any, made to him within the period of four weeks beginning on the date on which the notice was given: art 5(7).

4 ie for the purposes of (1) the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt II (ss 14-25) (as amended) (see PARA 1073 et seq post); (2) the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post); (3) the Leasehold Reform Act 1967 (see PARA 1389 et seq post); (4) the Rent (Agriculture) Act 1976 (see PARA 1134 et seq post); (5) the Rent Act 1977 (see PARA 808 et seq post); (6) the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARAS 1011 et seq, 1183-1186 post); and (7) the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post).

5 Local Government Finance (Repeals, Savings and Consequential Amendments) Order 1990, SI 1990/776, art 5(2), (8).

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## **(ii) Covenants for Payment of Rates, Taxes and Outgoings**

### **524. Liability may usually be determined by agreement.**



In certain cases a landlord may be debarred by statute from shifting a burden which the legislature has imposed upon him to the tenant<sup>1</sup>; but in general, where a tax or rent is *prima facie* to be borne by one party, it is competent for the parties to agree that it is to be borne by the other<sup>2</sup>. Thus, while certain improvement expenses incurred by local authorities and expenses in connection with the abatement of nuisances<sup>3</sup>, if recovered from the occupier, may be deducted from rent, in each case the right of the occupier to deduct the amount paid by him from his rent is subject to any agreement to the contrary<sup>4</sup>.

An agreement by the tenant to pay outgoing will not extend to rates or taxes of a new kind imposed by virtue of subsequent legislation, unless it is expressly provided that it shall include both present and future outgoing<sup>5</sup>.

Where, after the date a contract, tenancy or lease is made, there is a change in the VAT charged, or an election is made to waive the exemption from the tax, VAT may be added to the contract price, such as rent, unless the contract, tenancy or lease specifically otherwise provides<sup>6</sup>.

1 Eg the former right of the tenant of licensed premises to deduct from his rent a certain proportion of the compensation charge might not be excluded by agreement: see the Licensing Act 1964 s 17(4) (repealed). Where, as in this case, a burden is imposed by statute on the landlord 'notwithstanding any agreement to the contrary', these words include agreements made after the passing of the statute (*Wooler v North Eastern Breweries* [1910] 1 KB 247, where the dictum of Parke B to the contrary in *Re Knight, Gwynne v Knight* (1848) 1 Exch 802 was not accepted), but the words of a statute may themselves show that the statute only applies to agreements existing at the date of the Act and not to agreements made after that date (*R v Customs and Excise Comrs* [1928] AC 402, HL).

2 See PARA 525 et seq post.

3 As to such expenses see PARA 268 ante.

4 As to deducting such expenses from rent see PARA 268 ante.

5 *Mile End Old Town Vestry v Whitby* (1898) 78 LT 80. The tenant will not, however, be relieved on this ground if the new rates and taxes are in substance the successors of rates and taxes imposed at the date of the commencement of the tenancy: see *Smith v Smith* [1939] 4 All ER 312 (statutory drainage rates held to be the successors of rates imposed by local Acts). An exemption granted by statute from all taxes, rates and assessments whatsoever has been held to include taxes whether in existence at the time of the grant or not: *Pole-Carew v Craddock* [1920] 3 KB 109, CA, following *Associated Newspapers Ltd v London Corpn* [1916] 2 AC 429, HL, which overruled *Sion College v London Corpn* [1901] 1 KB 617, CA. Cf *City of Halifax v Novia Scotia Car Works Ltd* [1914] AC 992, PC (the phrase 'total exemption from taxation' was held to cover liability for contributions for the construction of sewers).

6 See the Value Added Tax Act 1994 s 89; and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 107. Unless there is an agreement, which may be express or implied, that VAT should be paid by the other party, the tax is payable by the person making the taxable supply. See further PARA 125 ante.

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## 525. Meaning of 'tax'.

'Tax' in its widest sense includes all money raised by taxation<sup>1</sup>, and it may, therefore, include parliamentary taxes, that is, taxes levied directly by Parliament, usually for the benefit of the whole nation<sup>2</sup>, and also rates and other charges levied by local authorities under statutory powers<sup>3</sup>. As a rule, however, it denotes parliamentary taxes, and an agreement by the tenant

to pay taxes will bind him to pay parliamentary taxes which are payable by the landlord, in the absence of agreement to the contrary<sup>4</sup>.

1 *Mitchell v Fordham* (1827) 6 B & C 274 at 277. The context of the agreement may, however, show that 'tax' refers only to local as opposed to parliamentary taxes: *Edinburgh Corp'n v Lord Advocate* 1923 SC 112, Ct of Sess.

2 *Bedfordshire Union v Bedford Comrs* (1852) 7 Exch 777 at 779.

3 Thus, 'parochial taxes' formerly included poor rates (*R v Toms* (1780) 1 Doug KB 401), and other rates raised out of poor rates (*R v Aylesbury with Walton Inhabitants* (1846) 9 QB 261); but although 'taxes' by itself might include poor rates (*Mitchell v Fordham* (1827) 6 B & C 274), poor rates were not included in a covenant by the landlord to pay 'all taxes on the land demised', as the former poor rate was not a tax on the land, but a personal charge on the occupier in respect of the land (*Theed v Starkey* (1727) 8 Mod Rep 314; *Rowls v Gells* (1776) 2 Cowp 451 at 452).

4 *Count Arran v Crisp* (1694) 12 Mod Rep 54; *Amfield v White* (1825) Ry & M 246; *Hopwood v Barefoot* (1709) 11 Mod Rep 237. The agreement throwing landlord's taxes on the tenant may be oral: *Amfield v White* supra. A covenant by the tenant to pay all parliamentary taxes and assessments was held to include a rentcharge representing redeemed land tax: *Governors of Christ's Hospital v Harrild* (1841) 2 Man & G 707; cf *Murray v Parker* (1854) 19 Beav 305. Where rent is to be paid free from all taxes, the effect is to relieve the landlord of all burdens which can be legally thrown on the tenant (*Giles v Hooper* (1690) Carth 135; *Parish v Sleeman* (1860) 1 De GF & J 326 (rent payable 'free of all outgoing')), except burdens of a wholly new kind imposed after the creation of the tenancy (*Mile End Old Town Vestry v Whitby* (1898) 78 LT 80; *Smith v Smith* [1939] 4 All ER 312). A contract by the landlord to pay rates is a contract of indemnity, and may render him liable for damages for imprisonment resulting from his default (*Atkins v Hutton* (1909) 103 LT 514, CA), or for damages resulting from a distress, even though illegal, suffered by the tenant (*Isaacs v Arlidge* (1917) 87 LJKB 347, DC).

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## 526. Landlord's covenant to pay rates and taxes.

Under an agreement for letting at a specified yearly rent 'including all rates and taxes', the tenant was entitled to deduct from his rent the whole of the general rate paid by him<sup>1</sup>. He would presumably now be entitled to deduct the whole of the uniform business rate, if applicable<sup>2</sup>.

A covenant by the landlord to pay rates included a water rate in respect of water supplied for domestic purposes, at least if the rate as levied extended to other premises belonging to the same landlord<sup>3</sup>. Subject to certain exceptions, and except in so far as provision to the contrary is made by any agreement to which the water undertaker is a party, the occupier of premises, and not the owner, is now liable to pay water charges, and is also liable for the payment of charges for sewerage services<sup>4</sup>.

1 *Barcroft v Welland* (1883) 12 LR Ir 35; and similarly where a net rent was to be paid (*Bennett v Womack* (1828) 7 B & C 627 at 629; *Bradbury v Wright* (1781) 2 Doug KB 624). Where the landlord covenanted to pay rates in respect of the ground demised, and buildings were subsequently erected, so that the subject matter of assessment was changed, and the assessment increased, the landlord was liable to pay rates only in respect of the ground, and not the part attributable to the buildings: *Watson v Home* (1827) 7 B & C 285. Similarly, where the landlord covenanted to pay all taxes then chargeable on the demised premises, and the tenant covenanted to pay all fresh taxes thereafter charged, the tenant paid fresh taxes, and also any increment in the old taxes which was occasioned by the improved value of the premises: *Watson v Atkins* (1820) 3 B & Ald 647; *Graham v Wade* (1812) 16 East 29. Where, however, the landlord's covenant extended to all rates and taxes at the date of the lease, or subsequently, payable in respect of the premises, and the assessment was afterwards increased

without any change in the premises, the landlord was liable for the increased rates: *Salaman v Holford* [1909] 2 Ch 602, CA.

2 As to the uniform business rate see PARA 521 ante; and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2. A tenant of residential premises is normally liable to pay council tax: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

3 *Spanish Telegraph Co v Shepherd* (1884) 13 QBD 202; *Bourne and Tant v Salmon and Gluckstein Ltd* [1907] 1 Ch 616, CA. Where the rate was assessed separately in respect of the demised premises, the result might be different: *Badcock v Hunt* (1888) 22 QBD 145, CA. The landlord's covenant did not extend to water supplied for trade purposes: *Re Floyd, Floyd v J Lyons & Co* [1897] 1 Ch 633, CA.

4 See the Water Industry Act 1991 s 144; and WATER AND WATERWAYS vol 100 (2009) PARA 422. As to water charges generally, and the statutory protection for certain vulnerable groups of consumers, see WATER AND WATERWAYS vol 100 (2009) PARA 417 et seq.

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## **527. Usual covenants in lease as to rates, taxes and outgoings.**

The tenant usually covenants to pay all rates, taxes and assessments payable in respect of the demised premises during the term; and in cases of long leases, and sometimes also in short tenancies, the covenant is extended so as to include liabilities which are described by one or more of the words 'duties', 'outgoings', 'impositions', 'burdens', or 'charges'; and it is expressed so as to include such liabilities 'now or hereafter' imposed, and whether they are imposed 'on the demised premises or on the landlord or tenant in respect thereof'<sup>1</sup>. Where, under such a covenant, the tenant is liable to pay expenses which are charged on the landlord, he may be sued for the amount of the expenses before the landlord has actually paid them<sup>2</sup>. Such a covenant by a subtenant is not subject to an implied condition that his immediate landlord should himself have paid or be liable to pay the rates, but may be enforced even though under the head lease the head landlord agreed to pay them<sup>3</sup>.

1 *Thompson v Lapworth* (1868) LR 3 CP 149 at 157; *Wilkinson v Collyer* (1884) 13 QBD 1, DC.

2 *Francis v Squire* [1940] 1 All ER 45.

3 *WH Read & Co Ltd v Walter* (1931) 48 TLR 15. As to statutory liability to council tax see PARA 521 ante; and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARAS 237, 239.

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## **528. Charges for permanent improvements.**

In general the tenant should be liable to bear all expenses which are of a regularly recurring nature and which relate to the occupation of the premises; the landlord should be liable for expenses which are incurred for the permanent improvement of the premises, except that in tenancies exceeding three years a share depending on the length of the tenancy should be

borne by the tenant; and the covenant will not be construed so as to throw expenses of permanent improvements on the tenant unless there are words clearly requiring such a result. In each case, however, the construction of the covenant depends on the words used, and upon any other provisions in the lease which may properly be regarded as assisting the construction. The usual charges for improvements of a permanent nature are those for drainage and paving expenses and for the abatement of nuisances<sup>1</sup>.

<sup>1</sup> As to enactments authorising local authorities to effect improvements and abate nuisances and to recover expenses from owners and occupiers see PARA 268 ante; and as to the making up of private streets and the imposition of the costs on frontagers see the Highways Act 1980 s 205 (as amended) et seq; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 149 et seq.

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### **529. Covenant to pay 'rates, taxes and assessments'.**

If a covenant binds the tenant to pay 'rates, taxes and assessments', it refers only to rates and assessments of a recurring nature, and not to expenses representing the permanent improvement of the premises, whether these are directly assessed in respect of the premises, or are assessed in consequence of the failure of the owner to do the work<sup>1</sup>. Consequently, it does not include expenses incurred<sup>2</sup> in connection with the abatement of a nuisance<sup>3</sup>. The covenant does not refer only to sums payable by the landlord; and, if the tenant omitted to pay the poor rate, this was a breach of the covenant<sup>4</sup>.

<sup>1</sup> *Wilkinson v Collyer* (1884) 13 QBD 1; *Aldridge v Ferne* (1886) 17 QBD 212 at 214, DC. Inhabited house duty was held to amount to an assessment charged upon the premises and to be covered by a covenant by the tenant to pay all assessments charged on the premises: *Eastwood v McNab* [1914] 2 KB 361, DC. A covenant to pay main drainage and sewers rates did not include drainage expenses incurred under the Metropolis Management Acts 1855 and 1862 (repealed); nor were such expenses payable by the tenant because the rent was payable 'without deduction': *Home and Colonial Stores v Todd* (1891) 63 LT 829; and see *Skinner v Hunt* [1904] 2 KB 452 at 459, CA. A covenant by the tenant to pay the rates imposed upon the demised premises might include the water rate even though the water facilities used by the tenant were on adjoining premises: *King v Cave-Brown-Cave* [1960] 2 QB 222, [1960] 2 All ER 751; but as to water charges see now para 526 the text and note 4 ante.

<sup>2</sup> See under the Environmental Protection Act 1990 s 81 (as amended): see NUISANCE vol 78 (2010) PARA 200.

<sup>3</sup> *Lyon v Greenhow* (1892) 8 TLR 457 (decided under what is now the Environmental Protection Act 1990 ss 79-82 (as amended): see NUISANCE vol 78 (2010) PARA 223 et seq).

<sup>4</sup> *Hurst v Hurst* (1849) 4 Exch 571. The poor rate became part of the general rate made under the General Rate Act 1967 (repealed). It seems that demand by the collector is not necessary to constitute a breach of the covenant; the publication of the rate creates the obligation to pay it: *Hooper v Woolmer* (1850) 10 CB 370; *Davis v Burrell and Lane* (1851) 10 CB 821 at 826. As to the recovery by the landlord of taxes which the tenant has undertaken to pay see *Spencer v Parry* (1835) 3 Ad & El 331.

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### 530. Construction of particular words.

If the covenant on the part of the tenant to pay rates and taxes includes any of the words 'duties', 'outgoings', 'impositions' or 'burdens', the effect is to carry the tenant's liability beyond annual assessments, and to make him liable to pay all sums of money payable in respect of the demised premises notwithstanding that they are expenses of permanent improvements<sup>1</sup>. Thus a covenant by the tenant to pay duties binds him to pay drainage expenses incurred under statutory public health provisions<sup>2</sup>, and also to pay the expenses incurred in abating a nuisance<sup>3</sup> whether the landlord does the work or the local authority does it on his default<sup>4</sup>.

'Outgoings' is as wide as 'duties'<sup>5</sup>, and applies equally to charges incurred by direct and indirect assessment<sup>6</sup>. It binds the tenant to pay street works expenses under the highways legislation<sup>7</sup>, drainage expenses and the expenses of remedying sanitary defects under the legislation relating to public health<sup>8</sup>.

Under many modern statutes a county court has power to apportion between the landlord and the tenant the expense of works required to be executed by the statute in question<sup>9</sup>. This power may be exercised even though the lease contains a general covenant to pay all outgoings<sup>10</sup>, but the court must have regard to the terms of any contract between the parties, and, if the parties clearly contemplated that the particular expense should fall upon the tenant, no apportionment will be made<sup>11</sup>.

In this connection no distinction can be drawn between a 'duty' and an imposition. A 'duty imposed' means a sum of money payable in respect of a duty imposed, and 'imposition' has a similar meaning<sup>12</sup>. 'Burdens' is equivalent to 'impositions'.

'Charges' has the same effect as 'impositions'<sup>13</sup>; but, where the covenant binds the tenant to pay impositions 'charged upon the premises', he is not liable unless a charge is actually created<sup>14</sup>. Further, the charge must be created after the commencement of the tenancy, as the covenant contemplates only subsequent burdens. Consequently, if the work has been completed before this date, the tenant is not liable, notwithstanding that the apportionment of the charge is made afterwards<sup>15</sup>.

In all the above cases, whether the covenant is in the restricted form 'rates, taxes and assessments', or whether it is extended by the use of one or more of the words 'duties', 'outgoings', 'impositions', 'burdens' or 'charges', if it defines these as existing 'in respect of the demised premises', this is enough to determine the scope of the covenant, and it is immaterial whether the words 'or on the landlord or tenant in respect thereof' are also inserted<sup>16</sup>.

1 See *Villenex Co Ltd v Courtney Hotels Ltd* (1969) 20 P & CR 575 (tenant held liable to pay for a fire escape which the landlord was required by statute to provide); *Foulger v Arding* [1902] 1 KB 700, CA; *Farlow v Stevenson* [1900] 1 Ch 128, CA; *Thompson v Lapworth* (1868) LR 3 CP 149.

2 See *Farlow v Stevenson* [1900] 1 Ch 128, CA; *Sweet v Seager* (1857) 2 CBNS 119. The effect of the word 'duties' is not restricted because the duties are referred to as 'payable' in respect of the premises: *Clayton v Smith* (1895) 11 TLR 374.

3 Under the Environmental Protection Act 1990 ss 79-82 (as amended): see NUISANCE vol 78 (2010) PARA 223 et seq.

4 See *Budd v Marshall* (1880) 5 CPD 481, CA; *Brett v Rogers* [1897] 1 QB 525, DC.

5 *Aldridge v Ferne* (1886) 17 QBD 212, DC. It included land tax (abolished) (*Parish v Sleeman* (1860) 1 De GF & J 326), liquor licence duties (*Wauer v Hoare & Co Ltd* (1910) 27 TLR 16), and drainage rates (*Smith v Smith* [1939] 4 All ER 312 at 315); but it has been held not to include the cost of statutory drainage works carried out by a tenant under a mining lease (see *Dalton Main Collieries Ltd v Rossington Main Colliery Co Ltd and Amalgamated Denaby Collieries Ltd* [1940] 4 All ER 384; affd [1941] Ch 268, [1941] 1 All ER 544, CA; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 340).

6 *Crosse v Raw* (1874) LR 9 Exch 209 at 212 per Bramwell B.

7 le under the Highways Act 1980 s 205 (as amended) et seq: see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 149 et seq. For decisions under previous relevant legislation eg the Public Health Act 1875 see *Gardner v Furness Rly Co* (1883) 47 JP 232; *Aldridge v Ferne* (1886) 17 QBD 212, DC; *Batchelor v Bigger* (1889) 60 LT 416; *Weld v Clayton-Le-Moors UDC* (1902) 86 LT 584; *Greaves v Whitmarsh, Watson & Co Ltd* [1906] 2 KB 340, DC; *Lowther v Clifford* [1927] 1 KB 130, CA. A rate levied under the Public Health Act 1875 ss 229, 230 (repealed) to meet special expenses incurred in respect of sewerage and sewage disposal was not a charge on the land, but an outgoing: *Calder's Yeast Co Ltd v Stockdale* [1928] Ch 340, CA.

8 See *Crosse v Raw* (1874) LR 9 Exch 209 (decided under what is now the Building Act 1984 s 59 (as amended)). See also the following cases decided under corresponding earlier public health enactments: *Re Bettingham, Melhado v Woodcock* (1892) 9 TLR 48; *Antil v Godwin* (1899) 15 TLR 462; *Stockdale v Ascherberg* [1904] 1 KB 447, CA.

9 See eg the Factories Act 1961 s 170; and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 871; the Offices, Shops and Railway Premises Act 1963 s 73(2); and HEALTH AND SAFETY AT WORK vol 53 (2009) PARA 876; the London Building Acts (Amendment) Act 1939 s 107 (as amended); the Public Health Act 1936 s 290 (as amended); and ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 126; the Environmental Protection Act 1990 s 81(7), Sch 3 para 1(1), (4)(a); and NUISANCE vol 78 (2010) PARA 200.

10 *Monk v Arnold* [1902] 1 KB 761, DC. The question is not determined by the terms of the tenancy alone: *Horner v Franklin* [1905] 1 KB 479 at 488, CA, per Romer LJ.

11 *Monro v Lord Burghclere* [1918] 1 KB 291, DC.

12 *Foulger v Arding* [1902] 1 KB 700 at 710, CA. See also *Smith v Robinson* [1893] 2 QB 53, DC; *Re Warriner, Brayshaw v Ninnis* [1903] 2 Ch 367. Formerly it was held that a covenant to pay 'impositions payable in respect of the demised premises' only included money imposed by way of direct assessment, and did not include money recoverable by way of indirect assessment, that is, where the local authority did the work on the owner's default (*Tidswell v Withworth* (1867) LR 2 CP 326; *Rawlins v Briggs* (1878) 3 CPD 368); but these cases are overruled (see *Greaves v Whitmarsh, Watson & Co Ltd* [1906] 2 KB 340, DC).

13 *George v Coates* (1903) 88 LT 48, CA; cf *Smith v Robinson* [1893] 2 QB 53, DC. It included tithe rentcharge: *Lockwood v Wilson* (1874) 43 LJCP 179. Tithe rentcharge is now extinguished: see ECCLESIASTICAL LAW vol 14 para 1212 et seq.

14 See *Bird v Elwes* (1868) LR 3 Exch 225; *Hartley v Hudson* (1879) 4 CPD 367.

15 *Surtees v Woodhouse* [1903] 1 KB 396, CA; *Lumby v Faupel* (1904) 90 LT 140, CA. As to expenses which become a charge on the owner rather than on the premises see *Smith v Robinson* [1893] 2 QB 53, DC; *Wix v Rutson* [1899] 1 QB 474; *Allum v Dickinson* (1882) 9 QBD 632, CA.

16 As to the restricted form see *Wilkinson v Collyer* (1884) 13 QBD 1, DC; *Home and Colonial Stores v Todd* (1891) 63 LT 829 ('in respect of the premises'); *Baylis v Jiggins* [1898] 2 QB 315; *Lyon v Greenhow* (1892) 8 TLR 457; *Lumby v Faupel* (1903) 51 WR 522; affd (1904) 90 LT 140, CA ('on the landlord or tenant in respect thereof'). As to the wider form, the words 'in respect of the premises' alone occurred in *Brett v Rogers* [1897] 1 QB 525, DC; *Antil v Godwin* (1899) 15 TLR 462; *Farlow v Stevenson* [1900] 1 Ch 128, CA; *Stockdale v Ascherberg* [1904] 1 KB 447, CA. In *Re Warriner, Brayshaw v Ninnis* [1903] 2 Ch 367, it was expressly decided that the words 'imposed on the landlord or tenant' were not necessary to give the wide meaning to the covenant. See also *Foulger v Arding* [1902] 1 KB 700 at 708, CA; *Greaves v Whitmarsh, Watson & Co Ltd* [1906] 2 KB 340, DC.

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### 531. Covenant construed by reference to circumstances.

'Impositions', and other similar words which may be used in a covenant by the tenant to pay rates and taxes<sup>1</sup>, will not be construed so widely as to include obligations which cannot reasonably be supposed to have been within the contemplation of the parties<sup>2</sup>; and their effect

may be restricted by other provisions of the lease which specifically throw upon the landlord expenses which they would otherwise include. Thus, an agreement by the landlord to do outside repairs may relieve a tenant who has agreed to pay 'impositions' from liability for the expenses of the abatement of a nuisance arising from outside drains<sup>3</sup>; and similarly a covenant by a tenant to pay a fair share of statutory charges may relieve him from liability to pay the whole under a covenant to pay outgoing<sup>4</sup>. The fact, however, that the tenant has not covenanted to repair<sup>5</sup>, or has entered into a restricted covenant to repair<sup>6</sup>, does not relieve him from liability under his covenant to pay outgoing<sup>7</sup>; nor is his liability under such a covenant restricted because in the *reddendum* the rent is reserved clear of all 'rates, taxes and deductions' without mention of outgoing<sup>7</sup>. Moreover, the full effect will be given to a covenant expressed in the usual general terms in a three years' agreement, or in respect of a yearly tenancy created by a tenant holding over<sup>8</sup>, notwithstanding the shortness of the tenancy<sup>9</sup>. On the other hand, where the covenant is to pay 'rates, taxes and assessments', a further covenant by the tenant to make and repair drains will not render him liable for the local authority's expenses of making a drain in order to abate a nuisance<sup>10</sup>.

1 As to the construction of such words generally see PARA 530 ante.

2 *Foulger v Arding* [1902] 1 KB 700 at 707, 711, CA. The obligations referred to are those which are quite outside the relation of landlord and tenant, such as an obligation to pull down premises and rebuild them in conformity with a building line: *Foulger v Arding* supra. See also *Anglo-American Telegraph Co Ltd v Western Union Telegraph Co* [1950] WN 172, HL, where it was held that 'debts, obligations and liabilities' in a lease had in their context to be limited to civil obligations as distinct from fiscal (ie taxation) burdens.

3 *Henman v Berliner* [1918] 2 KB 236 (landlord's compliance with a covenant by him to put the premises in repair held to be a condition precedent to the tenant's liability to pay outgoing in respect of repairs); *Howe v Botwood* [1913] 2 KB 387 (landlord held liable under his covenant to do outside repairs for outside drainage expenses); *Hearn v Hovinden* (30 October 1903, unreported).

4 *Arding v Economic Printing and Publishing Co Ltd* (1898) 79 LT 622, CA (expenses of fire-escape appliances).

5 *Foulger v Arding* [1902] 1 KB 700, CA.

6 *Re Bettingham, Melhado v Woodcock* (1892) 9 TLR 48; *Re Warriner, Brayshaw v Ninnis* [1903] 2 Ch 367; cf *Smith v Robinson* [1893] 2 QB 53, DC.

7 *Gardner v Furness Rly Co* (1883) 47 JP 232.

8 *Lowther v Clifford* [1927] 1 KB 130, CA. It was formerly thought that, where the outgoing were excessive having regard to the yearly value of the premises, they were not included in such a covenant by a tenant (*Valpy v St Leonard's Wharf Co Ltd* (1903) 67 JP 402), and that a covenant to pay all the outgoing was inconsistent with the terms of a yearly tenancy created by holding over (*Harris v Hickman* [1904] 1 KB 13), but these two cases were overruled by *Lowther v Clifford* supra, following *Foulger v Arding* [1902] 1 KB 700, CA, and *Stockdale v Ascherberg* [1904] 1 KB 447, CA. See also *Smith v Smith* [1939] 4 All ER 312.

9 *Batchelor v Bigger* (1889) 60 LT 416; *Stockdale v Ascherberg* [1903] 1 KB 873; affd [1904] 1 KB 447 CA; *Re Warriner, Brayshaw v Ninnis* [1903] 2 Ch 367.

10 See *Lyon v Greenhow* (1892) 8 TLR 457 (decided under what is now the Environmental Protection Act 1990 ss 79-82 (as amended): see NUISANCE vol 78 (2010) PARA 223 et seq).

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### (3) COVENANT TO INSURE

### 532. Usual covenants for insurance and tenant's statutory rights.

In most modern leases of whatever duration the liability for insurance is expressly defined; and a covenant to insure is entered into either by the landlord or the tenant. If the covenant is by the landlord, the insurance will in the first instance be at his own expense; but provision may be made for transferring the expense to the tenant, the most effectual way of doing this being to reserve the amount of the insurance as an additional rent<sup>1</sup>. It has been held that there will not generally be implied a term that the landlord will place the insurance so as not to impose an unnecessarily heavy burden on the tenant<sup>2</sup>; but it may be that the general principle that service charges and similar impositions are not to be inflated by unreasonable expenditure by the landlord applies<sup>3</sup>. In construing a covenant to insure 'for the full cost of reinstatement against loss or damage by fire', it is proper to have regard to the fact that there will be a delay between the occurrence of the damage and the completion of the reinstatement and that building costs are likely to rise in that period<sup>4</sup>. If the covenant is by the tenant, the insurance will be at his expense<sup>5</sup>.

Any express obligation to insure land against war damage is void; and any obligation to insure land against fire or other risks is construed as not including an obligation to insure against war damage<sup>6</sup>.

Any party to a long lease of a dwelling other than a flat may apply to a leasehold valuation tribunal for an order varying the insurance provisions of the lease on the grounds that the lease fails to make satisfactory provision in that respect<sup>7</sup>.

Where a tenant covenants in a tenancy of a dwelling to indemnify the landlord in respect of insurance premiums, the landlord may not recover such expenditure unless the cost was reasonably incurred<sup>8</sup>.

A tenant of a dwelling has statutory rights to request certain details of the insurance cover from his landlord and to inspect the policy<sup>9</sup>. A tenant of a house under a long lease also has a statutory right to effect the insurance of the house with any authorised insurer, provided that certain conditions are satisfied<sup>10</sup>.

1 Although described as an additional rent, such amounts may not be strictly rent: see *Marquis of Breadalbane v Robertson* (1914) 51 SLR 156; and PARA 243 note 5 ante.

2 *Bandar Property Holdings Ltd v JS Darwen (Successors) Ltd* [1968] 2 All ER 305, 19 P & CR 785 (landlords held entitled to recover the whole amount of premium from the tenants, even though the identical cover could be obtained at a lower premium).

3 See *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581, CA. The general principle has to be applied, if at all, to insurance covenants in the light of the decisions referred to in the notes to para 533 post, notably *Viscount Tredegar v Harwood* [1929] AC 72, HL (cited in PARA 533 note 3 post).

4 *Gleniffer Finance Corpn Ltd v Bamar Wood and Products Ltd* (1978) 37 P & CR 208, 122 Sol Jo 110. A lease granted under the mandatory leaseback provisions of the Leasehold Reform, Housing and Urban Development Act 1993 must contain a covenant by the lessor to insure for full reinstatement value: see s 36(1), Sch 9 para 14(2); and PARA 1666 post.

5 Breach of the covenant is usually a cause of forfeiture; but this may not be so if the landlord is entitled to insure on default, and if the amount of the premium is reserved as additional rent so that he may distrain for it: *Doe d Pittman v Sutton* (1841) 9 C & P 706. If the landlord pays the premium, this is a waiver of the forfeiture: *Mills v Griffiths* (1876) 45 LJQB 771. As to the mode of proof of non-insurance see *Chaplin v Reid* (1858) 1 F & F 315. Undisturbed possession by the tenant is evidence that there has been no breach: *Montresor v Williams* (1823) 1 LJOS Ch 151. Formerly there was no relief against forfeiture for non-insurance (*Green v Bridges* (1830) 4 Sim 96), but some relief is now allowed (see PARA 619 post).

6 Landlord and Tenant (War Damage) (Amendment) Act 1941 s 11 (amended by the Statute Law (Repeals) Act 1995). Failure to insure against war damage might otherwise have been a breach of the covenant even if no such insurance was obtainable: see *Moorgate Estates Ltd v Trower* [1940] Ch 206, [1940] 1 All ER 195. For the meaning of 'war damage' see PARA 479 note 3 ante; and as to the repair of war damage see PARAS 479-480 ante.



- 7 See the Landlord and Tenant Act 1987 s 40 (as amended); and PARA 154 ante.
- 8 See the Landlord and Tenant Act 1985 s 19 (as amended); and PARA 341 ante.
- 9 See *ibid* s 30A, Schedule (as added and amended); and PARA 359 et seq ante.
- 10 See the Commonhold and Leasehold Reform Act 2002 s 164; and PARA 366 ante.

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### **533. Stipulations as to office and names.**

A covenant by the tenant to insure may require that the insurance is to be in an office or with insurers either specified or to be approved by the landlord<sup>1</sup>, and in particular names; but it is not necessary that the office or insurers should be specified<sup>2</sup>. In the absence of such special requirements the covenant is performed by an insurance for a proper sum by the tenant in his own name with an office or insurers selected by him. If the covenant is to insure in a specified office or other office approved by the landlord, the landlord is entitled without giving any reasons to refuse his approval of insurance with any office other than that specified<sup>3</sup>. If under such a covenant the tenant insuring with the specified office obtains a policy excepting damage by a foreign enemy, military or usurped power, the landlord may not complain of a breach of covenant through failure to insure against those risks, if it is shown that such is the usual policy issued by the specified office, because the covenant will not in such a case be to insure against loss or damage however occasioned, but such loss or damage as is covered by the normal policy issued by the office<sup>4</sup>. A covenant to insure in the joint names of the landlord and tenant is broken by an insurance in the name of the tenant only<sup>5</sup>; and a covenant to insure in the name of the landlord is broken if the tenant adds his own name<sup>6</sup>; but an insurance in the name of the landlord only, when it should be in the joint names of the landlord and tenant, is a substantial performance of the covenant, as the addition of the tenant's name is only for his own benefit<sup>7</sup>. A landlord who covenants to effect an adequate insurance discharges his obligation if he takes proper advice from the insurance company (or, it would seem, from reputable professional advisers) and follows that advice<sup>8</sup>.

There may be a covenant by the tenant not to do anything whereby the premium for insurance may be increased; and, if he uses the premises in such a way that the premium will be increased, or the policy not renewed, he will be in breach of covenant, which may be restrained by injunction<sup>9</sup>. The fact that such a covenant is made by a tenant who pays the insurance premium casts no obligation, however, upon the landlord not to let adjoining premises for purposes which may result in the tenant's having to pay an increased premium; and, if an increase in premium results from the landlord's letting adjoining premises for particular purposes, the tenant and not the landlord will be liable for the increase<sup>10</sup>.

Where a tenant is required to insure with an insurer nominated by the landlord, he may nevertheless apply to a county court or leasehold valuation tribunal for a determination as to whether the insurance available from the nominated insurer is unsatisfactory or the premiums payable in respect of the insurance are excessive; and on such an application the court or tribunal may make an order requiring the landlord to nominate or approve a different insurer<sup>11</sup>. A tenant of a house under a long lease also has a statutory right to effect the insurance of the house with any authorised insurer, provided that certain conditions are satisfied<sup>12</sup>.

1 Where the office or insurers are to be named by the landlord, there is probably no breach of covenant by non-insurance unless the landlord has named an office: *Lillie v Legh* (1858) 3 De G & J 204. Often the particular office is named in the lease: *Doe d Flower v Peck* (1830) 1 B & Ad 428; *Chaplin v Reid* (1858) 1 F & F 315.

2 *Doe d Pitt v Shewin* (1811) 3 Camp 134.

3 *Viscount Tredegar v Harwood* [1929] AC 72, HL; *Upjohn v Hitchens*, *Upjohn v Ford* [1918] 2 KB 48 at 55, CA, per Warrington LJ.

4 *Upjohn v Hitchens*, *Upjohn v Ford* [1918] 2 KB 48, CA (evidence held to be admissible to show the nature of policies issued by insurance companies); but cf *Enlayde Ltd v Roberts* [1917] 1 Ch 109 (such evidence held to be inadmissible; landlord who had covenanted to insure against loss or damage by fire could not show that his covenant was to insure against loss or damage by fire other than fire due to causes usually excepted in policies; the landlord was, therefore, liable for loss due to one of the causes usually excepted). Quaere whether similar considerations apply where the usual insurance policy excludes damage caused by acts of terrorism.

5 *Doe d Knight v Rowe* (1826) Ry & M 343; *Doe d Muston v Gladwin* (1845) 6 QB 953. If the insurance is to be in the name of the landlord and his assignee, there can be no breach after assignment of the reversion until notice to the tenant: *Crane v Batten* (1854) 23 LTOS 220.

6 *Penniall v Harborne* (1848) 11 QB 368.

7 *Havens v Middleton* (1853) 10 Hare 641. Where the insurance is in the tenant's name only, the landlord may have debarred himself by his conduct from recovering for the breach, as, for example, where he has induced the tenant to believe that such insurance would be accepted as a compliance with the covenant (*Doe d Knight v Rowe* (1826) Ry & M 343), but this may be only a waiver as to past breaches (see *Doe d Muston v Gladwin* (1845) 6 QB 953). As to waiver of forfeiture generally see PARA 615 post.

8 *Mumford Hotels Ltd v Wheler* [1964] Ch 117, [1963] 3 All ER 250.

9 *Chapman v Mason and Liniline Co* (1910) 103 LT 390.

10 *O'Cedar Ltd v Slough Trading Co Ltd* [1927] 2 KB 123.

11 See the Landlord and Tenant Act 1985 s 30A, Schedule para 8 (as substituted and amended); and PARA 365 ante.

12 See the Commonhold and Leasehold Reform Act 2002 s 164; and PARA 366 ante.

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### 534. Breach of covenant to insure.

Where a tenant covenants to insure and keep insured the demised premises, he must effect the insurance within a reasonable time. If the effecting of the insurance is delayed, the onus of showing that the delay is reasonable is on the tenant<sup>1</sup>.

It is a breach of covenant if any part of the premises is uninsured<sup>2</sup>, and if the insurance is not subsisting at any time during the term<sup>3</sup>. So long as there is a failure to keep the premises insured in accordance with the terms of the covenant, there is a continuing breach; and receipt of rent by the landlord operates as a waiver of the forfeiture only until the receipt<sup>4</sup>. Even if no fire has occurred during the period that the premises were uninsured, it is possible that the landlord is entitled to recover more than nominal damages by reason of the risk which he has run<sup>5</sup>; but, on remedying the breach, the tenant may obtain relief against the forfeiture, and relief may be given without requiring payment by the tenant of any sum by way of compensation<sup>6</sup>. Where the premises are destroyed or damaged, the measure of damages for breach of the covenant to insure is the cost of their restoration<sup>7</sup>.

Where a tenant makes good damage following a fire at the expense of an insurance company and then brings a claim for breach of covenant to insure against the landlord, the tenant is entitled to more than nominal damages because the arrangement with the insurance company is purely collateral<sup>8</sup>.

1 *Doe d Darlington v Ulph* (1849) 13 QB 204. If the delay is short, and the landlord has led the tenant to believe that there was already an existing insurance on the premises, he may not treat the breach of covenant as a cause of forfeiture: *Doe d Pittman v Sutton* (1841) 9 C & P 706.

2 *Penniall v Harborne* (1848) 11 QB 368.

3 *Doe d Flower v Peck* (1830) 1 B & Ad 428 at 438; *Heckman v Isaac* (1862) 6 LT 383. The covenant is broken by non-insurance, even though no actual loss may be occasioned to the landlord: *Doe d Pitt v Shewin* (1811) 3 Camp 134 at 137 (premium not paid within the days of grace subsequently accepted by the office); and see *Wilson v Wilson* (1854) 14 CB 616; *Price v Worwood* (1859) 4 H & N 512; cf *Doe d Pitt v Laming* (1814) 4 Camp 73 (indorsement after the death of the tenant in favour of his executors held to be sufficient, even though not made within the stipulated time).

4 *Doe d Muston v Gladwin* (1845) 6 QB 953.

5 *Hey v Wyche* (1842) 12 LJB 83 at 85.

6 See the Law of Property Act 1925 s 146 (as amended); and PARA 619 et seq post. Where a lease is forfeited for failure of a tenant to insure, the tenant may not recover the value of his reversionary interest from subtenants who also have not insured: see *Logan v Hall* (1847) 4 CB 598 at 614, 623; and PARA 109 ante.

7 *Burt v British Transport Commission* (1955) 166 Estates Gazette 4; and see *Argy Trading Development Co Ltd v Lapid Development Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444 (tenant had failed to insure against fire, having been informed by the landlord that the premises were insured under a block policy). A covenant by the landlord to insure may result in the landlord's being unable to press a claim against a tenant where the loss has been caused by the negligence of the tenant: *Greenwood Shopping Plaza Ltd v Neil J Buchanan Ltd* (1979) 99 DLR (3d) 289, NS SC.

8 *Naumann v Ford* [1985] 2 EGLR 70.

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### 535. Separate insurances by landlord and tenant.

If the tenant has insured in accordance with his covenant, and the landlord effects a separate insurance, the loss will be apportioned by the insurers between the two policies<sup>1</sup>. The landlord may not in this way deprive the tenant of the benefit of his performance of the covenant, and he must account to the tenant for the moneys received under the policy effected by himself<sup>2</sup>.

1 See INSURANCE vol 25 (2003 Reissue) PARAS 496, 614.

2 *Reynard v Arnold* (1875) 10 Ch App 386. In *Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601, there seems to have been no apportionment between the two policies; and the tenant was held to have no interest in the landlord's policy.

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PARAS 1386-2000)/12. OTHER COVENANTS/(3) COVENANT TO INSURE/536. Application of insurance moneys.

### 536. Application of insurance moneys.

An express covenant to insure, whether by the landlord or the tenant, usually provides that the insurance moneys are to be applied in reinstating the premises<sup>1</sup>. Where the landlord insures on his own account, without being under express liability to do so, and receives the insurance moneys, he is not bound to apply them in rebuilding<sup>2</sup>. Where the landlord covenants to insure the premises and the tenant is obliged to repay to the landlord the amount of the premiums, the correct inference is that the insurance is intended to enure for the benefit of both parties; and the landlord is obliged to use the insurance moneys received in reinstating the property if the tenant so requires<sup>3</sup>. In any event, the tenant is entitled, at any time before the insurers have paid the moneys in respect of damage by fire to the landlord<sup>4</sup>, to require that the moneys are to be spent in restoring the premises<sup>5</sup>. This does not, however, extend to trade fixtures affixed by the tenant<sup>6</sup>. Where it becomes impossible to apply the insurance moneys in reinstatement, for example because the premises were compulsorily acquired after the event which gave rise to the payment of the insurance moneys but before any work could be done<sup>7</sup>, the insurance moneys belong to the party who paid the premiums, even if the insurance was placed in the joint names of the landlord and the tenant<sup>8</sup>. Accordingly, it is always desirable that the lease should contain specific provision as to the ownership or apportionment of the insurance moneys in the event of reinstatement becoming impossible.

A policy of insurance<sup>9</sup> is a contract of indemnity, and, therefore, if the tenant restores the property under his covenant to repair, the landlord is not entitled to claim payment under the policy or to retain a payment which has been made<sup>10</sup>.

Where under the terms of the lease the landlord is entitled to be indemnified in respect of the insurance premiums by the tenant and in the event of damage by fire the landlord recoups his loss from the insurance moneys, he may not further claim against the tenant for damages in negligence<sup>11</sup>.

1 'Cost of reinstatement' means the cost when reinstatement is likely to be completed, notwithstanding reasonable delay: see *Gleniffer Finance Corp'n Ltd v Bamar Wood and Products Ltd* (1978) 37 P & CR 208, 122 Sol Jo 110; and PARA 532 ante.

2 *Leeds v Cheetham* (1827) 1 Sim 146; *Lofft v Dennis* (1859) 1 E & E 474.

3 *Mumford Hotels Ltd v Wheler* [1964] Ch 117, [1963] 3 All ER 250. It is uncertain whether the same result ensues if the landlord is under an obligation to insure but wholly at his own expense.

4 *Simpson v Scottish Union Insurance Co* (1863) 1 Hem & M 618.

5 See the Fires Prevention (Metropolis) Act 1774 s 83; paras 414, 428 ante; and INSURANCE vol 25 (2003 Reissue) PARAS 637-638. The 1774 Act does not make the tenant an insured person in respect of a policy taken out by the landlord; and, if the tenant has also insured, there is no double insurance by the tenant: *Portavon Cinema Co Ltd v Price and Century Insurance Co Ltd* [1939] 4 All ER 601.

6 *Re Barker, ex p Gorely* (1864) 4 De GJ & Sm 477.

7 *Id* as in *Re King, Robinson v Gray* [1963] Ch 459, [1963] 1 All ER 781, CA.

8 *Re King, Robinson v Gray* [1963] Ch 459, [1963] 1 All ER 781, CA. Lord Denning MR, dissenting, expressed the view that insurance in joint names envisages that each party should be insured as to his respective insurable interest, and that the insurance money should therefore be divided proportionately to the interests in the property of the landlord and the tenant.

9 *Id* a policy of insurance against eg risk of damage to buildings by fire.

10 *Darrell v Tibbitts* (1880) 5 QBD 560, CA; and see INSURANCE vol 25 (2003 Reissue) PARAS 198, 634, 639.

11 *Mark Rowlands Ltd v Berni Inns Ltd* [1986] QB 211, [1985] 3 All ER 473, CA.

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### **537. VAT on payments made by tenant in respect of insurance.**

Insurance transactions are exempt from VAT<sup>1</sup>. Where, however, a landlord takes out insurance on a building he is renting out that covers damage to the building which he is liable to repair under the terms of the rental agreement and passes on the cost of the insurance to his tenants, the additional amount charged in respect of insurance will follow the VAT liability of the property rental services and will not be exempt as insurance because it is the landlord's risk that is covered by the insurance and not the tenant's<sup>2</sup>. But there will be an exempt supply of insurance to the tenant where the landlord arranges insurance for the tenants covering their risks and naming them as insured parties on the contract, for example, household insurance, so that the supply of insurance is passing from the insurer via the landlord to the tenant<sup>3</sup>.

1 See the Value Added Tax Act 1994 s 31(1), Sch 9 Pt II, Group 2 (as substituted and amended); and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 160.

2 See HMRC Public Notice 701/36 *Insurance* (May 2002) PARA 11.1; and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 27. As to the treatment of rent for VAT purposes see PARA 252 ante.

3 See HMRC Public Notice 701/36 *Insurance* (May 2002) PARA 11.1; and VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 27.

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## **(4) COVENANTS FOR RENEWAL**

### **538. Effect of covenant for renewal.**

A lease may contain a covenant on the part of the landlord<sup>1</sup> that he will, at the end of the term, or at some stated period within the term<sup>2</sup>, grant a renewal of the lease if so required by the tenant<sup>3</sup>. Such a lease confers on the tenant an immediate term with a right to the further term, and in the event of his death within the term this right devolves upon his personal representatives<sup>4</sup>, and will run with the land and the reversion<sup>5</sup>. If, however, the lease is granted in the exercise of a power, the covenant cannot be enforced unless, at the date of renewal, the renewed lease is one authorised by the power<sup>6</sup>.

Any contract entered into on or after 1 January 1926 for the renewal of a lease or underlease for a term exceeding 60 years from the termination of the lease or underlease is void<sup>7</sup>.

If the covenant requires that the lease to be granted is to contain so far as possible clauses identical with those in the lease, the landlord is not bound to grant a renewal of the lease, if,

owing to a change of circumstances, it becomes impossible to renew on the same terms as the original lease<sup>8</sup>.

1 As to options to renew see PARAS 139-140 ante. The notice exercising an option need not comply with the formalities required by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante; and *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600. The landlord may not deal with the property in prejudice of the tenant's rights under the covenant for renewal: see *A-G of the Straits Settlement v Wemyss* (1888) 13 App Cas 192, PC.

2 Where the lease is renewable at the end of any of certain periods, as at the end of every 14 years of the term, the tenant may require renewal at the end of any such period notwithstanding that he has missed previous periods (*Bogg v Midland Rly Co* (1867) LR 4 Eq 310; cf *Swinburne v Milburn* (1884) 9 App Cas 844, HL (lease renewable on the dropping of lives)), unless on the terms of the covenant he is bound to renew, if at all, at the end of the various periods in order (*Rubery v Jervoise* (1786) 1 Term Rep 229; *Hussey v Domville (No 2)* [1903] 1 IR 265, Ir CA; *Domville v Callwell* [1907] 2 IR 617; and see *Reid v Blagrove* (1831) 9 LJOS Ch 245; *Maxwell v Ward* (1824) 13 Price 674).

3 On notice to renew being given, the contract for renewal becomes binding on the tenant: *Dawson v Lepper* (1892) 29 LR Ir 211. As to the consideration for an agreement to renew see *Richardson v Sydenham* (1703) 2 Vern 447; *Robertson v St John* (1786) 2 Bro CC 140; *Redshaw v Governor of Bedford Level Co* (1759) 1 Eden 346; *Dowling v Mill* (1816) 1 Madd 541; *Crofton v Ormsby* (1806) 2 Sch & Lef 583. Where the tenant is bound to renew under a penalty, this does not give him the option to pay the penalty and not renew: *Reid v Blagrove* (1831) 9 LJOS Ch 245. As to a penalty on failure to renew in time see *Lord Doneraile v Chartres* (1784) 1 Ridg Parl Rep 122. Where the covenant for renewal stated that the landlord would grant a lease 'for a rent and containing the like covenants and provisions as are herein contained with the exception of the present covenant for renewal', it was held as a matter of construction that the rent in the new lease would be the same as that in the old lease: *Rothwell v Wakeling* (1974) 29 P & CR 234. As to the statutory right to acquire a new lease of a flat see the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended); and PARA 1671 et seq post.

4 *Hyde v Skinner* (1723) 2 P Wms 196.

5 *Richardson v Sydenham* (1703) 2 Vern 447; cf *Muller v Trafford* [1901] 1 Ch 54.

6 *Gas Light and Coke Co v Towse* (1887) 35 ChD 519; *Doe d Bromley v Bettison* (1810) 12 East 305; *Dowell v Dew* (1842) 1 Y & C Ch Cas 345; *Salamon v Sopwith* (1876) 35 LT 826, CA.

7 See the Law of Property Act 1922 s 145, Sch 15 para 7(2); and PARA 140 ante.

8 *Hollies Stores Ltd v Timmis* [1921] 2 Ch 202 (lease provided for the payment of rent by three named sureties; one of them died prior to the time for renewal; it was held as a matter of construction that any new lease had to contain a covenant by those three sureties, and, as that could not be obtained, the landlord was not bound to grant a new lease). As to the position where it may be impossible for the landlord to recover the full rent to be reserved in the new lease because of the effect of Rent Act restrictions see *Mauray v Durley Chine (Investments) Ltd* [1953] 2 QB 433, [1953] 2 All ER 458, CA; cf *Newman v Dorrington Developments Ltd* [1975] 3 All ER 928, [1975] 1 WLR 1642.

As to whether a document agreeing the terms of a new lease is void for uncertainty see *Trustees of National Deposit Friendly Society v Beatties of London Ltd* [1985] 2 EGLR 59; *Corson v Rhuddlan Borough Council* (1990) 59 P & CR 185, [1990] 1 EGLR 255, CA. These cases must now be read in the light of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

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### 539. Observance of conditions by tenant.

A covenant for renewal usually requires that the tenant shall give notice of his intention to take a renewal before the determination of the term; and under such a requirement he loses his

right if he fails to give the notice in time<sup>1</sup>. A notice given an unreasonable time in advance may be ineffective<sup>2</sup>. An option agreement must be strictly complied with<sup>3</sup>; thus if the renewal is made conditional on the observance of his covenants by the tenant, that observance is a condition precedent to the right of renewal; and the right of renewal is not enforceable if at the time for renewal there is a subsisting breach of covenant<sup>4</sup>, even though it is not a serious breach<sup>5</sup>. The condition applies to subsisting breaches only and not spent breaches of covenant<sup>6</sup>. The condition will, however, be less strictly construed in the case of a building lease than in the case of a lease of an existing house<sup>7</sup>. If the new lease is to be granted on payment of a sum of money, and it is not stipulated that this is to be paid before the expiration of the old lease, it is sufficient if it is paid on the granting of the new lease notwithstanding that this is after the expiration of the old term<sup>8</sup>. If the renewed lease is not conditional on the observance of covenants, the court will not refuse to enforce the renewal on the ground of breach of covenant unless the breach is serious and wilful, or unless the landlord could immediately put an end to the renewed lease under a proviso for re-entry<sup>9</sup>.

1 *Bayley v Leominster Corp* (1792) 1 Ves 476; *Wight v Earl of Hopetoun* (1864) 4 Macq 729, HL; *Nicholson v Smith* (1882) 22 ChD 640; and see *BP Oil Ltd v Lloyds TSB Bank plc* [2004] EWCA Civ 1710, [2005] 1 EGLR 61, [2004] All ER (D) 336 (Dec). Relief will not be given in equity against failure to give the notice in time (*Eaton v Lyon* (1798) 3 Ves 690; *City of London v Mitford* (1807) 14 Ves 41), save under special circumstances (*Earl of Ross v Worsop* (1740) 1 Bro Parl Cas 281, HL; *Statham v Trustees of Liverpool Docks* (1830) 3 Y & J 565; *Hunter v Earl of Hopetoun* (1865) 13 LT 130, HL). Where notice to renew a lease for lives had to be given within six months after the dropping of any life, relief was not given on the ground of ignorance of the death if the tenant might with reasonable diligence have discovered it (*Harries v Bryant* (1827) 4 Russ 89); and generally accident does not entitle the tenant to time for renewal unless it could not by reasonable diligence have been avoided (see *Reid v Blagrove* (1831) 9 LJOS Ch 245; *Maxwell v Ward* (1824) 13 Price 674; cf *Firman v Lord Ormonde* (1829) Beat 347). As to laches in applying for renewal see PARA 95 note 18 ante; cf *Baldwin v Bridges* (1835) L & G temp Plunk 408.

2 *Biondi v Kirklington and Piccadilly Estates Ltd* [1947] 2 All ER 59 (notice given 34 years in advance).

3 *BP Oil Ltd v Lloyds TSB Bank plc* [2004] EWCA Civ 1710, [2005] 1 EGLR 61, [2004] All ER (D) 336 (Dec) (put option in a lease demised to three separate companies, defined as 'the purchaser'; option agreement could only be exercised by all three companies).

4 *Job v Banister* (1856) 2 K & J 374 (affd 26 LJ Ch 125); *Finch v Underwood* (1876) 2 ChD 310, CA; *Bastin v Bidwell* (1881) 18 ChD 238; *Greville v Parker* [1910] AC 335, PC; *Thompson v Guyon* (1831) 5 Sim 65. It may be essential, on the construction of the covenant, that there is to be no breach at the time when the new lease is applied for: see *Bastin v Bidwell* supra at 251-252.

5 *Finch v Underwood* (1876) 2 ChD 310, CA; *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA (failure by the tenants to paint in accordance with the covenant in the lease held to disentitle them from exercising an option to renew; landlord's silence about the breaches could not constitute a waiver or an estoppel). It is otherwise where the performance of the covenants is not a condition precedent: see the text and notes 6-8 infra; cf *Gardner v Blaxill* [1960] 2 All ER 457, [1960] 1 WLR 752 (option contained the words 'provided the tenant has reasonably fulfilled his covenants').

6 *Bass Holdings Ltd v Morton Music Ltd* [1988] Ch 493, [1987] 2 All ER 1001, CA. It is irrelevant for these purposes whether past breaches were of positive or negative covenants: *Bass Holdings Ltd v Morton Music Ltd* supra.

7 *Robinson v Thames Mead Park Estate Ltd* [1947] Ch 334, [1947] 1 All ER 366.

8 *Nicholson v Smith* (1882) 22 ChD 640. The landlord may not require payment of a collateral debt as a condition of renewal: *Fitzgerald v Carew* (1839) 11 Eq R 346.

9 *Hare v Burgess* (1857) 5 WR 585; *Thompson v Guyon* (1831) 5 Sim 65.

PARAS 1386-2000)/12. OTHER COVENANTS/(4) COVENANTS FOR RENEWAL/540. Perpetual renewal.

#### 540. Perpetual renewal.

The covenant may be a covenant for perpetual renewal<sup>1</sup>, but the court will not treat it as such unless the intention in that behalf is clearly shown<sup>2</sup>, as, for example, where the covenant expressly states that the lease is to be renewable for ever<sup>3</sup>. If the intention to renew perpetually is clear, the court will give effect to it notwithstanding that certain other terms of the lease appear to be inconsistent with such an intention<sup>4</sup>. A provision that the new lease is to contain the same covenants as the old lease does not entitle the tenant to have the covenant for perpetual renewal inserted<sup>5</sup>, unless the provision expressly includes 'this present covenant' or some other plain indication of the parties' intention that the covenant for renewal should be inserted<sup>6</sup>. The intention to renew perpetually must be clear from the language of the lease; and the fact that several renewals have been granted is not admissible to explain the intention of the parties to the lease<sup>7</sup>. A covenant for perpetual renewal will not be construed as a contract to grant a succession of reversionary terms, so as to render void all such terms commencing more than 21 years after the date of the lease<sup>8</sup>.

1 The covenant is not open to objection on the ground of perpetuity (*Bridges v Hitchcock* (1715) 5 Bro Parl Cas 6, HL), unless the persons entitled to renewal are an unascertained class (*Hope v Gloucester Corp*n (1855) 7 De GM & G 647); and see *London and South Western Rly Co v Gomm* (1882) 20 ChD 562 at 572, CA, per Jessel MR; *Muller v Trafford* [1901] 1 Ch 54 at 61; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1039. A lease containing such a covenant takes effect as a demise for 2,000 years: see PARA 541 post.

2 *Baynham v Guy's Hospital* (1796) 3 Ves 295 at 298; *Moore v Foley* (1801) 6 Ves 232 at 237; *Iggulden v May* (1804) 9 Ves 325 at 330; *Browne v Tighe* (1834) 2 Cl & Fin 396 at 416, HL; *Swinburne v Milburn* (1884) 9 App Cas 844, HL; *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd* [1969] 3 All ER 1441, [1970] 1 WLR 52; cf *Smyth v Nangle* (1840) 7 Cl & Fin 405, HL; *Wynn v Conway Corp*n [1914] 2 Ch 705, CA. As to an agreement to grant a term where the landlord holds for lives with perpetual renewal see *Leathem v Allen* (1850) 11 Ch R 683.

3 *City of London v Mitford* (1807) 14 Ves 41; *Nicholson v Smith* (1882) 22 ChD 640; *Atkinson v Pillsworth* (1787) 1 Ridg Parl Rep 449; *Palmer v Hamilton* (1793) 2 Ridg Parl Rep 535. An express covenant to renew is not essential (*Chambers v Gaussen* (1844) 2 Jo & Lat 99); and it seems that the habendum may be so framed as to amount to a covenant for perpetual renewal (*Sheppard v Doolan* (1842) 3 Dr & War 1).

4 *Northchurch Estates Ltd v Daniels* [1947] Ch 117, [1946] 2 All ER 524; but see *Green v Palmer* [1944] Ch 328, [1944] 1 All ER 670 (furnished tenancy), which was doubted in *Parkus v Greenwood* [1950] Ch 644, [1950] 1 All ER 436, CA.

5 *Hyde v Skinner* (1723) 2 P Wms 196; *Tritton v Foote* (1789) 2 Bro CC 636; *Russel v Darwin* (1767) 2 Bro CC 639n; *Lewis v Stephenson* (1898) 67 LJQB 296; *Plumrose Ltd v Real and Leasehold Estates Investment Society Ltd* [1969] 3 All ER 1441, [1970] 1 WLR 52; cf *Swan v Colclough* (1834) Hayes & Jo 607.

6 *Hare v Burges* (1857) 4 K & J 45; *Re Hopkins's Lease, Caerphilly Concrete Products Ltd v Owen* [1972] 1 All ER 248, [1972] 1 WLR 372, CA; cf *Marjorie Burnett Ltd v Barclay* (1980) 125 Sol Jo 199. A covenant to renew 'from time to time' (*Furnival v Crew* (1744) 3 Atk 83), or 'at any time' (*Copper Mining Co v Beach* (1823) 13 Beav 478), or 'from year to year' (*Gray v Spyer* [1922] 2 Ch 22, CA; *Northchurch Estates Ltd v Daniels* [1947] Ch 117, [1946] 2 All ER 524), is a covenant for perpetual renewal if on the whole language it means 'to renew and continue renewing', but not otherwise (*Brown v Tighe* (1834) 2 Cl & Fin 396 at 419, HL).

7 *Baynham v Guy's Hospital* (1796) 3 Ves 295; and see *Sadlier v Biggs* (1853) 4 HL Cas 435 at 457; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 206. The burden of strict proof of the right to a renewal lies on the tenant: *Swinburne v Milburn* (1884) 9 App Cas 844 at 850, HL.

8 *Northchurch Estates Ltd v Daniels* [1947] Ch 117, [1946] 2 All ER 524; and see the Law of Property Act 1925 s 149(3); and PARA 106 ante.



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#### **541. Effect of covenant for perpetual renewal.**

Since 31 December 1925 perpetually renewable leases and underleases<sup>1</sup> have been abolished<sup>2</sup>, and, if a lease contains a covenant which entitles the tenant to enforce perpetual renewal<sup>3</sup>, the lease takes effect as a demise for a term of 2,000 years<sup>4</sup>, and any contract for the grant of a lease with a covenant for perpetual renewal operates as an agreement for a demise for a term of 2,000 years<sup>5</sup>. In the case of subsisting leases, the term is calculated from the date at which the existing lease commenced; in all other cases the term commences from the date fixed for the commencement of the perpetually renewable lease<sup>6</sup>. Every term so created is subject to all the same trusts, powers, executory limitations over, rights and equities, if any, and to all the same incumbrances and obligations of every kind, as the perpetually renewable lease which it replaces would have been subject to<sup>7</sup>, and is deemed to contain:

- 1119 (1) a power, exercisable only with the consent of the persons, if any, interested in any derivative interest which might be prejudicially affected, for the lessee<sup>8</sup>, by giving at least ten days' notice in writing to the lessor<sup>9</sup>, to determine the lease at any date upon which the original lease would have expired if it had not been renewed<sup>10</sup>;
- 1120 (2) a covenant by the lessee to register every assignment or devolution of the term, including all probates or letters of administration affecting the same, with the lessor or his solicitor<sup>11</sup> or agent, within six months from the date of the assignment, devolution or grant of probate or letters of administration<sup>12</sup>.

Any power of re-entry contained in the lease applies and extends to the breach of every such covenant<sup>13</sup>.

Where a perpetually renewable lease or an agreement to grant such a lease, containing a provision for payment of a fine on renewal, was made before 1926, the fines were converted into an additional rent payable throughout the term<sup>14</sup>. Where such a lease or agreement is made after 1925, the lessee takes free from any obligation for payment in respect of renewal<sup>15</sup>.

1 'A perpetually renewable lease or underlease' means a lease or underlease the holder of which is entitled to enforce, whether or not subject to the fulfilment of any condition, the perpetual renewal thereof, and includes a lease or underlease for a life or lives or for a term of years, whether determinable with life or lives or not, which is perpetually renewable as aforesaid, but does not include copyhold land held for a life or lives or for years, whether or not determinable with life, whether the tenant had before 1 January 1926 a right of perpetual renewal subject or not to the fulfilment of any condition: Law of Property Act 1922 s 190(iii). 'Underlease' includes a sub-term created out of a derivative leasehold interest: s 190(iv). As to underleases see PARA 542 post. As to the deposit of perpetually renewable leases and underleases at the Central Office, and as to the power to search the file of such instruments and obtain copies of them see s 145, Sch 15 para 20 (prospectively amended by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 2 para 4(1), (3), as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed); the Filing of Leases Rules 1925, SR & O 1925/1128; the Filing of Leases Fee Order 1925, SR & O 1925/1149.

2 Law of Property Act 1922 s 145, Sch 15 paras 1(1), 5(1) (Sch 15 para 5(1) numbered as such, and Sch 15 para 5(2), (3) added, by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 1). Where a grant (1) relates to commonhold land; and (2) would take effect by virtue of the Law of Property Act 1922 Sch 15 para 5(1) (as so amended) as a demise for a term of 2,000 years or a sub-demise for a fixed term, the grant is to be treated as if it purported to be a grant of the term so referred to and the Commonhold and Leasehold Reform Act 2002 ss 17, 18 (residential and non-residential leases: see PARA 18 ante) apply accordingly: Law of Property Act 1922 Sch 15 para 5(2), (3) (as so added).

The 1922 Act came into operation on 1 January 1926: Law of Property Act (Postponement) Act 1924 s 1 (repealed); Law of Property (Amendment) Act 1924 s 12 (repealed).

3 As to when a covenant for renewal is a covenant for perpetual renewal see PARA 540 ante.

4 The conversion of perpetually renewable leases subsisting on 1 January 1926 into long terms was effected by the Law of Property Act 1922 Sch 15 para 1(1), and the Law of Property Act 1925 s 202; and the creation of such leasehold interests is prevented by the Law of Property Act 1922 Sch 15 para 5 (as amended: see note 2 supra). In the case of subsisting leases, the term vested in the person entitled to such lease on 1 January 1926 (see Sch 15 para 1(1) (cited in note 2 supra)); if such person was a minor, then the term vested in the person of full age who became entitled by statute to the minor's legal estate (see Sch 15 para 3(1)).

5 Existing contracts to grant perpetually renewable interests were converted into contracts to grant long terms (see *ibid* Sch 15 para 6(1)); and contracts for renewal entered into since 31 December 1925 operate as agreements to grant long terms (see Sch 15 para 7(1)). Accordingly, an oral lease for a term not exceeding three years, containing a covenant for perpetual renewal, does not confer a legal estate, but operates only as an agreement to grant a term of 2,000 years. As to oral leases see PARA 101 ante.

6 See *ibid* Sch 15 paras 1(1), 5, 7(1) (Sch 15 para 5 as amended: see note 2 supra).

7 See *ibid* Sch 15 para 3(1).

8 For these purposes, 'lessee' includes the persons deriving title under him: *ibid* s 190(ii).

9 For these purposes, 'lessor' means the person for the time being entitled in reversion expectant on the interest demised or, where the reversion is incumbered, the person having power to accept a surrender of the lease or underlease: *ibid* s 190(i).

10 See *ibid* Sch 15 para 10(1)(i).

11 For these purposes, any reference to a solicitor is to be construed as including a reference to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended): Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1.

12 See the Law of Property Act 1922 Sch 15 para 10(1)(ii). A fee of £1.05, which is to be in satisfaction of all costs, is to be paid in respect of each registration: Sch 15 para 10(1)(ii). This covenant is in substitution for any express covenant to register with the lessor or his solicitor or agent assignments and devolutions of the term and to pay fees or costs in respect of such registration: Sch 15 para 10(1)(ii).

13 See *ibid* Sch 15 para 10(1).

14 See *ibid* Sch 15 paras 6, 12 (amended by the Law of Property (Amendment) Act 1924 s 2, Sch 2 para 5; and by the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794, art 5(1), Sch 1 para 1).

15 See the Law of Property Act 1922 Sch 15 paras 5(1), 7(1) (Sch 15 para 5(1) as amended: see note 2 supra).

## UPDATE

### 541 Effect of covenant for perpetual renewal

NOTE 1--Appointed day is 1 October 2009: SI 2009/1604.

NOTE 11--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/12. OTHER COVENANTS/(4) COVENANTS FOR RENEWAL/542. Underlease with covenant for renewal.

## 542. Underlease with covenant for renewal.

A lessee holding for a term or for lives with a covenant for renewal may underlet upon similar conditions<sup>1</sup>; but since 31 December 1925 perpetually renewable underleases have been abolished<sup>2</sup>. If an underlease contains a covenant for perpetual renewal<sup>3</sup>, it takes effect in the same manner as a perpetually renewable lease<sup>4</sup>, except that the term of the substituted underlease is one day less in duration than the term out of which it is derived<sup>5</sup>.

1 The right of the undertenant to renewal (*Morgan v Gurley* (1851) 1 I Ch R 482), and of the underlandlord to compel acceptance of renewal (*Curry v Stanley* (1833) Hayes & Jo 487; *Pilson v Spratt* (1889) 25 LR Ir 5), may be lost by their conduct; thus the undertenant may forfeit his right of renewal by non-payment of fines (*Hunt v Sayers* (1832) Hayes 590; *Cullen v Leonard* (1842) 5 I Eq R 134; *Chesterman v Mann* (1851) 9 Hare 206); but the notice requiring payment must be distinctly proved (*Lawless v Grogan* (1837) 1 Dr & Wal 53; cf *John v Armstrong* (1834) L & G temp Plunk 392; *Statham v Trustees of Liverpool Docks* (1830) 3 Y & J 565). As to the person entitled to arrears of fines see *Re Brinkley's Estate* (1868) 16 WR 356; and as to the apportionment of liability for fines among beneficiaries see *Re Baring, Jeune v Baring* [1893] 1 Ch 61.

2 See PARA 541 ante.

3 As to what amounts to a covenant for perpetual renewal see PARA 540 ante.

4 See PARA 541 ante.

5 See the Law of Property Act 1922 Sch 15 paras 2, 5 (Sch 15 para 5 amended by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 1). Similarly, a contract for the grant of an underlease with a covenant for perpetual renewal operates as an agreement for a sub-demise for a term less in duration by one day than the term out of which it is derived: see the Law of Property Act 1922 Sch 15 paras 6(1), 7(1).

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## (5) COVENANTS RELATING TO LICENSED PREMISES

### 543. Usual covenants.

Leases of licensed premises may contain covenants on the tenant's part which are intended to protect the premises licence<sup>1</sup>. If the landlord is a brewer and the premises are to be 'tied' to his business, the lease will contain covenants to create the 'tie' and ensure that the benefit of it is assignable<sup>2</sup>. Such arrangements are now uncommon and have largely been superseded by arrangements where the landlord supplying beer under a 'beer tie' agreement is not a brewer but a company owning a number of public houses and supplying its tenants with a range of beers from different brewers<sup>3</sup>. Alternatively, the beer tie may require beers to be purchased from a nominated supplier other than the landlord. Even if a nominated supplier has a dominant position in the market, and even if the prices it charges the tenant are higher than those available from other suppliers, that is not enough to establish abuse of its dominant position for the purposes of the Competition Act 1998<sup>4</sup>.

1 See PARAS 544-545 post. As to usual covenants in leases generally see PARA 83 ante.

2 See PARA 546 post. The restrictions formerly contained in the Supply of Beer (Tied Estate) Order 1989, SI 1989/2390 (as amended; now revoked) have been removed: see the Supply of Beer (Tied Estate) (Revocation) Order 2002, SI 2002/3204, art 2. As to the enforceability of tied house covenants see PARA 546 post.

<sup>3</sup> See PARA 546 post. For a case where a 'traditional' tied house lease was surrendered in exchange for a new lease from such a company see *Plummer v Tibsco Ltd* [2002] EWCA Civ 102, [2002] 1 EGLR 29, [2002] All ER (D) 303 (Jan).

<sup>4</sup> *P & S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), [2006] All ER (D) 285 (Jun).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/12. OTHER COVENANTS/(5) COVENANTS RELATING TO LICENSED PREMISES/544. Covenant not to endanger premises licence.

#### **544. Covenant not to endanger premises licence.**

If the tenant covenants that he will not do or suffer to be done anything whereby the premises licence may be revoked or the renewal of it withheld, this will render him and his assigns liable in respect of their own conduct of the premises; but it will not render them liable if the licence is revoked, or if renewal is withheld, by reason of offences committed by a subtenant or his employee<sup>1</sup>. To render the tenant and his assigns liable in that event, the covenant must either extend specifically to the conduct of a subtenant or other occupier or be an absolute covenant that the premises are to be so conducted that the premises licence shall not be revoked nor the renewal refused<sup>2</sup>.

On an oral letting of a public house there is no implied agreement that the tenant is to do no act whereby the premises licence may be revoked<sup>3</sup>.

<sup>1</sup> *Wilson v Twamley* [1904] 2 KB 99, CA; and see *Bryant v Hancock & Co* [1899] AC 442, HL; *Mumford v Walker* (1901) 71 LJB 19. As to revocation of a premises licence see the Licensing Act 2003 s 52; as to offences connected with licensed premises see Pt 7 (ss 136-159); and as to the closure of identified premises see ss 161-170. See further LICENSING AND GAMBLING vol 67 (2008) PARAS 80, 132 et seq, 168 et seq.

<sup>2</sup> See *Bryant v Hancock & Co* [1899] AC 442, HL (covenant to conduct the business so as to afford no ground for discontinuing the licence not broken when renewal was refused owing to the conduct of the subtenant); *Palethorpe v Home Brewery Co Ltd* [1906] 2 KB 5, CA (covenant at all times to conduct the premises in a proper manner held to be absolute); *Williamson v Issott* (1909) 25 TLR 514 (covenant to transfer the licence at the end of the term not broken when the licence had been lost through the conduct of the subtenant); *Wootton v Lichfield Brewery Co* [1916] 1 Ch 44, CA (under a covenant to insure the licence against loss or forfeiture tenant not bound to insure against the risk of non-renewal on the ground of redundancy).

<sup>3</sup> *Maw v Hindmarsh* (1873) 28 LT 644.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/12. OTHER COVENANTS/(5) COVENANTS RELATING TO LICENSED PREMISES/545. Other usual covenants as to licence.

#### **545. Other usual covenants as to licence.**

In a lease of licensed premises the tenant usually covenants to keep open the premises at all lawful hours<sup>1</sup>, and to apply for and use his best endeavours to obtain a grant or renewal of any certificates and licences necessary for keeping the premises open as a public house<sup>2</sup>. He commits a breach of the covenant as to renewal if, on a renewal being refused, he makes no attempt to have the decision reversed<sup>3</sup>. Where the renewal of the licence is refused, this does not put an end to the lease, and the rent continues to be payable<sup>4</sup>. Where a reversionary lease

is granted and the licence is forfeited during the continuance of the prior lease, the rent under the reversionary lease is payable in full when it falls into possession<sup>5</sup>.

Covenants relating to the management of the premises run with the reversion; and the assignee of the reversion is, therefore, entitled to take advantage of them<sup>6</sup>.

1 On breach of this covenant the landlord may be entitled to the appointment of a receiver of the licence to secure its preservation: *Charrington & Co Ltd v Camp* [1902] 1 Ch 386; *Whitbread & Co v Grain* (1907) 23 TLR 462; *Leney & Sons Ltd v Callingham and Thompson* [1908] 1 KB 79, CA; and see RECEIVERS. There is no implied obligation that the tenant is to reside on the premises or conduct the business personally: *Re Lander and Bagley's Contract* [1892] 3 Ch 41; *Moore v Robinson* (1878) 48 LJQB 156. Any attempt by the tenant to reduce sales of liquor on the premises may be restrained by injunction (*Dartford Brewery Co Ltd v Till and Godfrey* (1906) 95 LT 636, CA); but the covenant in its entirety will not be enforced in that way (see *Hooper v Brodrick* (1840) 11 Sim 47; and CIVIL PROCEDURE vol 11 (2009) PARA 462).

2 See *Bryant v Hancock & Co* [1899] AC 442, HL. An executor, if he is willing to transfer the licence, and if he delivers up possession which is accepted by the landlord, is not liable for loss of the licence due to his omission to obtain an interim transfer: *Brown v Watson* [1904] 2 IR 218, CA. As to the transfer of a premises licence see the Licensing Act 2003 ss 42-46; and see further LICENSING AND GAMBLING vol 67 (2008) PARAS 73-75.

3 *Linder v Pryor* (1838) 8 C & P 518.

4 *Grimsdick v Sweetman* [1909] 2 KB 740, DC. The lease may, however, be made determinable in the event of the licence being withdrawn: see *Williams v Lassell and Sharman Ltd* (1906) 22 TLR 443.

5 *Blum v Ansley* (1900) 64 JP 184; cf *Hart v Arrol* (1903) 6 F 36, Ct of Sess.

6 *Fleetwood v Hull* (1889) 23 QBD 35; and see PARA 554 et seq post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/12. OTHER COVENANTS/(5) COVENANTS RELATING TO LICENSED PREMISES/546. Tied house covenants.

#### 546. Tied house covenants.

A covenant by the tenant of licensed premises to obtain all liquor required for his business from the landlord is valid at common law<sup>1</sup>, but it is subject to an implied condition that the landlord is ready to supply to the tenant liquor such as he reasonably requires in kind and quality<sup>2</sup>; and, if this condition is not fulfilled, the tenant may obtain his supplies elsewhere<sup>3</sup>. The covenant is sometimes enforced by reserving an additional rent while it is broken or by allowing a reduction of rent while it is observed. This does not, however, prevent the covenant from being imperative, at any rate where there is a proviso for re-entry on non-performance; and a tenant does not have the option of paying the additional or the unreduced rent and of dealing with another brewer or supplier<sup>4</sup>.

An exclusive supply clause may be unenforceable under European Union law (and under the Competition Act 1998) as an agreement, decision or concerted practice which has as its object or effect the prevention, restriction or distortion of competition<sup>5</sup> if:

- 1121 (1) having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks<sup>6</sup>; and
- 1122 (2) the agreement in question makes a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context<sup>7</sup>.

However, any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings and any concerted practice or category of concerted practices which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question is not caught by the prohibition on anti-competitive agreements, decisions and practices<sup>8</sup>; and no prior decision to that effect by the European Commission is now required<sup>9</sup>. The undertaking or association of undertakings claiming the benefit of this exemption bears the burden of proving that the conditions of the exemption are fulfilled<sup>10</sup>. The Commission has previously made a block exemption for vertical agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain; these are permitted provided that they satisfy the requirements of the relevant Commission regulation<sup>11</sup>. A beer tie which does not require the tenant to purchase the beers brewed by the landlord alone or from a single nominated brewer, but requires him to purchase only beers supplied by the landlord from a range of brewers, national and international, enabling those brewers to penetrate the market, is thus enforceable<sup>12</sup>; and standard tenancy agreements to that effect have been specifically approved by the European Commission<sup>13</sup>. Nor is a beer tie requiring the tenant to purchase beers from a supplier nominated by the landlord necessarily an abuse of a dominant position in the market for the purposes of European Union law<sup>14</sup> or of the Competition Act 1998<sup>15</sup>.

A domestic court is not obliged to treat the European Commission's factual assessment of the United Kingdom beer tie market in one of its decisions<sup>16</sup> as effectively binding when considering an issue arising between different parties with respect to a different beer tie arrangement; the Commission's decision is simply evidence properly admissible before the court which, given the expertise of the Commission, may well be regarded as highly persuasive but is, as a matter of law, only part of the evidence which the court will take into account<sup>17</sup>. Where, however, national courts rule on agreements, decisions or practices under the relevant European Union provisions<sup>18</sup> which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission and must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated; and to that effect the national court may assess whether it is necessary to stay its proceedings<sup>19</sup>. Similarly, when competition authorities of the member states rule on agreements, decisions or practices under those provisions<sup>20</sup> which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission<sup>21</sup>.

1 Such covenants were at first viewed with disfavour, as being prejudicial to the public welfare (*Cooper v Twibill* (1808) 3 Camp 286 note (a); *Thornton v Sherratt* (1818) 8 Taunt 529), but their validity is well established, subject to their not infringing the EC Treaty arts 81, 82 (see the text and notes 5-14 infra); and see eg *P & S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 99 (Ch), [2006] All ER (D) 25 (Feb); *P & S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), [2006] All ER (D) 285 (Jun). Cf a 'solus agreement in gross' which is not a term of the lease and, as an agreement in restraint of trade, may be invalid unless reasonable: see *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, [1966] 1 All ER 126, CA; see also *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116, CA; *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA. Such a covenant was capable of running with the land (*Clegg v Hands* (1890) 44 ChD 503, CA) and the benefit and burden may now be transmitted on assignment (see the Landlord and Tenant (Covenants) Act 1995 s 3 (as amended); and PARA 580 post).

2 *Noakes & Co Ltd v Day* [1910] 1 Ch 270n, CA; *Courage & Co Ltd v Carpenter* [1910] 1 Ch 262. A provision in a tied house covenant that the landlord will supply liquor at the 'fair market price' must be construed in the light of the context and the surrounding circumstances; the words 'fair market price' have no fixed legal significance: *Charrington & Co Ltd v Wooller* [1914] AC 71, HL (where it was held to mean the price applying to

tenants of tied houses). As to evidence of quality see *Holcombe v Hewson* (1810) 2 Camp 391; *Manchester Brewery Co v Coombs* (1900) as reported in 82 LT 347. The court will not, however, now imply into a beer tie agreement terms requiring that beer be sold to a tenant at a reasonable price, or preventing a supplier selling beer to non-tied houses at a lower price: *Courage Ltd v Crehan*, *Byrne v Innentrepreneur Beer Supply Co Ltd* (formerly known as *Courage Ltd*), *Innentrepreneur Beer Supply Co Ltd v Langton*, *Greenalls Management Ltd v Smith*, *Walker Cain v McCaughey* [1999] 2 EGLR 145, CA.

3 *Holcombe v Hewson* (1810) 2 Camp 391; *Thornton v Sherratt* (1818) 8 Taunt 529; *Edwick v Hawkes* (1881) 18 ChD 199; *Weaver v Sessions* (1815) 6 Taunt 154; *Stancliffe v Clarke* (1852) 7 Exch 439. Sometimes an express proviso to the same effect is inserted: see *Doe d Calvert v Reid* (1830) 10 B & C 849 at 851; *Clegg v Hands* (1890) 44 ChD 503 at 516, CA.

4 *Hanbury v Cundy* (1887) 58 LT 155.

5 See the EC Treaty art 81(1); and *Holleran v Daniel Thwaites plc* [1989] 2 CMLR 917. See also the Competition Act 1998 s 2(1), (2); and COMPETITION vol 18 (2009) PARA 116. Agreements, decisions and concerted practices caught by the EC Treaty art 81(1) which do not satisfy the conditions of art 81(3) (see the text and note 8 infra) are prohibited, no prior decision to that effect being required: EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 1(1). The abuse of a dominant position referred to in the EC Treaty art 82 is likewise prohibited, no prior decision to that effect being required: EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 1(3). As to the abuse of a dominant position under domestic law see the Competition Act 1998 s 18; and COMPETITION vol 18 (2009) PARA 125. A party to a contract that is liable to restrict or distort competition within the meaning of the EC Treaty art 81 can rely upon the breach of art 81 to obtain relief from the other contracting party: Case C-453/99 *Courage Ltd v Crehan* [2002] QB 507, [2001] All ER (EC) 886, ECJ.

6 The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult: see Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935, [1992] 5 CMLR 210, ECJ.

7 Case C-234/89 *Delimitis v Henninger Brau* [1991] ECR I-935, [1992] 5 CMLR 210, ECJ. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement: *Delimitis v Henninger Brau* supra.

8 See the EC Treaty art 81(3); and EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 1(2). See also the Competition Act 1998 s 9(1) (amended by the Competition Act 1998 and other enactments (Amendment) Regulations 2004, SI 2004/1261, reg 4, Sch 1 para 6); and COMPETITION vol 18 (2009) PARA 122. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between member states but which do not restrict competition within the meaning of the EC Treaty art 81(1), or which fulfil the conditions of art 81(3) or which are covered by a regulation for the application of art 81(3); but member states are not thereby precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings: EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 3(2).

9 See *ibid* art 1(2).

10 EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 2. See also the Competition Act 1998 s 9(2) (added by the Competition Act 1998 and other enactments (Amendment) Regulations 2004, SI 2004/1261, reg 4, Sch 1 para 6(4)).

11 See EC Commission Regulation 2790/1999 (OJ L336, 29/12/99, p 21). As to the power to make block exemptions under the Competition Act 1998 see ss 6, 8 (as amended); and COMPETITION vol 18 (2009) PARA 121. Vertical agreements are also excluded from the Chapter I prohibition in the Competition Act 1998 (ie the prohibition imposed by s 2: see COMPETITION vol 18 (2009) PARA 116) provided that they are land agreements (ie an agreement between undertakings which creates, alters, transfers or terminates an interest in land, or an agreement to enter into such an agreement, together with any obligation and restriction to which the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 5 applies: see art 3); art 4. See further COMPETITION vol 18 (2009) PARA 142.

12 *Punch Taverns (PTL) Ltd v Moses* [2006] EWHC 599 (Ch), [2006] All ER (D) 317 (Feb). See also *Passmore v Morland plc* [1999] 3 All ER 1005, [1999] 1 CMLR 1129, CA (covenant became enforceable when the reversion was assigned though it had previously been void).

13 See EC Commission Decision 2000/84 (OJ L195, 01/08/2000, p 49).

14 Ie for the purposes of the EC Treaty art 82.

- 15 See *P & S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510 (Ch), [2006] All ER (D) 285 (Jun).
- 16 See EC Commission Decision 99/230 (Case No IV/35.079/F3--Whitbread) [1999] OJ L88, 31.03.1999, p 26).
- 17 *Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trading intervening)* [2006] UKHL 38, [2006] 3 WLR 148, [2006] All ER (D) 255 (Jul), rvsg [2004] EWCA Civ 637, [2004] 3 EGLR 128, [2004] All ER (D) 322 (May).
- 18 See under the EC Treaty art 81 or art 82.
- 19 EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 16(1). This obligation is without prejudice to the rights and obligations under the EC Treaty art 234 (preliminary rulings by the European Court of Justice): EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 16(1).
- 20 See note 18 supra.
- 21 EC Council Regulation 1/2003 (OJ L01, 04.01.2003, p 01) art 16(2).

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## **13. ASSIGNMENT AND DEVOLUTION OF LEASES**

### **(1) AGREEMENT TO ASSIGN**

#### **547. Licence to assign.**

Where a lease requires the licence or consent of the landlord to be obtained to an assignment<sup>1</sup>, it is the duty of the vendor who agrees to assign the lease to obtain the necessary licence<sup>2</sup>. If the vendor fails to carry out this duty, he is liable to pay damages to the purchaser<sup>3</sup>. If the vendor fails to obtain a licence, the agreement to assign is not enforceable<sup>4</sup>; but, if the purchaser causes the landlord to refuse his consent, the purchaser may be liable to make any payment due under the agreement<sup>5</sup>. If the assignment is made without obtaining the required licence, the assignment is not void; it is effectual to vest the term in the assignee, but the landlord may treat the assignment as a cause of forfeiture provided, in the case of a covenant against assignment, that the lease contains a proviso for re-entry<sup>6</sup>. The purchaser cannot compel the vendor to assign the lease where the landlord's licence is required and cannot be obtained so that the assignment would amount to a breach of covenant<sup>7</sup>. If the licence to assign is required to be in writing, an oral licence is insufficient<sup>8</sup>, unless the necessity for written consent is waived by the landlord<sup>9</sup>. Unless the lease expressly so provides, no particular form of licence is required<sup>10</sup>. The licence extends only to the actual assignment or underlease which it authorises<sup>11</sup>, although it is usual expressly so to provide in the licence. If it is intended that the assignee is not to be let into possession until the assignment is complete, this also should be expressly stated<sup>12</sup>. A provision that the licence shall be void on certain conditions may not be relied upon by the person in breach<sup>13</sup>.

1 As to covenants requiring the landlord's consent to an assignment, and as to the withholding of that consent and the mutual position of the landlord and the tenant under the lease, see PARA 485 et seq ante. As to the questions whether and how the term devolves and the position as between the tenant and third parties, eg potential purchasers of the residue of the term, see the text and notes 2-13 infra; and PARA 548 et seq post.

2 *Lloyd v Crispe* (1813) 5 Taunt 249; *Mason v Corder* (1816) 7 Taunt 9. The Standard Conditions of Sale (4th Edn) conditions 8.3.1, 8.3.2 provide that, if a consent to let, assign or sublet is required to complete the contract for sale, the seller is to apply for the consent at his expense and to use all reasonable endeavours to



obtain it and the buyer is to provide all information and references reasonably required. If the landlord unreasonably withholds his consent, the vendor is not bound to take legal proceedings to force the landlord to consent (*Lehmann v McArthur* (1868) 3 Ch App 496); nor, where met with a ground of refusal that is not wholly unreasonable, is the vendor bound to try to make the landlord change his mind, or to approach the freeholder where the landlord holds an intermediate interest, or to give an opportunity to the proposed assignee himself to approach the freeholder (*Lipmans Wallpaper Ltd v Mason and Hodgkinton Ltd* [1969] 1 Ch 20, [1968] 1 All ER 1123).

The Standard Conditions of Sale (4th Edn) condition 8.3.3 provides that, unless he is in breach of his obligations under condition 8.3.2, either party may rescind the contract by notice to the other party if, three working days before the completion date (or before a later date on which the parties have agreed to complete the contract), the consent has not been given or has been given subject to a condition to which a party reasonably objects. Any necessary consent must be in the form which satisfies the requirement to obtain it: see condition 8.3.1(b); and *Aubergine Enterprises Ltd v Lakewood International Ltd* [2002] EWCA Civ 177, [2002] 1 WLR 2149, [2002] NLJR 364. The fact that the landlord's licence is needed does not of itself make the contract of sale conditional: *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA; *Aubergine Enterprises Ltd v Lakewood International Ltd* supra. Where the landlord's licence cannot be so obtained, the purchaser may recover any deposit he has paid even though he has negotiated unsuccessfully with the landlord for a new lease to be granted to him: *Winter v Dumerque* (1866) 14 WR 699. Cf *Pincott v Moorstons Ltd* [1937] 1 All ER 513, CA (deposit held not to be recoverable).

It may be an implied term of the Standard Conditions of Sale (4th Edn) that the purchaser will not do any act which would cause the landlord to withhold licence to assign: see *Jebco Properties Ltd v Mastforce Ltd* [1992] NPC 42 (such a term implied into a contract incorporating the National Conditions of Sale).

As to consent to assignment see PARA 485 et seq ante; and as to the right to recover damages for breach of contract for sale and the measure of damages see DAMAGES vol 12(1) (Reissue) PARA 1059; SALE OF LAND vol 42 (Reissue) PARA 254 et seq.

3 *Day v Singleton* [1899] 2 Ch 320, CA.

4 *Lehmann v McArthur* (1868) 3 Ch App 496; *Shires v Brock* (1977) 247 Estates Gazette 127, CA; cf *Day v Singleton* [1899] 2 Ch 320, CA. A purchaser may not object to the title of the land on the ground that the licence has not been obtained until the date of completion: *Ellis v Rogers* (1885) 29 ChD 661, CA. See also *Sanctuary Housing Association v Baker* (1997) 30 HLR 809, [1998] 1 EGLR 42, CA (landlord could not avoid an assignment to which it was not party or privy).

5 See *Davis v Nisbett* (1861) 10 CBNS 752.

6 *Williams v Earle* (1868) LR 3 QB 739; *Old Grovebury Manor Farm Ltd v W Seymour Sales and Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA; but see *Elliott v Johnson* (1866) LR 2 QB 120 at 126.

7 *Willmott v Barber* (1880) 15 ChD 96.

8 *Richardson v Evans* (1818) 3 Madd 218. If, however, the oral licence has been given for fraudulent purposes, relief will be given in equity: *Richardson v Evans* supra; and see *Walker v Ballamie* (1605) Cro Jac 102.

9 *Millard v Humphreys* (1918) 62 Sol Jo 505, applying *Richardson v Evans* (1818) 3 Madd 218.

10 Licences are often given by means of a formal document to which the assignee is often a party. The licence may, however, be given informally eg by way of a letter: see *Bader Properties Ltd v Linley Property Investments Ltd* (1968) 19 P & CR 620, 205 Estates Gazette 655; *Rutter v Michael John Ltd* (1966) 201 Estates Gazette 299. See also *Venetian Glass Gallery Ltd v Next Properties Ltd* [1989] 2 EGLR 42 (licence to assign held to have been delivered in escrow and so irrevocable).

11 See the Law of Property Act 1925 s 143(1); *Eyton v Jones* (1870) 21 LT 789. See also the Law of Property Act 1925 s 143(2) (preservation of rights of forfeiture), s 143(3) (licence to one of two or more tenants and licence in respect of part of the demised property); and PARA 618 post.

12 *West v Dobb* (1870) LR 5 QB 460, Ex Ch.

13 *Cerium Investments Ltd v Evans* (1991) 62 P & CR 203, [1991] 1 EGLR 80, CA.

## UPDATE

### 547 Licence to assign

NOTE 2--A party will lose its right to rescind under the Standard Conditions of Sale (4th Edn) condition 8.3.3 if it not exercised promptly: *Alchemy Estates Ltd v Astor* [2008] EWHC 2675 (Ch), [2009] 1 WLR 940, [2008] All ER (D) 35 (Nov).

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#### **548. Agreement to assign must be in writing.**

The sale of leasehold premises is, in general, governed by the same principles as the sale of freehold property<sup>1</sup>. Thus, the agreement must satisfy the statutory provisions relating to contracts for the sale or other dispositions of land<sup>2</sup>. This rule applies whenever there is in effect an agreement for the transfer of the premises for the residue of the term; where, for example, the tenant agrees to give possession to another who is to be tenant for the residue of the term<sup>3</sup> or merely to give up possession of a house to another<sup>4</sup>. Even though the assignment has been completed by transfer of the premises in pursuance of an oral agreement, the vendor cannot recover the price on the contract, but, if the purchaser has admitted the amount to be due, it will be recoverable on an account stated<sup>5</sup>.

1 As to the conveyancing aspect see SALE OF LAND; as to investigation of title see PARA 89 et seq ante; and SALE OF LAND vol 42 (Reissue) PARAS 138, 140; as to recitals in assurances of leaseholds see SALE OF LAND vol 42 (Reissue) PARA 300; and as to the restrictions on requiring premiums on assignment see PARA 485 ante, PARA 925 et seq post.

A contract for the assignment of a lease is an estate contract which must be registered as such if it is to be binding on subsequent purchasers for value: see the Land Charges Act 1972 s 2(4), Class C(iv); and LAND CHARGES vol 26 (2004 Reissue) PARAS 632, 643. Where the title to the lease is registered, the contract should be protected by notice on the register: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq.

2 The agreement must satisfy the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante. The contract must be in writing even though the unexpired residue of the term is less than three years (*Poultny v Holmes* (1720) 1 Stra 405; *Barrett v Rolph* (1845) 14 M & W 348), or the tenancy to be assigned is a yearly tenancy granted orally (*Botting v Martin* (1808) 1 Camp 317).

3 *Buttermere v Hayes* (1839) 5 M & W 456.

4 *Kelly v Webster* (1852) 12 CB 283; *Smart v Harding* (1855) 15 CB 652; *Hodgson v Johnson* (1858) EB & E 685, doubted in *Pullbrook v Lawes* (1876) 1 QBD 284. Under a contract to take over from the tenant a farm held under an expired lease if the landlord should accept the new tenant on the covenants in the lease, the lease itself must be handed over by the tenant to the proposed new tenant: *Burton v Banks* (1860) 2 F & F 213.

5 *Cocking v Ward* (1845) 1 CB 858; *Pulbrook v Lawes* (1876) 1 QBD 284; and see also CONTRACT vol 9(1) (Reissue) PARA 1051.

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## **(2) ASSIGNMENT OF LEASES**

#### **549. Assignment of legal estate must normally be by deed.**

An assignment is ineffective to pass the legal estate in leasehold premises unless it is made by deed<sup>1</sup>, even if that estate arises under an oral grant of a yearly tenancy<sup>2</sup>. However, if made for value, an assignment under hand operates as an agreement to assign and vests an equitable interest in the assignee<sup>3</sup>. The assignor may assign the premises direct to himself and another<sup>4</sup> or assign them to or vest them in himself<sup>5</sup>.

1 See the Law of Property Act 1925 s 52(1); DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14; and see *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA, applied in *Camden London Borough Council v Alexandrou* (1997) 30 HLR 534, 74 P & CR D33, CA (assignment of periodic tenancy must be by deed); but cf *Parc (Battersea) Ltd (in administrative receivership) v Hutchinson* [1999] 2 EGLR 33, [1999] All ER (D) 297 (assignment taking effect by operation of law; see PARA 107 ante). See also *City Permanent Building Society v Miller* [1952] Ch 840, [1952] 2 All ER 621, CA. As to the conveyances to which the Law of Property Act 1925 s 52 (as amended) does not apply see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 15. At common law an assignment of a chattel interest in corporeal hereditaments might be made by word of mouth: see Littleton's Tenures s 59; Co Litt 48a note (1), 49a, 85a note (2), 338a; 3 Preston's Abstracts of Title (2nd Edn) 115-117. The requirement of writing was introduced by the Statute of Frauds (1677) s 3 (repealed) and a deed was made necessary by the Real Property Act 1845 s 3 (repealed). As to assignment by the sheriff on sale under an execution see CIVIL PROCEDURE vol 12 (2009) PARA 1317; and as to registration of title on the assignment of leaseholds and transfers of registered leaseholds see LAND REGISTRATION.

2 *Botting v Martin* (1808) 1 Camp 317 (decided on the Statute of Frauds (1677)); *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA.

3 See PARA 117 ante. The assignment under hand must then satisfy the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): see PARA 79 ante.

4 See the Law of Property Act 1925 s 72(1).

5 See *ibid* s 72(3).

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## 550. VAT and stamp duty land tax on assignments.

Where the residue of the term of a lease or the reversion to the lease is assigned or conveyed, a charge to VAT arises in certain circumstances<sup>1</sup>. An apportionment of rent between the assignee and the assignor does not, however, give rise to a charge to VAT<sup>2</sup>.

For the purposes of stamp duty land tax, in the case of an assignment of a lease<sup>3</sup> the assumption by the assignee of the obligation to pay rent<sup>4</sup>, or to perform or observe any other undertaking of the tenant under the lease, does not count as chargeable consideration for the assignment<sup>5</sup>. Nor does a reverse premium<sup>6</sup> on an assignment count as chargeable consideration<sup>7</sup>. Where, under arrangements made in connection with the assignment of a lease:

- 1123 (1) the assignee, or any person connected with him or acting on his behalf, pays a deposit, or makes a loan, to any person; and
- 1124 (2) the repayment of all or part of the deposit or loan is contingent on anything done or omitted to be done by the assignee or on the death of the assignee,

the amount of the deposit or loan (disregarding any repayment) is, however, to be taken<sup>8</sup> to be consideration other than rent given for the assignment of the lease<sup>9</sup>; but this does not apply in relation to a deposit if the amount that would otherwise fall to be so treated in relation to the assignment of the lease is not more than twice the relevant maximum rent<sup>10</sup>.

Where the grant of a lease is exempt from charge by virtue of any of the specified statutory provisions<sup>11</sup>, the first assignment of the lease that is not exempt from charge by virtue of any of those provisions, and in relation to which the assignee does not acquire the lease as a bare trustee of the assignor, is treated for the purposes of stamp duty land tax as if it were the grant of a lease by the assignor:

- 1125 (a) for a term equal to the unexpired term of the lease referred to above; and
- 1126 (b) on the same terms as those on which the assignee holds that lease after the assignment<sup>12</sup>;

but this does not apply where the relief in question is group relief, reconstruction or acquisition relief or charities relief and is withdrawn as a result of a disqualifying event<sup>13</sup> occurring before the effective date of the assignment<sup>14</sup>. Except where the first assignment is so treated as a grant of a lease, where a lease is assigned, anything that but for the assignment would be required or authorised to be done by or in relation to the assignor under or by virtue of the statutory provisions relating to certain adjustments and returns<sup>15</sup> must, if the event giving rise to the adjustment or return occurs after the effective date of the assignment, be done instead by or in relation to the assignee<sup>16</sup>.

1 See generally VALUE ADDED TAX 49(1) (2005 Reissue) PARA 156 et seq.

2 See [1991] STI 485.

3 For the meaning of 'lease' see PARA 93 note 5 ante.

4 For the meaning of 'rent' see PARA 124 note 20 ante.

5 Finance Act 2003 s 120, Sch 17A para 17 (s 120, Sch 17A added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22).

6 In relation to the assignment of a lease, a 'reverse premium' means a premium moving from the assignor to the assignee: Finance Act 2003 Sch 17A para 18(2)(b) (as added: see note 5 supra).

7 Ibid Sch 17A para 18(1) (as added: see note 5 supra).

8 Ie for the purposes of ibid Pt 4 (ss 42-124) (as amended): see further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

9 Ibid Sch 17A para 18A(2) (Sch 17A para 18A added by the Finance (No 2) Act 2005 s 49, Sch 10 Pt 1 paras 1, 14).

10 Finance Act 2003 Sch 17A para 18A(3) (as added: see note 9 supra). For the meaning of 'the relevant maximum rent' see Sch 17A para 18A(4) (as so added); and PARA 124 note 27 ante. See further Sch 17A para 18A(5), (6) (as so added); and PARA 124 ante.

11 Ie by virtue of any of the provisions specified in ibid Sch 17A para 11(3) (as added). The provisions are (1) s 57A (as added) (sale and leaseback arrangements); (2) Sch 7 Pt 1 (paras 1-6) (as amended) or Sch 7 Pt 2 (paras 7-13) (as amended) (group relief or reconstruction or acquisition relief); (3) s 66 (as amended) (transfers involving public bodies); (4) Sch 8 (as amended) (charities relief); and (5) any such regulations as are mentioned in s 123(3) (regulations reproducing in relation to stamp duty land tax the effect of enactments providing for exemption from stamp duty): Sch 17A para 11(3) (as added: see note 5 supra). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

12 Ibid Sch 17A para 11(1), (2) (as added (see note 5 supra); Sch 17A para 11(1) substituted by the Finance (No 2) Act 2005 Sch 10 Pt 1 paras 1, 12).

13 For these purposes, 'disqualifying event' means (1) in relation to the withdrawal of group relief, the event falling within the Finance Act 2003 Sch 7 para 3(1)(a) (purchaser ceasing to be a member of the same group as the vendor), as read with Sch 7 para 4A (as added); (2) in relation to the withdrawal of reconstruction or acquisition relief, the change of control of the acquiring company mentioned in Sch 7 para 9(1)(a) or, as the case may be, the event mentioned in Sch 7 para 11(1)(a) or (2)(a); (3) in relation to the withdrawal of charities relief, a disqualifying event as defined in Sch 8 para 2(3) or Sch 8 para 3(2) (as added): Sch 17A para 11(5) (as added (see note 5 supra); amended by the Finance (No 2) Act 2005 Sch 10 Pt 1 paras 1, 7). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

14 Finance Act 2003 Sch 17A para 11(4) (as added: see note 5 supra).

15 le under or by virtue of (1) *ibid* s 80 (as amended) (adjustment where contingency ceases or consideration is ascertained); (2) s 81A (as added) (return or further return in consequence of later linked transaction); (3) Sch 17A para 3 or 4 (as added) (return or further return required where lease for indefinite period continues); (4) Sch 17A para 8 (as added) (adjustment where rent ceases to be uncertain): Sch 17A para 12(1) (as added: see note 5 supra). See further PARA 124 ante; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

16 *Ibid* Sch 17A para 12(1), (3) (as added: see note 5 supra). So far as necessary for giving effect to this provision, anything previously done by or in relation to the assignor must be treated as if it had been done by or in relation to the assignee: Sch 17A para 12(2).

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### **551. Assignment of part of land comprised in a lease.**

Where in a conveyance for valuable consideration, other than a mortgage, made on or after 1 January 1926, of part of the land<sup>1</sup> comprised in a lease<sup>2</sup>, for the residue of the term or interest created by the lease, the rent<sup>3</sup> reserved by such a lease or a part thereof is, without the consent of the lessor<sup>4</sup>, expressed to be:

- 1127 (1) charged exclusively on the land conveyed or any part thereof in exoneration of the land retained by the assignor or other land; or
- 1128 (2) charged exclusively on the land retained by the assignor or any part thereof in exoneration of the land conveyed or other land; or
- 1129 (3) apportioned between the land conveyed or any part thereof and the land retained by the assignor or any part thereof,

then, without prejudice to the rights of the lessor, such charge or apportionment is binding as between the assignor and the assignee under the conveyance and their respective successors in title<sup>5</sup>.

Where:

- 1130 (a) any default is made in payment of the whole or part of a rent by the person who, by reason of such charge or apportionment, is liable to pay the same; or
- 1131 (b) any breach occurs of any of the leases's<sup>6</sup> covenants, other than, in the case of an apportionment, the covenant to pay the entire rent, or conditions contained in the lease, so far as the same relate to land retained or conveyed, as the case may be,

the lessee for the time being of any other land comprised in the lease, in whom, as respects that land, the residue of the term or interest created by the lease is vested, and who pays or is required to pay the whole or part of the rent which ought to have been paid by the defaulter or

who incurs any costs, damages or expenses by reason of the breach of covenant or condition, may enter into and distrain on the land comprised in the lease in respect of which the default or breach is made or occurs, or any part of that land, and dispose according to law of any distress found. He may also take possession of the income of that land until, so long as the term or interest created by the lease is subsisting, by means of such distress and receipt of income or otherwise the whole or part of the rent, charged or apportioned as aforesaid, so unpaid, and all costs, damages and expenses incurred by reason of the non-payment thereof or of the breach of those covenants and conditions, are fully paid or satisfied<sup>7</sup>.

The remedies so conferred take effect so far only as they might have been conferred by the conveyance whereby the rent or any part of it is expressed to be so charged or apportioned; but a trustee, personal representative, mortgagee or other person in a fiduciary position has, and is deemed always to have had, power to confer the same or like remedies<sup>8</sup>; and those remedies apply only where the conveyance whereby the rent or any part thereof is expressly to be charged or apportioned is made after 31 December 1925 and do not apply where the rent is charged exclusively or legally apportioned with the consent of the owner or lessor<sup>9</sup>.

Assignment of part of the land comprised in the lease without the landlord's consent does not create two separate holdings with separate tenants for each holding<sup>10</sup>.

1 For the meaning of 'land' see PARA 17 note 1 ante.

2 'Lease' includes an underlease or other tenancy: Law of Property Act 1925 s 205(1)(xxiii).

3 For these purposes, 'rent' includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment in money or money's worth, reserved or issuing out of or charged upon land, but does not include mortgage interest: *ibid* s 205(1)(xxiii).

4 For the meaning of 'lessor' see PARA 240 note 6 ante.

5 Law of Property Act 1925 s 190(3). Section 190(3) does not create a contract between the subsequent owners of the two parts: *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA.

The Law of Property Act 1925 s 190 applies only if and in so far as a contrary intention is not expressed in the conveyance whereby the rent or any part thereof is expressed to be so charged or apportioned and takes effect subject to the terms of that conveyance and to the provisions therein contained: s 190(6).

The rule of law relating to perpetuities (see PERPETUITIES AND ACCUMULATIONS) does not affect the powers or remedies conferred by s 190 or any like powers or remedies expressly conferred, before, on or after 1 January 1926, by an instrument: s 190(8).

6 For the meaning of 'lessee' see PARA 145 note 3 ante.

7 Law of Property Act 1925 s 190(4). See also note 5 *supra*.

8 *Ibid* s 190(5). See also note 5 *supra*.

9 *Ibid* s 190(7). See also note 5 *supra*.

10 *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA (cited in PARA 562 note 5 *post*).

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### **(3) ASSIGNMENT OF REVERSION**

#### **552. Form of transfer.**

An assignment of the reversion on a lease must be by deed<sup>1</sup>. Under statute<sup>2</sup> where land<sup>3</sup> is subject to a lease the conveyance of a reversion in the land expectant on the determination of the lease is valid without any attornment<sup>4</sup> of the lessee<sup>5</sup>; but nothing in this provision:

- 1132 (1) affects the validity of any payment of rent by the lessee to the person making the conveyance before notice of the conveyance is given to him by the person entitled thereunder; or
- 1133 (2) renders the lessee liable for any breach of covenant to pay rent, on account of his failure to pay rent to the person entitled under the conveyance before such notice is given to the lessee<sup>6</sup>.

An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor<sup>7</sup>, if made without the consent of the lessor, is void<sup>8</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14. This applies to the assignment of a reversion on a yearly tenancy: *Brawley v Wade* (1824) M'Cle 664.

2 See the Law of Property Act 1925 s 151(1): see the text and notes 3-6 infra. Section 151 replaces the Administration of Justice Act 1705 ss 9, 10 (as amended by the Distress for Rent Act 1737 s 11). At common law attornment was necessary for a grant but not for a devise: see *Shep Touch* (8th Edn) 255-257; Littleton's Tenures s 586; *Doe d Wright v Smith* (1838) 8 Ad & El 255 at 260; *Vigers v Dean and Chapter of St Paul's* (1849) 14 QB 909 at 928, Ex Ch. The statute applies to all tenancies even though not created by deed: see the definition of 'lease' in the Law of Property Act 1925 s 154 (cited in PARA 145 note 1 ante).

3 For the meaning of 'land' see PARA 17 note 1 ante.

4 'Attornment' means an acknowledgment by a person in occupation of land that some other person is his landlord: see PARA 3 ante.

5 For the meaning of 'lessee' see PARA 145 note 3 ante.

6 Law of Property Act 1925 s 151(1)(a); and see *Watts v Ognell* (1607) Cro Jac 192; *Birch v Wright* (1786) 1 Term Rep 378 at 385; and PARA 262 ante. It was held in *Allcock v Moorhouse* (1882) 9 QBD 366, CA (decided under the Administration of Justice Act 1705 s 9 (repealed)) that the statute did not give to the assignee of the reversion a right of action for rent against a yearly tenant by an oral grant who had parted with his estate in the premises. Notice of the grant was not necessary before ejectment for breach of covenant other than a covenant for payment of rent: *Scaltock v Harston* (1875) 1 CPD 106. As to the vesting of the reversion and the rent in different persons see *Taylor v Martindale* (1842) 1 Y & C Ch Cas 658; *Vigers v Dean and Chapter of St Paul's* (1849) 14 QB 909 at 917, Ex Ch; *Franklin v Howes* (1871) 19 WR 581.

7 For the meaning of 'lessor' see PARA 240 note 6 ante.

8 Law of Property Act 1925 s 151(2). Section 151(2) does not, however, apply to an attornment (1) made pursuant to a judgment of a court of competent jurisdiction; or (2) to a mortgagee by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or (3) to any other person rightfully deriving title under the lessor: s 151(2).

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### **553. Duty to notify tenant of assignment of reversion.**

If the interest of the landlord<sup>1</sup> under a tenancy<sup>2</sup> of premises which consist of or include a dwelling<sup>3</sup> is assigned<sup>4</sup>, the new landlord must give notice in writing of the assignment, and of

his name and address<sup>5</sup>, to the tenant not later than the next day on which rent is payable under the tenancy or, if that is within two months of the assignment, the end of that period of two months<sup>6</sup>. A person who is the new landlord under such a tenancy and who fails without reasonable excuse to give the notice so required commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>7</sup>.

Where a new landlord is so required to give notice to a tenant of an assignment to him, then if:

- 1134 (1) the tenant is a qualifying tenant<sup>8</sup> within the meaning of the provisions of the Landlord and Tenant Act 1987 which confer a collective right of first refusal on the tenants of certain flats<sup>9</sup>; and
- 1135 (2) the assignment was a relevant disposal<sup>10</sup> within the meaning of those provisions affecting premises to which at the time of the disposal those provisions applied<sup>11</sup>,

the landlord must also give notice in writing to the tenant to the following effect<sup>12</sup>. The notice must state:

- 1136 (a) that the disposal to the landlord was one to which the provisions referred to in head (1) above applied;
- 1137 (b) that the tenant, together with other qualifying tenants, may have the right under those provisions to obtain information about the disposal, and to acquire the landlord's interest in the whole or part of the premises in which the tenant's flat is situated; and
- 1138 (c) the time within which any such right must be exercised, and the fact that the time would run from the date of receipt of notice<sup>13</sup> by the requisite majority of qualifying tenants<sup>14</sup>.

A person who is so required to give notice and who fails, without reasonable excuse, to do so within the time allowed<sup>15</sup> commits a summary offence and is liable on conviction to a fine not exceeding level 4 on the standard scale<sup>16</sup>.

The person who was the landlord under the tenancy immediately before the assignment ('the old landlord') is liable to the tenant in respect of any breach of any covenant, condition or agreement under the tenancy occurring before the end of the relevant period<sup>17</sup> in like manner as if the interest assigned were still vested in him; and, where the new landlord is also liable to the tenant in respect of any such breach occurring within that period, he and the old landlord are jointly and severally liable in respect of it<sup>18</sup>.

No duty is imposed by statute in respect of landlords who assign reversions on leases of premises not consisting of or including a dwelling; but, for the purposes of the provisions applying to business tenancies<sup>19</sup> and certain other tenancies<sup>20</sup>, service of notice by the tenant on the last person known by him to be the landlord is effective against the actual landlord if no notice has been given to the tenant of the assignment of the reversion<sup>21</sup>.

1 For the meaning of 'landlord' see PARA 52 note 1 ante.

2 For these purposes, 'tenancy' includes a statutory tenancy: Landlord and Tenant Act 1985 s 3(4)(a). For the meanings of 'tenancy' generally, and 'statutory tenancy', see PARA 52 note 1 ante.

3 For the meaning of 'dwelling' see PARA 52 note 2 ante.

4 For these purposes, references to the assignment of the landlord's interest include any conveyance other than a mortgage or charge: Landlord and Tenant Act 1985 s 3(4)(b).

5 For the meaning of 'address' see PARA 52 note 4 ante.



6 Landlord and Tenant Act 1985 s 3(1). If trustees constitute the new landlord, a collective description of the trustees as trustees of the trust in question may be given as the name of the landlord; and, where such a collective description is given (1) the address of the new landlord may be given as the address from which the affairs of the trust are conducted; and (2) a change in the persons who are for the time being the trustees of the trust is not to be treated as an assignment of the landlord's interest: s 3(2).

7 Ibid s 3(3). As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate see s 33; and PARA 52 note 6 ante; and as to the power of local housing authorities to prosecute such an offence see s 34; and PARA 52 note 6 ante.

8 For the meaning of 'qualifying tenant' see PARA 1748 post.

9 Ie within the meaning of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq post.

10 For the meaning of 'relevant disposal' see PARA 1750 post.

11 As to premises to which the Landlord and Tenant Act 1987 Pt I (as amended) applies see PARA 1746 post.

12 Landlord and Tenant Act 1985 s 3A(1) (s 3A added by the Housing Act 1996 s 93(1)).

13 Ie notice under the Landlord and Tenant Act 1985 s 3A (as added: see note 12 supra).

14 Ibid s 3A(2) (as added: see note 12 supra). For the meaning of 'the requisite majority of qualifying tenants' for the purposes of the Landlord and Tenant Act 1987 Pt I (as amended) see PARA 1749 post.

15 Ie the time allowed under the Landlord and Tenant Act 1985 s 3(1): see the text to note 6 supra.

16 Ibid s 3A(3) (as added: see note 12 supra).

17 For these purposes, 'the relevant period' means the period beginning with the date of the assignment and ending with the date when (1) notice in writing of the assignment, and of the new landlord's name and address, is given to the tenant by the new landlord, whether in accordance with ibid s 3(1) (see the text and notes 1-6 supra) or not; or (2) notice in writing of the assignment, and of the new landlord's name and last-known address, is given to the tenant by the old landlord, whichever happens first: s 3(3B) (s 3(3A), (3B) added by the Landlord and Tenant Act 1987 s 50).

18 Landlord and Tenant Act 1985 s 3(3A) (as added: see note 17 supra). Nothing in the Landlord and Tenant (Covenants) Act 1995 (see PARAS 554, 578 et seq post) affects the operation of the Landlord and Tenant Act 1985 s 3(3A) (as so added): Landlord and Tenant (Covenants) Act 1995 s 26(2).

19 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq post.

20 Eg long residential tenancies falling within ibid Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) or long leaseholds falling within the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq post).

21 See the Landlord and Tenant Act 1927 s 23(2); the Landlord and Tenant Act 1954 s 66(4); the Local Government and Housing Act 1989 Sch 10 para 20(5); and PARAS 703, 1238, 1429 post. See also the Leasehold Reform Act 1967 s 22(5) (as amended); and PARA 1429 post.

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## **(4) BENEFIT AND BURDEN OF COVENANTS**

### **(i) Introduction**

#### **554. Passing of benefit and burden; in general.**

It is a general principle of the law of contract that a contract cannot confer rights or impose obligations on persons who are not parties to the contract<sup>1</sup>, although the Contracts (Rights of Third Parties) Act 1999 now enables a third party to enforce a term of certain contracts<sup>2</sup> in his own right if the contract expressly provides that he may or the term purports to confer a benefit on him<sup>3</sup>. A lease of land may, however, last for many years and the reversion and the term are normally freely transferable<sup>4</sup>. Consequently, it was necessary that covenants in leases should be enforceable between the successors in title of the original landlord and the tenant and this was achieved either under the doctrine of privity of estate<sup>5</sup>, by virtue of statute<sup>6</sup>, by express assignment<sup>7</sup> or by the rule that in equity the burden of a restrictive covenant may run with the land<sup>8</sup>.

The original parties to the lease might, however, remain liable to each other, even though their interest had passed to a successor in title, by virtue of the doctrine of privity of contract<sup>9</sup>. In particular, a former tenant might remain liable for breaches of the terms of a lease which he had assigned many years earlier. In 1988, the Law Commission recommended radical reform of the law in this area<sup>10</sup> and the Landlord and Tenant (Covenants) Act 1995 now embodies many of the commission's proposals<sup>11</sup>. The 1995 Act distinguishes between 'new tenancies', which are tenancies granted on or after 1 January 1996<sup>12</sup>, and other tenancies. The majority of its provisions<sup>13</sup> apply only to new tenancies<sup>14</sup>; but the provisions restricting the liability of the former tenant or his guarantor for rent or service charge on assignment or subsequent variation of the lease<sup>15</sup> apply to both new and other tenancies<sup>16</sup>. Those provisions with regard to rent or service charge have already been discussed<sup>17</sup> and the provisions of the 1995 Act with regard to the benefits and burdens of other landlord and tenant covenants are discussed below<sup>18</sup>. In relation to tenancies granted before 1 January 1996, or granted on or after that date in pursuance of an agreement entered into, or an order of a court made, before that date<sup>19</sup>, the relevant rules contained in the Law of Property Act 1925 with regard to the benefits and burdens of other landlord and tenant covenants<sup>20</sup> and the common law rules so far as not superseded by the 1925 Act, continue to apply as discussed in the following paragraphs<sup>21</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 748; and see eg *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446, [1962] 1 All ER 1, HL; *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

2 For exceptions see the Contracts (Rights of Third Parties) Act 1999 s 6 (as amended); and CONTRACT.

3 See *ibid* s 1(1). As to the conditions to which this right is subject see s 1(2)-(6); and CONTRACT.

4 The term is freely transferable unless the tenant has bargained away his freedom of alienation, whereas a licensee has a purely personal right: see PARA 6 *et seq ante*.

5 The resolutions in *Spencer's Case* (1583) 5 Co Rep 16a (see PARA 559 *post*) are the basis of the common law doctrine. 'Privity of estate' simply means that at the relevant time the parties stand in the relation of landlord and tenant. Thus, before any assignment of the lease or of the reversion there is privity of contract and privity of estate between the original landlord and the original tenant. If the reversion is assigned to A and the lease to B, there is privity of estate between A and B as long as the two interests are vested in them. If B assigns the lease to C, privity of estate ends between A and B and commences between A and C. There is, however, no privity of estate as between the assignor and assignee of a lease: see *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA.

6 *Ie* by virtue of the Law of Property Act 1925 ss 141, 142: see PARAS 567, 571 *post*.

7 An example is a tenant's option to purchase the freehold reversion, which is collateral in the above sense and thus does not automatically pass to an assignee of the lease: *Woodall v Clifton* [1905] 2 Ch 257. The benefit of the option may be expressly assigned to the assignee; and the circumstances may be such that an assignment of the lease operates as an assignment of the benefit of the option even without express mention: see eg *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA. See also PARA 135 *ante*.

8 See *Tulk v Moxhay* (1848) 2 Ph 774; EQUITY vol 16(2) (Reissue) PARA 615; and PARA 565 *post*. At common law the general rule is that the burden of covenants never runs with the land: *Austerberry v Oldham Corpn* (1885) 29 ChD 750, CA. The relationship of landlord and tenant may be regarded as an exception to this rule: see *Austerberry v Oldham Corpn* *supra* at 781. See also *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch

402 at 433, [1965] 3 All ER 673 at 680, CA, per Harman LJ; *Dowager Duchess Chandos v Brownlow* (1791) 2 Ridg Parl Rep 345 at 407.

9 See PARA 556 post.

10 See *Landlord and Tenant: Privity of Contract and Estate* (Law Com no 174) (1988).

11 See PARAS 289-291 ante, PARA 578 et seq post.

12 See the Landlord and Tenant (Covenants) Act 1995 s 1(3); and PARA 578 post.

13 *le* *ibid* ss 3-16, 21: see PARAS 578 et seq, 611 post.

14 *Ibid* s 1(1).

15 *le* *ibid* ss 17-20 (as amended): see PARAS 289-291 ante.

16 *Ibid* s 1(2).

17 See PARAS 289-291 ante.

18 See PARA 578 et seq post.

19 See the Landlord and Tenant (Covenants) Act 1995 s 1(3)(a), (b).

20 *le* the Law of Property Act 1925 ss 77-79, 141, 142 (as amended): see PARAS 559, 566-567, 571, 575-577 post.

21 See PARA 556 et seq post.

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### **555. Passing on severance of the reversion.**

The reversion may be divided as regards either the estate or the land. The reversion is divided as regards the estate where the reversioner grants a new lease which is subject to the existing lease, that is a lease of the reversion; and is divided as regards the land where the reversion in a part of the land becomes vested in one person and the reversion in another part becomes vested in another person. Severance of the reversion and of the incidents attached to the reversion does not sever the tenancy into two tenancies; there remains one single tenancy after the severance<sup>1</sup>. An assignment of the reversion to a bare trustee or nominee for the landlord does not, however, effect a severance<sup>2</sup>.

Where the reversion is divided as regards the estate, different statutory rules apply depending on whether or not the tenancy is a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995<sup>3</sup>.

Where the reversion is divided as regards the land, at common law rent was apportionable between the two reversioners in proportion to the value of the respective areas of land<sup>4</sup> and the benefit and burden of covenants passed so far as they concerned the part of the reversion transferred<sup>5</sup>. The benefit of a condition, as opposed to a covenant, was not severable and did not pass to an assignee of a part<sup>6</sup>; but that rule has now been changed by statute.

Notwithstanding the severance by conveyance, surrender or otherwise of the reversionary estate in any land<sup>7</sup> comprised in a lease<sup>8</sup> (so that the reversion in one part vests in one person and the reversion in another part vests in another person) and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land

comprised therein, every condition or right of re-entry<sup>9</sup>, and every other condition contained in the lease<sup>10</sup>, is apportioned and remains annexed to the severed parts of the reversionary estate as severed and is in force with respect to the term whereon each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease<sup>11</sup>.

1 See *Jelley v Buckman* [1974] QB 488, [1973] 3 All ER 853, CA; distinguished in *William Skelton & Son Ltd v Harrison and Pinder Ltd* [1975] QB 361, [1975] 1 All ER 182 (notice served to determine a tenancy under the Landlord and Tenant Act 1954 s 24(3)(a), in which the landlords severed the reversion both as to the estate and as to the land). See also *Nevill Long & Co (Boards) Ltd v Firmenich & Co (unlimited company)* (1983) 47 P & CR 59, CA (tenancy of land and a right of way over other land not converted into two tenancies by severance of the reversion); cf *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA (cited in PARA 562 note 5 post).

2 *Persey v Bazley* (1983) 47 P & CR 37, CA.

3 If the tenancy is not a new tenancy, then the Law of Property Act 1925 ss 141, 142 apply (see PARAS 567, 571 et seq post) but they do not apply to new tenancies (see the Landlord and Tenant (Covenants) Act 1995 s 30(4)(b)). As to the apportionment of liability where part only of the reversion is assigned see s 9; and PARA 586 post. For the meaning of 'new tenancy' for those purposes see PARA 578 post.

4 *Bliss v Collins* (1822) 5 B & Ald 876; *Jelley v Buckman* [1974] QB 488, [1973] 3 All ER 853, CA.

5 Under 32 Hen 8 c 34 (Grantees of Reversions) (1540) (now replaced by the Law of Property Act 1925 ss 141, 142) the tenant's covenants could be severed: *Twynam v Pickard* (1818) 2 B & Ald 105; *Badeley v Vigurs* (1854) 4 E & B 71; *Swansea Corpn v Thomas* (1882) 10 QBD 48; and see *Attoe v Hemmings* (1614) 2 Bulst 281.

6 Co Litt 215a, resolutions 5, 7; *Knight's Case* (1588) 5 Co Rep 54b at 55h; *Dumpor's Case* (1603) 4 Co Rep 119b; *Piggott v Middlesex County Council* [1909] 1 Ch 134 (severance by compulsory purchase). The condition could be severed where the severance took place by operation of law: see eg *Piggott v Middlesex County Council* supra.

7 For the meaning of 'land' see PARA 17 note 1 ante.

8 For the meaning of 'lease' see PARA 145 note 1 ante.

9 For these purposes, 'right of re-entry' includes a right to determine the lease by notice to quit or otherwise; but, where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within one month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate therein a counter-notice expiring at the same time as the original notice: Law of Property Act 1925 s 140(2) (amended by the Agricultural Holdings Act 1948 ss 98, 100(1), Sch 8), overruling on this matter *Re Bebington's Tenancy, Bebington v Wildman* [1921] 1 Ch 559. As to the invalidity of a notice to quit given after the severance of the reversion see *Smith v Kinsey* [1936] 3 All ER 73, CA; and as to notice to quit part of an agricultural holding see AGRICULTURAL LAND vol 1 (2008) PARAS 395-398. For the meaning of 'lessee' see PARA 145 note 3 ante.

10 The right to give a notice determining a tenancy of business premises under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 post) is not a condition or right of re-entry contained in the lease and thus cannot be apportioned under the Law of Property Act 1925 s 140 (as amended): *Dodson Bull Carpet Co Ltd v City of London Corpn* [1975] 2 All ER 497, [1975] 1 WLR 781.

11 See the Law of Property Act 1925 s 140(1). Section 140 (as amended) applies to leases made before, on or after 1 January 1926 and whether the severance of the reversionary estate or the partial avoidance or cesser of the term was effected before, on or after that date; but, where the lease was made before 1 January 1882, nothing in s 140 affects the operation of a severance of the reversionary estate or partial avoidance or cesser of the term which was effected before 1 January 1926: s 140(3). Section 140 (as amended) applies whether or not the tenancy is a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995. For the meaning of 'new tenancy' for those purposes see PARA 578 post.

PARAS 1386-2000)/13. ASSIGNMENT AND DEVOLUTION OF LEASES/(4) BENEFIT AND BURDEN OF COVENANTS/(ii) Tenancies granted before 1 January 1996/A. RIGHTS OF THE ORIGINAL PARTIES TO THE LEASE/556. Rights and obligations of the landlord; the position at common law.

## **(ii) Tenancies granted before 1 January 1996**

### **A. RIGHTS OF THE ORIGINAL PARTIES TO THE LEASE**

#### **556. Rights and obligations of the landlord; the position at common law.**

Privity of contract remains between the original landlord and the original tenant even after the assignment of the lease. Consequently, the liability of the original tenant to the original landlord continues notwithstanding that the lease has been assigned and notwithstanding that the original landlord has a remedy against the assignee for the rent and on the covenants running with the land and notwithstanding a surrender of part of the demised premises or a variation in the terms of the lease agreed between the landlord and the assignee<sup>1</sup> in respect of the period for which the assignee holds the term<sup>2</sup>. Where a lease had been assigned and the liquidator or trustee in bankruptcy of the assignee disclaims the lease, the original lessee remained liable to pay the rent throughout the term<sup>3</sup>. The remedy as against the original lessee is founded on privity of contract, the remedy as against the assignee on privity of estate. Where a lease contains an option to renew the lease, the exercise of the option ordinarily involves the creation of a new lease<sup>4</sup>, and as regards the new lease there is no privity of contract between the landlord and the original tenant under the old lease which contained the option to renew; but the right given to a tenant may be simply to extend the term, in which case privity of contract endures between the original parties, even during the extended term<sup>5</sup>. The original landlord may sue either the original tenant or the assignee or both at the same time; but he may obtain only one satisfaction<sup>6</sup>. Furthermore, if by an accord and satisfaction<sup>7</sup> the landlord releases the assignee, the original tenant is also released, at least where the landlord does not expressly reserve his rights against the original tenant and make it clear that it is only the assignee whom he intends to release<sup>8</sup>. The release of a surety does not, however, operate to release the tenant<sup>9</sup>. Once the original landlord has transferred the reversion, the right to recover rent and to enforce covenants which refer to the subject matter of the lease passes to the transferee<sup>10</sup>, even as against the original tenant, and the transferee alone may then sue on the covenants in the lease<sup>11</sup>.

Where there have been successive assignments of a lease and the landlord sues the original tenant under his covenant to pay the rent for the remainder of the term because the present tenant is insolvent, the original tenant may not compel an intermediate tenant to sue his successor who is solvent forcing him to pay the rent to the landlord. Nor may the intermediate tenant be compelled to assign the benefit of his covenant to the original tenant<sup>12</sup>.

The operation of these common law rules is now tempered by statute<sup>13</sup>.

1 *Barnard v Godscall* (1612) Cro Jac 309; *Thursby v Plant* (1670) 1 Saund 230; *Auriol v Mills* (1790) 4 Term Rep 94; *Staines v Morris* (1812) 1 Ves & B 8; *Orgill v Kemshead* (1812) 4 Taunt 642; *Bickford v Parson* (1845) 5 CB 920; *Baynton v Morgan* (1888) 22 QBD 74, CA; *Gilbey v Cossey* (1912) 106 LT 607; *John Betts & Sons Ltd v Price* (1924) 40 TLR 589; *Baker v Merckel (Anson, third party)* [1960] 1 QB 657, [1960] 1 All ER 668, CA; *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P & CR 393; *Thames Manufacturing Co Ltd v Perrotts (Nichol & Peyton) Ltd* (1984) 50 P & CR 1; *Selous Street Properties Ltd v Oronel Fabrics Ltd* [1984] 1 EGLR 50. (1984) 270 Estates Gazette 643; *Allied London Investments Ltd v Hambro Life Assurance Ltd* (1985) 50 P & CR 207, [1985] 1 EGLR 45, CA; *Weaver v Mogford* [1988] 2 EGLR 48, CA; *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* (1991) 64 P & CR 187, [1992] 1 EGLR 86, CA; *GUS Property Management Ltd v Texas Homecare Ltd* [1993] 2 EGLR 63, [1993] 27 EG 130 (assignee can deal with the estate to alters its terms and bind the original tenant); *Royton Industries Ltd v Lawrence* [1994] 1 EGLR 110, [1994] 20 EG 151. As to the position where the tenancy continues under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended)

(see PARA 701 et seq post) see *City of London Corp'n v Fell* [1994] 1 AC 458, [1993] 4 All ER 968, HL (the Landlord and Tenant Act 1954 extends the term of the lease but does not extend the continuing liability of the original tenant; only an express covenant in the lease to pay rent during any statutory continuation will impose liability); and PARA 713 post.

2 As to the position of the assignee after he has further assigned the term see PARA 563 post.

3 *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517; *Tempany v Royal Liver Trustees Ltd* [1984] BCLC 568. The liability of the original tenant is a primary liability and he is not merely a surety for the assignee. See also *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945; *WH Smith Ltd v Wyndham Investments Ltd* (1994) 70 P & CR 21, (1994) Times, 26 May.

4 *Re Savile Settled Estates, Savile v Savile* [1931] 2 Ch 210 at 216-217 per Maugham J; and see *Baker v Merckel (Anson, third party)* [1960] 1 QB 657, [1960] 1 All ER 668, CA.

5 *Baker v Merckel (Anson, third party)* [1960] 1 QB 657, [1960] 1 All ER 668, CA (where the view was expressed that, after a lease had been varied by the introduction of a right to extend the term, the variation by a supplemental deed in itself effected a surrender and regrant of the premises for a new term of seven years, or on the happening of a specified event, being the giving of notice by the tenant, for 11 years); but as to the position under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) see *City of London Corp'n v Fell* [1994] 1 AC 458, [1993] 4 All ER 968, HL; and PARA 713 post.

6 *Brett v Cumberland* (1619) Cro Jac 521; *Bachelour v Gage* (1630) Cro Car 188; and see *House Property and Investment Co Ltd v Bernardout* [1948] 1 KB 314 at 318, [1947] 2 All ER 753 at 756 per Singleton J. The same rule applies whether the lease is by deed or under hand: *John Betts & Sons Ltd v Price* (1924) 40 TLR 589.

7 As to accord and satisfaction see CONTRACT vol 9(1) (Reissue) PARA 1043 et seq.

8 *Deanplan Ltd v Mahmoud* [1993] Ch 151, [1992] 3 All ER 945 (original tenant as a covenantor under a primary liability, as opposed to a surety), applying the decisions in *Nicholson v Revill* (1836) 4 Ad & El 675 and *Re EWA (a Debtor)* [1901] 2 KB 642, CA. See also *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All ER 581, [1994] 2 BCLC 721; *Mytre Investments Ltd v Reynolds* [1995] 3 All ER 588, [1995] 2 EGLR 40.

9 *Allied London Investments Ltd v Hambro Life Assurance Ltd* [1984] 1 EGLR 16, (1983) 269 Estates Gazette 41 (original tenant having a primary liability).

10 Ie even in respect of rent which accrued due before the transfer of the reversion.

11 *Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 113, [1971] 1 WLR 1080, CA; *Re King, Robinson v Gray* [1963] Ch 459, [1963] 1 All ER 731, CA; *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA. It may be that the same principle applies where the reversion has become vested in a person other than the original landlord otherwise than by assignment: see *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd (British Telecommunications plc, third party)* (1991) 63 P & CR 143, [1991] 2 EGLR 46, CA. The original landlord may probably expressly reserve this contractual right in the transfer: see PARA 570 post. The original tenant was held liable on an action for use and occupation until the original landlord had accepted the new tenant, but not afterwards: *Shine v Dillon* (1867) 15 WR 847; cf *Hyde v Moakes* (1832) 5 C & P 42. The original tenant ceases to be liable in debt (although he continues to be liable on any personal covenant to pay) for the rent after the original landlord has accepted the assignee as his tenant whether expressly or impliedly, eg by acceptance of rent: *Walker's Case* (1587) 3 Co Rep 22a; *Auriol v Mills* (1790) 4 Term Rep 94 at 98 ('It is extremely clear that a person who enters into an express covenant in a lease continues liable on his covenant notwithstanding the lease be assigned over. The distinction between the actions of debt and covenant, which was taken in early times, is equally clear: if the lessee assign over the lease, and the lessor accept the assignee as his lessee, either tacitly or expressly, it appears by the authorities that an action for debt will not lie against the original lessee; but all those cases with one voice declare that, if there be an express covenant, the obligation on such covenant still continues'); and see *Wadham v Marlowe* (1784) 8 East 315n; *John Betts & Sons Ltd v Price* (1924) 40 TLR 589 at 590.

12 *RPH Ltd v Mirror Group Newspapers and Mirror Group (Holdings) Ltd* (1992) 65 P & CR 252, [1993] 1 EGLR 74.

13 See PARA 558 post.

OF COVENANTS/(ii) Tenancies granted before 1 January 1996/A. RIGHTS OF THE ORIGINAL PARTIES TO THE LEASE/557. Rights of the original tenant.

### 557. Rights of the original tenant.

The transfer of the reversion does not affect the privity of contract between the original landlord and the original tenant. Consequently, the original tenant may enforce the covenants in the lease against the original landlord, even though the reversion has been transferred and even though he may also be able to enforce the covenants against the transferee<sup>1</sup>. If the lease is assigned, the contractual rights pass to the assignee, and it is the assignee and not the original tenant who may then sue the original landlord<sup>2</sup>. Even after the assignment of the term, however, the original tenant may sue the landlord for loss suffered as a result of breaches of the landlord's covenants before the assignment<sup>3</sup>.

1 *Stuart v Joy* [1904] 1 KB 362, CA; *Eccles v Mills* [1898] AC 360, PC. This principle is confirmed by the last paragraph of the Law of Property Act 1925 s 142(2) ('[Section 142] takes effect without prejudice to any liability affecting a covenantor or his estate'). See also *Bath v Bowles* (1905) 93 LT 801, DC; *Williams v Gabriel* [1906] 1 KB 155.

2 See PARA 566 post.

3 *City and Metropolitan Properties Ltd v Greycroft* [1987] 3 All ER 839, [1987] 1 WLR 1085.

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### 558. Statutory restriction on former tenant's liability for rent or service charge etc.

In the case of a tenancy granted before 1 January 1996<sup>1</sup>, the former tenant is now only liable to pay rent after an assignment<sup>2</sup>, or to pay any service charge or any amount payable in the event of failure to comply with a tenant covenant<sup>3</sup> after an assignment, if the landlord satisfies the statutory notice conditions<sup>4</sup>. Where the former tenant then makes full payment he has the right to be granted an overriding lease<sup>5</sup>.

The former tenant's liability is also restricted by statute where the tenant covenants of the tenancy are varied after assignment<sup>6</sup>.

1 I.e. a tenancy which is not a 'new tenancy' for the purposes of the Landlord and Tenant (Covenants) Act 1995. For the meaning of 'new tenancy' see PARA 578 post.

2 As to the common law rules whereby the former tenant remained liable see PARA 556 ante.

3 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

4 See the Landlord and Tenant (Covenants) Act 1995 s 17; and PARA 289 ante.

5 See *ibid* ss 19, 20; and PARA 290 ante.

6 See *ibid* s 18; and PARA 291 ante.

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## ***B. ASSIGNMENT OF THE LEASE***

### **559. Burden of tenant's covenants: in general.**

Whether the burden of a covenant by the tenant runs with the land depends partly upon the nature and partly upon the form of the covenant. As regards its nature, the covenant may concern the land itself or something already in existence on the land, in either of which cases it concerns a thing in being; or, although directly relating to the land, it may concern something only contemplated to be brought into existence; or it may not in strictness concern the land at all, in which case it is said to be collateral.

In order to ascertain whether a covenant has reference to the subject matter of the lease<sup>1</sup> a satisfactory working test is that the relevant covenant will be so regarded if:

- 1139 (1) the covenant benefits only the reversioner for the time being and, if separated from the reversion, ceases to be of benefit to the covenantee;
- 1140 (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner;
- 1141 (3) the covenant is not expressed to be personal, that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant.

The fact that a covenant is to pay a sum of money does not prevent it from touching and concerning the land so long as the conditions in heads (1) to (3) above are satisfied and the covenant is connected with something to be done on, to or in relation to the land<sup>2</sup>.

As regards the form of the covenant, it may be entered into by the tenant for himself, or for himself and his personal representatives only; or it may purport expressly to bind his assigns. The following rules, which apply also to leases of incorporeal hereditaments<sup>3</sup>, govern these cases<sup>4</sup>:

- 1142 (a) where the covenant relates to a thing in being, and directly concerns the land, it binds the assigns, whether named or not<sup>5</sup>;
- 1143 (b) a covenant made before 1 January 1926, where it relates to a thing not yet in being and directly concerns the land, binds the assigns if they are named, but not otherwise<sup>6</sup>; a covenant made on or after that date binds the assigns unless a contrary intention is expressed<sup>7</sup>;
- 1144 (c) where the covenant does not touch or concern the land, but is merely collateral, it does not bind the assigns but is a personal covenant only; it cannot, therefore, be made to run with the land<sup>8</sup>.

If, in accordance with the above rules, the burden of a covenant has not passed to the assignee, the landlord may not enforce the covenant by proceedings for an injunction or damages against the assignee. It is possible that the landlord may still be able to forfeit the lease on a breach of the covenant by the assignee<sup>9</sup>.



1 The words 'has reference to the subject matter of the lease' are the modern phraseology used by statute (see the Law of Property Act 1925 ss 141, 142) in place of the traditional phrase 'touch and concern the land' (*Spencer's Case* (1583) 5 Co Rep 16a). The two expressions have the same meaning and effect: see *Davis v Town Properties Investment Corp'n Ltd* [1903] 1 Ch 797 at 805, CA, per Cozens-Hardy LJ (referring to the Conveyancing Act 1881 s 11 (repealed) and the words 'with reference to the subject matter of the lease').

2 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632 at 642, [1988] 2 All ER 885 at 891, HL, per Lord Oliver. More delphically it had earlier been stated that the proper test is whether the covenant affects either the landlord qua landlord or the tenant qua tenant: *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1 at 7, [1948] 1 All ER 758 at 759, CA, per Scott LJ.

3 *Hooper v Clark* (1867) LR 2 QB 200; and see *Martyn v Williams* (1857) 1 H & N 817.

4 *Spencer's Case* (1583) 5 Co Rep 16a.

5 First resolution in *Spencer's Case* (1583) 5 Co Rep 16a. According to the words of the resolution the thing must be parcel of the demise, but it is sufficient if it directly concerns the land: see *Lyle v Smith* [1909] 2 IR 58. Of this nature are covenants to pay rent (*Parker v Webb* (1693) 3 Salk 5; *Stevenson v Lambard* (1802) 2 East 575 at 580; *Williams v Bosanquet* (1819) 1 Brod & Bing 238), to render services in the nature of rent (*Vyvyan v Arthur* (1823) 1 B & C 410; and see *Keppell v Bailey* (1834) 2 My & K 517 at 541), to allow deductions out of rent (*Baylye v Hughes* (1628) Cro Car 137), to repair or to leave in repair houses already built (*Matures v Westwood* (1598) Cro Eliz 599; *Dean and Chapter of Windsor v Hyde* (1601) 5 Co Rep 24a; *Wakefield v Brown* (1846) 9 QB 209 at 223; *Martyn v Clue* (1852) 18 QB 661), to spend a certain sum annually on repairs, or pay the difference between that sum and the sum actually spent (*Moss' Empires Ltd v Olympia (Liverpool) Ltd* [1939] AC 544, [1939] 3 All ER 460, HL), to pay a fixed sum towards redecoration in lieu of damages for fair wear and tear (*Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA), to repair and renew fixtures already affixed to the premises (*Williams v Earle* (1868) LR 3 QB 739), to insure against fire (*Vernon v Smith* (1821) 5 B & Ald 1; and see PARA 532 ante), to use the premises as a private dwelling house only (*Wilkinson v Rogers* (1864) 2 De GJ & Sm 62), to reside upon them during the demise (*Tatem v Chaplin* (1793) 2 Hy Bl 133), to pay a sum as liquidated damages for breach of a covenant which ran with the land (*Lord Howard de Walden v Barber* (1903) 19 TLR 183), not to assign without the consent of the landlord (see PARA 564 post), that a named person should not be concerned in the business carried on from the demised premises (*Lewin v American and Colonial Distributors Ltd* [1945] Ch 225, [1945] 1 All ER 592; affd on appeal [1945] Ch 225 at 236, [1945] 2 All ER 271n, CA), in a lease of a public house, a covenant to conduct the house properly (*Fleetwood v Hull* (1889) 23 QBD 35), and to buy liquor from the landlord (*Clegg v Hands* (1890) 44 ChD 503, CA; *White v Southend Hotel Co* [1897] 1 Ch 767, CA; and see PARAS 544, 546 ante), in a lease of a petrol filling station created by an attornment clause, to take all oil and petrol supplies from the landlord (*Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402, [1965] 3 All ER 673, CA), in an agricultural lease, to manure (*Sale v Kitchingham* (1713) 10 Mod Rep 158), and not to plough more than a certain quantity of land (*Cockson v Cock* (1607) Cro Jac 125), in a mining lease, to pay compensation for damage done to the surface (*Norval v Pascoe* (1864) 34 LJ Ch 82; *Dyson v Forster*, *Dyson v Seed*, *Quinn*, *Morgan etc* [1909] AC 98, HL; and see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 198), in a sporting lease, to leave the land well stocked with game (*Hooper v Clark* (1867) LR 2 QB 200), and in a lease of land near the sea, to maintain a sea wall though not parcel of the demised premises (*Lyle v Smith* supra).

6 Second resolution in *Spencer's Case* (1583) 5 Co Rep 16a. For this rule to apply, the tenant must have expressly covenanted for himself and for his assigns, and the covenant, while relating to a thing in the future, must directly touch or concern the thing demised: *Spencer's Case* supra; *Congleton Corp'n v Pattison* (1808) 10 East 130 at 135; *Doughty v Bowman* (1848) 11 QB 444 at 454; *Thomas v Hayward* (1869) LR 4 Exch 311. The distinction between covenants relating to a thing in being and a thing in the future rests on no intelligible basis and was questioned in *Minshull v Oakes* (1858) 2 H & N 793. The substance of the distinction between things in being and things in the future is that things in being comprise things that are in existence at the date of the lease, eg existing buildings, and things in the future comprise things not then in existence, eg buildings which are to be erected by the lessee. Covenants relating to things in the future are: a covenant to erect new buildings (*Spencer's Case* supra; *Doughty v Bowman* supra), at the end of the term to deliver up at valuation fruit trees then growing (*Grey v Cuthbertson* (1785) 2 Chit 482), and in a colliery lease, to convey, upon a railway to be made on the demised land, all coal got from a certain colliery (*Hemingway v Fernandes* (1842) 13 Sim 228). Although the thing in the future is to be done off the land, the covenant is treated as directly concerning the land if the thing to be done tends to the maintenance of the demised premises, such as a covenant in a mining lease to build a smelting mill on adjacent waste land not included in the demise: *Sampson v Easterby* (1829) 9 B & C 505 at 516 (affd sub nom *Easterby v Sampson* (1830) 6 Bing 644, Ex Ch); *Bally v Wells* (1769) 3 Wils 25; *Lyle v Smith* [1909] 2 IR 58; cf *Dewar v Goodman* [1909] AC 72 at 77, HL. As to covenants not to assign without the consent of the landlord see PARA 564 post.

7 See the Law of Property Act 1925 s 79; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256; and EQUITY vol 16(2) (Reissue) PARA 618.

8 Second resolution in *Spencer's Case* (1583) 5 Co Rep 16a; *Lord Uxbridge v Staveland* (1747) 1 Ves Sen 56; *Thomas v Hayward* (1869) LR 4 Exch 311. Of this nature are the following covenants: to pay to the landlord or a stranger a collateral sum, that is, a sum not reserved as rent (*Mayho v Buckhurst* (1617) Cro Jac 438; *Earl Inchiquin v Burnell* (1795) 3 Ridg Parl Rep 376; *Lambert v Norris* (1837) 2 M & W 333; *Flight v Glossopp* (1835) 2 Bing NC 125); to pay taxes on premises not included in the demise (*Gower v Postmaster General* (1887) 57 LT 527); to build a house upon other land of the landlord (*Spencer's Case* supra), the house not being immediately required for the purposes of the demised premises (*Sampson v Easterby* (1829) 9 B & C 505 at 516); to repair and renew chattels (*Williams v Earle* (1868) LR 3 QB 739; *Gorton v Gregory* (1862) 3 B & S 90); not to employ a certain class of persons on the premises (*Congleton Corp v Pattison* (1808) 10 East 130; *Walsh v Fussell* (1829) 6 Bing 163); a condition of re-entry on conviction of the tenant for an offence against the game laws (*Stevens v Copp* (1868) LR 4 Exch 20); and, in a lease of a public house, not to keep a public house within half a mile of the demised premises (*Thomas v Hayward* (1869) 38 LJ Ex 175 at 176).

9 Most leases contain a right of re-entry exercisable by the landlord on breach of covenant. A right of re-entry is an interest in land (see the Law of Property Act 1925 s 1(2)(e); and REAL PROPERTY vol 39(2) (Reissue) PARA 45) and the owner of it may exercise the right even though he is not entitled to enforce the covenant on the breach of which the right becomes exercisable: *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL; cf *Horsey Estate Ltd v Steiger* [1899] 2 QB 79 at 88-89, CA, per Lord Russell CJ (where, however, the covenant in issue was one of which the burden did pass to the assignee). If the landlord can indeed obtain forfeiture of the lease for breaches by an assignee of even collateral covenants, then in practice such covenants become in reality enforceable as the alternative of losing his lease will generally persuade the assignee to comply with the covenant. Somewhat similar questions arise with regard to the exercise of rights of re-entry by transferees of the reversion: see PARA 567 note 7 post; and see *Stevens v Copp* (1868) LR 4 Exch 20. As to forfeiture generally see PARA 603 et seq post.

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## 560. Form of lease.

The ordinary principles relating to the transfer of the burden of the tenant's covenants to an assignee apply to leases by deed and to leases in writing but not by deed<sup>1</sup>. The same principles probably apply to mere oral leases<sup>2</sup>. The assignment of the benefit of a specifically enforceable agreement for a lease does not transfer the burden of the tenant's covenants to the assignee<sup>3</sup>. Even where the burden of covenants is not enforceable against an assignee by reason of privity of estate, then, if the assignee goes into possession and rent is paid and accepted, a new agreement or new lease generally arises by implication in his favour, and the covenants may be enforced against him by reason of privity of contract under this new relationship<sup>4</sup>.

1 It was at one time said that, for these principles to apply, the lease had to be by deed: see *Elliott v Johnson* (1866) LR 2 QB 120 at 127. It is now settled that the same principles apply to a lease under hand: *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA (lease for three years in writing). As to when leases may validly be granted otherwise than by deed see PARA 101 ante.

2 *Elliott v Johnson* (1866) LR 2 QB 120 was a decision concerning an oral agreement, and is now to be regarded as overruled by *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA. In practice oral leases are rarely assigned. The practical difficulty is that there is no written record of the terms of the lease.

3 *Marquis of Camden v Batterbury* (1860) 7 CBNS 864; *Purchase v Lichfield Brewery Co* [1915] 1 KB 184. There is no privity of estate between the landlord and the assignee. This rule is one of the instances in which an agreement for a lease is not as satisfactory as an actual lease notwithstanding the equitable doctrine of *Walsh v Lonsdale* (1882) 21 ChD 9, CA (see PARA 76 ante). There are dicta of Denning LJ in *Boyer v Warbey* [1953] 1 QB 234 at 246, [1953] 1 All ER 269 at 274, CA, to the effect that since the fusion of law and equity the burden of covenants does pass to an assignee, even though there is only an agreement for a lease. It is possible that the burden may pass to an assignee of the agreement who has taken possession: see *Purchase v Lichfield Brewery Co* supra at 188 per Lush J, expressly leaving open this point.

<sup>4</sup> *Buckworth v Simpson* (1835) 1 Cr M & R 834; *Elliott v Johnson* (1866) LR 2 QB 120; *Cornish v Stubbs* (1870) LR 5 CP 334.

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### 561. Persons liable as assignees.

The liability of an assignee arises on the mere assignment of the legal estate in the demised premises, even though the assignee has not entered<sup>1</sup>. The assignee is liable, however, on the covenants only where he has taken a legal assignment of the entire residue of the term<sup>2</sup>, or where he has estopped himself from denying such an assignment, as, for example, where he has gone into possession and paid the rent reserved by the lease<sup>3</sup>. An equitable assignee, therefore, whether under an agreement for an assignment<sup>4</sup> or as equitable mortgagee<sup>5</sup>, is not liable, notwithstanding that he has entered into possession. A person who gains a title by adverse possession as against the tenant under the Limitation Act 1980 is not an assignee so as to be liable at law on the covenants in the lease<sup>6</sup>. A person who takes the legal estate by assignment is, however, liable on the covenants, even though he takes as trustee and has not entered into possession<sup>7</sup>; and the person equitably interested is not liable<sup>8</sup>. A trustee under a creditor's deed which contains a general assignment of personal estate is liable on the covenants incident to the debtor's leasehold property<sup>9</sup>, unless the leaseholds are expressly excluded<sup>10</sup>, or unless the general words of assignment are not suitable to include leaseholds<sup>11</sup>. An assignment of the demised premises to co-owners renders each co-owner fully liable for the rent and the covenants of the lease<sup>12</sup>.

<sup>1</sup> *Williams v Bosanquet* (1819) 1 Brod & Bing 238; *Burton v Barclay* (1831) 7 Bing 745 at 761; and see *Pilkington v Shaller and Jefferies* (1700) 2 Vern 374; *A-G v Parsons* [1955] Ch 664 at 680, [1955] 2 All ER 466 at 474, CA (revsd on another point [1956] AC 421, [1956] 1 All ER 65, HL). As to personal representatives see, however para 596 post. It was formerly necessary that the tenant should have entered (see *Wiggins v Masson* (1827) 6 LJOSKB 93); but see now the Law of Property Act 1925 s 149 (as amended); and PARA 118 ante.

<sup>2</sup> *West v Dobb* (1869) LR 4 QB 634 at 637; and see *Goddard v Lewis* (1909) 101 LT 528; *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271, CA. 'Assigns' does not ordinarily include an undertenant: *Bryant v Hancock & Co* [1898] 1 QB 716 at 719, 720, CA; *South of England Dairies Ltd v Baker* [1906] 2 Ch 631. Cf *Holloway Bros Ltd v Hill* [1902] 2 Ch 612. As to involuntary assignments inter vivos see PARA 483 ante.

<sup>3</sup> See ESTOPPEL vol 16(2) (Reissue) PARA 1032.

<sup>4</sup> *Cox v Bishop* (1857) 8 De GM & G 815, overruling *Close v Wilberforce* (1838) 1 Beav 112; cf *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 1 Ch 86 at 90; revsd on other grounds [1899] 2 Ch 261, CA.

<sup>5</sup> See *Re Loom, Fulford v Reversionary Interest Society Ltd* [1910] 2 Ch 230 (beneficiary under a will mortgaged her interests under the will, which included a leasehold house; mortgagees obtained an order for foreclosure, but did not take possession and subsequently disclaimed all interest in the house; they were held not to be liable on the covenants to repair contained in the lease). See also *Moore v Choat* (1839) 8 Sim 508; *Moore v Greg* (1848) 2 Ph 717; *Robinson v Rosher* (1841) 1 Y & C Ch Cas 7 (cases on equitable mortgages by deposit of title deeds; it is no longer possible to create an equitable mortgage in such a way: see MORTGAGE vol 77 (2010) PARAS 118, 119).

<sup>6</sup> *Tichborne v Weir* (1892) 67 LT 735, CA. Restrictive covenants binding in equity will, however, be enforceable: see *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, CA; *Ashe v Hogan* [1920] 1 IR 159; and LIMITATION PERIODS vol 68 (2008) PARA 1098.

<sup>7</sup> *Gretton v Diggles* (1813) 4 Taunt 766. Whether the trustee is tenant or assignee, he alone is liable to the landlord, and the landlord may not sue the beneficiary (*Walters v Northern Coal Mining Co* (1855) 5 De GM & G

629 at 641; and see *Arkwright v Colt* (1842) 2 Y & C Ch Cas 4; cf *Wright v Pitt* (1870) LR 12 Eq 408; and see TRUSTS vol 48 (2007 Reissue) PARA 728), but the trustee may be entitled to an indemnity from the beneficiary. The same was formerly true of mortgagees (see *Stone v Evans* (1796) Peake Add Cas 94; *Haig v Homan* (1830) 4 Bli NS 380, HL; *Anon* (1701) Freem Ch 253), but a legal mortgage of leaseholds cannot now be made by assignment (see MORTGAGE vol 77 (2010) PARA 188).

8 *Nokes v Fish* (1857) 3 Drew 735.

9 *Ringer v Cann* (1838) 3 M & W 343; *White v Hunt* (1870) LR 6 Exch 32.

10 If power is reserved to exclude leaseholds, the trustee is liable until they are actually excluded: *Debenham v Digby* (1873) 28 LT 170.

11 *Harrison v Blackburn* (1864) 17 CBNS 678; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 234.

12 *United Dairies Ltd v Public Trustee* [1923] 1 KB 469. Each assignee bears full liability even if in equity the assignees are tenants in common and not joint tenants.

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## 562. Assignment of part.

An assignee of a part of the premises comprised in the lease is liable to the landlord for a proportion only of the rent reserved<sup>1</sup>. Nevertheless, the landlord may distrain on any part of the demised premises for the rent of the whole<sup>2</sup>. If the assignee of part pays the whole of the rent in order to avoid distress, he is entitled to recover from the tenant of the remainder of the demised premises the latter's due proportion of the rent<sup>3</sup>. The assignee of part is also liable on every other covenant running with the land and affecting the part of the premises assigned to him<sup>4</sup>.

The assignment of part of the premises comprised in the lease without the landlord's consent does not create two separate holdings with separate tenants for each holding<sup>5</sup>.

1 *Gamon v Vernon* (1678) 2 Lev 231; *Curtis v Spitty* (1835) 1 Bing NC 756; *Orme v Wills* (1878) 2 LR Ir 124; and see *Dooner v Odum* [1914] 2 IR 411, Ir CA. The point was left open in *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA. The apportionment may be made (1) by the agreement of the parties, although a person not a party to the agreement will not be bound by it (see *Bliss v Collins* (1822) 5 B & Ald 876); (2) by the court (see *Bliss v Collins* supra; *Whitham v Bullock* supra at 86 and at 315); (3) by the Secretary of State or the National Assembly for Wales or the relevant Welsh minister on an application under the Landlord and Tenant Act 1927 s 20 (as amended) (see PARA 281 ante).

2 *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA (where this rule was said to be unquestionable and to result from the proposition that the rent for the whole becomes due out of each and every part of the land).

3 *Whitham v Bullock* [1939] 2 KB 81, [1939] 2 All ER 310, CA.

4 *Congham v King* (1631) Cro Car 221; *Stevenson v Lambard* (1802) 2 East 575; *Wollaston v Hakewill* (1841) 3 Man & G 297.

5 *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA (part of land held under a lease which included a house assigned without the landlord's consent; subsequent assignee of that part sought to acquire the freehold under the Leasehold Reform Act 1967; there was held to be only one tenancy and because of the agricultural use of the other part of the land the house was held to be comprised in an agricultural holding).

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### **563. Liability of assignee after further assignment.**

Since the liability of the assignee of a lease depends on privity of estate, such liability ceases as soon as the assignee further assigns the land except as regards rent accrued due and breaches of covenant committed prior to the assignment and while the lease was vested in him<sup>1</sup>; and the assignee is entitled to avail himself of this principle in order to escape liability even though the new assignee is a person of no substance<sup>2</sup>. An assignee is also not liable for breaches of covenant which occurred before the assignment to him<sup>3</sup>. No notice to, or consent of, the landlord is required<sup>4</sup>; and the assignee's liability is terminated by the assignment even if the new assignee does not take possession<sup>5</sup>. A further assignment of this nature may be made by a trustee in bankruptcy<sup>6</sup>. The assignment must, however, be a real assignment<sup>7</sup>, and is ineffectual to terminate the liability of the assignee if the new assignee is merely his agent<sup>8</sup>; but the assignee remains liable throughout the term if he enters into a direct covenant with the landlord to pay the rent and observe the covenants during the remainder of the term<sup>9</sup>, or if he enters into a similar covenant with the tenant and the tenant assigns the benefit of it to the landlord<sup>10</sup>.

1 *Paul v Nurse* (1828) 8 B & C 486; and see *Pitcher v Tovey* (1692) 1 Salk 81; *City of London v Richmond* (1701) Prec Ch 156 (affd sub nom *Richmond v City of London* (1702) 1 Bro Parl Cas 516, HL); *Chancellor v Poole* (1781) 2 Doug KB 764; *Odell v Wake* (1813) 3 Camp 394. As to the liability of the assignee to indemnify the tenant see, however, PARA 573 et seq post.

2 *Valliant v Dodemede* (1742) 2 Atk 546; *Barnfather v Jordan* (1780) 2 Doug KB 452; *Taylor v Shum* (1797) 1 Bos & P 21 at 23; and see *Odell v Wake* (1813) 3 Camp 394.

3 *Grescot v Green* (1700) 1 Salk 199; *Churchwardens of St Saviour's, Southwark v Smith* (1762) 3 Burr 1271; *Parry v Robinson-Wyllie Ltd* (1987) 54 P & CR 187, [1987] 2 EGLR 133. An assignee is not liable for particular breaches of a tenant's repairing covenants committed by his predecessors, but he is liable for the disrepair of the premises as they stand when he takes over: *Granada Theatres Ltd v Freehold Investment (Leytonstone) Ltd* [1959] Ch 592, [1959] 2 All ER 176, CA.

4 *Valliant v Dodemede* (1742) 2 Atk 546; *Lekeux v Nash* (1745) 2 Stra 1221; *Onslow v Corrie* (1817) 2 Madd 330; and see *Paul v Nurse* (1828) 8 B & C 486. In practice leases usually contain a covenant not to assign without the landlord's consent and an assignment in breach of such a covenant, while it does not invalidate the assignment, ordinarily renders the lease liable to be forfeited: see PARA 547 ante.

5 *Walker v Reeve* (1781) 3 Doug KB 19; and see *Valliant v Dodemede* (1742) 2 Atk 546.

6 *Hopkinson v Lovering* (1883) 11 QBD 92.

7 *Fagg v Dobie* (1838) 3 Y & C Ex 96.

8 *Philpot v Hoare and Robertson* (1741) 2 Atk 219.

9 *J Lyons & Co Ltd v Knowles* [1943] 1 KB 366, [1943] 1 All ER 477, CA. This is so even though the subsequent assignee is required by the terms of the lease to enter into a similar covenant with the landlord: *J Lyons & Co Ltd v Knowles* supra. A landlord's requirement that an assignee give such a direct covenant as a condition of the landlord consenting to the assignment is not to be regarded as a demand by the landlord for a fine or premium for the purposes of the Law of Property Act 1925 s 144 (see PARA 485 ante): see *Waite v Jennings* [1906] 2 KB 11, CA. See also *Estates Gazette Ltd v Benjamin Restaurants Ltd* [1995] 1 All ER 129, [1994] 1 WLR 1528, CA (covenant in a licence to assign interpreted to impose liability for the duration of the term).

10 *Butler Estates Co v Bean* [1942] 1 KB 1, [1941] 2 All ER 793, CA.

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#### **564. Covenant against assignment without consent.**

A covenant against assignment without the landlord's consent<sup>1</sup> is a covenant which runs with the land and binds assigns whether mentioned<sup>2</sup> or not<sup>3</sup>, unless the parties indicate a contrary intention<sup>4</sup>. The covenant binds personal representatives<sup>5</sup> and voluntary assigns inter vivos. Whether or not the covenant binds the tenant's trustee in bankruptcy depends on the words of the covenant. A trustee in bankruptcy is not an assignee of the tenant<sup>6</sup> and, therefore, is not bound by a covenant which applies only to assigns; but a trustee in bankruptcy is a successor in title of the tenant and is bound by any covenant which is expressed to be binding on such a successor in title<sup>7</sup>. An execution creditor is in the same position as a trustee in bankruptcy<sup>8</sup>. The covenant does not bind an undertenant<sup>9</sup>; but the head landlord may enforce a covenant in an underlease against assignment without the head landlord's consent<sup>10</sup>. An absolute covenant against assignment is also a covenant which runs with the land and binds assigns<sup>11</sup>.

1 As to covenants against assignment without the landlord's consent see PARA 482 et seq ante.

2 *Williams v Earle* (1868) LR 3 QB 739; *McEacharn v Colton* [1902] AC 104, PC; and see *West v Dobb* (1869) LR 4 QB 634 at 637 note (1) (on appeal (1870) LR 5 QB 460, Ex Ch); *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480.

3 *Goldstein v Sanders* [1915] 1 Ch 549; *Re Robert Stephenson & Co Ltd, Poole v Robert Stephenson & Co Ltd* [1915] 1 Ch 802.

4 *Re Robert Stephenson & Co Ltd, Poole v Robert Stephenson & Co Ltd* [1915] 1 Ch 802 at 808.

5 *Sir William More's Case* (1584) Cro Eliz 26; *Roe d Gregson v Harrison* (1788) 2 Term Rep 425.

6 *Doe d Goodbehere v Bevan* (1815) 3 M & S 353.

7 *Re Wright, ex p Landau v Trustee* [1949] Ch 729, [1949] 2 All ER 605; and see BANKRUPTCY AND INSOLVENCY vol 3(2) (2002 Reissue) PARA 414.

8 See CIVIL PROCEDURE vol 12 (2009) PARA 1317. A letting by a receiver under a direction of the court is perhaps not a breach: see *Rogers v Bateman* (1841) Fl & K 432.

9 *Villiers v Oldcorn* (1903) 20 TLR 11; *Mackusick v Carmichael* [1917] 2 KB 581.

10 See the Law of Property Act 1925 s 56(1); DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61; and *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250, [1953] 2 All ER 1475, CA.

11 *Re Robert Stephenson & Co Ltd, Poole v Robert Stephenson & Co Ltd* [1915] 1 Ch 802 at 808. Since a covenant against assignment in the absolute form contemplates that no assignment will take place, it is possibly easier to construe the covenant as intended to bind the original tenant only as in *Whitchcot v Fox* (1616) Cro Jac 398 (covenant that assignment could be to certain specified persons only so that it was clear that such a specified person could assign without restriction). See also *Seers v Hind* (1791) 1 Ves 294.

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### **565. Liability to observe restrictive covenants binding in equity.**

Where the lease was made before 1 January 1926, a tenant and his successors in title and assigns are bound by a restrictive covenant which binds the reversion and was imposed before the date of the lease, provided that the tenant would have had notice of the covenant if he had investigated the reversioner's title<sup>1</sup>. Where the lease was made after 31 December 1925, a restrictive covenant imposed before 1 January 1926 and binding on the reversion at the date of the lease is binding on the tenant only if at the date of the lease he had actual notice of the covenant<sup>2</sup>. Where the lease was made after 31 December 1925, a restrictive covenant imposed after that date and binding on the reversion at the date of the lease is binding on the tenant only if, before the execution of the lease, the covenant was registered as a land charge in the case of unregistered land<sup>3</sup>, or noted on the register in the case of registered land<sup>4</sup>.

A subtenant is bound by restrictive covenants contained in a superior lease which would have been disclosed if he had investigated his landlord's title<sup>5</sup>; but he is not bound by restrictions affecting any leasehold reversion if he had no right to call for the title to that reversion, unless he had actual notice of such restrictions<sup>6</sup>.

A tenant may enter into a restrictive covenant with some person other than the landlord, and the covenant will be enforced in equity in the same way as a covenant between freeholders<sup>7</sup>.

1 *Patman v Harland* (1881) 17 ChD 353. The Law of Property Act 1925 s 44(5) (as amended) (see EQUITY vol 16(2) (Reissue) PARA 583) is not retrospective in its operation. As to restrictive covenants generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq.

2 The burden of proving that the tenant had notice lies upon the person seeking to enforce the covenant: *Shears v Wells* [1936] 1 All ER 832.

3 See the Land Charges Act 1972 s 2(5) (as amended), Class D(ii); *White v Bijou Mansions Ltd* [1937] Ch 610 at 619, [1937] 3 All ER 269 at 273 (affd [1938] Ch 351, [1938] 1 All ER 546, CA); EQUITY vol 16(2) (Reissue) PARA 620; and LAND CHARGES vol 26 (2004 Reissue) PARA 635. As to registration as notice generally see LAND CHARGES vol 26 (2004 Reissue) PARA 616.

4 See the Land Registration Act 2002 s 32; LAND REGISTRATION vol 26 (2004 Reissue) PARA 995; *White v Bijou Mansions Ltd* [1937] Ch 610, [1937] 3 All ER 269 (affd on appeal [1938] Ch 351, [1938] 1 All ER 546, CA).

5 See EQUITY vol 16(2) (Reissue) PARA 620.

6 See the Law of Property Act 1925 s 44(5) (as amended); para 89 ante; and SALE OF LAND vol 42 (Reissue) PARA 140.

7 *Clements v Welles* (1865) LR 1 Eq 200; *John Bros Abergarw Brewery Co v Holmes* [1900] 1 Ch 188; *Wilkes v Spooner* [1911] 2 KB 473, CA.

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### **566. Benefit of landlord's covenants.**

The benefit of a covenant by the landlord runs with the land in favour of the tenant's assigns, provided that the covenant is one which touches and concerns the land<sup>1</sup>. Most of the principles which govern the passing of the burden of covenants apply also to the passing of the benefit<sup>2</sup>. Even if the benefit of a covenant does not pass automatically under the doctrine of privity of estate, it may be transferred to an assignee by express assignment<sup>3</sup>.

1 See *Spencer's Case* (1583) 5 Co Rep 16a, resolution 4 (covenant for quiet enjoyment), resolution 6 (covenant to repair house during the term). For examples of covenants which do and which do not touch and concern the land see PARA 571 note 2 post. A covenant relating to any land of the covenantee is deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and has effect as if those successors and other persons were expressed: Law of Property Act 1925 s 78(1); and see *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA; and EQUITY vol 16(2) (Reissue) PARA 618. Even after assignment of the term, however, the original tenant may sue the landlord for loss suffered as a result of breaches of the landlord's covenants before the assignment: *City and Metropolitan Properties Ltd v Greycroft Ltd* [1987] 3 All ER 839, [1987] 1 WLR 1085. A covenant by the landlord to return to the tenant at the end of the term a security deposit does not touch and concern the land: *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99, [1987] 1 All ER 1110, PC.

2 As to these principles see PARA 559 et seq ante. For example, a squatter may not sue on the covenants in a lease: see *Tichbourne v Weir* (1892) 67 LT 735, CA; and PARA 561 ante. An assignee of a part of the land is entitled to the benefit of a covenant in so far as it affects the part assigned: see *Simpson v Clayton* (1838) 4 Bing NC 758 at 781; and PARA 562 ante. The assignee is entitled to enforce the covenants only while the lease is vested in him: see PARA 563 ante. Just as the burden of obligations now passes to the assignee of a lease under hand and not by deed, and perhaps to the assignee of an oral lease (see *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA; and PARA 560 ante), so presumably the benefit of obligations passes to an assignee of a lease not by deed. As regards the benefit of agreements for leases, this may pass to assignees on the general principle that the benefit of a contract may be assigned: see note 3 infra.

3 In this respect there is an important distinction between the burden and the benefit of tenant's covenants. The burden may not be transferred by ordinary assignment and so its passing to an assignee is dependent upon privity of estate. The benefit may be so transferred: see PARA 554 note 7 ante. For an example of the benefit of an option to purchase passing by an assignment of a lease without any express mention in the assignment see *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA; and see *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708.

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## **C. TRANSFER OF THE REVERSION**

### **567. Benefit of tenant's covenants runs with reversion.**

At common law the benefit of the tenant's covenants did not run with the reversion, except in the case of covenants for payment of rent, or the rendering of services in the nature of rent<sup>1</sup>; but under statute<sup>2</sup> rent<sup>3</sup> reserved by a lease<sup>4</sup>, and the benefit of every covenant or provision therein contained having reference to the subject matter thereof<sup>5</sup> and on the lessee's<sup>6</sup> part to be observed or performed, and every condition of re-entry<sup>7</sup> and other condition therein contained, is annexed and incident to and goes with the reversionary estate in the land<sup>8</sup>, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate and without prejudice to any liability affecting a covenantor or his estate<sup>9</sup>. Any such rent, covenant or provision<sup>10</sup> is capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to



the term, to the income of the whole or any part, as the case may require, of the land leased<sup>11</sup>. Where that person becomes entitled by conveyance or otherwise, such rent, covenant or provision may be recovered, received, enforced or taken advantage of by him notwithstanding that he becomes so entitled after the condition of re-entry or forfeiture has become enforceable<sup>12</sup>. Notwithstanding the above provisions a beneficiary may not distrain or sue for rent under a lease where the legal estate in the reversion is held by trustees<sup>13</sup>.

1 *Vyvyan v Arthur* (1823) 1 B & C 410; *Bickford v Parson* (1848) 5 CB 920 at 931; *Harper v Burgh* (1677) 2 Lev 206. Such covenants were said to be implied or an inherent incident of the relationship of landlord and tenant.

2 The Law of Property Act 1925 s 141, which replaces 32 Hen 8 c 34 (Grantees of Reversions) (1540) s 1; the Conveyancing Act 1881 s 10 and the Conveyancing Act 1911 s 2, all of which are repealed. The 1540 Act was passed on the dissolution of the monasteries in order to preserve the remedies on leases of their forfeited land but, although primarily designed for the benefit of grantees from the Crown, it was made to apply to grantees of reversions generally: see Co Litt 215a, resolutions. The rule as to covenants running with the reversion therefore preceded the common law rule that covenants ran with the lease which arose under *Spencer's Case* (1583) 5 Co Rep 16a: see PARA 559 ante.

3 For the meaning of 'rent' see PARA 551 note 3 ante.

4 Where the owner in fee demised to a railway company for a term of years a wayleave with the right to make and use a railway reserving to himself, his heirs and assigns a periodical payment on goods carried over the land and certain other parts of the company's railway, it was held that the assignee of the owner in fee could recover amounts payable in respect of goods carried over such parts of the company's railway: *Lord Hastings v North Eastern Rly Co* [1898] 2 Ch 674; affd sub nom *North Eastern Rly Co v Lord Hastings* [1900] AC 260, HL; cf *Earl of Portmore v Bunn* (1823) 1 B & C 694. For the meaning of 'lease' see PARA 145 note 1 ante.

5 These words are equivalent to 'which touch and concern the land', within the rules stated in PARA 556 et seq ante, and do not alter the class of covenants which run with the reversion: *Davis v Town Properties Investment Corp Ltd* [1903] 1 Ch 797, CA; *Barnes v City of London Real Property Co* [1918] 2 Ch 18 at 33; *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1, [1948] 1 All ER 758, CA. The requirement that the covenant should touch and concern the land was not stated in 32 Hen 8 c 34 (Grantees of Reversions) (1540) s 1 (repealed) but arose from the application of that statute by the courts. A covenant by the tenant of a public house to take liquor from the landlord is of this nature (*Fleetwood v Hull* (1889) 23 QBD 35); and also a covenant in an agricultural lease against selling hay and manure off the farm (*Chapman v Smith* [1907] 2 Ch 97); and apparently a provision for resumption of possession (*Kennedy v Liddy* (1867) 15 WR 431); so also is a covenant in a lease of mines not to let down the surface and to pay compensation for damage done (*Westhoughton UDC v Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159, CA). See also *Wagstaff v Clinton* (1883) Cab & El 45 (covenant by agricultural tenant to a valuation of tenant right on quitting equal to incoming valuations; enures for benefit of subsequent landlord). A covenant to pay a premium for the grant of a lease is a personal obligation and not a covenant or provision having reference to the land. Thus, where the freehold reversion was sold by the mortgagee under his power of sale to the tenant, the obligation to pay the premium was held not to have been destroyed: *Hill v Booth* [1930] 1 KB 381, CA.

6 For the meaning of 'lessee' see PARA 145 note 3 ante.

7 It is not clear whether, under the Law of Property Act 1925 s 141(1), an assignee of the reversion may enforce a right of re-entry even in respect of a breach of covenant which does not touch and concern the land. The wording of the statute appears to confine the requirement of having reference to the subject matter of the lease to covenants as opposed to rights of re-entry. There is now the general authority of the House of Lords for the proposition that a person may exercise a right of re-entry arising on a breach of covenant even though he cannot otherwise enforce the covenant (see *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL), so that the fact that the benefit of the covenant does not pass is not decisive of the question. There is authority for the view that the right of re-entry is exercisable only where the covenant broken touched and concerned the land: see *Stevens v Copp* (1868) LR 4 Exch 20 (decided on the wording of 32 Hen 8 c 34 (Grantees of Reversions) (1540)). For a discussion of a similar question relating to the assignment of the lease see PARA 559 note 9 ante; and as to forfeiture clauses see also PARA 555 ante.

8 For the meaning of 'land' see PARA 17 note 1 ante.

9 Law of Property Act 1925 s 141(1). As to the liability of the covenantor see PARA 557 ante. Section 141 applies to leases made before, on or after 1 January 1926 (s 141(4)); but does not affect the operation of any severance of the reversionary estate effected before 1 January 1926 (s 141(4)(a)). As to severance of the reversion see PARA 555 ante, PARA 572 post. After a purchase of the reversion of the tenant holds of the

purchaser on the same terms as he previously held of the vendor until the tenancy is regularly determined: *Greenwood v Bairstow* (1836) 5 LJ Ch 179.

10 In the Law of Property Act 1925 s 141(2), (3), 'provision' is to be construed as including a condition of re-entry or other condition, although there is no express reference to such conditions as there is in s 141(1). It is clear from the previous legislation (the Conveyancing Act 1881 s 10 (amended by the Conveyancing Act 1911 s 2) and now repealed) that such was intended.

11 Law of Property Act 1925 s 141(2). Thus, a mortgagor in possession whose mortgagee has neither taken possession nor given notice of his intention to take possession is entitled to enforce the covenants in a lease of the mortgaged land: *Turner v Walsh* [1909] 2 KB 484, CA. On going into possession, the mortgagee may enforce the covenants in a lease made by the mortgagor under his statutory power (*Municipal Permanent Investment Building Society v Smith* (1888) 22 QBD 70, CA); and he is also entitled to arrears of rent (*Re Ind, Coope & Co Ltd, Fisher v Ind, Coope & Co Ltd* [1911] 2 Ch 223). See further MORTGAGE vol 77 (2010) PARAS 297, 345. A person in whom the reversion is vested by a private Act may enforce the covenants in the lease: *Sunderland Orphan Asylum v River Wear Comrs* [1912] 1 Ch 191. A claimant claiming as an assignee of the reversion should show in his pleading how and by what steps the reversion became vested in him: *Davis v James* (1884) 26 ChD 778; cf *Darbyshire v Leigh* [1896] 1 QB 554 at 561, CA, per Rigby LJ; *Harris v Beavan* (1828) 4 Bing 646. The Law of Property Act 1925 s 141(2) applies to a person holding an equitable interest in the reversionary interest to a lease and is not restricted to persons holding only a legal interest: *Scribes West Ltd v Relsa Anstalt* [2004] EWCA Civ 1744, [2005] 2 All ER 690, [2005] 1 WLR 1847.

12 Law of Property Act 1925 s 141(3). Section 141(3) does not, however, render enforceable any condition of re-entry or other condition waived or released before such person becomes so entitled (s 141(3)); and s 141 does not affect the operation of any acquisition by conveyance or otherwise of the right to receive or enforce any rent, covenant or provision effected before 1 January 1926 (s 141(4)). As to waiver of forfeiture see PARA 615 post. As to purported forfeiture by the purchaser prior to registration of its title as proprietor see *Rother District Investments Ltd v Corke* [2004] EWHC 14 (Ch), [2004] 2 P & CR 311, [2004] 1 EGLR 47.

13 *Schalit v Joseph Nadler Ltd* [1933] 2 KB 79, DC.

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### **568. Benefit of surety's covenants may run with reversion.**

The same tests are to be applied to ascertain whether the benefit of a surety's covenant runs with the reversion as are to be applied to the tenant's covenants<sup>1</sup> so that a covenant which runs with the reversion against the tenant runs with the reversion against the surety<sup>2</sup>. Thus, covenants by a surety guaranteeing payment of the rent and performance by the tenant of his covenants<sup>3</sup> and to take a new lease if the existing lease is disclaimed<sup>4</sup> may be enforced by an assignee of the reversion without any express assignment of the benefit of the surety's covenants.

1 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632, [1988] 2 All ER 885, HL.

2 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632 at 638, [1988] 2 All ER 885 at 887, HL, per Lord Templeman.

3 *P & A Swift Investments (a firm) v Combined English Stores Group plc* [1989] AC 632, [1988] 2 All ER 885, HL, approving *Kumar v Dunning* [1989] QB 193, [1987] 2 All ER 801, CA. The decisions to the contrary in *Pinemain Ltd v Welbeck International Ltd* (1984) 272 Estates Gazette 1166 and *Re Distributors and Warehousing Ltd* [1986] BCLC 129 can no longer be regarded as good law.

4 *Coronation Street Industrial Properties Ltd v Ingall Industries plc* [1989] 1 All ER 979, [1979] 1 WLR 304, HL.

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### **569. Form of lease.**

The transfer<sup>1</sup> to the assignee of the reversion of the benefit of the tenant's covenants is permitted<sup>2</sup> whether the lease under which the tenant holds is by deed, in writing or oral<sup>3</sup>. The same principle applies where the tenant holds under a specifically enforceable agreement for a lease<sup>4</sup>.

1 As to the form of any concurrent lease which effects the transfer see PARAS 104-105 ante.

2 le by the Law of Property Act 1925 s 141: see PARA 567 ante.

3 Under 32 Hen 8 c 34 (Grantees of Reversions) (1540) the lease had to be by deed: *Standen v Christmas* (1847) 10 QB 135; *Bickford v Parson* (1848) 5 CB 920; *Smith v Errington* (1874) LR 9 CP 145. Under the Conveyancing Act 1881 a written lease was sufficient even though not by deed (*Rye v Purcell* [1926] 1 KB 446), but an oral tenancy was not (*Blane v Francis* [1917] 1 KB 252, CA). Even in cases under the old legislation the benefit of covenants inherent to the relationship of landlord and tenant passed to the assignee of the reversion whatever the form of lease under the common law rule: see *Wedd v Porter* [1916] 2 KB 91 at 100, CA; and PARA 567 ante. If the benefit of the covenant was not transferred, the original landlord continued to be entitled to enforce it: *Bickford v Parson* supra. In the Law of Property Act 1925 'lease' includes an underlease or other tenancy (see s 154 cited in PARA 145 note 1 ante) and thus extends to an oral tenancy (see *Re King, Robinson v Gray* [1963] Ch 459, [1963] 1 All ER 781, CA per Upjohn LJ). 'Covenant' is not confined to promises by deed: *Weg Motors Ltd v Hales* [1962] Ch 49, [1961] 3 All ER 181, CA. As to the transfer of the burden and benefit of covenants on the assignment of written and oral leases see PARA 560 ante; and see *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA.

4 *Rickett v Green* [1910] 1 KB 253, DC; *Rye v Purcell* [1926] 1 KB 446; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608.

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### **570. Persons who may enforce tenant's covenants.**

An assignee of the reversion is entitled to sue in respect not only of rent due and breaches of covenant which occur after the assignment to him, but also in respect of rent due<sup>1</sup> and breaches of covenant which have occurred prior to the assignment to him<sup>2</sup>. After an assignment of the reversion it is accordingly the assignee who alone may sue for rent and for breaches of covenant whenever they have occurred, at any rate unless the assignee and the assignor have agreed to the contrary<sup>3</sup>. The principles which govern the transfer of the benefit of the tenant's covenants are entirely derived from statute and do not depend upon the common law doctrine of privity of estate<sup>4</sup>.

1 *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA, overruling *Flight v Bentley* (1835) 7 Sim 149; *Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 113, [1971] 1 WLR 1080, CA.

2 *Re King, Robinson v Gray* [1963] Ch 459, [1963] 1 All ER 781, CA. Thus a landlord can forfeit a lease for non-payment of rent due to a previous landlord even if there are no arrears due to the new landlord: *Kataria v Safeland plc* [1998] 1 EGLR 39, [1997] 45 LS Gaz R 27, CA. It may be that the same principle applies where the reversion has become vested in some person other than the original landlord otherwise than by assignment: *Electricity Supply Nominees Ltd v Thorn EMI Retail Ltd (British Telecommunications plc, third party)* (1991) 63 P & CR 143, [1991] 2 EGLR 46, CA.

3 This result of an assignment of the reversion follows from the application of the Law of Property Act 1925 s 141: see PARA 567 ante. The possibility of a contrary agreement was recognised by Upjohn LJ in *Re King, Robinson v Gray* [1963] Ch 459 at 488, [1963] 1 All ER 781 at 793, CA.

4 *In Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 113, [1971] 1 WLR 1080, CA, the assignee of the reversion was held to be able to sue an assignee of the lease for rent accrued due prior to the assignment of the reversion by virtue of the Law of Property Act 1925 s 141, even though there had been no privity of contract or of estate between the two assignees.

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## 571. Burden of landlord's covenants runs with reversion.

The obligation under a condition or of a covenant entered into by a lessor<sup>1</sup> with reference to the subject matter of the lease<sup>2</sup> is, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, annexed and incident to and goes with that reversionary estate or the several parts thereof, notwithstanding the severance of that reversionary estate and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise<sup>3</sup>. If and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation may be taken advantage of and enforced against any person so entitled<sup>4</sup>. The above provisions apply whether the lease is by deed, in writing or merely oral<sup>5</sup>; and they probably also apply to a specifically enforceable agreement for a lease<sup>6</sup>.

1 For the meaning of 'lessor' see PARA 240 note 6 ante.

2 These words are equivalent to 'which touch and concern the land': see PARA 559 note 1 ante. A covenant for quiet enjoyment seems to be of this nature: see *Noke v Awdler* (1595) Cro Eliz 373 at 436; *Derisley v Custance* (1790) 4 Term Rep 75; *Campbell v Lewis* (1820) 3 B & Ald 392; and see *Cole's Case* (1692) 1 Salk 196; cf *Dewar v Goodman* [1908] 1 KB 94 at 108, CA. For the meaning of 'lease' see PARA 145 note 1 ante.

Other covenants which touch and concern the land for this purpose are a covenant to renew (*Richardson v Sydenham* (1703) 2 Vern 447; *Simpson v Clayton* (1838) 4 Bing NC 758 at 780; *Muller v Trafford* [1901] 1 Ch 54 at 60), a covenant for further assurance (*Middlemore v Goodale* (1638) Cro Car 503), a covenant to supply the demised houses with water (*Jourdain v Wilson* (1821) 4 B & Ald 266; cf *Athol v Midland Great Western of Ireland Rly Co* (1868) IR 3 CL 333), a covenant to lay down part of the land demised in grass within a year (*Eccles v Mills* [1898] AC 360, PC), a covenant to pay rates and taxes (see *South of England Dairies Ltd v Baker* [1906] 2 Ch 631), a covenant restrictive of building on adjoining land of the landlord (*Ricketts v Churchwardens of Enfield* [1909] 1 Ch 544), a covenant to build on the demised land (*Re Hughes, Ellis v Hughes* [1913] 2 Ch 491), a covenant to supply a housekeeper to keep premises clean (*Barnes v City of London Real Property Co* [1918] 2 Ch 18) and, in a periodic tenancy, a restriction on the right to give notice during a specified period (*Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1, [1948] 1 All ER 758, CA); but a covenant by the landlord to give the tenant a right of pre-emption over adjoining ground is merely collateral (*Collison v Lettsom* (1815) 6 Taunt 224 at 229), and so is a covenant to pay a lump sum if the tenant does not renew (*Re Hunter's Lease, Giles v Hutchings* [1942] Ch 124, [1942] 1 All ER 27) and a covenant by the landlord to repay a security deposit

to the tenant at the end of the term of the lease (*Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] AC 99, [1987] 1 All ER 1110, PC). A covenant to renew runs with the reversion which is vested in the landlord at the date of the lease; it does not bind the assignee of a different reversion which the landlord subsequently acquires: *Coey v Pascoe* [1899] 1 IR 125; *Muller v Trafford* supra. As to who is bound by a covenant to renew see further *Earl Shelburne v Biddulph* (1748) 6 Bro Parl Cas 356 at 363; *Hamilton v Patten* (1839) 1 I Eq R 341; *Beere v Cavendish* (1806) 5 I Eq R 472; and as to options to purchase the freehold see PARA 135 ante. See also *System Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48, [1994] NPC 127, CA (a covenant allowing a tenant to surrender a lease binds a successor in title to the reversion, even if the covenant is personal to the tenant); *Harbour Estates Ltd v HSBC Bank plc* [2004] EWHC 1714 (Ch), [2005] Ch 194, [2004] 3 All ER 1057 (break clause touched and concerned the land; applied in *Sugarman v Porter* [2006] EWHC 331 (Ch), [2006] 11 EG 195 (CS), [2006] All ER (D) 117 (Mar)); *Cardwell v Walker* [2003] EWHC 3117 (Ch), [2004] 2 P & CR 122, [2003] All ER (D) 395 (Dec) (landlord's successor in title bound by easements, including tenants' right to the passage of electricity).

Where an underlandlord covenants to perform the covenants of the head lease so far as they relate to premises comprised in the head lease, but not in the underlease, and to indemnify the undertenant against breach, this is only collateral; it is not treated as touching and concerning the land on the ground that the undertenant is liable to be evicted for non-performance of the covenants in the head lease (*Dewar v Goodman* [1909] AC 72, HL); and a covenant to pay at the end of the term for articles which are not fixtures is collateral (*Gorton v Gregory* (1862) 3 B & S 90).

3 Law of Property Act 1925 s 142(1). Section 142 replaces 32 Hen 8 c 34 (Grantees of Reversions) (1540) s 2 (repealed) and the Conveyancing Act 1881 s 11 (repealed). The Law of Property Act 1925 s 142 applies to leases made before, on or after 1 January 1926, whether the severance of the reversionary estate was effected before, on or after that date (s 142(2)); but, where the lease was made before 1 January 1882, nothing in s 142 affects the operation of any severance of the reversionary estate effected before 1 January 1926 (s 142(2) proviso). Section 142 takes effect without prejudice to any liability affecting a covenantor or his estate: s 142(2).

4 Ibid s 142(1); and see note 3 supra.

5 The same principles apply as apply to the transfer of the benefit of the landlord's covenants: see PARA 569 note 3 ante.

6 See PARA 569 the text and note 4 ante. The decisions there cited all relate to the transfer of the benefit of the landlord's covenants under an agreement for a lease, but the same principle probably applies to the transfer of the burden.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/13. ASSIGNMENT AND DEVOLUTION OF LEASES/(4) BENEFIT AND BURDEN OF COVENANTS/(ii) Tenancies granted before 1 January 1996/C. TRANSFER OF THE REVERSION/572. Severance of reversion.

## 572. Severance of reversion.

The reversion may be divided as regards either the estate or the land<sup>1</sup>. Where the reversion is divided as regards the estate, by statute the burden and benefit of covenants in the existing lease pass to the new lessee<sup>2</sup>. The position where the reversion is divided as regards the land has already been discussed<sup>3</sup>.

1 See PARA 555 ante. Severance of the reversion and of the incidents attached to the reversion does not sever the tenancy into two tenancies; there remains one single tenancy after the severance: see PARA 555 the text and note 1 ante. An assignment of the reversion to a bare trustee or nominee for the landlord does not effect a severance: see PARA 555 the text and note 2 ante.

2 Ie under the Law of Property Act 1925 ss 141, 142: see PARAS 567, 571 ante. See also Co Litt 215a, resolution 4; *Wright v Burroughes* (1846) 3 CB 685.

3 See the Law of Property Act 1925 s 140 (as amended); and PARA 555 ante.

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#### **D. MUTUAL LIABILITY OF TENANT AND ASSIGNEE**

##### **573. Assignee's implied liability at common law to indemnify tenant.**

By taking the estate subject to the payment of rent and the performance of the covenants in the original lease, the assignee makes it his duty to pay the rent and perform the covenants, and from this duty the law implies a promise on his part<sup>1</sup>. Therefore, although both tenant and assignee are liable to the landlord, as between themselves the assignee is primarily liable while the term is vested in him; and, after paying the debt or discharging the obligation, the tenant has his remedy over against the assignee<sup>2</sup>. The liability of the assignee continues only so long as the term remains vested in him<sup>3</sup>. For this reason, before 1 January 1926, it was usual for the assignee to enter into an express covenant to indemnify the tenant<sup>4</sup> throughout the remainder of the term; but such a covenant is now implied in the case of an assignment for valuable consideration, other than a mortgage<sup>5</sup>. Upon a further assignment, the liability devolves upon the new assignee and the same relation is then constituted between the tenant and the new assignee, the new assignee being primarily liable and the tenant still being liable only as surety with a remedy over against the new assignee; and this holds as between the tenant and each subsequent assignee of the term, notwithstanding that the subsequent assignee has entered into an express covenant to indemnify his immediate assignor<sup>6</sup>. Each assignee is liable for rent accrued and breaches of covenant committed in his own time, even though the action is not commenced until after he has further assigned<sup>7</sup>.

The right of indemnity of a tenant against an assignee depends upon the assignee's taking the tenant's entire estate. It does not extend to an undertenant of the assignee, even though the underlease is by way of mortgage, and the mortgagee obtains the benefit of the tenant's payment of rent<sup>8</sup>; nor does it extend to a judgment creditor who takes the term in execution as a means to a sale of it<sup>9</sup>. Where, however, the tenant has executed a declaration of trust, he is entitled to be indemnified by the equitable assignee against the liabilities of the lease in the same manner as an ordinary trustee<sup>10</sup>; and, generally, where there is an agreement to assign under which the equitable assignee enters and enjoys the premises, it seems that he is liable to indemnify the tenant, if he is the immediate assignor, in respect of the period of his enjoyment, although not subsequently<sup>11</sup>. Where a surety for an assignee of the lease covenants with the landlord that the assignee will pay the rent, the assignee is entitled to be indemnified by the surety if the assignor pays the rent to the landlord on the tenant's default<sup>12</sup>.

Where there have been successive assignments of a lease and the landlord sues the original tenant under his covenant to pay the rent for the remainder of the term because the present tenant is insolvent, the original tenant may not compel an intermediate tenant to sue his successor who is solvent forcing him to pay the rent to the landlord; nor may the intermediate tenant be compelled to assign the benefit of his covenant to the original tenant<sup>13</sup>.

The former tenant is now afforded limited statutory protection in circumstances where the current tenant is in arrears with rent and may call for an overriding lease if he settles those arrears<sup>14</sup>.

<sup>1</sup> *Burnett v Lynch* (1826) 5 B & C 589 at 602; *Wolveridge v Stewart* (1833) 1 Cr & M 644 at 659, Ex Ch; *Moule v Garrett* (1870) LR 5 Exch 132 at 137 (affd (1872) LR 7 Ex Ch 101); *Selous Street Properties Ltd v Oronel*

*Fabrics Ltd* [1984] 1 EGLR 50, (1984) 270 Estates Gazette 643; *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376. Alternatively, without any implied promise, the assignee is liable in tort for breach of the duty: *Burnett v Lynch* supra at 604, 607.

2 It is said that the tenant is liable only as surety (see *Wolveridge v Steward* (1833) 1 Cr & M 644, Ex Ch; *Humble v Langston* (1841) 7 M & W 517 at 530), but he is not a surety in the true sense of the term (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1021, 1259). The tenant has no lien on the premises for payments which he makes: *O'Loughlin v Dwyer* (1884) 13 LR Ir 75. If he brings a claim before he has made any payments, he may recover only nominal damages notwithstanding that a claim by the landlord is pending: *Beattie v Quirey* (1876) IR 10 CL 516. The rights of a tenant who is an alien enemy to be indemnified by his assignee are suspended during time of war: *Halsey v Lowenfeld* [1916] 2 KB 707, CA; and see generally WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 573 et seq.

3 *Burnett v Lynch* (1826) 5 B & C 589 at 605; *Wolveridge v Steward* (1833) 1 Cr & M 644, Ex Ch.

4 See PARA 574 post.

5 See PARA 575 post.

6 *Moule v Garrett* (1870) LR 5 Exch 132; affd (1872) LR 7 Exch 101, Ex Ch; and see *Wolveridge v Steward* (1833) 1 Cr & M 644 at 660, Ex Ch. As to the covenant of indemnity see PARA 574 post.

7 *Harley v King* (1835) 2 Cr M & R 18; and see *Burnett v Lynch* (1826) 5 B & C 589. If the premises are dilapidated after the assignee has further assigned, substantial damages may be recovered on the implied covenant of indemnity, unless the assignee shows that the dilapidations did not take place in his time: *Smith v Peat* (1853) 9 Exch 161. See also *Cheverell Estates Ltd v Harris* [1998] 1 EGLR 27, [1998] 2 EG 127 (decided under the Landlord and Tenant (Covenants) Act 1995 s 17 (see PARA 289 ante) (guarantors covenanted in respect of the liabilities of the original tenant and not of assignees, but default of assignees gave rise to liability on the part of the original tenant which was enforceable against guarantors)).

8 *Bonner v Tottenham and Edmonton Permanent Investment Building Society* [1899] 1 QB 161, CA.

9 *Johns v Pink* [1900] 1 Ch 296.

10 *Close v Wilberforce* (1838) 1 Beav 112; *Willson v Leonard* (1840) 3 Beav 373; and see *Nokes v Fish* (1857) 3 Drew 735 and TRUSTS.

11 *Crouch v Tregonning* (1872) LR 7 Exch 88 at 93.

12 *Becton Dickinson UK Ltd v Zwebner* [1989] QB 208, [1988] 3 WLR 1376 (the surety's liability is primary as between the tenant and the surety).

13 *RPH Ltd v Mirror Group Newspapers and Mirror Group (Holdings) Ltd* (1992) 65 P & CR 252, [1993] 1 EGLR 74.

14 See the Landlord and Tenant (Covenants) Act 1995 ss 17-20; and PARA 289 et seq ante.

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## 574. Express covenant of indemnity.

It was usual for the tenant, on assigning the term, to take from the assignee an express covenant for payment of rent and performance of the covenants of the lease, and for indemnity, the assignee taking a similar covenant on further assignment; and the tenant and an assignee who, by reason of his having entered into such a covenant, remained under a continuing liability were entitled to have this covenant inserted in the assignment<sup>1</sup>. An express covenant for indemnity should still be inserted where the assignment is not made for valuable

consideration. In other cases an express covenant need not be inserted because, by statute, a covenant similar to the usual express covenant is implied<sup>2</sup>.

1 *Staines v Morris* (1812) 1 Ves & B 8.

2 See PARA 575 post.

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### **575. Statutory implied covenant for indemnity.**

In a conveyance<sup>1</sup> for valuable consideration<sup>2</sup>, other than a mortgage, of the entirety of the land<sup>3</sup> comprised in a lease, for the residue of the term or interest created by the lease, there is implied, in addition to the covenants for title otherwise implied by statute<sup>4</sup>, a covenant by the assignee or joint and several covenant by the assignees, if more than one, with the conveying parties and with each of them, if more than one, that the assignees, or the persons deriving title under them will at all times:

- 1145 (1) from the date of the conveyance or other date therein stated, duly pay all rent becoming due under the lease creating the term or interest for which the land is conveyed, and observe and perform all the covenants, agreements and conditions therein contained and thenceforth on the part of the lessees<sup>5</sup> to be performed and observed; and
- 1146 (2) from such date, save harmless and keep indemnified the conveying parties and their estates and effects from and against all proceedings, costs, claims and expenses on account of any omission to pay such rent or any breach of any of such covenants, agreements and conditions<sup>6</sup>.

Where the assignment is of part of the land comprised in the lease and the rent has been apportioned with the lessor's consent, the covenant so implied is implied in the like manner as if the apportioned rent were the original rent reserved and the lease related solely to that part<sup>7</sup>. Where, however, the assignment is of part of the land, and the rent has been apportioned without the landlord's consent<sup>8</sup>, there is implied a similar covenant by the assignee and also a covenant by the assignor with the assignee, if the assignor conveys and is expressed to convey as beneficial owner and he retains a part of the land, that the assignor will pay his apportioned part of the rent and perform the covenants relating to the land retained by him and will indemnify the assignee accordingly<sup>9</sup>. Where the part of the land assigned is conveyed either subject to the entire rent or discharged from the entire rent, the appropriate modifications are implied<sup>10</sup>. The covenants so implied may be varied or extended by deed and, as so varied or extended, operate, as far as may be, in the like manner and with the like incidents, effects and consequences, as if such variations or extensions were directed<sup>11</sup> to be implied<sup>12</sup>. The benefit of the covenants so implied are annexed and incident to, and go with, the estate or interest of the implied covenantee and are capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested<sup>13</sup>.

The chain of liability constituted by successive covenants of indemnity given on successive assignments may be broken by the bankruptcy of an intermediate assignee, but the tenant



may take from the trustee in bankruptcy an assignment of the bankrupt's right of indemnity against a subsequent assignee, and may then recover in full from that assignee<sup>14</sup>.

The express exclusion of the statutory implied covenant does not prevent the assignee's implied liability at common law to indemnify the tenant from arising<sup>15</sup>.

1    le a conveyance after 31 December 1925: see the Law of Property Act 1925 s 77(8). For these purposes, 'conveyance' does not include a demise by way of lease at a rent: s 77(3). For the meanings of 'lease' and 'rent' see PARA 551 notes 2-3 ante.

2    An assignee gives valuable consideration by taking over liability under the tenant's covenants in the lease, even if no, or only a nominal, premium is paid for the assignment: *Johnsey Estates Ltd v Lewis and Manley (Engineering) Ltd* [1987] 2 EGLR 69, (1987) 54 P & CR 296, CA.

3    For the meaning of 'land' see PARA 17 note 1 ante.

4    le in addition to the covenants implied, in relation to dispositions made on or after 1 July 1995, under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (implied covenants for title): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq. As to implied covenants for title in relation to dispositions made before 1 July 1995 see the Law of Property Act 1925 s 76 (repealed); and SALE OF LAND vol 42 (Reissue) PARA 338 et seq.

5    For the meaning of 'lessee' see PARA 145 note 3 ante.

6    Law of Property Act 1925 s 77(1)(C), Sch 2 Pt IX (s 77(1) amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 1). Nothing in the Landlord and Tenant (Covenants) Act 1995 s 30(1), (2), Schs 1, 2 (amendments and repeals) affects the operation of the Law of Property Act 1925 s 77 (as amended), Sch 2 Pts IX, X in relation to tenancies which are not new tenancies for the purposes of the 1995 Act: Landlord and Tenant (Covenants) Act 1995 s 30(3). For the meaning of 'new tenancy' see PARA 578 post.

7    Law of Property Act 1925 s 77(1)(C).

8    As to apportionment without the landlord's consent see PARA 551 ante.

9    See the Law of Property Act 1925 s 77(1)(D), Sch 2 Pt X. Any covenant which would be implied under s 77 (as amended) by reason of a person conveying or being expressed to convey as beneficial owner may, by express reference to s 77 (as amended), be implied, with or without variation, in a conveyance, whether or not for valuable consideration, by a person who conveys and is expressed to convey as settlor, trustee, mortgagee, or as a personal representative of a deceased person, or under an order of the court: s 77(4) (amended by the Mental Health Act 1959 s 149(2), Sch 8 Pt I).

10   See the Law of Property Act 1925 s 77(2) (as originally enacted).

11   le in *ibid* s 77 (as amended).

12   *Ibid* s 77(6). Any covenant implied under s 77 (as amended) may be extended by providing that the part of the land demised which remains vested in the covenantor shall, as the case may require, stand charged with the payment of all money which may become payable under the implied covenant: s 77(7)(c).

13   *Ibid* s 77(5).

14    *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182, CA; and see *Josselson v Borst (Gliksten, third party)* [1938] 1 KB 723, [1937] 3 All ER 722, CA; *Butler Estates Co v Bean* [1942] 1 KB 1, [1941] 2 All ER 793, CA (expenses in liquidation). Where the tenant is a trustee for an equitable assignee and the tenant goes bankrupt, money recovered under the right of indemnity from the equitable assignee cannot be treated as assets in the bankruptcy: *Re Richardson, ex p Governors of St Thomas's Hospital* [1911] 2 KB 705, CA; and see BANKRUPTCY AND INSOLVENCY vol 3(2) (2002 Reissue) PARA 428. As to proof in bankruptcy under a claim to indemnity see BANKRUPTCY AND INSOLVENCY vol 3(2) (2002 Reissue) PARA 493 note 6; and as to proof in winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 760.

15    *Re Healing Research Trustee Co Ltd* [1992] 2 All ER 481, [1992] 2 EGLR 231.

PARAS 1386-2000)/13. ASSIGNMENT AND DEVOLUTION OF LEASES/(4) BENEFIT AND BURDEN OF COVENANTS/(ii) Tenancies granted before 1 January 1996/D. MUTUAL LIABILITY OF TENANT AND ASSIGNEE/576. Construction of express and statutory implied covenants for indemnity.

### **576. Construction of express and statutory implied covenants for indemnity.**

Express or statutory implied covenants for indemnity<sup>1</sup> are binding on the assignee for the residue of the term; and he cannot put an end to his liability by further assigning unless the liability is expressly so limited<sup>2</sup>. The covenants are construed as covenants for indemnity only<sup>3</sup>; and the assignor is not entitled to insist upon the observance of the covenants in the lease except so far as is necessary for his indemnity<sup>4</sup>. It is, however, a question of construction whether an express covenant is limited to an indemnity; and, where there is no mention of an indemnity, it may be construed as an unqualified covenant<sup>5</sup>. The covenant implied by statute binds the assignee to indemnify the assignor only against future breaches<sup>6</sup>; and an express covenant is usually qualified so as to bind the assignee to indemnify the assignor against future breaches only<sup>7</sup>. In the absence of such a qualification an express covenant may entitle the assignor to indemnity against past breaches, at any rate as regards dilapidations, as these may have been taken into account in fixing the price<sup>8</sup>. The assignee may also be entitled to an indemnity against past breaches of a continuing nature under the statutory implied covenants<sup>9</sup>.

1 See PARAS 574-575 ante.

2 See *Harris v Goodwyn* (1841) 9 Dowl 409 at 418-419; cf *Crossfield v Morrison* (1849) 7 CB 286.

3 *Re Poole and Clarke's Contract* [1904] 2 Ch 173 at 177, CA; *Harris v Boots, Cash Chemists (Southern) Ltd* [1904] 2 Ch 376; *Reckitt v Cody* [1920] 2 Ch 452. As to indemnities generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1255 et seq.

4 *Harris v Boots, Cash Chemists (Southern) Ltd* [1904] 2 Ch 376.

5 *Butler Estates Co Ltd v Bean* [1942] 1 KB 1, [1941] 2 All ER 793, CA (tenant assigned the benefit of the covenant to the landlord; landlord held to be able to sue the assignee after he had further assigned).

6 See the Law of Property Act 1925 s 77(1)(C), Sch 2 Pt IX; and PARA 575 ante.

7 *Hawkins v Sherman* (1828) 3 C & P 459; cf *Reckitt v Cody* [1920] 2 Ch 452; *Opton Ltd v Commission for the New Towns* [1993] 2 EGLR 89, [1993] 35 EG 125.

8 *Gooch v Clutterbuck* [1899] 2 QB 148, CA; and see *Re Russell, Russell v Shoolbred* (1885) 29 ChD 254, CA.

9 The effect of the implied covenant under the Law of Property Act 1925 Sch 2 Pt IX, in respect of continuing breaches such as breaches of repairing obligations, is not confined to breaches occurring after the date of the assignment: see *Middlegate Properties Ltd v Bilbao (Caroline Construction Co Ltd, third party)* (1972) 24 P & CR 329.

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### **577. Costs recoverable under express covenant.**

If, after an assignment, the landlord sues the tenant for breach of covenant, it may be reasonable for the tenant to defend the claim, whether for the purpose of having the damages ascertained or otherwise; and in a claim on the covenant of indemnity the tenant may recover

as damages from the assignee the costs properly so incurred, notwithstanding that the defence was unsuccessful<sup>1</sup>. When, however, the extent of the liability to the landlord has been ascertained, the assignee has no reason for defending the tenant's claim; and, if he does so, he may not recover the costs against a subsequent assignee<sup>2</sup>.

1 *Howard v Lovegrove* (1870) LR 6 Exch 43; *Murrell v Fysh* (1883) Cab & El 80; and see *Cousins v Phillips* (1865) 3 H & C 892. As to the damages to be awarded see DAMAGES vol 12 paras 1120-1121; and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1265.

2 *Smith v Howell* (1851) 6 Exch 730.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/13. ASSIGNMENT AND DEVOLUTION OF LEASES/(4) BENEFIT AND BURDEN OF COVENANTS/(iii) New Tenancies granted on or after 1 January 1996/A. IN GENERAL/578. Tenancies and covenants to which the 1995 Act applies.

### **(iii) New Tenancies granted on or after 1 January 1996**

#### **A. IN GENERAL**

#### **578. Tenancies and covenants to which the 1995 Act applies.**

The provisions of the Landlord and Tenant Act 1995 which are set out below<sup>1</sup> apply only to new tenancies<sup>2</sup>. For these purposes, a tenancy<sup>3</sup> is a new tenancy if it is granted on or after 1 January 1996<sup>4</sup> otherwise than in pursuance of:

- 1147 (1) an agreement entered into before that date<sup>5</sup>; or
- 1148 (2) an order of a court made before that date<sup>6</sup>;

and heads (1) and (2) above apply<sup>7</sup> to the grant of a tenancy where by virtue of any variation of a tenancy there is a deemed surrender and regrant as it applies to any other grant of a tenancy<sup>8</sup>.

The Landlord and Tenant (Covenants) Act 1995 applies to a landlord covenant<sup>9</sup> or a tenant covenant<sup>10</sup> of a tenancy whether or not the covenant has reference to the subject matter of the tenancy, and whether the covenant is express, implied or imposed by law<sup>11</sup>. It does not, however, apply to, and nothing in that Act affects, any covenant imposed in pursuance of:

- 1149 (a) the provisions of the Housing Act 1985 requiring repayment of discount on early disposals following a conveyance in pursuance of a local authority's right to dispose of land held for housing purposes<sup>12</sup> or in pursuance of the right to buy<sup>13</sup>;
- 1150 (b) the provisions of that Act requiring redemption of the landlord's share following the exercise of the right to acquire on rent to mortgage terms<sup>14</sup>; or
- 1151 (c) the provisions of the Housing Act 1996 or of the Housing Associations Act 1985 requiring repayment of discount on early disposals following the purchase of housing from a registered social landlord<sup>15</sup> or restricting disposals<sup>16</sup> of certain houses so purchased<sup>17</sup>.

1 ie the Landlord and Tenant (Covenants) Act 1995 ss 3-16, 21: see PARAS 580 et seq, 611 post.

2 Ibid s 1(1).

- 3 For the meaning of 'tenancy' see PARA 289 note 3 ante.
- 4 Ie the date on which the Landlord and Tenant (Covenants) Act 1995 came into force: see the Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995, SI 1995/2963, art 2.
- 5 Where a tenancy granted on or after 1 January 1996 is so granted in pursuance of an option granted before that date, the tenancy is to be regarded for these purposes as granted in pursuance of an agreement entered into before that date (and accordingly is not a new tenancy), whether or not the option was exercised before that date: Landlord and Tenant (Covenants) Act 1995 s 1(6). For these purposes, 'option' includes right of first refusal: s 1(7).
- 6 Ibid s 1(3). Section 1(3) has effect subject to s 20(1) in the case of overriding leases granted under s 19 (see PARA 290 ante): s 1(4). An overriding lease is a new tenancy for the purposes of s 1 only if the relevant tenancy in respect of which it is created is a new tenancy: see s 20(1); and PARA 290 ante.
- 7 Ie without prejudice to the generality of ibid s 1(3).
- 8 Ibid s 1(5).
- 9 'Landlord covenant', in relation to a tenancy, means a covenant falling to be complied with by the landlord of premises demised by the tenancy: ibid s 28(1). For the meaning of 'landlord' see PARA 289 note 2 ante; and for the meaning of 'covenant' see PARA 289 note 6 ante.
- 10 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.
- 11 Landlord and Tenant (Covenants) Act 1995 s 2(1).
- 12 Ie the covenants required by the Housing Act 1985 s 35 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 310.
- 13 Ie the covenants required by ibid s 155 (as amended): see PARA 1889 post.
- 14 Ie the covenants required by ibid s 151A, Sch 6A para 1 (as added): see PARA 1877 post.
- 15 Ie the covenants required by the Housing Associations Act 1985 Sch 2 para 1 (repealed) or the Housing Act 1996 s 11 (as substituted): see HOUSING vol 22 (2006 Reissue) PARA 108.
- 16 Ie the covenants required by the Housing Associations Act 1985 Sch 2 para 3 (repealed) or the Housing Act 1996 s 13 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 112.
- 17 Landlord and Tenant (Covenants) Act 1995 s 2(1), (2) (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2, PARA 22).

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### **579. Restrictions on contracting out.**

Any agreement relating to a tenancy<sup>1</sup> is void to the extent that:

- 1152 (1) it would otherwise have effect to exclude, modify or otherwise frustrate the operation of any provision of the Landlord and Tenant (Covenants) Act 1995; or
- 1153 (2) it provides for the termination or surrender of the tenancy, or the imposition on the tenant of any penalty, disability or liability, in the event of the operation of any provision of the 1995 Act; or

- 1154 (3) it provides for any of the matters referred to in head (2) above and does so, whether expressly or otherwise, in connection with, or in consequence of, the operation of any provision of that Act<sup>2</sup>.

To the extent, however, that an agreement relating to a tenancy constitutes a covenant<sup>3</sup>, whether absolute or qualified, against the assignment<sup>4</sup>, or parting with the possession, of the premises demised by the tenancy or any part of them<sup>5</sup>:

- 1155 (a) the agreement is not void by virtue of heads (1) to (3) above by reason only of the fact that as such the covenant prohibits or restricts any such assignment or parting with possession; but  
 1156 (b) head (a) above does not otherwise affect the operation of heads (1) to (3) above in relation to the agreement, and in particular does not preclude its application to the agreement to the extent that it purports to regulate the giving of, or the making of any application for, consent<sup>6</sup> to any such assignment or parting with possession<sup>7</sup>.

Nothing in the above provisions applies<sup>8</sup> to any agreement to the extent that it is an authorised guarantee agreement<sup>9</sup>; but an agreement is void<sup>10</sup> to the extent that it is one<sup>11</sup> which purports:

- 1157 (i) to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee; or  
 1158 (ii) to impose on the tenant any liability, restriction or other requirement, of whatever nature, in relation to any time after the assignee is released from that covenant by virtue of the 1995 Act<sup>12</sup>.

Nothing in the 1995 Act is to be read as preventing:

- 1159 (A) a party to a tenancy from releasing a person from a landlord covenant<sup>13</sup> or a tenant covenant<sup>14</sup> of the tenancy; or  
 1160 (B) the parties to a tenancy from agreeing to an apportionment of liability under such a covenant<sup>15</sup>.

Further, an agreement between landlord and tenant to limit liability under their covenants from the outset does not impinge upon the operation of any provision of the 1995 Act and does not fall within head (1) above<sup>16</sup>. The mischief at which the Act was aimed was the absence of an exit route from the landlord's or tenant's future liabilities on a lawful assignment<sup>17</sup>; it is not intended to close any exit route available to the parties other than that provided by its own relieving provisions<sup>18</sup> and in particular that by agreement their liability may be curtailed from the outset or later relieved or waived<sup>19</sup>.

1 The Landlord and Tenant (Covenants) Act 1995 s 25 (see the text and notes 2-12 *infra*) applies to an agreement relating to a tenancy whether or not the agreement is (1) contained in the instrument creating the tenancy; or (2) made before the creation of the tenancy: s 25(4). For the meaning of 'tenancy' see PARA 289 note 3 *ante*.

2 *Ibid* s 25(1).

3 For the meaning of 'covenant' see PARA 289 note 6 *ante*.

4 For the meaning of 'assignment' see PARA 289 note 1 *ante*.

5 As to covenants against alienation see PARA 481 *et seq* *ante*.

- 6 'Consent' includes licence: Landlord and Tenant (Covenants) Act 1995 s 28(1).  
 7 Ibid s 25(2).  
 8 Ie in accordance with ibid s 16(1): see PARA 593 post.  
 9 For the meaning of 'authorised guarantee agreement' see PARA 593 post.  
 10 Ie without prejudice to the generality of the Landlord and Tenant (Covenants) Act 1995 s 25(1).  
 11 Ie one falling within ibid s 16(4)(a) or (b): see PARA 593 post at heads (i)-(ii) in the text.  
 12 Ibid s 25(3).  
 13 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.  
 14 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.  
 15 Landlord and Tenant (Covenants) Act 1995 s 26(1). As to apportionment of liability under the statutory procedure see ss 9, 10; and PARAS 586-587 post.  
 16 *London Diocesan Fund v Phithwa (Avonridge Property Co Ltd, Pt 20 defendant)* [2005] UKHL 70, [2006] 1 All ER 127, [2005] 1 WLR 3956.  
 17 See *London Diocesan Fund v Phithwa (Avonridge Property Co Ltd, Pt 20 defendant)* [2005] UKHL 70 at [10]-[13], [17]-[19], [2006] 1 All ER 127, [2005] 1 WLR 3956 per Lord Nicholls of Birkenhead.  
 18 Ie the Landlord and Tenant (Covenants) Act 1995 ss 5-8: see PARAS 582-585 post.  
 19 See *London Diocesan Fund v Phithwa (Avonridge Property Co Ltd, Pt 20 defendant)* [2005] UKHL 70 at [17], [2006] 1 All ER 127, [2005] 1 WLR 3956 per Lord Nicholls of Birkenhead.

## UPDATE

### 579 Restrictions on contracting out

NOTE 17--See *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] EWHC 330 (Ch), [2010] 14 EG 114, [2010] All ER (D) 238 (Mar) (Landlord and Tenant (Covenants) Act 1995 would be seriously undermined if guarantor was required to enter into further guarantee when underlease was assigned).

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## B. TRANSMISSION OF COVENANTS

### 580. Transmission of benefit and burden of covenants.

The benefit and burden of all landlord and tenant covenants<sup>1</sup> of a tenancy<sup>2</sup>:

- 1161 (1) are annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion<sup>3</sup> in them; and  
 1162 (2) pass<sup>4</sup> on an assignment<sup>5</sup> of the whole or any part of those premises or of the reversion in them<sup>6</sup>.

Where the assignment is by the tenant<sup>7</sup> under the tenancy, then as from the assignment the assignee:

- 1163 (a) becomes bound by the tenant covenants of the tenancy except to the extent that immediately before the assignment they did not bind the assignor<sup>8</sup>, or they fall to be complied with in relation to any demised premises not comprised in the assignment; and
- 1164 (b) becomes entitled to the benefit of the landlord covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises<sup>9</sup>.

Where the assignment is by the landlord<sup>10</sup> under the tenancy, then as from the assignment the assignee:

- 1165 (i) becomes bound by the landlord covenants of the tenancy except to the extent that immediately before the assignment they did not bind the assignor<sup>11</sup>, or they fall to be complied with in relation to any demised premises not comprised in the assignment; and
- 1166 (ii) becomes entitled to the benefit of the tenant covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises<sup>12</sup>.

Any landlord or tenant covenant of a tenancy which is restrictive of the user of land is, as well as being capable of enforcement against an assignee, capable of being enforced against any other person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the tenancy to that effect<sup>13</sup>.

Nothing in these provisions operates, however:

- 1167 (A) in the case of a covenant which, in whatever terms, is expressed to be personal to any person<sup>14</sup>, to make the covenant enforceable by or, as the case may be, against any other person; or
- 1168 (B) to make a covenant enforceable against any person if it would not otherwise be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972<sup>15</sup>.

Any rule of law by virtue of which the burden of a covenant whose subject matter is not in existence at the time when it is made does not run with the land affected unless the covenantor covenants on behalf of himself and his assigns is abolished in relation to tenancies<sup>16</sup>.

Where as a result of an assignment a person becomes, by virtue of the Landlord and Tenant (Covenants) Act 1995, bound by or entitled to the benefit of a covenant, he does not by virtue of that Act have any liability or rights under the covenant in relation to any time falling before the assignment<sup>17</sup>; but this does not preclude any such rights being expressly assigned to the person in question<sup>18</sup>.

1 For the meaning of 'landlord covenant' see PARA 578 note 9 ante; and for the meanings of 'covenant' and 'tenant covenant' see PARA 289 note 6 ante.

2 For the meaning of 'tenancy' see PARA 289 note 3 ante. As to the tenancies to which the Landlord and Tenant (Covenants) Act 1995 s 3 (as amended) applies see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

3 'Reversion' means the interest expectant on the termination of a tenancy: *ibid* s 28(1).

4 le in accordance with *ibid* s 3 (as amended): see the text and notes 5-14 *infra*.

5 For the meaning of 'assignment' see PARA 289 note 1 *ante*.

6 *Ibid* s 3(1). In circumstances where an overriding lease has been granted, and there are two potential claimants for the benefit of a tenant covenant, entitlement to that benefit depends upon the express or presumed intentions of the parties deduced from the overriding lease; the presumption is that benefits of a capital kind remain with the freeholder and that those of an income nature pass to the grantee of the overriding lease: see *First Penthouse Ltd v Channel Hotels & Properties (UK) Ltd*, *Channel Hotels & Properties (UK) Ltd v Al Tamimi* [2003] EWHC 2713 (Ch) at [58], [2004] 1 EGLR 16 *obiter per* Lightman J; *affd* on other grounds [2004] EWCA Civ 1072, [2004] All ER (D) 568 (Jul). As to overriding leases see PARA 290 *ante*.

7 For the meaning of 'tenant' see PARA 289 note 2 *ante*.

8 In determining for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 3(2) or (3) (see heads (a)-(b), (i)-(ii) in the text) whether any covenant bound the assignor immediately before the assignment, any waiver or release of the covenant which (in whatever terms) is expressed to be personal to the assignor must be disregarded: s 3(4).

9 *Ibid* s 3(2).

10 For the meaning of 'landlord' see PARA 289 note 2 *ante*.

11 See note 8 *supra*.

12 Landlord and Tenant (Covenants) Act 1995 s 3(3).

13 *Ibid* s 3(5). On the true construction of s 3(5), the term 'any demised premises' does not refer to any premises demised by the landlord, but rather means any of the premises demised by the lease in question: *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234, [2000] 1 All ER 975.

14 See eg *BHP Great Britain Petroleum Ltd v Chesterfield Properties Ltd* [2002] Ch 12 [2001] 2 All ER 914; *rvsd* in part [2001] EWCA Civ 1797, [2002] Ch 194, [2002] 1 All ER 821 (in agreement for a lease, landlord agreed to carry out certain building works which were expressed to be personal obligations of the landlord and tenant acknowledged that it would have no claim against the landlord's successors arising out of the landlord's obligations to remedy building works defects; held that the obligation to make good defects was a personal obligation and not a landlord covenant); *First Penthouse Ltd v Channel Hotels & Properties (UK) Ltd*, *Channel Hotels & Properties (UK) Ltd v Al Tamimi* [2003] EWHC 2713 (Ch), [2004] 1 EGLR 16; *affd* on other grounds [2004] EWCA Civ 1072, [2004] All ER (D) 568 (Jul); (covenants to pay commission and grant a development sublease not 'tenant covenants'); *Edlington Properties Ltd v JH Fenner & Co Ltd* [2006] EWCA Civ 403, [2006] 3 All ER 1200, [2006] 1 WLR 1583 (tenant's right to claim damages against a predecessor in title of the landlord, whether or not arising under a covenant in the lease, is a personal right). Cf *London Diocesan Fund v Phithwa (Avonridge Property Co Ltd, Pt 20 defendant)* [2005] UKHL 70, [2006] 1 All ER 127, [2005] 1 WLR 3956, cited in PARA 579 *ante*, where the covenant in question was intended to endure throughout the term of the sublease and so was not 'personal', even though the landlord's liability was expressly limited to the period when it held the reversion.

15 Landlord and Tenant (Covenants) Act 1995 s 3(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (2)).

16 See the Landlord and Tenant (Covenants) Act 1995 s 3(7).

17 *Ibid* s 23(1).

18 *Ibid* s 23(2).

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## 581. Transmission of rights of re-entry.



The benefit of a landlord's<sup>1</sup> right of re-entry under a tenancy<sup>2</sup> is annexed and incident to the whole, and to each and every part, of the reversion<sup>3</sup> in the premises demised by the tenancy, and passes on an assignment<sup>4</sup> of the whole or any part of the reversion in those premises<sup>5</sup>.

Where as a result of an assignment a person becomes, by virtue of the Landlord and Tenant (Covenants) Act 1995, entitled to a right of re-entry contained in a tenancy, that right is exercisable in relation to any breach of a covenant of the tenancy occurring before the assignment as in relation to one occurring thereafter, unless by reason of any waiver or release it was not so exercisable immediately before the assignment<sup>6</sup>.

1 For the meaning of 'landlord' see PARA 289 note 2 ante.

2 For the meaning of 'tenancy' see PARA 289 note 3 ante.

3 For the meaning of 'reversion' see PARA 580 note 3 ante.

4 For the meaning of 'assignment' see PARA 289 note 1 ante.

5 Landlord and Tenant (Covenants) Act 1995 s 4. As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

6 Ibid s 23(3).

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### ***C. RELEASE ON ASSIGNMENT; APPORTIONMENT OF LIABILITY***

#### **582. Tenant released from covenants on assignment of tenancy.**

The following provisions apply where a tenant<sup>1</sup> assigns premises demised to him under a tenancy<sup>2</sup>, whether or not the tenant is tenant of the whole of the premises comprised in the tenancy<sup>3</sup>.

If the tenant assigns the whole of the premises demised to him<sup>4</sup>, he is released from the tenant covenants<sup>5</sup> of the tenancy and ceases to be entitled to the benefit of the landlord covenants<sup>6</sup> of the tenancy, as from the assignment<sup>7</sup>.

If the tenant assigns part only of the premises demised to him, then as from the assignment he is released from the tenant covenants of the tenancy, and ceases to be entitled to the benefit of the landlord covenants of the tenancy, only to the extent that those covenants fall to be complied with in relation to that part<sup>8</sup> of the demised premises<sup>9</sup>.

1 For the meaning of 'tenant' see PARA 289 note 2 ante.

2 Landlord and Tenant (Covenants) Act 1995 s 5(1). For the meaning of 'tenancy' see PARA 289 note 3 ante. As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

3 Ibid s 5(4).

4 For these purposes, any assignment (however effected) consisting in the transfer of the whole of the tenant's interest in any premises demised by a tenancy is to be treated as an assignment by the tenant of those premises even if it is not effected by him: *ibid* s 28(6)(b). For the meaning of 'assignment' see PARA 289 note 1 ante.

5 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

6 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.

7 Landlord and Tenant (Covenants) Act 1995 s 5(2). As to the effects of such a release see PARA 589 post. In practice, in the vast majority of assignments of commercial leases the tenant will have continuing liability for the performance of the covenants in the lease by the assignee by virtue of being required to enter into an authorised guarantee agreement: see PARA 593 post.

8 For the purposes of any reference in the Landlord and Tenant (Covenants) Act 1995 to a covenant falling to be complied with in relation to a particular part of the premises demised by a tenancy, a covenant falls to be so complied with if (1) it in terms applies to that part of the premises; or (2) in its practical application it can be attributed to that part of the premises (whether or not it can also be so attributed to other individual parts of those premises): s 28(2). This does not, however, apply in relation to covenants to pay money; and for the purposes of any reference in the 1995 Act to a covenant falling to be complied with in relation to a particular part of the premises demised by a tenancy, a covenant of a tenancy which is a covenant to pay money falls to be so complied with if (a) the covenant in terms applies to that part; or (b) the amount of the payment is determinable specifically by reference (i) to that part; or (ii) to anything falling to be done by or for a person as tenant or occupier of that part (if it is a tenant covenant); or (iii) to anything falling to be done by or for a person as landlord of that part (if it is a landlord covenant): s 28(3).

9 *Ibid* s 5(3); and see note 7 supra.

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### **583. Landlord may be released from covenants on assignment of reversion.**

The following provisions apply where a landlord<sup>1</sup> assigns the reversion<sup>2</sup> in premises of which he is the landlord under a tenancy<sup>3</sup>, whether or not the landlord is landlord of the whole of the premises comprised in the tenancy<sup>4</sup>.

If the landlord assigns the reversion in the whole of the premises<sup>5</sup> of which he is the landlord:

- 1169 (1) he may apply to be released<sup>6</sup> from the landlord covenants<sup>7</sup> of the tenancy; and
- 1170 (2) if he is so released from all of those covenants, he ceases to be entitled to the benefit of the tenant covenants<sup>8</sup> of the tenancy as from the assignment<sup>9</sup>.

If the landlord assigns the reversion in part only of the premises<sup>10</sup> of which he is the landlord:

- 1171 (a) he may apply to be so released from the landlord covenants of the tenancy to the extent that they fall to be complied with in relation to that part of those premises<sup>11</sup>; and
- 1172 (b) if he is, to that extent, so released from all of those covenants, then as from the assignment he ceases to be entitled to the benefit of the tenant covenants only to the extent that they fall to be complied with in relation to that part of those premises<sup>12</sup>.

- 1 For the meaning of 'landlord' see PARA 289 note 2 ante.
- 2 For the meaning of 'reversion' see PARA 580 note 3 ante.
- 3 Landlord and Tenant (Covenants) Act 1995 s 6(1). For the meaning of 'tenancy' see PARA 289 note 3 ante. As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.
- 4 Ibid s 6(4).
- 5 For these purposes, any assignment (however effected) consisting in the transfer of the whole of the landlord's interest (as owner of the reversion) in any premises demised by a tenancy is to be treated as an assignment by the landlord of the reversion in those premises even if it is not effected by him: *ibid* s 28(6)(a). References to the assignment by a landlord of the reversion in the whole or part of the premises demised by a tenancy are to the assignment by him of the whole of his interest (as owner of the reversion) in the whole or part of those premises: s 28(5).
- 6 *Ie* in accordance with *ibid* s 8: see PARA 585 post.
- 7 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.
- 8 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.
- 9 Landlord and Tenant (Covenants) Act 1995 s 6(2). As to the effects of such a release see PARA 589 post. Nothing in the 1995 Act, however, affects the operation of the Landlord and Tenant Act 1985 s 3(3A) (as added) (preservation of former landlord's liability until tenant notified of new landlord): see PARA 553 the text and note 18 ante. Nor is a landlord released from a personal covenant: see *BHP Great Britain Petroleum Ltd v Chesterfield Properties Ltd* [2002] Ch 12, [2001] 2 All ER 914; *rvsd* in part [2001] EWCA Civ 1797, [2002] Ch 194, [2002] 1 All ER 821, cited in PARA 585 note 12 post.
- 10 As to assignment of the reversion in part of the premises see the Landlord and Tenant (Covenants) Act 1995 s 28(5) (cited in note 5 supra).
- 11 As to covenants falling to be complied with in relation to a particular part of the premises see PARA 582 note 8 ante.
- 12 Landlord and Tenant (Covenants) Act 1995 s 6(3); and see note 9 supra.

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#### **584. Former landlord may be released from covenants on assignment of reversion.**

The following provisions apply where:

- 1173 (1) a landlord<sup>1</sup> assigns the reversion<sup>2</sup> in premises of which he is the landlord under a tenancy<sup>3</sup>; and
- 1174 (2) immediately before the assignment<sup>4</sup> a former landlord of the premises remains bound by a landlord covenant<sup>5</sup> of the tenancy ('the relevant covenant')<sup>6</sup>,

whether or not the landlord making the assignment is landlord of the whole of the premises comprised in the tenancy and whether or not the former landlord has previously applied<sup>7</sup> to be released from the relevant covenant<sup>8</sup>.

If immediately before the assignment the former landlord does not remain the landlord of any other premises demised by the tenancy, he may apply to be released<sup>9</sup> from the relevant covenant<sup>10</sup>. In any other case the former landlord may apply to be so released from the relevant covenant to the extent that it falls to be complied with in relation to any premises comprised in the assignment<sup>11</sup>.

If the former landlord:

1175 (a) is so released from every landlord covenant by which he remained bound immediately before the assignment, he ceases to be entitled to the benefit of the tenant covenants<sup>12</sup> of the tenancy<sup>13</sup>;

1176 (b) is so released from every such landlord covenant to the extent that it falls to be complied with in relation to any premises comprised in the assignment, he ceases to be entitled to the benefit of the tenant covenants of the tenancy to the extent that they fall to be so complied with<sup>14</sup>.

1 For the meaning of 'landlord' see PARA 289 note 2 ante.

2 For the meaning of 'reversion' see PARA 580 note 3 ante.

3 For the meaning of 'tenancy' see PARA 289 note 3 ante.

4 For the meaning of 'assignment' see PARA 289 note 1 ante.

5 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.

6 Landlord and Tenant (Covenants) Act 1995 s 7(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

7 *Ie* under *ibid* s 6 (see PARA 583 ante) or s 7 (see the text and notes 1-6 *supra*, 8-14 *infra*).

8 *Ibid* s 7(6).

9 *Ie* in accordance with *ibid* s 8: see PARA 585 post.

10 *Ibid* s 7(2). As to the effects of such a release see PARA 589 post. Nothing in the 1995 Act, however, affects the operation of the Landlord and Tenant Act 1985 s 3(3A) (as added) (preservation of former landlord's liability until tenant notified of new landlord): see PARA 553 the text and note 18 ante.

11 Landlord and Tenant (Covenants) Act 1995 s 7(3); and see note 10 *supra*.

12 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

13 Landlord and Tenant (Covenants) Act 1995 s 7(4); and see note 10 *supra*.

14 *Ibid* s 7(5); and see note 10 *supra*.

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## **585. Procedure for seeking release from a relevant covenant.**

For the statutory purposes<sup>1</sup> an application for the release of a covenant<sup>2</sup> to any extent is made by serving<sup>3</sup> on the tenant<sup>4</sup>, either before or within the period of four weeks beginning with the date of the assignment<sup>5</sup> in question, a notice<sup>6</sup> informing him of:

- 1177 (1) the proposed assignment or, as the case may be, the fact that the assignment has taken place; and
- 1178 (2) the request for the covenant to be released to that extent<sup>7</sup>.

Where an application for the release of a covenant is made in accordance with these provisions, the covenant is released to the extent mentioned in the notice if:

- 1179 (a) the tenant does not, within the period of four weeks beginning with the day on which the notice is served, serve on the landlord or former landlord<sup>8</sup> a notice in writing objecting to the release<sup>9</sup>; or
- 1180 (b) the tenant does so serve such a notice but the court<sup>10</sup>, on the application of the landlord or former landlord, makes a declaration that it is reasonable for the covenant to be so released; or
- 1181 (c) the tenant serves on the landlord or former landlord a notice in writing consenting to the release and, if he has previously served a notice objecting to it, stating that that notice is withdrawn<sup>11</sup>.

Any release from a covenant in accordance with these provisions is to be regarded as occurring at the time when the assignment in question takes place<sup>12</sup>.

1    le for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 6 (see PARA 583 ante) or s 7 (see PARA 584 ante).

2    For the meaning of 'covenant' see PARA 289 note 6 ante.

3    The Landlord and Tenant Act 1927 s 23 (see PARA 703 post) applies in relation to the service of notices for these purposes and for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 10 (see PARA 587 post): s 27(5).

4    For these purposes, 'the tenant' means the tenant of the premises comprised in the assignment in question (or, if different parts of those premises are held under the tenancy by different tenants, each of those tenants): *ibid* s 8(4)(a). For the meaning of 'tenant' generally see PARA 289 note 2 ante.

5    For the meaning of 'assignment' see PARA 289 note 1 ante.

6    The form of any notice to be served for the purposes of the Landlord and Tenant (Covenants) Act 1995 ss 8, 10 must be prescribed by regulations made by the Lord Chancellor by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 27(1), (6). The regulations must require any notice served for the purposes of s 8(1) or s 10(1) ('the initial notice') to include: (1) an explanation of the significance of the notice and the options available to the person on whom it is served; (2) a statement that any objections to the proposed release, or (as the case may be) to the proposed binding effect of the apportionment, must be made by notice in writing served on the person or persons by whom the initial notice is served within the period of four weeks beginning with the day on which the initial notice is served; and (3) an address in England and Wales to which any such objections may be sent: s 27(2).

For the prescribed forms of notice for the purposes of s 8(1) see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, regs 1(2), 2, Schedule, Forms 3-6. Form 3 must be used where the landlord is applying to be released from all the landlord covenants of the tenancy on the assignment of his entire interest; Form 4 where he is applying to be released to the appropriate extent on the assignment of part only of his interest; Form 5 where the former landlord is applying to be released from all the landlord covenants of the tenancy on a subsequent assignment of the landlord's interest; and Form 6 where the former landlord who assigned part only of his interest is applying to be released to the appropriate extent on a subsequent assignment of the landlord's interest. Forms substantially to the like effect may be used: reg 2. If any notice purporting to be served for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 8(1) is not in the prescribed form, or in a form substantially to the same effect, the notice is not effective: s 27(4).

7 Ibid s 8(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

8 For these purposes, any reference to the landlord or the former landlord is a reference to the landlord referred to in ibid s 6 or the former landlord referred to in s 7, as the case may be: s 8(4)(b).

9 The prescribed form for the notice of objection is Pt II of the form served by the landlord as set out in the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2, Schedule, Forms 3-6.

10 For these purposes, 'the court' means a county court: Landlord and Tenant (Covenants) Act 1995 s 8(4) (c).

11 Ibid s 8(2). No specific form for the notice referred to in head (c) in the text is prescribed, except that it must contain a statement that the tenant is now consenting and that the notice is now withdrawn: see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2.

12 Landlord and Tenant (Covenants) Act 1995 s 8(3). As to the effects of such a release see PARA 589 post. Nothing in the 1995 Act, however, affects the operation of the Landlord and Tenant Act 1985 s 3(3A) (as added) (preservation of former landlord's liability until tenant notified of new landlord): see PARA 553 the text and note 18 ante. Nor does service of a notice under the Landlord and Tenant (Covenants) Act 1995 s 8 release a landlord from a personal obligation which is not a landlord covenant falling to be complied with by the person for the time being entitled to the reversion: see *BHP Great Britain Petroleum Ltd v Chesterfield Properties Ltd* [2002] Ch 12, [2001] 2 All ER 914; *rvsd* in part [2001] EWCA Civ 1797, [2002] Ch 194, [2002] 1 All ER 821 (in agreement for a lease, landlord agreed to carry out certain building works which were expressed to be personal obligations of the landlord and tenant acknowledged that it would have no claim against the landlord's successors arising out of the landlord's obligations to remedy building works defects; held that the obligation to make good defects was a personal obligation and not a landlord covenant).

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### **586. Apportionment of liability under covenants binding both assignor and assignee of tenancy or reversion.**

The following provisions apply where:

- 1182 (1) a tenant<sup>1</sup> assigns part only of the premises demised to him by a tenancy;
- 1183 (2) after the assignment<sup>2</sup> both the tenant and his assignee are to be bound by a non-attributable tenant covenant<sup>3</sup> of the tenancy; and
- 1184 (3) the tenant and his assignee agree that as from the assignment liability under the covenant is to be apportioned between them in such manner as is specified in the agreement<sup>4</sup>;

and also apply where:

- 1185 (a) a landlord<sup>5</sup> assigns the reversion<sup>6</sup> in part only of the premises of which he is the landlord under a tenancy;
- 1186 (b) after the assignment both the landlord and his assignee are to be bound by a non-attributable landlord covenant<sup>7</sup> of the tenancy; and
- 1187 (c) the landlord and his assignee agree that as from the assignment liability under the covenant is to be apportioned between them in such manner as is specified in the agreement<sup>8</sup>.

In any such case the parties to the agreement may apply for the apportionment to become binding<sup>9</sup> on the appropriate person<sup>10</sup>. They may also apply for the apportionment to become binding on any person, other than the appropriate person, who is for the time being entitled to enforce the covenant in question<sup>11</sup>.

1 For the meaning of 'tenant' see PARA 289 note 2 ante.

2 For the meaning of 'assignment' see PARA 289 note 1 ante.

3 For these purposes, a covenant is, in relation to an assignment, a 'non-attributable' covenant if it does not fall to be complied with in relation to any premises comprised in the assignment: Landlord and Tenant (Covenants) Act 1995 s 9(6). For the meaning of 'covenant' and 'tenant covenant' see PARA 289 note 6 ante.

4 Ibid s 9(1). Any such agreement as is mentioned in head (3) or head (c) in the text may apportion liability in such a way that a party to the agreement is exonerated from all liability under a covenant: s 9(3). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

5 For the meaning of 'landlord' see PARA 289 note 2 ante.

6 For the meaning of 'reversion' see PARA 580 note 3 ante.

7 For the meaning of 'landlord covenant' see PARA 578 note 9 ante; and see note 3 supra.

8 Landlord and Tenant (Covenants) Act 1995 s 9(2); and see note 4 supra.

9 Ie in accordance with ibid s 10: see PARA 587 post.

10 Ibid s 9(4). For these purposes, 'the appropriate person' means either (1) the landlord of the entire premises referred to in s 9(1)(a) (see head (1) in the text) (or, if different parts of those premises are held under the tenancy by different landlords, each of those landlords); or (2) the tenant of the entire premises referred to in s 9(2)(a) (see head (a) in the text) (or, if different parts of those premises are held under the tenancy by different tenants, each of those tenants), depending on whether the agreement in question falls within s 9(1) or s 9(2): s 9(7).

11 Ibid s 9(5). Section 10 applies in relation to such an application as it applies in relation to an application made with respect to the appropriate person: s 9(5).

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### **587. Procedure for making apportionment bind other party to lease.**

For the purposes of the apportionment of liability under non-attributable covenants<sup>1</sup>, the parties to an agreement falling within the relevant statutory provisions<sup>2</sup> apply for an apportionment to become binding on the appropriate person<sup>3</sup> if, either before or within the period of four weeks beginning with the date of the assignment<sup>4</sup> in question, they serve<sup>5</sup> on that person a notice<sup>6</sup> informing him of:

1188 (1) the proposed assignment or, as the case may be, the fact that the assignment has taken place;

1189 (2) the prescribed particulars<sup>7</sup> of the agreement; and

1190 (3) their request that the apportionment should become binding on him<sup>8</sup>.

Where an application for an apportionment to become binding has been so made, the apportionment becomes binding on the appropriate person if:

1191 (a) he does not, within the period of four weeks beginning with the day on which the notice is served<sup>9</sup>, serve on the parties to the agreement a notice in writing<sup>10</sup> objecting to the apportionment becoming binding on him; or

1192 (b) he does so serve such a notice but the court<sup>11</sup>, on the application of the parties to the agreement, makes a declaration that it is reasonable for the apportionment to become binding on him; or

1193 (c) he serves on the parties to the agreement a notice in writing consenting to the apportionment becoming binding on him and, if he has previously served a notice objecting thereto, stating that the notice is withdrawn<sup>12</sup>.

Where any apportionment becomes binding in accordance with these provisions, this is to be regarded as occurring at the time when the assignment in question takes place<sup>13</sup>.

No apportionment which has become binding in accordance with these provisions is affected by any order or decision made under or by virtue of any enactment not contained in the Landlord and Tenant (Covenants) Act 1995 which relates to apportionment<sup>14</sup>.

1    le for the purposes of the Landlord and Tenant (Covenants) Act 1995 s 9: see PARA 586 ante.

2    le an agreement falling within *ibid* s 9(1) or (2): see PARA 586 ante.

3    For these purposes, 'the appropriate person' has the same meaning as in *ibid* s 9 (see PARA 586 note 10 ante): s 10(4).

4    For the meaning of 'assignment' see PARA 289 note 1 ante.

5    As to service of notices see PARA 585 note 3 ante.

6    The notice must be in the prescribed form or a form substantially to the like effect: see PARA 585 note 6 ante. For the prescribed forms of notice for the purposes of s 10(1) see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, regs 1(2), 2, Schedule, Forms 7-8. Form 7 must be used for a joint application by the tenant and the tenant's assignee and Form 8 for a joint application by the landlord and the landlord's assignee.

7    For these purposes, 'prescribed' means prescribed by virtue of the Landlord and Tenant (Covenants) Act 1995 s 27 (see PARA 585 note 6 ante): s 10(4).

8    *Ibid* s 10(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

9    le under *ibid* s 10(1).

10   The prescribed form for the notice of objection is Pt II of the form served as set out in the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2, Schedule, Forms 7-8.

11   For these purposes, 'the court' means a county court: Landlord and Tenant (Covenants) Act 1995 s 10(4).

12   *Ibid* s 10(2). No specific form for the notice referred to in head (c) in the text is prescribed, except that it must contain a statement that the appropriate person is now consenting and that the notice is now withdrawn: see the Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995, SI 1995/2964, reg 2.

13   Landlord and Tenant (Covenants) Act 1995 s 10(3).

14   *Ibid* s 26(3).



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**588. Assignments in breach of covenant or by operation of law.**

In relation to assignments<sup>1</sup> in breach of a covenant<sup>2</sup> of a tenancy<sup>3</sup> or assignments by operation of law ('excluded assignments'), the operation of the statutory provisions for the release from covenants and apportionment of liability<sup>4</sup> is as follows<sup>5</sup>.

In the case of an excluded assignment:

- 1194 (1) the tenant's automatic release from the tenant covenants of the tenancy<sup>6</sup> does not have effect in relation to the tenant<sup>7</sup> as from that assignment, but has that effect as from the next assignment, if any, of the premises assigned by him which is not an excluded assignment<sup>8</sup>;
- 1195 (2) the landlord's or former landlord's statutory right to apply for release from the landlord covenants of the tenancy<sup>9</sup> or from the relevant covenant<sup>10</sup> does not enable the landlord or former landlord<sup>11</sup> to apply for such a release<sup>12</sup> as from that assignment, but applies on the next assignment, if any, of the reversion<sup>13</sup> assigned by the landlord which is not an excluded assignment so as to enable the landlord or former landlord to apply for any such release as from that subsequent assignment<sup>14</sup>;
- 1196 (3) the provisions for the apportionment of liability<sup>15</sup> do not enable the tenant or landlord and his assignee to apply for an agreed apportionment to become binding<sup>16</sup> as from that assignment, but apply on the next assignment, if any, of the premises or reversion assigned by the tenant or landlord which is not an excluded assignment so as to enable him and his assignee to apply for such an apportionment to become binding<sup>17</sup> as from that subsequent assignment<sup>18</sup>.

If any such subsequent assignment as is mentioned in head (1), head (2) or head (3) above comprises only part of the premises assigned by the tenant or, as the case may be, only part of the premises the reversion in which was assigned by the landlord on the excluded assignment:

- 1197 (a) the relevant statutory provision or provisions<sup>19</sup> only have the effect mentioned above<sup>20</sup> to the extent that the covenants or covenant in question fall or falls to be complied with in relation to that part of those premises<sup>21</sup>; and
- 1198 (b) head (1), head (2) or head (3) above may accordingly apply on different occasions in relation to different parts of those premises<sup>22</sup>.

1 For the meaning of 'assignment' see PARA 289 note 1 ante.

2 For the meaning of 'covenant' see PARA 289 note 6 ante.

3 For the meaning of 'tenancy' see PARA 289 note 3 ante.

4 I.e. the operation of the Landlord and Tenant (Covenants) Act 1995 ss 5-10: see PARA 582 et seq ante.

5 See *ibid* s 11(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

6 I.e. *ibid* s 5(2) or (3): see PARA 582 ante.

7 It does not have the effect mentioned in *ibid* s 5(2) or (3). For the meaning of 'tenant' see PARA 289 note 2 ante.

8 *Ibid* s 11(2). As to the effects of such a release see PARA 589 post. Nothing in the 1995 Act, however, affects the operation of the Landlord and Tenant Act 1985 s 3(3A) (as added) (preservation of former landlord's liability until tenant notified of new landlord): see PARA 553 the text and note 18 ante.

Where a person ('the former tenant') is to any extent released from a covenant of a tenancy by virtue of the Landlord and Tenant (Covenants) Act 1995 s 11(2) as from an assignment and the assignor under the assignment enters into an authorised guarantee agreement with the landlord with respect to the performance of that covenant by the assignee under the assignment, the landlord may require the former tenant to enter into an agreement under which he guarantees, on terms corresponding to those of that authorised guarantee agreement, the performance of that covenant by the assignee under the assignment: s 16(6)(a). If its provisions conform with s 16(4), (5) (see PARA 593 post), any such agreement is an authorised guarantee agreement for the purposes of s 16 (see PARA 593 post): s 16(6)(b). As to the application of s 16 in relation to any such agreement see PARA 593 note 5 post; and for the meaning of 'authorised guarantee agreement' see PARA 593 post.

9 *Ibid* s 6(2) or (3); see PARA 583 ante.

10 *Ibid* s 7(2) or (3): see PARA 584 ante.

11 For the meaning of 'landlord' generally see PARA 289 note 2 ante; and for the meaning of 'landlord or former landlord' for these purposes see PARA 585 note 8 ante.

12 *Ibid* such a release as is mentioned in the Landlord and Tenant (Covenants) Act 1995 s 6(2) or (3) or s 7(2) or (3).

13 For the meaning of 'reversion' see PARA 580 note 3 ante.

14 Landlord and Tenant (Covenants) Act 1995 s 11(3); and see note 8 supra. Where s 6(2) or (3) or s 7(2) or (3) does so apply, then: (1) any reference in s 6 or s 7 to the assignment (except where it relates to the time as from which the release takes effect) is a reference to the excluded assignment; but (2) in that excepted case and in s 8 (see PARA 585 ante) as it applies in relation to any application under s 8 made by virtue of s 11(3), any reference to the assignment or proposed assignment is a reference to any such subsequent assignment as is mentioned in s 11(3): s 11(4).

15 *Ibid* s 9: see PARA 586 ante.

16 *Ibid* in accordance with *ibid* s 10: see PARA 587 ante.

17 See note 16 supra.

18 Landlord and Tenant (Covenants) Act 1995 s 11(5); and see note 8 supra. Where s 9 does so apply, then: (1) any reference in s 9 to the assignment or the assignee under it is a reference to the excluded assignment and the assignee under that assignment; but (2) in s 10 as it applies in relation to any application under s 9 made by virtue of s 11(5), any reference to the assignment or proposed assignment is a reference to any such subsequent assignment as is mentioned in s 11(5): s 11(6).

19 *Ibid* the relevant provision or provisions of *ibid* s 5, s 6, s 7 or s 9: see PARAS 582-584, 586 ante.

20 *Ibid* the effect mentioned in *ibid* s 11(2), (3) or (5): see heads (1)-(3) in the text.

21 *Ibid* s 11(7)(a). As to covenants falling to be complied with in relation to part of the premises see PARA 582 note 8 ante.

22 *Ibid* s 11(7)(b).

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### **589. Effects of release from liability under, or loss of benefit of, covenant.**

Any release of a person from a covenant<sup>1</sup> by virtue of the Landlord and Tenant (Covenants) Act 1995 does not affect any liability of his arising from a breach of the covenant occurring before the release<sup>2</sup>. Where:

1199 (1) by virtue of that Act a tenant<sup>3</sup> is released from a tenant covenant<sup>4</sup> of a tenancy<sup>5</sup>; and

1200 (2) immediately before the release another person is bound by a covenant of the tenancy imposing any liability or penalty in the event of a failure to comply with that tenant covenant,

then, as from the release of the tenant, that other person is released from the covenant mentioned in head (2) above to the same extent as the tenant is released from that tenant covenant<sup>6</sup>.

Where a person bound by a landlord or tenant covenant<sup>7</sup> of a tenancy:

1201 (a) assigns the whole or part of his interest in the premises demised by the tenancy; but

1202 (b) is not released by virtue of the 1995 Act from the covenant, with the result that the provisions set out above do not apply,

the assignment<sup>8</sup> does not affect any liability of his arising from a breach of the covenant occurring before the assignment<sup>9</sup>.

Where by virtue of that Act a person ceases to be entitled to the benefit of a covenant, this does not affect any rights of his arising from a breach of the covenant occurring before he ceases to be so entitled<sup>10</sup>.

1 For the meaning of 'covenant' see PARA 289 note 6 ante.

2 Landlord and Tenant (Covenants) Act 1995 s 24(1).

3 For the meaning of 'tenant' see PARA 289 note 2 ante.

4 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

5 For the meaning of 'tenancy' see PARA 289 note 3 ante.

6 Landlord and Tenant (Covenants) Act 1995 s 24(2).

7 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.

8 For the meaning of 'assignment' see PARA 289 note 1 ante.

9 Landlord and Tenant (Covenants) Act 1995 s 24(3).

10 Ibid s 24(4).

COVENANTS AND JOINT LIABILITY UNDER COVENANTS/590. Covenants with management companies etc.

## ***D. THIRD PARTY COVENANTS AND JOINT LIABILITY UNDER COVENANTS***

### **590. Covenants with management companies etc.**

The following provisions apply where:

- 1203 (1) a person other than the landlord<sup>1</sup> or tenant<sup>2</sup> ('the third party') is under a covenant<sup>3</sup> of a tenancy<sup>4</sup> liable, as principal, to discharge any function with respect to all or any of the demised premises ('the relevant function'); and
- 1204 (2) that liability is not the liability of a guarantor or any other financial liability referable to the performance or otherwise of a covenant of the tenancy by another party to it<sup>5</sup>.

To the extent that any covenant of the tenancy confers any rights against the third party with respect to the relevant function, then for the purposes of the transmission of the benefit of the covenant<sup>6</sup> it is to be treated as if it were:

- 1205 (a) a tenant covenant<sup>7</sup> of the tenancy to the extent that those rights are exercisable by the landlord; and
- 1206 (b) a landlord covenant<sup>8</sup> of the tenancy to the extent that those rights are exercisable by the tenant<sup>9</sup>.

To the extent that any covenant of the tenancy confers any rights exercisable by the third party with respect to the relevant function, then for the purposes of:

- 1207 (i) the transmission of the burden of the covenant<sup>10</sup>; and
- 1208 (ii) any release from, or apportionment of liability in respect of, the covenant<sup>11</sup>,

it is to be treated as if it were:

- 1209 (A) a tenant covenant of the tenancy to the extent that those rights are exercisable against the tenant; and
- 1210 (B) a landlord covenant of the tenancy to the extent that those rights are exercisable against the landlord<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 289 note 2 ante.

2 For the meaning of 'tenant' see PARA 289 note 2 ante.

3 For the meaning of 'covenant' see PARA 289 note 6 ante.

4 For the meaning of 'tenancy' see PARA 289 note 3 ante.

5 Landlord and Tenant (Covenants) Act 1995 s 12(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.

6 Ie in accordance with the Landlord and Tenant (Covenants) Act 1995: see PARAS 580-581 ante.

7 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

8 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.

9 Landlord and Tenant (Covenants) Act 1995 s 12(2).

10 See note 6 *supra*.

11 *Ie* in accordance with the Landlord and Tenant (Covenants) Act 1995: see PARAS 582-588 *ante*.

12 *Ibid* s 12(3), (4). In relation to the release of the landlord from any covenant which is to be treated as a landlord covenant by virtue of s 12(3), s 8 (see PARA 585 *ante*) applies as if any reference to the tenant were a reference to the third party: s 12(5).

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### **591. Covenants binding two or more persons.**

Where in consequence of the Landlord and Tenant (Covenants) Act 1995 two or more persons are bound by the same covenant<sup>1</sup>, they are so bound both jointly and severally<sup>2</sup>; and where by virtue of that Act:

1211 (1) two or more persons are bound jointly and severally by the same covenant;  
and

1212 (2) any of the persons so bound is released from the covenant,

the release does not extend<sup>3</sup> to any other of those persons<sup>4</sup>.

For the purpose of providing for contribution between persons who, by virtue of the 1995 Act, are bound jointly and severally by a covenant, the Civil Liability (Contribution) Act 1978 has effect as if:

1213 (a) liability to a person under a covenant were liability in respect of damage suffered by that person;

1214 (b) references to damage accordingly included a breach of a covenant of a tenancy; and

1215 (c) certain transitional provision made by that 1978 Act<sup>5</sup> were omitted<sup>6</sup>.

Where two or more persons jointly constitute either the landlord or the tenant in relation to a tenancy, however, nothing in the above provisions applies in relation to the rights and liabilities of such persons between themselves<sup>7</sup>.

1 For the meaning of 'covenant' see PARA 289 note 6 *ante*.

2 Landlord and Tenant (Covenants) Act 1995 s 13(1). As to the tenancies to which these provisions apply see PARA 578 *ante*; and as to restrictions on contracting out see PARA 579 *ante*.

3 *Ie* subject to *ibid* s 24(2): see PARA 589 *ante*.

4 *Ibid* s 13(2).

5 *Ie* the Civil Liability (Contribution) Act 1978 s 7(2): see TORT vol 45(2) (Reissue) PARA 349.

6 Landlord and Tenant (Covenants) Act 1995 s 13(3).

7 Ibid s 28(4).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/13. ASSIGNMENT AND DEVOLUTION OF LEASES/(4) BENEFIT AND BURDEN OF COVENANTS/(iii) New Tenancies granted on or after 1 January 1996/E. ENFORCEMENT OF COVENANTS; AUTHORISED GUARANTEE AGREEMENTS/592. Enforcement of covenants.

## ***E. ENFORCEMENT OF COVENANTS; AUTHORISED GUARANTEE AGREEMENTS***

### **592. Enforcement of covenants.**

Where any tenant covenant<sup>1</sup> of a tenancy<sup>2</sup>, or any right of re-entry contained in a tenancy, is enforceable:

- 1216 (1) by the reversioner<sup>3</sup> in respect of any premises demised by the tenancy, it is also so enforceable by:
  - 111 136. (a) any person other than the reversioner who, as the holder of the immediate reversion in those premises, is for the time being entitled to the rents and profits under the tenancy in respect of those premises; or
  - 137. (b) any mortgagee<sup>4</sup> in possession of the reversion in those premises who is so entitled<sup>5</sup>;
- 112 1217 (2) against the tenant<sup>6</sup> in respect of any premises demised by the tenancy, it is also so enforceable against any mortgagee in possession of those premises under a mortgage<sup>7</sup> granted by the tenant<sup>8</sup>.

Where any landlord covenant<sup>9</sup> of a tenancy is enforceable:

- 1218 (i) against the reversioner in respect of any premises demised by the tenancy, it is also so enforceable against any person falling within head (1)(a) or head (1)(b) above<sup>10</sup>;
- 1219 (ii) by the tenant in respect of any premises demised by the tenancy, it is also so enforceable by any mortgagee in possession of those premises under a mortgage granted by the tenant<sup>11</sup>.

Nothing in these provisions, however, operates:

- 1220 (A) in the case of a covenant which, in whatever terms, is expressed to be personal to any person, to make the covenant enforceable by or, as the case may be, against any other person; or
- 1221 (B) to make a covenant enforceable against any person if it would not otherwise be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972<sup>12</sup>.

Where a person ('the former tenant') is as a result of an assignment<sup>13</sup> no longer a tenant under a tenancy but he has under an authorised guarantee agreement<sup>14</sup> guaranteed the performance by his assignee of a tenant covenant of the tenancy under which any fixed charge<sup>15</sup> is payable,

he is not liable to make any payment under that agreement unless the landlord satisfies the statutory conditions as to notice<sup>16</sup>. If he then makes full payment he is entitled to be granted an overriding lease of the premises by the landlord<sup>17</sup>.

- 1 For the meaning of 'tenant covenant' and 'covenant' see PARA 289 note 6 ante.
- 2 For the meaning of 'tenancy' see PARA 289 note 3 ante.
- 3 For these purposes, 'the reversioner', in relation to a tenancy, means the holder for the time being of the interest of the landlord under the tenancy: Landlord and Tenant (Covenants) Act 1995 s 15(6). For the meaning of 'landlord' see PARA 289 note 2 ante.
- 4 For these purposes, 'mortgagee' includes 'chargee': ibid s 15(6).
- 5 Ibid s 15(1). As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante.
- 6 For the meaning of 'tenant' see PARA 289 note 2 ante.
- 7 For these purposes, 'mortgage' includes 'charge': Landlord and Tenant (Covenants) Act 1995 s 15(6).
- 8 Ibid s 15(4).
- 9 For the meaning of 'landlord covenant' see PARA 578 note 9 ante.
- 10 Landlord and Tenant (Covenants) Act 1995 s 15(2).
- 11 Ibid s 15(3).
- 12 Ibid s 15(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 33(1), (2)).
- 13 For the meaning of 'assignment' see PARA 289 note 1 ante.
- 14 As to authorised guarantee agreements see PARA 593 post.
- 15 For the meaning of 'fixed charge' see PARA 289 note 7 ante.
- 16 See the Landlord and Tenant (Covenants) Act 1995 s 17; and PARA 289 ante.
- 17 See ibid ss 19, 20; and PARA 290 ante.

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### **593. Tenant guaranteeing performance of covenant by assignee.**

Where on an assignment<sup>1</sup> a tenant<sup>2</sup> is to any extent released from a tenant covenant of a tenancy<sup>3</sup> by virtue of the Landlord and Tenant (Covenants) Act 1995 ('the relevant covenant'), nothing in that Act<sup>4</sup> precludes him from entering into an authorised guarantee agreement with respect to the performance of that covenant by the assignee<sup>5</sup>. For these purposes an agreement is an authorised guarantee agreement if:

- 1222 (1) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee; and
- 1223 (2) it is entered into in the specified circumstances<sup>6</sup>; and

1224 (3) its provisions conform<sup>7</sup> with the relevant statutory requirements<sup>8</sup>.

The specified circumstances are as follows:

- 1225 (a) by virtue of a covenant against assignment, whether absolute or qualified, the assignment cannot be effected without the consent<sup>9</sup> of the landlord<sup>10</sup> under the tenancy or some other person;
- 1226 (b) any such consent is given subject to a condition, lawfully imposed, that the tenant is to enter into an agreement guaranteeing the performance of the covenant by the assignee; and
- 1227 (c) the agreement is entered into by the tenant in pursuance of that condition<sup>11</sup>.

An agreement is not an authorised guarantee agreement to the extent that it purports:

- 1228 (i) to impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee; or
- 1229 (ii) to impose on the tenant any liability, restriction or other requirement, of whatever nature, in relation to any time after the assignee is released from that covenant by virtue of the Landlord and Tenant (Covenants) Act 1995<sup>12</sup>.

Subject to heads (i) and (ii) above, an authorised guarantee agreement may:

- 1230 (A) impose on the tenant any liability as sole or principal debtor in respect of any obligation owed by the assignee under the relevant covenant;
- 1231 (B) impose on the tenant liabilities as guarantor in respect of the assignee's performance of that covenant which are no more onerous than those to which he would be subject in the event of his being liable as sole or principal debtor in respect of any obligation owed by the assignee under that covenant;
- 1232 (C) require the tenant, in the event of the tenancy assigned by him being disclaimed, to enter into a new tenancy of the premises comprised in the assignment whose term expires not later than the term of the tenancy assigned by the tenant, and whose tenant covenants are no more onerous than those of that tenancy;
- 1233 (D) make provision incidental or supplementary to any provision made by virtue of any of heads (A) to (C) above<sup>13</sup>.

The rules of law relating to guarantees, and in particular those relating to the release of sureties are, subject to its terms, applicable in relation to any authorised guarantee agreement as in relation to any other guarantee agreement<sup>14</sup>.

It has been held that on the renewal of a business tenancy<sup>15</sup>, the provisions of the new lease may not entitle the landlord to require, in all cases, an authorised guarantee agreement as a condition of consent for an assignment, but may only do so where such a requirement is reasonable<sup>16</sup>.

1 For the meaning of 'assignment' see PARA 289 note 1 ante.

2 For the meaning of 'tenant' see PARA 289 note 2 ante.

3 For the meanings of 'tenant covenant' and 'covenant' see PARA 289 note 6 ante; for the meaning of 'tenancy' see PARA 289 note 3 ante; and as to the release of a tenant see PARA 582 ante.



4     le and in particular, nothing in the Landlord and Tenant (Covenants) Act 1995 s 25 (prohibition on contracting out): see PARA 579 ante.

5     Ibid s 16(1). For these purposes it is immaterial that (1) the tenant has already made an authorised guarantee agreement in respect of a previous assignment by him of the tenancy referred to in the text, it having been subsequently revested in him following a disclaimer on behalf of the previous assignee; or (2) the tenancy referred to in the text is a new tenancy entered into by the tenant in pursuance of an authorised guarantee agreement; and in any such case ss 16(2)-(5) (see the text and notes 6-13 *infra*) apply accordingly: s 16(7). 'Authorised guarantee agreement' means an agreement which is an authorised guarantee agreement for the purposes of s 16: s 28(1).

Where a person ('the former tenant') is to any extent released from a covenant of a tenancy by virtue of s 11(2) (see PARA 588 ante) as from an assignment and the assignor under the assignment enters into an authorised guarantee agreement with the landlord with respect to the performance of that covenant by the assignee under the assignment, the landlord may require the former tenant to enter into an agreement under which he guarantees, on terms corresponding to those of that authorised guarantee agreement, the performance of that covenant by the assignee under the assignment; and if its provisions conform with ss 16(4) and (5), any such agreement is an authorised guarantee agreement for the purposes of s 16: s 16(6)(a), (b). In the application of s 16 in relation to any such agreement, s 16(2)(b),(c), (3) (see heads (2)-(3), (a)-(c) in the text) are omitted, and any reference to the tenant or to the assignee is to be read as a reference to the former tenant or to the assignee under the assignment: s 16(6)(c).

As to the tenancies to which these provisions apply see PARA 578 ante; and as to restrictions on contracting out see PARA 579 ante. Section 16 applies where the tenancy referred to in s 16(1) is an overriding lease (as to which see PARA 290 ante) as it applies in other cases falling within s 16(1): s 20(5)(b).

6     le the circumstances set out in *ibid* s 16(3): see heads (a)-(c) in the text.

7     le its provisions conform with *ibid* s 16(4), (5): see the text and notes 12-13 *infra*.

8     Ibid s 16(2).

9     For the meaning of 'consent' see PARA 579 note 6 ante. As to covenants against assignment without consent see PARA 481 *et seq* ante.

10    For the meaning of 'landlord' see PARA 289 note 2 ante.

11    Landlord and Tenant (Covenants) Act 1995 s 16(3); and see the text and notes 15-16 *infra*. Where a subtenant went into administrative receivership, and the sublease contained terms requiring the provision of an authorised guarantee agreement on assignment in such form as the landlord reasonably required, it was held that the landlord was not entitled, as a condition of relief from forfeiture for the purposes of an assignment, to require that the agreement should be given not only by the original tenant but also by the administrative receiver personally: see *Legends Surf Shops plc (in administrative receivership) v Sun Life Assurance Society plc* [2005] EWHC 1438 (Ch) [2005] 3 EGLR 43, [2005] 46 EG 178.

12    Landlord and Tenant (Covenants) Act 1995 s 16(4).

13    Ibid s 16(5).

14    Ibid s 16(8). See generally FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1013 *et seq*.

15    le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 *et seq* post.

16    See *Wallis Fashion Group Ltd v CGU Life Assurance Ltd* (2000) 81 P & CR 393, [2000] 2 EGLR 49 (landlord cannot demand the inclusion of an authorised guarantee agreement as of right). In practice, however, an authorised guarantee agreement is almost invariably required on assignment, usually because it is a term of the lease that the tenant enters into such an agreement.

## UPDATE

### 593 Tenant guaranteeing performance of covenant by assignee

NOTE 13--See *Shaw v Doleman* [2009] EWCA Civ 279, [2009] 2 BCLC 123 (as, by virtue of Insolvency Act 1986 s 178(4) (see PARA 643), disclaimer released company disclaiming from liability but had no affect on rights of any other person, assignor

remained liable in respect of assignee company's performance of its covenants under authorised guarantee agreement).

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#### **(iv) Liability as between Adjoining Tenants**

##### **594. General rule and exceptions.**

Where neighbouring premises have been let to different tenants subject to restrictive covenants, the question arises whether the different tenants, or their respective successors in title, are entitled to the benefit of the covenants as against each other<sup>1</sup>. The general rule at common law is that one tenant may not enforce as against other tenants the covenants in the leases under which the other tenants hold the premises demised to them. To that general rule three, or possibly four, exceptions arise:

- 1234 (1) where a tenant has taken an assignment from the landlord of the benefit of a covenant entered into by a tenant of other premises<sup>2</sup>;
- 1235 (2) where the various tenants or their predecessors in title have entered into a mutual deed of covenant, in which case each is entitled to enforce it against the other parties<sup>3</sup>;
- 1236 (3) where there exists a building scheme, that is to say, where an estate has been laid out under a common scheme for building and the leases have been taken pursuant to that scheme; in such a case, each tenant may enforce the observance of the negative covenants by the other tenants, irrespective of the order in which the leases have been granted<sup>4</sup>;
- 1237 (4) where a letting scheme is imposed on the premises; the same principles apply as apply in respect of a building scheme, but there need be no physical laying out of the estate; it is sufficient that the estate is divided up into separate parcels and each parcel is let out on substantially identical terms in such circumstances as, if the estate had been physically laid out for the purposes of the building scheme, would have justified the recognition of such a scheme; the concept of a letting scheme is usually applied only to large buildings, such as a block of flats<sup>5</sup> and in order to establish a letting scheme, it is not enough that all of the leases contained similar or identical restrictive covenants; it must be shown that the covenants were taken in order to benefit the tenants of the various parcels comprised within the building or the estate generally<sup>6</sup>.

If a tenant may not enforce a restrictive covenant against another tenant pursuant to one or other of the above exceptions to the general rule, he may not be able to compel the landlord to enforce the covenant for him, as the landlord is not regarded as holding the benefit of the various tenants' covenants as trustee for and on behalf of the other tenants within the landlord's estate<sup>7</sup>. The landlord himself is, however, entitled to enforce them<sup>8</sup>; and, if on his part he has covenanted with tenants that the restrictions are to be observed, then, by reason of his continuing liability, he may enforce the covenants, notwithstanding that he has conveyed away the whole of the property<sup>9</sup>.

1 As to letting schemes for flats see PARA 520 ante; and the text to notes 5-6 infra.

2 See *Renals v Cowlshaw* (1878) 9 ChD 125 at 129; affd (1879) 11 ChD 866, CA. It may be that, if a subsequent tenant's covenants in his lease are expressed to be made with a previous tenant, that previous tenant may enforce them under the Law of Property Act 1925 s 56: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61.

3 *Renals v Cowlshaw* (1878) 9 ChD 125; affd (1879) 11 ChD 866, CA.

4 *Renals v Cowlshaw* (1878) 9 ChD 125 (affd (1879) 11 ChD 866, CA); *Spicer v Martin* (1888) 14 App Cas 12, HL; *Elliston v Reacher* [1908] 2 Ch 374 (affd [1908] 2 Ch 665, CA); *Reid v Bickerstaff* [1909] 2 Ch 305, CA; *Newman v Real Estate Debenture Corp Ltd and Flower Decorations Ltd* [1940] 1 All ER 131 (letting scheme); *Brunner v Greenslade* [1971] Ch 993, [1970] 3 All ER 833; *Texaco Antilles Ltd v Kernochan* [1973] AC 609, [1973] 2 All ER 118, PC; *Emile Elias & Co Ltd v Pine Groves Ltd* [1993] 1 WLR 305, 66 P & CR 1, PC; and see *Re Spike and Rocca Group Ltd* (1979) 107 DLR (3d) 62, PEI SC. The same principles apply when the various lots within the area of the scheme are sold rather than let. Each tenant may enforce the scheme against the landlord as well as against the other tenants. As to building schemes see further EQUITY vol 16(2) (Reissue) PARA 624 et seq. In *Brunner v Greenslade* supra at 999 and at 836 Megarry J described schemes of development as the genus of which building schemes were a species: see EQUITY vol 16 (2) (Reissue) PARA 617 note 4.

5 See eg *Hudson v Cripps* [1896] 1 Ch 265.

6 See eg *Newman v Real Estate Debenture Corp Ltd and Flower Decorations Ltd* [1940] 1 All ER 131 (where the purpose of the identical restrictions was to protect the landlord's own leasehold interest); *Andrews v Sohal* [1989] EGCS 12 (leases of five units let by common landlord each contained a covenant for use for a specified purpose; there was held to be no scheme of development because it must have been clear to any intending tenant that the landlord had retained the right to control uses and that any tenant could seek consent for change of use); *Williams v Kiley (t/a CK Supermarkets Ltd)* [2002] EWCA Civ 1645, [2003] 1 EGLR 46, [2002] All ER (D) 301 (Nov) (covenant in letting scheme restricted shops in parade to certain trades; for further proceedings as to the terms of the injunction see *Williams v Kiley (t/a CSK Supermarkets Ltd)* [2004] EWCA Civ 870, [2004] All ER (D) 122 (Jun)).

7 *Kemp v Bird* (1877) 5 ChD 974, CA; *Ashby v Wilson* [1900] 1 Ch 66; and see *Fitz v Iles* [1893] 1 Ch 77, CA; *Holloway Bros v Hill* [1902] 2 Ch 612.

8 If the landlord has not assigned the benefit of the covenants expressly or impliedly to other tenants, he may release them: *Earl of Zetland v Hislop* (1882) 7 App Cas 427, HL.

9 *Spencer v Bailey* (1893) 69 LT 179.

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## (5) DEVOLUTION ON TENANT'S DEATH

### 595. Lease devolves on personal representatives.

Whether it is for a term of years or from year to year, a tenant's interest in the demised property vests, on his death, in his personal representatives<sup>1</sup>. This is so notwithstanding that the tenant has bequeathed the property, and the term does not vest in the legatee until the executor has assented to the bequest<sup>2</sup>. There is, however, a distinction as to the time when a lease vests in an executor and an administrator respectively. The executor generally derives his title from the will, and the lease vests in him from the moment of the tenant's death, so that he may do almost all the acts incident to his office before probate<sup>3</sup>. An administrator, however, derives his title from the grant of letters of administration, and the lease vests in him only from that time; until the grant, the lease is vested in the President of the Family Division<sup>4</sup>. Thus, an administrator may not in general act before the grant<sup>5</sup>; and a notice to quit served on the President before the grant, or on the persons in occupation as his agents, is effective to determine a tenancy<sup>6</sup>.

1 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 360. As to a yearly tenant see also *Doe d Hull v Wood* (1845) 14 M & W 682. A weekly tenancy creates a contractual duty to pay rent which binds a personal representative to the extent of the tenant's assets after the tenant's death until the tenancy is determined by notice to quit: *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA. As to claims by the landlord's personal representatives see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 30, 36. In *Eccles v Mills* [1898] AC 360, PC, a covenant by the landlord to lay down part of the demised land in grass, and in *Re Hughes, Ellis v Hughes* [1913] 2 Ch 491 a covenant by a landlord to erect buildings on the demised land, were held, on the landlord's death, to have created liabilities which ought to be discharged out of the testator's general estate and not by the specific devisees of the reversions. In *Re Day's Will Trust, Lloyds Bank Ltd v Shafe* [1962] 3 All ER 699, [1962] 1 WLR 1419 it was held that an obligation of a deceased lessor to put demised premises into repair ought to be borne by the residuary estate rather than by the specific devisee of the reversion. As to the incidence of charges see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 425-426.

2 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 559. After an unconditional assent the executor is not entitled to an indemnity out of the testator's estate in respect of the covenants in the lease: *Shadbolt v Woodfall* (1845) 2 Coll 30; *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467; and see *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467; *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 29-30.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 33-34.

5 His dispositions may, however, be rendered valid by the doctrine of relation back: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 35-37.

6 *Fred Long & Sons Ltd v Burgess* [1950] 1 KB 115, [1949] 2 All ER 484; *Earl of Harrowby v Snelson* [1951] 1 All ER 140; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

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### 596. Liability of representative as assignee.

A deceased tenant's personal representative<sup>1</sup> takes the leasehold property as assignee<sup>2</sup>; but he does not become personally liable for rent or on the covenants in the lease unless he has entered<sup>3</sup>. Further, even though he has entered and has thus made himself prima facie liable as assignee both for rent and on the covenants, he is entitled to limit his liability for rent to the yearly value of the premises<sup>4</sup>; but he cannot limit his liability in respect of any other covenant<sup>5</sup>. Where he is sued in his personal capacity as assignee, the liability, subject to such limitation, must be satisfied out of his own property<sup>6</sup>; but he may also be sued as representative, in which case the judgment, whether for rent<sup>7</sup> or breach of covenant<sup>8</sup>, is against the testator's property only, and the claim may be met by a plea of plene administravit<sup>9</sup>.

1 This includes an administrator ad colligenda bona: *Whitehead v Palmer* [1908] 1 KB 151. As to grants ad colligenda bona see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 223.

2 *Tilny v Norris* (1700) 1 Ld Raym 553. An executor de son tort may also be treated as assignee: *Williams v Heales* (1874) LR 9 CP 177; cf *Paull v Simpson* (1846) 9 QB 365; *Stratford-upon-Avon Corp'n v Parker* [1914] 2 KB 562; and see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 53. Where the term is vested in the survivor of two joint tenants, the executors of the deceased joint tenant are not, however, liable to assignees of the reversion for want of privity of estate, notwithstanding that there was a tenancy in common in equity: *Goddard v Lewis* (1909) 101 LT 528. As the assignment is by operation of law, it is not a breach of a covenant or condition against assignment: see PARA 483 ante.

3 Originally, in charging an assignee, it was necessary to allege that he had entered (see *Cook v Harris* (1698) 1 Ld Raym 367); but the liability of the ordinary assignee now arises without entry (see PARA 561 ante). As regards executors, however, the requirement has been maintained: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 772. As the executor may not accept the executorship as to part only of the property, its maintenance is a matter of obvious convenience. In effect he disclaims the lease by not entering, and in this sense he is said to 'renounce' or 'waive' it: *Wilkinson v Cawood* (1797) 3 Anst 905, 909; *Stephens v Hotham* (1855) 1 K & J 571, 575; cf *Howse v Webster* (1607) Yelv 103. In pleading, the executor should not deny the assignment to himself; he should plead that he took as executor and never entered: *Green v Earl Listowel* (1840) 2 ILR 384; *Wollaston v Hakewill* (1841) 3 Man & G 297; *Kearsley v Oxley* (1864) 2 H & C 896 at 904-905; and see note to *Goodland v Ewing* (1883) Cab & El 43 at 44. The payment of rent accrued due after the death of the tenant, unless otherwise explained, amounts to entry: *Rendall v Andreae* (1892) 61 LQB 630.

4 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 773; *Youngmin v Heath* [1974] 1 All ER 461, [1974] 1 WLR 135, CA; *Rendall v Andreae* (1892) 61 LQB 630. It is a question of fact whether an executor is in as assignee or under a new tenancy on the terms of the lease: see *Theatre Royal Drury Lane Co of Proprietors v Chapman* (1843) 1 Car & Kir 14. The executor may similarly limit his liability if he is sued for use and occupation: *Patten v Reid* (1862) 6 LT 281; and see *Atkins v Humphrey* (1846) 2 CB 654; *Nixon v Quinn* (1868) IR 2 CL 248.

5 *Tilny v Norris* (1700) 1 Ld Raym 553; *Rendall v Andreae* (1892) 61 LQB 630; and see the other cases cited in EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 773.

6 *Tilny v Norris* (1700) 1 Ld Raym 553; *Buckley v Pirk* (1710) 1 Salk 316. Executors who become yearly tenants by occupying and paying rent impliedly undertake to observe the terms of the original contract: *Buckworth v Simpson* (1835) 1 Cr M & R 834.

7 *Buckley v Pirk* (1710) 1 Salk 316; *Lyddall v Dunlapp* (1743) 1 Wils 4; and see *Hargrave's Case* (1601) 5 Co Rep 31a.

8 *Lady Wilson v Wigg* (1808) 10 East 313.

9 *Lyddall v Dunlapp* (1743) 1 Wils 4; *Lady Wilson v Wigg* (1808) 10 East 313. As to the defence of plene administravit see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 828 et seq.

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### 597. Avoidance of liability.

Unless the lease contains a condition or covenant against assignment<sup>1</sup>, a personal representative who has become personally liable as assignee may avoid future liability by assigning the lease<sup>2</sup>. Where the testator was an assignee, the personal representative, by assigning, may avoid any future liability of the testator's estate<sup>3</sup>. Moreover, if the personal representative assigns the leaseholds on sale, then by satisfying all liabilities then accrued due and claimed, and setting apart a sufficient fund to answer any future claim in respect of any fixed sum covenanted to be laid out on the property, he may avoid personal liability for all claims which have not then been made<sup>4</sup>. This does not affect the liability of the testator's estate, but the lessor is not entitled to have the assets impounded to answer the future rent and covenants<sup>5</sup>. It is, however, unnecessary for the personal representative to require an indemnity as to leaseholds on distributing the estate<sup>6</sup> unless he has made himself personally liable by entering<sup>7</sup>.

1 *Sir William More's Case* (1584) Cro Eliz 26; *Roe d Gregson v Harrison* (1788) 2 Term Rep 425. As to covenants against assignment see PARA 481 et seq ante.

2 *Taylor v Shum* (1797) 1 Bos & P 21; *Goodland v Ewing* (1883) Cab & El 43; and see PARA 563 ante.

3 See EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 771. The original tenants may be entitled to indemnity against the testator's estate, and in his claim the executor may plead plene administravit; but he is not bound to keep the assets as an indemnity fund: *Collins v Crouch* (1849) 13 QB 542.

4 See the Trustee Act 1925 s 26 (as amended); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 408. Section 26 (as amended) does not apply if the executor has entered and has incurred personal liability as an assignee as well as liability as an executor: see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 408; and *Re Owers, Public Trustee v Death* [1941] Ch 389, [1941] 2 All ER 589. In such a case he is entitled to have an indemnity fund set aside until he has assented: *Re Owers, Public Trustee v Death* supra; *Re Bennett, Midland Bank Executor and Trustee Co Ltd v Fletcher* [1943] 1 All ER 467.

5 *King v Malcott* (1852) 9 Hare 692; and see *Re King, Mellor v South Australian Land Mortgage and Agency Co* [1907] 1 Ch 72 at 75.

6 *Dodson v Sammell* (1861) 1 Drew & Sm 575; and see *King v Malcott* (1852) 9 Hare 692 at 695.

7 See PARA 596 note 3 ante.

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## **(6) EFFECT OF TENANT'S INSOLVENCY**

### **598. Personal insolvency.**

On the bankruptcy of a tenant who is beneficially interested in the leasehold property<sup>1</sup> the term vests<sup>2</sup> in his trustee<sup>3</sup>, who thereupon, as assignee, becomes personally liable for the rent and under the covenants<sup>4</sup>. The trustee in bankruptcy may terminate his liability by assigning over<sup>5</sup>, unless prevented from assigning by the terms of the lease<sup>6</sup>, or he may avoid the liability altogether by disclaiming<sup>7</sup>. In either case the landlord, and, if the bankrupt is an assignee, the assignor, may prove against the estate of the bankrupt for any loss they may sustain<sup>8</sup>. Leaseholds acquired by the bankrupt after the bankruptcy follow the rule applicable to personal property generally; they do not automatically vest in the trustee, but may be claimed by the trustee<sup>9</sup>.

1 As to the property of a bankrupt which is divisible amongst his creditors see the Insolvency Act 1986 s 283 (as amended); and BANKRUPTCY AND INSOLVENCY vol 3(2) (2002 Reissue) PARA 216.

2 Where the tenancy is (1) a tenancy which is an assured tenancy or an assured agricultural occupancy, within the meaning of the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARAS 1018, 1183 post), and the terms of which inhibit an assignment as mentioned in the Rent Act 1977 s 127(5) (as amended) (see PARA 929 note 10 post); or (2) a protected tenancy, within the meaning of the Rent Act 1977 (see PARA 818 post), in respect of which, by virtue of any provision of Pt IX (ss 119-128) (as amended) (see PARAS 925 et seq, 998 post), no premium can lawfully be required as a condition of assignment; or (3) a tenancy of a dwelling house by virtue of which the bankrupt is, within the meaning of the Rent (Agriculture) Act 1976 (see PARAS 1144-1145 post), a protected occupier of the dwelling house, and the terms of which inhibit an assignment as mentioned in the Rent Act 1977 s 127(5) (as amended); or (4) a secure tenancy, within the meaning of the Housing Act 1985 Pt IV (ss 79-117) (as amended): see PARA 1300 et seq post, which is not capable of being assigned, except in the cases mentioned in s 91(3) (as amended) (see PARA 1323 post), the tenancy does not automatically vest in the trustee as part of the bankrupt's estate but so vests only upon the service on the bankrupt by the trustee of a notice in writing under the Insolvency Act 1986 s 308A (as added) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 393); see the Insolvency Act 1986 s 283(3A) (added by the Housing Act 1988 s 117); the Insolvency Act 1986 s 308A (as so added); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 393.

3 See *ibid* s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 391. This result is not prevented by a covenant against assignment contained in the lease. Where a trustee holds leasehold property

for the beneficiary subject to his own right of indemnity, this gives him a beneficial interest, so that, if the retention of the leaseholds is necessary to give full effect to his rights, the leaseholds pass to his trustee in bankruptcy: *Governors of St Thomas's Hospital v Richardson* [1910] 1 KB 271, CA.

4 *Re Solomon, ex p Dressler* (1878) 9 ChD 252, CA; *Wilson v Wallani* (1880) 5 Ex D 155 at 163; *Titterton v Cooper* (1882) 9 QBD 473, CA. The trustee is, however, entitled to be indemnified out of the estate of the bankrupt: *Lowrey v Barker* (1880) 5 Ex D 170 at 173, CA.

5 *Wilkins v Fry* (1816) 1 Mer 244 at 265. It seems that the assignment may be made even to a person of no means, for the express purpose of getting rid of the liability: *Hopkinson v Lovering* (1883) 11 QBD 92.

6 *Re Wright, ex p Landau v Trustee* [1949] Ch 729, [1949] 2 All ER 605 (covenant against assignment binding the tenant and his successors in title held to bind the trustee in bankruptcy). Previously it was thought that a trustee in bankruptcy, acting under the authority of a statute, was not bound by a covenant between the parties: *Goring v Warner* (1724) 2 Eq Cas Abr 100; *Re Johnson, ex p Blackett* (1894) 70 LT 381. Although the decision in *Re Wright, ex p Landau v Trustee* supra was based on the express inclusion in the covenant of the successors in title to the tenant, the trustee would seem to be bound by every covenant made since 31 December 1925, unless a contrary intention is expressed, as the covenant is deemed to be made by the tenant on behalf of himself and his successors in title: see the Law of Property Act 1925 s 79(1); DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 414.

7 As to disclaimer see PARAS 642-643 post; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq.

8 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 488. As to the landlord's right to distrain after the commencement of bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 686 et seq; and as to forfeiture on bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 412-413.

9 *Re Clayton and Barclay's Contract* [1895] 2 Ch 212; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 445-446. As to disclaimer of after-acquired property see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 473.

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### 599. Corporate insolvency.

On the making of a winding-up order, the property of a company does not vest in the liquidator<sup>1</sup>. The liquidator has power to assign leaseholds held by the company<sup>2</sup>; but, where leaseholds are held by the company subject to a covenant against assignment without the landlord's consent, he may not assign without that consent<sup>3</sup>. The liquidator has power to disclaim leaseholds vested in the company<sup>4</sup>; and, upon such a disclaimer occurring, the landlord is reduced to the position of an unsecured creditor proving in the liquidation in respect of any arrears of rent other than arrears which accrued while the liquidator retained the lease for the general benefit of the creditors or for the convenience of the winding up<sup>5</sup>.

Whether the lease is assigned, disclaimed or retained by the liquidator, the landlord, and, if the company is an assignee, the assignor, may prove in the winding up for any loss they may sustain<sup>6</sup>; and in certain circumstances a fund may be set aside to meet future claims<sup>7</sup>.

1 The liquidator may, however, apply to the court for an order vesting property of the company in the liquidator: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 575.

2 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577.

3 See PARA 483 ante; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 587.

4 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq. As to the circumstances in which a liquidator may disclaim, or be put to his election whether to disclaim, see the Insolvency Act 1986 s 178; paras 642-643 post; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 866 et seq, 872.

5 *Re Lundy Granite Co, ex p Heavan* (1871) 6 Ch App 462; *Re North Yorkshire Iron Co* (1878) 7 ChD 661; *Re Oak Pits Colliery Co* (1882) 21 ChD 322, CA; *Re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 All ER 650, [1970] 1 WLR 702 (landlord held to be entitled to prove only for a dividend in respect of the rent due for the period while the liquidator decided whether to retain the lease). See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 759; cf *Re HH Realisations Ltd* (1975) 31 P & CR 249 (landlord entitled to full rent, as the lease was retained for the benefit of the creditors, only until the liquidator gave notice of his application for leave to disclaim; thereafter, for the period from notice until actual disclaimer, the landlord could prove only in the liquidation).

6 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 759, 879. As to the landlord's right to distrain and to recover rent after the commencement of the winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 889-890; and as to forfeiture on winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 891; and PARA 606 post. See also *Re ABC Coupler and Engineering Co Ltd (No 3)* [1970] 1 All ER 650, [1970] 1 WLR 702; *Re HH Realisations Ltd* (1975) 31 P & CR 249; *Re Blue Jeans Sales Ltd* [1979] 1 All ER 641, [1979] 1 WLR 362.

7 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 759.

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## 14. TERMINATING LEASES; RECOVERING POSSESSION

### (1) IN GENERAL

#### 600. Methods of determination.

A lease may be determined only in one of certain recognised ways, that is to say by:

- 1238 (1) effluxion of time<sup>1</sup>;
- 1239 (2) notice to quit<sup>2</sup>;
- 1240 (3) exercise of an option to determine<sup>3</sup>;
- 1241 (4) operation of a condition subsequent<sup>4</sup>;
- 1242 (5) forfeiture<sup>5</sup>;
- 1243 (6) surrender<sup>6</sup>;
- 1244 (7) merger<sup>7</sup>;
- 1245 (8) disclaimer<sup>8</sup>;
- 1246 (9) application to the county court in the case of derelict land<sup>9</sup>;
- 1247 (10) application to the magistrates' court in the case of deserted premises<sup>10</sup>;
- 1248 (11) operation of the housing legislation<sup>11</sup>;
- 1249 (12) enlargement under the Law of Property Act 1925<sup>12</sup>;
- 1250 (13) exercise of the landlord's statutory power to determine the lease on the tenant's conviction for knowingly permitting the premises to be used as a brothel and failure thereafter to assign<sup>13</sup>;
- 1251 (14) frustration, repudiation and acceptance<sup>14</sup>.

Compulsory purchase does not itself extinguish a term, but rather transfers it to the acquiring authority whereupon it merges with the reversion also acquired; but the practical effect is that compulsory acquisition can be regarded as a further method whereby a lease may be



determined<sup>15</sup>. Similarly, where a tenant exercises his right to acquire the freehold pursuant to the right to enfranchise<sup>16</sup>, the lease under which he holds the property is normally merged, where there is no intervening interest, with the freehold so acquired and the lease is thereby determined.

The Law Commission has recommended the abolition of the current law of forfeiture and the creation of a new statutory procedure for the termination of fixed term commercial tenancies and residential tenancies of 21 years or more<sup>17</sup>.

1 See PARAS 208, 239 ante.

2 See PARA 213 et seq ante.

3 See PARAS 141-143 ante.

4 Like other interests in land, leases may be granted so as to determine upon the operation of a condition subsequent: see PARA 238 ante; and REAL PROPERTY vol 39(2) (Reissue) PARAS 97, 115.

5 See PARA 603 et seq post.

6 See PARA 630 et seq post.

7 See PARAS 640-641 post.

8 See PARA 642 et seq post.

9 See PARA 648 post.

10 See PARA 649 post.

11 Leases of premises in respect of which a demolition order has become operative may be determined by order of a residential property tribunal: see the Housing Act 1985 s 317 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 441. Closing orders have been replaced by prohibition orders under the Housing Act 2004; see s 20 et seq; and HOUSING vol 22 (2006 Reissue) PARA 387 et seq. As to the effect of a closing order on a tenancy see *Blake v Smith* [1921] 2 KB 685; *Ferguson v Pittman* 1958 SLT 18, Sh Ct.

12 See PARAS 1386-1388 post.

13 See PARA 22 ante.

14 See PARA 601 post.

15 Eg in the case of short tenancies where the tenant is required to give up possession: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 698 et seq.

16 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended); see PARA 1389 et seq post. Cf the right to buy conferred by the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.

17 See *Termination of Tenancies for Tenant Default* (Law Com no 303) (October 2006).

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## **601. Frustration and repudiation.**

There is no principle of law that the contractual doctrine of frustration<sup>1</sup> can never apply so as to determine a lease<sup>2</sup>. The fact that an executed lease, as well as being a contract, conveys an estate in land is no bar in principle to the application of the doctrine<sup>3</sup>. Even so, the instances in

which the doctrine can apply so as to determine a lease will be rare<sup>4</sup>. There is no reported English case where a lease has been ruled to have been frustrated<sup>5</sup>. A possible instance of the application of the doctrine would be where the subject matter of the lease had been destroyed, although such an occurrence may be rare in relation to a lease of land<sup>6</sup>. An agreement for a lease may be frustrated<sup>7</sup>, as may a licence to use or occupy land<sup>8</sup>.

Notwithstanding earlier dicta and views to the contrary<sup>9</sup>, it is now clear that the contractual doctrine of repudiation and acceptance<sup>10</sup> applies to leases. Thus breaches of covenant by a landlord that are serious enough to amount to a repudiation of the terms of the contract embodied in the lease entitle the tenant to accept such repudiatory conduct and treat the lease as terminated<sup>11</sup>.

1 The doctrine of frustration is a doctrine of law applicable to contracts generally. 'Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance': *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700, [1981] 1 All ER 161 at 175, HL, per Lord Simon of Glaisdale. As to frustration generally see CONTRACT vol 9(1) (Reissue) PARA 897 et seq.

2 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL. Prior to that decision there had been no binding decision of the House of Lords on the question. In *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL, Viscount Simon LC and Lord Wright took the view that in principle the doctrine of frustration could apply to an executed lease, Lord Russell of Killowen and Lord Goddard were of the opposite view, and Lord Porter reserved his opinion on the point. All courts except the House of Lords were, however, bound by the decision in *Leightons Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493, [1943] 2 All ER 97, CA, to the effect that an executed lease could never be frustrated.

3 See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700-701, [1981] 1 All ER 161 at 170-171, HL, per Lord Wilberforce.

4 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 692, [1981] 1 All ER 161 at 166-167, HL, where the difference of opinion which had previously arisen was said by Lord Hailsham of St Marylebone LC to be a difference between those who considered that the doctrine of frustration could never apply to a lease, and those who considered that it could apply but on the facts there would hardly ever be a case where the lease was frustrated.

5 In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL, warehouse premises which had been let for a term of ten years were deprived of the possibility of vehicular access, and thus of any use, for a period in excess of a year by a road closure; the proposition that these facts could amount to frustration was held not even to be a triable issue when it was raised as a defence in an action brought by the landlords for rent payable during the period of the road closure. Other decisions in which it has been held that a lease was not frustrated are *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20 (tenant unable to reside on the premises because he was an enemy alien); *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680; *Redmond v Dainton* [1920] 2 KB 256 (bomb damage); *Matthey v Curling* [1922] 2 AC 180, HL (destruction by fire); *Swift v MacBean* [1942] 1 KB 375, [1942] 1 All ER 126 (government requisition of premises); *Eyre v Johnson* [1946] KB 481, [1946] 1 All ER 719 (refusal of a licence to repair under wartime regulations); *Denman v Brise* [1949] 1 KB 22, [1948] 2 All ER 141, CA (destruction by enemy action); *Bracknell Development Corp v Greenlees Lennards Ltd* [1981] 2 EGLR 105, (1981) 260 Estates Gazette 500 (difficulty in fixing a full and fair market rent for the premises in question for 21 years).

The doctrine of frustration, or an analogous doctrine, is applicable to leases of land in other common law jurisdictions: see eg *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710, Can SC (cited in *National Carriers Ltd v Panalpina (Northern) Ltd* supra at 703 and at 172).

6 Instances sometimes advanced of the destruction of the demised premises are the destruction of a flat on the top floor of a building or the erosion of property on the top of a cliff. These possibilities were mentioned in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL. In *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221 at 229, [1945] 1 All ER 252 at 256, HL, Viscount Simon LC, while following the view that a lease could in principle be frustrated, considered that it was only in limited cases such as where 'some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea' that a lease would actually end by frustration. In *National Carriers Ltd v Panalpina (Northern) Ltd* supra at 700 and at 175 Lord Simon of Glaisdale expressed the view that that put

matters too catastrophically, even in the case of a long lease and that in the case of a short lease something other than such a natural disaster might in practice amount to a frustrating event. See also PARA 274 notes 6-7 ante.

7 *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 Estates Gazette 427.

8 See eg *Krell v Henry* [1903] 2 KB 740, CA. The doctrine of frustration also applies to demise charters of ships: see CONTRACT vol 9(1) (Reissue) PARA 900.

9 In *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318, [1971] 3 All ER 1226, CA, Lord Denning MR stated that his view that repudiation and acceptance did not apply to leases was supported by the opinions of Lord Russell of Killowen and Lord Goddard in *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221, [1945] 1 All ER 252, HL, that the doctrine of frustration did not apply to leases. Those opinions no longer represent the law following the decision in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL.

10 As to the doctrine of repudiation and acceptance generally see CONTRACT vol 9(1) (Reissue) PARAS 997-1001.

11 Repudiation and acceptance may apply to leases where there is a letting of a furnished house with an implied condition that it is in a fit state for habitation at the commencement of the tenancy; and the tenant may repudiate the contract at once if the condition is not fulfilled: see PARA 426 ante. The doctrine also applies where there have been breaches of the covenant implied by the Landlord and Tenant Act 1985 s 11 (as amended) (see PARAS 416-417 ante) which vitiate the purpose of the contract: see *Hussein v Mehman* [1992] 2 EGLR 86, county court. The judgment in this case applies the principle set out in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL. That principle seems to be the unstated basis of the reasoning in *Chartered Trust plc v Davies* (1997) 76 P & CR 396, [1997] 2 EGLR 83, CA, and was applied explicitly in the High Court in *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7, [1999] 02 EG 139 (no repudiatory breach on the facts where despite deliberate, prolonged and surreptitious breaches of covenant relating to rights of use of a forecourt, the judge held that the breaches did not deprive the tenant of substantially the whole benefit of the lease). The principle was also accepted in *Petra Investments Ltd v Jeffrey Rogers plc* (2000) 81 P & CR 267, [2000] 3 EGLR 120 (alleged breaches related to failure to establish sophisticated shopping centre insufficient to found a repudiatory breach of contract).

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## **602. Statutory limitation of rights to possession; in general.**

A landlord's right to claim that a lease has been determined and that he is entitled to possession may be postponed. Thus, where a tenancy of residential property protected by the Rent Act 1977 comes to an end, a new statutory tenancy may arise in favour of the tenant<sup>1</sup>. Protection is also given by the Housing Act 1988 upon the expiration of an assured tenancy<sup>2</sup> when a statutory periodic tenancy arises<sup>3</sup>. Where a tenancy of business premises reaches its contractual term date, the term continues by virtue of statute until a prescribed notice is served by the landlord on the tenant<sup>4</sup>. Where a tenant is performing a period of relevant service<sup>5</sup> with the forces of the Crown, a landlord is debarred from taking possession of any property or re-entering on any land without the leave of the court<sup>6</sup>.

Even where the landlord is entitled to possession in that the lease has been determined in accordance with its contractual terms and the tenant does not enjoy any statutory protection, the landlord may still need the court's assistance in order to assert his right to possession<sup>7</sup>.

Where, under the terms of a rental purchase agreement<sup>8</sup>, a person has been let into possession of a dwelling house and, on the termination of the agreement or of his right to possession under it, proceedings are brought for the possession of the dwelling house, the court may:

1252 (1) adjourn the proceedings; or

1253 (2) on making an order for the possession of the dwelling house, stay or suspend execution of the order or postpone the date of possession,

for such period or periods as the court thinks fit<sup>9</sup>. On any such adjournment, stay, suspension or postponement the court may impose such conditions with regard to payments by the person in possession in respect of his continued occupation of the dwelling house and such other conditions as the court thinks fit<sup>10</sup>; and the court may revoke or from time to time vary any condition so imposed<sup>11</sup>.

The courts have power to restrain a landlord from abusing his contractual right to terminate a tenancy when it is shown that his purpose was to procure a breach of European Union law by requiring a tenant to enter into an agreement illegal under that law<sup>12</sup>.

1 See PARA 831 post.

2 For the meaning of 'assured tenancy' see PARA 1018 post.

3 See PARA 1067 post.

4 See PARA 713 post.

5 For the meaning of 'relevant service' see PARA 780 note 2 post.

6 See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(2)(a), 3; and ARMED FORCES vol 2(2) (Reissue) PARAS 81, 78 respectively. As to the appropriate court see the Reserve and Auxiliary Forces (Protection of Civil Interests) Rules 1951, SI 1951/1401, r 6.

7 See PARAS 651-655 post.

8 For these purposes, 'rental purchase agreement' means an agreement for the purchase of a dwelling house, whether freehold or leasehold property, under which the whole or part of the purchase price is to be paid in three or more instalments and the completion of the purchase is deferred until the whole or a specified part of the purchase price has been paid: Housing Act 1980 s 88(4).

9 Ibid s 88(1). Section 88 came into force on 3 October 1980 and extends to proceedings for the possession of a dwelling house which were begun before that date unless an order for the possession of the dwelling house was made in the proceedings and executed before that date: s 88(5); Housing Act 1980 (Commencement No 1) Order 1980, SI 1980/1406, art 3, Schedule.

10 Housing Act 1980 s 88(2).

11 Ibid s 88(3).

12 *Holleran v Daniel Thwaites plc* [1989] 2 CMLR 917. As to whether tied house agreements are valid under European Union law see PARA 546 ante.

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## **(2) FORFEITURE**

### **(i) Right of Re-entry**

#### **603. Effect of proviso for re-entry.**

A lease may contain an express proviso for re-entry or forfeiture<sup>1</sup> by the landlord on specified events, such as non-payment of rent, non-performance or non-observance by the tenant of the covenants of the lease, the tenant's bankruptcy<sup>2</sup>, or the levy of execution on his goods<sup>3</sup>. Such a proviso leaves it at the option of the landlord whether he will exercise his right of determining the lease on a cause of forfeiture arising, and the effect is the same where the proviso contains a declaration that in the events specified the term is to cease. The proviso does not by itself enable the tenant to treat the term as at an end, as the lease is not void but voidable<sup>4</sup>, and only the landlord may avoid it<sup>5</sup>. Hence, notwithstanding the cause of forfeiture, the tenancy continues until the landlord does some act which shows his intention to determine it<sup>6</sup>. Even if the proviso declares that on re-entry the landlord is to have the premises again as if the deed had never been made, the landlord may sue for rent accrued due, or for breach of covenant committed, before the forfeiture<sup>7</sup>.

The forfeiture of the lease also destroys the rights of undertenants<sup>8</sup>; and a breach of covenant as to part of the premises, if followed by forfeiture, will destroy an underlease of another part<sup>9</sup>. An undertenant may, however, obtain what is substantially relief from forfeiture by way of a vesting order<sup>10</sup>. In certain circumstances a landlord may forfeit a lease as to part of the premises<sup>11</sup>.

Where an administration application in respect of a company has been made and either the application has not yet been granted or dismissed, or the application has been granted but the administration order has not yet taken effect, and in other specified circumstances<sup>12</sup>, a landlord<sup>13</sup> may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the permission of the court<sup>14</sup> and no legal process<sup>15</sup> may be instituted or continued against the company or property of the company except with the like permission<sup>16</sup>. Similarly, during the period for which an administration order is in force in relation to a company, a landlord<sup>17</sup> may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or the permission of the court and no legal process<sup>18</sup> may be instituted or continued against the company or property of the company except with the like consent or permission<sup>19</sup>.

1 As to when such a proviso may be inserted in a lease made in pursuance of an agreement for a lease to contain 'usual covenants and provisions' see PARA 83 ante. It is normal practice for a lease to contain a re-entry clause; but see *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64, [1998] 2 All ER 860, where the leases contained no forfeiture clause or proviso for re-entry so that breach of a repairing covenant did not entitle the landlord to forfeit the leases. A landlord who enters for other than the specified events is liable to be treated as a trespasser: *Yelloly v Morley* (1910) 27 TLR 20, DC. A lease containing a proviso for re-entry need not be by deed: *Hayne v Cummings* (1864) 16 CBNS 421.

2 See eg *Cadogan Estates Ltd v McMahon* [2001] 1 AC 378, [2000] 4 All ER 897, HL. A proviso for re-entry on bankruptcy refers to the bankruptcy of the person in whom the term is vested for the time being: *Williams v Earle* (1868) LR 3 QB 739 at 749; *Smith v Gronow* [1891] 2 QB 394; *Horseley Estate Ltd v Steiger* [1899] 2 QB 79, CA. A lease which contains a proviso for forfeiture on the bankruptcy of the tenant, his executors, administrators or assignees is liable to forfeiture on the bankruptcy of the tenant's personal representative: see *Doe d Bridgman v David* (1834) 1 Cr M & R 405; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 412-414. It is not necessary to obtain the court's leave under the Insolvency Act 1986 s 285 in order to commence forfeiture proceedings against a tenant against whom a bankruptcy order has been made: *Ezekiel v Orakpo* [1977] QB 260, [1976] 3 All ER 659, CA; *Razzaq v Pala* [1997] 1 WLR 1336, [1997] 2 EGLR 53. It seems that the right to forfeit is not defeated by a subsequent annulment of the bankruptcy (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 625); but an irregularity in the bankruptcy proceedings may enable a tenant to escape from forfeiture under a proviso for re-entry if he is 'duly found and declared a bankrupt' (see *Doe d Lloyd v Ingleby* (1846) 15 M & W 465).

3 *Davis v Eyton* (1830) 7 Bing 154.

4 *Bowser v Colby* (1841) 1 Hare 109; *Davenport v R* (1877) 3 App Cas 115 at 128, PC; *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222, PC; *Jardine v A-G for Newfoundland* [1932] AC 275, PC.

5 A tenant who has been guilty of a wrongful act cannot avail himself of that wrongful act to insist that the lease has thereby become void: *Reid v Parsons* (1817) 2 Chit 247 (sub nom *Rede v Farr* 6 M & S 121); *Doe d Bryan v Bancks* (1821) 4 B & Ald 401 at 406; *Arnsby v Woodward* (1827) 6 B & C 519; *Dakin v Cope* (1827) 2

Russ 170; *Doe d Nash v Birch* (1836) 1 M & W 402; *Jones v Carter* (1846) 15 M & W 718 at 725; *Toleman v Portbury* (1871) LR 6 QB 245 at 250; *Re Tickle, ex p Leather Sellers' Co* (1886) 3 Morr 126; *Quesnel Forks Gold Mining Co Ltd v Ward* [1920] AC 222, PC; *Jardine v A-G for Newfoundland* [1932] AC 275, PC. The proviso can operate only during the term, and cannot be used after the term to deprive the tenant of a claim to emblements: *Johns v Whitley* (1770) 3 Wils 127 at 140. Once a landlord elects to forfeit a lease and the tenant accepts forfeiture, the landlord is not permitted unilaterally to withdraw from the proceedings or to challenge the validity of the forfeiture: see *GS Fashions Ltd v B & Q plc* [1995] 4 All ER 899, [1995] 1 WLR 1088; but cf *Mount Cook Land Ltd v Media Business Centre Ltd* [2004] EWHC 346 (Ch), [2004] 2 P & CR 24, [2004] All ER (D) 111 (Feb) (tenant chose to defend forfeiture proceedings; when landlord discontinued the claim, the lease was resurrected). Where a landlord brings a claim for forfeiture and the tenant accepts it and vacates the premises, the landlord is liable for the non-domestic rates payable in respect of the unoccupied premises: *Kingston-upon-Thames London Borough Council v Marlow* [1996] 1 EGLR 101, (1995) 160 LG Rev 181, DC.

6 *Roberts v Davey* (1833) 4 B & Ad 664 at 671. As to avoidance of a Crown lease under a colonial statute see *Davenport v R* (1877) 3 App Cas 115, PC.

7 *Hartshorne v Watson* (1838) 4 Bing NC 178. See also *Blore v Giulini* [1903] 1 KB 356 (landlord held entitled to sue for breach of covenant where the lease was determined by the tenant). It is the service, not the issue, of the claim form which is equivalent to re-entry and effects a forfeiture; and the lease determined from the date of service: *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795, CA. Where the landlord is also the mortgagee, his election to forfeit must be made clear by unequivocal acts or works: *Hone v Daejan Properties Ltd* (1976) 120 Sol Jo 488, CA. See also *Jones v Vaughan* [2005] EWHC 3343 (Ch), [2005] All ER (D) 383 (Nov) (landlord's right to do works and to charge the tenant for them had already accrued at the date of the forfeiture; effect of the forfeiture had not been to rob the landlord of that right).

8 *Great Western Rly Co v Smith* (1876) 2 ChD 235 at 253, CA; *Fleming v House* (1972) 224 Estates Gazette 2020 (interest of a service licensee of the tenant determined by forfeiture of the tenancy). The undertenant has no remedy by way of a claim for breach of the covenant for quiet enjoyment in his lease: see PARA 508 ante.

9 *Darlington v Hamilton* (1854) Kay 550; *Creswell v Davidson* (1887) 56 LT 811.

10 See the Law of Property Act 1925 s 146(4); and PARA 627 post.

11 *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch 1, [1981] 1 All ER 619.

12 See the Insolvency Act 1986 s 8 (as substituted), Sch B1 para 44(2)-(4) (added by the Enterprise Act 2002 s 248(2), Sch 16); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 224.

13 'Landlord' includes a person to whom rent is payable: Insolvency Act 1986 Sch B1 para 43(8) (as added (see note 12 supra); applied for these purposes by Sch B1 para 44(5) (as so added)).

14 See *ibid* Sch B1 para 43(4) (as added (see note 12 supra); applied with modifications by Sch B1 para 44(5) (as so added)); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 224, 231, 239. These provisions, and the provisions set out in the text and notes 12-13 supra, 15-19 infra, reverse the decision in *Re Lomax Leisure Ltd* [2000] Ch 502, [1999] 3 All ER 22.

15 *Ie* including legal proceedings, execution, distress and diligence.

16 See *ibid* Sch B1 paras 43(6), 44(1) (as added (see note 12 supra); Sch B1 para 43(6) applied with modifications by Sch B1 para 44(5) (as so added)); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 224, 231, 239.

17 See note 13 supra.

18 See note 15 supra.

19 See the Insolvency Act Sch B1 para 43(4), (6) (as added: see note 12 supra); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 263.

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#### 604. Term determinable on breach of a condition.

A lease will be determinable without an express proviso for re-entry on the happening of the event specified in a condition subject to which the term was created<sup>1</sup>.

If, however, the clause which is put forward as terminating the term constitutes only an agreement on the part of the tenant to do or not to do a specific act and not a condition, the landlord may not re-enter for a breach of it except under an express proviso for re-entry<sup>2</sup>. The question whether the provision in question is a condition (breach of which automatically ends the lease) or a covenant (breach of which gives the landlord an option to end the lease with the possibility of relief against forfeiture being granted to the tenant) is a matter for determination according to the precise words used in the lease and the intention of the parties<sup>3</sup>. It may be possible for a provision to have the dual character of a covenant and a condition<sup>4</sup>.

1 See *Freeman v Boyle* (1788) 2 Ridg Parl Rep 69 at 79; *Sexton d Freeman v Boyle* (1788) Vern & Scr 402 at 414, Ex Ch; *Doe d Lockwood v Clarke* (1807) 8 East 185; *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC.

2 *Doe d Willson v Phillips* (1824) 2 Bing 13 (agreement to give up part of the premises on landlord's requisition); *Shaw v Coffin* (1863) 14 CBNS 372 (agreement not to underlet without consent); and see *Crawley v Price* (1875) LR 10 QB 302.

3 *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC; *Shep Touch* 122; *Co Litt* 203b; *Doe d Henniker v Watt* (1828) 8 B & C 308; *Brookes v Drysdale* (1877) 3 CPD 52.

4 *Bashir v Lands Comr* [1960] AC 44, [1960] 1 All ER 117, PC. In such a case the only remedy available to the landlord for breach is apparently to forfeit the lease, in which case the tenant may apply for relief. Thus in their consequences provisions of a dual character are akin to covenants.

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#### 605. Impugning landlord's title as ground for forfeiture.

There is implied in every lease a condition that the tenant is not to do anything that may prejudice the landlord's title, and that, if this is done, the landlord may re-enter for breach of this implied condition<sup>1</sup>. Thus it is a cause of forfeiture if the tenant denies the landlord's title by alleging in writing, or, in the case of a tenancy from year to year, either in writing or orally, that the title to the land is in himself or another<sup>2</sup>, or if he assists a third person to set up an adverse title, as where he acknowledges the freehold title to be in him<sup>3</sup>, or delivers the premises to him in order to enable him to set up a title<sup>4</sup>. In the case of a tenancy from year to year, the effect of such a denial of title is that the tenancy may be forthwith determined by the landlord without notice to quit<sup>5</sup>. It is, however, a question of fact what intention underlies the tenant's words or actions, whether in fact he is definitely asserting a title adverse to the landlord, or, as the case may be, intending to enable somebody else to set up such a title<sup>6</sup>. Thus it is not sufficient that the tenant pays rent to a third person<sup>7</sup>, or does not at once acknowledge the landlord's title, or refuses to give up possession at a time when the landlord has no right to claim it<sup>8</sup>. A denial in a pleading does not now give rise to forfeiture unless the denial amounts to the setting up of a title of a rival claimant or a claim of ownership on the part of the tenant<sup>9</sup>. Re-entry on the basis of a denial of title cannot be effected until after the service of a notice<sup>10</sup> under the Law of Property Act 1925<sup>11</sup>.

1 4 Bac Abr, Leases and Terms for Years (T2). The historical origins of the doctrine were considered by Lord Denning MR in *Warner v Sampson* [1959] 1 QB 297 at 309-317, [1959] 1 All ER 120 at 122-126, CA.

2 *Doe d Whitehead v Pittman* (1833) 2 Nev & MKB 673; *Doe d Williams and Jeffery v Cooper* (1840) 1 Man & G 135 at 139; *Doe d Phillips v Rollings* (1847) 4 CB 188 at 200 (disclaimer proved); *Doe d Lewis v Cawdor* (1834) 1 Cr M & R 398; *Hunt v Allgood* (1861) 10 CBNS 253; *Jones v Mills* (1861) 10 CBNS 788 (disclaimer not proved). See also the cases cited in note 5 infra.

3 4 Bac Abr, Leases and Terms for Years (T2).

4 *Doe d Ellerbrock v Flynn* (1834) 1 Cr M & R 137; *Ackland v Lutley* (1839) 9 Ad & El 879 at 884; *Wisbech St Mary Parish Council v Lilley* [1956] 1 All ER 301 at 303, [1956] 1 WLR 121 at 124, CA.

5 *Throgmorton v Whelpdale* (1769) Bull NP (7th Edn) 96; *Doe d Williams v Pasquali* (1793) Peake 196; *Doe d Jefferies v Whittick* (1820) Gow 195; *Doe d Calvert v Frowd* (1828) 4 Bing 557; *Doe d Grubb v Grubb* (1830) 10 B & C 816; *Doe d Davies v Evans* (1841) 9 M & W 48; *Doe d Lansdell v Gower* (1851) 17 QB 589 at 592; *Vivian v Moat* (1881) 16 ChD 730. Similarly, denial of the landlord's title determines a tenancy at will: *Doe d Price v Price* (1832) 9 Bing 356 at 358.

6 *Wisbech St Mary Parish Council v Lilley* [1956] 1 All ER 301 at 304, [1956] 1 WLR 121 at 126, CA, per Romer LJ (assignment by the tenant of all his interest in the premises and a letter from his solicitor saying that the tenant had never paid rent did not disclose an intention to repudiate the landlord's title); and see *Doe d Bennett v Long* (1841) 9 C & P 773.

7 *Doe d Dillon v Parker* (1820) Gow 180.

8 *Doe d Gray v Stanion* (1836) 1 M & W 695 at 703.

9 *Warner v Sampson* [1959] 1 QB 297, [1959] 1 All ER 120, CA. Even if a pleading had that effect through inadvertence, the error could be cured by amendment: *Warner v Sampson* supra, overruling *Kisch v Hawes Bros Ltd* [1935] Ch 102. Partial disclaimer of a landlord's title in a pleading is not a disclaimer as to the whole of the title, although in appropriate circumstances a partial disclaimer might lead to forfeiture of part of the premises: see *WG Clark (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297, [1992] 1 All ER 596. See also *Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821, [2001] 45 EG 138 (CS), [2001] All ER (D) 305 (Oct) (tenant cannot be said to have denied the title of the landlord when it asked for the issue of who was the true owner to be determined by the court in forfeiture proceedings); and PARA 626 note 17 post.

10 Ie a notice under the Law of Property Act 1925 s 146 (as amended): see PARA 619 post.

11 *Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821, [2001] 45 EG 138 (CS), [2001] All ER (D) 305 (Oct).

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## 606. Construction of forfeiture clauses.

The ordinary rules of construction apply to conditions and covenants the breach of which may lead to a forfeiture<sup>1</sup>, and the intention of the parties has to be found from the language they have used<sup>2</sup>. Conditions of this nature are entitled to neither favour nor disfavour, but a fair construction is to be put upon them according to the apparent intent of the contracting parties<sup>3</sup>.

Thus, in the case of a covenant with a proviso for re-entry, the court has to ascertain the meaning of the covenant without regard to the forfeiture, and then see, upon that ascertained meaning, whether a forfeiture has been incurred<sup>4</sup>. Subject to this principle, the court leans towards a literal<sup>5</sup> or strict<sup>6</sup> construction of a forfeiture clause; and, since the clause destroys or defeats the estate, it is subject to the subsidiary rule of construction that it is to be taken most



strongly against the person at whose instance it is introduced, that is the landlord<sup>7</sup>. Hence, before the forfeiture is established, it must be clearly shown, in the case of a condition, that the event specified in the condition has happened, and, in the case of a proviso for re-entry on breach of covenant, that the proviso extends to the covenant<sup>8</sup>, and that there has been a breach<sup>9</sup>. Thus a condition against assignment is not broken by the creation of an equitable charge<sup>10</sup>, or by an assignment which is in fact void<sup>11</sup>. Where, however, there is a proviso for re-entry on the liquidation of a tenant company, in the absence of express restriction 'liquidation' includes voluntary liquidation, even if it is only for the purpose of reconstruction<sup>12</sup>.

Where the substance of a stipulation in a lease is that it is a forfeiture clause or proviso for re-entry, the court will treat it as such and will disregard the form of the stipulation<sup>13</sup>.

1 *Croft v Lumley* (1858) 6 HL Cas 672 at 693.

2 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 165 et seq.

3 *Goodtitle d Luxmore v Saville* (1812) 16 East 87 at 95 per Lord Ellenborough CJ; *Doe d Davis v Elsam* (1828) Mood & M 189; *Doe d Muston v Gladwin* (1845) 6 QB 953 at 961.

4 *Bristol Corp'n v Westcott* (1879) 12 ChD 461 at 465, CA.

5 *Doe d Spencer v Godwin* (1815) 4 M & S 265 at 269 (proviso for re-entry for breach of covenants 'hereinafter contained'; no forfeiture for breach of a covenant contained before the proviso, even though there were no covenants after); *Rees d Powell v King and Morris* (1800) For 19 (proviso for re-entry if no sufficient distress is found; every part of the premises must be searched); *Shepherd v Berger* [1891] 1 QB 597, CA (proviso for re-entry if and whenever one quarter's rent or any part of it was in arrear for 21 days and no sufficient distress be found); *Doe d Abdy v Stevens* (1832) 3 B & Ad 299 (proviso for re-entry if the tenant did an 'act' contrary to the covenants did not apply to an omission to repair); *Doe d Lloyd v Ingleby* (1846) 15 M & W 465 (proviso for re-entry if tenant duly found bankrupt did not apply where there was an error in the process). If the condition is grammatically unintelligible, the court will not find a meaning for it: *Doe d Wyndham v Carew* (1841) 2 QB 317; *Murray v Dunn* [1907] AC 283 (covenant not to erect unseemly buildings too vague to be enforceable). Where the breach is by act of law, a forfeiture is not incurred: see *Doe d Lord Grantley v Butcher* (1840) 6 QB 115n (b); *Doe d Marquis of Anglesea v Churchwardens of Rugeley* (1844) 6 QB 107. As to re-entry under a statutory power see *Doe d Bywater v Brandling* (1828) 7 B & C 643.

6 *Doe d Lloyd v Powell* (1826) 5 B & C 308 at 313; *Northcote v Duke* (1765) Amb 511; *Simons v Farren* (1834) 1 Bing NC 126.

7 *Doe d Abdy v Stevens* (1832) 3 B & Ad 299 at 303; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 178.

8 *Croft v Lumley* (1858) 6 HL Cas 672 at 693. Where the proviso is for re-entry on breach of covenants or stipulations, it applies to a provision against assignment even though it is not in the form of a covenant: *Brookes v Drysdale* (1877) 3 CPD 52.

9 *West v Dobb* (1870) LR 5 QB 460, Ex Ch; *Bristol Corp'n v Westcott* (1879) 12 ChD 461 at 467, CA. It is for the claimant to prove the forfeiture. Thus, on an alleged breach of a covenant to insure, the claimant must prove the non-insurance; it is not sufficient that the tenant fails to produce the policy unless he is expressly bound to do so by the covenant: *Doe d Bridger v Whitehead* (1838) 8 Ad & El 571; *Doe d Chandless v Robson* (1826) 2 C & P 245; *Chaplin v Reid* (1858) 1 F & F 315. The former rule that a person could not be compelled to produce any document in any legal proceedings if to do so would tend to expose him to a forfeiture has been abolished, except in relation to criminal proceedings: see the Civil Evidence Act 1968 s 16(1)(a); and CIVIL PROCEDURE vol 11 (2009) PARA 970. If the covenant provides eg that the tenant is not to permit a sale by auction without the landlord's consent, the landlord must prove that the tenant permitted the sale and give evidence that consent was not obtained: see *Toleman v Portbury* (1870) LR 5 QB 288, Ex Ch.

10 *Bowser v Colby* (1841) 1 Hare 109 at 138; and see PARA 482 ante.

11 *Doe d Lloyd v Powell* (1826) 5 B & C 308 at 313; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 414.

12 *Horseley Estate Ltd v Steiger* [1899] 2 QB 79, CA; *Fryer v Ewart* [1902] AC 187, HL. In a compulsory liquidation the right of re-entry accrues on the making of the winding-up order: *General Share and Trust Co v Wetley Brick and Pottery Co* (1882) 20 ChD 260, CA. See also COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 891.

13 Thus the statutory provisions relating to forfeiture will apply, notwithstanding that the form of the transaction is disguised as a surrender: *Plymouth Corp v Harvey* [1971] 1 All ER 623, [1971] 1 WLR 549. Similarly, a provision entitling a landlord to determine a tenancy by giving three months' notice in the event of breach of covenant or non-payment of rent (when 12 months' notice would otherwise have been required) was construed as a forfeiture clause: *Richard Clarke & Co Ltd v Widnall* [1976] 3 All ER 301, [1976] 1 WLR 845, CA, distinguished in *Clays Lane Housing Co-operative Ltd v Patrick* (1984) 49 P & CR 72, CA (for a provision for forfeiture to be effective it was necessary that it brought the lease to an end earlier than what otherwise would be the termination date; a provision could not be effective merely because it operated on the tenant's default).

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### **607. Positive and negative covenants.**

As some of the tenant's covenants, such as the covenant to repair, are positive, and others, such as the covenant not to assign, are negative, it is usual to make the proviso for re-entry take effect on the 'non-performance or non-observance' of the tenant's covenants. While these words are appropriate to the positive and negative covenants respectively, a reference to 'non-performance' only will nevertheless apply to a breach of a negative covenant<sup>1</sup>.

1 *Harman v Ainslie* [1904] 1 KB 698 at 709, CA per Collins MR ('in a proviso for re-entry for non-performance of covenants, it seems to me that the word 'perform' is used as meaning the fulfilment of the obligation or duty undertaken, and not as referring to the thing to be done or left undone in pursuance of the covenant'). Before this decision it was considered that, where there was a reference to non-performance only of covenants, the proviso for re-entry would not apply to breach of a negative covenant (see *Hyde v Warden* (1877) 3 ExD 72 at 82, CA; *Evans v Davis* (1878) 10 ChD 747 at 761) although a reference also to non-observance extended the proviso to such covenants (see *Croft v Lumley* (1858) 6 HL Cas 672; *Evans v Davis* supra; *Timms v Baker* (1883) 49 LT 106 ('perform and keep')). The word 'performance' will still be restricted to positive covenants where there is a condition attached to the proviso for re-entry which indicates that this is the intention eg where the proviso is to take effect on default by the tenant in the performance of his covenants after a specified length of notice from the landlord: *Doe d Palk v Marchetti* (1831) 1 B & Ad 715; and see *Harman v Ainslie* supra.

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### **608. To whom right of re-entry may be reserved.**

At common law a right of re-entry may be reserved only in favour of the person in whom the legal estate is vested, either actually or by estoppel<sup>1</sup>. However, all rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, on and after 1 January 1926, be made exercisable by any person and the persons deriving title under him<sup>2</sup>. To support a condition of re-entry it is not essential that there should be a reversion; a tenant who sublets for the whole residue of his term may reserve a right of re-entry on breach of covenant notwithstanding that the sublease operates as an assignment<sup>3</sup>.

In relation to tenancies granted on or after 1 January 1996<sup>4</sup>, the benefit of a landlord's right of re-entry under a tenancy is annexed to the whole and every part of the reversion in the premises and passes on an assignment of the whole or any part of the premises<sup>5</sup>.

1 Thus a right of entry could not be reserved in favour of a beneficiary whose title as such appeared by the lease: *Doe d Barney v Adams* (1832) 2 Cr & J 232; *Doe d Barker v Goldsmith* (1832) 2 Cr & J 674; *Saunders v Merryweather* (1865) 3 H & C 902. See also *Doe d Barber v Lawrence* (1811) 4 Taunt 23.

2 Law of Property Act 1925 s 4(3). See also s 151(1); and PARA 552 ante; and, in relation to tenancies granted before 1 January 1996, see s 141; and PARA 567 ante.

3 *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL; *Doe d Freeman v Bateman* (1818) 2 B & Ald 168; *Hyde v Warden* (1877) 3 ExD 72.

4 le 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 ante.

5 See *ibid* s 4; and PARA 581 ante. See also *Kataria v Safeland plc* [1998] 1 EGLR 39, [1997] 45 LS Gaz R 27, CA (on an assignment of the reversion, the right to recover rent arrears remained, by agreement and reassignment with the former landlord; nevertheless the new landlord could forfeit by re-entry on the ground of those arrears since the proprietary remedy of forfeiture was separate from the right to sue for the arrears); and *Rother District Investments Ltd v Corke* [2004] EWHC 14 (Ch), [2004] 2 P & CR 311, [2004] 1 EGLR 47 (forfeiture by new landlord before it had registered its title was valid).

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### 609. What amounts to re-entry.

The terms of a proviso for re-entry require that, if the landlord elects to determine the lease for a forfeiture, he must do so by re-entry<sup>1</sup>, which the landlord may effect by physically entering upon the premises with the intention of determining the tenancy<sup>2</sup> or by the issue and service<sup>3</sup> of proceedings for the recovery of possession of the premises. In the case of forfeiture for non-payment of rent the landlord must first make formal demand for payment<sup>4</sup>, unless this requirement is dispensed with by suitable words in the proviso<sup>5</sup>, or by statute. Usually the formal demand is expressly dispensed with by inserting the words 'whether formally demanded or not'<sup>6</sup>, and it is dispensed with by statute in cases where half a year's rent is in arrear and no sufficient distress can be found upon the premises<sup>7</sup>.

Actual entry is not necessary in order to take advantage of the forfeiture. When the cause of forfeiture is complete, the landlord may bring a claim to recover possession, and the bringing of the claim<sup>8</sup> is equivalent to actual entry<sup>9</sup>. If the claim form contains an unequivocal demand for possession<sup>10</sup>, its service operates as a final election to determine the term, whether judgment is obtained or not<sup>11</sup>. Re-entry may be effected by the landlord's allowing a third party into possession as a tenant, or by accepting a subtenant as a tenant under a new tenancy<sup>12</sup>. The mere receipt of rent is not an assertion of a right of re-entry<sup>13</sup>.

1 Where the premises are in the possession of an undertenant, a reletting of the premises to him by the landlord is a sufficient re-entry to avoid the lease (see the text and note 12 *infra*), but it has been held to be otherwise when he relets to a stranger to whose entry the undertenant objects (*Parker v Jones* [1910] 2 KB 32).

2 As to the need for an intention to effect a forfeiture, and as to the circumstances in which an apparent re-entry by the landlord may not determine the lease, see *Relvok Properties Ltd v Dixon* (1972) 25 P & CR 1, CA, applying the test earlier enunciated, in relation to the question whether a landlord's acts amounted to the acceptance of a surrender, in *Oastler v Henderson* (1877) 2 QBD 575, CA.

3 See the cases cited in note 11 *infra*.

4 *Doe d Chandless v Robson* (1826) 2 C & P 245; *Hill v Kempshall* (1849) 7 CB 975; *Jackson & Co v Northampton Street Tramways Co* (1886) 55 LT 91. The demand must be made upon the land and, if there is a house on the premises, at the front door: Co Litt 201b, 202a. In the absence of the tenant it may be made upon

the occupier (*Doe d Brook v Brydges* (1822) 2 Dow & Ry KB 29); but it is effective even if no one is on the premises (Co Litt 201b). The demand must be only of the sum due for rent for the last period for payment (*Scot v Scot* (1587) Cro Eliz 73; *Fabian v Winston* (1589) Cro Eliz 209; *Doe d Wheeldon v Paul* (1829) 3 C & P 613), and must be made before sunset on the last day of payment, and continued until sunset (Co Litt 202a; *Wood v Chivers* (1573) 4 Leon 179; *Doe d Wheeldon v Paul* supra; *Acocks v Phillips* (1860) 5 H & N 183; and see 1 Wms Saund (1871 Edn) 434-440; *Doe d Darke v Bowditch* (1846) 8 QB 973). The condition is fulfilled by tender of the rent to the person who is to receive it on any part of the land at any time on the last day of payment: Co Litt 202a.

5 *Doe d Harris v Masters* (1824) 2 B & C 490; cf *Treseder-Griffin v Co-operative Insurance Society Ltd* [1956] 2 QB 127 at 143, [1956] 2 All ER 33 at 39, CA.

6 It seems that the words 'being demanded' are sufficient, but the full period of grace mentioned in the lease must be allowed to elapse before demand (*Phillips v Bridge* (1873) LR 9 CP 48), and the amount demanded must be correct (*Jackson & Co v Northampton Street Tramways Co* (1886) 55 LT 91). 'Being lawfully demanded' was held not to dispense with formal demand in *Doe d Scholefield v Alexander* (1814) 2 M & S 525, although in that case demand was dispensed with by the statute; but Lord Ellenborough CJ dissented, and in *Manser v Dix* (1857) 8 De GM & G 703 these words were treated as sufficient. As to a power of distress upon a mining rent being 'legally demanded' see *Thorp v Hurt* [1886] WN 96.

7 Common Law Procedure Act 1852 s 210 (amended by the Statute Law Revision Act 1892) (re-enacting the Landlord and Tenant Act 1730 s 2). The statute dispenses with both formal demand and re-entry, and enables the landlord to sue for recovery of the premises. It must be proved that half a year's rent was due before the service of proceedings, that there was no sufficient distress (*Doe d Forster v Wandlass* (1797) 7 Term Rep 117), and that the landlord had power to re-enter (*Doe d Darke v Bowditch* (1846) 8 QB 973). If the proviso gives a right of re-entry if and whenever one quarter's rent was in arrears for 21 days and no sufficient distress could be levied, the right to re-enter arises at any time the two conditions arise: *Shepherd v Berger* [1891] 1 QB 597, CA. A distress which reduces the arrears below half a year's rent takes the case out of the statute: *Cotesworth v Spokes* (1861) 10 CBNS 103. The goods must be so visibly on the premises as to be distrainable by a broker using due diligence (*Doe d Haverson v Franks* (1847) 2 Car & Kir 678), but it is not necessary that the goods should be actually distrained (see *Rickett v Green* [1910] 1 KB 253, DC). If the premises are locked up, no distress can be found and the statute is satisfied: *Hammond v Mather* (1862) 3 F & F 151; and see *Doe d Chippendale v Dyson* (1827) 1 Mood & M 77; *Doe d Cox v Roe* (1847) 5 Dow & L 272. The statute does not prevent the parties from dispensing by the lease with formal demand: *Goodright d Hare v Cator* (1780) 2 Doug KB 477 at 486.

8 Where the tenant, in breach of his covenant, had assigned the term and had disappeared, proceedings brought against the assignee were held to be a sufficient declaration to determine the tenancy under the forfeiture clause: *Works Comrs v Hull* [1922] 1 KB 205.

9 Under the old practice in ejectment the defendant admitted the landlord's entry, and no actual entry was necessary (*Goodright d Hare v Cator* (1780) 2 Doug KB 477; *Doe d Phillips v Rollings* (1847) 4 CB 188, 197), and the alteration in procedure has not affected the right of the landlord, so that he may still bring his claim without previous entry (*Grimwood v Moss* (1872) LR 7 CP 360 at 364; *Ware v Booth* (1894) 10 TLR 446); and see *Re Morrish, ex p Hart Dyke* (1882) 22 ChD 410, CA.

10 A claim for a permanent injunction is not an unequivocal election by the landlord to determine the lease on the ground of forfeiture: *Calabar Properties Ltd v Seagull Autos Ltd* [1969] 1 Ch 451, [1968] 1 All ER 1, discussing *Moore v Ullcoats Mining Co Ltd* [1908] 1 Ch 575 and *Wheeler v Keeble (1914) Ltd* [1920] 1 Ch 57. The landlord is entitled at the trial to abandon his claim for possession and proceed with his claim for an injunction upon the basis that the lease is still afoot. A claim for a declaration of title to possession operated as a forfeiture although the writ did not claim an order for possession: *Cohen v Donegal Tweed Co Ltd* (1935) 79 Sol Jo 592, CA.

11 *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795, CA; *Elliott v Boynton* [1924] 1 Ch 236, CA. See also *Jones v Carter* (1846) 15 M & W 718; *Kilkenny Gas Co v Somerville* (1878) 2 LR Ir 192; *Scarf v Jardine* (1882) 7 App Cas 345, HL; *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA. Service of the writ on a trespasser allowed into occupation by the tenant may not, however, be effective as a forfeiture of the tenant's lease: see *Capital and City Holdings Ltd v Dean Warburg Ltd* (1988) 58 P & CR 346, [1989] 1 EGLR 90, CA. See also *Associated Deliveries Ltd v Harrison* (1984) 50 P & CR 91, [1984] 2 EGLR 76, CA. As to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33; and for the procedure relating to (1) possession claims brought by landlords, former landlords, licensors or former licensors; and (2) claims by tenants seeking relief against forfeiture, see PARA 656 et seq post.

12 *London & County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA; *Baylis v Le Gros* (1858) 4 CBNS 537; distinguished in *Ashton v Sobelman* [1987] 1 All ER 755, [1987] 1 WLR 177 (no re-entry where subtenant remained upon terms of existing subtenancy).

13 *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237, [1989] 2 All ER 655.

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## (ii) Statutory Restrictions on Forfeiture of Certain Tenancies

### 610. Restriction on termination of residential tenancy for failure to pay service charge.

A landlord<sup>1</sup> may not, in relation to premises let as a dwelling<sup>2</sup>, exercise a right of re-entry or forfeiture<sup>3</sup> for failure by a tenant<sup>4</sup> to pay a service charge<sup>5</sup> or administration charge<sup>6</sup> unless:

- 1254 (1) it is finally determined by, or on appeal from, a leasehold valuation tribunal or by a court, or by an arbitral tribunal<sup>7</sup> in proceedings pursuant to a post-dispute arbitration agreement<sup>8</sup>, that the amount of the service charge or administration charge is payable by him<sup>9</sup>; or
- 1255 (2) the tenant has admitted that it is so payable<sup>10</sup>.

The landlord may not exercise a right of re-entry or forfeiture by virtue of head (1) above until after the end of the period of 14 days beginning with the day after that on which the final determination is made<sup>11</sup>.

Nothing in these provisions affects the exercise of a right of re-entry or forfeiture on other grounds<sup>12</sup>.

These provisions apply in relation to Crown land as in relation to other land<sup>13</sup>.

1 For these purposes of the Housing Act 1996, 'lease' and 'tenancy' have the same meaning; and both expressions include (1) a sublease or subtenancy; and (2) an agreement for a lease or tenancy, or sublease or subtenancy: s 229(1), (2). The expressions 'lessor and 'lessee' and 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly: s 229(3).

2 For these purposes, 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante): Housing Act 1996 s 81(5)(c) (s 81(5)(a)-(c) added, and s 81(5)(d) numbered as such, by the Commonhold and Leasehold Reform Act 2002 s 170(1), (6)). The reference in the text to premises let as a dwelling does not, however, include premises let on (1) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies (business tenancies: (see PARA 701 et seq post); (2) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (3) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Housing Act 1996 s 81(4).

3 References for these purposes to the exercise of a right of re-entry or forfeiture include the service of a notice under the Law of Property Act 1925 s 146(1) (restriction on re-entry or forfeiture: see PARA 619 post): Housing Act 1996 s 81(4A) (added by the Commonhold and Leasehold Reform Act 2002 s 170(1), (5)).

4 See note 1 supra.

5 For these purposes, 'service charge' means a service charge within the meaning of the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante), other than one excluded from s 18 (as amended) by s 27 (as amended) (rent of dwelling registered and not entered as variable: see PARA 325 ante): Housing Act 1996 s 81(5)(d) (as amended: see note 2 supra).

6 For these purposes, 'administration charge' has the meaning given by the Commonhold and Leasehold Reform Act 2002 s 158, Sch 11 Pt I (paras 1-6) (see PARA 355 ante): Housing Act 1996 s 81(5)(a) (as added: see note 2 supra).

7 For these purposes, 'arbitral tribunal' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1226 et seq): Housing Act 1996 s 81(5)(b) (as added: see note 2 supra).

8 For these purposes, 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (see ARBITRATION vol 2 (2008) PARA 1213) and 'post-dispute arbitration agreement', in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen: Housing Act 1996 s 81(5)(b) (as added: see note 2 supra).

9 For these purposes, it is finally determined that the amount of a service charge or administration charge is payable (1) if a decision that it is payable is not appealed against or otherwise challenged, at the end of the time for bringing an appeal or other challenge; or (2) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in ibid s 81(3A) (as substituted) (see heads (a)-(b) infra): s 81(3) (s 81(3), (3A) substituted by the Commonhold and Leasehold Reform Act 2002 s 170(1), (4)). The time referred to in head (2) supra is the time when the appeal or other challenge is disposed of (a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any); or (b) by its being abandoned or otherwise ceasing to have effect: Housing Act 1996 s 81(3A) (as so substituted). Any order of a court to give effect to a determination of a leasehold valuation tribunal is to be treated as a determination by the court for these purposes: s 81(5A) (added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 para 16). The county court has jurisdiction in relation to proceedings under the Housing Act 1996 s 81 (as amended): see s 95(5)(a).

10 Housing Act 1996 s 81(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 170(1), (2)). For transitional provisions in relation to England see the Commonhold and Leasehold Reform Act 2002 (Commencement No 5 and Saving and Transitional Provision) Order 2004, SI 2004/3056, arts 3(f), 4(3); and in relation to Wales see the Commonhold and Leasehold Reform Act 2002 (Commencement No 3 and Saving and Transitional Provision) (Wales) Order 2005, SI 2005/1353, arts 2(f), 3(4).

See also *Mohammadi v Anston Investments Ltd* [2003] EWCA Civ 981, [2004] HLR 88, [2003] All ER (D) 268 (Jul) (amount of unpaid service charges neither admitted nor the subject of a final determination; payment of such charges ought not to have been included in terms of relief from forfeiture).

11 Housing Act 1996 s 81(2) (substituted by the Commonhold and Leasehold Reform Act 2002 s 170(1), (3)).

12 Housing Act 1996 s 81(6).

13 Commonhold and Leasehold Reform Act 2002 s 172(1)(f). For the meaning of 'Crown land' see PARA 24 note 8 ante.

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### **611. New tenancies; forfeiture limited to part only of demised premises.**

In relation to tenancies granted on or after 1 January 1996<sup>1</sup>, where:

- 1256 (1) as a result of one or more assignments<sup>2</sup> a person is the tenant<sup>3</sup> of part only of the premises demised by a tenancy<sup>4</sup>; and
- 1257 (2) under a proviso or stipulation in the tenancy there is a right of re-entry or forfeiture for a breach of a tenant covenant<sup>5</sup> of the tenancy; and
- 1258 (3) the right is otherwise exercisable in relation to that part and other land demised by the tenancy,

the right is nevertheless, in connection with a breach of any such covenant by that person, to be taken to be a right exercisable only in relation to that part<sup>6</sup>.

1 The new tenancies for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 ante.

2 For the meaning of 'assignment' see PARA 289 note 1 ante.

3 For the meaning of 'tenant' see PARA 289 note 2 ante.

4 For the meaning of 'tenancy' see PARA 289 note 3 ante.

5 For the meaning of 'tenant covenant' see PARA 289 note 6 ante.

6 Landlord and Tenant (Covenants) Act 1995 ss 1(1), 21(1).

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## **612. Long residential leases; no forfeiture for failure to pay small amount.**

A landlord<sup>1</sup> under a long lease<sup>2</sup> of a dwelling<sup>3</sup> may not exercise a right of re-entry or forfeiture for failure by a tenant<sup>4</sup> to pay an amount consisting of rent, service charges<sup>5</sup> or administration charges<sup>6</sup> or a combination of them ('the unpaid amount') unless the unpaid amount:

- 1259 (1) exceeds the prescribed sum<sup>7</sup>, which must not exceed £500<sup>8</sup>; or
- 1260 (2) consists of or includes an amount which has been payable for more than a prescribed period<sup>9</sup>.

If the unpaid amount includes a default charge<sup>10</sup>, it is to be treated for the purposes of head (1) above as reduced by the amount of the charge<sup>11</sup>.

1 For the meaning of 'landlord' see PARA 369 note 8 ante (definition applied by the Commonhold and Leasehold Reform Act 2002 s 167(5)).

2 For these purposes, 'long lease' has the meaning given by *ibid* ss 76, 77 (as amended) (see PARA 371 ante), except that a shared ownership lease is a long lease whatever the tenant's total share: s 167(5). See further note 3 *infra*.

3 For these purposes, 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante): Commonhold and Leasehold Reform Act 2002 s 167(5). 'Long lease of a dwelling' does not, however, include: (1) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies (business tenancies: see PARA 701 *et seq post*); (2) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 *post*; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (3) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 *post*; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Commonhold and Leasehold Reform Act 2002 s 167(4).

4 For the meaning of 'tenant' see PARA 369 note 8 ante (definition applied by *ibid* s 167(5)).

5 For these purposes, 'service charge' has the meaning given by the Landlord and Tenant Act 1985 s 18(1) (as amended) (see PARA 326 ante): Commonhold and Leasehold Reform Act 2002 s 167(5).

6 'Administration charge' has the same meaning as in *ibid* s 158, Sch 11 Pt 1 (paras 1-6) (see PARA 355 ante): s 167(5).

7 'Prescribed' means prescribed by regulations made by the appropriate national authority: *ibid* s 167(5). For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante; and as to the power to make regulations under Pt 2 (ss 71-179) (as amended) see PARA 59 note 2 ante. Regulations may not be made by the Secretary of State under s 167 or s 171 (see PARA 614 post) unless a draft of the instrument containing them has been laid before and approved by a resolution of each House of Parliament: s 178(4).

8 See *ibid* s 167(2). The prescribed sum is £350: Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004, SI 2004/3086, reg 2(1); Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (Wales) Regulations 2005, SI 2005/1352, reg 2(1).

9 Commonhold and Leasehold Reform Act 2002 s 167(1). The prescribed period is three years: Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004, SI 2004/3086, reg 2(2); Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (Wales) Regulations 2005, SI 2005/1352, reg 2(2)

10 For this purpose 'default charge' means an administration charge payable in respect of the tenant's failure to pay any part of the unpaid amount: Commonhold and Leasehold Reform Act 2002 s 167(3).

11 *Ibid* s 167(3).

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### **613. Long residential leases; no forfeiture notice before determination of breach.**

A landlord<sup>1</sup> under a long lease<sup>2</sup> of a dwelling<sup>3</sup> may not serve a forfeiture notice<sup>4</sup> in respect of a breach by a tenant<sup>5</sup> of a covenant or condition in the lease unless the statutory condition<sup>6</sup> is satisfied<sup>7</sup>. That condition is satisfied if:

- 1261 (1) it has been finally determined on an application to a leasehold valuation tribunal<sup>8</sup> that the breach has occurred<sup>9</sup>;
- 1262 (2) the tenant has admitted the breach; or
- 1263 (3) a court in any proceedings, or an arbitral tribunal<sup>10</sup> in proceedings pursuant to a post-dispute arbitration agreement<sup>11</sup>, has finally determined<sup>12</sup> that the breach has occurred<sup>13</sup>.

A notice may not, however, be served by virtue of head (1) or head (3) above until after the end of the period of 14 days beginning with the day after that on which the final determination is made<sup>14</sup>.

A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred<sup>15</sup>; but he may not make such an application in respect of a matter which:

- 1264 (a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party;
- 1265 (b) has been the subject of determination by a court; or
- 1266 (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement<sup>16</sup>.

An agreement by a tenant under a long lease of a dwelling, other than a post-dispute arbitration agreement, is void in so far as it purports to provide for a determination in a



particular manner, or on particular evidence, of any question which may be the subject of such an application<sup>17</sup>.

Nothing in the above provisions affects the service of a forfeiture notice in respect of a failure to pay a service charge<sup>18</sup> or an administration charge<sup>19</sup>.

1 For the meaning of 'landlord' see PARA 369 note 8 ante (definition applied by the Commonhold and Leasehold Reform Act 2002 s 169(5)).

2 For these purposes, 'long lease' has the meaning given by *ibid* ss 76, 77 (as amended) (see PARA 371 ante), except that a shared ownership lease is a long lease whatever the tenant's total share: s 169(5). See further note 3 *infra*. For these purposes, a lease limited to continue as long only as the lessee abstains from committing a breach of covenant is and takes effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach: Law of Property Act 1925 s 146(7) (applied for the purposes of the Commonhold and Leasehold Reform Act 2002 ss 168, 169 by s 169(6)).

3 For these purposes, 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante): Commonhold and Leasehold Reform Act 2002 s 169(5). 'Long lease of a dwelling' does not, however, include: (1) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies (business tenancies: see PARA 701 *et seq* post); (2) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (3) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Commonhold and Leasehold Reform Act 2002 s 169(4).

4 *le* a notice under the Law of Property Act 1925 s 146(1): see PARA 619 post.

5 For the meaning of 'tenant' see PARA 369 note 8 ante (definition applied by the Commonhold and Leasehold Reform Act 2002 s 169(5)).

6 *le* *ibid* s 168(2): see heads (1)-(3) in the text.

7 *Ibid* s 168(1).

8 *le* an application under *ibid* s 168(4): see the text and note 15 *infra*.

9 For these purposes, it is finally determined that a breach of a covenant or condition in a lease has occurred: (1) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge; or (2) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in *ibid* s 169(3): s 169(2). The time referred to in s 169(2)(b) (see head (2) *supra*) is the time when the appeal or other challenge is disposed of (a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any); or (b) by its being abandoned or otherwise ceasing to have effect: s 169(3).

10 For these purposes, 'arbitral tribunal' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1226 *et seq*): Commonhold and Leasehold Reform Act 2002 s 169(5).

11 For these purposes, 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (see ARBITRATION vol 2 (2008) PARA 1213); and 'post-dispute arbitration agreement', in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen: Commonhold and Leasehold Reform Act 2002 s 169(5).

12 See note 9 *supra*.

13 Commonhold and Leasehold Reform Act 2002 s 168(2).

14 *Ibid* s 168(3).

15 *Ibid* s 168(4). The application must be accompanied by a statement giving particulars of the alleged breach of covenant or condition and a copy of the lease concerned: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(7A), Sch 1 para 8, Sch 2 para 7 (added by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(7A), Sch 1 para 8, Sch 2 para 7 (added by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 *et seq* ante. Procedure regulations may include provision requiring the payment of fees

in respect of such an application, or in respect of an oral hearing of such a case: see the Commonhold and Leasehold Reform Act 2002 Sch 12 para 9(1)(d); and PARA 59 ante.

16 Ibid s 168(5).

17 Ibid s 169(1).

18 Ie within the meaning of the Landlord and Tenant Act 1985 s 18(1) (as amended): see PARA 326 ante.

19 Commonhold and Leasehold Reform Act 2002 s 169(7). The administration charge referred to in the text is an administration charge within the meaning of s 158, Sch 11 Pt 1 (para 1-6) (see PARA 355 ante): see s 169(7).

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#### **614. Power to prescribe additional or different requirements.**

The appropriate national authority<sup>1</sup> may by regulations<sup>2</sup> prescribe requirements which must be met before a right of re-entry or forfeiture may be exercised in relation to a breach of a covenant or condition in a long lease<sup>3</sup> of an unmortgaged dwelling<sup>4</sup>. The regulations may specify that the requirements are to be in addition to, or instead of, requirements imposed otherwise than by the regulations<sup>5</sup>.

1 For the meaning of 'the appropriate national authority' see PARA 355 note 9 ante.

2 As to the making of regulation see PARA 612 note 7 ante.

3 For these purposes, 'long lease' has the meaning given by the Commonhold and Leasehold Reform Act 2002 ss 76, 77 (as amended) (see PARA 371 ante), except that a shared ownership lease is a long lease whatever the tenant's total share: s 171(5). See further note 4 infra.

4 Ibid s 171(1). For these purposes, 'dwelling' has the same meaning as in the Landlord and Tenant Act 1985 (see PARA 52 note 2 ante) (Commonhold and Leasehold Reform Act 2002 s 171(5)); and a dwelling is unmortgaged if it is not subject to a mortgage, charge or lien (s 171(4)). 'Long lease of a dwelling' does not, however, include: (1) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies (business tenancies: see PARA 701 et seq post); (2) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (3) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Commonhold and Leasehold Reform Act 2002 s 171(3).

5 Ibid s 171(2). At the date at which this title states the law, no such regulations had been made.

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#### **(iii) Waiver of Forfeiture**

##### **615. Waiver of forfeiture.**

The landlord has the option whether to take advantage of a forfeiture or not<sup>1</sup>; and, if he elects not to do so, the forfeiture is waived. Such election may be either express or implied, and it is implied when, after the cause of forfeiture has come to his knowledge<sup>2</sup>, the landlord does any act whereby he recognises the relationship of landlord and tenant as still continuing<sup>3</sup>. The onus of proof that the landlord knew of the cause of forfeiture is on the tenant<sup>4</sup>, and does not shift to the landlord on proof that the landlord has recognised the tenancy after the ground of forfeiture has arisen<sup>5</sup>. If, however, it is shown that, with knowledge of the cause of forfeiture, the landlord has recognised the tenancy, he will be precluded from saying that he did not do the act with the intention of waiving the forfeiture<sup>6</sup>. A landlord does not waive the forfeiture by merely standing by and seeing it incurred, as, for example, where the tenant makes alterations in breach of covenant and the landlord does not interfere; there must be some positive act of waiver<sup>7</sup>. There is no difference in principle in the rules governing waiver of the right to forfeiture whether the breach is a failure to pay the rent or some other breach of covenant<sup>8</sup>.

1 See PARA 603 ante.

2 Waiver implies knowledge: see *Pennant's Case* (1596) 3 Co Rep 64a (sub nom *Harvey v Oswald* Cro Eliz 553 at 572); *Roe d Gregson v Harrison* (1788) 2 Term Rep 425; *Atkin v Rose* [1923] 1 Ch 522; *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA.

3 *Ward v Day* (1864) 5 B & S 359 at 362, Ex Ch; *Re Garrud, ex p Newitt* (1881) 16 ChD 522 at 533, CA. See also *Green's Case* (1582) Cro Eliz 3; *Doe d Sore v Eykins* (1824) 1 C & P 154. A reference in a reversionary lease granted to a third person to the effect that it was granted subject to and with the benefit of another lease then liable to be forfeited is not a waiver of the right to forfeit that other lease as it was an ordinary conveyancing practice and did not amount to an unequivocal recognition of the existence of the other lease: *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA, overruling *Davenport v Smith* [1921] 2 Ch 270.

4 *Matthews v Smallwood* [1910] 1 Ch 777; *Atkin v Rose* [1923] 1 Ch 522. Where the knowledge of the breach is that of an employee of the landlord who had a duty to pass on the knowledge to the landlord, the landlord will be taken to have had sufficient knowledge of the breach for his conduct to amount to a waiver: *Metropolitan Properties Co Ltd v Cordery* (1979) 39 P & CR 10, CA (decided under the Rent Act 1977 s 137 (as amended): see PARAS 975-977 post).

5 *Fuller's Theatre and Vaudeville Co Ltd v Rofe* [1923] AC 435, PC.

6 *Toleman v Portbury* (1871) LR 6 QB 245 at 248; *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, [1962] 2 All ER 680; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA (right to forfeit for breach of covenant waived by acceptance of rent even though that acceptance was caused by an error on the part of the landlord's agent). As to acts amounting to waiver see PARA 616 post.

7 *Doe d Sheppard v Allen* (1810) 3 Taunt 78 at 81; *Perry v Davis* (1858) 3 CBNS 769; *Griffin v Tomkins* (1880) 42 LT 359 at 362. It will be a waiver, however, if the landlord encourages the tenant to spend money (*North Stafford Steel, Iron and Coal Co (Burslem) Ltd v Lord Camoys* (1865) 11 Jur NS 555; *Hume v Kent* (1811) 1 Ball & B 554), or if he apparently acquiesces in a breach of covenant (*Whitehead v Bennett* (1861) 9 WR 626; *Millard v Humphreys* (1918) 62 Sol Jo 505). See *Official Custodian for Charities v Parway Estates Developments Ltd* [1985] Ch 151, [1984] 3 All ER 679, CA (continued acceptance of rent after official publication of tenant company's liquidation; no waiver as publication did not amount to constructive notice). See also *Chrisdell Ltd v Johnson* (1987) 54 P & CR 257, 19 HLR 406, CA (landlord suspected that a breach of covenant against assignment had taken place but took no action, accepting the tenant's representations as true; no waiver), applied in *Duarte v Mount Cook Land Ltd* [2001] 33 EG 87 (CS), [2001] All ER (D) 368 (Jul) (suspicion of a breach does not amount to knowledge of the breach so there can be no waiver). As to acquiescence see EQUITY vol 16(2) (Reissue) PARA 909 et seq.

8 See *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA.

PARAS 1386-2000/14. TERMINATING LEASES; RECOVERING POSSESSION/(2) FORFEITURE/(iii) Waiver of Forfeiture/616. What acts amount to waiver.

### **616. What acts amount to waiver.**

A subsisting tenancy is recognised, and, if the landlord has notice of the cause of forfeiture, the forfeiture is waived:

- 1267 (1) by his bringing a claim<sup>1</sup> for, or by the mere receipt of, rent which has accrued due since the cause of forfeiture<sup>2</sup>, whether the forfeiture is for condition broken or under an express proviso for re-entry<sup>3</sup>;
- 1268 (2) by distraining for rent, whether accrued due before or after the cause of forfeiture<sup>4</sup>, unless the object of the distress is such that the distress does not imply a recognition of the tenancy, as where it is levied for the purpose of escaping the requirement of formal demand of the rent<sup>5</sup>; or
- 1269 (3) by agreeing to grant a new lease to commence from the regular determination of the existing lease<sup>6</sup>.

Merely entering into and continuing 'without prejudice' negotiations does not necessarily constitute a waiver<sup>7</sup>.

A demand made by the landlord or his agent with knowledge of the breach for rent due after the cause of the forfeiture operates as a waiver<sup>8</sup>. Where money is accepted, it is a question of fact whether it is tendered and accepted as rent; if it is so tendered and accepted, it is then a principle of law that, so long as the landlord then knew of the breach, the acceptance constitutes a waiver<sup>9</sup>. Thus the fact that the landlord, by accepting rent, has no actual intention of waiving the breach does not prevent his action amounting in law to a waiver<sup>10</sup>. Nor can the landlord prevent the waiver by demanding or accepting rent 'without prejudice'<sup>11</sup>. An acceptance of rent in error by a managing agent's clerk will bind the landlord and waive the breach<sup>12</sup>. If, however, the landlord has already shown a final determination to take advantage of the forfeiture, for instance by commencing proceedings to recover possession, no subsequent act, whether receipt of rent<sup>13</sup>, or distress<sup>14</sup>, or otherwise, will operate as a waiver. Forfeiture is not waived by acceptance of rent accrued due before the cause of forfeiture<sup>15</sup> unless at the same time the landlord recognises the tenancy as subsisting, as, for example, where he describes the tenant as such in the receipt<sup>16</sup>. A forfeiture is not waived by a landlord's proffering an unexecuted engrossment of a deed of variation<sup>17</sup>. Where the forfeiting event is the tenant's liquidation, publication in the London Gazette of that liquidation does not impute that knowledge to the landlord<sup>18</sup>. Forfeiture is, however, waived where a landlord issues proceedings claiming production of an insurance policy under a tenant's insurance covenant<sup>19</sup> or where, having failed to ascertain who is living in premises let on a lease providing for re-entry for breach of a covenant preventing subletting, he commences access proceedings against the purchaser of the lease<sup>20</sup>.

1 *Roe d Crompton v Minshall* (1760) Bull NP (7th Edn) 96; *Dendy v Nicholl* (1858) 4 CBNS 376; *Penton v Barnett* [1898] 1 QB 276, CA. If the landlord takes advantage of the forfeiture, he will recover the equivalent of the rent as mesne profits. The taking of other proceedings which imply the continuance of the tenancy will also operate as a waiver of the forfeiture: see *Pellatt v Boosey* (1862) 31 LJCP 281; *Evans v Davis* (1878) 10 ChD 747; and see the text and note 19 infra. There appears, however, to be no objection to commencing proceedings in which a claim for possession on the ground of forfeiture is joined with a claim, in the alternative, for a permanent injunction to restrain breaches of covenant: *Calabar Properties Ltd v Seagull Autos Ltd* [1969] 1 Ch 451, [1968] 1 All ER 1; and see PARA 609 note 10 ante. See also *Practice Direction--Possession Claims* PD 55 para 1.7; and PARA 660 note 5 post.

2 *Pennant's Case* (1596) 3 Co Rep 64a at 64b note (B); *Whitchcot v Fox* (1616) Cro Jac 398; *Goodright d Walter v Davids* (1778) 2 Cowp 803; *Arnsby v Woodward* (1827) 6 B & C 519; *Doe d Griffith v Pritchard* (1833) 5 B & Ad 765; *Doe d Gatehouse v Rees* (1838) 4 Bing NC 384; *Pellatt v Boosey* (1862) 31 LJCP 281; *Miles v Tobin*

(1867) 17 LT 432; *Clifford v Reilly* (1869) IR 4 CL 218. This is especially so if the landlord has also required repairs to be done: *Griffin v Tomkins* (1880) 42 LT 359. Payment into the landlord's bank account, if usual, may operate as a waiver, even if the landlord has instructed the bank not to receive it: *Pierson v Harvey* (1885) 1 TLR 430; but see PARA 265 ante. It is sufficient if payment is accepted from a subtenant (*Price v Worwood* (1859) 4 H & N 512) or other person in satisfaction of the rent (*Pellatt v Boosey* supra). Acceptance from an assignee prior to the completion of the assignment will not enable the assignee to make a good title when he has failed to comply with a notice of dilapidations: *Re Martin, ex p Dixon (Trustee) v Tucker* (1912) 106 LT 381. Where, however, a lease was at the date of assignment voidable on the ground of breach of covenant to repair, the defect of title was cured by the acceptance of rent from the assignee by the landlord after the assignment: *Buterl v Mountview Estates Ltd* [1951] 2 KB 563 at 568, [1951] 1 All ER 693 at 698. The rule applies to a Crown lease: *Bridges v Longman* (1857) 24 Beav 27. See also *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA; *Thomas v Ken Thomas Ltd* [2006] All ER (D) 100 (Oct), CA.

3 *Marsh v Curteys* (1597) Cro Eliz 528.

4 *Green's Case* (1582) Cro Eliz 3; *Pennant's Case* (1596) 3 Co Rep 64a; *Doe d Flower v Peck* (1830) 1 B & Ad 428; *Doe d David v Williams* (1835) 7 C & P 322; *Shepherd v Berger* [1891] 1 QB 597, CA. Since, apart from statute, the landlord may distrain only during the continuance of the tenancy, it makes no difference whether the arrears accrued due before or after the forfeiture. In ordinary cases of determination of tenancy, distress may be made within six months after the determination under the Landlord and Tenant Act 1709, but this does not apply where the tenancy is determined by forfeiture: *Grimwood v Moss* (1872) LR 7 CP 360 at 365; *Kirkland v Briancourt* (1890) 6 TLR 441; cf *Ward v Day* (1864) 5 B & S 359, Ex Ch. See also DISTRESS vol 13 (2007 Reissue) PARA 965. The continuing in possession of a distress levied before the forfeiture is, however, not a waiver: *Doe d Taylor v Johnson* (1816) 1 Stark 411.

5 See the Common Law Procedure Act 1852 s 210; and PARA 609 ante; *Brewer d Lord Onslow v Eaton* (1783) 3 Doug KB 230; *Thomas v Lulham* [1895] 2 QB 400, CA.

6 *Doe d Weatherhead v Curwood* (1835) 1 Har & W 140; *Ward v Day* (1864) 5 B & S 359, Ex Ch.

7 *Re National Jazz Centre Ltd* [1988] 2 EGLR 57.

8 *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 3 All ER 782, [1973] 1 WLR 1487; *Segal Securities Ltd v Thoseby* [1963] 1 QB 887, [1963] 1 All ER 500; *Doe d Nash v Birch* (1836) 1 M & W 402; *Croft v Lumley* (1858) 6 HL Cas 672. See also *Inner City Businessmen's Club v James Kirkpatrick Ltd* [1975] 2 NZLR 636. See, however, *Trustees of Henry Smith's Charity v Willson* [1983] QB 316, [1983] 1 All ER 73, CA (a demand for future rent made with knowledge that the statutory tenancy had ceased and that the statutory tenant had granted an unlawful subtenancy did not amount to a waiver of the landlord's right to claim possession on the basis that the subtenancy was unlawful).

9 *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, [1962] 2 All ER 680.

10 *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, [1962] 2 All ER 680; *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048; *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 3 All ER 782, [1973] 1 WLR 1487. The statement of Harman J in *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751 at 761 that the effect of a demand for or acceptance of rent depends on the intent with which the act was done is no longer good law. See also PARA 615 note 6 ante.

11 *Segal Securities Ltd v Thoseby* [1963] 1 QB 887, [1963] 1 All ER 500 (demand); *Windmill Investments (London) Ltd v Milano Restaurant Ltd* [1962] 2 QB 373, [1962] 2 All ER 680 (acceptance); *Matthews v Smallwood* [1910] 1 Ch 777; *Oak Property Co Ltd v Chapman* [1947] KB 886, [1947] 2 All ER 1, CA. The insertion in the lease of a provision that, to be binding on the landlord, the waiver must be in writing does not prevent the acceptance of rent being a waiver: *R v Paulson* [1921] 1 AC 271, PC.

12 *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA; cf *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751. A mechanical acceptance of rent because a computer program had not been amended was, however, held not to constitute a waiver in *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953.

13 *Doe d Morecraft v Meux* (1824) 1 C & P 346; *Toleman v Portbury* (1872) LR 7 QB 344 at 351, Ex Ch; *Evans v Enever* [1920] 2 KB 315 (where Lord Coleridge said the bringing of proceedings to recover possession is an irrevocable election to determine the lease); *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347. However, receipt of rent may be evidence of a new tenancy from year to year on such of the former terms as are applicable: *Evans v Wyatt* (1880) 43 LT 176.

14 *Grimwood v Moss* (1872) LR 7 CP 360; and see *Kilkenny Gas Co v Somerville* (1878) 2 LR Ir 192.

- 15 *Green's Case* (1582) Cro Eliz 3; *Price v Worwood* (1859) 4 H & N 512.
- 16 *Green's Case* (1582) Cro Eliz 3.
- 17 *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA.
- 18 *Official Custodian for Charities v Parway Estates Developments Ltd* [1985] Ch 151, [1984] 3 All ER 679, CA.
- 19 *Cardigan Properties Ltd v Consolidated Property Investments Ltd* [1991] 1 EGLR 64.
- 20 le even though the access proceedings are taken to verify a belief that there has been no breach of covenant: *Cornillie v Saha and Bradford & Bingley Building Society* (1996) 72 P & CR 147, 28 HLR 561, CA.

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### 617. Continuing breach of covenant.

Where the breach of covenant which gives the right of re-entry is a continuing breach<sup>1</sup>, there is a continually recurring cause of forfeiture. The demand for or acceptance of rent which is payable in arrear is only a waiver of breaches which have occurred up to the date when the rent is due<sup>2</sup> and, where the rent is payable in advance, is a waiver of only those breaches which at the time of the demand or acceptance are known to be continuing and operates only for such period as it is definitely known they will continue<sup>3</sup>. The levy of a distress for rent waives a continuing breach to the same extent<sup>4</sup>. The landlord is not, therefore, precluded from taking advantage of a subsequent continuation of the breach<sup>5</sup>. Thus, where there is a breach of covenant to repair, this is a continuing breach, and demand for and receipt of rent is no waiver, at least if there is no improvement in the condition of the premises between service of a notice under the Law of Property Act 1925<sup>6</sup> and commencement of proceedings<sup>7</sup>. Where the breach of one covenant, for example not to underlet, necessarily involves breach of another covenant, for example to use the premises as a single dwelling house, waiver of a breach of the first covenant, even though that breach is not a continuing breach, necessarily waives the continuing breach of the second covenant<sup>8</sup>.

1 Eg a covenant to use premises as a private residence only (*Segal Securities Ltd v Thoseby* [1963] 1 QB 887, [1963] 1 All ER 500), a covenant to repair (*Fryett d Harris v Jeffreys* (1795) 1 Esp 392; *Coward v Gregory* (1866) LR 2 CP 153; *Penton v Barnett* [1898] 1 QB 276, CA) or a covenant to insure (*Doe d Flower v Peck* (1830) 1 B & Ad 428; *Doe d Muston v Gladwin* (1845) 6 QB 953). In the case of a covenant against assigning or underletting or permitting a third person to occupy the premises, it is not a continuing breach to allow an undertenant to remain in possession (*Walrond v Hawkins* (1875) LR 10 CP 342), although user of premises by the undertenant contrary to a covenant in the head lease may be a continuing breach of that covenant on the part of the tenant (*Lawrie v Lees* (1880) 14 ChD 249 at 262, CA; affd (1881) 7 App Cas 19 at 30, HL; contra *Griffin v Tomkins* (1880) 42 LT 359). A failure to pay rent is a once and for all and not a continuing breach: *London and County (A & D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764, [1970] 2 All ER 600, CA.

2 *Doe d Ambler v Woodbridge* (1829) 9 B & C 376; *Doe d Baker v Jones* (1850) 5 Exch 498.

3 *Segal Securities Ltd v Thoseby* [1963] 1 QB 887, [1963] 1 All ER 500.

4 *Doe d Hemmings v Durnford* (1832) 2 Cr & J 667.

5 *Penton v Barnett* [1898] 1 QB 276, CA, where a three months' notice to repair was served under what is now the Law of Property Act 1925 s 146 (as amended) on 22 September 1896 and on 14 January 1897, no repairs having been done, an action was brought claiming the rent due on 25 December and possession. It was held, overruling *Bevan v Barnett* (1897) 13 TLR 310, that the claim for rent was not a waiver of the breach of

the covenant to repair continuing after 25 December. This case was followed in *New River Co v Crumpton* [1917] 1 KB 762, in which some doubt was cast on the correctness of the decision in *Guillemard v Silverthorne* (1908) 99 LT 584, where a landlord was held to have waived the breach, notwithstanding that it was continuing, by the acceptance of rent while negotiations for a new lease were going on and after some repairs had been executed. See also *Farimani v Gates* [1984] 2 EGLR 66, (1984) 271 Estates Gazette 887, CA; and *Greenwich London Borough Council v Discreet Selling Estates Ltd* [1990] 2 EGLR 65, CA (following *Penton v Barnett* supra).

6 le under the Law of Property Act 1925 s 146 (as amended): see PARA 619 post.

7 *Greenwich London Borough Council v Discreet Selling Estates Ltd* (1990) 61 P & CR 405, [1990] 2 EGLR 65, CA (following *Penton v Barnett* [1898] 1 QB 276, CA). There would still be a right to re-enter if any of the breaches the subject of the notice survived at the date the landlord issued proceedings, and it is submitted that the notice waives only the right to forfeit (which arises afresh the following day) and not the breach: see *Greenwich London Borough Council v Discreet Selling Estates Ltd* supra at 68 per Staughton LJ.

8 *Downie v Turner* [1951] 2 KB 112, [1951] 1 All ER 416.

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## 618. Effect of waivers and licences.

Where any actual waiver<sup>1</sup> by a lessor<sup>2</sup> or persons deriving title under him of the benefit of any covenant or condition in any lease<sup>3</sup> is proved to have taken place in any particular instance, such waiver is not deemed to extend to any instance, or to any breach of covenant or condition save that to which such waiver specially relates, or to operate as a general waiver of the benefit of any such covenant or condition<sup>4</sup> unless a contrary intention appears<sup>5</sup>. Where single breaches of a covenant have been continually waived, the landlord is not debarred from exercising his rights in respect of a subsequent similar breach unless it can be inferred that the terms of the lease have been varied<sup>6</sup>.

Where a licence is granted to a lessee<sup>7</sup> to do any act, the licence, unless otherwise expressed, extends only:

- 1270 (1) to the permission actually given; or
- 1271 (2) to the specific breach of any provision or covenant referred to; or
- 1272 (3) to any other matter thereby specifically authorised to be done,

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence<sup>8</sup>. Notwithstanding any such licence:

- 1273 (a) all rights under covenants and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and
- 1274 (b) the condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done<sup>9</sup>.

Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted:

- 1275 (i) to any one of two or more lessees to do any act or to deal with his equitable share or interest; or  
 1276 (ii) to any lessee, or to any one of two or more lessees, to assign or underlet part only of the property, or to do any act in respect of part only of the property,

the licence does not operate to extinguish the right of entry in case of any breach of covenant or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property, as the case may be, in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence<sup>10</sup>.

- 1 'Actual waiver' includes waiver by conduct: *Mills v Griffiths* (1876) 45 LJQB 771.
- 2 For the meaning of 'lessor' see PARA 240 note 6 ante.
- 3 For the meaning of 'lease' see PARA 145 note 1 ante.
- 4 Law of Property Act 1925 s 148(1); and see *Broomleigh Housing Association Ltd v Hughes* [1999] EGCS 134 (tenant's work on property in breach of subsequently waived covenant; the Law of Property Act 1925 s 148(1) entitled landlord to recover service charge).
- 5 Ibid s 148(2).
- 6 *Bird v Hildage* [1948] 1 KB 91, [1947] 2 All ER 7, CA (landlord who has for a long period accepted payment of rent in arrears may still forfeit for non-payment on the due date).
- 7 For the meaning of 'lessee' see PARA 145 note 3 ante.
- 8 Law of Property Act 1925 s 143(1), which re-enacts the Law of Property Amendment Act 1859 s 1 (repealed), which abrogated the rule in *Dumport's Case* (1603) 4 Co Rep 119b that a licence to do any act in breach of a covenant or condition determined the covenant or condition.
- 9 Law of Property Act 1925 s 143(2).
- 10 Ibid s 143(3). Section 143(3) does not, however, authorise the grant on or after 1 January 1926 of a licence to create an undivided share in a legal estate: s 143(3). 'Legal estates' means the estates, interests and charges, in or over land, subsisting or created at law, which are authorised by the Law of Property Act 1925 to subsist or to be created as legal estates: s 205(1)(x). For the meaning of 'land' see PARA 17 note 1 ante.

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#### **(iv) Relief against Forfeiture**

##### **A. BREACH OF COVENANT OTHER THAN NON-PAYMENT OF RENT**

###### **619. Statutory conditions of re-entry.**

A right of re-entry or forfeiture under any proviso or stipulation in a lease<sup>1</sup> for a breach of any covenant or condition in the lease is not enforceable<sup>2</sup> unless and until the lessor<sup>3</sup> serves on the lessee a notice<sup>4</sup>:

- 1277 (1) specifying the particular breach complained of; and



- 1278 (2) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- 1279 (3) in any case, requiring the lessee to make compensation in money for the breach,

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach<sup>5</sup>. If the lease is assigned after service of the notice, it is not necessary to serve a new notice on the assignee<sup>6</sup>. The requirement of a notice is not confined to cases where the tenant has broken a covenant or obligation imposed on him by the terms of the lease. Thus, subject to statutory exceptions, a notice is required before a forfeiture on the ground of the bankruptcy of the tenant<sup>7</sup> or on the ground of the bankruptcy of a surety of the tenant's obligations<sup>8</sup> or on the basis of impugning the landlord's title<sup>9</sup>.

A right of re-entry or forfeiture for breach of any covenant or agreement to repair is not enforceable<sup>10</sup> unless the lessor proves that the fact that the requisite notice under the Law of Property Act 1925<sup>11</sup> had been served on the lessee was known either:

- 1280 (a) to the lessee; or
- 1281 (b) to an underlessee holding under an underlease which reserved a nominal reversion only to the lessee; or
- 1282 (c) to the person who last paid the rent due under the lease either on his own behalf or as agent for the lessee or the underlessee,

and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice had come to the knowledge of any such person<sup>12</sup>.

Where a lessor serves on the lessee a notice<sup>13</sup> that relates to a breach of a covenant or agreement to keep or put in repair during the currency of the lease<sup>14</sup> all or any of the property comprised in the lease, and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may within 28 days from that date serve on the lessor a counter-notice<sup>15</sup> to the effect that he claims the benefit of the Leasehold Property (Repairs) Act 1938<sup>16</sup>.

1 For these purposes, 'lease' includes an original or derivative underlease, an agreement for a lease where the lessee has become entitled to have his lease granted and a grant at a fee farm rent, or securing a rent by condition (Law of Property Act 1925 s 146(5)(a)); 'underlease' includes an agreement for an underlease where the underlessee has become entitled to have his underlease granted (s 146(5)(d)); 'lessee' includes an original or derivative underlessee, and the persons deriving title under a lessee and also a grantee under any such grant as aforesaid and the persons deriving title under him (s 146(5)(b)); and 'underlessee' includes any person deriving title under an underlessee (s 146(5)(e)). The particular lessee required to be served under s 146(1) is the person who, vis-à-vis the lessor, is bound to remedy a breach or to make compensation in money; the relationship of lessor and lessee is unaffected by a mortgage, and that remains the position even if the mortgagee takes possession: *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983, [2003] 1 All ER 509, CA.

2 ie by action (now generally known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) or otherwise (ie by peaceable entry: see *Re Riggs, ex p Lovell* [1901] 2 KB 16 at 20). See also *Howard v Fanshawe* [1895] 2 Ch 581.

3 For these purposes 'lessor' includes an original or derivative underlessor, and the persons deriving title under a lessor; and also a person making a grant at a fee farm rent, or securing a rent by condition and the persons deriving title under him: Law of Property Act 1925 s 146(5)(c).

4 The statutory provisions as to service of a notice on the tenant and the tenant's right to apply to the court for relief against forfeiture (see the text and notes 10-16 infra; and PARA 620 et seq post) cannot be avoided by disguising what is in truth and substance a forfeiture as some other form of transaction: *Plymouth Corpn v Harvey* [1971] 1 All ER 623, [1971] 1 WLR 549 (where there was an arrangement by which the tenant executed

a deed of surrender in escrow and handed it to a third person to be handed to the landlord upon a specified breach of covenant, and this was held to be a forfeiture not a surrender). See also *Richard Clarke & Co Ltd v Widnall* [1976] 3 All ER 301, [1976] 1 WLR 845, CA; and PARA 628 note 3 post. The statutory provisions do not, however, apply where the re-entry is by operation of law and not under a proviso or stipulation in a lease: see *Warner v Sampson* [1958] 1 QB 404, [1958] 1 All ER 44; and PARA 626 note 17 post. As to the statutory restrictions on serving a notice under the Law of Property Act 1925 s 146 (as amended) with regard to residential tenancies see PARA 610 et seq ante.

No such notice is required, and s 146 (as amended) does not apply, in relation to:

- 39 (1) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison or of any secure training centre or part of a secure training centre (see the Criminal Justice Act 1991 s 84(1), (3)(b) (substituted by the Criminal Justice and Public Order Act 1994 s 96); the Criminal Justice and Public Order Act 1994 s 7(1), (3)(b); and PRISONS vol 36(2) (Reissue) PARAS 532, 658);
- 40 (2) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation (see the Immigration and Asylum Act 1999 s 149(3)(b) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157).

5 Law of Property Act 1925 s 146(1), which replaced the Conveyancing Act 1881 s 14(1) (repealed). The Law of Property Act 1925 s 146(1) does not, however, destroy the landlord's right of re-entry, but merely gives the tenant a chance to remedy the situation: *Creswell v Davidson* (1887) 56 LT 811. A notice served after the landlord has taken possession is effective: see *Fuller v Judy Properties Ltd* (1991) 64 P & CR 176, [1992] 1 EGLR 75, CA. Where the breach of covenant is an assignment of the lease without the landlord's consent, the assignment is still effective to vest the lease in the assignee and the statutory notice should be addressed to and served on the assignee: *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA. If the prospective tenant has already committed breaches of the intended covenants, he is not entitled to have his lease granted, and so cannot obtain the statutory relief: *Coatsworth v Johnson* (1886) 55 LJQB 220, CA. The Law of Property Act 1925 s 146 (as amended) does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent and has effect notwithstanding any stipulation to the contrary: s 146(11), (12).

Where the landlord has waived a breach of a covenant to repair by receipt of rent accruing due during the currency of the notice, but no repairs have been done at the expiration of the notice, he may sue for possession without serving a fresh notice (*Penton v Barnett* [1898] 1 QB 276, CA); nor is a fresh notice required where some of the repairs are executed and rent has been accepted after the expiry of the notice, if after the acceptance of rent the notice remains not fully complied with (*New River Co v Crumpton* [1917] 1 KB 762). The same principle probably applies to any continuing breach of covenant: see PARA 617 ante. In *Guilemar v Silverthorne* (1908) 99 LT 584, it was held that the forfeiture was waived by the execution of some of the repairs and by the landlord carrying on negotiations for a new lease; but this decision was not followed in *New River Co v Crumpton* supra, where the decision in *Penton v Barnett* supra was preferred. It is not necessary in proceedings to recover possession for breach of covenant to allege specifically that the notice has been served on the tenant: *Gates v WA and RJ Jacobs Ltd* [1920] 1 Ch 567; and see also *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

The Law of Property Act 1925 s 146 (as amended) applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament: s 146(6). For the purposes of s 146 (as amended), a lease limited to continue as long only as the lessee abstains from committing a breach of covenant is and takes effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach: s 146(7).

6 *Kanda v Church Comrs for England* [1958] 1 QB 332, sub nom *Church Comrs for England v Kanda* [1957] 2 All ER 815, CA.

7 See the Law of Property Act 1925 s 146(10); and PARA 626 post. See also *Ivory Gate Ltd v Spetale* (1998) 77 P & CR 141, [1998] 2 EGLR 43, CA (tenant in receivership; forfeiture claim settled; tenant's surety liable for arrears of rent and service charges).

8 *Halliard Property Co Ltd v Jack Segal Ltd* [1978] 1 All ER 1219, [1978] 1 WLR 377, applied in *Dream Factory Ltd v Crown Estate Comrs* [2000] 3 EGLR 107, [1998] EGCS 136; and see PARA 626 note 14 post.

9 *Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821, [2001] 45 EG 138 (CS), [2001] All ER (D) 305 (Oct).

- 10 See note 2 *supra*.
- 11 Ie under the Law of Property Act 1925 s 146 (as amended).
- 12 Landlord and Tenant Act 1927 s 18(2); and see PARA 449 note 14 *ante*.
- 13 Ie under the Law of Property Act 1925 s 146(1).
- 14 For the meaning of 'lease' see PARA 455 note 9 *ante*.
- 15 As to the validity of the counter-notice see PARA 455 *ante*.
- 16 Leasehold Property (Repairs) Act 1938 s 1(1) (amended by the Landlord and Tenant Act 1954 s 51(2)(a)); and see PARA 455 *ante*. A mortgagee in possession is not entitled to serve a counter-notice under this provision: *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983, [2003] 1 All ER 509, CA, disapproving *Target Home Loans Ltd v Iza Ltd* [2000] 1 EGLR 23, [2000] 02 EG 117, Central London county court.

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## **620. What notice is required.**

The notice of breach of covenant must be so distinct as to direct the tenant's attention to the particular things of which the landlord complains in order that the tenant may have an opportunity of remedying them before a claim to enforce the forfeiture is begun<sup>1</sup>. It must also be sufficient to inform the tenant of what is complained of, but it need not identify every defect or amount to a detailed specification of the work to be done<sup>2</sup>. The notice will not be invalid because, in attempting to enumerate the specific breaches, it includes some breaches which have not been committed<sup>3</sup>. Nor will it be invalid because, in addition to referring to covenants which do exist, it refers to a covenant which does not exist<sup>4</sup>.

It is not necessary that the notice should require payment of compensation in money<sup>5</sup>, nor, where the breach is incapable of remedy<sup>6</sup>, need the notice require it to be remedied<sup>7</sup>. If the breach is capable of remedy and the notice fails to require its remedy, the notice will be insufficient; if there is any doubt as to whether the breach is or is not capable of remedy, it is sufficient in the notice to require the remedy of the breach 'if it is capable of remedy'<sup>8</sup>. The notice may state a time within which the breach is to be remedied, but the landlord will not be entitled to re-enter at the end of the stated period unless the time is in fact reasonable<sup>9</sup>. Even if the breach is incapable of remedy, a reasonable time must be given to the tenant between the service of the notice and the beginning of proceedings against him<sup>10</sup>.

1 *Fletcher v Nokes* [1897] 1 Ch 271 (notice that the tenant had broken the covenants to repair, without giving any details of the want of repair, held to be insufficient); *Re Serle, Gregory v Serle* [1898] 1 Ch 652; *Jolly v Brown* [1914] 2 KB 109, CA (affd sub nom *Fox v Jolly* [1916] 1 AC 1, HL); *Davenport v Smith* [1921] 2 Ch 270; and see *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296, [2006] 2 All ER 872, [2006] 1 WLR 201 (notice alleging breach of covenant against assignment or subletting or parting with possession of the premises insufficient as the tenant had merely shared possession). The notice need not, however, specify the particular acts which the tenant must do: *Piggott v Middlesex County Council* [1909] 1 Ch 134 at 147; *Fox v Jolly* *supra*.

2 *Fox v Jolly* [1916] 1 AC 1, HL, where the notice concluded 'and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary'. It was held that the notice was not thereby invalidated, but that the landlord had merely reserved his rights if he later discovered a further breach. See also *Adagio Properties Ltd v Ansari* [1998] 2 EGLR 69, [1998] 05 LS Gaz R 30 (in a case of alleged breach of covenant against alterations, it was sufficient to allege division into two flats); and PARA 626 note 17 *post*.

3 *Matthews v Usher* [1900] 2 QB 535, CA; *Pannell v City of London Brewery Co* [1900] 1 Ch 496, followed in *McIlvenny v McKeever* [1931] NI 161, NI CA; *Blewett v Blewett* [1936] 2 All ER 188, CA. The notice will, however, be invalid if it claims in respect of special covenants to repair which are additional to those contained in the lease (*Guillemard v Silverthorne* (1908) 99 LT 584), or refers to the wrong covenant (*Jacob v Down* [1900] 2 Ch 156).

4 *Silvester v Ostrowska* [1959] 3 All ER 642, [1959] 1 WLR 1060 (distinguishing *Guillemard v Silverthorne* (1908) 99 LT 584), where a notice to remedy a breach of covenant to repair also referred to a breach of a non-existing covenant against subletting.

5 *Lock v Pearce* [1893] 2 Ch 271, CA; *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347; *Rugby School Governors v Tannahill* [1935] 1 KB 87, CA.

6 Certain breaches of covenant are, by their very nature, irremediable: see *Rugby School Governors v Tannahill* [1935] 1 KB 87, CA (use of house for immoral purposes); *Egerton v Esplanade Hotels London Ltd* [1947] 2 All ER 88 (hotel used as brothel); *Hoffmann v Fineberg* [1949] Ch 245, [1948] 1 All ER 592 (use as gaming house); *Barthwick-Norton v Romney Warwick Estates Ltd* [1950] 1 All ER 798, CA (sublet flat used as brothel); *Bickerton's Aerodromes Ltd v Young* (1958) 108 L Jo 218 (breaches of licensing laws); *Ali v Booth* (1966) 110 Sol Jo 708, CA (conviction under food and drugs regulations); *Scala House and District Property Co Ltd v Forbes* [1974] QB 575, [1973] 3 All ER 308, CA (breach of covenant not to assign, sublet or part with possession of the demised premises); *DR Evans & Co v Chandler* (1969) 211 Estates Gazette 1381 (use of premises so as to give them a stigma or bad name which would last well beyond the cessation of the use). Whether the breach of a covenant not to suffer distress is remediable depends upon the particular circumstances of the case; if the landlord has sustained no undue injury, and no undue notoriety has attached to the premises, the breach may be remediable on payment of the rent due and the costs of the landlord's distress: *Hartley v Larkin* (1950) 66 (Pt I) TLR 896. In *Glass v Kencakes Ltd* [1966] 1 QB 611, [1964] 3 All ER 807, it was held that an immoral use by a subtenant was not a breach incapable of remedy by a head tenant when the head tenant did not know of it and took all reasonable steps to stop it when he found out; cf *British Petroleum Pension Trust Ltd v Behrendt* (1985) 52 P & CR 117, 18 HLR 42, CA (cited in PARAS 22 note 4, 500 ante). Most, if not all, breaches of positive covenants, whether continuous or once and for all, are capable of remedy: *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA.

7 *Rugby School Governors v Tannahill* [1935] 1 KB 87, CA.

8 *Glass v Kencakes Ltd* [1966] 1 QB 611, [1964] 3 All ER 807; *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* [1986] Ch 340, [1985] 2 All ER 998, CA (a breach of a positive covenant is distinguishable from a breach of a negative covenant and is remediable if the remedy is carried out within a reasonable time); *Savva v Houssein* (1996) 73 P & CR 150, [1996] 2 EGLR 65, CA (test suggested to be whether mischief resulting from the breach can be removed).

9 *Horsey Estate Ltd v Steiger* [1899] 2 QB 79 at 92, CA; *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347 (14 days' notice held to be sufficient). A three months' notice will usually be reasonable (see *Penton v Barnett* [1898] 1 QB 276, CA; *Gulliver Investments v Abbott* [1966] EGD 299); but, where the notice applies to all the premises and a longer period is necessary in respect of part, it must be allowed in respect of the whole (*Hopley v Tarvin Parish Council* (1910) 74 JP 209). See also *Cardigan Properties Ltd v Consolidated Property Investments Ltd* [1991] 1 EGLR 64; *Courtney Lodge Management Ltd v Blake* [2004] EWCA Civ 975, [2005] 1 P & CR 17, [2004] All ER (D) 30 (Jul) (landlord did not afford tenant reasonable period of time in which to remedy the breach before issue of proceedings). The defence that the time allowed was not reasonable need not be specifically pleaded: *Hopley v Tarvin Parish Council* supra; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

10 *Horsey Estate Ltd v Steiger* [1899] 2 QB 79, CA; *Scala House and District Property Co Ltd v Forbes* [1974] QB 575, [1973] 3 All ER 308, CA. In such a case the purpose of allowing to the tenant a period of time is so that he will have an opportunity to consider his position generally and in particular to consider such matters as whether he should apply for relief and offer compensation to the landlord. In *Horsey Estate Ltd v Steiger* supra two days was held not to be a reasonable time; whereas in *Scala House and District Property Co Ltd v Forbes* supra 14 days was held to be a sufficient time.

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## 621. Service of notice.

Any notice<sup>1</sup> served on a lessee<sup>2</sup> or mortgagor<sup>3</sup> is sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained<sup>4</sup>. Any notice is sufficiently served if it is left at the last-known place of abode or business in the United Kingdom<sup>5</sup> of the lessee, lessor<sup>6</sup>, mortgagee, mortgagor, or other person to be served<sup>7</sup>, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him<sup>8</sup> on the land<sup>9</sup> or any house or building comprised in the lease or mortgage, or, in the case of a mining lease<sup>10</sup>, is left for the lessee at the office or counting-house of the mine<sup>11</sup>. Notice is also sufficiently served if it is sent by post in a registered letter<sup>12</sup> addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name and that letter is not returned by the postal operator<sup>13</sup> concerned undelivered; and that service is deemed to be made at the time at which the registered letter would in the ordinary course be delivered<sup>14</sup>. The notice must be served before the alleged breach is remedied<sup>15</sup>.

1    Ie under the Law of Property Act 1925 s 146(1): see PARA 619 ante. Any notice required or authorised to be served or given under the Law of Property Act 1925 must be in writing: s 196(1). Service is presumed if the statutory requirements are complied with, even though the notice is never received: see *R v Westminster Union Assessment Committee, ex p Woodward & Sons* [1917] 1 KB 832, 86 LJKB 698; but see also *Holwell Securities Ltd v Hughes* [1974] 1 All ER 161, [1974] 1 WLR 155, CA.

2    For the meaning of 'lessee' see PARA 145 note 3 ante. A notice served upon an equitable assignee of a lease by name is not an effective service on the lessee: see *Gentle v Faulkner* [1900] 2 QB 267, 69 LJQB 777, CA. A notice addressed to the original lessee and 'all others whom it both or may concern' and served on the person in occupation of the demised premises is sufficiently addressed to and validly served on the assignee of the lease: see *Cronin v Rogers* (1884) Cab & El 348.

3    For these purposes, 'mortgagor' includes any person from time to time deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate, interest or right in the mortgaged property; and 'mortgage' includes any charge or lien on any property for securing money or money's worth: Law of Property Act 1925 s 205(1)(xvi).

4    Ibid s 196(2).

5    Any reference in ibid s 196(3) or (4) (see the text and notes 6-14 infra) to the last known place of abode or business of the person to be served has effect, in its application to a notice to be served by a tenant on a landlord of premises to which the Landlord and Tenant Act 1987 Pt VI (ss 46-50) (as amended) (see PARAS 53, 257 ante), as if that reference included a reference to (1) the address last furnished to the tenant by the landlord in accordance with s 48 (as amended) (see PARA 53 ante); or (2) if no address has been so furnished in accordance with s 48 (as amended), the address last furnished to the tenant by the landlord in accordance with s 47 (as amended) (see PARA 257 ante): s 49. For the meaning of 'United Kingdom' see PARA 25 note 18 ante.

6    For the meaning of 'lessor' see PARA 240 note 6 ante.

7    If there is more than one lessee, all the lessees must be served: *Blewett v Blewett* [1936] 2 All ER 188, CA. Where the legal estate in the lease is vested in the Public Trustee, eg under the Law of Property Act 1925 Sch 1 Pt IV para 1(4) (as amended), the Public Trustee must be served: *Blewett v Blewett* supra. There is no requirement that a mortgagee or underlessee must be served: *Church Comrs for England v Ve-Ri-Best Manufacturing Co Ltd* [1957] 1 QB 238, [1956] 3 All ER 777; *Egerton v Jones* [1939] 2 KB 702, [1939] 3 All ER 889, CA.

8    The notice will be left for the tenant if it is left with some person on the premises provided there is reasonable ground for supposing that that person will pass it on to the tenant if possible: *Cannon Brewery Co Ltd v Signal Press Ltd* (1928) 139 LT 384.

9    For the meaning of 'land' see PARA 17 note 1 ante.

10   For these purposes, 'mining lease' means a lease for mining purposes, ie the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes

connected therewith, and includes a grant or licence for mining purposes: Law of Property Act 1925 s 205(1) (xiv).

11 Ibid s 196(3); and see *Trustees of Henry Smith's Charity v Kyriakou* (1989) 22 HLR 66, [1989] 2 EGLR 110, CA; *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573 at [53], [2003] 2 P & CR 84, [2002] 2 EGLR 29, obiter, per Robert Walker LJ (fixing of notice to building which was inaccessible because of security measures constituted sufficient service).

12 In a neighbourhood in which there is no usual delivery, service by registered post is not good: see *Lewis v Evans* (1874) LR 10 CP 297; but it is questionable whether on the facts in that case, in which there was no delivery within two miles of the premises in question, it would now be held that letters were not delivered in the ordinary course.

13 Ie within the meaning of the Postal Services Act 2000: see s 125(1); and POST OFFICE.

14 Law of Property Act 1925 s 196(4) (amended by the Postal Services Act 2000 (Consequential Modifications No 1) Order 2001, SI 2001/1149, art 3(1), Sch 1 para 7); Recorded Delivery Service Act 1962 s 1(1). See also the Landlord and Tenant Act 1927 s 18(2); and PARA 449 ante. In *Stephenson & Son v Orca Properties Ltd* [1989] 2 EGLR 129 it was held that delivery in the ordinary course of post, in the case of recorded delivery letters, requires an available recipient; but this was not followed in *WX Investments Ltd v Begg* [2002] EWHC 925 (Ch), [2002] 1 WLR 2849, [2002] 3 EGLR 47 (recorded delivery letter posted several days before expiry of notice period but delivered after expiry of that period as previous attempts by the Post Office to deliver it were abortive; held that notice was deemed to have been served within the notice period); and see *Re 88 Berkeley Road, London NW9, Rickwood v Turnsek* [1971] Ch 648, [1971] 1 All ER 254 (letter of severance of joint tenancy sent recorded delivery held to have been served even though it was alleged not to have been received by the plaintiff). See also *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2003] 2 P & CR 84, [2002] 2 EGLR 29, where the relevant authorities are reviewed.

15 *SEDAC Investments Ltd v Tanner* [1982] 3 All ER 646, [1982] 1 WLR 1342; *Hamilton v Martell Securities Ltd* [1984] Ch 266, [1984] 1 All ER 665.

## UPDATE

### 621 Service of notice

TEXT AND NOTE 1--A notice to quit served by a council is not a notice required or authorised to be given by the 1925 Act s 196: *Enfield LBC v Devonish* (1996) 74 P & CR 288, CA.

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### 622. Tenant's right to relief.

Where a lessor<sup>1</sup> is proceeding to enforce the right of re-entry or forfeiture<sup>2</sup>, the lessee<sup>3</sup> may, in the lessor's claim<sup>4</sup>, if any, or in any claim brought by himself, apply to the court for relief<sup>5</sup>.

The right to apply for relief is available in the High Court or a county court<sup>6</sup>. The application may be made before or after the landlord has actually re-entered<sup>7</sup>. A court cannot, however, grant relief if the landlord has obtained a judgment for possession against the tenant and has entered into possession pursuant to that judgment<sup>8</sup>. The tenant may apply in the landlord's claim or may himself bring a claim and apply for relief but relief cannot be granted to joint tenants unless they both apply for it<sup>9</sup>. The landlord need not make a mortgagee a party to the claim or inform the mortgagee of the proceedings<sup>10</sup>.

The court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs<sup>11</sup>, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit<sup>12</sup>. In each case the court will consider all the circumstances and the conduct of the parties, the nature and gravity of the breach and its relation to the value of the property<sup>13</sup>, in deciding whether relief should be granted, and, if so, upon what terms<sup>14</sup>. There is no rule that relief is granted only in exceptional circumstances<sup>15</sup>. Although relief is normally granted where the tenant remedies the breach and is able and willing to perform his obligations in the future, it may still be refused in exceptional circumstances, as, for example, where the tenant has shown himself personally unsuitable<sup>16</sup> or where the tenant grants an underlease on terms which disregard the undertakings in the licence to underlet<sup>17</sup>. Relief may, however, in an appropriate case be granted even where the breach is serious<sup>18</sup> or is incapable of remedy<sup>19</sup>. In certain circumstances relief may be granted in respect of a part only of the demised premises<sup>20</sup>. Where relief is granted subject to a condition with a time limit, the court may extend the time for compliance<sup>21</sup>. Where the landlord grants a lease of the premises to a bona fide third party purchaser for value without notice of the tenant's right to relief, the court may grant relief subject to the lease held by the third party, the tenant being put into the position of immediate reversioner of the third party's lease<sup>22</sup>.

1 For the meaning of 'lessor' for these purposes see PARA 619 note 3 ante.

2 I.e. by action (now known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) or otherwise. If the notice has not been served, the landlord's claim to enforce the forfeiture will necessarily fail (*Greenfield v Hanson* (1886) 2 TLR 876; *Jacques v Harrison* (1884) 12 QBD 165, CA); but a notice is not a necessary preliminary of a claim for a receiver (*Charrington & Co Ltd v Camp* [1902] 1 Ch 386; *Leney & Sons Ltd v Callingham and Thompson* [1908] 1 KB 79, CA). Nor can the landlord obtain a mere declaration of forfeiture not to be followed by re-entry: *Wilson v Rosenthal* (1906) 22 TLR 233.

3 For the meaning of 'lessee' for these purposes see PARA 619 note 1 ante. See, however, *Escalus Properties Ltd v Robinson*, *Escalus Properties Ltd v Dennis*, *Escalus Properties Ltd v Cooper-Smith*, *Sinclair Gardens Investments (Kensington) Ltd v Walsh* [1996] QB 231, [1995] 4 All ER 852, CA (as a matter of construction, the class of lessees who are entitled to apply to the court for retrospective relief under the Law of Property Act 1925 s 146(2) is not restricted to those who are in privity of contract or estate with the lessor, but extends to a mortgagee by way of sub-demise seeking relief against forfeiture).

4 The statutory wording is 'action'; but see note 2 supra.

5 Law of Property Act 1925 s 146(2). Originally relief against forfeiture was a creation of the Court of Chancery. Relief against forfeiture for non-payment of rent would readily be granted but relief in other cases was rare: *Hill v Barclay* (1811) 18 Ves 56. In the field of landlord and tenant the old equitable jurisdiction has been replaced by a statutory jurisdiction for breaches other than non-payment of rent: see *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL; *Smith v Metropolitan City Properties Ltd* [1986] 1 EGLR 52, (1985) 277 Estates Gazette 753; cf *Abbey National Building Society v Maybeech Ltd* [1985] Ch 190, [1984] 3 All ER 262. Nonetheless the equitable jurisdiction remains and can be invoked in suitable cases: see *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL; *Thatcher v CH Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748, 19 P & CR 682. See also *Rexhaven Ltd v Nurse* (1995) 28 HLR 241, [1995] EGCS 125 (application for relief from forfeiture for breach of service charge covenant).

It is probable that a claim for relief may not be brought until the landlord has served a statutory notice: *Pakwood Transport Ltd v 15 Beauchamp Place* (1978) 36 P & CR 112 at 116, 117, CA. See also *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499 at 508, [1966] 2 All ER 222 at 224. It is only when the landlord has served a statutory notice that he can be said to be proceeding to forfeit the lease; the fact that a landlord has served the requisite statutory notice does not necessarily mean that he is entitled to refuse an application by the tenant for consent to assign the lease, and the court may grant relief against forfeiture and a declaration that consent to an assignment has been unreasonably withheld: *Pakwood Transport Ltd v 15 Beauchamp Place* supra.

6 The county court has jurisdiction whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings: see the Law of Property Act 1925 s 146(13) (added by the County Courts Act 1984 s 148(1), Sch 2 para 5; amended by the High Court and County Courts Jurisdiction Order 1991, 1991/724, art 2(1)(a), (8), Schedule Pt I). Relief may be given upon a counterclaim by the tenant in

the landlord's claim for possession: *Warden etc of Cholmeley's School at Highgate v Sewell* [1893] 2 QB 254; and see CPR Pt 20.4. As to possession proceedings see PARA 656 et seq post.

7 *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL, distinguishing *Rogers v Rice* [1892] 2 Ch 170, CA; *Quilter v Mapleson* (1882) 9 QBD 672 and *Pakwood Transport Ltd v 15 Beauchamp Place* (1977) 36 P & CR 112; and see *Lock v Pearce* [1893] 2 Ch 271 at 274, CA; *Scott v Matthew Brown & Co Ltd* (1884) 51 LT 746. Where a landlord claims possession in the High Court and seeks final judgment, the tenant's right to relief is a true equitable defence and counterclaim for such relief for which unconditional leave to defend should be given: *Liverpool Properties Ltd v Oldbridge Investments Ltd* [1985] 2 EGLR 111, CA; *Sambrin Investments Ltd v Taborn* [1990] 1 EGLR 61. As to the caution to be exercised in the use of pre-CPR authorities, however, see CIVIL PROCEDURE vol 11 (2009) PARA 33.

8 *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL, affirming *Rogers v Rice* [1892] 2 Ch 170, CA. Cf, however, *Rexhaven Ltd v Nurse and Alliance & Leicester Building Society* (1995) 28 HLR 241, [1995] EGCS 125 (court has jurisdiction to set aside a judgment of possession and to grant a mortgagee relief from forfeiture after execution of such a judgment, although such relief will be granted only in exceptional circumstances if the mortgagee was properly informed of the proceedings).

9 *TM Fairclough & Sons Ltd v Berliner* [1931] 1 Ch 60; *Gill v Lewis* [1956] 2 QB 1, [1956] 1 All ER 844, CA.

10 *Egerton v Jones* [1939] 2 KB 702, [1939] 3 All ER 889, CA; cf *Church Comrs for England v Ve-Ri-Best Manufacturing Co Ltd* [1957] 1 QB 238, [1956] 3 All ER 777. A mortgagee has a right to seek relief against forfeiture under the Law of Property Act 1925 s 146(4): see PARA 627 note 4 post.

11 An order against an applicant for costs on an indemnity basis should not be made as a condition of granting relief against forfeiture of a lease, since indemnity costs encourage lawyers and surveyors to charge large fees, there is no inducement to the landlord to compromise his dispute with the tenant and there is no reason why an unsuccessful applicant for relief should be in any worse position than any other unsuccessful litigant: *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL.

12 Law of Property Act 1925 s 146(2), replacing the Conveyancing Act 1881 s 14(2). The right to relief is a chose in action and devolves, in the event of the tenant's bankruptcy, on his trustee, who may assign it to a purchaser: *Howard v Fanshawe* [1895] 2 Ch 581 at 589.

13 *Cremin v Barjack Properties Ltd* [1985] 1 EGLR 30.

14 *Hyman v Rose* [1912] AC 623, HL; *Egerton v Esplanade Hotels London Ltd* [1947] 2 All ER 88. Immediate rectification of the breach of covenant is not in all cases an essential prerequisite of relief: *Duke of Westminster v Swinton* [1948] 1 KB 524, [1948] 1 All ER 248. As to the conditions of relief see *Quilter v Mapleson* (1882) 9 QBD 672, CA; *North London Freehold Land and House Co v Jacques* (1883) 49 LT 659; *Bond v Freke* [1884] WN 47. As to the conditions which were imposed where relief was granted in a case where the landlord had suffered no appreciable damage see *Associated Omnibus Co Ltd v Idris & Co Ltd* (1919) 148 LT Jo 157.

15 As to the considerations which influenced the court in granting relief see *Ropemaker Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50; *Southern Depot Co Ltd v British Railways Board* [1990] 2 EGLR 39; *Khar v Delmounty Ltd* (1996) 75 P & CR 232, CA. In appropriate cases an appellate court can exercise a fresh discretion under the Law of Property Act 1925 s 146(2) where circumstances have changed and new evidence is available, but it is important to distinguish between a change of circumstances and a change of heart: *Darlington Borough Council v Denmark Chemists Ltd* [1993] 1 EGLR 62, [1993] 02 EG 117, CA (fresh evidence directed to the willingness and financial ability of the appellant to remedy the breach did not show a change of circumstances).

16 *Earl Bathurst v Fine* [1974] 2 All ER 1160, [1974] 1 WLR 905, CA. Thus the financial soundness of the tenant is a relevant consideration and discovery could be ordered on this issue: *Mascherpa v Direck Ltd* [1960] 2 All ER 145, [1960] 1 WLR 447, CA. See also *Harry Lay Ltd v Fox* (1963) 186 Estates Gazette 15; *Athabasca Realty Co Ltd v Graves* (1979) 106 DLR (3d) 473 (Alta).

17 *St Marylebone Property Co Ltd v Tesco Stores Ltd* [1988] 2 EGLR 40.

18 *Mitchison v Thomson* (1883) Cab & El 72; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA (premises used as brothel); *Burfort Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891; *Ropemaker Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50 (club used for purposes of prostitution).

19 See eg *Scala House and District Property Co Ltd v Forbes* [1974] QB 575, [1973] 3 All ER 308, CA. The very facts which make the breach incapable of remedy may, however, also be a reason for refusing relief: see eg *Ali v Booth* (1966) 110 Sol Jo 708, CA.



20 In *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch 1, [1981] 1 All ER 619, a part of the demised premises, which had been lawfully sublet, was used by the subtenants for immoral purposes. The order for possession made against the tenant was in respect of that part only. Where relief is granted as to a part of the premises, the court may impose terms apportioning the rent and making other adjustments to the terms of the lease.

21 *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA; and see *Ridley v Brookpyle Investments Ltd* (1961) 179 Estates Gazette 387, CA.

22 *Fuller v Judy Properties Ltd* (1991) 64 P & CR 176, [1992] 1 EGLR 75, CA.

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### 623. Compensation and costs.

If the tenant has remedied the breach, he will be required to make compensation only where the landlord has in fact suffered loss; and, in general, where compensation is given, it will be measured by the same rule as damages in a claim for breach of the covenant<sup>1</sup>.

A lessor<sup>2</sup> is entitled to recover as a debt due to him from a lessee<sup>3</sup>, and in addition to damages, if any, all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved<sup>4</sup> unless the Leasehold Property (Repairs) Act 1938<sup>5</sup> applies, in which case those costs can be recovered only if the lessor applies to the court for leave to proceed under that Act and on the application the court directs that the lessor is entitled to recover those costs<sup>6</sup>.

In general it is a condition of relief that the tenant pays the costs of the landlord's claim for possession including the costs of the application for relief<sup>7</sup>.

1 *Skinner's Co v Knight* [1891] 2 QB 542, CA; and see PARA 459 ante. The measure of damages for breach of a covenant to use as a private dwelling house may be the cost of reinstatement (*Eyre v Rea* [1947] KB 567, [1947] 1 All ER 415) or only part of it (*Duke of Westminster v Swinton* [1948] 1 KB 524, [1948] 1 All ER 248).

2 For the meaning of 'lessor' for these purposes see PARA 619 note 3 ante.

3 For the meaning of 'lessee' for these purposes see PARA 619 note 1 ante.

4 Law of Property Act 1925 s 146(3) (re-enacting the Conveyancing and Law of Property Act 1892 s 2(1)). Such costs could not be included in damages, although their payment might be made a condition of relief: *Bond v Freke* [1884] WN 47; *Bridge v Quick* (1892) 61 LJ QB 375. They are recoverable only where the landlord waives the breach by writing under his hand, or where the tenant is relieved under the statute, not where the tenant complies with the notice and so avoids the forfeiture: *Nind v Nineteenth Century Building Society* [1894] 2 QB 226, CA.

5 See PARA 456 ante.

6 Leasehold Property (Repairs) Act 1938 s 2.

7 See *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA; *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143, [1964] 1 WLR 139, CA (both cases concerned with forfeiture for non-payment of rent); *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL (cited in PARA 622 note 11 ante).

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#### **624. Effect of order on lease; non-compliance with conditions of order.**

Where relief is granted, it is not necessary for a new lease to be executed as the tenant continues to hold the premises under the old lease<sup>1</sup>. Where relief is granted subject to conditions to be performed within a certain time, then, until those conditions are performed or the time expires, the status of the tenant is that of a tenant at will or a tenant at sufferance only<sup>2</sup>. As long as the tenant is pursuing in good faith a claim for relief against forfeiture, his lease cannot, however, be said to have come to an end for all purposes<sup>3</sup>.

The tenant cannot be compelled to perform the conditions of relief, and, if he declines to do so, the order for relief will be treated as abandoned<sup>4</sup>. If the order fixes a time limit for performance of the conditions, the court has power to extend the time limit<sup>5</sup>.

Where a lease contains a rent review clause, the court should attach some condition to the grant of relief preserving the landlord's rights under that clause<sup>6</sup>.

The effect of the compromise of a forfeiture claim is that the lease is fully restored and there is no need for the grant of relief from forfeiture<sup>7</sup>. Where the landlord discontinues forfeiture proceedings against the tenant, it has been held that the effect of the discontinuance is to resurrect the lease from the 'twilight' period in which it was prospectively terminated during the pendency of those proceedings<sup>8</sup>.

1 *Dendy v Evans* [1910] 1 KB 263, CA; *Driscoll v Church Comrs for England* [1957] 1 QB 330, [1956] 3 All ER 802, CA; *Bland v Ingram's Estates Ltd (No 2)* [2001] EWCA Civ 1088, [2002] Ch 177, [2002] 1 All ER 244.

2 *City of Westminster Insurance Co Ltd v Ainis* (1975) 29 P & CR 469, CA (where it was held that until the order for relief from forfeiture had taken effect, it was the landlord company as opposed to the tenant who had such a right to immediate possession as entitled it to maintain proceedings for trespass against squatters).

3 *Meadows v Clerical, Medical and General Life Assurance Society* [1981] Ch 70, [1980] 1 All ER 454 (where it was held that, while the tenant was applying for relief against forfeiture, his lease had not 'come to an end ... by forfeiture' within the meaning of the Landlord and Tenant Act 1954 s 24(2) (as amended) (see PARA 713 post), so as to prevent him from applying for a new tenancy under s 24(1) (as amended) (see PARA 720 post).

4 *Talbot v Blindell* [1908] 2 KB 114.

5 *Chandless-Chandless v Nicholson* [1942] 2 KB 321, [1942] 2 All ER 315, CA; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA.

6 *Soteri v Psylides* [1991] 1 EGLR 138.

7 *Twinsectra v Hynes Ltd* (1995) 71 P & CR 145, sub nom *Hynes Ltd v Twinsectra* [1995] 2 EGLR 69, CA.

8 *Mount Cook Land Ltd v Media Business Centre Ltd* [2004] EWHC 346 (Ch), [2004] 2 P & CR 477 (Case No 25), [2004] All ER (D) 111 (Feb).

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Relief against Forfeiture/A. BREACH OF COVENANT OTHER THAN NON-PAYMENT OF RENT/625.  
Covenant against assignment.

### 625. Covenant against assignment.

Relief could not be granted against forfeiture in respect of a breach of covenant or condition against assigning, underletting or parting with the possession or disposing of the land leased<sup>1</sup>, where the breach occurred before 1 January 1926<sup>2</sup>. With regard to breaches of such covenants and conditions on or after that date, the same requirements as to notice<sup>3</sup> must be complied with as in the case of breaches of other covenants before the landlord can enforce any right of re-entry or forfeiture and the tenant can similarly obtain relief<sup>4</sup>.

1 Such covenants and conditions were excepted from the operation of the Conveyancing Act 1881 s 14 (repealed), replaced by the Law of Property Act 1925 s 146 (as amended); and thus no notice had to be given prior to enforcing a right of re-entry or forfeiture, nor could relief in such a case be obtained in equity: *Barrow v Isaacs & Son* [1891] 1 QB 417, CA; *Ellis v Allen* [1914] 1 Ch 904; *Atkin v Rose* [1923] 1 Ch 522. The exception did not include a covenant against sharing possession (*Jackson v Simons* [1923] 1 Ch 373), nor one against assigning for the benefit of creditors (*Gentle v Faulkner* [1900] 2 QB 267, CA), but did include a covenant against parting with possession of part of the premises (*Abrahams v MacFisheries Ltd* [1925] 2 KB 18, which did not follow the judgment of Scrutton LJ in *Russell v Beecham* [1924] 1 KB 525, CA, but which was followed in *Carrington Manufacturing Co v Saldin Ltd* (1925) 133 LT 432).

2 Law of Property Act 1925 s 146(8)(i).

3 See PARA 619 ante.

4 *House Property and Investment Co Ltd v James Walker (Goldsmith and Silversmith) Ltd* [1948] 1 KB 257, [1947] 2 All ER 789. The statutory notice under the Law of Property Act 1925 s 146 (as amended) (see PARA 619 ante) should be directed to the assignee not the assignor, even though the assignment was a breach of covenant: *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 3 All ER 504, [1979] 1 WLR 1397, CA; *Fuller v Judy Properties Ltd* [1991] 2 EGLR 41 (revsd on other grounds (1991) 64 P & CR 176, [1992] 1 EGLR 75, CA).

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### 626. Where restrictions and relief inapplicable.

The statutory provisions relating to the service of notices and the grant of relief against forfeiture<sup>1</sup> do not apply to a condition for forfeiture on bankruptcy<sup>2</sup> of the lessee<sup>3</sup>, or on taking in execution of the lessee's interest if contained in a lease<sup>4</sup> of:

- 1283 (1) agricultural or pastoral land<sup>5</sup>;
- 1284 (2) mines or minerals<sup>6</sup>;
- 1285 (3) a house used or intended to be used as a public house<sup>7</sup>;
- 1286 (4) a house let as a dwelling house with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures<sup>8</sup>;
- 1287 (5) any property with respect to which the tenant's personal qualifications are of importance for the preservation of the value or character of the property or on the ground of neighbourhood to the lessor<sup>9</sup> or to any person holding under him<sup>10</sup>.

In the case of leases other than those mentioned in heads (1) to (5) above, those statutory provisions apply to the forfeiture condition if the lessee's interest is sold<sup>11</sup> within one year from the bankruptcy or taking in execution; if his interest is not sold within that year, they apply only to the forfeiture condition during the first year from the date of the bankruptcy or taking in execution<sup>12</sup>. Hence, within the year, and afterwards if there has been a sale within the year, notice must be given before forfeiture and relief may be granted<sup>13</sup>. Notice is also required where the landlord is entitled to forfeit the lease upon the bankruptcy of the surety of the tenant's obligations<sup>14</sup>.

The statutory provisions<sup>15</sup> do not apply to forfeiture for non-payment of rent<sup>16</sup> but it is now clear that they do apply to forfeiture by reason of denial by the tenant of the landlord's title and to any other implied terms in the lease<sup>17</sup>.

1    le the Law of Property Act 1925 s 146 (as amended): see PARA 619-625 ante.

2    'Bankruptcy' includes the liquidation of a company (Law of Property Act 1925 s 205(1)(i), replacing the Conveyancing Act 1881 s 2(xv); *Horse Estate Ltd v Steiger* [1899] 2 QB 79, CA), even if only for the purposes of reconstruction (*Fryer v Ewart* [1902] AC 187, HL). See also *Re Walker, ex p Gould* (1884) 13 QBD 454; BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 412; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 997. A forfeiture arises only on the bankruptcy of the tenant in possession of the term, not on that of an original grantee who has assigned the term: *Smith v Gronow* [1891] 2 QB 394.

3    For the meaning of 'lessee' for these purposes see PARA 619 note 1 ante.

4    For the meaning of 'lease' for these purposes see PARA 619 note 1 ante.

5    Law of Property Act 1925 s 146(9)(a). To constitute a lease of agricultural or pastoral land, it is sufficient if a substantial portion of the land is of that character, even though a factory and other buildings are on the land demised: *Ferguson & Co Ltd v Ferguson* [1924] 1 IR 22, Ir CA.

6    Law of Property Act 1925 s 146(9)(b). A lease of premises used as a mineral water spa at a rent varying with the quantity of mineral water produced has been held not to be one of mines and minerals: *Gee v Harwood* (1932) 48 TLR 606; affd on appeal on other grounds [1933] Ch 712, CA, and sub nom *Pearson v Gee and Braceborough Spa Ltd (in liquidation)* [1934] AC 272, HL. The Law of Property Act 1925 s 146 (as amended) does not extend, in the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things or to enter or inspect the mine or its workings: see s 146(8)(ii). For the meaning of 'mining lease' see PARA 621 note 10 ante.

7    Ibid s 146(9)(c).

8    Ibid s 146(9)(d).

9    For the meaning of 'lessor' for these purposes see PARA 619 note 3 ante.

10   Law of Property Act 1925 s 146(9)(e); and see *Re Walker, ex p Gould* (1884) 13 QBD 454; *Earl Bathurst v Fine* [1974] 2 All ER 1160, [1974] 1 WLR 905, CA (tenant's personal qualifications precluded relief against forfeiture); *Hockley Engineering Co Ltd v V & P Midlands Ltd* [1993] 1 EGLR 76, [1993] 18 EG 129 (the Law of Property Act 1925 s 146(9)(e) must be read as a whole and so read the two phrases 'personal qualifications of the tenant' and 'on the ground of neighbourhood' appear to colour each other).

11   For the meaning of 'sale' for this purpose see *Harry Lay Ltd v Fox* (1963) 186 Estates Gazette 15; *Ferguson & Co Ltd v Ferguson* [1924] 1 IR 22, Ir CA; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 413.

12   Law of Property Act 1925 s 146(10). As to forfeiture on bankruptcy see further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 413. The same principles apply to forfeiture on taking in execution of the tenant's interest.

13   See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 413.

14   *Halliard Property Co Ltd v Jack Segal Ltd* [1978] 1 All ER 1219, [1978] 1 WLR 377, where the exceptions as to service of notice and relief provided for in the Law of Property Act 1925 s 146(10) did not apply as there was no forfeiture on the bankruptcy of the lessee.

15   See note 1 supra.

16 Law of Property Act 1925 s 146(11). As to relief in such a case see PARA 628 post. A maintenance charge is not 'rent' for the purpose of the statutory provisions: *Khar v Delmounty Ltd* (1996) 75 P & CR 232, CA.

17 *Abidogun v Frolan Health Care Ltd* [2001] EWCA Civ 1821, [2001] 45 EG 138 (CS), [2001] All ER (D) 305 (Oct). In *Warner v Sampson* [1959] 1 QB 297, [1959] 1 All ER 120, CA, Ashworth J held at first instance ([1958] 1 QB 404, [1958] 1 All ER 44) that the statutory provisions did not apply; but the Court of Appeal only held that there had not on the facts been such a denial of title as to bring this doctrine into operation). The Law of Property Act 1925 s 146 (as amended) applies only to re-entry or forfeiture under any 'proviso or stipulation in a lease' (see PARA 619 ante); but since the right of forfeiture for denial of title is a right based upon an implied term of the lease, a notice under s 146 (as amended) is required: *Abidogun v Frolan Health Care Ltd* supra at [37]-[49] per Arden LJ, applying dicta in *WG Clark (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297, [1992] 1 All ER 596.

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## **627. Underlessee's right to relief or to a vesting order.**

Where a lessor<sup>1</sup> is proceeding<sup>2</sup> to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease<sup>3</sup>, or for non-payment of rent, the court may, on application by any person claiming as underlessee<sup>4</sup> any estate or interest in the property comprised in the lease, either in the lessor's claim, if any, or in any claim brought by such person for that purpose<sup>5</sup>, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part of it in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent<sup>6</sup>, costs<sup>7</sup>, expenses, damages, compensation, giving security or otherwise, as the court in the circumstances of each case may think fit; in no case, however, is any such underlessee entitled to require a lease to be granted to him for any longer term than he had under his original sublease<sup>8</sup>. The estate so vested is a new estate<sup>9</sup> which commences from the date the vesting order takes effect<sup>10</sup>; and the underlessee will normally be required to enter into covenants in all respects the same, or at least as stringent, as the covenants in the original lease<sup>11</sup>. It follows that the landlord will be entitled to the rents and profits from the land<sup>12</sup>, or to a sum by way of compensation equivalent to mesne profits<sup>13</sup>, for the period between the termination of the former head tenancy and the creation by the vesting order of the former subtenant's new tenancy<sup>14</sup>, at least in relation to such part of that period as the landlord has been kept out of possession<sup>15</sup>. A new lease so granted to a mortgagee<sup>16</sup> is a substituted security and is subject to the mortgage<sup>17</sup>. The court has power<sup>18</sup> to grant such relief to an underlessee against conditions of forfeiture on bankruptcy<sup>19</sup>, and against forfeiture for non-payment of rent<sup>20</sup>, and for breach of covenants of any description, but the power is clearly discretionary and has been exercised sparingly and with caution<sup>21</sup>. The court is entitled to exercise its discretion in refusing to grant relief where the underlessee will not accept the repairing liabilities of the forfeited headlease<sup>22</sup>.

Where the superior landlord fails to inform an underlessee of the forfeiture of the headlease, and the rents reserved by the underlease continue to be demanded and paid, the superior landlord may be estopped from denying that the underlessee holds by the term of the underlease. The grant of relief to a subtenant does not reinstate sub-underleases which determined upon forfeiture of the head lease<sup>23</sup>.

A liquidator of an underlessee company may apply for relief from forfeiture<sup>24</sup>.

- 1 For the meaning of 'lessor' for these purposes see PARA 619 note 3 ante.
  - 2 le by action (now known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18) or otherwise.
  - 3 For the meaning of 'lease' for these purposes see PARA 619 note 1 ante.
  - 4 For the meaning of 'underlessee' see PARA 619 note 1 ante. Where a legal mortgage of land is created by deed expressed to be by way of legal mortgage, the mortgagee has the same protection, powers and remedies as if a mortgage term or, as the case may be, a sub-term, had been created: see the Law of Property Act 1925 s 87(1); and MORTGAGE vol 77 (2010) PARA 191. Thus, 'underlessee' includes a person having a mortgage by sub-demise or by way of legal charge, and a person having the right to call for such a mortgage: *Re Good's Lease, Good v Wood* [1954] 1 All ER 275, [1954] 1 WLR 309; *Grand Junction Co Ltd v Bates* [1954] 2 QB 160, [1954] 2 All ER 385; *Regent Oil Co Ltd v JA Gregory (Hatch End) Ltd* [1966] Ch 402, [1965] 3 All ER 673, CA; *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143, [1964] 1 WLR 139, CA. While an equitable chargee does not have a direct right to apply for relief against forfeiture, there is an implied obligation on the chargor to take reasonable steps to preserve the chargee's security, which may include pursuing relief against forfeiture: *Bland v Ingram's Estates Ltd* [2001] Ch 767, [2002] 1 All ER 221, CA.
  - 5 An application is usually made by a counterclaim in the landlord's claim where the underlessee has been joined as a party; otherwise by an application issued by the underlessee in the landlord's claim asking to be joined as a party and seeking relief.
  - 6 The rent may be increased (*Ewart v Fryer* [1901] 1 Ch 499, CA; *Wardens etc of Cholmeley School, Highgate v Sewell* [1894] 2 QB 906 at 913), and may be restricted to part of the land originally leased (*London Bridge Buildings Co v Thomson* (1903) 89 LT 50). See also *Gray v Bonsall* [1904] 1 KB 601, CA; *Chatham Empire Theatre (1955) Ltd v Ultrans Ltd* [1961] 2 All ER 381, [1961] 1 WLR 817.
  - 7 The underlessee must pay the costs of obtaining relief (*London Bridge Building Co v Thomson* (1903) 89 LT 50) including the costs of an inquiry necessary to determine the new rent (*Ewart v Fryer* (1902) 86 LT 676) and may, as a condition of relief, be required to pay a sum equal to the costs even though he is a legally aided litigant (*Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630, CA). See also *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA; *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143, [1964] 1 WLR 139, CA (both cases concerned with forfeiture for non-payment of rent). A mortgagee may be required to pay the landlord's costs of the proceedings against the tenant: see *Egerton v Jones* [1939] 2 KB 702, [1939] 3 All ER 889, CA (where it was conceded that the landlord's judgment for costs against the tenant ought to be assigned to the mortgagee).
  - 8 Law of Property Act 1925 s 146(4); County Courts Act 1984 s 138(5) (amended by the Administration of Justice Act 1985 ss 55(1), (2), 67(2), Sch 8 Pt III; the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 17); *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, 67 P & CR 18, CA. See also *Factors (Saundries) Ltd v Miller* [1952] 2 All ER 630, CA. Relief may be available to unlawful subtenants in circumstances where the sole ground of forfeiture was non-payment of rent by the head tenant, the subtenants are able to pay the rent and the landlord has previously negotiated with the claimants about the possibility of granting them a tenancy: see *Duarte v Mount Cook Land Ltd* [2001] 33 EGCS 87, [2001] All ER (D) 368 (Jul).
- A distinction must be drawn between (1) relief from forfeiture properly so called whereby the original lease and underlease are reinstated as if they had never been determined by the forfeiture; and (2) a vesting order whereby a new leasehold interest is created. 'Relief from forfeiture' and 'vesting order' are used in these meanings in this paragraph and in PARA 629 post. The distinction which is now made was largely ignored until *Official Custodian for Charities v Mackey* [1985] Ch 168, [1984] 3 All ER 689; and confusion between the two terms is compounded by the several meanings of 'relief'; thus the relief which an undertenant seeks may be a vesting order.
- 9 *Serjeant v Nash, Field & Co* [1903] 2 KB 304 at 313, CA; *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237, [1989] 2 All ER 655.
  - 10 *Cadogan v Dimovic* [1984] 2 All ER 168, [1984] 1 WLR 609, CA.
  - 11 *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751 at 767.
  - 12 *Official Custodian for Charities v Mackey* [1985] Ch 168, [1984] 3 All ER 689.
  - 13 See *Leeds Permanent Building Society v Manyfield Ltd* (16 June 1993, unreported).
  - 14 *Official Custodian for Charities v Mackey* [1985] Ch 168, [1984] 3 All ER 689. A vesting order cannot have retrospective effect: *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308.

15 *Leeds Permanent Building Society v Manyfield Ltd* (16 June 1993, unreported). There is, therefore, an important distinction between the cost of obtaining relief from forfeiture, whether by a tenant or a subtenant, on the one hand and the obtaining of a vesting order by a subtenant or mortgagee on the other.

16 See note 4 *supra*.

17 *Chelsea Estates Investment Trust Co Ltd v Marche* [1955] Ch 328, [1955] 1 All ER 195.

18 See under the Law of Property Act 1925 s 146(4): see the text and notes 1-8 *supra*.

19 *Wardens etc of Cholmeley School, Highgate v Sewell* [1894] 2 QB 906.

20 See PARA 628 *post*.

21 *Imray v Oakshette* [1897] 2 QB 218, CA; *Matthews v Smallwood* [1910] 1 Ch 777; *Hurd v Whaley* [1918] 1 KB 448; *Atkin v Rose* [1923] 1 Ch 522; *Creery v Summersell and Flowerdew & Co Ltd* [1949] Ch 751. A subtenant to whom premises have not been lawfully 'sublet' within the Rent Act 1977 s 137 (as amended) (see PARAS 975-977 *post*), and who is therefore not entitled to protection under s 137 (as amended) may nevertheless apply for relief, but the circumstance that the grant of relief to him will place him in a more favourable position under that Act is a factor to be taken into consideration: *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630, CA. See also *Clifford v Personal Representatives of Johnson* (1979) 251 Estates Gazette 571, CA; *St Marylebone Property Co Ltd v Tesco Stores Ltd* [1988] 2 EGLR 40.

22 *Hill v Griffin* [1987] 1 EGLR 81, CA.

23 *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237, [1989] 2 All ER 655. For a claim by the superior landlord for rents collected from underlessees by a receiver appointed by a mortgagee see *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016, [1985] 1 WLR 1308.

24 *Re Brompton Securities Ltd (No 2)* [1988] 3 All ER 677, [1988] 2 EGLR 95.

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## **B. NON-PAYMENT OF RENT**

### **628. Right to relief against forfeiture for non-payment of rent.**

The proviso for re-entry on non-payment of rent is regarded in equity as merely a security for the rent<sup>1</sup> and, accordingly, provided that the landlord and other persons interested can be put in the same position as before<sup>2</sup>, the tenant is entitled to be relieved against the forfeiture on payment of the rent and any expenses to which the landlord has been put<sup>3</sup>. Save in exceptional circumstances, therefore, relief will be granted on payment of the rent in arrears<sup>4</sup>, and, moreover, save in exceptional circumstances, the court will grant relief on payment of arrears of rent and costs and will disregard other breaches of covenant<sup>5</sup>.

This right to relief has been recognised, and restricted as to time, by statute. Under the Common Law Procedure Act 1852, if the landlord has brought a claim<sup>6</sup> to recover possession, then at any time before trial<sup>7</sup>, and provided that the rent is six months in arrears<sup>8</sup>, the tenant or his assignee may pay or tender to the landlord, or pay into court, all the rent in arrear, together with costs; thereupon all further proceedings are stayed, and the tenant or his assignee holds the demised land under the lease, without any new lease<sup>9</sup>. After trial and judgment for recovery of possession the tenant is still entitled to relief, but he must apply within six months from the date when the judgment was executed; after that time he is barred from relief<sup>10</sup>. If, however, he applies in time and obtains relief, he holds the demised premises in accordance with the terms

of the original lease, without the necessity for a new lease<sup>11</sup>. A person who has acquired title as against the tenant by adverse possession has no right to apply for relief<sup>12</sup>. Where the landlord has re-entered peaceably without bringing proceedings, the statutory six months' time limit for an application for relief does not apply and the court may grant relief under its equitable jurisdiction outside that limit<sup>13</sup>. The jurisdiction is exercised by the High Court<sup>14</sup>.

Similarly, under the County Courts Act 1984, where a lessor<sup>15</sup> is proceeding by a claim<sup>16</sup> in a county court to enforce against a lessee<sup>17</sup> a right of re-entry or forfeiture in respect of any land for non-payment of rent, then if the lessee pays into court or to the lessor not less than five clear days before the return day<sup>18</sup> all the rent in arrear and the costs of the proceedings, the proceedings cease, and the lessee holds the land according to the lease<sup>19</sup> without any new lease<sup>20</sup>. If the proceedings do not so cease and the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture, the court must order possession of the land to be given to the lessor at the expiration of such period, not being less than four weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrear and the costs of the proceedings<sup>21</sup>. The court may extend the period specified for these purposes at any time before possession of the land is recovered in pursuance of the order<sup>22</sup>. If within the period specified in the order, or within that period as so extended, the lessee pays into court or to the lessor all the rent in arrear and the costs of the proceedings, he holds the land according to the lease without any new lease<sup>23</sup>. If he does not so make payment, the order is enforceable in the prescribed manner<sup>24</sup> and so long as the order remains unreversed the lessee is<sup>25</sup> barred from all relief<sup>26</sup>. Where the lessor recovers possession of the land at any time after the making of the order, whether as a result of the enforcement of the order or otherwise, the lessee may, at any time within six months from the date on which the lessor recovers possession, apply to the court for relief; and on any such application the court may, if it thinks fit, grant to the lessee such relief, subject to such terms and conditions, as it thinks fit<sup>27</sup>. Where the lessee is granted relief on such an application, he holds the land according to the lease without any new lease<sup>28</sup>.

Where a lessor has enforced against a lessee, by re-entry without bringing legal proceedings<sup>29</sup>, a right of re-entry or forfeiture as respects any land for non-payment of rent, the lessee may at any time within six months from the date on which the lessor re-entered apply to the county court for relief, and on any such application the court may, if it thinks fit, grant to the lessee such relief as the High Court could have granted<sup>30</sup>.

1 The original jurisdiction to grant relief against forfeiture for non-payment of rent arose from the practice of the old Court of Chancery: see *Popham v Bampfild* (1682) 1 Vern 79; *Grimston v Lord Bruce* (1707) 1 Salk 156. Later the equitable intervention, which originally extended to all breaches, was confined to non-payment of rent: *Hill v Barclay* (1810) 16 Ves 402. For modern discussions of the historic basis of relief see *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA; *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL; *Khar v Delmounty Ltd* (1996) 75 P & CR 232, CA. Statute intervened to restrict the time within which relief could be granted to six months after execution of a judgment, first by the Landlord and Tenant Act 1730 and then by the Common Law Procedure Act 1852 of which s 210 (as amended) remains the statutory basis of relief where the tenant seeks relief after a judgment for possession. Relief in favour of underlessees is also available under the Law of Property Act 1925 s 146(4): see PARA 627 ante. Where the landlord enters without a judgment for possession, relief may still be obtained apart from statute under the old equitable jurisdiction.

2 *Stanhope v Haworth* (1886) 3 TLR 34, CA; *Chandless-Chandless v Nicholson* [1942] 2 KB 321, [1942] 2 All ER 315, CA; and see eg *Razzaq v Pala* [1997] 1 WLR 1336, [1997] 2 EGLR 53 (forfeiture against bankrupt tenant for non-payment of rent).

3 *Gill v Lewis* [1956] 2 QB 1 at 16, [1956] 1 All ER 844 at 853, CA, per Hodson LJ; *Wadman v Calcraft* (1804) 10 Ves 67; *Howard v Fanshawe* [1895] 2 Ch 581 at 588; *Dendy v Evans* [1910] 1 KB 263 at 270, CA. See also *Inntrepreneur Pub Co (CPC) Ltd v Langton* [2000] 1 EGLR 34, [2000] 08 EG 169 (tenant unable to produce evidence of ability to pay arrears within fixed time had no right to relief). Where the lease contains a provision allowing the landlord to determine the lease on giving a period of notice following a breach of covenant by the tenant, the court may grant relief against the operation of the clause after non-payment of rent: *Richard Clarke & Co Ltd v Widnall* [1976] 3 All ER 301, [1976] 1 WLR 845, CA. It is the same whether there is a proviso for re-entry or whether the lease is conditioned to be void on non-payment of rent: *Bowser v Colby* (1841) 1 Hare 109



at 128. If the order granting relief fixes a time limit for compliance with the conditions, there is power to extend the time: see *Chandless-Chandless v Nicholson* [1942] 2 KB 321, [1942] 2 All ER 315, CA; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA.

4 An example of an exceptional case where relief was refused in spite of the arrears being paid was *Public Trustee v Westbrook* [1965] 3 All ER 398, [1965] 1 WLR 1160, CA (no rent paid for 22 years). See also *Stanhope v Haworth* (1886) 3 TLR 34, CA; *Silverman v AFCO (UK) Ltd* (1988) 56 P & CR 185, [1988] 1 EGLR 51 (position of the parties had changed and the rights of a third party had intervened). The payment of the arrears is a statutory condition of relief: *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499, [1966] 2 All ER 222. See also *Howard v Central Board of Finance of the Church of England* (1976) 244 Estates Gazette 51, DC.

5 *Gill v Lewis* [1956] 2 QB 1, [1956] 1 All ER 844, CA. In *Piccadilly Estates Hotels Ltd v Total Property Investments Ltd* (1974) 232 Estates Gazette 589, however, relief against forfeiture was given for non-payment of rent but on terms that the tenant remedied other breaches of covenant.

6 The statutory wording is 'action'; but an 'action' is now generally known as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

7 A trial is not completed where there has been judgment against one only of two joint tenants: *Gill v Lewis* [1956] 2 QB 1, [1956] 1 All ER 844, CA.

8 *Standard Pattern Co Ltd v Ivey* [1962] Ch 432, [1962] 1 All ER 452.

9 Common Law Procedure Act 1852 s 212. In order that an assignee may obtain relief against an order for possession, it is necessary that he should pay or tender not only the amount due from him, but also the amount of rent due from the original tenant, his assignor: *Barratt v Richardson and Cresswell* [1930] 1 KB 686. It appears that arrears which are statute-barred need not be paid: see *Re Howell's Application* [1972] Ch 509, [1972] 3 All ER 662; and LIMITATION PERIODS vol 68 (2008) PARAS 1033, 1057, 1077. A mortgagee is entitled to relief on the same terms as the tenant: *Doe d Whitfield v Roe* (1811) 3 Taunt 402. The relief protects subtenants: *Shine v Gough* (1811) 1 Ball & B 436. The Common Law Procedure Act 1852 s 212 has no application to a tenant holding over under the Rent Act 1977 after the contractual relationship of landlord and tenant has ceased: *Dellenty v Pellow* [1951] 2 KB 858, [1951] 2 All ER 716, CA. As to relief in such cases see PARA 949 post.

10 See the Common Law Procedure Act 1852 s 210 (amended by the Statute Law Revision Act 1892); and *Vesey v Bodkin* (1830) 4 Bli NS 64, HL. The fact that, after judgment has been obtained against him, the tenant signs an agreement by which he undertakes to give up possession will not necessarily deprive him of the right to relief: *Nance v Naylor* [1928] 1 KB 263, CA. However, relief cannot be spelled out of the conduct of the parties without grant of relief or order: see *Smith v Odder* [1949] WN 249, CA (order for possession in default of appearance had been set aside and the tenant continued in possession without any further order). As to rent accruing due after judgment where the tenant is restored to possession see *Wilson v Burne* (1889) 24 LR Ir 14, CA.

11 Supreme Court Act 1981 s 38(2) (the Supreme Court Act 1981 prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed). Formerly, when relief was granted after the determination of the lease, a new lease had to be executed: see *Hare v Elms* [1893] 1 QB 604 at 608, DC; *Dendy v Evans* [1910] 1 KB 263 at 266, CA.

12 *Tickner v Buzzacott* [1965] Ch 426, [1965] 1 All ER 131.

13 *Thatcher v CH Pearce & Sons (Contractors) Ltd* [1968] 1 WLR 748. As to restrictions on re-entry without the assistance of the court see PARAS 652-653 post.

14 The Common Law Procedure Act 1852 left the tenant to apply in equity for relief; the Common Law Procedure Act 1860 (repealed) empowered the courts of common law to give relief, and this jurisdiction passed to the High Court: *Wilson v Bolton* (1893) 10 TLR 17. In any claim in the High Court for the forfeiture of a lease for non-payment of rent, the court now has power to grant relief against forfeiture in a summary manner, and may do so subject to the same terms and conditions as to the payment of rent, costs or otherwise as could have been imposed by it in such a claim immediately before 1 January 1982: Supreme Court Act 1981 s 38(1); and see note 11 supra. The term 'rent' in s 38 and in the County Courts Act 1984 s 138 (as amended) (see the text and notes 15-28 infra) is to be construed as a periodical sum paid in return for the occupation of land, issuing out of the land and for the non-payment of which a distress is leviable; accordingly, a lease which provided that service charge should be deemed to be sums due by way of additional rent and should be recoverable as rent had the effect of investing the charge with the character of rent and, for the purposes of claiming relief, it was to be treated as such, even though the parties to the agreement had omitted to reserve the service charge as rent in the reddendum: *Escalus Properties Ltd v Robinson, Escalus Properties Ltd v Dennis, Escalus Properties*

*Ltd v Cooper-Smith, Sinclair Gardens Investments (Kensington) Ltd v Walsh* [1996] QB 231, [1995] 4 All ER 852, CA.

An application for relief has been said to be inappropriate before the landlord has begun proceedings or taken possession: *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499 at 508, [1966] 2 All ER 222 at 224. As to forfeiture of a right of renewal for non-payment of rent see *Mulloy v Goff* (1850) 1 I Ch R 27; *M'Donnell v Burnett, Burnett v Going* (1841) 4 I Eq R 216; *Fitzgerald v O'Connell* (1844) 6 I Eq R 455; and as to non-payment of fines see *Butler v Mulvihill* (1819) 1 Bligh 137, HL; *Trant v Dwyer* (1828) 2 Bli NS 11.

15 For these purposes, 'lessor' includes (1) an original or derivative underlessor; (2) the persons deriving title under a lessor; (3) a person making a grant at a fee farm rent, or a grant securing a rent by condition; and (4) the persons deriving title under such a grantor: County Courts Act 1984 s 140.

16 Ie being a claim in which the county court has jurisdiction: *ibid* s 138(1); and see note 6 supra.

17 For these purposes, 'lessee' includes (1) an original or derivative underlessee; (2) the persons deriving title under a lessee; (3) a grantee under a grant at a fee farm rent, or under a grant securing a rent by condition; and (4) the persons deriving title under such a grantee; and 'underlessee' includes any person deriving title under an underlessee: *ibid* s 140.

18 'Return day' means the day appointed in any summons or proceeding for the appearance of the defendant or any other day fixed for the hearing of any proceedings: *ibid* s 147(1).

19 For these purposes, 'lease' includes (1) an original or derivative underlease; (2) an agreement for a lease where the lessee has become entitled to have his lease granted; and (3) a grant at a fee farm rent, or under a grant securing a rent by condition; and 'underlease' includes an agreement for an underlease where the underlessee has become entitled to have his underlease granted: *ibid* s 140.

20 *Ibid* s 138(1), (2) (s 138(2), (3), (5), (7), (8), (9) amended by the Courts and Legal Services Act 1990 s 125(2), Sch 17 para 17). See also *Escalus Properties Ltd v Robinson, Escalus Properties Ltd v Dennis, Escalus Properties Ltd v Cooper-Smith, Sinclair Gardens Investments (Kensington) Ltd v Walsh* [1996] QB 231, [1995] 4 All ER 852, CA, cited in note 14 supra. Relief under the County Courts Act 1984 s 138 (as amended) cannot be claimed where an order for possession has been made on mandatory grounds under the Housing Act 1988 (see PARA 1106 et seq post): *Artesian Residential Investments Ltd v Beck* [2000] QB 541, [1999] 3 All ER 113, CA, applied in *Procureur v Alexander* [2004] EWHC 607 (Ch), [2004] All ER (D) 406 (Feb).

The County Courts Act 1984 s 138(2) (as so amended) does not apply where the lessor is proceeding in the same claim to enforce a right of re-entry or forfeiture on any other ground as well as for non-payment of rent, or to enforce any other claim as well as the right of re-entry or forfeiture and the claim for arrears of rent: s 138(6). In a case where s 138 (as amended) has effect, if (1) one-half-year's rent is in arrear at the time of the commencement of the claim; and (2) the lessor has a right to re-enter for non-payment of that rent; and (3) no sufficient distress is to be found on the premises countervailing the arrears then due, the service of the summons in the claim in the prescribed manner stands in lieu of a demand and re-entry: s 139(1).

21 *Ibid* s 138(3) (as amended: see note 20 supra); and see *Maryland Estates Ltd v Bar-Joseph* [1998] 3 All ER 193, [1999] 1 WLR 83, CA (the 'rent in arrear' for these purposes means the rent in arrears at the time when the court making its order assumes that payment of that rent will result in the lease continuing for all purposes, and thus includes sums falling due after the service of the claim form, for use and occupation and claimed as mesne profits, in addition to the rent in arrears at the date of service).

22 County Courts Act 1984 s 138(4). The extension under s 138(4) of a period fixed by a court is not to be treated as relief from which the lessee is barred by s 138(7) (see the text and notes 24-26 infra) if he fails to pay into court or to the lessor all the rent in arrear and the costs of the proceedings within that period: s 138(8) (as amended: see note 20 supra). Where the court extends a period under s 138(4) at a time when (1) that period has expired; and (2) a warrant has been issued for the possession of the land, the court must suspend the warrant for the extended period; and, if, before the expiration period, the lessee pays into court or to the lessor all the rent in arrear and all the costs of the proceedings, the court must cancel the warrant: s 138(9) (as so amended). The court may also adjourn the hearing to enable inquiries to be made into the tenant's ability to pay, but this discretion ought not to be exercised in a way that is unfair to the landlord: see *R v Circuit Judge, ex p Wathen* (1976) 33 P & CR 423, sub nom *Wathen v White* [1976] 1 EGLR 47.

23 County Courts Act 1984 s 138(5) (as amended (see note 20 supra); also amended by the Administration of Justice Act 1985 ss 55(2), 67(2), Sch 8 Pt III).

24 As to the enforcement of county court orders see CIVIL PROCEDURE vol 12 (2009) PARA 1227 et seq; COURTS.

25 Ie subject to the County Courts Act 1984 s 138(8) (as amended) (see note 22 supra) and s 138(9A) (as added) (see the text and note 27 infra).

26 Ibid s 138(7) (as amended) (see note 20 supra); also amended by the Administration of Justice Act 1985 s 55(3)).

27 County Courts Act s 138(9A) (s 138(9A)-(9C) added by the Administration of Justice Act 1985 s 55(1), (4)), reversing the effect of *Di Palma v Victoria Square Property Co Ltd* [1986] Ch 150, [1985] 2 All ER 676, CA; and see *Swordheath Properties Ltd v Bolt* [1992] 2 EGLR 68. An application under the County Courts Act 1984 s 138(9A) (as so added) may be made by a person with an interest under a lease of the land derived (whether immediately or otherwise) from the lessee's interest therein in like manner as if he were the lessee; and on any such application the court may make an order which (subject to such terms and conditions as the court thinks fit) vests the land in such a person, as lessee of the lessor, for the remainder of the term of the lease under which he has any such interest as aforesaid, or for any lesser term: s 138(9B) (as so added). For these purposes, any reference to the land includes a reference to a part of the land: s 138(9B) (as so added).

28 Ibid s 138(9C) (as added: see note 27 supra). Section 138(9C) (as so added) applies to the holder of a charging order against a tenant and entitles such a person to apply for relief from forfeiture for non-payment of rent; on such an application, the court may, if it thinks fit, restore the original lease merely for the purpose of enabling the applicant to apply for an order for sale, and on condition that he does so or, alternatively, the holder of the charging order may obtain a lease: *Croydon (Unique) Ltd v Wright* [2001] Ch 318, [1999] 4 All ER 257, CA; and see *Bland v Ingram's Estates Ltd (No 2)* [2001] EWCA Civ 1088, [2002] Ch 177, [2002] 1 All ER 244.

29 See note 6 supra.

30 County Courts Act 1984 s 139(2). Section 138(9B), (9C) (as added) (see the text and notes 27-28 supra) has effect in relation to such an application as it has effect in relation to an application under s 138(9A) (as added): s 139(3) (added by the Administration of Justice Act 1985 s 55(5)).

Nothing in the County Courts Act 1984 ss 138, 139 (as amended) is to be taken to affect (1) the power of the court to make any order which it would otherwise have power to make as respects a right of re-entry or forfeiture on any ground other than non-payment of rent; or (2) the Law of Property Act 1925 s 146(4) (relief against forfeiture: see PARA 627 ante): County Courts Act 1984 s 138(10).

## UPDATE

### 628 Right to relief against forfeiture for non-payment of rent

NOTE 11--Appointed day is 1 October 2009: SI 2009/1604.

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### 629. Underlessee's right to relief from forfeiture or to a vesting order.

Where the head lease is forfeited for non-payment of rent, an underlessee has a number of statutory procedures available which he may use to seek relief or a vesting order<sup>1</sup>.

The first procedure which applies where the proceedings are brought in the High Court is under the Common Law Procedure Act 1852 which confers on an undertenant the like rights as those conferred on a tenant<sup>2</sup>. The underlessee need not prove his title under the original tenant; it is sufficient that he is in possession and claims as underlessee<sup>3</sup>. If he does not apply until after the lease has been actually determined by the landlord<sup>4</sup>, he must, as the granting of the relief means the revival of the lease, bring the original tenant, and, where the lease has been assigned, the last assignee, before the court<sup>5</sup>, or must satisfactorily account for their absence<sup>6</sup>. If, however, the underlessee applies before the actual determination of the lease, the presence of the original tenant and the last assignee is not necessary<sup>7</sup>.

Where the landlord is proceeding against the head tenant in the county court<sup>8</sup>, an underlessee or mortgagee has the like right to pay into court<sup>9</sup> the arrears claimed and costs as has the head tenant, notwithstanding the fact that the underlessee is not a party to the landlord's claim, and this will relieve the forfeiture of the head lease and thereby the forfeiture of the sublease<sup>10</sup>. In the county court an underlessee is prevented by the Common Law Procedure Act 1852<sup>11</sup> and the County Courts Act 1984<sup>12</sup> from seeking relief after the statutory six-month period<sup>13</sup>.

An alternative procedure which applies in both the High Court and the county court is that under the Law of Property Act 1925<sup>14</sup>. The underlessee may apply for a vesting order before the landlord has obtained possession or, if the landlord physically re-entered without obtaining a judgment, may apply after the landlord so re-entered<sup>15</sup>; and it is not necessary to bring the original lessee or the last assignee before the court<sup>16</sup>. The court will normally grant a vesting order upon terms. The underlessee is usually required to pay any arrears of rent under the head lease<sup>17</sup> and costs<sup>18</sup> and may be required to make good any subsisting breaches of covenant in the head lease<sup>19</sup>. A frequent order is that the premises should vest in the underlessee for the residue of the term of the underlease upon his executing a deed of covenant to pay the rent and perform the covenants of the head lease during that residue. A mortgagee by sub-demise and a mortgagee holding under a charge by way of legal mortgage may apply for a vesting order under this procedure<sup>20</sup>.

The usual practice in the High Court is to seek relief or a vesting order under the Law of Property Act 1925 where that can be done<sup>21</sup>. The principles as to the granting of relief and the terms imposed do not differ between the High Court procedures<sup>22</sup>, although the consequences of relief from forfeiture and a vesting order differ<sup>23</sup>.

Where the landlord has obtained possession by proceedings in the county court, the underlessee may at any time within six months from the date on which the landlord recovers possession apply to the county court for a vesting order which the court may grant subject to such terms and conditions as it thinks fit<sup>24</sup>.

1 As to the distinction between 'relief from forfeiture' and 'vesting order' see PARA 627 note 8 ante. The decision of the Court of Appeal in *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, 67 P & CR 18, CA shows that hitherto many undertenants who have sought vesting orders after forfeiture for non-payment of rent could more advantageously have obtained relief from forfeiture. However, an undertenant of part only of much larger premises formerly comprised in a forfeited lease may well have no practical alternative.

2 Ie under the Common Law Procedure Act 1852 s 210 (as amended), s 212: see PARA 628 ante. In s 210 (as amended) the words used are 'the lessee or his assignee, or other person claiming or deriving under the said lease', which are clearly wide enough to include underlessees. In s 212 the words are the 'tenant or his assignee'; but 'tenant' in this context includes an underlessee: see *Doe d Wyatt v Byron* (1845) 1 CB 623 (decided under the Landlord and Tenant Act 1730 s 4, replaced by the Common Law Procedure Act 1852 ss 210, 212). The relief is available for mortgagees by sub-demise: *Hare v Elms* [1893] 1 QB 604, DC; *Newbolt v Bingham* (1895) 72 LT 852, CA; *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA. As to contribution between underlessees see *Webber v Smith* (1689) 2 Vern 103.

3 *Moore v Smee and Cornish* [1907] 2 KB 8, CA.

4 It seems that the judgment determines the lease; and the lease does not continue until possession is delivered under the judgment: see *Dendy v Evans* [1910] 1 KB 263 at 266, CA.

5 *Hare v Elms* [1893] 1 QB 604 at 609, DC; cf *Adams v St Leger* (1809) 1 Ball & B 181.

6 *Humphreys v Morten* [1905] 1 Ch 739 (presence of the tenant dispensed with on the ground of his bankruptcy and assignment by his trustee in bankruptcy, and of the assignee on the ground of his disappearance for 26 years).

7 *Doe d Wyatt v Byron* (1845) 1 CB 623; *Hare v Elms* [1893] 1 QB 604 at 609, DC.

8 Ie under the County Courts Act 1984 s 138 (as amended): see PARA 628 ante.

9 le either not less than five clear days before the return day under *ibid* s 138(2) (as amended) or after judgment but within the period thereby specified (usually 28 days) under s 138(5) (as amended): see PARA 628 ante.

10 *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, (1993) 67 P & CR 18, CA, distinguishing *Matthews v Dobbins* [1963] 1 All ER 417, [1967] 1 WLR 227. See also *Escalus Properties Ltd v Robinson*, *Escalus Properties Ltd v Dennis*, *Escalus Properties Ltd v Cooper-Smith*, *Sinclair Gardens Investments (Kensington) Ltd v Walsh* [1996] QB 231, [1995] 4 All ER 852, CA, applying *United Dominions Trust Ltd v Shellpoint Trustees Ltd* *supra* (mortgagee by sub-demise entitled to retrospective relief against forfeiture of a lease for non-payment of rent by the tenant on payment of all arrears to the landlord and in the form of reinstatement of the lease without incurring any liability to pay mesne profits to the landlord).

11 le by the Common Law Procedure Act 1852 s 210 (as amended).

12 le by the County Courts Act 1984 s 138 (as amended).

13 *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, (1993) 67 P & CR 18, CA.

14 le under the Law of Property Act 1925 s 146(4): see PARA 627 ante.

15 See *Billson v Residential Apartments Ltd* [1992] 1 AC 494, [1992] 1 All ER 141, HL, distinguishing *Rogers v Rice* [1892] 2 Ch 170, CA.

16 *Gray v Bonsall* [1904] 1 KB 601, CA.

17 Where the whole of the premises comprised in the head lease are also underlet to the applicant for relief, he will normally be required to pay the whole of the arrears of rent. An underlessee of a part only of the premises comprised in the head lease will normally be required to pay only a proportionate part of the arrears: *Chatham Empire Theatre (1955) Ltd v Ultrans Ltd* [1961] 2 All ER 381, [1961] 1 WLR 817.

18 As to costs see *Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 All ER 143, [1964] 1 WLR 139, CA. An applicant for relief will not, however, be required to pay costs in so far as they have been increased in resisting the claim for relief: *Howard v Fanshawe* [1895] 2 Ch 581; *Grangeside Properties Ltd v Collingwoods Securities Ltd* *supra*.

19 *Gray v Bonsall* [1904] 1 KB 601, CA.

20 *Grand Junction Co Ltd v Bates* [1954] 2 QB 160, [1954] 2 All ER 385; *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA. It may be that an equitable charge may apply to the court for relief under the court's inherent jurisdiction: see *Ladup Ltd v Williams & Glyn's Bank plc* [1985] 2 All ER 577, [1985] 1 WLR 851.

21 See, however note 1 *supra*. The underlessee may apply either before or after the landlord has obtained possession: see the text and note 15 *supra*.

22 *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436, [1963] 3 All ER 828, CA (a vesting order case where the court used the term 'relief' indiscriminately).

23 See PARA 627 note 15 ante.

24 See the County Courts Act 1984 s 138(9A), (9C) (as added); and PARA 628 ante. Thus the same substantive position is achieved in the High Court or county court. After six months it is too late to obtain an order: *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310, (1993) 67 P & CR 18, CA. Since the vesting order will create a new leasehold interest, *prima facie* the same principles as to determining the terms upon which the vesting order is made (see PARA 627 ante) will apply. See also *Leeds Permanent Building Society v Manyfield Ltd* (16 June 1993, unreported).

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### (3) SURRENDER

## (i) In general

### 630. Nature of surrender.

A surrender is a voluntary act of the parties whereby, with the landlord's consent, the tenant surrenders his lease to the landlord so that the lease merges with the reversion and is thus brought to an end<sup>1</sup>. It is defined as being the yielding up of the term to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion<sup>2</sup>. The surrender may be either express, that is by an act of the parties having the expressed intention of effecting a surrender, or by operation of law, that is as an inference from the acts of the parties<sup>3</sup>. The parties to the surrender must be the owner of the term<sup>4</sup> and the owner of the immediate reversion expectant on the term<sup>5</sup>. Consequently an undertenant cannot surrender his underlease to the head landlord<sup>6</sup>. A surrender must be of the entire term in the premises<sup>7</sup>; hence a tenancy held jointly cannot be surrendered by one of two joint tenants<sup>8</sup>. A part only of the demised premises may, however, be surrendered<sup>9</sup>.

It was once considered that a tenant could not surrender his lease until he had entered, but it is now probable that a tenant can validly surrender his lease even prior to actual entry on the land by him<sup>10</sup>. Authority has suggested that a surrender must take effect at once and cannot take effect at a future date<sup>11</sup>, but an agreement for a surrender entered into for valuable consideration is enforceable<sup>12</sup>. An express surrender may be subject to a condition precedent or condition subsequent<sup>13</sup>. If a condition precedent is not satisfied, the surrender will not take effect; and, if a condition subsequent is not satisfied, the lease will revive and the tenant will remain liable under it<sup>14</sup>.

1 A surrender is to be distinguished from a merger. A merger occurs where the tenant acquires the landlord's reversion or a third person acquires both the lease and the reversion with the result that the two interests merge, being in the ownership of the same person. The principle underlying surrender and merger is the same, namely that the lease and the reversion become vested in the same person and the lease, being a lesser interest derived from the reversion, ends. As to merger generally see PARAS 640-641 post.

2 Co Litt 337b; 4 Bac Abr, Leases and Terms for Years (S) 1(1). On surrender the landlord is entitled to possession against a trespasser who has acquired a possessory title against the tenant: *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, HL.

3 As to surrender by operation of law see PARA 633 et seq post.

4 See *Seaward v Drew* (1898) 67 LQB 322 at 323; cf *Stait v Fenner* [1912] 2 Ch 504.

5 *Edwards v Wickwar* (1866) LR 1 Eq 403 (but the actual decision in this case, which depended upon a supposed lack of attornment and the former doctrine of interesse termini (see PARA 118 ante) cannot be supported: see *Horn v Beard* [1912] 3 KB 181, DC). Hence a surrender to a sequestrator is ineffectual: *Cornish v Searell* (1828) 8 B & C 471 at 476. The assignee of the reversion may accept a surrender and put an end to the rent, notwithstanding an agreement on the assignment that the rent is to continue to be received by the assignor: *Southwell v Scotter* (1880) 49 LQB 356, CA (but see *Wood v Marquis of Londonderry* (1847) 10 Beav 465). Where a concurrent lease is granted so as to pass the reversion on the prior lease (see PARAS 104-106 ante), the later tenant can accept a surrender of the earlier lease. Where the title to the lease has been registered under the Land Registration Act 2002 or the title to the reversion is so registered and the lease is noted on the register as an incumbrance, the determination of the lease by surrender should be notified on the register: see the Land Registration Rules 2003, SI 2003/1417, r 79. As to the powers of mortgagors and mortgagees to make or accept surrenders see the Law of Property Act 1925 s 100; and MORTGAGE vol 77 (2010) PARAS 351-354; as to surrenders of leases where the reversion is settled land see the Settled Land Act 1925 ss 52, 90(1)(iv); and SETTLEMENTS vol 42 (Reissue) PARAS 859, 869; as to surrender where the reversioner is a minor see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 49; and as to mentally disordered persons see MENTAL HEALTH vol 30(2) (Reissue) PARAS 608-609.

6 Such a purported surrender would merely effect an assignment of the undertenant's interest to the head landlord. A surrender by an undertenant and tenant to the landlord will, however, operate as a surrender by the undertenant to the tenant, followed by a surrender by the tenant to the landlord: *Paramour v Yardley* (1579) 2 Plowd 539 at 541. A term may be surrendered to a leasehold reversioner who holds for a shorter term: *Hughes*

*v Robotham* (1593) Cro Eliz 302 at 303; 4 Bac Abr, Leases and Terms for Years (S) 1(2). Previously it was held that a term could not be 'drowned' in a term: *Porry v Allen* (1590) Cro Eliz 173.

7 *Burton v Barclay* (1831) 7 Bing 745 at 757.

8 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Greenwich London Borough Council v McGrady* (1982) 81 LGR 288, CA. Cf the position where one joint tenant serves notice to quit: see PARA 226 note 1 ante.

9 See *Baynton v Morgan* (1888) 22 QBD 74, CA; *Holme v Brunskill* (1878) 3 QBD 495, CA.

10 As to the previous position see Co Litt 388a; and as to the doctrine of *interesse termini* and its abolition see PARA 118 ante.

11 *Weddall v Capes* (1836) 1 M & W 50 at 52; *Doe d Murrell v Milward* (1838) 3 M & W 328 at 332 per Parke B. Cf *Badeley v Vigurs* (1854) 4 E & B 71, 79; and see also *Parker v Briggs* (1893) 37 Sol Jo 452, CA. The acceptance by the tenant of an invalid notice to quit does not effect a surrender: *Bessell v Landsberg* (1845) 7 QB 638. See also PARA 633 note 3 post.

12 *Wallace v Patton* (1846) 12 Cl & Fin 491, HL. A future lease cannot be surrendered expressly, although it may be surrendered by operation of law: 4 Bac Abr, Leases and Terms for Years (S) 2(2).

13 Shep Touch 307. There is no modern authority on this point. See, however, *Plymouth Corp'n v Harvey* [1971] 1 All ER 623, [1971] 1 WLR 549 (parties executed a surrender in escrow to be handed by the president of the local law society to the landlord if the tenant failed to comply with a term of the lease; transaction held to be in truth a forfeiture of the lease disguised as a surrender).

14 Shep Touch 308; *Coupland v Maynard* (1810) 12 East 134 (surrender subject to a condition subsequent that a valuation be made of the tenant's effects on the premises; no valuation made; surrender held to have had no effect and landlord could distrain for arrears of rent). As to the situation where an express surrender is effected and a new lease granted which turns out to be void see *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465; and PARA 632 post.

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### **631. VAT and stamp duty land tax on surrenders.**

Subject to certain exceptions<sup>1</sup>, the grant of any interest in or right over land<sup>2</sup> or of any licence to occupy<sup>3</sup> land is an exempt supply for the purposes of VAT<sup>4</sup>; and 'grant' includes an assignment or surrender and the supply made by the person to whom an interest is surrendered when there is a reverse surrender<sup>5</sup>. The supply made by a landlord in accepting the surrender of his tenant's lease in return for a payment made by the tenant is also normally exempt<sup>6</sup>.

For the purposes of stamp duty land tax, where a lease<sup>7</sup> is granted in consideration of the surrender of an existing lease between the same parties, the grant of the new lease does not count as chargeable consideration for the surrender, and the surrender does not count as chargeable consideration for the grant of the new lease<sup>8</sup>. Nor, in the case of a surrender, does a reverse premium<sup>9</sup> count as chargeable consideration<sup>10</sup>. The release of certain tenant's obligations<sup>11</sup> does not count as chargeable consideration in relation to the surrender of the lease<sup>12</sup>.

1 See VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 at heads (1)-(13) in the text.

2 For the meaning of 'land' for these purposes see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 14 note 22.

3 A distinction must be drawn between the grant or assignment of a licence to occupy land (which may be exempt) and the grant or assignment of a licence to go upon land (which is not): see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156 note 4.

4 Value Added Tax Act 1994 Sch 9 Pt II Group 1 item 1. For the meaning of 'exempt supply' see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 155.

5 Ibid s 31(1), Sch 9 Pt II Group 1 note (1) (substituted by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 2, 3). A 'reverse surrender' is one in which the person to whom the interest is surrendered is paid by the person by whom the interest is being surrendered to accept the surrender: Value Added Tax Act 1994 Sch 9 Pt II Group 1 note (1A) (added by the Value Added Tax (Land) Order 1995, SI 1995/282, arts 2, 4).

6 Customs and Excise Business Brief 18/95 [1995] STI 1380; and see *Lloyds Bank plc v Customs and Excise Comrs* (1996) VAT Decision 14181, [1996] STI 1358. See also Case C-63/92 *Lubbock Fine & Co v Customs and Excise Comrs* [1994] QB 571, [1994] STC 101, ECJ. See further VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 156.

7 For the meaning of 'lease' for these purposes see PARA 93 note 5 ante.

8 Finance Act 2003 s 120, Sch 17A para 16 (s 120, Sch 17A added by the Finance Act 2004 s 296, Sch 39 Pt 2 para 22). See further STAMP DUTIES AND STAMP DUTY RESERVE TAX.

9 A 'reverse premium' means, in relation to the surrender of a lease, a premium moving from the tenant to the landlord: Finance Act 2003 Sch 17A para 18(2)(c) (as added: see note 8 supra).

10 Ibid Sch 17A para 18(1) (as added: see note 8 supra).

11 Ie the release of any such obligation as is mentioned in ibid Sch 17A para 10(1) (as added and amended): see PARA 124 note 23 ante.

12 Ibid Sch 17A para 10(2) (as added: see note 8 supra).

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## (ii) Express Surrender

### 632. Form of surrender.

Every express surrender is void unless made by deed or in writing<sup>1</sup>. Leases taking effect in possession for a term not exceeding three years at the best rent that can be reasonably obtained without taking a fine<sup>2</sup> may be surrendered by writing, signed by the person making the surrender or his agent lawfully authorised in writing<sup>3</sup>; but surrenders of all other terms, except where the surrender is by operation of law, must be made by deed<sup>4</sup>.

The use of the word 'surrender' is not necessary. Any form of words which shows the intention of the parties to effect a surrender will be sufficient; and the words will be construed so as to give effect to that intention<sup>5</sup>. It is, however, always necessary to ascertain the true nature of the document and not just its ostensible form, so that a forfeiture in the guise of a surrender remains a forfeiture<sup>6</sup>. The mere cancellation or mutilation of the lease without a deed or other sufficient writing is not a sufficient surrender<sup>7</sup>, nor is it prima facie evidence of a formal surrender<sup>8</sup>. This is because, where a deed, such as a lease, operates as a conveyance of property, its cancellation does not have the effect of revesting or reconveying the estate or interest conveyed<sup>9</sup>. The surrender vests the estate immediately in the person accepting the surrender without express acceptance, but is made void by his dissent<sup>10</sup>. Where a lease is expressly surrendered and a new lease granted which is void, the surrender is not thereby



rendered void<sup>11</sup>. It may be that in such circumstances the express surrender is voidable and may be set aside during the currency of the term of the lease surrendered<sup>12</sup>.

1 See the Law of Property Act 1925 s 52 (as amended), s 53(1); and *Hoggett v Hoggett* (1979) 39 P & CR 121, CA.

2 In leases falling within the Law of Property Act 1925 s 54(2): see PARA 101 ante. Such leases may be created orally (s 54(2)) but their surrender, if express, must be by writing (s 53(1)). See also *Matthews v Sawell* (1818) 8 Taunt 270; *Taylor v Chapman* (1795) Peake Add Cas 19).

3 Law of Property Act 1925 s 53(1)(a); but see *Crago v Julian* [1992] 1 All ER 744, [1992] 1 EGLR 84 (assignment of an oral tenancy must be by deed). See also *Tarjomani v Panther Securities Ltd* (1982) 46 P & CR 32 (cited in PARA 633 note 1 post). Before the Statute of Frauds (1677) s 3 (repealed and replaced by the Law of Property Act 1925 s 53) oral surrenders were valid (*Sleigh v Bateman* (1596) Cro Eliz 487; *Farmer d Earl v Rogers* (1755) 2 Wils 26 at 27), but since then all oral surrenders, and oral agreements for the determination of a tenancy which are equivalent to a surrender (*Thomson v Wilson* (1818) 2 Stark 379), are void (*Matthews v Sawell* (1818) 8 Taunt 270; *Taylor v Chapman* (1795) Peake Add Cas 19; *Mollett v Brayne* (1809) 2 Camp 103). Cf the abandonment of a contractual licence to occupy land, where no formalities are required: see *Bone v Bone* [1992] EGCS 81, CA.

4 Law of Property Act 1925 s 52(1). Surrenders by operation of law, including surrenders which may, by law, be effected without writing, are excepted from the effect of s 52(1): s 52(2)(c).

5 4 Bac Abr, Leases and Terms for Years (S) 1(1); *Smith v Mapleback* (1786) 1 Term Rep 441; *Doe d Wyatt v Stagg* (1839) 5 Bing NC 564. An agreement between the landlord and the tenant that the landlord is to have immediate possession operates as a surrender, if otherwise suitable for this purpose (*Williams v Sawyer* (1821) 3 Brod & Bing 70); and the terms of an agreement to purchase the reversion may suffice to show the intention of the parties to surrender an existing tenancy (*Turner v Watts* (1927) 97 LJB 92; affd (1928) 97 LJB 403, CA). As to the effect of an agreement to purchase the reversion apart from special terms see, however, PARA 636 post. The landlord's consent is always required as the agreement of both parties is essential to a surrender: see *Colles v Evanson* (1865) 19 CBNS 372. An assignment of the residue of the term by the tenant to the landlord, even if only by way of mortgage, is equivalent to a surrender (*Cottee v Richardson* (1851) 7 Exch 143), as is a demise by the tenant to the landlord for the whole term (*Loyd v Langford* (1677) 2 Mod Rep 174; *Smith v Mapleback* supra); and, if rent is reserved on this redemise, it is recoverable only as a contractual sum (*Smith v Mapleback* supra).

6 *Plymouth Corp v Harvey* [1971] 1 All ER 623, [1971] 1 WLR 549.

7 *Roe d Earl of Berkeley v Archbishop of York* (1805) 6 East 86; *Wootley v Gregory* (1828) 2 Y & J 536 at 542; *Lord Ward v Lumley* (1860) 5 H & N 87; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 76.

8 *Doe d Courtail v Thomas* (1829) 9 B & C 288 (lease mutilated by having the names of the parties torn off). A recital in a lease that it is granted in consideration of the surrender of an earlier lease is not evidence of a formal surrender: *Roe d Earl of Berkeley v Archbishop of York* (1805) 6 East 86.

9 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 76.

10 *Thompson v Leach* (1698) 2 Salk 618. As to the previous litigation in this matter see *Thompson v Leach* supra at 618 note (b).

11 *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465. The decisions in *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; *Doe d Biddulph v Poole* (1848) 11 QB 713; and *Canterbury Corp v Cooper* (1908) 99 LT 612 (affd (1909) 100 LT 597, CA) were distinguished on the basis that they did not involve express surrenders. As to surrender by operation of law on the grant of a void lease see PARA 634 post.

12 See *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257 at 267-268, [1959] 1 WLR 465 at 475-477; *Canterbury Corp v Cooper* (1908) 99 LT 612 at 615.

## UPDATE

### 632 Form of surrender

NOTE 10--See also *Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] Bus LR 412 (tenant repudiating lease; repudiation not accepted, and so tenant liable for rent after vacating premises).

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### **(iii) Surrender by Operation of Law**

#### **633. In general.**

Delivery of possession by the tenant to the landlord and his acceptance of possession effect a surrender by operation of law, also referred to, especially in modern caselaw, as implied surrender<sup>1</sup>. The surrender in this case depends upon the agreement by the landlord and the tenant that the term is to cease and upon the change of possession in pursuance of the agreement<sup>2</sup>. The change of possession is essential<sup>3</sup>; and the parties to the lease must act towards each other in a manner that is inconsistent with a continuation of the lease<sup>4</sup>. A consent given by the landlord to the tenant to quit the premises during the tenancy, for example in the middle of a quarter where the tenant holds under an annual tenancy determinable at a quarter's notice, will not of itself operate as a surrender as there is no delivery of possession; but, where the tenant gives up possession following the consent, and the landlord accepts it, the surrender by operation of law is complete<sup>5</sup>. An implied surrender may be effectual under the Settled Land Act 1925<sup>6</sup>.

There is a delivery of possession sufficient to effect a surrender where the tenant returns the keys of the premises and the landlord accepts them with the intention of changing the possession<sup>7</sup>. The landlord's consent to the delivery of the keys is, however, essential, and it is not sufficient that they are delivered to one of his employees who does not return them<sup>8</sup>. If there is no consent at the time, the surrender is not complete until the landlord takes possession in such a manner as to estop him from denying that the tenancy is at an end<sup>9</sup>. He does not thus take possession by taking action to dispossess trespassers<sup>10</sup>, or attempting to relet the premises<sup>11</sup>, or by entering to do necessary repairs<sup>12</sup>, or by making occasional use of a part of the premises<sup>13</sup>. Where the tenant quits the premises without the landlord's consent and the landlord changes the locks of the premises with a view only to securing the premises and maintaining them in repair, he does not accept possession so as to effect a surrender<sup>14</sup>. If, however, after the tenant has quitted the premises, the landlord relets them to another tenant who goes into occupation, a surrender is effected from the time of reletting, unless the landlord gives notice to the tenant that the reletting is on his account<sup>15</sup>. Acts of omission by the landlord cannot be the unequivocal conduct sufficient for the purposes of an implied surrender<sup>16</sup>.

Where the elements of surrender are satisfied, the subsequent assertion by the tenant that he had no intention of leaving permanently is irrelevant<sup>17</sup>.

1 In this case the law gives effect to the intention of the parties as appearing from their acts, and cures the informality of the surrender: see *Cannan v Hartley* (1850) 9 CB 634. Directing the occupier to acknowledge the landlord as his landlord, ie to attorn to the landlord, is a sufficient delivery of possession by the tenant to the landlord: *Gray v Balls, Field v Merrison* (1861) 5 LT 395. As to surrender by operation of law generally see notes to *Thursby v Plant* (1669) 1 Saund 230. Cf *Tarjomani v Panther Securities Ltd* (1982) 46 P & CR 32 (insufficient evidence to establish surrender); *Chamberlaine v Scally* (1992) 26 HLR 26, [1992] EGCS 90, CA (no surrender where tenant moved out but retained her keys and left her possessions and two cats in the premises with her former cohabitee, returning to visit on a weekly basis); *Mattey Securities Ltd v Ervin* (1998) 77 P & CR 160, [1998] 2 EGLR 66, CA (no surrender where tenant's assignee went into administration and landlord accepted

rent from a company that took over assignee's business); *Re a debtor (No 325 of 1997) Bhogal v Cheema* [1998] 2 EGLR 50, [1998] 29 EG 117 (no implied surrender and regrant); *Rysaffe Trustee Co (CI) Ltd v Ataghan Ltd* [2006] All ER (D) 35 (Sep) (agricultural tenancy the terms of which reserved to the landlord the right to resume possession of and determine the tenancy for the purposes, inter alia, of quarrying; later cessation of use of land for agricultural purposes and use for quarrying activity gave rise to legitimate inference that agricultural tenancy had been terminated; held that there had been an informal surrender by operation of law). For an unusual case where the intention was held by one person alone see *Allen v Rochdale Borough Council* [2000] Ch 221, [1999] 3 All ER 443, CA (council was both the landlord as bare trustee and tenant in its own right, but not in possession; lease not revealed to either purchaser of land or beneficiary of the land; held that there was an implied surrender at the date of sale of the freehold).

2 *Phené v Popplewell* (1862) 12 CBNS 334 at 342; *Easton v Penny* (1892) 67 LT 290 at 292; *Edward H Lewis & Son Ltd v Morelli* [1948] 1 All ER 433 (revsd on another point [1948] 2 All ER 1021, CA); *Hoggett v Hoggett* (1979) 39 P & CR 121, CA. A delivery up of part of the premises will be a surrender as to that part: see *Holme v Brunskill* (1878) 3 QBD 495, CA. Where part of land subject to a lease is sold, a surrender takes effect to the extent of the land sold and the retained land remains subject to the lease: *Allen v Rochdale Borough Council* [2000] Ch 221, [1999] 3 All ER 443, CA.

3 *Whitehead v Clifford* (1814) 5 Taunt 518. Thus there cannot be a surrender by a conditional agreement which is not followed by the tenant giving up possession: *Coupland v Maynard* (1810) 12 East 134 at 140. An agreement to deliver up possession at a future date does not effect an immediate surrender by operation of law, as it is said that a surrender must take effect at once and cannot take effect at a future date: see PARA 630 ante. Such an agreement can, however, take effect as an agreement to surrender, and, if the agreement is acted upon by the delivery and acceptance of possession, there will at that time be a surrender by operation of law. An insufficient notice to quit given by the tenant to the landlord will not operate as a surrender even if accepted by the landlord if the tenant retains possession after the notice: *Johnstone v Hudlestone* (1825) 4 B & C 922; *Doe d Murrell v Milward* (1838) 3 M & W 328. Where, however, there is a delivery and acceptance of possession following the giving of the invalid notice to quit by the tenant, there is a surrender by operation of law even though the landlord is induced to accept possession by the tenant's conduct, so long as the conduct is not fraudulent: *Gray v Owen* [1910] 1 KB 622, DC (tenant held to be liable in damages for the landlord's loss of rent). A grant of a new tenancy following the delivery of an invalid notice to quit erroneously believed valid will mean that the previous tenancy is surrendered: *Hodges v Lawrance* (1854) 18 JP 347.

4 *Bellcourt Estates Ltd v Adesina* [2005] EWCA Civ 208 at [10], [2005] 2 EGLR 33, sub nom *Belcourt Estates Ltd v Adesina* [2005] All ER (D) 293 (Feb) per Longmore LJ and at [30] per Peter Gibson LJ.

5 *Grimman v Legge* (1828) 8 B & C 324 at 325; *Mollett v Brayne* (1809) 2 Camp 103. See also *Ealing Family Housing Association Ltd v McKenzie* [2003] EWCA Civ 1602, [2004] HLR 313, [2003] All ER (D) 174 (Oct) (tenant alleging domestic violence gave two invalid notices to quit the sole tenancy in order to be rehoused; held there was a surrender by operation of law since there was a manifest intention accepted by the housing association).

6 *Easton v Penny* (1892) 67 LT 290. The court will not set up again a lease so surrendered in good faith: *Nixon v Robinson* (1844) 2 Jo & Lat 4.

7 *Natchbolt v Porter* (1689) 2 Vern 112; *Dodd v Acklom* (1843) 6 Man & G 672; cf *Mines Royal Societies v Magnay* (1854) 10 Exch 489 at 493. The taking of keys by a landlord, when coupled with other acts, may indicate the taking of possession by him but where there is no other act that evidences an intention to resume possession by the landlord, there will be no surrender: *Proudreed Ltd v Microgen Holdings plc* (1996) 72 P & CR 388, [1996] 1 EGLR 89, CA. A document signed by a sole tenant purporting to create a joint tenancy cannot lead to an inference of surrender in the absence of an act pointing unequivocally to surrender: *Newham London Borough Council v Phillips* (1997) 96 LGR 788, [1998] 1 FLR 613, CA. See also *Sanctuary Housing Association v Campbell* [1999] 3 All ER 460, [1999] 1 WLR 1279, CA.

8 *Cannan v Hartley* (1850) 9 CB 634 at 648; *Furnivall v Grove* (1860) 8 CBNS 496.

9 *Oastler v Henderson* (1877) 2 QBD 575, CA.

10 *McDougalls Catering Foods Ltd v BSE Trading Ltd* (1997) 76 P & CR 312, [1997] 2 EGLR 65, CA (action was clearly taken to protect the property and there was no intention to accept surrender).

11 *Redpath v Roberts* (1800) 3 Esp 225; *Oastler v Henderson* (1877) 2 QBD 575, CA; *Smith v Blackmore* (1885) 1 TLR 267. If the landlord puts up a notice to let and paints out the tenant's name, this will be a resumption of possession: *Phené v Popplewell* (1862) 12 CBNS 334 at 342.

12 *Smith v Blackmore* (1885) 1 TLR 267. The method of doing the repairs may, however, imply that the landlord regards the house as in his own possession, so as to complete the surrender: *Smith v Roberts* (1892) 9 TLR 77, CA.

13 *Oastler v Henderson* (1877) 2 QBD 575, CA.

14 See *Relvok Properties Ltd v Dixon* (1972) 25 P & CR 1, CA (where the same rules were held to apply both in respect of surrender or forfeiture, and where the court applied *Oastler v Henderson* (1877) 2 QBD 575, CA). It is in every case a question of fact whether the landlord has done only what is necessary to protect his interests, in which case there will be no surrender, or has gone further so as to be taken to have accepted possession, in which case there will be a surrender: *Relvok Properties Ltd v Dixon* supra. See also *Tarjomani v Panther Securities Ltd* (1982) 46 P & CR 32; *Cooper v Varzdari* (1986) 18 HLR 299, CA; and see *John Laing Construction Ltd v Amber Pass Ltd* [2004] 2 EGLR 128, [2004] All ER (D) 115 (Apr) (tenant's continued provision for the security of the premises did not negate the fact that the tenant had yielded up the premises)

15 *Walls v Atcheson* (1826) 3 Bing 462.

16 *Bellcourt Estates Ltd v Adesina* [2005] EWCA Civ 208 at [11], [2005] 2 EGLR 33, sub nom *Bellcourt Estates Ltd v Adesina* [2005] All ER (D) 293 (Feb) per Longmore LJ (Ward LJ concurring) (not answering tenant's letters, making no rent claims and leaving property empty for 12 months insufficient). Cf *Bellcourt Estates Ltd v Adesina* supra at [29]-[33] per Peter Gibson LJ (mere inaction usually insufficient, but each case should turn on its own facts, referring to *Preston Borough Council v Fairclough* (1982) 8 HLR 70 at 73, CA, obiter per Griffiths LJ where it was suggested that a surrender may be inferred when the tenant has been absent from the premises for a considerable period of time and owing substantial arrears of rent, but on the facts of that case a surrender was not established).

17 *R v London Borough of Croydon, ex p Toth* (1987) 20 HLR 576, CA.

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### **634. Surrender by grant of new lease to tenant.**

A surrender by operation of law takes place when the tenant takes a new lease from the landlord to commence during the term of the old lease, even though the new lease is for a shorter term than the residue of the old term<sup>1</sup>. This surrender is founded upon estoppel, and takes place without regard to the intention of the parties<sup>2</sup>. The landlord has no power to grant the new lease except upon the footing that the old lease is surrendered; and the tenant, being a party to the grant of the new lease, is estopped from denying the surrender<sup>3</sup>. Consequently the acceptance of the new lease operates as a surrender of the old one<sup>4</sup>; and the result is the same even though the new lease is a future lease<sup>5</sup>, or even if the new lease is made orally and the old lease was by deed<sup>6</sup>. It is essential to such a surrender that the new lease should be valid and should take effect at once as a lease; hence, there is no implied surrender by the acceptance by the tenant of a new lease which is void<sup>7</sup>, or which is voidable and is in fact avoided<sup>8</sup>; or by a mere agreement for a new lease<sup>9</sup>, unless the agreement for a new lease has been acted upon<sup>10</sup> or, probably, is an agreement which will be specifically enforced and takes effect in equity as a lease<sup>11</sup>.

1 *Dodd v Acklom* (1843) 6 Man & G 672 at 679; cf *Fulmerston v Steward* (1554) 1 Plowd 101 at 106-107. An acceptance of a new lease of part of the demised premises is a surrender only of that part: *Earl Carnarvon v Villebois* (1844) 13 M & W 313 at 342.

2 *Lyon v Reed* (1844) 13 M & W 285 at 306, applied in *Ealing Family Housing Association Ltd v McKenzie* [2003] EWCA Civ 1602, [2004] HLR 313, [2003] All ER (D) 174 (Oct) (transfer by the landlord of the tenant's rent book of the old premises in favour of the new premises imposing an obligation on the tenant to pay rent for the new premises may give rise to an inference that the old tenancy has come to an end).

3 See ESTOPPEL vol 16(2) (Reissue) PARAS 955, 1031 et seq; and *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477 at 496, [1970] 3 All ER 414 at 419, CA, per Russell LJ. There cannot be an implied surrender by virtue of an agreement to which the tenant is not a party: *Porry v Allen* (1590) Cro Eliz 173; cf *Easton v Penny* (1892) 67 LT 290 at 292.

4 *Lyons v Reed* (1844) 13 M & W 285 at 306; *Fenner v Blake* [1900] 1 QB 426, DC.

5 *Ive's Case* (1597) 5 Co Rep 11a. The future lease will bring about a surrender of a current lease only if it is to commence during the subsistence of that current lease.

6 *Dodd v Acklom* (1843) 6 Man & G 672; cf *Foquet v Moor* (1852) 7 Exch 870.

7 *Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702; *Doe d Biddulph v Poole* (1848) 11 QB 713; *Zouch d Abbot and Hallet v Parsons* (1765) 3 Burr 1794 at 1807; *Wilson v Sewell* (1766) 4 Burr 1975 at 1980; *Davison d Bromley v Stanley* (1768) 4 Burr 2210 at 2213. It is otherwise with an express surrender effected upon the grant of a new lease where the surrender remains valid even though the new lease is void: *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465; and see PARA 632 ante. Where the property is mortgaged and the mortgagor has no power to let without the consent of the mortgagee, as the new lease is not effective against the mortgagee for want of consent, its acceptance cannot operate as against the mortgagee as a surrender of the old one: *Barclays Bank Ltd v Stasek* [1957] Ch 28, [1956] 3 All ER 439. See also MORTGAGE vol 77 (2010) PARA 351.

8 The implied surrender is subject to an implied condition that the surrender is to be void if the new lease is made void (*Doe d Earl of Egremont v Courtenay* (1848) 11 QB 702 at 712; *Easton v Penny* (1892) 67 LT 290; *Zick v London United Tramways Ltd* [1908] 2 KB 126 at 132, CA; *Canterbury Corp v Cooper* (1908) 99 LT 612; affd (1909) 100 LT 597, CA); that is, if it is void in toto (*Brinkley v M'Munn* (1893) 32 LR 532). The effect is the same where the new lease is expressed to be made in consideration of the surrender of the old lease: *Knight v Williams* [1901] 1 Ch 256. The acceptance of a voidable lease operates as a surrender: see *Roe d Earl of Berkeley v Archbishop of York* (1805) 6 East 86 at 102.

9 *Hamerton v Stead* (1824) 3 B & C 478 at 482; *Foquet v Moor* (1852) 7 Exch 870. The creation of a new tenancy in favour of the tenant and a third person who enters and occupies jointly with the tenant will effect a surrender: *Hamerton v Stead* supra at 482.

10 *Re Young, ex p Vitale* (1882) 47 LT 480; and see *Ealing Family Housing Association Ltd v McKenzie* [2003] EWCA Civ 1602, [2004] HLR 313, [2003] All ER (D) 174 (Oct), cited in note 2 supra.

11 See *Walsh v Lonsdale* (1882) 21 ChD 9, CA.

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### 635. Variation of terms of lease.

Where the terms of the relationship between the landlord and the tenant are altered by agreement, it is necessary to decide whether the alteration amounts to the creation of a new tenancy upon the altered terms, and thus of necessity the surrender by operation of law of the previous tenancy, or whether the alteration merely continues the previous tenancy in a varied form. Certain agreed alterations necessarily involve the surrender of the previous tenancy and its replacement by a new tenancy. The only way in which new land may be added to the demised premises is by the process of surrender by operation of law of the old lease and the grant of a new lease to include both the old and the new premises<sup>1</sup>. Equally the duration of a lease can be extended only by the surrender of the existing lease and its replacement by a new lease for the longer term<sup>2</sup>. As a matter of law the parties can achieve this intention only by the fiction of a surrender and regrant.

Other agreed alterations do not necessarily involve a surrender and regrant. If the parties wish, they may increase the rent payable under a tenancy without creating a new tenancy; and the old tenancy continues at the increased rent<sup>3</sup>. The rent may be reduced in the same way<sup>4</sup>. Other minor variations may be effected without a surrender and regrant<sup>5</sup>. Where the agreement between the parties does not affect the terms of an existing tenancy, there is no reason to

imply a surrender and regrant<sup>6</sup>. Where, however, the parties intend that their altered relationship is to amount to a new tenancy, there will be a surrender of the previous tenancy<sup>7</sup>.

1 *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, [1970] 3 All ER 414, CA. A part of the premises within an existing tenancy may, however, be surrendered, leaving the tenancy validly subsisting as regards the remainder of the premises: *Holme v Brunskill* (1878) 3 QBD 495, CA.

2 *Re Savile Settled Estates, Savile v Savile* [1931] 2 Ch 210. Where, however, a lease is granted for a term certain and during that term the parties agree that the lease is to be varied so that the tenant has an option to extend the term, that variation will amount to the surrender of the old lease and the grant of a new lease with the added option: *Baker v Merckel* [1960] 1 QB 657, [1960] 1 All ER 668, CA. In *Joseph v Joseph* [1967] Ch 78, [1966] 3 All ER 486, CA, it was held that the introduction of new parties, a shorter term and a new rent involved a surrender and regrant.

3 *Jenkin R Lewis & Son Ltd v Kerman* [1971] Ch 477, [1970] 3 All ER 414, CA; *Gable Construction Co Ltd v IRC* [1968] 2 All ER 968, [1968] 1 WLR 1426; *Doe d Monck v Geekie* (1844) 5 QB 841; *Lord Inchiquin v Lyons* (1887) 20 LR 474, Ir CA. *Donellan v Read* (1832) 3 B & Ad 899 is not good authority to the contrary.

4 *Crowley v Vitty* (1852) 7 Exch 319.

5 See *Smirk v Lyndale Developments Ltd* [1975] Ch 317, [1975] 1 All ER 690, CA (the giving to the tenant of a new rent book containing terms somewhat different to those in a previous rent book held not to amount to a surrender and regrant); *Coker v London Rent Assessment Panel* [2006] All ER (D) 297 (May) (substantial disputes between landlord and tenant compromised and terms embodied in a Tomlin order which did not increase premises demised or the length of term; the absence of those features does not mean that there can never be a surrender but that there will only exceptionally be one; in that case, the Tomlin order did not amount to a surrender and regrant).

6 An arrangement by which the subtenant of one room was permitted to use a number of other rooms for a limited period was held not to involve a surrender of the sublease of the one room: *Fredco Estates Ltd v Bryant* [1961] 1 All ER 34, [1961] 1 WLR 76, CA.

7 See *Hodges v Lawrance* (1854) 18 JP 347 (parties agreed to a reduced rent in the erroneous belief that the previous tenancy had been validly determined by notice; this was held to bring about the surrender of the previous tenancy).

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### **636. Surrender by change in nature of tenant's occupation.**

A surrender is implied when the tenant remains in occupation of the premises in a capacity inconsistent with his being tenant, as, for example, where he becomes the landlord's employee<sup>1</sup>, or where the parties agree that the tenant is in future to occupy the premises rent-free for life as a licensee<sup>2</sup>. An agreement by the tenant to purchase the reversion does not of itself effect a surrender, as the purchase is conditional on a good title being made by the landlord<sup>3</sup>.

1 *Peter v Kendal* (1827) 6 B & C 703 at 710; *Lambert v M'Donnell* (1864) 15 ICLR 136. Where a service occupancy exists, the employer is regarded as occupying the property vicariously through the employee: see PARA 15 ante. A tenant who arranges to surrender his tenancy to his landlord, and whose employer agrees to accept a new tenancy from the landlord, will be estopped from denying, as he has had the advantage of his employer being substituted for him as tenant, that in fact a surrender has taken place by operation of law: *Metcalfe v Boyce* [1927] 1 KB 758, DC.

2 *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA. Such an arrangement will often be effected by an express surrender, as in *Mathew v Bobbins* (1980) 41 P & CR 1, [1980] 2 EGLR 97, CA.

3 *Doe d Gray v Stanion* (1836) 1 M & W 695 at 701; *Tarte v Darby* (1846) 15 M & W 601; *Ellis v Wright* (1897) 76 LT 522, CA; *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA. Where, however, the terms of the agreement to purchase are such as to render its performance incompatible with a continuance of the tenancy, the agreement will be held to operate as either an express surrender or a surrender by operation of law of the existing tenancy: *Turner v Watts* (1928) 97 LJB 403, CA; cf *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA. As to enfranchisement under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) see PARA 1389 et seq post; and as to the right to buy conferred by the Housing Act 1985 Pt V (ss 118-188) (as amended) see PARA 1795 et seq post.

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### 637. Surrender by lease to third person with tenant's consent.

The grant by the landlord of a new lease to a third person, with the tenant's consent<sup>1</sup>, operates as a surrender of the old lease, provided the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease<sup>2</sup>. The same effect is produced where the landlord, with the tenant's consent, accepts another person as tenant<sup>3</sup>, and that other person takes possession<sup>4</sup>, unless the landlord reserves his rights against the original tenant<sup>5</sup> or is induced to accept the new tenant by the fraud of the original tenant<sup>6</sup>. Receipt of rent from a person in possession may be evidence of the landlord's acceptance of him as tenant, whether he is a stranger<sup>7</sup>, or whether he was already in possession as subtenant<sup>8</sup>.

1 See *Edward H Lewis & Son Ltd v Morelli* [1948] 1 All ER 433.

2 *Wallis v Hands* [1893] 2 Ch 75. The change of possession gives the notoriety which is necessary to raise the estoppel upon which the surrender depends (*Lyon v Reed* (1844) 13 M & W 285 at 309; *Creagh v Blood* (1845) 3 Jo & Lat 133 at 160), and this change is essential to the implied surrender (*Davison v Gent* (1857) 1 H & N 744). See also *Tower Hamlets London Borough Council v Ayinde* (1994) 26 HLR 631, CA (statement by tenant that he had moved and offer of tenancy to new tenant). It follows that mere negotiations for a lease to a third person do not cause a surrender: *Dawson v Lamb* (1853) 3 Car & Kir 269. The change of possession need not be physical; it may be effected by a change in the position of the tenant: *Metcalfe v Boyce* [1927] 1 KB 758, DC. The principle applies also where the tenant was a mere statutory tenant: *Collins v Cloughton* [1959] 1 All ER 95, [1959] 1 WLR 145, CA.

3 *Woodcock v Nuth* (1832) 8 Bing 170; *Doe d Hull v Wood* (1845) 14 M & W 682; *Doran v Kenny* (1869) 3 IR Eq 148; cf *Mathews v Sawell* (1818) 2 Moore CP 262. There will be no surrender, however, if it is the intention of the parties that the lease is to continue to exist: *Clifford v Reilly* (1869) IR 4 CL 218. Where the landlords are executors, acceptance of the new tenant by one only will not suffice: *Turner v Hardey* (1842) 9 M & W 770.

4 *Thomas v Cook* (1818) 2 B & Ald 119; *Reeve v Bird* (1834) 1 Cr M & R 31; *Walker v Richardson* (1837) 2 M & W 882; *Nickells v Atherstone* (1847) 10 QB 944; and see *Taylor v Chapman* (1795) Peake Add Cas 19; *Doe d Hull v Wood* (1845) 14 M & W 682; *Glynn v Coghlan* [1918] 1 IR 482. The principle was applied to a surrender of a freehold interest, a lease for lives, in *Lynch's Lessee v Lynch* (1843) 6 ILR 131 (doubted in *Creagh v Blood* (1845) 3 Jo & Lat 133). An exchange between two tenants who hold under different landlords, made with the consent of the landlords, operates as a surrender of the old tenancies and the creation of a new tenancy as to each holding: *Bees v Williams* (1835) 2 Cr M & R 581.

5 *Dawson v Lamb* (1853) 3 Car & Kir 269.

6 *Bruce v Ruler* (1828) 2 Man & Ry KB 3. An innocent misrepresentation will not vitiate a surrender, although it may give rise to a claim for damages of which the loss of rent is the measure: *Gray v Owen* [1910] 1 KB 622, DC.

7 *Laurance v Faux* (1861) 2 F & F 435; cf *Copeland v Watts* (1815) 1 Stark 95; and see ESTOPPEL vol 16(2) (Reissue) PARA 1037.

8 *Harding v Crethorn* (1793) 1 Esp 56 per Lord Kenyon.

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#### **(iv) Effect of Surrender**

##### **638. Effect on subtenants.**

The surrender of the term does not destroy the rights of subtenants. As regards subtenants, and as regards third persons generally, the surrender operates only subject to their rights, and the term is treated as continuing so far as is required for the preservation of those rights<sup>1</sup>. Thus an equitable charge created over the leasehold interest does not become inoperative because the lease has been surrendered<sup>2</sup>. This principle makes it necessary to provide for the substitution of a new reversion for the leasehold reversion which has been surrendered, and also, in the case of a surrender and renewal, for the validity of the renewed lease as against the subtenants. Under the Law of Property Act 1925<sup>3</sup>, the estate of the head landlord is deemed to be the reversion on the underlease to the extent and for the purpose of preserving such incidents to and obligations on the surrendered leasehold reversion as, but for the surrender, would have subsisted<sup>4</sup>. Further, a lease may be surrendered with a view to the acceptance of a new lease in place of it without a surrender of any underlease derived out of it<sup>5</sup>. A new lease may be granted and accepted, in place of any lease so surrendered, without any such surrender of an underlease, and the new lease operates as if all underleases derived out of the surrendered lease had been surrendered before the surrender of that lease was effected<sup>6</sup>.

The lessee under the new lease and any person deriving title under him is entitled to the same rights and remedies in respect of the rent reserved by, and the covenants, agreements and conditions contained in, any underlease as if the original lease had not been surrendered but was or remained vested in him<sup>7</sup>. Each underlessee and any person deriving title under him is entitled to hold and enjoy the land comprised in his underlease, subject to the payment of any rent reserved by, and to the observance of the covenants, agreements and conditions contained in, the underlease, as if the lease out of which the underlease was derived had not been surrendered<sup>8</sup>.

The lessor<sup>9</sup> granting the new lease and any person deriving title under him is entitled to the same remedies, by distress or entry in and upon the land comprised in any such underlease for rent reserved by, or for breach of any covenant, agreement or condition contained in, the new lease, so far only as the rents reserved by, or the covenants, agreements or conditions contained in, the new lease do not exceed or impose greater burdens than those reserved by or contained in the original lease out of which the underlease is derived, as he would have had:

- 1288 (1) if the original lease had remained on foot; or
- 1289 (2) if a new underlease derived out of the new lease had been granted to the underlessee or a person deriving title under him,

as the case may require<sup>10</sup>.

A surrender followed by a new lease to the same tenant remaining in possession does not destroy the tenant's right to remove fixtures<sup>11</sup>.



1 *Pleasant (Lessee of Hayton) v Benson* (1811) 14 East 234 at 238; *Doe d Beadon v Pyke* (1816) 5 M & S 146 at 154; *Pike v Eyre* (1829) 9 B & C 909 at 914; *Mellor v Watkins* (1874) LR 9 QB 400; and see Co Litt 338b; *Clements v Matthews* (1883) 11 QBD 808 at 815, CA; *Phipos v Callegari* (1910) 54 Sol Jo 635; *Wilkes v Spooner* [1911] 2 KB 473 at 479, 487, CA; *Wilson v Nevile, Reid & Co* (1916) 32 TLR 542. Although a forfeiture destroys the rights of subtenants (see PARA 627 ante) if the landlord accepts a surrender after a cause of forfeiture has accrued, the above rule prevails and the rights of subtenants are preserved: *Great Western Rly Co v Smith* (1876) 2 ChD 235, CA; affd sub nom *Smith v Great Western Rly Co* (1877) 3 App Cas 165. The same result appears to follow where the landlord has no notice of the facts entitling him to forfeit the term at the date of the surrender: *Parker v Jones* [1910] 2 KB 32. Service of a notice to quit by either a tenant or a landlord by pre-arrangement with the other is not tantamount to a surrender of the tenancy, as unlike a surrender it does not need the consent of the receiving party to have effect: *Barrett v Morgan* [2000] 2 AC 264, [2000] 1 All ER 481, HL. See also *Pennell v Payne* [1995] QB 192, [1995] 2 All ER 592, CA (service of upwards notice to quit by tenant under the Agricultural Holdings Act 1986 determined the subtenancy as well); *PW & Co v Milton Gate Investments Ltd (BT Property Ltd, Pt 20 defendant)* [2003] EWHC 1994 (Ch), [2004] Ch 142, [2004] 3 EGLR 103 (break clause not a surrender provision).

2 *ES Schwab & Co Ltd v McCarthy* (1975) 31 P & CR 196, CA. The possessory title obtained by a squatter against a leasehold interest may, however, be destroyed by the surrender of the lease by the dispossessed tenant: *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, HL. Where one spouse or civil partner holds a lease of a dwelling house and the other spouse or civil partner has home rights under the Family Law Act 1996 s 30 (as amended) having effect as a charge under s 31 (as amended), the surrender of the lease does not destroy the right of occupation but has effect subject to the charge: see s 31(9) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 285-286.

3 See the text and notes 4-10 infra.

4 Where a reversion expectant on a lease is merged, the estate or interest which as against the lessee for the time being confers the next vested right to the land is deemed the reversion for the purpose of preserving the same incidents and obligations as would have affected the original reversion had there been no merger thereof: Law of Property Act 1925 s 139(1). The reference to the 'estate or interest which as against the lessee for the time being confers the next vested right to the land' is to the reversion in which the surrendered lease has merged. For the meaning of 'lease' see PARA 145 note 1 ante; for the meaning of 'lessee' see PARA 145 note 3 ante; and for the meaning of 'land' see PARA 17 note 1 ante.

Under s 139 a tenant to whom a landlord has granted a fresh lease, subject to the unexpired portion of a subtenant's term after the surrender of the original lease by the former tenant, is entitled to sue for the rent due from the subtenant for the unexpired portion of his term and also for possession on the expiry of the notice to quit given by the original tenant: *Plummer and John v David* [1920] 1 KB 326.

5 Law of Property Act 1925 s 150(1). Section 150 applies both to express and implied surrender; but it does not affect the powers of the court to give relief against forfeiture: s 150(6). The court could not compel a surrender of an underlease for the purpose of a renewal of the head lease: *Colchester v Arnott* (1700) 2 Vern 383. In *Re Grosvenor Settled Estates, Duke of Westminster v McKenna* [1932] 1 Ch 232 at 241, it was held that a tenant for life under the Settled Land Act 1925 acting under s 42(1) could take advantage of the Law of Property Act 1925 s 150 without getting in the subleases. See also *Ecclesiastical Comrs for England v Tremer* [1893] 1 Ch 166.

6 Law of Property Act 1925 s 150(2). See also note 5 supra.

7 Ibid s 150(3). See also note 5 supra. The new tenant retains the rights held by his predecessor against the subtenant: see *Plummer and John v David* [1920] 1 KB 326.

8 Law of Property Act 1925 s 150(4); and see *Cousins v Phillips* (1865) 3 H & C 892. See also note 5 supra.

9 For the meaning of 'lessor' see PARA 240 note 6 ante.

10 Law of Property Act 1925 s 150(5). See also note 5 supra. This removed the doubt expressed in *Doe d Palk v Marchetti* (1831) 1 B & Ad 715 as to the enforceability by the landlord of a right of re-entry for breach of covenants in the new lease co-extensive with those in the old lease against the subtenant. The intention of the Law of Property Act 1925 s 150 is to place all parties as to every matter in the same situation as if no surrender had taken place: see *Doe d Palk v Marchetti* supra at 721 per Lord Tenterden CJ.

11 See *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145, [1992] 1 All ER 624, CA (cited in PARA 182 note 3 ante).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(3) SURRENDER/(iv) Effect of Surrender/639. Effect on liability for rent and breaches of covenant.

### **639. Effect on liability for rent and breaches of covenant.**

The surrender of a lease stops the subsequent accrual of rent<sup>1</sup>. Where the lease is by deed with a covenant for payment of rent, rent accrued before the surrender may be recovered on the covenant<sup>2</sup>; otherwise it is recoverable on the agreement or in a claim for use and occupation<sup>3</sup>.

The surrender of the lease does not affect the liability of the tenant<sup>4</sup>, or of the landlord<sup>5</sup>, for breaches of covenant committed prior to the surrender.

1 *Southwell v Scotter* (1880) 49 LJQB 356. On accepting a surrender from an assignee of the lease, the landlord cannot reserve his rights against the tenant: *Clements v Richardson* (1888) 22 LR Ir 535.

2 *A-G v Cox, Pearce v A-G* (1850) 3 HL Cas 240. Where a lease is surrendered after a rent review date, but before the reviewed rent has been determined, the surrender does not prevent the landlord having the rent reviewed and recovering the rent as reviewed: see *Torminster Properties Ltd v Green* [1983] 2 All ER 457, [1983] 1 WLR 676, CA.

3 *Shaw v Lomas* (1888) 59 LT 477; and see PARA 284 ante.

It has been held that where rent is payable in advance, but the parties thought it was payable in arrear, and the lease is surrendered before the expiry of a rent period, the tenant is not entitled to repayment of rent in respect of the part of that period falling after the surrender becomes operative (*William Hill (Football) Ltd v Willen Key & Hardware Co Ltd* (1964) 190 Estates Gazette 867, 108 Sol Jo 482); but cf *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, HL, reversing the former rule of law that money paid under a mistake of law could not be recovered.

4 *Dalton v Pickard* (1911) [1926] 2 KB 545n, CA (liability for dilapidations); *Richmond v Savill* [1926] 2 KB 530, CA.

5 *Brown v Blake* (1912) 47 L Jo 495 (damages for breach of collateral agreement to fit up premises for specified purpose).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(4) MERGER/640. Merger of term at law and in equity.

## **(4) MERGER**

### **640. Merger of term at law and in equity.**

At common law where a term of years becomes vested in the owner for the time being of the reversion immediately expectant on the term, the term is merged in the reversion<sup>1</sup>. Thus a person cannot at law be reversioner to himself<sup>2</sup>. For this purpose the reversion is deemed to be the greater estate, notwithstanding that it is in fact shorter than the term; hence a term of 1,000 years can be merged in a reversionary term of 500 years<sup>3</sup>. Even at common law there was no merger if the interests were held by one person in different rights or capacities, at any rate if the union was not due to his own act<sup>4</sup>. Where the term merges, the covenants attached to it are extinguished<sup>5</sup>.

The position in equity is different; it is clear that in equity there is no merger where the reversion and the term are held by the same person in different rights, as, for example, where the reversion is vested in him as administrator, and the term beneficially<sup>6</sup>. Even where the reversion and the term are held by the same person in the same right, the question of merger is governed in equity by the intention of the parties; and there is no merger if it is intended that the term should be kept alive<sup>7</sup>. In the absence of any direct evidence of intention<sup>8</sup>, it will be presumed that merger is not intended if it is to the party's interest, or only consistent with his duty, that merger should not take place; and, in the absence of any evidence of intention or indication of where a party's interest or duty lies, the common law doctrines will operate<sup>9</sup>.

There is no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity<sup>10</sup>.

1 *Burton v Barclay* (1831) 7 Bing 745 at 746.

2 *Doe d Rawlings v Walker* (1826) 5 B & C 111 at 121. The term and the reversion are concurrent estates and cannot exist together. It is different where the same person has successive estates, the one following immediately on the other; so that, if the tenant grants to his subtenant the residue of the term from the determination of the sublease, the subterm is not merged in the residue of the head term: *Hyde v Warden* (1877) 3 Ex D 72 at 84, CA.

3 4 Bac Abr, Leases and Terms for Years (S) 1(2); *Hughes v Robotham* (1593) Cro Eliz 302; *Stephens v Bridges* (1821) 6 Madd 66.

4 *Lady Platt v Sleep* (1611) Cro Jac 275; *Jones v Davies* (1860) 5 H & N 766 (affd (1861) 7 H & N 507, Ex Ch).

5 *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 3 All ER 506, [1965] 1 WLR 1189; *Lord Dynevor v Tennant* (1888) 13 App Cas 279, HL. It may be that, where the parties to the surrender are the parties with the benefit and burden of a restrictive covenant and they expressly declare their intention that the covenant is to continue in force, it is not extinguished by the surrender: see *Birmingham Joint Stock Co v Lea* (1877) 36 LT 843, distinguished in *Golden Lion Hotel (Hunstanton) Ltd v Carter* supra.

6 *Chambers v Kingham* (1878) 10 ChD 743.

7 This principle is more usually operative in respect of charges, but it applies also to estates: *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, CA. As to merger of estates and charges generally see EQUITY vol 16(2) (Reissue) PARA 764 et seq.

8 Where the intention of the parties is expressed, the court will give effect to that intention even though the intention may have been expressed in ignorance of the true interests of the parties: see *Golden Lion Hotel (Hunstanton) Ltd v Carter* [1965] 3 All ER 506, [1965] 1 WLR 1189 (express declaration of merger resulted in the loss of the benefit of a restrictive covenant). It is common practice to insert into deeds an express declaration against merger where that is desired.

9 *Forbes v Moffatt* (1811) 18 Ves 384 at 390; *Capital and Counties Bank Ltd v Rhodes* [1903] 1 Ch 631, CA; *Ingle v Vaughan Jenkins* [1900] 2 Ch 368; *Theellusson v Liddard* [1900] 2 Ch 635; *Re Fletcher, Reading v Fletcher* [1917] 1 Ch 339, CA. Merger is sometimes avoided by taking a conveyance of the term to a trustee (*Belaney v Belaney* (1867) 2 Ch App 138); but the insertion in the conveyance to the landlord of a declaration against merger is equally effectual. See generally EQUITY vol 16(2) (Reissue) PARA 764.

10 Law of Property Act 1925 s 185. The rules of equity now prevail: see EQUITY vol 16(2) (Reissue) PARA 764.

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#### **641. Effect of merger on underlease.**

At common law the merger of a term in the reversion destroyed the covenants in an underlease<sup>1</sup>; but now by statute, where a reversion expectant on a lease<sup>2</sup> is merged, the estate or interest which as against the lessee<sup>3</sup> for the time being confers the next vested right to the land<sup>4</sup> is deemed the reversion for the purpose of preserving the same incidents and obligations as would have affected the original reversion had there been no merger thereof<sup>5</sup>.

1 *Webb v Russell* (1789) 3 Term Rep 393.

2 For the meaning of 'lease' see PARA 145 note 1 ante.

3 For the meaning of 'lessee' see PARA 145 note 3 ante.

4 For the meaning of 'land' see PARA 17 note 1 ante.

5 Law of Property Act 1925 s 139(1), re-enacting the Real Property Act 1845 s 9. The head landlord will have the same right against an undertenant on merger as on a surrender. As to his position as an undertenant on a surrender by a tenant see PARA 638 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(5) DISCLAIMER/(i) Corporate and Individual Insolvency/642. Right to disclaim.

## (5) DISCLAIMER

### (i) Corporate and Individual Insolvency

#### 642. Right to disclaim.

A trustee in bankruptcy may disclaim any lease which is part of his bankrupt's property<sup>1</sup>; and a liquidator may disclaim by notice of disclaimer any lease which is a part of the property of a company being wound up<sup>2</sup>.

Any person interested in the property may serve a notice in writing on the liquidator or, as the case may be, the trustee requiring him to decide whether he will disclaim or not; and, if the liquidator or, as the case may be, the trustee does not disclaim within 28 days of such notice, or such longer period as the court may allow, a notice of disclaimer may not be given<sup>3</sup>.

A disclaimer of a lease does not take effect unless a copy of the disclaimer has been served, so far as the liquidator or, as the case may be, the trustee is aware of their address, on every person claiming under the company or, as the case may be, the bankrupt as underlessee or mortgagee and either no application for a vesting order is made within 14 days or, where such an application has been made, the court directs that the disclaimer is to take effect<sup>4</sup>.

In relation to tenancies granted on or after 1 January 1996<sup>5</sup>, where:

1290 (1) a company which is being wound up, or a trustee in bankruptcy, is as a result of one or more assignments<sup>6</sup> the tenant<sup>7</sup> of part only of the premises demised by a tenancy<sup>8</sup>; and

1291 (2) the liquidator of the company or the trustee in bankruptcy exercises his power<sup>9</sup> to disclaim property demised by the tenancy,

the power is exercisable only in relation to the part of the premises referred to in head (1) above<sup>10</sup>.

- 1 See the Insolvency Act 1986 ss 315-321 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq. The power of disclaiming leases is a part of the wider power of disclaiming onerous property. Where there has been an assignment and the bankrupt is the person who came in as assignee, he cannot disclaim the assignment or the licence to assign without disclaiming the lease: see *MEPC plc v Scottish Amicable Life Assurance Society* (1993) 67 P & CR 314, [1993] 2 EGLR 93, CA.
- 2 See the Insolvency Act 1986 ss 178-182; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq.
- 3 See *ibid* s 178(5); and COMPANY AND PARTNERSHIP INSOLVENCY vol 4) (2004 Reissue) PARA 872 et seq; s 316; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472.
- 4 See *ibid* s 179(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2002 Reissue) PARA 874; s 317(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 481. A right of disclaimer of the bequest is available to a donee by will of leaseholds: see eg *Re Lysons, Beck v Lysons* (1912) 107 LT 146; and WILLS vol 50 (2005 Reissue) PARA 441 et seq.
- 5 *le* 'new tenancies' for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 ante.
- 6 For the meaning of 'assignment' see PARA 289 note 1 ante.
- 7 For the meaning of 'tenant' see PARA 289 note 2 ante.
- 8 For the meaning of 'tenancy' see PARA 289 note 3 ante.
- 9 *le* under the Insolvency Act 1986 s 178 (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 866 et seq) or s 315 (as amended) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq).
- 10 Landlord and Tenant (Covenants) Act 1995 s 21(2).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(5) DISCLAIMER/(i) Corporate and Individual Insolvency/643. Effect of disclaimer.

### **643. Effect of disclaimer.**

A disclaimer by a trustee in bankruptcy operates so as to determine, as from the date of the disclaimer, the bankrupt's rights, interests and liabilities and his estate in or in respect of the property disclaimed, and discharges the trustees from all personal liability in respect of that property as from the date of the commencement of his trusteeship, but does not, except so far as is necessary for the purpose of releasing the bankrupt, the bankrupt's estate and the trustee from any liability, affect the rights or liabilities of any other person<sup>1</sup>.

A disclaimer by a liquidator operates so as to determine, from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed, but does not, except so far as is necessary for the purpose of releasing the company from liability, affect the rights or liabilities of any other person<sup>2</sup>.

In accordance with these principles, when a head lease is disclaimed, an undertenant is freed from his covenants to the underlandlord but must perform the covenants in the head lease or he will become liable to distress or forfeiture<sup>3</sup>. The head lease is not, therefore, to be regarded as totally extinguished and it is still proper to describe the underlease as an underlease<sup>4</sup>.

Where at the time of the disclaimer the lease is still vested in the original tenant, then as between landlord and tenant it is for all practical purposes brought to an end; but a surety's liability does not determine with the ending of the lessee's primary liability<sup>5</sup>.

Where the lease has passed to an assignee, the practical effect of a disclaimer differs according to whether or not the lease was granted on or after 1 January 1996<sup>6</sup>. In the case of a lease granted before that date, the disclaimer does not extinguish any continued liability of the original tenant to the landlord for the rent and on the covenants in the lease<sup>7</sup>. Where liability remains, the original tenant will normally be entitled to an indemnity from his immediate assignee and usually either he or a subsequent assignee will be entitled to prove in the bankruptcy or liquidation for his loss<sup>8</sup>. These principles are the same whether the disclaimer is by a trustee in bankruptcy or a liquidator<sup>9</sup>, but are now subject to the provisions of the Landlord and Tenant (Covenants) Act 1995 restricting the liability of the former tenant or his guarantor for rent or service charge on assignment or subsequent variation of the lease<sup>10</sup>. In the case of a tenancy granted on or after 1 January 1996<sup>11</sup>, the original tenant will have been released from the burden of tenant covenants on assignment<sup>12</sup>.

The court has power to vest the disclaimed lease in any person who claims any interest in it or who is under the liability not discharged by the disclaimer<sup>13</sup>. The power may conveniently be used to vest the lease in an undertenant or a mortgagee of the leasehold interest<sup>14</sup> or, where the disclaimed lease was vested in an assignee, in the original tenant.

It has been held that a right given to the tenant to remove fixtures during the term by the provisions of the lease cannot be exercised after a disclaimer<sup>15</sup>. Where, however, the court directs<sup>16</sup> that a disclaimer is to take effect, it may make such orders with respect to fixtures, tenant's improvements and other matters arising out of the lease as it thinks fit<sup>17</sup>.

1 See the Insolvency Act 1986 s 315(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 474. The leading case is *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, where the statutory disclaimer provisions, their application to landlord and tenant situations and earlier legislation and the older authorities are discussed at 83 et seq and at 742 et seq by Lord Nicholls of Birkenhead. See also *Eyre v Hall* (1986) 18 HLR 509, [1986] 2 EGLR 95, CA (disclaimer valid where lease contains onerous covenants).

2 See the Insolvency Act 1986 s 178(4); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 868. See also *Re Park Air Services plc, Christopher Moran Holdings Ltd v Bairstow* [2000] 2 AC 172, [1999] 1 All ER 673, HL.

3 *Re Finley, ex p Clothworkers' Co* (1888) 21 QBD 475, CA.

4 *Re Thompson and Cottrell's Contract* [1943] Ch 97, [1943] 1 All ER 169 (disclaimed lease described by Uthwatt J as being something like a dormant volcano). See also *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517 (disclaimed lease described by Megarry V-C as existing though cataleptic).

5 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL, overruling *Stacey v Hill* [1901] 1 KB 660, CA. See also *Scottish Widows plc v Tripitkul* [2003] EWHC 1874 (Ch), [2004] 1 P & CR 461, [2003] All ER (D) 24 (Aug).

6 Ie the date when the Landlord and Tenant (Covenants) Act 1995 came into force: see PARA 578 ante.

7 *Warnford Investments Ltd v Duckworth* [1979] Ch 127, [1978] 2 All ER 517, applying *Hill v East and West India Dock Co* (1884) 9 App Cas 448, HL (decided on the somewhat different wording of the Bankruptcy Act 1869 s 23 (repealed)); and see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, [1996] 1 All ER 737, HL; *WH Smith Ltd v Wyndham Investments Ltd* (1994) 70 P & CR 21; *Cromwell Developments Ltd v Godfrey* (1998) 78 P & CR 197, [1998] 2 EGLR 62, CA. As to the general principle that an original tenant remains liable on the covenants in a lease notwithstanding an assignment see PARAS 288, 556 ante.

8 *Warnford Investments Ltd v Duckworth* [1979] Ch 127 at 140, 141, [1978] 2 All ER 517 at 527-528. As to the rights of the original tenant and assignee generally see PARAS 557-566 ante.

9 *Warnford Investments Ltd v Duckworth* [1979] Ch 127 at 142, [1978] 2 All ER 517 at 528.

10 Ie the Landlord and Tenant (Covenants) Act 1995 ss 17-20 (as amended): see PARAS 289-291 ante.

11 Ie a new tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995: see PARA 578 et seq ante.

12 See *ibid* s 5; and PARA 582 ante. He may, however, be (and in practice in the case of commercial leases usually is) required to enter into an authorised guarantee agreement guaranteeing performance of the covenants by the assignee: see PARA 593 ante.

13 See the Insolvency Act 1986 ss 181, 182; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 877; and ss 320, 321; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 486.

14 An order vesting the disclaimed property in a mortgagee by sub-demise may include a part of the demised premises which is not included in the mortgage: see *Re Holmes, ex p Ashworth* [1908] 2 KB 812, DC (lease vested in a trustee for the mortgagees). A bank that had a legal charge over two leases disclaimed by the tenant's trustee in bankruptcy was not allowed to seek a vesting order and relief from forfeiture in respect of one lease alone when one lease was supplemental to, and varied, the other: *Barclays Bank plc v Prudential Assurance Co Ltd* [1998] BCC 928, [1998] 1 EGLR 44.

15 *Re Latham, ex p Glegg* (1881) 19 ChD 7, CA (decided under the Bankruptcy Act 1869 s 23 (repealed), which provided that the disclaimer had the operation of a surrender of the lease). The right given to a tenant to remove tenant's fixtures within a reasonable time after the expiration of the lease by the general law may, however, apply after a disclaimer (see *Re Lavies, ex p Stephens* (1877) 7 ChD 127 at 130, CA, per James LJ, although that case was also concerned with the Bankruptcy Act 1869 s 23 (repealed); and it has now been established that this right is not affected by a surrender, at least where this is followed by a new lease (see *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA).

16 *Ie* under the Insolvency Act 1986 s 179(1)(b) (see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 874) or s 317(1)(b) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 481).

17 See *ibid* s 179(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 874; s 317(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 481.

## UPDATE

### 643 Effect of disclaimer

NOTE 5--*Hardcastle*, cited, applied in *Shaw v Doleman* [2009] EWCA Civ 279, [2009] 2 BCLC 123 (see PARA 593).

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## (ii) War Damage and Requisitioning of Land

### 644. War damage.

The Landlord and Tenant (War Damage) Acts 1939 and 1941<sup>1</sup> which are not expressed to be temporary legislation<sup>2</sup>, provide that by means of notices and counter-notices a lease of land which is affected by war damage<sup>3</sup> may be disclaimed or retained on altered terms. The Acts bind the Crown<sup>4</sup>, and contracting out is forbidden<sup>5</sup>. Special provisions apply to agricultural and mining leases, ground leases, multiple leases and short tenancies. Powers of entry are conferred by the Acts to facilitate the carrying out of urgent repairs to, or the removal of furniture and property from, war damaged land<sup>6</sup>. Notwithstanding that he has served a notice of disclaimer, any tenant of any land which is unfit by reason of war damage is entitled to enter upon the land for the purpose of taking any measures necessary to preserve or remove any furniture or other goods belonging to or used by him<sup>7</sup>.

<sup>1</sup> *Ie* the Landlord and Tenant (War Damage) Act 1939 and the Landlord and Tenant (War Damage) (Amendment) Act 1941: see s 19. In addition to making provision for the disclaimer or retention of leases of war

damaged land, these Acts also provide relief from repairing obligations and from the obligation to insure against war damage.

2 The Acts contain no provision which expressly provides for their termination or expressly limits their application to the 1939-45 war.

3 As to the meaning of 'war damage' see PARA 479 note 3 ante.

4 Landlord and Tenant (War Damage) Act 1939 s 22.

5 Ibid s 21.

6 See the Landlord and Tenant (War Damage) (Amendment) Act 1941 s 12(1).

7 Ibid s 12(2).

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#### **645. General effect of war damage legislation.**

Where land comprised in a lease becomes unfit<sup>1</sup> for use by the tenant by reason of war damage, he may serve on the landlord a notice electing to disclaim the lease or a notice electing to retain the lease on altered terms<sup>2</sup>. Notices must be in writing and must comply with the statutory provisions regarding service<sup>3</sup>. The effect of a notice of disclaimer is that the lease disclaimed is deemed to have been surrendered as from the date of service of the notice<sup>4</sup>. The effect of a notice of retention is that the lease becomes subject to an implied covenant that the tenant will render the land fit as soon as is reasonably practicable; and no rent is payable until the premises are rendered fit<sup>5</sup>. If the tenant serves no notice, the landlord may serve notice on the tenant requiring him to elect which notice he should serve<sup>6</sup>. If the tenant fails to comply with the landlord's notice, he is deemed to have served a notice of retention<sup>7</sup>. Where a notice of disclaimer is served, the landlord may serve on the tenant a notice to avoid disclaimer<sup>8</sup>. The effect of a notice to avoid disclaimer is that the notice of disclaimer ceases to be valid and the lease is modified so that there is an implied covenant by the landlord that the land will be rendered fit as soon as is reasonably practicable; and no rent is payable until the land is rendered fit<sup>9</sup>. The court has jurisdiction to decide whether the land is unfit by reason of war damage<sup>10</sup>.

1 For the meaning of 'unfit' see the Landlord and Tenant (War Damage) Act 1939 s 24; and PARA 507 note 5 ante.

2 Ibid s 4(1), (2). As to the particulars to be included in notices of disclaimer see s 7; and as to disclaimer in the case of multiple leases comprising two or more tenements see s 15 (as amended).

3 See ibid s 20.

4 Ibid s 8(1). All subleases are also deemed to have been surrendered except a sublease entitling a person to actual occupation of the land comprised in the disclaimed lease or of any part of it and in respect of which no notice of disclaimer has been served: s 8(2)(b). Rent is apportioned up to the date of the deemed surrender: see the Landlord and Tenant (War Damage) (Amendment) Act 1941 s 13. The court has power to modify the operation of a notice of disclaimer: see the Landlord and Tenant (War Damage) Act 1939 s 9 (as amended).

5 See ibid s 10(1)(a), (b), (2). The court may direct a rent to be paid if satisfied that a part of the land is capable of beneficial occupation or that there has been unreasonable delay in rendering the land fit: see s 10(1)(c), (d).



6 See *ibid* s 4(3).

7 *Ibid* s 4(4).

8 *Ibid* s 4(5).

9 *Ibid* s 11(1)(a), (b), (2). The court may direct a rent to be paid if satisfied that part of the land is capable of beneficial occupation: s 11(1)(c).

10 This jurisdiction is exercisable by a county court subject to the statutory provisions for the removal of proceedings into the High Court: see *ibid* s 23.

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#### **646. Disclaimer after requisition.**

The Landlord and Tenant (Requisitioned Land) Act 1942 contains provisions authorising the disclaimer of certain leases<sup>1</sup> comprising land<sup>2</sup> which has been requisitioned<sup>3</sup>. These provisions apply only to a lease which:

- 1292 (1) provides that the term thereby created will expire, or may be determined, at a date not later than five years after the material date<sup>4</sup>; or
- 1293 (2) provides, whatever form of words may be used, that the term thereby created will expire, or may be determined, at the end, or not later than 12 months after the end, of any war in which Her Majesty may be engaged<sup>5</sup>.

The Act binds the Crown, and applies to land belonging to Her Majesty, or forming part of the possessions of the Duchy of Cornwall, or belonging to a government department, or held in trust for Her Majesty for the purposes of a government department<sup>6</sup>.

1 For these purposes, 'lease' means a lease, underlease or other tenancy, assignment operating as a lease or underlease, or an agreement for such lease, underlease, tenancy or assignment: Landlord and Tenant (Requisitioned Land) Act 1942 s 13(1).

2 For these purposes, 'land' includes, without prejudice to any of the provisions of the Interpretation Act 1978 s 5, Sch 3, land covered with water, and parts of houses and buildings: Landlord and Tenant (Requisitioned Land) Act 1942 s 13(1); Interpretation Act 1978 s 17(2)(a).

3 *Ie* requisitioned under emergency powers within the meaning of the Compensation (Defence) Act 1939 s 17(1) (as amended). As to the distinction between requisitioning of land and compulsory purchase of land see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 501.

4 For these purposes, 'material date', in relation to any occasion on which possession of the land or any part of the land comprised in a lease has been taken in the exercise of emergency powers, means 26 March 1942, or if later, the date on which the land or part of the land was so taken: Landlord and Tenant (Requisitioned Land) Act 1942 s 13(1).

5 *Ibid* s 11.

6 *Ibid* s 12. In addition to authorising the disclaimer of certain leases, the Act adjusts the rights of landlord and tenant in regard to fixtures and removable buildings and also the liabilities of the parties where the landlord has undertaken to pay rates, to execute improvements or to provide services. The rights of the parties under repairing covenants are modified by the Landlord and Tenant (Requisitioned Land) Act 1944: see PARA 480 ante.

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#### **647. General effect of legislation.**

The statutory provisions relating to the disclaimer of certain leases<sup>1</sup> of requisitioned land apply where the land is requisitioned and the land or the main part was, immediately before the requisition, being used by the tenant or a member of the tenant's family as his residence, or for the purpose of his business, or partly as his residence and partly for purposes of his business<sup>2</sup>. The tenant may, within three months from the material date<sup>3</sup>, serve on the landlord a notice of disclaimer stating that he disclaims the lease<sup>4</sup>; but a notice of disclaimer may not be served unless at the time when it is served possession of the land to which it relates is retained in the exercise of emergency powers<sup>5</sup>. The notice must be in writing and served in the specified manner<sup>6</sup>. Where a notice of disclaimer has been served, the landlord may, at any time within one month from the service of the notice, apply to the court to determine whether the notice is of no effect on the ground that the above conditions are not fulfilled, and, if any such application is made, it lies with the tenant to show that those conditions are fulfilled, and, unless it is decided by the court on such an application that the notice is of no effect, the conditions are deemed to be fulfilled<sup>7</sup>.

Where a notice of disclaimer has been served, and the court has not decided that it is of no effect, the notice becomes effective subject to any order of the court, at the expiration of one month from the service of the notice<sup>8</sup>. Where a notice of disclaimer has become effective, the lease disclaimed is deemed to have been surrendered as from the material date and all interests in or derived out of the term created by the lease disclaimed are deemed to have been extinguished from that date<sup>9</sup>.

Where any lease is deemed to have been surrendered, the compensation payable<sup>10</sup> in respect of any period after the date on which the surrender is deemed to have taken effect is payable to the landlord<sup>11</sup>.

1    I.e. the provisions of the Landlord and Tenant (Requisitioned Land) Act 1942. As to the leases to which these provisions apply see PARA 646 ante.

2    Ibid s 1(1).

3    For the meaning of 'material date' see PARA 646 note 4 ante.

4    For the meaning of 'lease' see PARA 646 note 1 ante.

5    Landlord and Tenant (Requisitioned Land) Act 1942 s 1(1).

6    See ibid s 9.

7    Ibid s 1(3).

8    Ibid s 2(1). Upon application the court may allow a further period: see s 2(1).

9    Ibid s 2(2). Where any lease is deemed to have been surrendered, the rent payable in respect of the period during which the surrender is deemed to have taken effect is apportionable, whether the rent under the lease is payable in advance or otherwise, and any rent paid by the tenant in respect of that period in excess is recoverable by him: s 6(1). Where a notice of disclaimer has been served, the court may (1) on the application of any person having a mortgage or charge in respect of the term created by the lease disclaimed, vest the lease in that person on such terms as the court thinks just which may include adaptations or modifications of the terms of the lease; (2) on the application of the landlord or tenant, make such adaptations or modifications as the court thinks just of any term of the lease relating to repairing obligations and, in particular, require the

tenant to pay such sum as it thinks just in respect of any dilapidations which have already occurred and for which the tenant is liable or would, but for the disclaimer, become liable; (3) on the application of the landlord or the tenant, make such adaptations or modifications as the court thinks just of any term of the lease imposing any liability on either party which will take effect on the surrender of the lease; and any such application may be made at any time before the notice of disclaimer becomes effective: s 2(4).

10     le under the Compensation (Defence) Act 1939: see s 2(1)(a).

11     Landlord and Tenant (Requisitioned Land) Act 1942 s 6(2).

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## **(6) DERELICT LAND AND DESERTED PREMISES**

### **648. Derelict land.**

Where a landlord, having power to serve a notice to quit<sup>1</sup>, on an application to the county court satisfies the court:

- 1294 (1) that he has taken all reasonable steps to communicate with the person last known to him to be the tenant, and has failed to do so<sup>2</sup>;
- 1295 (2) that during the period of six months ending with the date of the application neither the tenant nor any person claiming under him has been in occupation of the property comprised in the tenancy<sup>3</sup> or any part of it<sup>4</sup>; and
- 1296 (3) that during that period either no rent was payable by the tenant or the rent payable has not been paid<sup>5</sup>,

the court may, if it thinks fit, by order determine the tenancy as from the date of the order<sup>6</sup>.

1     For the meaning of 'notice to quit' see PARA 704 note 19 post; and as to the giving of notices to quit see generally para 213 et seq ante.

2     Landlord and Tenant Act 1954 s 54(a).

3     For the meaning of 'tenancy' see PARA 706 note 2 post.

4     Landlord and Tenant Act 1954 s 54(b).

5     Ibid s 54(c).

6     Ibid s 54. Section 54 applies where the interest of the landlord, or any other interest in the land in question, belongs to Her Majesty in right of the Crown or the Duchy of Lancaster or to the Duchy of Cornwall, or belongs to a government department or is held on behalf of Her Majesty for the purposes of a government department, in like manner as if that interest were an interest not so belonging or held: s 56(6). As to the similar power for justices to put a landlord in possession of deserted premises under the Distress for Rent Act 1737 s 16 see PARA 649 post.

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### 649. Recovery of deserted premises.

If any tenant holding any lands, tenements or hereditaments at a rack rent, or at a rent three-quarters of the yearly value of the demised premises:

- 1297 (1) is in arrear for a half-year's rent<sup>1</sup>; and  
 1298 (2) has deserted the demised premises and left them uncultivated or unoccupied<sup>2</sup> and so that there is no sufficient distress to meet the arrears of rent,

the landlord, his bailiff or receiver may request<sup>3</sup> two or more justices to go upon and view the premises<sup>4</sup>, and affix a notice that they will return to take a second view after a period of at least 14 days<sup>5</sup>. If on the second view the tenant, or some person on his behalf, does not appear and pay the rent in arrear, or if there is not sufficient distress on the premises, the justices may put the landlord into possession<sup>6</sup> of the demised premises and the lease of them to that tenant is, as to any demise contained in it only, thenceforth void<sup>7</sup>. An appeal lies to the High Court<sup>8</sup>. A successful appeal gives no claim for trespass against the justices so long as the statutory procedure has been followed<sup>9</sup>; but the landlord is liable if he has improperly procured the interference of the justices<sup>10</sup>.

1 The Deserted Tenements Act 1817 altered the period of arrears from one year to half a year. It is not necessary that the landlord should have an express power of re-entry: see the Deserted Tenements Act 1817; and *Edwards v Hodges* (1855) 15 CB 477 at 490. Cf *Ex p Pilton* (1818) 1 B & Ald 369.

2 It is immaterial that the landlord knows where the tenant is, if no one is found in possession (*Ex p Pilton* (1818) 1 B & Ald 369); but premises are not deserted if the tenant's wife and family are there (cf *Ashcroft v Bourne* (1832) 3 B & Ad 684).

3 The request need not be on oath: *Basten v Carew* (1825) 3 B & C 649.

4 Within the metropolitan police district, a district judge (magistrates' courts) is not required to view the premises but may send a constable to do so: see the Metropolitan Police Courts Act 1840 s 13 (as amended); and MAGISTRATES vol 29(2) (Reissue) PARA 580.

5 Distress for Rent Act 1737 s 16 (amended by the Courts Act 2003 s 109(1), (3), Sch 8 para 3, Sch 10). There must be 14 clear days: *Creak v Brighton Justices* (1858) 1 F & F 110.

6 If the magistrates are not satisfied that the case is within the statute, a mandatory order will not be made to compel them to give possession: *Ex p Fulder* (1840) 8 Dowl 535. As to mandatory orders see JUDICIAL REVIEW vol 61 (2010) PARA 703 et seq.

7 Distress for Rent Act 1737 s 16 (as amended: see note 5 supra).

8 Distress for Rent Act 1737 s 17; Supreme Court Act 1981 ss 1(1), 19(2), (3), 151(5), Sch 4 para 1 (the Supreme Court Act 1981 prospectively amended so as to be entitled the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1, as from a day to be appointed under s 148(1); at the date at which this title states the law, no such day had been appointed). If the appeal is successful, the magistrates are not bound to restore possession unless so directed by the order: *R v Traill* (1840) 12 Ad & El 761.

9 *Basten v Carew* (1825) 3 B & C 649; *Ashcroft v Bourne* (1832) 3 B & Ad 684.

10 See *Basten v Carew* (1825) 3 B & C 649 at 655.

## UPDATE

### 649 Recovery of deserted premises

NOTE 8--Appointed day is 1 October 2009: SI 2009/1604.

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## **(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION**

### **(i) Entry**

#### **650. Liability to restore possession.**

A lease usually contains a covenant on the tenant's part to deliver up the premises on the determination of the term. In the absence of such a covenant or of any express stipulation, the tenant is under an implied contract to restore possession to the landlord<sup>1</sup>. The damages for breach of this express or implied obligation<sup>2</sup> are not limited to the value of the land but are the amount of the real damage sustained by the landlord<sup>3</sup>. This will include the rent of the premises during the time the landlord is kept out of possession<sup>4</sup>; the reasonable damages and costs incurred by the landlord in respect of claims against him naturally arising out of the tenant's failure to deliver possession<sup>5</sup>; and also, where a subtenant or assignee is in possession and is not protected by statute<sup>6</sup>, the costs of proceedings brought against him to recover possession<sup>7</sup>. The landlord may sue for the recovery of chattels which form part of the demised premises and which have been wrongfully removed during the tenancy<sup>8</sup>.

1 *Henderson v Squire* (1869) LR 4 QB 170 at 173; and see *Harding v Crethorn* (1793) 1 Esp 56. The rule applies where the lease is determined by surrender: *D'Arcy v Lord Castlemaine and Cameron* [1909] 2 IR 474, Ir CA. The tenant cannot by the use and enjoyment of the demised land acquire against the landlord an easement in it distinct from such use and enjoyment (*Outram v Maude* (1881) 17 ChD 391 at 404; and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 89); nor can he, by holding over and paying to the landlord the amount of the rates, taxes and outgoings in respect of the premises, but not the rent, acquire a title to the freehold by adverse possession (*Neall v Beadle* (1912) 107 LT 646). In such a case he may be deemed to hold as tenant from year to year.

2 It is not a breach of the obligation if the tenant holds over after the expiry of his tenancy under statutory authority, as, eg, a statutory tenant under the Rent Act 1977 or under the provisions of the Landlord and Tenant Act 1954.

3 *Watson v Lane* (1856) 11 Exch 769 at 774. Where one of two joint tenants holds over, both will be liable if the other assents to the holding over, but otherwise only the one who holds over: *Tancred v Christy* (1843) 12 M & W 316, Ex Ch; *Draper v Crofts* (1846) 15 M & W 166.

4 *Henderson v Squire* (1869) LR 4 QB 170. The landlord is entitled to complete possession, and, if the tenant retains physical possession of part, may recover mesne profits based on the rental of the whole: see *Guthrie v McCrindle* (1949) 65 TLR 192. It will be immaterial that the landlord did not intend to relet the premises, so that he cannot prove any actual loss of rent: *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA (plaintiff company sued licensees of its former tenant who had remained in occupation as trespassers). The same principle applies to the assessment of mesne profits strictly so called, which are merely a specific category of damages for trespass recoverable from a former tenant.

5 Eg where he has contracted to let the premises, but cannot place the new tenant in possession: *Bramley v Chesterton* (1857) 2 CBNS 592.

6 Where an undertenant is entitled to remain in possession by statute (eg under the Landlord and Tenant Act 1954 s 24 (as amended) (see PARA 713 post) or the Rent Act 1977 s 137 (as amended) (see PARAS 975-977 post) and the tenant has done all that lies in his power to give vacant possession (eg serving notice to quit on

the undertenant), he will not be liable for rent or for the use and occupation of the premises for such period as the undertenant continues in possession (*Reynolds v Bannerman* [1922] 1 KB 719; approved in *Watson v Saunders-Roe Ltd* [1947] KB 437, CA); nor will the tenant be liable for mesne profits since the former subtenant will have become the landlord's direct tenant. If the tenant arranges to continue his tenancy, the undertenant, if he remains in possession, will usually be presumed to continue the underlease so as to be liable to the tenant for rent: *Levy v Lewis* (1861) 9 CBNS 872.

7 *Henderson v Squire* (1869) LR 4 QB 170; *Henderson v Van Cooten* [1922] WN 340 (caretaker installed by the tenant refused to vacate the premises). While an undertenant wrongfully remains in occupation, the landlord may treat the tenant as still in possession (*Harding v Crethorn* (1793) 1 Esp 56; cf *Roe v Wiggs* (1806) 2 Bos & PNR 330), and may recover rent from him for the period of the undertenant's occupation (*Ibbs v Richardson* (1839) 9 Ad & El 849; *Thames Manufacturing Co Ltd v Perrotts (Nichols & Peyton) Ltd* (1984) 50 P & CR 1 (tenant liable on covenants where assignee wrongfully remains in occupation); but see now paras 289-291, 578 et seq ante).

8 *Petre v Ferrers* (1891) 61 LJ Ch 426. In the case of a furnished letting, a tenant who has agreed to deliver up the house and chattels in as good state and order as the same were in at the date of the letting will be liable for damage done by burglars: *Phillimore v Lane* (1925) 133 LT 268.

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### **651. Landlord's right of re-entry.**

Where a lease has ended and the landlord has a contractual right to retake possession, his right of re-entry is subject to two substantial statutory restrictions<sup>1</sup>. Where neither of these restrictions applies, the landlord may simply re-enter, as, for example, where the tenant has abandoned possession<sup>2</sup> or where there is no residential occupier and the landlord can effect his entry without violence<sup>3</sup>. A landlord who has obtained judgment for possession is not bound to call in the help of the sheriff or bailiff to put him in possession if he can enter peaceably and lawfully without that help<sup>4</sup>.

1 See PARAS 652-653 post.

2 *Lacey v Lear* (1802) Peake Add Cas 210; *Wildbor v Rainforth* (1828) 8 B & C 4.

3 See *Williams v Taperell* (1892) 8 TLR 241. Re-entry after the determination of the term is merely the exercise of the landlord's right of property, and is to be distinguished from a re-entry on a default of the tenant which determines or defeats the tenant's title: *Butcher v Poole Corpn* [1943] KB 48 at 53, [1942] 2 All ER 572 at 577, CA.

4 *Aglionby v Cohen* [1955] 1 QB 558, [1955] 1 All ER 785.

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### **652. Unauthorised violent entry.**

Any person who, without lawful authority, uses or threatens violence<sup>1</sup> for the purpose of securing entry into any premises<sup>2</sup> for himself or for any other person is guilty of an offence provided that there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure and the person using or threatening the violence knows that this is the case<sup>3</sup>. This does not, however, apply to a person who is a displaced residential occupier<sup>4</sup> or a protected intending occupier<sup>5</sup> of the premises in question or who is acting on behalf of such an occupier; and if the accused adduces sufficient evidence that he was, or was acting on behalf of, such an occupier he must be presumed to be, or to be acting on behalf of, such an occupier unless the contrary is proved by the prosecution<sup>6</sup>. Subject to that, the fact that a person has any interest in or right to possession or occupation of any premises does not constitute lawful authority for the use or threat of violence by him or anyone else for the purpose of securing his entry into those premises<sup>7</sup>.

A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or to both<sup>8</sup>.

1 It is immaterial for these purposes (1) whether the violence in question is directed against the person or against property; and (2) whether the entry which the violence is intended to secure is for the purpose of acquiring possession of the premises in question or for any other purpose: Criminal Law Act 1977 s 6(4).

2 For these purposes 'premises' means any building, any part of a building under separate occupation, any land ancillary to a building, the site comprising any building or buildings together with any land ancillary thereto: *ibid* s 12(1)(a).

3 *Ibid* s 6(1). As to damages for unlawful eviction see *PARAS* 654-655 *post*.

4 Subject to *ibid* s 12(4), any person who was occupying any premises as a residence immediately before being excluded from occupation by anyone who entered those premises, or any access to those premises, as a trespasser is a displaced residential occupier of the premises for these purposes so long as he continues to be excluded from occupation of the premises by the original trespasser or by any subsequent trespasser: ss 6(7), 12(3). A person who was himself occupying the premises in question as a trespasser immediately before being excluded from occupation is not, however, by virtue of s 12(3) a displaced residential occupier of the premises for these purposes: s 12(4). A person who by virtue of s 12(3) is a displaced residential occupier of any premises is to be regarded for these purposes as a displaced residential occupier also of any access to those premises; and 'access' means, in relation to any premises, any part of any site or building within which those premises are situated which constitutes an ordinary means of access to those premises (whether or not that is its sole or primary use): s 12(1)(b), (5).

5 For the purposes, an individual is a protected intending occupier of any premises at any time if at that time he falls within *ibid* s 12A(2), (4) or (6) (as added): ss 6(7), 12A(1) (s 6(7) amended, and s 12A added, by the Criminal Justice and Public Order Act 1994 ss 72(1), (5), 74). A person who is a protected intending occupier of any premises is to be regarded for these purposes as a protected intending occupier also of any access to those premises: Criminal Law 1977 s 12A(11) (as so added).

An individual is a protected intending occupier of any premises if (1) he has in those premises a freehold interest or a leasehold interest with not less than two years still to run; (2) he requires the premises for his own occupation as a residence; (3) he is excluded from occupation of the premises by a person who entered them, or any access to them, as a trespasser; and (4) he or a person acting on his behalf holds a written statement (a) which specifies his interest in the premises; (b) which states that he requires the premises for occupation as a residence for himself; and (c) with respect to which the requirements in s 12A(3) (as added) are fulfilled: s 12A(2) (as so added). Those requirements are that the statement is signed by the person whose interest is specified in it in the presence of a justice of the peace or commissioner for oaths and that the justice of the peace or commissioner for oaths has subscribed his name as a witness to the signature: s 12A(3) (as so added). A person is guilty of an offence if he makes a statement for the purposes of head (4) *supra* or head (iv) *infra* which he knows to be false in a material particular or if he recklessly makes such a statement which is false in a material particular: s 12A(8) (as so added). A person guilty of an offence under s 12A(8) (as so added) is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale or to both: s 12A(10) (as so added). As to the standard scale see *PARA* 52 note 6 *ante*.

An individual is also a protected intending occupier of any premises if (i) he has a tenancy of those premises (other than a tenancy falling within s 12A(2)(a) (as added) (see head (1) *supra*) or s 12A(6)(a) (as added) (see head (A) *infra*) or a licence to occupy those premises granted by a person with a freehold interest or a leasehold interest with not less than two years still to run in the premises; (ii) he requires the premises for his own occupation as a residence; (iii) he is excluded from occupation of the premises by a person who entered them, or any access to them, as a trespasser; and (iv) he or a person acting on his behalf holds a written statement

which states that he has been granted a tenancy of those premises or a licence to occupy those premises, specifies the interest in the premises of the person who granted that tenancy or licence to occupy ('the landlord'), states that he requires the premises for occupation as a residence for himself and with respect to which the requirements in s 12A(5) (as added) are fulfilled: s 12A(4) (as so added). Those requirements are that the statement is signed by the landlord and by the tenant or licensee in the presence of a justice of the peace or commissioner for oaths and that the justice of the peace or commissioner for oaths has subscribed his name as a witness to the signatures: s 12A(5) (as so added).

An individual is also a protected intending occupier of any premises if (A) he has a tenancy of those premises (other than a tenancy falling within s 12A(2)(a) or (4)(a) (as added: see heads (1), (i) supra) or a licence to occupy those premises granted by an authority to which this provision applies; (B) he requires the premises for his own occupation as a residence; (C) he is excluded from occupation of the premises by a person who entered the premises, or any access to them, as a trespasser; and (D) there has been issued to him by or on behalf of the authority referred to in head (A) supra above a certificate stating that he has been granted a tenancy of those premises or a licence to occupy those premises as a residence by the authority and that the authority which granted that tenancy or licence to occupy is one to which this provision applies, being of a description specified in the certificate: s 12A(6) (as so added). Section 12A(6) (as so added) applies to the following authorities, ie any body mentioned in the Rent Act 1977 s 14 (as amended) (landlord's interest belonging to local authority etc: see PARA 884 post); the Housing Corporation; and a registered social landlord within the meaning of the Housing Act 1985 (see s 5(4), (5) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 67): Criminal Law Act 1977 s 12A(7) (as so added; amended by the Government of Wales Act 1998 ss 140, 152, Sch 16 para 3(2), Sch 18 Pt V; the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5(1), Sch 2, PARA 8). The Criminal Law Act 1977 also applies to the Secretary of State or to the National Assembly for Wales or the relevant Welsh minister if the tenancy or licence is granted by him or by it under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 18 et seq): Criminal Law Act 1977 s 12A(7A) (added by the Government of Wales Act 1998 s 140, Sch 16 para 3(3)). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

6 Criminal Law Act 1977 s 6(1A) (added by the Criminal Justice and Public Order Act 1994 s 72(2)).

7 Criminal Law Act 1977 s 6(2) (amended by the Criminal Justice and Public Order Act 1994 s 72(3)).

8 Criminal Law Act 1977 s 6(5) (amended by the Criminal Justice Act 1982 ss 38, 46).

## UPDATE

### 652 Unauthorised violent entry

NOTE 5--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 653. Residential occupiers.

Where any premises are let as a dwelling<sup>1</sup> on a lease which is subject to a right of re-entry or forfeiture, it is not lawful to enforce that right otherwise than by proceedings in the court<sup>2</sup> while any person is lawfully residing in the premises or part of them<sup>3</sup>.

Where any premises:

1299 (1) have been let as a dwelling under a tenancy<sup>4</sup> which is neither a statutorily protected tenancy<sup>5</sup> nor an excluded tenancy<sup>6</sup>; or

1300 (2) are subject to any restricted contract which creates a licence<sup>7</sup>; or



1301 (3) are occupied as a dwelling under a licence, other than an excluded licence<sup>a</sup>,

and the tenancy ('the former tenancy') or, as the case may be, the licence has come to an end but the occupier<sup>9</sup> continues to reside in the premises or part of them, it is not lawful for the owner<sup>10</sup> to enforce against the occupier, otherwise than by proceedings in the court<sup>11</sup>, his right to recover possession of the premises<sup>12</sup>. A mortgagee is not, however, prevented by these provisions from enforcing his right to possession against a tenant of the mortgagor where the tenancy is not binding on the mortgagee<sup>13</sup>.

The above provisions are binding on the Crown<sup>14</sup>; but they do not apply to any premises being a caravan stationed on a protected site<sup>15</sup>. The fact that the landlord has committed an offence under the above provisions does not of itself give the tenant a civil remedy in damages<sup>16</sup>.

If for the purpose of any proceedings, whether civil or criminal, brought or intended to be brought under the above provisions, any person serves upon any agent of the landlord<sup>17</sup> named as such in the rent book or other similar document, or the person who receives the rent of the dwelling, a notice in writing requiring the agent or other person to disclose to him the full name and place of abode or place of business of the landlord, that agent or other person must comply with the notice forthwith<sup>18</sup>. If any such agent or other person fails or refuses so to comply with a notice so served on him, he is liable on summary conviction to a fine not exceeding level 4 on the standard scale, unless he shows to the satisfaction of the court that he did not know, and could not with reasonable diligence have ascertained, such of the facts required by the notice to be disclosed as were not disclosed by him<sup>19</sup>.

1 For these purposes, 'let as a dwelling' means 'let wholly or partly as a dwelling' and so applies to premises which are let for mixed residential and business purposes; there is no reason why the statutory protection against eviction without court proceedings ought not to apply to a tenant for whom the premises represent not only his home but also his place of business: *Pirabakaran v Patel* [2006] EWCA Civ 685, [2006] 23 EG 165 (CS), [2006] All ER (D) 380 (May). For the meaning of 'let' see PARA 215 note 2 ante; and note 8 infra.

2 For these purposes, 'the court' means (1) the county court, in relation to premises with respect to which the county court has for the time being jurisdiction in claims for the recovery of land; and (2) the High Court, in relation to other premises: Protection from Eviction Act 1977 s 9(1). A county court now has jurisdiction to hear and determine any such claim: see the County Courts Act 1984 s 21(1) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule Pt I).

3 Protection from Eviction Act 1977 s 2. No specific penalty is provided, but an unlawful act under s 2 may also amount to an offence of unlawful eviction or unlawful harassment: see s 1 (as amended); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609. As to damages for unlawful eviction see PARAS 654-655 post.

4 For the meaning of 'tenancy' see PARA 215 note 2 ante; and note 8 infra. Where there is a licence granted to a person who is not an employee of the licensor, the prohibition on eviction without due process of law under *ibid* s 3 (as amended) does not apply; and, if the licensee's belongings are evicted after the licensee has been duly evicted by notice, no offence is committed under s 1 (as amended): see *R v Blankley* [1979] Crim LR 166.

The Protection from Eviction Act 1977 s 3 (as amended) also applies, with the necessary modifications, where the owner's right to recover possession arises on the death of the tenant under a statutory tenancy within the meaning of the Rent Act 1977 (see PARA 831 post) or the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 post): Protection from Eviction Act 1977 s 3(3). For the meaning of 'the owner' see note 10 infra.

As to the special provisions affecting agricultural employees see s 4 (as amended); and PARAS 1194-1195 post.

5 For these purposes, 'statutorily protected tenancy' means (1) a protected tenancy within the meaning of the Rent Act 1977 (see PARA 831 post) or a tenancy to which the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) applies; (2) a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976 (see PARA 1144 et seq post); (3) a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq post) applies; (4) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 which is a tenancy in relation to which that Act applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323); (5) an assured tenancy (see PARA 1011 et seq post) or assured agricultural occupancy (see PARA 1183 et seq post) under the Housing Act 1988 Pt I (ss 1-45)

(as amended); (6) a tenancy to which the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) applies; (7) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Protection from Eviction Act 1977 s 8(1) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 61; the Housing Act 1988 s 33; the Local Government and Housing Act 1989 s 194(1), Sch 11 para 54; the Agricultural Tenancies Act 1995 s 40, Schedule para 29).

6 For these purposes, references to an excluded tenancy do not apply to a tenancy entered into before 15 January 1989 or a tenancy entered into on or after that date but pursuant to a contract made before that date, but, subject thereto, 'excluded tenancy' and 'excluded licence' are to be construed in accordance with the Protection from Eviction Act 1977 s 3A (as added and amended) (see PARA 215 ante): s 3(2C) (s 3(2B), (2C) added by the Housing Act 1988 s 30(2)).

7 The Protection from Eviction Act 1977 s 3(1), (2) (as amended) applies in relation to any restricted contract, within the meaning of the Rent Act 1977 (see PARA 986 post), which creates a licence and is entered into on or after 28 November 1980 as it applies in relation to a restricted contract which creates a tenancy: Protection from Eviction Act 1977 s 3(2A) (added by the Housing Act 1980 s 69(1)).

8 The Protection from Eviction Act 1977 s 3(1), (2) (as amended) applies in relation to any premises occupied as a dwelling under a licence, other than an excluded licence, as it applies in relation to premises let as a dwelling under a tenancy; and in s 3(1), (2) (as amended) the expressions 'let' and 'tenancy' are to be construed accordingly: s 3(2B) (as added: see note 6 supra). It does not, however, apply to a licence of accommodation secured by a local authority for a homeless person in discharge of its duty under the Housing Act 1996 s 188(1) (see HOUSING vol 22 (2006 Reissue) PARA 286): *Desnousse v Newham London Borough Council* [2006] EWCA Civ 547, [2006] 3 WLR 349, [2006] All ER (D) 256 (May), following *Mohamed v Manek and Royal Borough of Kensington and Chelsea* (1995) 94 LGR 211, (1995) 27 HLR 439, CA.

9 For these purposes, 'the occupier', in relation to any premises, means any person lawfully residing in the premises or part of them at the termination of the former tenancy: Protection from Eviction Act 1977 s 3(2).

10 For these purposes, 'the owner', in relation to any premises, means the person who, as against the occupier, is entitled to possession thereof: *ibid* s 8(3).

11 Any powers of a county court in proceedings for recovery of possession of any premises in the circumstances mentioned in *ibid* s 3(1) (as amended: see note 12 infra) may be exercised with the leave of the judge by any district judge, except in so far as rules of court otherwise provide: s 9(2); Courts and Legal Services Act 1990 s 74(1), (3). The jurisdiction of the High Court in proceedings to enforce a lessor's right of re-entry or forfeiture, or to enforce a mortgagee's right of possession in a case where the former tenancy was not binding on the mortgagee, is unaffected: Protection from Eviction Act 1977 s 9(3). See also *Peachey Property Corp'n Ltd v Robinson* [1967] 2 QB 543, [1966] 2 All ER 981, CA.

12 Protection from Eviction Act 1977 s 3(1) (amended by the Housing Act 1988 s 30(1)). No specific penalty is provided, but an unlawful act under the Protection from Eviction Act 1977 s 3 (as amended) may also amount to an offence of unlawful eviction or unlawful harassment under s 1 (as amended) (as to which see note 3 supra). The leave of the court is needed to begin proceedings to enforce a right of re-entry or forfeiture against a tenant who has made a claim under the Leasehold Reform Act 1967 (see PARA 1434 post) or who is participating in a claim to exercise the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1596 post) or who has made a claim to acquire a new lease under Pt I Ch II (ss 39-62) (as amended) (see PARA 1687 post).

13 *Bolton Building Society v Cobb* [1965] 3 All ER 814, [1966] 1 WLR 1.

14 In so far as the Protection from Eviction Act 1977 requires the taking of proceedings in the court for the recovery of possession or confers any powers on the court, it is binding, except in the case of s 4(10) (see PARA 1195 post), on the Crown: s 10.

15 Caravan Sites Act 1968 s 5(5) (amended by the Protection from Eviction Act 1977 s 12(1), Sch 1 para 3). For the meaning of 'protected site' see PARA 1281 post. As to the protection of residential occupiers of caravan sites generally see the Caravan Sites Act 1968 Pt I (ss 1-5) (as amended); and PARAS 1281-1284 post.

16 *McCall v Abelesz* [1976] QB 585, [1976] 1 All ER 727, CA; cf *Warder v Cooper* [1970] Ch 495, [1970] 1 All ER 1112.

17 For these purposes, 'landlord' includes (1) any person from time to time deriving title under the original landlord; (2) in relation to any dwelling house, any person other than the tenant who is or, but for the Rent Act 1977 Pt VII (ss 98-107) (as amended) (see PARAS 942 et seq, 959, 972, 1002 et seq post) would be, entitled to possession of the dwelling house; and (3) any person who grants to another the right to occupy the dwelling in

question as a residence and any person directly or indirectly deriving title from the grantor: Protection from Eviction Act 1977 s 7(3) (amended by the Housing Act 1988 s 140(1), (2), Sch 17 Pt I para 26, Sch 18).

18 Protection from Eviction Act 1977 s 7(1).

19 Ibid s 7(2) (amended by the Criminal Justice Act 1982 ss 39, 46). As to the standard scale see PARA 52 note 6 ante.

## UPDATE

### 653 Residential occupiers

NOTE 8--*Desnousse*, cited, reported at [2006] QB 831.

NOTE 12--See *Coombes v Waltham Forest LBC* [2010] All ER (D) 59 (Mar), DC (Protection from Eviction Act 1977 s 3 not incompatible with European Convention on Human Rights arts 6, 8).

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### 654. Damages for unlawful eviction.

The statutory right to damages for unlawful eviction<sup>1</sup> applies if, at any time after 9 June 1988, a landlord<sup>2</sup> ('the landlord in default') or any person acting on his behalf unlawfully deprives the residential occupier of any premises of his occupation of the whole or part of the premises<sup>3</sup>. That right also applies if at any time after that date a landlord ('the landlord in default') or any person acting on his behalf:

- 1302 (1) attempts unlawfully to deprive the residential occupier of any premises of his occupation of the whole or part of the premises; or
- 1303 (2) knowing or having reasonable cause to believe that the conduct is likely to cause the residential occupier of any premises:
- 113
- 138. (a) to give up his occupation of the premises or any part of them; or
- 139. (b) to refrain from exercising any right or pursuing any remedy in respect of the premises or any part of them,
- 114
- 1304 does acts likely to interfere with the peace or comfort of the residential occupier or members of his household, or persistently withdraws or withholds services reasonably required for the occupation of the premises as a residence,

and, as a result, the residential occupier gives up his occupation of the premises as a residence<sup>4</sup>.

Where the above provisions apply, the landlord in default is liable to pay damages, assessed on the statutory basis<sup>5</sup>, to the former residential occupier<sup>6</sup> in respect of his loss of the right to occupy the premises in question as his residence<sup>7</sup>. The right of a residential occupier to enforce any liability which otherwise arises in respect of his loss of the right to occupy premises as his residence is not affected; but damages may not be awarded both in respect of such a statutory liability<sup>8</sup> and in respect of a liability on account of the same loss<sup>9</sup>. No liability arises<sup>10</sup> if, before

the date on which the proceedings to enforce the liability are finally disposed of<sup>11</sup>, the former residential occupier is reinstated in the premises in question in such circumstances that he becomes again the residential occupier of them, or if, at the request of the former residential occupier, a court<sup>12</sup> makes an order, whether in the nature of an injunction or otherwise, as a result of which he is so reinstated<sup>13</sup>.

If, in proceedings to enforce a liability so arising, it appears to the court:

1305 (i) that prior to the event which gave rise to the liability, the conduct of the former residential occupier or any person living with him in the premises concerned was such that it is reasonable to mitigate the damages for which the landlord in default would otherwise be liable<sup>14</sup>; or

1306 (ii) that, before the proceedings were begun, the landlord in default offered to reinstate the former residential occupier in the premises in question and either it was unreasonable of the former residential occupier to refuse that offer or, if he had obtained alternative accommodation before the offer was made, it would have been unreasonable of him to refuse that offer if he had not obtained that accommodation,

the court may reduce the amount of damages which would otherwise be payable to such an amount as it thinks appropriate<sup>15</sup>.

In proceedings to enforce such a liability it is a defence for the defendant to prove that he believed, and had reasonable cause to believe:

1307 (A) that the residential occupier had ceased to reside in the premises in question at the time when he was deprived of occupation or, as the case may be, when the attempt was made or the acts were done as a result of which he gave up his occupation of those premises; or

1308 (B) that, where the liability would otherwise arise by virtue only of the doing of acts or the withdrawal or withholding of services, he had reasonable grounds for doing the acts or withdrawing or withholding the services in question<sup>16</sup>.

1 Ibid under the Housing Act 1988 s 27: see the text and notes 2-16 infra. As to the basis of assessment of damages see PARA 655 post.

2 For these purposes, 'landlord', in relation to a residential occupier, means the person who, but for the occupier's right to occupy, would be entitled to the occupation of the premises and any superior landlord under whom that person derives title: *ibid* s 27(9)(c); and see *Jones and Lee v Miah and Miah* (1992) 24 HLR 578, CA. 'Residential occupier', in relation to any premises, has the same meaning as in the Protection from Eviction Act 1977 s 1 (as amended) (see CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609): Housing Act 1988 s 27(9)(a). 'The right to occupy', in relation to a residential occupier, includes any restriction on the right of another person to recover possession of the premises in question: s 27(9)(b). See also note 6 infra.

3 Ibid s 27(1). Eviction without due process of law is prohibited by the Protection from Eviction Act 1977 s 3 (as amended), and re-entry under a lease is similarly restricted by s 2: see PARA 653 ante.

4 Housing Act 1988 s 27(2).

5 Ibid assessed on the basis set out in *ibid* s 28 (as amended): see PARA 655 post.

6 For these purposes, 'former residential occupier', in relation to any premises, means the person who was the residential occupier until he was deprived of or gave up his occupation as mentioned in *ibid* s 27(1) or (2) (see the text and notes 1-4 supra); and, in relation to a former residential occupier, 'the right to occupy' and 'landlord' are to be construed accordingly: s 27(9)(d).

7 Ibid s 27(3). Any liability arising by virtue of s 27(3) is to be in the nature of a liability in tort and, subject to s 27(5) (see the text and notes 8-9 infra), is additional to any liability arising apart from s 27, whether in tort, contract or otherwise: s 27(4). The occupier may choose whether to accept an offer of reinstatement or claim

damages: *Tagro v Cafane* [1991] 2 All ER 235, [1991] 1 WLR 378, CA. Damages under the Housing Act 1988 ss 27, 28 (as amended) can only be obtained from the landlord and not from his agent as a joint tortfeasor: *Sampson v Wilson* [1996] Ch 39, (1995) 70 P & CR 359, CA.

8     le a liability arising by virtue of the Housing Act 1988 s 27.

9     Ibid s 27(5). Damages awarded at common law for the loss of the right to occupy premises fall to be set off against damages awarded under ss 27, 28 (as amended): *Nwokorie v Mason* (1993) 26 HLR 60, sub nom *Mason v Nwokorie* [1994] 1 EGLR 59, CA.

10    le under the Housing Act 1988 s 27(3): see the text and notes 5-7 supra.

11    For these purposes, proceedings to enforce a liability are finally disposed of on the earliest date by which the proceedings, including any proceedings on or in consequence of an appeal, have been determined and any time for appealing or further appealing has expired, except that, if any appeal is abandoned, the proceedings are to be taken to be disposed of on the date of the abandonment: ibid s 27(6).

12    A county court has jurisdiction to hear and determine any question arising under these provisions: ibid s 40(1).

13    Ibid s 27(6); and see *Tagro v Cafane* [1991] 2 All ER 235, [1991] 1 WLR 378, CA. The former residential occupier can only obtain one form of redress, so he is entitled either to damages under the 1988 Act, or to a declaration that he remains in possession of the property, and must elect which remedy he prefers at trial: *Osei-Bonsu v Wandsworth London Borough Council* [1999] 1 All ER 265 at 280, [1999] 1 WLR 1011 at 1026, CA, per Simon Brown LJ.

14    Domestic violence may be relevant conduct for the purposes of head (1) in the text: *Osei-Bonsu v Wandsworth London Borough Council* [1999] 1 All ER 265, [1999] 1 WLR 1011, CA.

15    Housing Act 1988 s 27(7). 'Conduct' is not limited to serious acts of misfeasance, but is equivalent to 'behaviour' and includes acts and omissions, and an intention on the part of the former residential occupier, provided that intention is evidenced by action or inaction. Failure to pay rent will also lead to a reduction in damages, even where the court has made a separate order for payment of the arrears: *Regalgrand Ltd v Dickerson* (1996) 74 P & CR 312, (1996) 29 HLR 620, CA.

16    Housing Act 1988 s 27(8). It is no defence for the landlord that it has reasonable cause to believe the tenant has ceased to reside in the premises, where that belief is mistaken as to the validity of a joint tenant's purported termination of the tenancy: *Osei-Bonsu v Wandsworth London Borough Council* [1999] 1 All ER 265, [1999] 1 WLR 1011, CA.

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## **655. Measure of damages.**

The basis for the assessment of damages for unlawful eviction<sup>1</sup> is the difference in value, determined as at the time immediately before the residential occupier<sup>2</sup> ceased to occupy the premises in question as his residence, between:

1309 (1) the value of the interest of the landlord in default<sup>3</sup> determined on the assumption that the residential occupier continues to have the same right to occupy<sup>4</sup> the premises as before that time; and

1310 (2) the value of that interest determined on the assumption that the residential occupier has ceased to have that right<sup>5</sup>.

For the purposes of such valuations, it is to be assumed:

- 1311 (a) that the landlord in default is selling his interest on the open market to a willing buyer;
- 1312 (b) that neither the residential occupier nor any member of his family<sup>6</sup> wishes to buy; and
- 1313 (c) that it is unlawful to carry out any substantial development<sup>7</sup> of any of the land in which the landlord's interest subsists or to demolish the whole or part of any building on that land<sup>8</sup>.

1 le the basis of assessment referred to in the Housing Act 1988 s 27(3): see PARA 654 ante.

2 For these purposes, 'residential occupier' has the same meaning as in *ibid* s 27(9) (see PARA 654 note 2 ante): s 28(4).

3 In relation to any premises, any reference to the interest of the landlord in default is a reference to his interest in the building in which the premises in question are comprised, whether or not that building contains any other premises, together with its curtilage: *ibid* s 28(2). For these purposes, 'landlord in default' has the same meaning as in s 27 (see PARA 654 ante) (s 28(4)); and 'landlord' has the same meaning as in s 27(9) (see PARA 654 note 2 ante) (s 28(4)).

4 For these purposes, 'the right to occupy' has the same meaning as in *ibid* s 27(9) (see PARA 654 note 2 ante): s 28(4).

5 *Ibid* s 28(1). A valuation of the unincumbered interest should take into account the existence of other residential occupancies: *Melville v Bruton* (1997) 29 HLR 319, [1996] 13 LS Gaz R 26 CA, applied in *King v Jackson* (1997) 30 HLR 541, [1998] 1 EGLR 30 CA.

6 The Housing Act 1985 s 113 (as amended) (meaning of 'members of a person's family': see PARA 1319 note 5 post) applies for these purposes: Housing Act 1988 s 28(5).

7 The reference to substantial development of any of the land in which the landlord's interest subsists is a reference to any development other than (1) development for which planning permission is granted by a general development order for the time being in force and which is carried out so as to comply with any condition or limitation subject to which planning permission is so granted; or (2) a change of use resulting in the building referred to in *ibid* s 28(2) (see note 3 supra) or any part of it being used as, or as part of, one or more dwelling houses: s 28(6). For these purposes, 'general development order' has the meaning given in the Town and Country Planning Act 1990 s 56(6) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 221); Housing Act 1988 s 28(6) (amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 79(1)).

8 Housing Act 1988 s 28(3).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/656. Jurisdiction.

## **(ii) Proceedings for Possession**

### **656. Jurisdiction.**

A claim by a landlord to recover possession may be begun in the High Court or in a county court<sup>1</sup>. It is no longer possible to recover possession in a magistrates' court<sup>2</sup>, except in respect of deserted premises in certain circumstances<sup>3</sup>.

Where a possession claim is started electronically<sup>4</sup>, proceedings will be issued in the appropriate county court by reference to the post code provided by the claimant and that court has jurisdiction to hear and determine the claim and to carry out enforcement of any judgment irrespective of whether the property is within or outside the jurisdiction of that court<sup>5</sup>.

- 1 See PARA 660 post.
- 2 It was formerly possible to recover possession in a magistrates' court under the Small Tenements Recovery Act 1838 (repealed).
- 3 See PARA 649 ante.
- 4 See PARA 661 post.
- 5 See PARA 661 note 11 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/657. The pre-action protocol for certain possession claims based on rent arrears.

### **657. The pre-action protocol for certain possession claims based on rent arrears.**

As from 2 October 2006, a pre-action protocol<sup>1</sup> applies to residential possession claims by social landlords such as local authorities, registered social landlords<sup>2</sup> and housing action trusts<sup>3</sup> which are based solely on claims for rent arrears. The protocol does not apply to claims in respect of long leases or to claims for possession where there is no security of tenure. The protocol reflects the guidance on good practice given to social landlords in the collection of rent arrears. It recognises that it is in the interests of both landlords and tenants to ensure that rent is paid promptly and to ensure that difficulties are resolved wherever possible without court proceedings. Its aim is to encourage more pre-action contact between landlords and tenants and to enable court time to be used more effectively. Courts ought to take into account whether the protocol has been followed when considering what orders to make and registered social landlords and local authorities ought also to comply with guidance issued from time to time by the Housing Corporation<sup>4</sup> and the Department for Communities and Local Government<sup>5</sup>.

The pre-action protocol makes provision with regard to:

- 1314 (1) initial contact between the landlord and the tenant<sup>6</sup>;
- 1315 (2) the position after the service of statutory notices by the landlord<sup>7</sup>;
- 1316 (3) alternative dispute resolution<sup>8</sup>; and
- 1317 (4) court proceedings<sup>9</sup>.

Where court proceedings are taken, then not later than ten days before the date set for the hearing, the landlord ought to provide the tenant with up to date rent statements and disclose what knowledge he possesses of the tenant's housing benefit position to the tenant.<sup>10</sup> He should inform the tenant of the date and time of any court hearing and the order applied for. The landlord should advise the tenant to attend the hearing as the tenant's home is at risk; and records of such advice should be kept<sup>11</sup>. If the tenant complies with an agreement made after the issue of proceedings to pay the current rent and a reasonable amount towards arrears, the landlord should agree to postpone court proceedings so long as the tenant keeps to such agreement<sup>12</sup>; and if the tenant ceases to comply with the agreement, the landlord should warn the tenant of the intention to restore the proceedings and give the tenant clear time limits within which to comply<sup>13</sup>.

If the landlord unreasonably fails to comply with the terms of the protocol, the court may impose one or more of the following sanctions:

- 1318 (a) it may make an order for costs;  
 1319 (b) in cases other than those brought solely on mandatory grounds, it may adjourn, strike out or dismiss claims<sup>14</sup>.

If the tenant unreasonably fails to comply with the terms of the protocol, the court may take such failure into account when considering whether it is reasonable to make possession orders<sup>15</sup>.

1 See the *Pre-action Protocol for Possession Claims based on Rent Arrears*. As to pre-action protocols generally see CIVIL PROCEDURE vol 11 (2009) PARA 107 et seq.

2 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

3 As to housing action trusts see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

4 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

5 See the *Pre-action Protocol for Possession Claims based on Rent Arrears*, aims and scope.

6 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* paras 1-8.

7 See the *Pre-action Protocol for Possession Claims based on Rent Arrears*, PARAS 9-10.

8 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 11.

9 See the *Pre-action Protocol for Possession Claims based on Rent Arrears*, PARAS 12-15.

10 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 12.

11 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 13(a).

12 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 13(b).

13 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 13(c).

14 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 14.

15 See the *Pre-action Protocol for Possession Claims based on Rent Arrears* para 15.

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## **658. Notice to landlord of adverse claims.**

If the tenant is sued for possession by a person claiming adversely to the landlord, he must give notice to the landlord or his bailiff or receiver<sup>1</sup>. The landlord may then obtain an order adding him as a defendant<sup>2</sup>.

1 See the Law of Property Act 1925 s 145; and the County Courts Act 1984 s 137(1). If the tenant fails to give notice, he is liable to forfeit to the person of whom he holds the premises an amount equal to the value of three years' improved or rack rent of the premises, to be recovered by proceedings in any court having jurisdiction in respect of claims of such amount: see the Law of Property Act 1925 s 145; and the County Courts Act 1984 s 137(2). The rent is not the rent reserved, but such a rent as that at which premises could fairly be let



at the time of service of the writ or summons: *Crocker v Fothergill* (1819) 2 B & Ald 652 (decided on similar wording in the Distress for Rent Act 1737 s 12 (repealed)).

2 As to the joinder and substitution of parties see CPR Pt 19; and CIVIL PROCEDURE vol 11 (2009) PARA 210 et seq. The landlord must rely on his own title and must not set up any defect in the claimant's title as against the tenant: *Doe d Davies v Creed* (1829) 5 Bing 327; *Doe d Mee v Litherland* (1836) 4 Ad & El 784. As to the caution to be exercised in the use of pre-CPR authorities, however, see CIVIL PROCEDURE vol 11 (2009) PARA 33.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/659. Interim possession proceedings.

### 659. Interim possession proceedings.

An application for an interim possession order may only be made where the following conditions are satisfied:

- 1320 (1) the only claim made is a possession claim against trespassers for the recovery of premises;
- 1321 (2) the claimant:
- 115
- 140. (a) has an immediate right to possession of the premises; and
- 141. (b) has had such a right throughout the period of alleged unlawful occupation; and
- 142. (c) the claim is made within 28 days of the date on which the claimant first knew, or ought reasonably to have known, that the defendant, or any of the defendants, was in occupation<sup>1</sup>.
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Such an application may not be made against a defendant who entered or remained on the premises with the consent of a person who, at the time consent was given, had an immediate right to possession of the premises<sup>2</sup>.

Interim possession proceedings are thus not proceedings between landlord and tenant and are considered elsewhere in this work<sup>3</sup>.

1 See CPR 55.21(1).

2 See CPR 55.21(2).

3 See TORT.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/660. Possession proceedings; general rules for starting the claim.

### 660. Possession proceedings; general rules for starting the claim.

The procedure set out in the following rules<sup>1</sup> must be used where the claim includes:

- 1322 (1) a possession claim<sup>2</sup> brought by a landlord or former landlord, a mortgagee<sup>3</sup> or a licensor or former licensor;
- 1323 (2) a possession claim against trespassers<sup>4</sup>; or
- 1324 (3) a claim by a tenant seeking relief from forfeiture<sup>5</sup>.

The rules are subject to any enactment or practice direction which sets out special provisions with regard to any particular category of claim<sup>6</sup>. They do not apply where the claimant uses the procedure relating to accelerated possession claims of property let on an assured shorthold tenancy<sup>7</sup>, nor where the claimant seeks an interim possession order<sup>8</sup> except where the court orders otherwise or rules relating to such an order<sup>9</sup> so provide<sup>10</sup>.

The claim must be started in the county court for the district in which the land is situated unless the condition for bringing it in the High Court applies<sup>11</sup> or an enactment provides otherwise<sup>12</sup>. The relevant practice direction refers to circumstances which may justify starting the claim in the High Court<sup>13</sup>. Only exceptional circumstances justify starting a claim in the High Court<sup>14</sup>. Circumstances which may, in an appropriate case, justify starting a claim in the High Court are if:

- 1325 (a) there are complicated disputes of fact;
- 1326 (b) there are points of law of general importance; or
- 1327 (c) the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination<sup>15</sup>.

The value of the property and the amount of any financial claim may be relevant circumstances, but these factors alone will not normally justify starting the claim in the High Court<sup>16</sup>.

If a claimant starts a claim in the High Court and the court decides that it should have been started in the county court, the court will normally either strike the claim out or transfer it to the county court on its own initiative. This is likely to result in delay and the court will normally disallow the costs of starting the claim in the High Court and of any transfer<sup>17</sup>.

Where, in a possession claim against trespassers, the claimant does not know the name of a person in occupation or possession of the land, the claim must be brought against 'persons unknown' in addition to any named defendants<sup>18</sup>.

The claim form and form of defence sent with it must be in the forms set out in the relevant practice direction<sup>19</sup>.

The particulars of claim must be filed<sup>20</sup> and served with the claim form<sup>21</sup>. In a possession claim the particulars of claim must:

- 1328 (i) identify the land to which the claim relates;
- 1329 (ii) state whether the claim relates to residential property;
- 1330 (iii) state the ground on which possession is claimed;
- 1331 (iv) give full details about any mortgage or tenancy agreement; and
- 1332 (v) give details of every person who, to the best of the claimant's knowledge, is in possession of the property<sup>22</sup>.

Additional requirements are specified if the claim:

- 1333 (A) relates to residential property let on a tenancy<sup>23</sup>;

- 1334 (B) is a possession claim by a mortgagee<sup>24</sup>;
- 1335 (C) is a possession claim against trespassers<sup>25</sup>;
- 1336 (D) is a possession claim in relation to a demoted tenancy where the landlord is a housing action trust or a local housing authority<sup>26</sup>.

Certain possession claims may be started electronically<sup>27</sup>.

1 le CPR Pt 55 s I (CPR 55.1-55.10A): see the text and notes 2-21 infra; and PARA 661 et seq post.

2 For these purposes, 'a possession claim' means a claim for the recovery of possession of land (including buildings or parts of buildings): CPR 55.1(a).

3 For these purposes, 'mortgage' includes a legal or equitable mortgage and a legal or equitable charge and 'mortgagee' is to be interpreted accordingly: CPR 55.1(c). As to possession claims by mortgagees see further CPR 55.10; and MORTGAGE vol 77 (2010) PARA 550.

4 'A possession claim against trespassers' means a claim for the recovery of land which the claimant alleges is occupied only by a person or persons who entered or remained on the land without the consent of a person entitled to possession of that land but does not include a claim against a tenant or subtenant whether his tenancy has been terminated or not: CPR 55.1(b). As to such claims see further TORT.

5 CPR 55.2(1). A claim which is not a possession claim may be brought under the procedure set out in CPR Pt 55 s I if it is started in the same claim form as a possession claim which, by virtue of CPR 55.2(1), must be brought in accordance with CPR Pt 55 s I: *Practice Direction--Possession Claims* PD 55 para 1.7. For examples see PARAS 1.8, 1.9. As to the procedure where a demotion claim or a suspension claim (or both) is made in the same claim form in which a possession claim is started see CPR 65.12; and PARA 1066 post.

6 CPR 55.2(2)(a).

7 le the procedure set out in CPR Pt 55 s II (CPR 55.11-55.19): see PARA 1129 post.

8 le under CPR Pt 55 s III (CPR 55.20-CPR 55.28): see PARA 659 ante; and TORT.

9 le CPR Pt 55 s III.

10 CPR 55.2(2)(b), (c).

11 le unless CPR 55.3(2) applies. The claim may be started in the High Court if the claimant files with his claim form a certificate stating the reasons for bringing the claim in that court verified by a statement of truth in accordance with CPR 22.1(1) (see CIVIL PROCEDURE vol 11 (2009) PARA 613): CPR 55.3(2).

12 CPR 55.3(1). Except where the county court does not have jurisdiction, possession claims should normally be brought in the county court: *Practice Direction--Possession Claims* PD 55 para 1.1.

13 CPR 55.3(3).

14 *Practice Direction--Possession Claims* PD 55 para 1.1.

15 *Practice Direction--Possession Claims* PD 55 para 1.3.

16 *Practice Direction--Possession Claims* PD 55 para 1.4.

17 *Practice Direction--Possession Claims* PD 55 para 1.2.

18 CPR 55.3(4). As to service on trespassers see CPR 55.6; and *Practice Direction--Possession Claims* PD 55 para 4.1.

19 CPR 55.3(5). The claimant must use the appropriate claim form and particulars of claim form set out in *Practice Direction--Forms* PD 4 Table 1 (see Forms N5, N5A, N5B). The defence must be in form N11, N11B, N11M or N11R, as appropriate: *Practice Direction--Possession Claims* PD 55 para 1.5.

20 'Filing', in relation to a document, means delivering it, by post or otherwise, to the court office: CPR 2.3(1); and see CIVIL PROCEDURE vol 12 (2009) PARA 1832.

21 CPR 55.4.

22 *Practice Direction--Possession Claims* PD 55 para 2.1.

23 *Practice Direction--Possession Claims* PD 55 para 2.2. If the claim includes a claim for non-payment of rent the particulars of claim must set out: (1) the amount due at the start of the proceedings; (2) in schedule form, the dates and amounts of all payments due and payments made under the tenancy agreement for a period of two years immediately preceding the date of issue, or if the first date of default occurred less than two years before the date of issue, from the first date of default and a running total of the arrears; (3) the daily rate of any rent and interest; (4) any previous steps taken to recover the arrears of rent with full details of any court proceedings; and (5) any relevant information about the defendant's circumstances, in particular: (a) whether the defendant is in receipt of social security benefits; and (b) whether any payments are made on his behalf directly to the claimant under the Social Security Contributions and Benefits Act 1992: *Practice Direction--Possession Claims* PD 55 para 2.3. If the claimant wishes to rely on a history of arrears which is longer than two years, he should state this in his particulars and exhibit a full (or longer) schedule to a witness statement: para 2.3A.

If the claimant knows of any person (including a mortgagee) entitled to claim relief against forfeiture as underlessee under the Law of Property Act 1925 s 146(4) (see PARA 627 ante) (or in accordance with the Supreme Court Act 1981 s 38, or the County Courts Act 1984 s 138(9C) (as added) (see PARAS 628-629 ante), the particulars of claim must state the name and address of that person and the claimant must file a copy of the particulars of claim for service on him: *Practice Direction--Possession Claims* PD 55 para 2.4.

If the claim for possession relates to the conduct of the tenant, the particulars of claim must state details of the conduct alleged: para 2.4A.

24 See *Practice Direction--Possession Claims* PD 55 paras 2.5, 2.5A; and MORTGAGE vol 77 (2010) PARA 548.

25 The particulars of claim must state the claimant's interest in the land or the basis of his right to claim possession and the circumstances in which it has been occupied without licence or consent: *Practice Direction--Possession Claims* PD 55 para 2.6.

26 See *Practice Direction--Possession Claims* PD 55 para 2.7; and PARA 1382 post.

27 See PARA 661 post.

## UPDATE

### 660 Possession proceedings; general rules for starting the claim

NOTE 23--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

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### 661. Electronic issue of certain possession claims.

A practice direction may make provision for a claimant to start certain types of possession claim in certain courts by requesting the issue of a claim form electronically<sup>1</sup>. The practice direction may, in particular:

- 1337 (1) provide that only particular provisions apply in specific courts;
- 1338 (2) specify:
- 117
- 143. (a) the type of possession claim which may be issued electronically;

144. (b) the conditions that a claim must meet before it may be issued electronically;
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- 1339 (3) specify the court where the claim may be issued;
- 1340 (4) enable the parties to make certain applications or take further steps in relation to the claim electronically;
- 1341 (5) specify the requirements that must be fulfilled in relation to such applications or steps;
- 1342 (6) enable the parties to correspond electronically with the court about the claim;
- 1343 (7) specify the requirements that must be fulfilled in relation to electronic correspondence;
- 1344 (8) provide how any fee payable on the filing<sup>2</sup> of any document is to be paid where the document is filed electronically<sup>3</sup>.

The practice direction may disapply or modify the normal rules about possession claims<sup>4</sup> as appropriate in relation to possession claims started electronically<sup>5</sup>.

The relevant practice direction provides for a scheme ('Possession Claims Online') to operate in specified county courts<sup>6</sup> enabling claimants and their representatives to start certain possession claims<sup>7</sup> by requesting the issue of a claim form electronically via the PCOL website<sup>8</sup> and, where a claim has been started electronically, enabling the claimant or defendant and their representatives to take further steps in the claim electronically as specified in the practice direction<sup>9</sup>.

A claim may be started online if:

- 1345 (i) it is brought under the relevant rules relating to possession claims<sup>10</sup>;
- 1346 (ii) it includes a possession claim for residential property by:
- 119
145. (A) a landlord against a tenant, solely on the ground of arrears of rent, but not a claim for forfeiture of a lease; or
146. (B) a mortgagee against a mortgagor, solely on the ground of default in the payment of sums due under a mortgage,
- 120
- 1347 relating to land within the district of a specified court;
- 1348 (iii) it does not include a claim for any other remedy except for payment of arrears of rent or money due under a mortgage, interest and costs;
- 1349 (iv) the defendant has an address for service in England and Wales; and
- 1350 (v) the claimant is able to provide a postcode for the property<sup>11</sup>.

A claim must not, however, be started online if a defendant is known to be a child<sup>12</sup> or patient<sup>13</sup>.

The particulars of claim must be included in the online claim form and may not be filed separately. It is not necessary to file a copy of the tenancy agreement, mortgage deed or mortgage agreement with the particulars of claim<sup>14</sup>.

Provision is made with regard to security and the payment of fees<sup>15</sup> and with regard to electronic signatures<sup>16</sup>. If the PCOL website specifies that a court accepts electronic communications relating to claims brought using Possession Claims Online the parties may communicate with the court using the messaging service facility, available on the PCOL website<sup>17</sup>. A facility will be provided on that website for parties or their representatives to view the case record electronically<sup>18</sup>.

Certain applications in relation to a possession claim started online may be made electronically<sup>19</sup>.

1 CPR 55.10A(1).

2 For the meaning of 'filing' see PARA 660 note 20 ante.

3 CPR 55.10A(2).

4 Ie CPR Pt 55: see PARA 660 ante, PARA 662 et seq post.

5 CPR 55.10A(3).

6 'Specified court' means a county court specified on the PCOL website as one in which Possession Claims Online is available: *Practice Direction--Possession Claims Online* PD 55B para 1.2(2).

7 Ie under CPR Pt 55: see PARA 660 ante, PARA 662 et seq post.

8 'PCOL website' means the website [www.possessionclaim.gov.uk](http://www.possessionclaim.gov.uk) which may, at the date at which this title states the law, be accessed via Her Majesty's Courts Service website ([www.hmcourts-service.gov.uk](http://www.hmcourts-service.gov.uk)) and through which Possession Claims Online will operate: see *Practice Direction--Possession Claims Online* PD 55B para 1.2(1). The PCOL website contains further details and guidance about the operation of Possession Claims Online and, in particular, sets out (1) the specified courts; and (2) the dates from which Possession Claims Online will be available in each specified court: paras 2.1, 2.2. The operation of Possession Claims Online in any specified court may be restricted to taking certain of the steps specified in the practice direction, and in such cases the PCOL website will set out the steps which may be taken using Possession Claims Online in that specified court: para 2.3.

9 *Practice Direction--Possession Claims Online* PD 55B para 1.1.

10 Ie under CPR Pt 55 s I (paras 1-10A): see the text and notes 1-5 supra; and PARA 660 ante, PARA 662 et seq post.

11 *Practice Direction--Possession Claims Online* PD 55B para 5.1. A claimant may request the issue of a claim form by (1) completing an online claim form at the PCOL website; (2) paying the appropriate issue fee electronically at the PCOL website or by some other means approved by Her Majesty's Courts Service: para 6.1. The requirement for a statement of truth under CPR Pt 22 (statements of truth: see CIVIL PROCEDURE vol 11 (2009) PARA 613 et seq) applies to any online claims and defences and application notices: *Practice Direction--Possession Claims Online* PD 55B para 8.1.

When an online claim form is received, an acknowledgment of receipt will automatically be sent to the claimant. The acknowledgment does not constitute notice that the claim form has been issued or served: para 6.5. When the court issues a claim form following the submission of an online claim form, the claim is 'brought' for the purposes of the Limitation Act 1980 and any other enactment on the date on which the online claim form is received by the court's computer system. The court will keep a record, by electronic or other means, of when online claim forms are received: *Practice Direction--Possession Claims Online* PD 55B para 6.6. When the court issues a claim form it will (a) serve a printed version of the claim form and a defence form on the defendant; and (b) send the claimant notice of issue by post or, where the claimant has supplied an email address, by electronic means: para 6.7. The claim is deemed to be served on the fifth day after the claim was issued irrespective of whether that day is a business day or not: para 6.8. Where the period of time within which a defence must be filed ends on a day when the court is closed, the defendant may file his defence on the next day that the court is open: para 6.9. The claim form must have printed on it a unique customer identification number or a password by which the defendant may access the claim on the PCOL website: para 6.10. PCOL will issue the proceedings in the appropriate county court by reference to the post code provided by the claimant and that court has jurisdiction to hear and determine the claim and to carry out enforcement of any judgment irrespective of whether the property is within or outside the jurisdiction of that court: para 6.11.

12 'Child' means a person under 18: CPR 2.3(1), 21.1(2)(a).

13 *Practice Direction--Possession Claims Online* PD 55B para 5.2. 'Patient' means a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs: CPR 2.3(1), 21.1(2)(b). As to mental disorder and legal incapacity generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 596 et seq.

14 *Practice Direction--Possession Claims Online* PD 55B para 6.2. The particulars of claim must be included in the online claim form and may not be filed separately. It is not necessary to file a copy of the tenancy agreement, mortgage deed or mortgage agreement with the particulars of claim: para 6.2. The particulars of claim must include a history of the rent or mortgage account, in schedule form setting out (1) the dates and amounts of all payments due and payments made under the tenancy agreement, mortgage deed or mortgage agreement either from the first date of default if that date occurred less than two years before the date of issue

or for a period of two years immediately preceding the date of issue; and (2) a running total of the arrears: para 6.3. If the claimant wishes to rely on a history of arrears which is longer than two years, he should state this in his particulars and exhibit a full (or longer) schedule to a witness statement: para 6.4.

15 See *Practice Direction--Possession Claims Online* PD 55B paras 3-4.

16 For these purposes, any provision of the Civil Procedure Rules 1998 ('the CPR') which requires a document to be signed by any person is satisfied by that person entering his name on an online form: *Practice Direction--Possession Claims Online* PD 55B para 9.1.

17 See *Practice Direction--Possession Claims Online* PD 55B para 10.

18 See *Practice Direction--Possession Claims Online* PD 55B para 14.

19 See *Practice Direction--Possession Claims Online* PD 55B para 11; and see further PARA 666 notes 5-6 post.

## UPDATE

### 661 Electronic issue of certain possession claims

TEXT AND NOTE 13--Reference to patient is now to protected party: *Practice Direction--Possession Claims Online* PD 55B para 5.

NOTE 13--Definition replaced by 'protected party' which means a party, or an intended party, who lacks capacity to conduct the proceedings: CPR 2.3(1) (definition substituted by SI 2007/2204), CPR 21.1(2)(d) (CPR Pt 21 substituted by SI 2007/2204).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/662. The hearing date.

### 662. The hearing date.

The court will fix a date for the hearing when it issues the claim form<sup>1</sup>. In all possession claims<sup>2</sup> except claims against trespassers<sup>3</sup>:

- 1351 (1) the hearing date will be not less than 28 days<sup>4</sup> from the date of issue of the claim form;
- 1352 (2) the standard period between the issue of the claim form and the hearing will be not more than eight weeks; and
- 1353 (3) the defendant must be served<sup>5</sup> with the claim form and particulars of claim not less than 21 days before the hearing date<sup>6</sup>.

1 CPR 55.5(1). As to issuing the claim form see PARAS 660-661 ante.

2 For the meaning of 'possession claim' see PARA 660 note 2 ante.

3 In a possession claim against trespassers the defendant must be served with the claim form, particulars of claim and any witness statements: (1) in the case of residential property, not less than five days; and (2) in the case of other land, not less than two days, before the hearing date: CPR 55.5(2). As to shortening these time periods see note 4 infra. As to service of claims against trespassers see CPR 55.6.

4 The court may extend or shorten the time for compliance with any rule: see CPR 3.1(2)(a); and CIVIL PROCEDURE vol 11 (2009) PARA 249. The court may exercise its powers under CPR 3.1(2)(a), (b) to shorten the

time periods set out in CPR 55.5(2), (3) (see note 3 *supra*; and heads (1)-(3) in the text): *Practice Direction--Possession Claims* PD 55 para 3.1. Particular consideration should be given to the exercise of this power if: (1) the defendant, or a person for whom the defendant is responsible, has assaulted or threatened to assault: (a) the claimant; (b) a member of the claimant's staff; or (c) another resident in the locality; (2) there are reasonable grounds for fearing such an assault; or (3) the defendant, or a person for whom the defendant is responsible, has caused serious damage or threatened to cause serious damage to the property or to the home or property of another resident in the locality: para 3.2. Where para 3.2 applies but the case cannot be determined at the first hearing fixed under CPR 55.5, the court will consider what steps are needed to finally determine the case as quickly as reasonably practicable: *Practice Direction--Possession Claims* PD 55 para 3.3.

5 As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

6 CPR 55.5(3).

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### **663. The defendant's response.**

An acknowledgment of service is not required and the rules relating to acknowledgment of service<sup>1</sup> do not apply<sup>2</sup>.

Where, in any possession claim<sup>3</sup> except a claim against trespassers<sup>4</sup>, the defendant does not file<sup>5</sup> a defence within the specified time<sup>6</sup>, he may take part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs<sup>7</sup>. Where the claim has been issued electronically<sup>8</sup>, a defence may be filed electronically<sup>9</sup>.

Default judgment may not be given in a possession claim<sup>10</sup>.

1 *Ie* CPR Pt 10: see CIVIL PROCEDURE vol 11 (2009) PARAS 184-186.

2 CPR 55.7(1).

3 For the meaning of 'possession claim' see PARA 660 note 2 *ante*.

4 In a possession claim against trespassers, CPR 15.2 does not apply and the defendant need not file a defence: CPR 55.7(2).

5 For the meaning of 'filing' see PARA 660 note 20 *ante*.

6 *Ie* the time specified in CPR 15.4: see CIVIL PROCEDURE vol 11 (2009) PARA 201.

7 CPR 55.7(3).

8 See PARA 661 *ante*.

9 A defendant wishing to file (1) a defence; or (2) a counterclaim (to be filed together with a defence) to a claim which has been issued through the PCOL system may, instead of filing a written form, do so by (a) completing the relevant online form at the PCOL website; and (b) if the defendant is making a counterclaim, paying the appropriate fee electronically at the PCOL website or by some other means approved by Her Majesty's Courts Service: *Practice Direction--Possession Claims Online* PD 55B para 7.1. Where a defendant files a defence by completing the relevant online form, he must not send the court a hard copy: para 7.2. When an online defence form is received, an acknowledgment of receipt will automatically be sent to the defendant. The acknowledgment does not constitute notice that the defence has been served: para 7.3. The online defence form will be treated as being filed (i) on the day the court receives it, if it receives it before 4 pm on a working day; and (ii) otherwise, on the next working day after the court receives the online defence form: para 7.4. A defence is filed when the online defence form is received by the court's computer system. The court will keep a



record, by electronic or other means, of when online defence forms are received: para 7.5. For the meaning of 'the PCOL website' see PARA 661 note 8 ante.

10 See CPR 55.7(4), disapplying CPR Pt 12. As to default judgment see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/14. TERMINATING LEASES; RECOVERING POSSESSION/(7) LANDLORD'S REMEDIES FOR TENANT'S FAILURE TO DELIVER POSSESSION/(ii) Proceedings for Possession/664. Hearing and allocation of claims.

#### **664. Hearing and allocation of claims.**

At the hearing fixed in accordance with the relevant rule<sup>1</sup> or at any adjournment of that hearing, the court may:

- 1354 (1) decide the claim; or
- 1355 (2) give case management directions<sup>2</sup>.

Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions given under head (2) above will include the allocation of the claim to a track or directions to enable it to be allocated<sup>3</sup>.

Except where the claim is allocated to the fast track or the multi-track, or where the court orders otherwise, any fact that needs to be proved by the evidence of witnesses at a hearing referred to above may be proved by evidence in writing<sup>4</sup>. Except in a possession claim against trespassers<sup>5</sup>, all witness statements must be filed<sup>6</sup> and served<sup>7</sup> at least two days before the hearing<sup>8</sup>. If the maker of a witness statement does not attend a hearing and the other party disputes material evidence contained in his statement, the court will normally adjourn the hearing so that oral evidence can be given<sup>9</sup>.

Where the claimant serves the claim form and particulars of claim<sup>10</sup>, he must produce at the hearing a certificate of service of those documents<sup>11</sup>.

The House of Lords has recently summarised the practical position where a local authority brings possession proceedings<sup>12</sup>, stating that it is not necessary for a local authority to plead or prove in every case that domestic law complies with the Convention right<sup>13</sup> to respect for private and family life but that courts ought to proceed on the assumption that domestic law strikes a fair balance and is compatible with that Convention right. Only in exceptional circumstances will there be a seriously arguable case that the court ought not to make a possession order on the grounds that the law which requires it to be made is Convention-incompatible<sup>14</sup> or that the local authority's exercise of its power to seek a possession order is an unlawful act<sup>15</sup>; and deciding whether the defendant has a seriously arguable case on one or both of those grounds does not call for a full-blown trial but ought to be decided summarily<sup>16</sup>. The procedure to be followed and the extent to which the court is bound by a domestic precedent which is apparently inconsistent with Strasbourg authority have already been discussed<sup>17</sup>. A defence which is based only on the occupier's personal circumstances ought, however, to be struck out<sup>18</sup>.

1 le in accordance with CPR 55.5(1): see PARA 662 ante.

2 CPR 55.8(1). As to case management see generally CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq.

3 CPR 55.8(2). When the court decides the track for a possession claim, the matters to which it must have regard include: (1) the matters set out in CPR 26.8 as modified by the relevant practice direction (see CIVIL PROCEDURE vol 11 (2009) PARA 270); (2) the amount of any arrears of rent or mortgage instalments; (3) the importance to the defendant of retaining possession of the land; (4) the importance of vacant possession to the claimant; and (5) if applicable, the alleged conduct of the defendant: CPR 55.9(1). The court will only allocate possession claims to the small claims track if all the parties agree: CPR 55.9(2). Where a possession claim has been allocated to the small claims track the claim must be treated, for the purposes of costs, as if it were proceeding on the fast track except that trial costs are to be in the discretion of the court and must not exceed the amount that would be recoverable under CPR 46.2 (amount of fast track costs: see CIVIL PROCEDURE vol 12 (2009) PARA 1776) if the value of the claim were up to £3,000: CPR 55.9(3). Where all the parties agree the court may, when it allocates the claim, order that CPR 27.14 (costs on the small claims track: see CIVIL PROCEDURE vol 11 (2009) PARA 285) applies and, where it does so, CPR 55.9(3) does not apply: CPR 55.9(4).

4 CPR 55.8(3). The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved (1) at trial, by their oral evidence given in public; and (2) at any other hearing, by their evidence in writing; but this is subject to any provision to the contrary: see CPR 32.2(1), (2).

Each party should wherever possible include all the evidence he wishes to present in his statement of case, verified by a statement of truth: *Practice Direction--Possession Claims* PD 55 para 5.1. If relevant the claimant's evidence should include the amount of any rent or mortgage arrears and interest on those arrears. These amounts should, if possible, be up to date to the date of the hearing (if necessary by specifying a daily rate of arrears and interest). However, CPR 55.8(4) (see the text and notes 5-8 *infra*) does not prevent such evidence being brought up to date orally or in writing on the day of the hearing if necessary: *Practice Direction--Possession Claims* PD 55 para 5.2. If relevant the defendant should give evidence of: (a) the amount of any outstanding social security or housing benefit payments relevant to rent or mortgage arrears; and (b) the status of: (i) any claims for social security or housing benefit about which a decision has not yet been made; and (ii) any applications to appeal or review a social security or housing benefit decision where that appeal or review has not yet concluded: *Practice Direction--Possession Claims* PD 55 para 5.3.

5 In a possession claim against trespassers all witness statements on which the claimant intends to rely must be filed and served with the claim form: CPR 55.8(5).

6 For the meaning of 'filing' see PARA 660 note 20 *ante*.

7 As to service generally see CIVIL PROCEDURE vol 11 (2009) PARA 138 *et seq*.

8 CPR 55.8(4).

9 *Practice Direction--Possession Claims* PD 55 para 5.4.

10 As to the claim form and particulars of claim see PARAS 660-661 *ante*.

11 CPR 55.8(6). CPR 6.14(2)(a) (see CIVIL PROCEDURE vol 11 (2009) PARA 151) does not apply: CPR 55.8(6).

As to possession claims by mortgagees see further CPR 55.10; and MORTGAGE vol 77 (2010) PARA 550.

12 See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20.

13 I.e. the right to respect for the home under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8: see PARA 46 *ante*; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

14 I.e. within the meaning of *ibid* s 6 (as amended): see PARA 46 *ante*; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

15 I.e. *ibid* s 3: see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

16 *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Bingham of Cornhill, with whom the majority concurred on this point.

17 See PARA 47 *ante*.

18 See *Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Hope, Lord Scott, Lady Hale and Lord Brown (Lord Bingham of Cornhill, Lord Nicholls and Lord Walker dissenting). See further PARA 47 *ante*.

## UPDATE

## 664 Hearing and allocation of claims

NOTE 11--CPR 55.8(6) amended: SI 2008/2178.

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### 665. Restricted discretion of the court in making orders for possession.

Where a court makes an order for the possession of land, except where:

- 1356 (1) the order is made in a claim<sup>1</sup> by a mortgagee for possession; or
- 1357 (2) the order is made in a claim for forfeiture of a lease<sup>2</sup>; or
- 1358 (3) the court had power to make the order only if it considered it reasonable to make it<sup>3</sup>; or
- 1359 (4) the order relates to a dwelling house which is the subject of a restricted contract<sup>4</sup>; or
- 1360 (5) the order is made in proceedings for possession of premises let under a rental purchase agreement<sup>5</sup>,

the giving up of possession may not be postponed, whether by the order or any variation, suspension or stay of execution, to a date later than 14 days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and in any event not postponed to a date later than six weeks after the making of the order<sup>6</sup>.

These provisions also apply to consent orders<sup>7</sup>.

1 The statutory wording is 'action' but an action is now generally known as a claim: see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 Where an order for possession has been made on mandatory grounds under the Housing Act 1988 (see PARA 1106 et seq post), the exception under head (2) in the text does not apply as the tenancy has already been brought to an end: *Artesian Residential Investments Ltd v Beck* [2000] QB 541, [1999] 3 All ER 113, CA, applied in *Procureur v Alexander* [2004] EWHC 607 (Ch), [2004] All ER (D) 406 (Feb).

3 The exception under head (3) in the text cannot apply where an order for possession has been made on mandatory grounds: see the cases cited in note 2 supra.

4 Ie within the meaning of the Rent Act 1977 s 19 (as amended): see PARA 986 post.

5 Ie proceedings brought as mentioned in the Housing Act 1980 s 88(1): see PARA 602 ante.

6 Ibid s 89(1), (2). As to the court's wider discretion in possession proceedings under the Rent Act 1977 and the Housing Act 1988 see PARAS 972, 1117 post; and as to the court's discretion to set aside or vary a possession order where leave is given to the qualifying tenant of a flat to participate in a claim to exercise the right to collective enfranchisement or to claim a new lease under the Leasehold Reform Housing and Urban Development Act 1993 see PARAS 1592, 1684 post.

Once the period fixed by the order has expired, there is no power to extend it unless the Rent Act 1977 or similar statutory provisions apply: *Moore v Lambeth County Court Registrar* [1969] 1 All ER 782, [1969] 1 WLR 141, CA. The Housing Act 1980 s 89 is not restricted to orders made in the county court but applies equally to orders made in the High Court: *Hackney London Borough Council v Side by Side (Kids) Ltd* [2003] EWHC 1813

(QB), [2004] 2 All ER 373, [2004] 1 WLR 363, applied in *Procureur v Alexander* [2004] EWHC 607 (Ch), [2004] All ER (D) 406 (Feb).

7 *Hackney London Borough Council v Side by Side (Kids) Ltd* [2003] EWHC 1813 (QB), [2004] 2 All ER 373, [2004] 1 WLR 363.

## UPDATE

### 665 Restricted discretion of the court in making orders for possession

NOTE 6--The 1980 Act s 89(1) does not empower the court to postpone an order for possession of land occupied by trespassers: *Boyland and Son Ltd v Rand* (2007) Times, 18 January, CA. The restriction on postponement of the giving up of possession applies only to the court which made the order for possession, not to an appellate court: *Admiral Taverns (Cygnet) Ltd v Daniel* [2008] EWCA Civ 1501, [2009] 4 All ER 71.

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### 666. Enforcement of possession orders.

Judgement for recovery of possession<sup>1</sup> is enforced in the High Court by a writ of possession<sup>2</sup> and in a county court by a warrant of possession<sup>3</sup>. Where the court has made an order for possession in a claim started online<sup>4</sup> and the claimant is entitled to the issue of a warrant of possession without requiring the permission of the court, he may request the issue of a warrant by completing an online request form<sup>5</sup>. Similarly, where the court has issued a warrant of possession the defendant may apply electronically for the suspension of the warrant<sup>6</sup>.

The enforcement of judgments and orders is considered in detail elsewhere in this work<sup>7</sup>.

1 Judgment may include mesne profits up to the date on which the landlord obtains possession: *Southport Tramways Co v Gandy* [1897] 2 QB 66, CA. It is immaterial that the claimant has claimed too much by his writ, or has in fact claimed on a wrong basis, where eg the figure is based on double value: *Southport Tramways Co v Gandy* supra. Where recovery of possession is claimed for the breach of a covenant, the mesne profits are assessable from the date of the landlord's election to determine the tenancy, eg by the service, not the issue, of proceedings claiming possession on the ground that the lease is forfeited: *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433, [1970] 2 All ER 795, CA, not following *Elliott v Boynton* [1924] 1 Ch 236, CA, on this point. See also *Tingey v F Claydon (Wapping) Ltd* (1962) 185 Estates Gazette 79; and see *Maryland Estates Ltd v Bar-Joseph* [1998] 3 All ER 193, [1999] 1 WLR 83, CA. As to the calculation of mesne profits see *Guthrie v McCrindle* (1949) 65 TLR 192; *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283. As to mesne profits generally see PARA 285 ante. Where a tenant of residential premises fails to deliver up possession at the end of the term and remains in occupation as a trespasser, the landlord, in the absence of special factors, is entitled to damages based on the annual letting value of the premises without bringing evidence as to his actual loss: *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240, [1979] 1 WLR 285, CA. See also *Associated Deliveries v Harrison* (1984) 50 P & CR 91, CA; *Ministry of Defence v Ashman* (1993) 66 P & CR 195, 25 HLR 513, CA.

2 See CIVIL PROCEDURE vol 12 (2009) PARAS 1267, 1274-1276. The writ may be issued notwithstanding that the landlord's estate has terminated, unless this would be unjust and futile: *Knight v Clarke* (1885) 15 QBD 294, CA. Thus, where the landlord obtains judgment for possession and sells his estate before executing the judgment, the benefit of the order for possession does not automatically pass to the purchaser, and the correct procedure is for the vendor to enforce the judgment supported by the purchaser: *Chung Kwok Hotel Co Ltd v Field* [1960] 3 All ER 143, [1960] 1 WLR 1112, CA. It is uncertain whether the benefit of an order for possession may be expressly assigned, the point being expressly left undecided in *Chung Kwok Hotel Co Ltd v Field* supra. As to entry without the sheriff's assistance see *Aglionby v Cohen* [1955] 1 QB 558, [1955] 1 All ER 785; and PARA 651

ante. As to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 184.

3 See CIVIL PROCEDURE vol 12 (2009) PARA 1292.

4 See PARA 661 ante.

5 *Practice Direction--Possession Claims Online* PD 55B para 12.1. He must complete an online request form at the PCOL website and pay the appropriate fee electronically at the PCOL website or by some other means approved by Her Majesty's Courts Service: para 12.1. Such a request will be treated as being filed (1) on the day the court receives the request, if it receives it before 4 pm on a working day; and (2) otherwise, on the next working day after the court receives the request: para 12.2. For the meaning of 'the PCOL website' see PARA 661 note 8 ante; and for the meaning of 'filing' see PARA 660 note 20 ante.

6 Where the court has issued a warrant of possession, the defendant may apply electronically for the suspension of the warrant, provided that: (1) the application is made at least five clear days before the appointment for possession; and (2) the defendant is not prevented from making such an application without the permission of the court: *Practice Direction--Possession Claims Online* PD 55B para 13.1. The defendant may apply electronically for the suspension of the warrant by completing an online application for suspension at the PCOL website and paying the appropriate fee electronically at the PCOL website or by some other means approved by Her Majesty's Courts Service: para 13.2. When an online application for suspension is received, an acknowledgment of receipt will automatically be sent to the defendant. The acknowledgment does not constitute a notice that the online application for suspension has been served: para 13.3. Where an application must be made within a specified time, it is so made if the online application for suspension is received by the court's computer system within that time. The court will keep a record, by electronic or other means, of when online applications for suspension are received: para 13.4. When the court receives an online application for suspension it must (a) serve a copy of the online application for suspension indorsed with the date of the hearing by post on the claimant at least two clear days before the hearing; and (b) send the defendant notice of service and confirmation of the date of the hearing by post; provided that where either party has provided the court with an email address for service, service of the application and/or the notice of service and confirmation of the hearing date may be effected by electronic means: para 13.5. As to the suspension of warrants see CIVIL PROCEDURE vol 12 (2009) PARA 1363 et seq; and as to the statutory restriction on suspension of possession orders see PARA 665 ante.

7 See generally CIVIL PROCEDURE vol 12 (2009) PARA 1223 et seq.

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### **(iii) Claim for Double Rent or Double Value**

#### **667. Claim for double rent.**

If a tenant<sup>1</sup> gives notice to quit<sup>2</sup> at a time mentioned in the notice, and does not deliver up possession at the time so mentioned, he is liable thenceforward, during all the time that he continues in possession<sup>3</sup>, to pay to the landlord double the rent payable under the tenancy<sup>4</sup>. The landlord has the same remedies for the double rent as he had, before the notice, for the single rent<sup>5</sup>, but the tenant may leave at any time and stop the double rent without giving a fresh notice to quit<sup>6</sup>.

1 The Distress for Rent Act 1737 s 18 applies to all tenants, including weekly tenants, who have power to determine the tenancy by notice. *Sullivan v Bishop* (1826) 2 C & P 359 contra was decided on the erroneous assumption that that Act was similar to the Landlord and Tenant Act 1730 s 1 (as amended): see PARA 668 post. There are material distinctions between the two statutes. In *Johnstone v Hudlestone* (1825) 4 B & C 922 at 931 it was held that the Landlord and Tenant Act 1730 must be construed by itself; but see *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, [1999] 2 All ER 791, CA (in the case of ambiguity, the 1737 Act

must be read with the 1730 Act, for they are part of a single code); and see *Cutting v Derby* (1776) 2 Wm Bl 1075 at 1077; *Timmins v Rowllison* (1765) 1 Wm Bl 533.

2 The notice may be oral or in writing (*Timmins v Rowllison* (1765) 1 Wm Bl 533), but it must be certain; a notice to quit upon a contingency will not do, even if the contingency happens (*Farrance v Elkington* (1811) 2 Camp 591 at 592). See also DISTRESS vol 13 (2007 Reissue) PARA 987. In proceedings founded on the statute the terms of the tenancy and of the notice to quit must be so shown that the tenant's power to determine the tenancy by notice, and the sufficiency of the notice, may appear: *Humberstone v Dubois* (1842) 10 M & W 765.

3 *Anon* (1773) Lofft 275; *Booth v Macfarlane* (1831) 1 B & Ad 904.

4 Distress for Rent Act 1737 s 18. See also DISTRESS vol 13 (2007 Reissue) PARA 987. Section 18 applies only where (1) the tenant has in fact become a trespasser by holding over after his own notice to quit; and (2) the landlord has treated the tenant as a trespasser: *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, [1999] 2 All ER 791, CA.

A tenant of premises protected by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (repealed) was held nonetheless liable for double rent, as it was held that such a rent did not constitute an increase of rent within s 1: *Flannagan v Shaw* [1920] 3 KB 96, CA. This decision was assumed in *Barton v Fincham* [1921] 2 KB 291 at 299, CA, per Scrutton LJ, and *Northcott v Roche* (1921) 37 TLR 364, to be still of effect and binding where the premises were protected by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (repealed). See *Laity v Pearce* (1946) 13 LJCCR 154, distinguishing *Flannagan v Shaw* supra, on the ground that there was no evidence that the landlord had been misled to his detriment by the notice to quit, and holding that the tenant was not liable for double rent; cf *Prideaux v Williams* (1946) 13 LJCCR 37, which applied *Flannagan v Shaw* supra. The former rent restriction legislation is now contained in the Rent Act 1977 (see PARA 808 et seq post); and, although the authorities cited supra are in conflict, it would appear that in principle a tenant who ends his protected tenancy by serving a notice to quit should be able to hold over as a statutory tenant without any liability to pay double rent. Where, however, a protected tenant so serves notice, the landlord may be able to obtain an order for possession without proof of alternative accommodation: see PARA 953 post.

5 *Timmins v Rowllison* (1765) 1 Wm Bl 533; *Soulsby v Neving* (1808) 9 East 310, 314; *Humberstone v Dubois* (1842) 10 M & W 765. Where after the expiry of the notice to quit the landlord assigns the reversion, the assignee may sue for the double rent, as he is the landlord within the statute: *Northcott v Roche* (1921) 37 TLR 364. Such double rent is not in the nature of a penalty: *Northcott v Roche* supra, disagreeing with the opinion to the contrary expressed in *Flannagan v Shaw* [1920] 3 KB 96, CA.

6 *Booth v Macfarlane* (1831) 1 B & Ad 904.

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## **668. Claim for double value.**

If a tenant for any term of life, lives or years<sup>1</sup>, or any person who gets possession of the premises under or by collusion with such tenant, wilfully<sup>2</sup> holds over the premises after the determination of the term, and after demand made and notice in writing given for delivery of possession<sup>3</sup> by the reversioner or his lawfully authorised agent<sup>4</sup>, the person so holding over is liable to pay to the reversioner at the rate of double the yearly value of the premises<sup>5</sup>. The notice may be given either before<sup>6</sup> or after<sup>7</sup> the determination of the term, and it is not necessary that the demand and notice should be distinct<sup>8</sup>. Moreover, as a notice to quit involves in itself a demand for possession, it is a sufficient notice for this purpose<sup>9</sup>.

1 A tenant from year to year holds for a 'term' (*Doe d Hull v Wood* (1845) 14 M & W 682 at 686), and the Landlord and Tenant Act 1730 applies to such a tenant (see *Ryal v Rich* (1808) 10 East 48), but not to a weekly tenant (*Lloyd v Rosbee* (1810) 2 Camp 453) or other tenant for less than a year (*Wilkinson v Hall* (1837) 3 Bing NC 508).

2 The Landlord and Tenant Act 1730 does not apply where the holding over is under a bona fide mistake or under a fair claim of right; it must be contumacious in the sense that the tenant knows that he has no right to keep possession: *French v Elliott* [1959] 3 All ER 866, [1960] 1 WLR 40 (where there was held to be a sufficient muddle on both sides to prevent the holding over being wilful). See also *Wright v Smith* (1805) 5 Esp 203; *Soulsby v Neving* (1808) 9 East 310 at 313; *Hirst v Horn* (1840) 6 M & W 393; *Swinfen v Bacon* (1861) 6 H & N 846, Ex Ch; *Rawlinson v Marriott* (1867) 16 LT 207. Hence it does not apply where a subtenant holds over without the consent of the tenant: *Rands v Clark* (1870) 19 WR 48. Nor did it apply where the tenants held over under the provision of the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 (repealed): *Crook v Whitbread* (1919) 88 LJB 959, DC. See also *Hopper v Hart* [1922] EGD 171; *Bateson v Beswick* [1920] EGD 272. Where a tenant holds over as a statutory tenant under the Rent Act 1977, his conduct can hardly be said to be wilful so as to attract the liability for double value.

3 The tenant is not bound to give up possession until the end of the last day of the term; hence a notice under the statute to give up possession at noon on the last day is bad: *Page v More* (1850) 15 QB 684.

4 A receiver under a mortgage deed, with power to give notice to quit (*Poole v Warren* (1838) 8 Ad & El 582) and a receiver appointed by the court (*Wilkinson v Colley* (1771) 5 Burr 2694) are agents lawfully authorised to give a notice under the statute. As to receivers generally see RECEIVERS.

5 Landlord and Tenant Act 1730 s 1 (amended by the Statute Law Revision Act 1948).

6 *Cutting v Derby* (1776) 2 Wm Bl 1075; *Messenger v Armstrong* (1785) 1 Term Rep 53.

7 *Cobb v Stokes* (1807) 8 East 358. The landlord must not in the meantime have done any act recognising the continuance of the tenancy: *Cobb v Stokes* supra at 361.

8 *Wilkinson v Colley* (1771) 5 Burr 2694.

9 *Messenger v Armstrong* (1785) 1 Term Rep 53. For this purpose a notice given in the usual alternative form (see PARA 221 ante) will suffice, although, if there is doubt as to the actual time for quitting, this may prevent the holding over from being wilful: *Hirst v Horn* (1840) 6 M & W 393 at 395. A notice to quit which requires possession to be given before the determination of the term will not suffice: *Page v More* (1850) 15 QB 684; *Plummer and John v David* [1920] 1 KB 326.

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### **669. Nature of remedy.**

A claim for double value may be brought only by the landlord or the reversioner<sup>1</sup>; and he may bring it notwithstanding that he has obtained judgment for recovery of possession<sup>2</sup>. The claim may be brought in the county court<sup>3</sup> or in the High Court, but double value cannot be distrained for<sup>4</sup>. The double value is reckoned from the determination of the tenancy, if the notice was given before the determination<sup>5</sup>, and from the giving of the notice, if given afterwards<sup>6</sup>; and is calculated on the yearly value of the premises and not also on the value of incidental advantages<sup>7</sup>. If the landlord accepts a single rent for the period covered by his claim to double value, it is a question of fact whether he has waived the claim, or whether he takes the amount of the single rent in part satisfaction of it<sup>8</sup>. This principle can, however, only apply as a common law election between rights and so it was not applicable where the rent was paid while both parties considered the notice to quit invalid<sup>9</sup>.

1 *Harcourt v Wyman* (1849) 3 Exch 817. An assignee of the reversion assigned after expiry of a notice to quit given to the assignor is entitled to sue (*Northcott v Roche* (1921) 37 TLR 364), but a claim for double value may not be brought by a tenant under a future lease to commence after the determination of the first lease, as such future lease does not pass the reversion (*Blatchford v Cole* (1858) 5 CBNS 514). A claim for double value may

not be brought by the administrator of the landlord's executor until he has taken out administration de bonis non to the landlord, notwithstanding that the tenant has attorned to him: *Tingrey v Brown* (1798) 1 Bos & P 310.

2 As the claim is for double value, not double rent, it does not recognise a tenancy in the tenant: *Soulsby v Neving* (1808) 9 East 310. The headnote to *Wright v Smith* (1805) 5 Esp 203 to the contrary appears to be erroneous.

3 County Courts Act 1984 s 15(1) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule Pt I). See also *Wickham v Lee* (1848) 12 QB 521.

4 *Timmins v Rowllison* (1765) 1 Wm Bl 533 at 535.

5 *Soulsby v Neving* (1808) 9 East 310.

6 *Cobb v Stokes* (1807) 8 East 358 (where it was also held that single rent could not be recovered for the interval between the expiration of the term and the notice).

7 Eg the value of the supply of steam power incident to a tenancy of room in a factory: *Robinson v Learoyd* (1840) 7 M & W 48.

8 *Ryal v Rich* (1808) 10 East 48 at 52; and see *Doe d Cheny v Batten* (1775) 1 Cowp 243 at 246; cf *Rawlinson v Marriott* (1867) 16 LT 207.

9 *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, [1999] 2 All ER 791, CA.

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## 15. BUSINESS AND AGRICULTURAL TENANCIES

### (1) PROTECTION OF BUSINESS TENANCIES

#### (i) Scope of Protection; Continuation and Termination of Tenancies

##### A. INTRODUCTION

##### 701. The protection and the legislation.

Tenants of business premises were afforded a measure of security of tenure under the Landlord and Tenant Act 1927<sup>1</sup>, but it was principally only those tenants who could demonstrate that they had 'adherent goodwill' (so that compensation at the end of their tenancy would be inadequate) who could obtain the renewal of their leases under that Act. The first protection afforded generally to business tenants was conferred as a temporary measure by the Leasehold Property (Temporary Provisions) Act 1951<sup>2</sup> whilst a more permanent code was prepared for their protection. That code was embodied in Part II of the Landlord and Tenant Act 1954<sup>3</sup> which, although now extensively amended<sup>4</sup>, continues to apply and which came into operation on 1 October 1954<sup>5</sup>. The protection given to business tenants takes the form of continuing the tenancy automatically until it is terminated by certain steps being taken<sup>6</sup>, and by giving the tenant a right to apply for a new tenancy<sup>7</sup>. A tenant who is refused a new tenancy on certain grounds is enabled to obtain a limited amount of compensation<sup>8</sup>.

The legislation applies, with some modifications, where an interest of the Crown is involved<sup>9</sup>, and there are modifications also for special cases<sup>10</sup>, as where the public interest is involved.



Substantial reform of the 1954 legislation was proposed by the Law Commission in 1992<sup>11</sup>. Government consultation exercises were carried out in 1996 and 2001 and proposals for reform by means of a regulatory reform order<sup>12</sup> were laid before Parliament on 22 July 2002. Following concerns expressed by the relevant House of Lords committee as to the proposals for contracting out of the statutory protection<sup>13</sup>, a fresh government consultation exercise was carried out. The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 was then made on 1 December 2003, to come into effect on 1 June 2004<sup>14</sup>. That order makes a number of amendments to the 1954 Act and in particular:

- 1361 (1) permits the landlord and tenant to contract out of the statutory protection without having to obtain the agreement of the court, provided that the prescribed notice requirements are satisfied<sup>15</sup>;
- 1362 (2) makes changes to the procedure for continuation, termination and renewal of tenancies<sup>16</sup>; and
- 1363 (3) allows the tenant as well as the landlord to apply for the determination of an interim rent<sup>17</sup>.

1 See the Landlord and Tenant Act 1927 s 5 (repealed).

2 The Leasehold Property (Temporary Provisions) Act 1951 Pt II (ss 10-15) (repealed), as extended by the Leasehold Property Act and Long Leases (Scotland) Act Extension Act 1953 (repealed), enabled a tenant of shop premises to apply for a new tenancy at the end of a subsisting tenancy.

3 The Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended). The Acts mentioned in note 2 *supra* were repealed by the Landlord and Tenant Act 1954 ss 45, 68(1), Sch 7. Transitional provisions were enacted (see s 68(2), Sch 9 paras 8-11), but these are now spent, save that, where immediately before 1 October 1954 a tenancy was being continued by the Leasehold Property (Temporary Provisions) Act 1951 s 11(3) (repealed), the tenancy did not come to an end and the continuance by virtue of the Landlord and Tenant Act 1954 s 24 (now as amended) applied: Sch 9 para 11. The prohibition on taking further steps in proceedings pending on 1 October 1954 for a new lease (see Sch 9 para 8) did not extend to an appeal: see *Etam Ltd v Forte* [1955] 1 QB 239, [1954] 3 All ER 311, CA.

4 Prior to 1 June 2004, the main amendments since 1954 were those made by the Law of Property Act 1969 which came into force on 1 January 1970 (see s 31(2)) and the Landlord and Tenant (Licensed Premises) Act 1990 taking effect on different dates according to circumstances (see PARA 775 post). On 1 June 2004, however, the extensive amendments made by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see reg 1(3).

5 See the Landlord and Tenant Act 1954 s 70(2). The Act does not extend to Scotland or Northern Ireland: s 70(3).

6 See PARA 713 post.

7 See PARA 720 post.

8 See PARAS 758-761 post. In the case of a compulsory acquisition, if the amount of the compensation which would have been payable under the Landlord and Tenant Act 1954 s 37 (as amended) (see PARA 759 post) if (1) the tenancy had come to an end in circumstances giving rise to compensation thereunder; and (2) the date at which the acquiring authority obtained possession had been the termination of the current tenancy, exceeds the amount of the compensation payable under the Lands Clauses Consolidation Act 1845 s 121 (as amended) or the Compulsory Purchase Act 1965 s 20 (as amended) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 698 et seq) in the case of a tenancy to which the Landlord and Tenant Act 1954 Pt II (as amended) applies, that compensation must be increased by the amount of the excess; and nothing in s 24 (as amended) (continuation of tenancies: see PARA 713 post) affects the operation of the Lands Clauses Consolidation Act 1845 s 121 (as amended): Landlord and Tenant Act 1954 s 39(2), (3) (amended by the Land Compensation Act 1973 ss 47, 86, Sch 3). See also the Land Compensation Act 1973 s 47(1); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 806.

9 See the Landlord and Tenant Act 1954 s 56(1); and PARA 768 post.

10 See PARA 769 et seq post.

11 See *Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II* (Law Com no 208, HC 224) (1992).

12 See an order under the Regulatory Reform Act 2001.

13 See the House of Lords Select Committee on Delegated Powers and Regulatory Reform (Fourth Report, Session 2002-03), HL Paper 22). See also the House of Commons Regulatory Reform Committee (Second Report, Session 2002-03, HC 182).

14 See note 4 *supra*.

15 See PARA 711 *post*.

16 See PARAS 713 *et seq*, 734 *post*.

17 See PARA 730 *post*.

## UPDATE

### 701 The protection and the legislation

NOTE 12--Regulatory Reform Act 2001 replaced: see now the Legislative and Regulatory Reform Act 2006 Pt 1 (ss 1-20).

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### 702. Forms of notice.

For most steps which a landlord or tenant may take<sup>1</sup> forms of notice<sup>2</sup> are prescribed by regulations<sup>3</sup> made by the Secretary of State as respects England<sup>4</sup> and by the National Assembly for Wales or the relevant Welsh minister<sup>5</sup> as respects Wales<sup>6</sup>. Where a form is prescribed, it or a form which is substantially to the like effect must be used<sup>7</sup>; and whether wording is substantially to the like effect as the prescribed form will depend upon a comparison of the words used with the corresponding words in the prescribed form to see whether in their ordinary significance the words compared bear the same meaning<sup>8</sup>. It is immaterial whether any discrepancy between the form used and the form prescribed has actually misled the person to whom the form was addressed<sup>9</sup>, although the omission of a prescribed note which is irrelevant will not avoid the form, as the irrelevant matter would have been of no legal effect in that particular case<sup>10</sup>.

To be valid the notice must give the person to whom it is addressed the proper information which will enable him to deal in a proper way with the situation referred to in the notice<sup>11</sup>. Accompanying letters have been held sufficient to save notices by curing omissions or ambiguities<sup>12</sup> and obsolete forms of notice held to be valid where the use of the previously prescribed form did not mislead<sup>13</sup>. In general terms a liberal approach is applied by the courts to the question whether a notice complies with the regulations<sup>14</sup>. The omission of a prescribed warning to the tenant, however, renders a notice invalid<sup>15</sup>.

1 See under the Landlord and Tenant Act 1954.

2 Where the form of a notice to be served on persons of any description is prescribed for any of the purposes of the Landlord and Tenant Act 1954, the form to be prescribed must include such an explanation of the relevant provisions of that Act as appears to the Secretary of State or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister requisite for informing persons of that description of their rights and obligations under those provisions: s 66(2) (s 66(1), (2) amended by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 1974, SI 1974/1896, arts 2, 3(2); and see note 5 *infra*). Different forms may be prescribed for the purposes of the operation of any provision of the Landlord and Tenant Act 1954 in relation to different cases: s 66(3).

3 The forms are currently prescribed by the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, which came into force on 1 June 2004: reg 1.

4 See *ibid* preamble. As to the Secretary of State see PARA 27 note 3 *ante*.

5 The functions of the Secretary of State under the Landlord and Tenant Act 1954 are, so far as exercisable in relation to Wales, transferred to the Assembly or to the relevant Welsh minister except that in relation to ss 57(1)-(6), 58 (as amended) (see PARA 769 *et seq post*) the certification function is exercisable concurrently with any Minister of the Crown by whom it is exercisable: see the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended); and see further PARA 27 note 4 *ante*.

6 The regulations must be made by statutory instrument subject, in the case of regulations made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Landlord and Tenant Act 1954 s 66(1), (5) (as amended: see note 2 *supra*).

7 Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, reg 2(2).

8 *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA, per Stephenson LJ. Use of the original prescribed form of notice after it had been replaced by a new form was still use of a form substantially to the like effect as that which was prescribed, because the principal difference between the two was the replacement of the word 'received' by the word 'given', and in the context in which they were used both words have the same meaning: *Sun Alliance and London Assurance Co Ltd v Hayman* *supra*; *Snook v Schofield* [1975] 1 EGLR 69, (1975) 234 Estates Gazette 197, CA. See also *Morrow v Nadeem* [1987] 1 All ER 237, [1986] 1 WLR 1381, CA, approving *Barclays Bank Ltd v Ascott* [1961] 1 All ER 782, [1961] 1 WLR 717; *Tegerdine v Brooks* (1977) 36 P & CR 261, CA.

9 In *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA, this point was conceded, but it was the unanimous view of the court. In *Bond v Graham* [1975] 2 EGLR 63, (1975) 236 Estates Gazette 563, Shaw J appears to have attached importance to whether the tenant to whom the form was addressed 'could have been misled and was misled' by the discrepancy in the form used. Examples of deviations from the prescribed forms which have been held not to vitiate the document are *Falcon Pines Ltd v Stanhope Gate Property Co Ltd* (1967) 204 Estates Gazette 1243 (omission to fill in the space for the date on which the form was signed); *Bond v Graham* *supra* (obsolete rateable value limit for county court's jurisdiction included in the notes to the form). Cf *British Railways Board v Aja Smith Transport Ltd* [1981] 2 EGLR 69, (1981) 259 Estates Gazette 766. If, however, the form does not comply with the requirements of the Landlord and Tenant Act 1954 itself, that will be fatal, eg where it fails to state whether the landlord will oppose the grant of a new tenancy (*Barclays Bank Ltd v Ascott* [1961] 1 All ER 782, [1961] 1 WLR 717), although this defect in the form is cured where by specifying a ground of opposition the landlord makes it clear that he will oppose renewal of the tenancy (*Lewis v MTC (Cars) Ltd* [1974] 3 All ER 423, [1974] 1 WLR 1475; *affd* on other grounds without this question being reviewed [1975] 1 All ER 874, [1975] 1 WLR 457, CA) and, where the prescribed form itself does not comply with the statute, it has been held that, because the non-compliance meant that by using the form the landlord only was disadvantaged, he could waive a requirement imposed only for his benefit and so could validly use the form (*Baglarbasi v Deedmethod Ltd* [1991] 2 EGLR 71; *Bridgers and Hamptons Residential v Stanford* (1991) 63 P & CR 18, [1991] 2 EGLR 265, CA). A notice is also invalid where it is addressed to one of several joint tenants (so that it is not 'given' to 'the tenant') (*Norton v Charles Deane Productions Ltd* (1969) 214 Estates Gazette 559), although this defect can be waived by the intended addressees (*Norton v Charles Deane Productions Ltd* *supra*). See also PARA 716 *post*.

10 *Tegerdine v Brooks* (1977) 36 P & CR 261, CA.

11 *Morrow v Nadeem* [1987] 1 All ER 237, [1986] 1 WLR 1381, CA (where notice void for misnaming the landlord), approving *Barclays Bank Ltd v Ascott* [1961] 1 All ER 782, [1961] 1 WLR 717; *Tegerdine v Brooks* (1977) 36 P & CR 261, CA.

12 *Stidolph v American School in London Educational Trust Ltd* (1969) 20 P & CR 802, 113 Sol Jo 689, CA.

13 *Raisbury v Bass* (1961) 105 Sol Jo 1009 (pre-1957 form held to be substantially to the like effect as form prescribed by regulations made in 1957); *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA; *Snook v Schofield* [1975] 1 EGLR 69, (1975) 234 Estates Gazette 197, CA (1957

forms used without an amendment made in 1969); *Morris v Patel* [1987] 1 EGLR 75, CA (1957 form with 1969 amendment used when 1983 regulations prescribed a new form).

14 See eg *Germax Securities v Spiegel* (1978) 37 P & CR 204, CA (incorrect date); *Falcon Pipes Ltd v Stanhope Gate Property Co Ltd* (1967) 204 Estates Gazette 1243 (undated notice); and other cases cited in notes 9, 12-13 supra.

15 See *Sabella Ltd v Montgomery* (1997) 77 P & CR 431, [1998] 1 EGLR 65, CA (omission of prescribed warning to tenant to act quickly).

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### 703. Service of notices etc.

Any notice, request, demand or other instrument given or made<sup>1</sup> under the Landlord and Tenant Acts 1927 and 1954 must be in writing<sup>2</sup>. It may be served either personally or by leaving it at the last-known place of abode in England or Wales of the person on whom it is to be served<sup>3</sup>, or by being sent by registered post or the recorded delivery service addressed to him there<sup>4</sup>. If the person to be served is a local or public authority, or a statutory<sup>5</sup> or public utility<sup>6</sup> company, service may be effected by sending the notice by registered post or the recorded delivery service to the secretary or other proper officer at the principal office of the authority or company; and a notice to be served on a landlord may be served on his duly authorised agent<sup>7</sup>.

The prescribed permitted modes of service are not exhaustive, and it will be sufficient if a notice is sent and is in fact received, whether one of the statutory methods of service is employed or not<sup>8</sup>. Notices which have to be 'given' and requests 'made' under the Landlord and Tenant Act 1954 are given or made when served (actually or constructively) in accordance with these provisions.

Unless or until a tenant<sup>9</sup> has received notice that the person previously entitled to the rents and profits of the holding ('the original landlord') has ceased to be so entitled, and also notice of the name and address of the person who has become entitled to the rents and profits, any claim, notice, request, demand or other instrument served by the tenant upon the original landlord is deemed to have been served upon or delivered to the landlord of the holding<sup>10</sup>.

1 The Landlord and Tenant Act 1954 uses the verb 'give' (see s 25(1)-(3), s 26(2) proviso, s 26(3) ('made in the prescribed form given to the landlord'), s 26(4), (6) (as amended), s 27(1), (2) (as amended)), except in s 66 (as amended) and in the provisions referring to tenants' requests for new tenancies, where the verb 'make' is used (see ss 26(1)-(5), 29(3) (as amended)). The Interpretation Act 1978 s 7, re-enacting the Interpretation Act 1889 s 26 (repealed), assimilates 'giving', 'sending' and other such expressions to serving, and clearly notices are 'given' and requests are 'made' for the purposes of the Landlord and Tenant Act 1954 when the relevant document is actually or constructively served. See *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA, where the Interpretation Act 1889 was not discussed but 'give' and 'receive' were held to be synonymous in that they described the same event from the viewpoint of the originator and the addressee of a notice respectively. This decision was followed in *Snook v Schofield* [1975] 1 EGLR 69, (1975) 234 Estates Gazette 197, CA.

2 See the Landlord and Tenant Act 1927 s 23(1) (s 23 applied by the Landlord and Tenant Act 1954 s 66(4)).

3 To leave a notice at the furthest place to which a member of the public or a postman could go constitutes service 'at' the place of abode: *Trustees of Henry Smith's Charity v Kyriacou* (1990) 22 HLR 66, [1989] 2 EGLR 110, CA.

4 Landlord and Tenant Act 1927 s 23(1) (as applied: see note 2 supra); Recorded Delivery Service Act 1962 s 1(1). In the application of the Landlord and Tenant Act 1927 s 23 to the Landlord and Tenant Act 1954 Pt II (s 23-46) (as amended) 'place of abode' includes the business address of the person to be served: see *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396, [1959] 3 All ER 901; *Price v West London Investment Building Society* [1964] 2 All ER 318, [1964] 1 WLR 616, CA.

Where notice of the termination of a lease is served by a method authorised by the Landlord and Tenant Act 1927 s 23 (as so applied), the date of service is the date when the server entrusts the notice to the postal service for recorded delivery, as that provides certainty for those who are required to serve the documents; there is no indication in s 23 that there has to be some attempted or actual delivery: *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 3 All ER 202, [2004] 1 WLR 320, applying *Sun Alliance and London Assurance Co Ltd v Hayman* [1975] 1 All ER 248, [1975] 1 WLR 177, CA, *Chiswell v Griffon Land and Estates Ltd* [1975] 2 All ER 665, [1975] 1 WLR 1118, CA, *Galinski v McHugh* (1988) 57 P & CR 359, [1989] 1 EGLR 109, CA, *Railtrack plc v Gojra* [1998] 1 EGLR 63, [1998] 08 EG 158, CA and *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2002] 2 EGLR 29, [2002] All ER (D) 305 (Apr); approving *Italica Holdings SA v Bayadea* [1985] 1 EGLR 70, 273 Estates Gazette 888, *Commercial Union Life Assurance Co Ltd v Moustafa* [1999] 2 EGLR 44, [1999] 24 EG 155 and *Beanby Estates v Egg Stores (Stamford Hill)* [2003] EWHC 1252 (Ch), [2004] 3 All ER 184, [2003] All ER (D) 122 (May) and disapproving *Lex Service plc v Johns* (1989) 59 P & CR 427, [1990] 1 EGLR 92, CA. Moreover, it is neither unreasonable nor disproportionate to achieve certainty for landlords and tenants alike by interpreting the Landlord and Tenant Act 1927 s 23 in this way, and in excluding the applicability of the Interpretation Act 1978 s 7 (which provides that service is effected when the notice is delivered); nor is such a construction incompatible with the application of the Human Rights Act 1998: *CA Webber (Transport) Ltd v Railtrack plc* supra, applying Application 44277/98 *Stretch v United Kingdom* [2004] LGR 401, [2003] All ER (D) 306 (Jun), ECtHR and *Wilson v First County Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, [2003] 4 All ER 97 (a consumer credit case).

5 For the meaning of 'statutory company' see PARA 489 note 2 ante.

6 For the meaning of 'public utility company' see PARA 489 note 3 ante.

7 Landlord and Tenant Act 1927 s 23(1) (as applied: see note 2 supra); Recorded Delivery Service Act 1962 s 1(1).

8 *Stylo Shoes Ltd v Prices Tailors Ltd* [1960] Ch 396, [1959] 3 All ER 901. Furthermore, valid postal service may be effected even though the intended recipient does not know of the notice and is not at fault in not knowing about it, since the Landlord and Tenant Act 1927 s 23(1) does not contain any exception for letters which are returned by the postal operator (cf the Law of Property Act 1925 s 196(4) (as amended): see PARA 621 ante); *Blunden v Frogmore Investments Ltd* [2002] EWCA Civ 573, [2003] 2 P & CR 84, [2002] All ER (D) 305 (Apr).

9 For these purposes, unless the context otherwise requires, 'tenant' means any person entitled in possession to the holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise: Landlord and Tenant Act 1927 s 25(1).

10 Ibid s 23(2) (as applied: see note 2 supra). For the meaning of 'landlord' see PARA 486 note 3 ante.

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#### **704. Duties of tenants and landlords to give information to each other; in general.**

Where a person who is an owner of an interest in reversion expectant, whether immediately or not, on a tenancy<sup>1</sup> of any business premises<sup>2</sup> has, on or after 1 June 2004<sup>3</sup>, served on the tenant<sup>4</sup> a notice in the prescribed form<sup>5</sup> requiring him to do so, it is the duty of the tenant to give the appropriate person<sup>6</sup> in writing the specified information<sup>7</sup>. That information is:

- 1364 (1) whether the tenant occupies the premises or any part of them wholly or partly for the purposes of a business carried on by him;

- 1365 (2) whether his tenancy has effect subject to any subtenancy<sup>8</sup> on which his tenancy is immediately expectant and, if so:
- 121
- 147. (a) what premises are comprised in the subtenancy;
  - 148. (b) for what term it has effect or, if it is terminable by notice, by what notice it can be terminated;
  - 149. (c) what is the rent payable under it;
  - 150. (d) who is the subtenant;
  - 151. (e) to the best of his knowledge and belief, whether the subtenant is in occupation of the premises or of part of the premises comprised in the subtenancy and, if not, what is the subtenant's address;
  - 152. (f) whether an agreement is in force excluding in relation to the subtenancy the statutory provisions concerning the continuation and renewal of tenancies<sup>9</sup>; and
  - 153. (g) whether a notice of termination or objecting to renewal has been given<sup>10</sup>, or a request for a new tenancy has been made<sup>11</sup>, in relation to the subtenancy and, if so, details of the notice or request; and
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- 1366 (3) to the best of his knowledge and belief, the name and address of any other person who owns an interest in reversion in any part of the premises<sup>12</sup>.

Where the tenant of any business premises who is a tenant under a tenancy granted for a term of years certain exceeding one year, or granted for a term of years certain and thereafter from year to year<sup>13</sup>, has, on or after that date, served on a reversioner<sup>14</sup> or a reversioner's mortgagee in possession<sup>15</sup> a notice in the prescribed form<sup>16</sup> requiring him to do so, it is the duty of the person on whom the notice is served to give the appropriate person in writing the specified information<sup>17</sup>. That information is:

- 1367 (i) whether he is the owner of the fee simple in respect of the premises or any part of them or the mortgagee in possession of such an owner;
  - 1368 (ii) if he is not, then, to the best of his knowledge and belief:
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- 154. (A) the name and address of the person who is his or, as the case may be, his mortgagor's immediate landlord<sup>18</sup> in respect of those premises or of the part in respect of which he or his mortgagor is not the owner in fee simple;
  - 155. (B) for what term his or his mortgagor's tenancy has effect and what is the earliest date, if any, at which that tenancy is terminable by notice to quit<sup>19</sup> given by the landlord; and
  - 156. (C) whether a notice of termination or objecting to renewal has been given<sup>20</sup>, or a request for a new tenancy has been made<sup>21</sup>, in relation to the tenancy and, if so, details of the notice or request;
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- 1369 (iii) to the best of his knowledge and belief, the name and address of any other person who owns an interest in reversion in any part of the premises;
  - 1370 (iv) if he is a reversioner, whether there is a mortgagee in possession of his interest in the premises and, if so, to the best of his knowledge and belief, what is the name and address of the mortgagee<sup>22</sup>.

A duty imposed on a person by the above provisions is a duty to give the information concerned within the period of one month beginning with the date of service of the notice and, if within the period of six months beginning with the date of service of the notice that person becomes aware that any information which has been given in pursuance of the notice is not, or is no longer, correct, to give the appropriate person correct information within the period of one month beginning with the date on which he becomes aware<sup>23</sup>. These provisions do not,

however, apply to a notice served by or on the tenant more than two years before the date on which his tenancy would otherwise<sup>24</sup> come to an end by effluxion of time or could be brought to an end by notice to quit given by the landlord<sup>25</sup>.

A claim that a person has broken any duty so imposed may be made the subject of civil proceedings for breach of statutory duty<sup>26</sup>; and in any such proceedings a court may order that person to comply with that duty and may make an award of damages<sup>27</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 post.

2 For these purposes, 'business premises' means premises used wholly or partly for the purposes of a business: Landlord and Tenant Act 1954 s 40(8) (s 40 substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 23, 29(6), except in relation to a notice served before 1 June 2004). An identical definition applied in relation to notices so served: see the Landlord and Tenant Act 1954 s 40(5) (as originally enacted). For the meaning of 'business' see PARA 707 post.

3 Ie the date the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante.

4 As to service of notices see PARA 703 ante.

5 For the prescribed form of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), (3), Schs 1, 2, Form 4. Prior to 1 June 2004, the prescribed form of notice was the Landlord and Tenant Act 1954, Part II (Notices) Regulations 1983, SI 1983/133, regs 2(1), 3(1), Schs 1, 2, Form 9 (amended by SI 1989/1548 and now revoked). As to the use of the prescribed forms generally see PARA 702 ante.

6 Except as provided by the Landlord and Tenant Act 1954 s 40A (as added) (see PARA 705 post), the appropriate person for the purposes of s 40 (as substituted) and s 40A(1) (as added) is the person who served the notice under s 40(1) or (3) (as substituted): s 40(7) (as substituted: see note 2 supra).

7 Ibid s 40(1) (as substituted: see note 2 supra). Prior to 1 June 2004, the tenant was under a duty, where any person having an interest in reversion in any business premises expectant, whether immediately or not, on a tenancy of those premises, served on him a notice in the prescribed form requiring him to do so, to notify that person in writing within one month of the service of the notice: (1) whether he occupied the premises or any part of them wholly or partly for the purposes of a business carried on by him; and (2) whether his tenancy had effect subject to any subtenancy on which his tenancy was immediately expectant: see s 40(1) (as originally enacted). In a case where head (2) supra applied, the tenant was also to notify the reversioner for what term the subtenancy had effect (or, if it was terminable by notice, by what notice it could be terminated), what was the rent payable under it, who the subtenant was and, to the best of his knowledge and belief, whether the subtenant was in occupation of the premises or of part of the premises comprised in the subtenancy, and if not, what was the subtenant's address: s 40(1)(b) (as originally enacted).

8 For these purposes, 'subtenant' includes a person retaining possession of any premises by virtue of the Rent (Agriculture) Act 1976 (see PARA 1138 post) or the Rent Act 1977 (see PARA 974 et seq post) after the coming to an end of a subtenancy, and 'subtenancy' includes a right so to retain possession: Landlord and Tenant Act 1954 s 40(8) (as substituted: see note 2 supra). Prior to 1 June 2004, the definition of 'subtenant' for the purposes of s 40 (as originally enacted) did not include a person retaining possession of any premises by virtue of the Rent (Agriculture) Act 1976.

9 Ie the Landlord and Tenant Act 1954 ss 24-28 (as amended): see PARA 713 et seq post.

10 Ie under ibid s 25 (as amended) or s 26(6): see PARAS 716, 718 post.

11 Ie under ibid s 26 (as amended): see PARA 718 post.

12 Ibid s 40(2) (as substituted: see note 2 supra).

13 Ie such a tenancy as is mentioned in ibid s 26(1) (as amended): see PARA 718 post.

14 For these purposes, 'reversioner' means any person having an interest in the premises, being an interest in reversion expectant (whether immediately or not) on the tenancy: ibid s 40(8) (as substituted: see note 2 supra).

15 For these purposes, 'mortgagee in possession' includes a receiver appointed by the mortgagee or by the court who is in receipt of the rents and profits, and 'his mortgageor' is to be construed accordingly; and

'reversioner's mortgagee in possession' means any person being a mortgagee in possession in respect of such an interest: *ibid* s 40(8) (as substituted: see note 2 *supra*). 'Mortgage' includes a charge or lien and 'mortgagor' and 'mortgagee' are to be construed accordingly: s 69(1). Prior to 1 June 2004, the expressions 'mortgagee in possession' and 'his mortgagor' were defined in similar terms: see s 40(5) (as originally enacted).

16 For the prescribed form of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), (3), Schs 1, 2, Form 5. Prior to 1 June 2004, the prescribed form of notice was the Landlord and Tenant Act 1954, Part II (Notices) Regulations 1983 Schs 1, 2, Forms 10, 11 (amended by SI 1989/1548 and now revoked).

17 Landlord and Tenant Act 1954 s 40(3) (as substituted: see note 2 *supra*). Prior to 1 June 2004, it was the duty of any person (1) having an interest in the premises, being an interest in reversion expectant, whether immediately or not, on the tenant's; or (2) being a mortgagee in possession in respect of such an interest in reversion, where the tenant of any business premises served on him a notice in the prescribed form requiring him to do so, to notify the tenant in writing within one month after service of the notice: (a) whether he was the owner of the fee simple in respect of those premises or any part of them or the mortgagee in possession of such an owner; and, if not (b) to the best of his knowledge and belief, the name and address of the person who was his or, as the case might be, his mortgagor's immediate landlord in respect of those premises or of the part in respect of which he or his mortgagor was not the owner in fee simple: s 40(2), (3) (as originally enacted). The information which any such person as is mentioned in head (1) *supra* was required to give included information whether there was a mortgagee in possession of his interest in the premises and, if so, what was the name and address of the mortgagee: s 40(3) (as originally enacted). In a case where head (b) *supra* applied, the reversioner or mortgagee in possession was also to notify the tenant for what term his or his mortgagor's tenancy had effect and what was the earliest date, if any, at which that tenancy was terminable by notice to quit given by the landlord: s 40(2), (4) (as originally enacted).

18 For the meaning of 'landlord' see PARA 715 *post*.

19 For these purposes, 'notice to quit' means a notice to terminate a tenancy, whether a periodical tenancy or a tenancy for a term of years certain, given in accordance with the provisions, whether express or implied, of that tenancy: Landlord and Tenant Act 1954 s 69(1). For the meaning of 'term of years certain' see PARA 710 note 3 *post*.

20 See note 10 *supra*.

21 See note 11 *supra*.

22 Landlord and Tenant Act 1954 s 40(4) (as substituted: see note 2 *supra*).

23 *Ibid* s 40(5) (as substituted: see note 2 *supra*).

24 *Ie* apart from the Landlord and Tenant Act 1954.

25 *Ibid* s 40(6) (as substituted: see note 2 *supra*). A similar exclusion applied prior to 1 June 2004: see s 40(4) (as originally enacted).

26 As to breach of statutory duty see generally TORT.

27 Landlord and Tenant Act 1954 s 40B (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 23, 29(6), except in relation to a notice served before 1 June 2004 (see PARA 701 *ante*)). No such specific provision was made prior to that date.

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## **705. Duties to give information in transfer cases where notice is served on or after 1 June 2004.**



If a person on whom a notice requiring the specified information<sup>1</sup> has been served has transferred his interest in the premises or any part of them to some other person and gives the appropriate person<sup>2</sup> notice in writing<sup>3</sup> of the transfer of his interest and of the name and address of the person to whom he transferred it, then on giving the notice he ceases in relation to the premises or, as the case may be, to that part to be under any duty imposed by the statutory provisions<sup>4</sup> regarding the specified information<sup>5</sup>. If:

1371 (1) the person who served the notice requiring the specified information<sup>6</sup> ('the transferor') has transferred his interest in the premises to some other person ('the transferee'); and

1372 (2) the transferor or the transferee has given the person required to give the information notice in writing<sup>7</sup> of the transfer and of the transferee's name and address,

the appropriate person for the statutory purposes<sup>8</sup> is the transferee<sup>9</sup>.

If a transfer such as is mentioned in head (1) above has taken place but neither the transferor nor the transferee has given a notice such as is mentioned in head (2) above, any duty imposed by the statutory provisions regarding the specified information<sup>10</sup> may be performed by giving the information either to the transferor or to the transferee<sup>11</sup>.

1    Ie a notice under the Landlord and Tenant Act 1954 s 40(1) or (3) (as substituted): see PARA 704 ante.

2    For the meaning of 'the appropriate person' see PARA 704 note 6 ante. See also, however, the text and notes 6-9 infra.

3    No form of notice is prescribed for these purposes.

4    Ie imposed by the Landlord and Tenant Act 1954 s 40 (as substituted): see PARA 704 ante.

5    Ibid s 40A(1) (s 40A added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 24, 29(6), except in relation to a notice served before 1 June 2004 (see PARA 701 ante)).

6    Ie the notice under the Landlord and Tenant Act 1954 s 40(1) or (3) (as substituted): see PARA 704 ante.

7    See note 3 supra.

8    Ie for the purposes of the Landlord and Tenant Act 1954 ss 40, 40A(1) (as respectively substituted and added).

9    Ibid s 40A(2) (as added: see note 5 supra).

10   See note 4 supra.

11   Landlord and Tenant Act 1954 s 40A(3) (as added: see note 5 supra).

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## ***B. TENANCIES PROTECTED***

### **706. Tenancies to which the statutory protection applies.**

Part II of the Landlord and Tenant Act 1954<sup>1</sup> applies to any tenancy<sup>2</sup> where the property comprised in the tenancy is or includes premises<sup>3</sup> which are occupied<sup>4</sup> by the tenant and are so occupied for the purposes of a business<sup>5</sup> carried on by him<sup>6</sup> or for those and other purposes<sup>7</sup>. Occupation or the carrying on of a business:

- 1373 (1) by a company in which the tenant has a controlling interest<sup>8</sup>; or
- 1374 (2) where the tenant is a company, by a person with a controlling interest in the company,

is, with effect from 1 June 2004<sup>9</sup>, to be treated for these purposes as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant<sup>10</sup>; and accordingly references, however expressed, in Part II of the 1954 Act to the business of, or to use, occupation or enjoyment by, the tenant are to be construed as including references to the business of, or to use, occupation or enjoyment by, a company falling within head (1) above or a person falling within head (2) above<sup>11</sup>.

A property company, although carrying on the business of letting flats, will not be in occupation of a block of flats sublet by it<sup>12</sup>; but a tenant may be in occupation of premises for these purposes notwithstanding that he has permitted another to use the premises or even sublet to that other person, provided that the tenant himself retains a sufficient degree of control over the premises<sup>13</sup>.

Whether a tenant does retain sufficient control is a question of fact<sup>14</sup> to be decided by reference to the nature of the premises in question<sup>15</sup>. Where events have occurred over which the tenant had no control and which have led the tenant to absent himself from the premises, he will still be deemed to occupy the premises if he has continued to exert and claim his right to business occupancy<sup>16</sup>; but, if for reasons of business convenience or other cause<sup>17</sup> which is not involuntary the tenant ceases to trade, it again becomes a question of fact whether he is still in sufficient occupation<sup>18</sup>. If a break in the tenant's occupation occurs at a time when the tenancy is being continued by statute<sup>19</sup> or alternatively an application to the court is pending<sup>20</sup>, then such a break determines the statutory protection<sup>21</sup>. Thus, for the statutory provisions to apply to a tenancy it is not necessary that the whole of the property comprised in the tenancy should be used for business purposes; but the tenant's right to a new tenancy<sup>22</sup> is confined to the holding<sup>23</sup>, and the amount of compensation to which he may be entitled is measured with reference to the rateable value of the holding<sup>24</sup>, wherever that is possible<sup>25</sup>.

Where the business in question is not being carried on by the tenant in or from the premises, in order that it can be said that the tenant occupies the premises for the purposes of his business it is necessary that he occupy the premises, whether by himself or by his employees, for a purpose which is necessary to the furtherance of the business, as opposed to being merely for the convenience of the business<sup>26</sup>.

If the terms<sup>27</sup> of the tenancy include a prohibition, however expressed, against use for business purposes extending to the whole of the property and the tenant is carrying on a business in all or any part of the property in breach of that prohibition, the statutory protection does not apply to the tenancy unless the immediate landlord<sup>28</sup> or his predecessor in title has consented<sup>29</sup> to the breach or the immediate landlord has acquiesced<sup>30</sup> in it<sup>31</sup>.

1 le the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante; the text and notes 2-31 infra; and PARA 707 et seq post.

2 For these purposes, 'tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or in pursuance of any enactment, including the Landlord and Tenant Act 1954, but does not include a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his mortgagee, and references to the granting of a tenancy and to demised property are to be construed accordingly: s 69(1). The statutory protection extends to a tenancy by estoppel: *Bell v General Accident Fire and Life Assurance Corpn*

*Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA. A licensee is not protected (*Wroe (t/a Telepower) v Exmos Cover Ltd* [2000] 1 EGLR 66, [2000] All ER (D) 143, CA; and see *Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304, [2006] 1 EGLR 27, [2005] All ER (D) 112 (Nov) (permission to erect and maintain advertising hoardings at 13 sites created a licence, not a tenancy, of the sites)). A tenancy at will is outside the Act (*Wheeler v Mercer* [1957] AC 416, [1956] 3 All ER 631, HL (where there was an oral agreement only); *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368 (tenant holding over after succession of 'contracted out' leases)). See also *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209, [1975] 3 All ER 234, CA, and *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, [1970] 3 All ER 143 (where there were written agreements for a tenancy at will). An unlawful subtenant will be protected upon the expiry of the superior tenancy (when it will also be too late to forfeit that head tenancy and thereby to determine the subtenancy): see *D'Silva v Lister House Development Ltd* [1971] Ch 17, [1970] 1 All ER 858, disapproving *Earl of Radnor v Lovibond & Co Ltd* (1958) 108 L Jo 204. For the meaning of 'mortgage', 'mortgagor' and 'mortgagee' see PARA 704 note 15 ante.

Where a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post), after the term date of the lease the Landlord and Tenant Act 1954 Pt II (as amended) does not apply to any sublease directly or indirectly derived out of it: see the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post.

A statutory tenancy decontrolled under the Rent Act 1957 (repealed) to which the Landlord and Tenant Act 1954 Pt II (as amended) would have applied but for s 43(1)(c) (repealed) was, if the statutory tenancy had been a tenancy within the 1954 Act, deemed to be within Pt II (as amended): Rent Act 1957 s 11, Sch 4 para 11 (repealed). See also PARA 713 note 19 post.

3 In *Bracey v Read* [1963] Ch 88, [1962] 3 All ER 472, it was held that 'premises' was not to be construed in the restricted sense of buildings or structures, but included any kind of property in respect of which a lease might be granted, so that gallops for training racehorses were premises. A mere right of way is not premises for this purpose (*Land Reclamation Co Ltd v Basildon District Council* [1979] 2 All ER 993, [1979] 1 WLR 767, CA); nor are concrete bases for advertising hoardings (*Clear Channel UK Ltd v Manchester City Council* [2005] EWCA Civ 1304, [2006] 1 EGLR 27, [2005] All ER (D) 112 (Nov)). An incorporeal right, such as the right to use parking spaces, may, however, constitute 'premises' for these purposes and is capable of being occupied within the meaning of the Landlord and Tenant Act 1954 s 23(1): *Pointon York Group plc v Poulton* [2006] 29 EG 153 (CS), [2006] All ER (D) 175 (Jul).

4 The Landlord and Tenant Act 1954 s 23(1) speaks of occupation and not of possession. In order to 'occupy' the premises, for the purposes of s 23 (as amended), a tenant need not be physically present in the premises if he is using them in some other way as an incident in the ordinary course or conduct of business life, provided that the premises are occupied by no other business occupier and are not used for any non-business purpose: *Pointon York Group plc v Poulton* [2006] 29 EG 153 (CS), [2006] All ER (D) 175 (Jul). For the meaning of 'occupied' prior to the amendments made with effect from 1 June 2004 (see the text and notes 8-11 infra) see *Lee-Verhulst (Investments) Ltd v Harwood Trust* [1973] QB 204, [1972] 3 All ER 619, CA (where the proprietor of furnished apartments was held to have retained a sufficient degree of control over the premises to have retained occupation for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended) regardless of whether the users of the apartments were subtenants or licensees); and see *Linden v Department of Health and Social Security* [1986] 1 All ER 691, [1986] 1 WLR 164 (whether it was suggested that the test was the need for an active manager); *Hancock and Willis v GMS Syndicate Ltd* (1982) 265 Estates Gazette 473, CA (threat of continuity broken by grant of exclusive licence, tenants retaining only the use of a wine cellar at the premises); *Trans-Britannia Properties Ltd v Darby Properties Ltd* [1986] 1 EGLR 151, CA (insufficient control retained by tenants over lock-up garages which they sublet for the tenants themselves still to be regarded as in occupation for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended)). Regular horticultural work on an open space which a local authority tenant permitted members of the public to use for exercise and recreation was, however, held to be sufficient (*Wandsworth London Borough Council v Singh* (1991) 62 P & CR 219, [1991] 2 EGLR 75, CA); as was the active management of premises sublet in units for light industrial use (*William Boyer and Sons Ltd v Adams* (1975) 32 P & CR 89, CA). See also *Teasdale v Walker* [1958] 3 All ER 307, [1958] 1 WLR 1076, CA (where the tenant entered into a sham transaction by which an 'employee' ran the business, so that the tenant was no longer in occupation of the premises for the purposes of his business, and the Landlord and Tenant Act 1954 ceased to apply). See further *Jones v Christy* (1963) 107 Sol Jo 374, CA and *J Reid (D and K) Co Ltd v Burdell Engineering Co Ltd* (1958) 171 Estates Gazette 281, CA (where the actual occupation at the time of the application was by licensees whose licence had been terminated). Further examples are *Linden v Department of Health and Social Security* supra (hostels); *Ross Auto Wash Ltd v Tebbitt* (1978) 250 Estates Gazette 971 (indoor market).

5 For the meaning of 'business' see PARA 707 post.

6 As to the position where the tenant is a trustee and the beneficiary carries on the business see PARA 763 post; and as to the position where the tenant is a company and the business is carried on by another company in the same group see PARA 766 post. It is sufficient that the tenant carries on business in partnership: see *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991 at 997, 998, [1974] 1 WLR 583 at 589 obiter per Goulding J. As to partnerships see further PARA 765 post.

7 Landlord and Tenant Act 1954 s 23(1). See *I and H Caplan Ltd v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247, CA; *Wang v Wei* (1975) 119 Sol Jo 492. See also *Wright v Mortimer* (1996) 28 HLR 719, 72 P & CR D36, CA (art historian carrying out 30% of the work related to his writing in a residential flat but had no photocopier or fax machine there; held that as regards the application of the 1954 Act to a tenancy, the issue was the extent to which the business purposes could be said to be more than incidental to the occupation for residential purposes. The tenant did not have other premises at which he could carry out his business, but this did not mean that his business activities were automatically more than incidental to his residential occupation).

The court will strike out the application of a tenant who is not in occupation but who applies for a new lease: *Domer v Gulf Oil (Great Britain) Ltd* (1975) 119 Sol Jo 392.

8 For the purposes of the Landlord and Tenant Act 1954 Pt II (as amended), a person has a controlling interest in a company, if, had he been a company, the other company would have been its subsidiary; and for these purposes 'company' has the meaning given by the Companies Act 1985 s 735 and 'subsidiary' has the meaning given by s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25): Landlord and Tenant Act 1954 s 46(2) (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 17(2)).

9 The date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante.

10 Landlord and Tenant Act 1954 s 23(1A) (s 23(1A), (1B) added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, arts 2, 13).

11 Landlord and Tenant Act 1954 s 23(1B) (as added: see note 10 supra).

12 *Bagettes Ltd v GP Estates Ltd* [1956] Ch 290, [1956] 1 All ER 729, CA.

13 See note 4 supra.

14 *Hancock and Willis v GMS Syndicate Ltd* (1982) 265 Estates Gazette 473, CA. The cases considered by reference to occupation and those considered by reference to whether there has been business use by the tenant, which is also a question of fact (see eg *Kent Coast Property Investments Ltd v Ward* [1990] 2 EGLR 86, CA) have often considered the same problems. See also PARA 708 post.

15 *Wandsworth London Borough Council v Singh* (1991) 62 P & CR 219, [1991] 2 EGLR 75, CA.

16 *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205, [1976] 1 WLR 533, CA (tenant forced to vacate the premises by reason of damage by fire); and see *Flairline Properties Ltd v Hassan* [1999] 1 EGLR 138, [1998] 46 LS Gaz R 38. The relevant events must relate to the premises rather than the tenant's personal circumstances. See also *Pulleng v Curran* (1980) 44 P & CR 58, CA.

17 Eg having to remedy dilapidations resulting from the landlord's breaches of covenant: *Demetriou v Robert Andrews (Estate Agencies) Ltd* (1990) 62 P & CR 536, sub nom *Demetriou v Poolaction Ltd* [1991] 1 EGLR 100, CA.

18 *I and H Caplan Ltd v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247, CA; *Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103.

19 *Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103.

20 *I and H Caplan Ltd v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247, CA (continuity held not to have been broken where the tenant ceased trading after losing at first instance, but intended to resume trading if it won its appeal, which in fact it did).

21 See note 20 supra.

22 See PARA 720 et seq post. The landlord may require the new tenancy to extend to the whole of the property comprised in the original tenancy: see PARAS 748-749 post.

23 For these purposes, 'the holding', in relation to a tenancy to which the Landlord and Tenant Act 1954 Pt II (as amended) applies, means the property comprised in the tenancy, there being excluded any part of it which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which those provisions apply: s 23(3). This is subject to s 32 (as amended) (see PARA 749 post): s 46(1) (numbered as such by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 17(1)). If part of the premises is occupied as a residence by the tenant or an employee in the business, that part will be included in the holding. As to rent-controlled property see PARA 708 post. See further *Nurse v P Currie (Dartford) Ltd* [1959] 1 All ER 497, [1959] 1 WLR 273,

CA; *Narcissi v Wolfe* [1960] Ch 10, [1959] 3 All ER 71; *Fernandez v Walding* [1968] 2 QB 606, [1968] 1 All ER 994, CA; *Poster v Slough Estates Ltd* [1969] 1 Ch 495, [1969] 3 All ER 257; *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1996] AC 329, [1995] 4 All ER 831, HL (market stalls occupied by individual stall-holders not part of the holding of the tenant of a market).

24 See *Bagettes Ltd v GP Estates Ltd* [1956] Ch 290, [1956] 1 All ER 729, CA; and PARA 759 post.

25 For the provisions where domestic premises are included for which there is no longer a rateable value see PARA 760 post.

26 *Chapman v Freeman* [1978] 3 All ER 878, [1978] 1 WLR 1298, CA (tenancy of a cottage which the tenant used to house the staff of his nearby hotel held not to be protected by the Landlord and Tenant Act 1954 Pt II (as amended)). The premises merely have to be occupied for the purposes of the tenant's business, so that the business may be carried out from other premises: see *Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd* (1979) 39 P & CR 67, [1979] 2 EGLR 65, CA. See also *Groveside Properties Ltd v Westminster Medical School* (1983) 47 P & CR 507, [1983] 2 EGLR 68, CA; *Methodist Secondary Schools Trust Deed Trustees v O'Leary* (1992) 66 P & CR 364, [1993] 1 EGLR 105, CA.

27 For these purposes, 'terms', in relation to a tenancy, includes conditions: Landlord and Tenant Act 1954 s 69(1).

28 For the meaning of 'the landlord' see PARA 715 post.

29 As to consent and the manner in which it differs from acquiescence see *Bell v Alfred Franks & Bartlet Co Ltd* [1980] 1 All ER 356, [1980] 1 WLR 340, CA.

30 'Acquiescence' is not defined for these purposes. As a continuing breach is involved, it would seem that it must be conduct giving rise to the inference that the covenant has been abrogated or estopping the landlord from enforcing it: cf *Wolfe v Hogan* [1949] 2 KB 194, [1949] 1 All ER 570, CA; *Court v Robinson* [1951] 2 KB 60 at 74, CA. Knowledge is a prerequisite of acquiescence: *Methodist Secondary Schools Trust Deed Trustees v O'Leary* [1993] 1 EGLR 105 at 109, CA. As to acquiescence in equity see EQUITY vol 16(2) (Reissue) PARA 909.

31 Landlord and Tenant Act 1954 s 23(4). A prohibition of use for a specified business or of use for any but a specified business is not within s 23 (as amended), but a prohibition against any trade, against any profession, against any employment or against any activity carried on by a body of persons, is: s 23(4). As to the position of illegal subtenants see note 2 supra.

## UPDATE

### 706 Tenancies to which the statutory protection applies

NOTE 8--Definitions of 'company' and 'subsidiary' amended: SI 2009/1941.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/B. TENANCIES PROTECTED/707. Meaning of 'business'.

#### 707. Meaning of 'business'.

'Business' includes a trade, profession or employment, and includes any activity<sup>1</sup> carried on by a body of persons, whether corporate or incorporate<sup>2</sup>. Although the business of a property company may be the letting of premises<sup>3</sup>, in order that it can be said to occupy for the purposes of its business the premises which it has sublet, it must retain control over them<sup>4</sup>, and a letting of a dwelling house to a tenant for the purpose of the tenant making a profit from subletting is not of itself a letting for business purposes<sup>5</sup>. Whether an activity which is carried on by an individual tenant<sup>6</sup> is a trade, profession or employment so as to attract the statutory protection<sup>7</sup> is a question of degree to be decided in the light of all the circumstances existing<sup>8</sup>,

so that in particular circumstances both the taking in of lodgers<sup>9</sup> and the carrying on for religious and non-profitable purposes of a Sunday School<sup>10</sup> have been held not to be business activities. Where a tenant takes a tenancy of premises for residential purposes but, while the tenancy remains contractual<sup>11</sup>, proceeds to use those premises wholly or in part for business purposes, that use for business purposes may bring the tenancy into the protection of Part II of the Landlord and Tenant Act 1954 (and therefore out of the protection of the Rent Act 1977 or the Housing Act 1988<sup>12</sup>) if the business activities are sufficiently substantial, as opposed to being merely incidental to the tenant residing in the premises<sup>13</sup>.

1 As to what constitutes a 'business activity' see PARA 790 note 5 post and the cases there cited, especially *Town Investments Ltd v Department of the Environment* [1978] AC 359, [1977] 1 All ER 813, HL; and see further notes 2, 8-10 infra. See also *Lee-Verhulst (Investments) Ltd v Harwood Trust* [1973] QB 204, [1972] 3 All ER 619, CA, where *Bagettes Ltd v GP Estates Ltd* [1956] Ch 290, [1956] 1 All ER 729, CA was distinguished. No real limitation can be placed on the words 'any activity' (see *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513 at 529, [1957] 3 All ER 563 at 572, CA (tenant was a members' tennis club) so that 'business' has a different connotation according to whether the tenant is an individual or a 'body of persons'. Cf *Hillil Property and Investment Co Ltd v Naraine Pharmacy Ltd* (1979) 39 P & CR 67, [1979] 2 EGLR 65, CA, where a more restricted approach is suggested.

2 Landlord and Tenant Act 1954 s 23(2). The board of governors of a teaching hospital 'occupied' premises used for the purposes of the hospital and carried on an activity there although accountable to the Minister of Health: *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90, [1955] 3 All ER 365, CA. The tenancy of trustees of a tennis club is within the statutory protection where the property is occupied by a body of persons (the club or its members) for an activity, ie the tennis club: *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513, [1957] 3 All ER 563, CA (tennis club was an industrial and provident society); and see *Hawkesbrook Leisure Ltd v Reece-Jones Partnership* [2003] EWHC 3333 (Ch), [2004] 2 EGLR 61, [2004] 25 EG 172 (non-profit-making company limited by guarantee and managing sports grounds was in occupation for business purposes since it intended to make a surplus and the fact that it could not distribute its profits was irrelevant). The provision by a landlord company of accommodation, equipment and staff for another corporate body may in some circumstances amount to an activity by the landlord: see *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140, [1964] 2 All ER 39, CA.

3 *Bagettes Ltd v GP Estates Ltd* [1956] Ch 290, [1956] 1 All ER 729, CA.

4 See further PARA 708 the text and note 12 post.

5 *Horford Investments Ltd v Lambert* [1976] Ch 39, [1974] 1 All ER 131, CA, per curiam. See also *Fordree v Barrell* [1931] 2 KB 257 at 263, CA, per Scrutton LJ; *Ebner v Lascelles* [1928] 2 KB 486 at 500, DC, per Charles J; *Anspach v Charlton Steam Shipping Co Ltd* [1955] 2 QB 21 at 27, [1955] 1 All ER 693 at 696, CA.

6 Ie a person, or persons, who are not a 'body of persons' corporate or incorporate.

7 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended).

8 *Lewis v Weldcrest Ltd* [1978] 3 All ER 1226, [1978] 1 WLR 1107, CA (where it was said that the cases dealing with the meaning of 'business' in covenants against the use of residential premises for business purposes were not relevant, having regard to the different purposes behind such covenants and behind the Landlord and Tenant Act 1954; but this decision should be treated with caution as *Town Investments Ltd v Department of the Environment* [1978] AC 359, [1977] 1 All ER 813, HL, was not cited).

9 *Lewis v Weldcrest Ltd* [1978] 3 All ER 1226, [1978] 1 WLR 1107, CA.

10 *Abernethie v AM and J Kleiman Ltd* [1970] 1 QB 10, [1969] 2 All ER 790, CA (part of the premises used only for one hour per week). Cf *Parkes v Westminster Roman Catholic Diocese Trustee* (1978) 36 P & CR 22, CA (intention of diocesan trustee to occupy premises as parish community centre was intention to occupy for the purposes of a business).

11 If the tenancy has become a statutory tenancy under the Rent Act 1977 (see PARA 831 post), it will not be a tenancy for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended) and, therefore, will remain within the protection of the Rent Act 1977 for so long as residential use survives, or at least for so long as residential use remains the predominant or a substantial use: see PARAS 822-823, 831 post.

12 It would seem that, where a statutory periodic tenant (see PARA 1067 post) changes the use of the premises to a mixed use involving some business use, the tenancy would be brought into the protection of the

Landlord and Tenant Act 1954 Pt II (as amended), since the tenancy would no longer be an assured tenancy: see PARA 1029 post.

13 *Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page* [1979] 1 All ER 5, [1978] 1 WLR 1329, CA (where the use of a flat also as an office was held to be sufficient to bring the tenancy within the protection of the Landlord and Tenant Act 1954 Pt II (as amended); but the licence of the landlord to a physician to use part of his flat as a consulting room, coupled only with very occasional use as such, was held not to be sufficient). See also *Gurton v Parrott* (1990) 23 HLR 418, [1991] 1 EGLR 98, CA (premises used for the purpose of breeding and kennelling dogs and also for residential purposes held not to be within the statutory protection of business tenancies); *Wright v Mortimer* (1996) 28 HLR 719, 72 P & CR D36, CA (art historian carrying out 30% of the work related to his writing in a residential flat but had no photocopier or fax machine there; held that as regards the application of the 1954 Act to a tenancy, the issue was the extent to which the business purposes could be said to be more than incidental to the occupation for residential purposes. The tenant did not have other premises at which he could carry out his business, but this did not mean that his business activities were automatically more than incidental to his residential occupation). As to the position where the tenancy has already become a statutory tenancy under the Rent Act 1977 when the change of use occurs see PARA 822 note 2 post.

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## 708. Tenancies excluded.

The statutory protection of business tenancies<sup>1</sup> does not apply to the following classes of tenancy:

- 1375 (1) a tenancy<sup>2</sup> of an agricultural holding<sup>3</sup> and certain related tenancies<sup>4</sup>;
- 1376 (2) a farm business tenancy<sup>5</sup>;
- 1377 (3) a tenancy created by a mining lease<sup>6</sup>;
- 1378 (4) a tenancy granted by reason that the tenant was the holder of an office, appointment or employment from the grantor of it and continuing only so long as the tenant holds the office, appointment or employment, or terminable by the grantor on the tenant's ceasing to hold it, or coming to an end at a time fixed by reference to the time at which the tenant ceases to hold it<sup>7</sup>;
- 1379 (5) a tenancy granted for a term certain not exceeding six months<sup>8</sup> unless:  
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  - 157. (a) the tenancy contains provision for renewing the term or extending it beyond six months from its beginning<sup>9</sup>; or
  - 158. (b) the tenant has been in occupation for a period which, together with any period during which any predecessor of the tenant in the carrying on of the business<sup>10</sup> carried on by the tenant was in occupation, exceeds 12 months<sup>11</sup>;
- 126
  - 1380 (6) a tenancy where the business for the purposes of which the tenant occupies the holding is of such a character that it is necessarily brought to an end by the separation of the holding from the remainder of the premises comprised in the lease, so that the business could not be carried on if the tenancy were renewed as to the holding alone<sup>12</sup>;
  - 1381 (7) a tenancy granted to a dockyard contractor<sup>13</sup> in respect of any land in a designated dockyard<sup>14</sup>;
  - 1382 (8) a tenancy granted to a contractor<sup>15</sup> in respect of any land in premises designated<sup>16</sup> under the Atomic Weapons Establishment Act 1991<sup>17</sup>;

- 1383 (9) a lease or sublease granted by the Secretary of State of land and appurtenances held by him in trust for Her Majesty for the exclusive benefit of Greenwich Hospital<sup>18</sup>;
- 1384 (10) a lease or tenancy of land granted by the Secretary of State for the purposes of any contract with another person for the provision or running, or the provision and running, by him, or, if the contract so provides, for the running by sub-contractors of his, of any prison or part of a prison<sup>19</sup> or of any secure training centre or part of a secure training centre<sup>20</sup>;
- 1385 (11) a lease or tenancy of land granted by the Secretary of State for the purposes of a removal centre contract under the immigration and asylum legislation<sup>21</sup>;
- 1386 (12) a lease granted in pursuance of a franchise agreement which creates a tenancy of any property which, whether in whole or in part, constitutes, or is comprised in, the railway network or a railway facility<sup>22</sup>;
- 1387 (13) a tenancy granted by the Secretary of State in any case where the property comprised in the tenancy is or includes premises which, in accordance with any agreement relating to the tenancy, whether contained in the instrument creating the tenancy or not, are to be occupied for the purposes of a vehicle testing business<sup>23</sup>;
- 1388 (14) a Concession lease<sup>24</sup> granted by the Secretary of State under the Channel Tunnel Act 1987<sup>25</sup>;
- 1389 (15) a development agreement lease<sup>26</sup> granted by the Secretary of State in connection with the Channel Tunnel Rail Link or a lease granted by him which is one on the grant of which a development agreement, or an agreement connected with such an agreement<sup>27</sup>, is conditional, or which contains a statement to the effect that it is granted for purposes connected with the construction or operation of the rail link<sup>28</sup>.

1     I.e. the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 709 et seq post. Where the parties agree that ss 24-28 (as amended) shall not apply to the tenancy (see PARAS 710-712 post), the tenancy nevertheless remains one to which the remainder of Pt II (as amended) applies.

The following were also formerly excluded from protection as business tenancies under Pt II (as amended): (1) controlled tenancies prior to their conversion into regulated tenancies by the Housing Act 1980 s 64 (see PARA 848 post) or tenancies which would have been controlled tenancies if they had not been tenancies at a low rent (see the Landlord and Tenant Act 1954 s 43(1)(c) (repealed)); (2) old-style assured tenancies under the Housing Act 1980 (to which, however, the provisions of the Landlord and Tenant Act 1954 Pt II (as amended) were applied with modifications) (see PARA 890 post); and (3) tenancies of certain licensed premises (see s 43(1)(d) (repealed); and PARA 775 post).

2     For the meaning of 'tenancy' see PARA 706 note 2 ante.

3     I.e. a tenancy of an agricultural holding which is a tenancy in relation to which the Agricultural Holdings Act 1986 applies (see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323): Landlord and Tenant Act 1954 s 43(1)(a) (as amended: see note 4 infra), s 69(1) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 22).

4     Landlord and Tenant Act 1954 s 43(1)(a) (amended by the Agriculture Act 1958 s 8(1), Sch 1 para 29; the Agricultural Holdings Act 1986 ss 99, 100, Sch 13 para 3, Sch 14 para 21; the Agricultural Tenancies Act 1995 s 40, Schedule para 10(a)). The related tenancies are tenancies which would be tenancies of agricultural holdings if the Agricultural Holdings Act 1986 s 2(3) did not have effect or, in a case where approval was given under s 2(1), if that approval had not been given: Landlord and Tenant Act 1954 s 43(1)(a) (as so amended).

5     Ibid s 43(1)(aa) (added by the Agricultural Tenancies Act 1995 Schedule para 10(b)). 'Farm business tenancy' has the same meaning as in the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Landlord and Tenant Act 1954 s 69(1) (definition added by the Agricultural Tenancies Act 1995 Schedule para 12).

6     Landlord and Tenant Act 1954 s 43(1)(b). For these purposes, 'mining lease' means a lease for any mining purpose or purposes connected with it; and 'mining purposes' includes the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any



manufacture, carrying away and disposing of mines and minerals, in or under land, and the erection of buildings, and the execution of engineering and other works suitable for those purposes: Landlord and Tenant Act 1927 s 25(1) (applied by the Landlord and Tenant Act 1954 s 46(1) (numbered as such by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 17(1)). 'Mines and minerals' includes all substances capable of being worked for profit below the top surface of land (except peat): *O'Callaghan v Elliott* [1966] 1 QB 601, [1965] 3 All ER 111, CA (decided under the Landlord and Tenant Act 1954 Pt II (as amended)).

7 Ibid s 43(2). If the tenancy is granted after 1 October 1954, this exception does not apply unless the tenancy is granted by a written instrument expressing the purpose for which it was granted: s 43(2) proviso. If the occupier has only a service occupancy (see PARA 15 ante) and not a tenancy, he will in any event be outside the statutory protection.

8 A weekly, monthly or other periodic tenancy, not being for a term certain, is not excluded by this provision.

9 Landlord and Tenant Act 1954 s 43(3)(a) (s 43(3) amended by the Law of Property Act 1969 s 12(1)).

10 For the meaning of 'business' see PARA 707 ante.

11 Landlord and Tenant Act 1954 s 43(3)(b) (as amended: see note 9 supra). Where a tenancy, on its expiry, falls outside the statutory protection by virtue of s 43(3) (as amended), it cannot be retrospectively revived and brought within that protection by a subsequent period of occupation as a tenant at will, licensee or trespasser: see *Cricket Ltd v Shaftesbury plc* [1999] 3 All ER 283, [1999] 2 EGLR 57.

12 See *Bagettes Ltd v GP Estates Ltd* [1956] Ch 290 at 301, [1956] 1 All ER 729 at 734, CA, per Jenkins LJ. This exception will apply where the holding consists solely of the common parts and service areas of buildings, the remainder of which have been sub-demised upon terms that the mesne tenant has retained no rights of occupation and day to day control over them, such as a block of flats (see *Bagettes Ltd v GP Estates Ltd* supra); in such cases it will be a question of fact in each case whether the terms of the sublettings and the conduct by the mesne tenant of its business leave the mesne tenant still in occupation for the purposes of the Landlord and Tenant Act 1954 of other than the common parts and it will not be conclusive that he has granted subtenancies, as opposed to licences, to the occupiers of residential accommodation (*Lee-Verhulst (Investments) Ltd v Harwood Trust* [1973] QB 204, [1972] 3 All ER 619, CA; *William Boyer & Sons Ltd v Adams* (1975) 32 P & CR 89).

13 For these purpose, 'dockyard contractor' means a company which for the time being provides services which are designated dockyard services within the meaning of the Dockyard Services Act 1986 s 1(1) at a designated dockyard under contract with the Secretary of State or, by making the services of employees or property available, enables those services to be provided, whether by a company or by the Secretary of State: s 1(13).

14 Ibid s 3(2).

15 For these purposes, 'contractor' means a company, formed under the Companies Act 1985 or the corresponding provisions of any earlier enactment, which carries on designated activities at designated premises under contract with the Secretary of State or, by making the services of employees or property available, enables such activities to be carried on at such premises, whether by a company or by the Secretary of State: Atomic Weapons Establishment Act 1991 s 1(4). For the meaning of 'designated activities' and 'designated premises' see note 16 infra.

16 For these purposes, 'designated', with reference to any activities or premises, means designated by an order under ibid s 1(1): s 1(4). The activities that may be so designated are any activities connected with the development, production or maintenance of nuclear devices or with research into such devices or their effect; and the premises that may be so designated are those which on 25 September 1991 formed part of the undertaking carried on by the Secretary of State and known as the Atomic Weapons Establishment: s 1(2).

17 Ibid s 3(1), Schedule para 3.

18 See the Armed Forces Act 1996 s 30(1), (3), (7).

19 See the Criminal Justice Act 1991 s 84(1), (3)(a) (substituted by the Criminal Justice and Public Order Act 1994 s 96); and PRISONS vol 36(2) (Reissue) PARA 532.

20 See the Criminal Justice and Public Order Act 1994 s 7(1), (3)(a); and PRISONS vol 36(2) (Reissue) PARA 658.

21 See the Immigration and Asylum Act 1999 s 149(3)(a) (amended by the Nationality, Immigration and Asylum Act 2002 s 66(2)(a), (3)(c)); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 157.

22 See the Railways Act 1993 s 31(1); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 136.

23 See the Transport Act 1982 s 14(1); and ROAD TRAFFIC vol 40(2) (2007 Reissue) PARA 699.

24 For these purposes, 'Concession lease' means any lease granted by the Secretary of State to the Concessionaires in pursuance of the Concession; and references to a Concession lease include any provisions of a Concession agreement providing for the grant of a lease of any land by the Secretary of State to the Concessionaires: Channel Tunnel Act 1987 s 1(6).

25 See *ibid* s 16(2). The purpose of s 16 is to secure that the application of English law to any Concession lease does not have effect so as to prejudice the operation of the international arrangements, so far as relates to the provision for use by the Concessionaires of the land required in England for the construction and operation of the tunnel system by the grant to the Concessionaires of a Concession lease on terms determined in pursuance of those arrangements: s 16(1). See further RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324.

26 For these purposes, 'development agreement lease' means a lease granted by the Secretary of State in pursuance of a development agreement, or an agreement connected with such an agreement, and references to a development agreement lease include any provisions of a development agreement, or an agreement connected with such an agreement, providing for the grant of a lease of any land by the Secretary of State: Channel Tunnel Rail Link Act 1996 s 40(3). 'Development agreement' means an agreement, including one entered into before the passing of the 1996 Act (ie before 18 December 1996) to which the Secretary of State is a party and under which another party has responsibilities in relation to the design, construction, financing or maintenance of the rail link: s 56(1).

27 For these purposes, an agreement is connected with a development agreement if the development agreement is expressed to be conditional upon it being entered into: *ibid* s 40(4).

28 See *ibid* s 40(1), (2). See further RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324.

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## ***C. CONTRACTING OUT***

### **709. Restrictions on contracting out.**

Unless it satisfies the statutory requirements<sup>1</sup>, any agreement, whether in writing or not<sup>2</sup> and whether contained in the instrument creating the tenancy or not, is void in so far as it purports to preclude the tenant from making an application or request for a new tenancy<sup>3</sup>, or provides for the termination or the surrender of the tenancy<sup>4</sup> in the event of his doing so, or imposes any penalty or disability on him in such an event<sup>5</sup>. An agreement purports to have such an effect if its legal consequences are that it produces such an effect, regardless of its language<sup>6</sup>. A clause which provides that the tenant is to reimburse the landlord in respect of all the landlord's expenses in consequence of furthering a notice to renew a business tenancy is equivalent to a penalty clause and is therefore void<sup>7</sup>. A clause which prevents the tenant from assigning or otherwise dealing with the tenancy until the tenant has first offered to surrender it and the landlord has refused the tenant's offer is not void<sup>8</sup>; but, where the tenancy is one to which the provisions of Part II of the Landlord and Tenant Act 1954<sup>9</sup> apply, any apparent agreement which results from the landlord accepting the offer made by the tenant is void unless the statutory requirements<sup>10</sup> are satisfied<sup>11</sup>.

Furthermore, any agreement, whether in writing or not<sup>12</sup>, whether contained in the instrument creating the tenancy or not and whether made before or after the termination of that tenancy, is void to the extent that it purports to exclude or reduce compensation<sup>13</sup> where, during the whole of the five years immediately preceding the date on which the tenant under such a tenancy is to quit the holding<sup>14</sup>, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes, and, if during those five years there was a change in the occupier of the premises, the person who was occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change<sup>15</sup>. This does not, however, affect any agreement as to the amount of any such compensation which is made after the right to compensation has accrued<sup>16</sup>; and in any other case<sup>17</sup> such compensation may be excluded or modified by agreement<sup>18</sup>.

1     Ie the requirements of the Landlord and Tenant Act 1954 s 38A (as added): see PARAS 711-712 post. Prior to 1 June 2004, the agreement had to be authorised by the court: see the Landlord and Tenant Act 1954 s 38(4) (as added; now repealed); and PARA 710 post.

2     References in the Landlord and Tenant Act 1954 to an agreement between the landlord and the tenant, except in s 38(1), 38(2) (as originally enacted or as amended), are to be construed as references to an agreement in writing between them: s 69(2). For the meaning of 'the landlord' see PARA 715 post.

3     Ie under *ibid* Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 710 et seq post.

4     For the meaning of 'tenancy' see PARA 706 note 2 ante.

5     Landlord and Tenant Act 1954 s 38(1) (amended by the Law of Property Act 1969 s 5; and, with effect from 1 June 2004, by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 21(1)). This provision does not appear to cover all methods of excluding the provisions of the Landlord and Tenant Act 1954 from the occupation of business premises, and it will not avoid (or bring into the statutory protection) a tenancy at will of such premises: *Hagee (London) Ltd v AB Erikson and Larson (a firm)* [1976] QB 209, [1975] 3 All ER 234, CA; *Manfield & Sons Ltd v Botchin* [1970] 2 QB 612, [1970] 3 All ER 143 (in both of which cases the tenancy at will was created by an instrument in writing); *Wheeler v Mercer* [1957] AC 416, [1956] AC 416, [1956] 3 All ER 631, HL (oral agreement created a tenancy at will). As to tenancies at will see PARA 198 et seq ante.

6     *Joseph v Joseph* [1967] Ch 78, [1966] 3 All ER 486, CA (agreement by a tenant to whose tenancy the provisions of the Landlord and Tenant Act 1954 Pt II (as amended) applied that he would surrender his tenancy unenforceable at the suit of the landlord).

7     *Stephenson & Rush (Holdings) Ltd v Langdon* (1978) 38 P & CR 208, CA.

8     *Bocardo SA v S & M Hotels Ltd* [1979] 3 All ER 737, [1980] 1 WLR 17, CA (where neither the Landlord and Tenant Act 1954 nor the Rent Act 1977 applied to the tenancy); *Allnatt London Properties Ltd v Newton* [1984] 1 All ER 423, (1982) 45 P & CR 94, CA.

9     Ie the Landlord and Tenant Act 1954 Pt II (as amended). The provisions of Pt II (as amended) will not apply if a permitted agreement to contract out by surrendering a tenancy has been entered into: see PARA 712 post.

10    See note 1 supra.

11    *Allnatt London Properties v Newton* [1984] 1 All ER 423, (1982) 45 P & CR 94, CA.

12    See note 2 supra.

13    Ie compensation under the Landlord and Tenant Act 1954 s 37 (as amended): see PARAS 758-760 post.

14    For the meaning of 'the holding' see PARA 706 note 23 ante.

15    Landlord and Tenant Act 1954 s 38(2) (s 38(2), (3) amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, art 28(1), Sch 5 paras 1, 4); and see *London Baggage Co (Charing Cross) Ltd v Railtrack plc (No 2)* [2000] All ER (D) 2359. Business occupancy does not cease for these purposes where the premises are empty for only a short period, whether mid term or before or after trading at either end of the lease, provided that during that period there is no rival for the role of business occupant and that the

premises are not being used for some other non-business purpose: see *Bacchiocchi v Academic Agency Ltd* [1998] 2 All ER 241, [1998] 1 WLR 1313, CA.

16 Landlord and Tenant Act 1954 s 38(2) (as amended: see note 15 supra).

17 Ie any case not within the Landlord and Tenant Act 1954 s 38(2) (as amended): see the text to notes 12-16 supra.

18 Ibid s 38(3) (as amended: see note 15 supra).

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### **710. Permitted contracting out; agreements authorised before 1 June 2004.**

On the joint application of the persons who were to be the landlord<sup>1</sup> and the tenant in relation to a tenancy<sup>2</sup> to be granted for a term of years certain<sup>3</sup>, the court might, before 1 June 2004<sup>4</sup>, authorise an agreement excluding the statutory provisions as to the continuation and renewal of business tenancies<sup>5</sup> if the agreement was contained in or indorsed on the instrument creating the tenancy or such other instrument as the court might specify; and an agreement contained in or indorsed on an instrument pursuant to such an authorisation was valid notwithstanding the statutory restrictions<sup>6</sup> on contracting out<sup>7</sup>.

On the joint application of persons who were already the landlord and the tenant in relation to a tenancy to which the statutory provisions relating to security of business tenancies<sup>8</sup> applied, the court might authorise an agreement contained in or indorsed on such an instrument for the surrender of the tenancy on such date or in such circumstances and on such terms, if any, as might be specified in the agreement, and the agreement was then enforceable<sup>9</sup>.

The repeal of the above provisions has no effect in relation to an agreement which was so authorised by the court before 1 June 2004<sup>10</sup>. Further, if a person has, before that date, entered into an agreement to take a tenancy, any provision in that agreement which requires an order under the above provisions to be obtained in respect of the tenancy continues to be effective, notwithstanding the repeal of those provisions, and the court retains jurisdiction to make such an order<sup>11</sup>.

1 For the meaning of 'the landlord' see PARA 715 post.

2 Ie which would be a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applied: see PARAS 706-708 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 A term of years certain includes a term for a period which is certain but less than one year, eg nine months: *Re Land and Premises at Liss, Hants* [1971] Ch 986, [1971] 3 All ER 380. A tenancy with a break clause is a tenancy for a term of years certain within the meaning of the Landlord and Tenant Act 1954 Pt II (as amended): *Scholl Manufacturing Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41 at 51, [1966] 3 All ER 16 at 20, CA, per Diplock LJ.

4 Ie the date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into effect: see PARA 701 ante.

5 Ie the Landlord and Tenant Act 1954 ss 24-28 (as amended): see PARA 713 et seq post.

6 Ie ibid s 38(1)-(3) (as originally enacted and as amended prior to the amendments made by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096): see PARA 709 ante.

7 See the Landlord and Tenant Act 1954 s 38(4)(a) (s 38(4) added by the Law of Property Act 1969 s 5; repealed by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, arts 2, 21(2), 28(2), Sch 6). For transitional provisions see the text and notes 10-11 infra. The exclusion was effected by the making of the agreement pursuant to the previous authorisation by the court, and not by that authorisation itself (*Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17, [1974] 1 WLR 113); but, where a person went in and occupied premises as tenant under the agreement, but the agreement was not executed, his position was taken as if an instrument giving effect to the new tenancy upon the agreed terms (and therefore excluding the relevant statutory provisions) had been executed (*Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd* supra applying *Walsh v Lonsdale* (1882) 21 ChD 9, CA). Where there was a condition that a tenancy agreement negotiated between the parties should be subject to the making of a court order under the Landlord and Tenant Act 1954 s 38(4) (as so added and repealed), implicit in that condition was a term that, unless and until the court order was obtained, no legally binding grant or acceptance of the tenancy should be made: *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633 at 640, [1986] 1 WLR 368 at 377 per Knox J; and see the text and note 11 infra. Where the tenants had been party to an application to the county court, which was granted, to exclude the statutory protection, but at a time when it was intended that they would be sureties rather than tenants, and where the lease was subsequently granted to the tenants, it was held that the exclusion was valid: see *Brighton and Hove City Council v Collinson* [2004] EWCA Civ 678, [2004] 2 P & CR D29, [2004] All ER (D) 257 (Jun). Cf *Metropolitan Police District Receiver v Palacegate Properties Ltd* [2001] Ch 131, [2000] 3 All ER 663, CA (the court was not entitled to consider the fairness of the bargain which the parties proposed to make, but was instead concerned with whether the tenant understood that he was giving up protection; however, the landlord was not entitled to make wholesale changes to the draft tenancy submitted to the court when approval had been sought). The Landlord and Tenant Act 1954 s 38(4)(a) (as so added and repealed) was construed narrowly: see eg *Nicholls v Kinsey* [1994] QB 600, [1994] 1 EGLR 131, CA.

8 See the Landlord and Tenant Act 1954 Pt II (as amended): see PARA 701 et seq ante, PARA 711 et seq post.

9 Ibid s 38(4)(b) (as added and repealed: see note 7 supra). Such an agreement was valid notwithstanding anything in s 38(1)-(3) (amended as mentioned in note 6 supra): s 38(4) (as so added and repealed).

10 See the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(2)(a)(ii).

11 Ibid art 29(4).

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### **711. Permitted agreements to contract out before the tenancy is entered into; the current position.**

The persons who will be the landlord<sup>1</sup> and the tenant in relation to a tenancy<sup>2</sup> to be granted for a term of years certain<sup>3</sup> which will be a tenancy to which Part II of the Landlord and Tenant Act 1954 applies<sup>4</sup> may agree that the provisions of that Act as to the continuation and renewal of business tenancies<sup>5</sup> are to be excluded in relation to that tenancy<sup>6</sup>. Such an agreement is void unless:

- 1390 (1) the landlord has served on the tenant a notice in the prescribed form<sup>7</sup>, or substantially in that form<sup>8</sup>; and
- 1391 (2) the specified requirements<sup>9</sup> are met<sup>10</sup>.

The specified requirements are as follows<sup>11</sup>:

- 1392 (a) the notice referred to in head (1) above must<sup>12</sup> be served on the tenant<sup>13</sup> not less than 14 days before the tenant enters into the tenancy to which it applies, or, if earlier, becomes contractually bound to do so<sup>14</sup>;
- 1393 (b) if that notice requirement is met, the tenant, or a person duly authorised by him to do so, must, before the tenant enters into the tenancy to which the notice applies, or, if earlier, becomes contractually bound to do so, make a declaration in the prescribed form<sup>15</sup>, or substantially in the prescribed form<sup>16</sup>;
- 1394 (c) if that notice requirement is not met, the notice referred to in head (1) above must be served on the tenant before the tenant enters into the tenancy to which it applies, or, if earlier, becomes contractually bound to do so, and the tenant, or a person duly authorised by him to do so, must before that time make a statutory declaration in the prescribed form<sup>17</sup>, or substantially in the prescribed form<sup>18</sup>;
- 1395 (d) a reference to the notice and to either the declaration<sup>19</sup> or the statutory declaration<sup>20</sup> must be contained in or indorsed on the instrument creating the tenancy<sup>21</sup>;
- 1396 (e) the agreement that the relevant statutory provisions are to be excluded<sup>22</sup>, or a reference to the agreement, must be contained in or indorsed upon the instrument creating the tenancy<sup>23</sup>.

There is now no need for the court to authorise the agreement<sup>24</sup>. Any provision in a tenancy which requires an order by the court authorising the exclusion of the relevant statutory provisions<sup>25</sup> to be obtained in respect of any subtenancy is, so far as is necessary after 1 June 2004, to be construed as if it required the procedure mentioned above to be followed, and any related requirement is to be construed accordingly<sup>26</sup>.

1 For the meaning of 'the landlord' see PARA 715 post.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the meaning of 'tenancy for a term of years certain' see PARA 710 note 3 ante.

4 Ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARA 701 et seq ante, PARA 712 et seq post. As to such tenancies see PARAS 706-708 ante.

5 Ie the provisions of *ibid* ss 24-28 (as amended): see PARA 713 et seq post.

6 *Ibid* s 38A(1) (s 38A added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 22(1), with effect from 1 June 2004 (see art 1(3)).

7 For the prescribed form see the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 22(2), Sch 1. The notices and statutory declarations set out in Schs 1-4 are to be treated for the purposes of the Welsh Language Act 1993 s 26 (power to prescribe Welsh forms) as if they were specified by an Act of Parliament; and accordingly the power conferred by s 26(2) of that Act may be exercised in relation to those notices and declarations: Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(7). See also note 9 *infra*.

8 Landlord and Tenant Act 1954 s 38A(3)(a) (as added: see note 6 *supra*).

9 Ie the requirements specified in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 22(2), Sch 2: see the text and notes 11-23 *infra*.

Schedules 1-4 are designated as subordinate provisions for the purposes of the Regulatory Reform Act 2001 s 4; and a subordinate provisions order relating to those subordinate provisions is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(3), (4), (6). The power to make a subordinate provisions order relating to those provisions is to be exercisable in relation to Wales by the National Assembly for Wales or the relevant Welsh minister concurrently with a Minister of the Crown: art 28(5); and see PARA 27 note 4 ante.

10 Landlord and Tenant Act 1954 s 38A(3)(b) (as added: see note 6 *supra*).

- 11 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, Sch 2 para 1.
- 12 *Ie* subject to *ibid* Sch 2 para 4: see head (c) in the text.
- 13 As to service of notices see *PARA* 703 *ante*.
- 14 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, Sch 2 para 2.
- 15 For the prescribed form of declaration see *ibid* Sch 2 para 7. The prescribed form is a simple declaration that the tenant has received the notice and accepts its consequences before signing the lease, and contains a notice warning the tenant that by committing himself to the lease he is giving up his statutory rights to security of tenure.
- 16 *Ibid* Sch 2 para 3.
- 17 For the prescribed form of statutory declaration see *ibid* Sch 2 para 8. The prescribed form is a statutory declaration that the tenant has received the notice and accepts its consequences before signing the lease, and contains a notice warning the tenant that by committing himself to the lease he is giving up his statutory rights to security of tenure.
- 18 *Ibid* Sch 2 para 4.
- 19 *Ie* if *ibid* Sch 2 para 3 applies: see head (b) in the text.
- 20 *Ie* if *ibid* Sch 2 para 4 applies: see head (c) in the text.
- 21 *Ibid* Sch 2 para 5.
- 22 *Ie* the agreement under the Landlord and Tenant Act 1954 s 38A(1) (as added): see the text and notes 1-6 *supra*.
- 23 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, Sch 2 para 6.
- 24 Cf the position prior to 1 June 2004: see *PARA* 710 *ante*.
- 25 *Ie* an order under the Landlord and Tenant Act 1954 s 38(4) (as added and repealed): see *PARA* 710 *ante*.
- 26 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(3).

## UPDATE

### **711 Permitted agreements to contract out before the tenancy is entered into; the current position**

NOTE 9--Regulatory Reform Act 2001 replaced: see now the Legislative and Regulatory Reform Act 2006 Pt 1 (ss 1-20).

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### **712. Permitted agreements to contract out by surrendering a tenancy; the current position.**

The persons who are the landlord<sup>1</sup> and the tenant in relation to a tenancy<sup>2</sup> to which Part II of the Landlord and Tenant Act 1954 applies<sup>3</sup> may agree that the tenancy is to be surrendered on

such date or in such circumstances as may be specified in the agreement and on such terms, if any, as may be so specified<sup>4</sup>. Such an agreement is void unless:

- 1397 (1) the landlord has served on the tenant a notice in the prescribed form<sup>5</sup>, or substantially in that form<sup>6</sup>; and
- 1398 (2) the specified requirements<sup>7</sup> are met<sup>8</sup>.

The specified requirements are as follows<sup>9</sup>:

- 1399 (a) the notice referred to in head (1) above must<sup>10</sup> be served on the tenant<sup>11</sup> not less than 14 days before the tenant enters into the agreement to surrender the tenancy<sup>12</sup> or, if earlier, becomes contractually bound to do so<sup>13</sup>;
- 1400 (b) if that notice requirement is met, the tenant or a person duly authorised by him to do so, must, before the tenant enters into the agreement or, if earlier, becomes contractually bound to do so, make a declaration in the prescribed form<sup>14</sup>, or substantially in the prescribed form<sup>15</sup>;
- 1401 (c) if that notice requirement is not met, the notice must be served on the tenant before the tenant enters into the agreement or, if earlier, becomes contractually bound to do so, and the tenant, or a person duly authorised by him to do so, must before that time make a statutory declaration in the prescribed form<sup>16</sup>, or substantially in the prescribed form<sup>17</sup>;
- 1402 (d) a reference to the notice and to the declaration<sup>18</sup> or to the statutory declaration<sup>19</sup> must be contained in or indorsed on the instrument creating the agreement<sup>20</sup>.

There is now no need for the court to authorise the agreement<sup>21</sup>. Any provision in a tenancy which requires an order by the court authorising the exclusion of the relevant statutory provisions<sup>22</sup> to be obtained in respect of any subtenancy is, so far as is necessary after 1 June 2004, to be construed as if it required the procedure mentioned above to be followed, and any related requirement is to be construed accordingly<sup>23</sup>.

1 For the meaning of 'the landlord' see PARA 715 post.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 I.e. a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARA 701 et seq ante, PARA 713 et seq post. As to such tenancies see PARAS 706-708 ante.

4 Ibid s 38A(2) (s 38A added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 22(1), with effect from 1 June 2004 (see art 1(3)). Nothing in the 2003 Order has effect, however, in relation to an agreement for the surrender of a tenancy which was made before 1 June 2004 and which fell within the Landlord and Tenant Act 1954 s 24(2)(b) (now repealed) (see PARA 713 post): Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(2)(a)(i).

5 For the prescribed form see ibid art 22(2), Sch 3. As to Sch 3 see also PARA 711 notes 7, 9 ante.

6 Landlord and Tenant Act 1954 s 38A(4)(a) (as added: see note 4 supra).

7 I.e. the requirements specified in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 22(2), Sch 4: see the text and notes 9-20 infra. As to Schs 3, 4 see also PARA 711 note 9 ante.

8 Landlord and Tenant Act 1954 s 38A(4)(b) (as added: see note 4 supra).

9 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, Sch 4 para 1.

10 I.e. subject to ibid Sch 4 para 4: see head (c) in the text.



- 11 As to service of notices see PARA 703 ante.
- 12 Ie the agreement under the Landlord and Tenant Act 1954 s 38A(2) (as added): see the text and notes 1-4 supra.
- 13 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, Sch 4 para 2.
- 14 For the prescribed form of declaration see ibid Sch 4 para 6. The prescribed form is a simple declaration that the tenant has received the notice and accepts its consequences before surrendering the lease, and contains a notice warning the tenant that by committing himself to the agreement he is giving up his statutory right to renew the lease.
- 15 Ibid Sch 4 para 3.
- 16 For the prescribed form of statutory declaration see ibid Sch 4 para 7. The prescribed form is a statutory declaration that the tenant has received the notice and accepts its consequences before surrendering the lease, and contains a notice warning the tenant that by committing himself to the agreement he is giving up his statutory right to renew the lease.
- 17 Ibid Sch 4 para 4.
- 18 Ie if ibid Sch 4 para 3 applies: see head (b) in the text.
- 19 Ie if ibid Sch 4 para 4 applies: see head (c) in the text.
- 20 Ibid Sch 4 para 5.
- 21 Cf the position prior to 1 June 2004: see PARA 710 ante.
- 22 Ie an order under the Landlord and Tenant Act 1954 s 38(4) (as added and repealed): see PARA 710 ante.
- 23 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(3).

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## ***D. CONTINUATION AND TERMINATION OF TENANCIES***

### **713. Continuation of tenancies.**

A tenancy to which the statutory protection for business tenancies applies<sup>1</sup> does not come to an end unless terminated in accordance with the statutory provisions<sup>2</sup>; but that does not prevent the coming to an end of a tenancy by notice to quit<sup>3</sup> given by the tenant, by surrender<sup>4</sup> or forfeiture<sup>5</sup> or by the forfeiture of a superior tenancy unless the notice to quit was given before the tenant had been in occupation in right of the tenancy for one month<sup>6</sup>. Until 1 June 2004<sup>7</sup>, the tenancy could not come to an end by surrender if the instrument of surrender was executed before, or in pursuance of an agreement made before, the tenant had been in occupation in right of the tenancy for one month<sup>8</sup>.

Where the landlord<sup>9</sup> and tenant agree<sup>10</sup> for the grant to the tenant of a future tenancy of the holding<sup>11</sup>, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy<sup>12</sup> continues until that date but no longer, and is not a tenancy to which the statutory protection applies<sup>13</sup>. The tenancy, if continued, is continued as to the whole of the premises comprised in the tenancy, even if parts of the premises are not within the holding<sup>14</sup>. Special statutory provision is made in the case of reversionary tenancies<sup>15</sup>.

Where a tenancy originally granted for a term certain and continued by statute<sup>16</sup> ceases to be a tenancy to which the statutory protection applies, it does not come to an end for that reason only but may<sup>17</sup> be terminated by not less than three nor more than six months' notice in writing given by the landlord to the tenant<sup>18</sup>. Where the landlord gives notice to quit at a time when the tenancy is not one to which the statutory protection applies, the operation of the notice is not affected by reason that the tenancy subsequently becomes one to which that protection applies<sup>19</sup>.

The legal effect of the statutory continuance of a tenancy is fundamentally different from that of the creation of a statutory right of occupancy under the Rent Act 1977 for a statutory tenant under that Act. Such a statutory tenant has no estate but only a 'status of irremovability'<sup>20</sup>; but under Part II of the Landlord and Tenant Act 1954 (as under Part I also<sup>21</sup>) the common law tenancy is continued with a statutory variation as to the mode of determination<sup>22</sup>, so that an estate in land, and not a mere status, is enjoyed by the tenant<sup>23</sup>. The steps which may be taken under the Act to terminate a business tenancy are:

- 1403 (1) the service of a landlord's notice to terminate the tenancy<sup>24</sup>;
- 1404 (2) the making of a tenant's request for a new tenancy<sup>25</sup>; or
- 1405 (3) the service of a tenant's notice in respect of a fixed term<sup>26</sup>.

1    Ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

2    Ibid s 24(1). As to the interim continuation of tenancies while proceedings are pending under the 1954 Act see s 64 (as amended); and PARA 729 post. The landlord or the tenant may apply under s 24A (as substituted) for the determination of the amount of the rent which it is reasonable for the tenant to pay whilst the tenancy is being continued by s 24 (as amended): see PARA 730 post. As to temporary continuation if an order for a new tenancy is revoked see s 36(2); and PARA 757 post. Where a subtenancy is continued by the Act against the superior landlord and the demise includes fittings or other chattels belonging to the mesne tenant, the continuation of the tenancy continues also the right of the subtenant to use and enjoy those fittings and chattels: see *Poster v Slough Estates Ltd* [1969] 1 Ch 495, [1968] 3 All ER 257.

3    For the meaning of 'notice to quit' see PARA 704 note 19 ante.

4    As to surrender by operation of law see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA; *Tarjomani v Panther Securities Ltd* (1983) 46 P & CR 32; and as to an agreement to surrender see PARA 712 ante. If the tenant has vacated and the premises have been demolished, the tenant will not be able to assert that he still has statutory rights: *Aireps Ltd v Bradford City Metropolitan Council* [1985] 2 EGLR 143, CA.

5    As to forfeiture see PARA 603 et seq ante.

6    Landlord and Tenant Act 1954 s 24(2)(a) (added by the Law of Property Act 1969 s 4(1)). See *Watney v Broadley* [1975] 2 All ER 644, [1975] 1 WLR 857.

7    Ie the date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante.

8    See the Landlord and Tenant Act 1954 s 24(2)(b) (added by the Law of Property Act 1969 s 4(1); repealed by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(2), Sch 6). Nothing in the 2003 Order has effect, however, in relation to an agreement for the surrender of a tenancy which was made before 1 June 2004 and which fell within the Landlord and Tenant Act 1954 s 24(2)(b) (now repealed): Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(2)(a) (i).

9    For the meaning of 'the landlord' see PARA 715 post.

10    The Landlord and Tenant Act 1954 s 69(2) provides that the agreement must be in writing; but the further requirements of the Law of Property (Miscellaneous Provisions) Act 1989 will also apply since otherwise no enforceable agreement for a lease will subsist: see PARA 79 ante. As to the effect of unenforceable agreements see also *Akiens v Salomon* (1992) 65 P & CR 364, sub nom *Salomon v Akiens* [1993] 1 EGLR 101, CA (cited in PARA 716 note 22 post).

11 For the meaning of 'the holding' see PARA 706 note 23 ante.

12 For these purposes, 'current tenancy' means the tenancy under which the tenant holds for the time being: Landlord and Tenant Act 1954 s 46(1) (numbered as such, and definition substituted, by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 17(1), 28(1), Sch 5 paras 1, 6(a)).

13 Landlord and Tenant Act 1954 s 28.

14 See *Southport Old Links Ltd v Naylor* [1985] 1 EGLR 66, (1984) 273 Estates Gazette 767, CA.

15 See the Landlord and Tenant Act 1954 s 65; and PARA 714 post.

16 Ie by ibid s 24(1): see the text and notes 1-2 supra.

17 Ie without prejudice to the termination thereof in accordance with any terms of the tenancy. For the meaning of 'terms' see PARA 706 note 27 ante.

18 Landlord and Tenant Act 1954 s 24(3)(a). As to cessation of business use see *Pulleng v Curran* (1980) 44 P & CR 58, CA; *Aspinall Finance Ltd v Viscount Chelsea* [1989] 1 EGLR 103.

19 Landlord and Tenant Act 1954 s 24(3)(b). This provision is directed to tenancies which at the date of the notice were tenancies to which the Act did not apply but which subsequently (eg by conversion from residential to business premises) become tenancies to which it does apply: see *Orman Bros Ltd v Greenbaum* [1955] 1 All ER 610, [1955] 1 WLR 248, CA, distinguished in *Brown v Jamieson* [1959] 1 QB 338, [1959] 1 All ER 144, CA, where it was held also to be directed to the situation where the Act commenced to apply by operation of law (in this instance because the premises were decontrolled by the coming into operation of the Rent Act 1957 s 11, Sch 4 (repealed)) as opposed to any change in the use or other facts appertaining to the tenancy.

20 See PARA 832 post.

21 See PARA 1209 post.

22 *Bowes-Lyon v Green* [1963] AC 420, [1961] 3 All ER 843, HL, approving the dictum of Denning LJ in *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 168, [1956] 3 All ER 624 at 626, CA. The term 'business statutory tenancy' used by Sellers J in *Castle Laundry (London) Ltd v Read* [1955] 1 QB 586, [1955] 2 All ER 154, may be convenient but must not be confused with the 'statutory tenancy' under the Rent Restriction Acts (now the Rent Act 1977: see PARA 831 post) which is not a tenancy at all (*Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd* [1958] Ch 437 at 446, [1957] 3 All ER 663 at 667), and it is more convenient and more accurate to speak of a 'continuation tenancy'. A term certain which for the time being attracts the protection of the Landlord and Tenant Act 1954 Pt II (as amended) acquires an indeterminate potential which enables the tenant to sub-demise the premises for a term which purports to be longer than his own, without thereby assigning: see *William Skelton & Son Ltd v Harrison and Pinder Ltd* [1975] QB 361, [1975] 1 All ER 182.

This continuation does not, however, prolong the liability in covenant of the original tenant after he has assigned the term (*City of London Corp v Fell* [1994] 1 AC 458, [1993] 4 All ER 968, HL) nor the liability of any surety for the period of the statutory continuation of the tenancy, in the absence of an express stipulation to the contrary within the surety's covenant (*Junction Estates Ltd v Cope* (1974) 27 P & CR 482; *A Plesser & Co Ltd v Davis* [1983] 2 EGLR 70, (1983) 267 Estates Gazette 1039). Even a covenant to pay the rent for any extension of the term will not suffice to render the covenantor, if he is not currently the tenant, liable for an interim rent determined by the court (see PARAS 731-733 post): *City of London Corp v Fell* supra. Continuation may prolong the liability of the tenant for the time being, even if he vacates the premises: see eg *Long Acre Securities Ltd v Electro Acoustic Industries Ltd* (1990) 61 P & CR 177, [1990] 1 EGLR 91, CA (where the landlord had served a notice under the Landlord and Tenant Act 1954 s 25 and the tenant chose to vacate before the date of termination specified in that notice). As to the position under the Landlord and Tenant (Covenants) Act 1995 see PARAS 289-291, 578 et seq ante.

23 Where, however, the tenancy (whether contractual or statutory) of a dwelling which was subject to a controlled tenancy was taken out of control ('converted'), eg by the issue of a qualification certificate (see PARA 849 note 13 post), then, if the former controlled tenancy would have been a tenancy to which the Landlord and Tenant Act 1954 Pt II (as amended) would have applied if it had not been controlled (ie would have applied if the tenancy had been contractual in cases where in fact it was a statutory tenancy), it had to be treated (whether it was a statutory tenancy or remained a contractual tenancy) as if it were a business tenancy continued after the expiry of a term certain: Rent Act 1977 s 108(3) (repealed).

The same result occurred on the decontrol of mixed business and residential premises by reason of their rateable value, and on the final conversion of all controlled tenancies to regulated tenancies (see the Housing Act 1980 s 64(2); and PARA 848 post). As to the decontrol of mixed statutory tenancies in 1957 see the Rent Act

1957 s 11(1), (7), Sch 4 para 11 (repealed). Former controlled tenancies which remained contractual tenancies passed into the protection of the Landlord and Tenant Act 1954 Pt II (as amended) because upon decontrol they ceased to be excluded from it by s 43(1)(c) (repealed). A measure of decontrol of mixed premises in 1972-74 was achieved by the Housing Finance Act 1972 s 35(8) (repealed), but that provision (and subsequently also the Rent Act 1977 s 108(3) (repealed)) was so phrased as to require controlled but still contractual tenancies to be treated as tenancies which have been continued by the Landlord and Tenant Act 1954 s 24 (as amended) after the expiry of a term of years certain. As such tenancies may have been periodic, the change in the wording of the operative provisions of the 1957, 1972 and 1977 Acts may be significant in cases where it is desired to serve a notice under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 post) on such a former controlled tenant, as whether the tenancy has to be treated as still a contractual one or as a 'continuation tenancy' will affect the date by which the tenancy can be determined. These difficulties cannot be avoided by treating the phrase 'controlled tenancy' in the Rent Act 1977 s 108(3) (repealed) as not being required by its context to include protected (ie contractual) tenancies (see s 17 (repealed)), because that would have the effect of converting such contractual former controlled tenancies into regulated tenancies (see s 108(2) (repealed)), which is clearly not achieved by the statutory provisions.

24 See PARA 716 post.

25 See PARA 718 post.

26 See PARA 719 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/D. CONTINUATION AND TERMINATION OF TENANCIES/714. Reversions.

## 714. Reversions.

Where a tenancy<sup>1</sup> ('the inferior tenancy') is continued<sup>2</sup> for a period such as to extend to or beyond the end of the term of a superior tenancy, the superior tenancy is deemed<sup>3</sup>, so long as it subsists, to be an interest in reversion expectant upon the termination of the inferior tenancy and, if there is no intermediate tenancy, to be the interest in reversion immediately expectant upon that termination<sup>4</sup>. In the case of a tenancy continuing<sup>5</sup> after the coming to an end of the interest in reversion immediately expectant upon its termination, the statutory provisions relating to the effect of the extinguishment of a reversion<sup>6</sup> have effect as if references to the surrender or merger of the reversion included references to the coming to an end of the reversion for any reason other than surrender or merger<sup>7</sup>.

Where a tenancy ('the continuing tenancy') is continued<sup>8</sup> beyond the beginning of a reversionary tenancy which was granted<sup>9</sup> so as to begin on or after the date on which the continuing tenancy would otherwise<sup>10</sup> have come to an end, the reversionary tenancy has effect as if it had been granted subject to the continuing tenancy<sup>11</sup>.

Where a tenancy ('the new tenancy') is granted<sup>12</sup> for a period beginning on the same date as a reversionary tenancy or for a period such as to extend before the beginning of the term of a reversionary tenancy, whenever granted, the reversionary tenancy has effect as if it had been granted subject to the new tenancy<sup>13</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 Ie by virtue of any provision of the Landlord and Tenant Act 1954.

3 Ie for the purposes of the Landlord and Tenant Act 1954 and of any other enactment or rule of law.

4 Ibid s 65(1).

- 5 See note 2 supra.
- 6 I.e. the Law of Property Act 1925 s 139(1): see PARAS 638, 641 ante.
- 7 Landlord and Tenant Act 1954 s 65(2).
- 8 See note 2 supra.
- 9 The grant of a reversionary lease is not an agreement between the landlord and the tenant within the Landlord and Tenant Act 1954 s 28 (see PARA 713 ante): *Bowes-Lyon v Green* [1963] AC 420, [1961] 3 All ER 843, HL.
- 10 I.e. apart from the Landlord and Tenant Act 1954.
- 11 Ibid s 65(3).
- 12 See note 2 supra.
- 13 Landlord and Tenant Act 1954 s 65(4).

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### **715. Meaning of 'the landlord'.**

Although a notice to quit<sup>1</sup> served under the contractual provisions of the tenancy must be served by the immediate landlord<sup>2</sup>, in Part II of the Landlord and Tenant Act 1954<sup>3</sup> 'the landlord', in relation to a tenancy<sup>4</sup> ('the relevant tenancy'), means the person, whether or not he is the immediate landlord, who is the owner of that interest in the property comprised in the relevant tenancy<sup>5</sup> which for the time being fulfils the following conditions<sup>6</sup>, that is to say:

- 1406 (1) that it is an interest in reversion expectant, whether immediately or not, on the termination of the relevant tenancy<sup>7</sup>; and
- 1407 (2) that it is either the fee simple or a tenancy which will not come to an end within 14 months by effluxion of time, and, if it is such a tenancy, that no notice has been given by virtue of which it will come to an end within 14 months or any further time by which it may be continued under the statutory provisions relating to revocation by the court<sup>8</sup> or pending proceedings<sup>9</sup>,

and is not itself in reversion expectant, whether immediately or not, on an interest which fulfils those conditions<sup>10</sup>. Thus it is the owner of the immediate reversion, if it fulfils these conditions, or of the reversion nearest to the immediate reversion which does so, who is the landlord<sup>11</sup>.

The Act does not require that the landlord, throughout the whole period after its machinery has been set in motion, should be the same person; it is, for example, sufficient if at the time when a landlord puts in a notice of objection he is then in fact the landlord<sup>12</sup>. Where there has been a change of landlord, the new landlord becomes the person to act as such for the purposes of all further steps under the Act<sup>13</sup>.

If at any time the landlord's interest is subject to a mortgage<sup>14</sup>, and the mortgagee is in possession or a receiver appointed by the mortgagee or by the court is in receipt of the rents and profits, anything authorised or required<sup>15</sup> to be done at that time by, to or with the landlord,

or a landlord of a specified description, is deemed to be authorised or required to be done by, to or with that mortgagee instead of that landlord<sup>16</sup>.

1 For the meaning of 'notice to quit' see PARA 704 note 19 ante.

2 See the Landlord and Tenant Act 1954 s 44(2). This preserves the common law terminology in respect of such notices.

3 *Ibid* Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 716 et seq post.

4 For the meaning of 'tenancy' see PARA 706 note 2 ante.

5 With effect from 1 June 2004, this reference to a person who is the owner of an interest such as is mentioned in the text is to be construed, where different persons own such interests in different parts of the property, as a reference to all those persons collectively: Landlord and Tenant Act 1954 s 44(1A) (s 44(1) amended, and s 44(1A) added, by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 27(1), (2)).

6 Landlord and Tenant Act 1954 s 44(1) (as amended: see note 5 supra).

7 *Ibid* s 44(1)(a).

8 *Ibid* under *ibid* s 36(2): see PARA 757 post.

9 *Ibid* under *ibid* s 64 (as amended) (see PARA 729 post): s 44(1)(b) (substituted by the Law of Property Act 1969 s 14(1)).

10 Landlord and Tenant Act 1954 s 44(1) (as amended: see notes 5, 9 supra). See *Rene Claro (Haute Coiffure) Ltd v Hallé Concerts Society* [1969] 2 All ER 842, [1969] 1 WLR 909, CA, overruling *Westbury Property and Investment Co Ltd v Carpenter* [1961] 1 All ER 481, [1961] 1 WLR 273. In the Landlord and Tenant Act 1954 s 44(3), Sch 6 (as amended) (see PARA 762 post), the landlord who for the time being fulfils the statutory conditions is conveniently entitled 'the competent landlord', but this term is not used in the body of the Act. The amendments made to s 44(1) by the Law of Property Act 1969 s 14(1) recognised the effect of the decisions in *Cornish v Brook Green Laundry Ltd* [1959] 1 QB 394, [1959] 1 All ER 373, CA, and *Bowes-Lyon v Green* [1963] AC 420, [1961] 3 All ER 843, HL. See also *Shelley v United Artists Corp Ltd* (1990) 60 P & CR 241, [1990] 1 EGLR 103, CA (exercise of option to renew by tenant will make that tenant the competent landlord of his subtenant, although a request for a new tenancy served under the Landlord and Tenant Act 1954 s 26 (as amended) (see PARA 718 post) will not have that effect). For the special provisions where the immediate landlord is not the owner of the fee simple see PARA 762 post; and for the special provisions as to reversions where a tenancy is continued by statute see PARA 714 ante.

11 For these purposes, a statutory tenancy under the Rent Act 1977 is not a reversion (*Piper v Muggleton* [1956] 2 QB 569, [1956] 2 All ER 249, CA); but a 'continuation tenancy' in respect of which no notices have yet been served under the Landlord and Tenant Act 1954 s 25, s 26 or s 27 (as amended) will satisfy the statutory conditions (see *Cornish v Brook Green Laundry Ltd* [1959] 1 QB 394, [1959] 1 All ER 373, CA; *Bowes-Lyon v Green* [1963] AC 420, [1961] 3 All ER 843, HL).

12 *XL Fisheries Ltd v Leeds Corp* [1955] 2 QB 636 at 646, [1955] 2 All ER 875 at 878, CA.

13 *Piper v Muggleton* [1956] 2 QB 569 at 578, [1956] 2 All ER 249 at 252-253, CA, per Jenkins LJ. See also *AD Wimbury & Son Ltd v Franmills Properties Ltd* [1961] Ch 419, [1961] 2 All ER 197; *Marks v British Waterways Board* [1963] 3 All ER 28, [1963] 1 WLR 1008, CA.

14 For the meaning of 'mortgage', 'mortgagor' and 'mortgagee' see PARA 704 note 15 ante.

15 *Ibid* by the provisions of the Landlord and Tenant Act 1954 other than s 40(3) (as substituted) (duty to give information): see PARA 704 ante.

16 *Ibid* s 67 (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, art 28(2), Sch 6; for transitional provisions see art 29(6)). Where between the making of a tenant's application for a new lease and the hearing of that application a mortgagee of the landlord's interest goes into possession or appoints a receiver, that mortgagee should be added as a respondent to the proceedings: *Meah v Mouskos* [1964] 2 QB 23, [1963] 3 All ER 908, CA; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

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## **716. Landlord's notice to terminate business tenancy.**

The landlord<sup>1</sup> may terminate a business tenancy<sup>2</sup> by a notice given to the tenant in the prescribed form<sup>3</sup> specifying the date at which the tenancy is to come to an end ('the date of termination')<sup>4</sup>.

The notice must be signed by the landlord<sup>5</sup> or by a duly authorised agent<sup>6</sup>. A notice which is not in the prescribed form or substantially to the like effect will not be effective for the statutory purposes<sup>7</sup>, but may still be an effective exercise of an option to determine the term<sup>8</sup>. A notice does not have effect unless it is given not more than 12 nor less than six months before the date of termination specified in it<sup>9</sup>.

In the case of a tenancy which could otherwise<sup>10</sup> have been brought to an end by notice to quit<sup>11</sup> given by the landlord, the date of termination specified in a statutory notice<sup>12</sup> must not be earlier than the earliest date on which the tenancy could otherwise have been brought to an end by notice to quit given by the landlord on the date of the giving of the statutory notice<sup>13</sup>. In the case of any other tenancy, the statutory notice must not specify a date of termination earlier than the date on which the tenancy would otherwise have come to an end by effluxion of time<sup>14</sup>. A notice which is in the prescribed form may take effect both as a notice to quit in respect of a periodic tenancy and as a notice to terminate, and in such a case it need not specify as its date of termination only a date on which an ordinary notice to quit could expire<sup>15</sup>.

A statutory notice does not have effect unless it states whether the landlord is opposed to the grant of a new tenancy to the tenant<sup>16</sup>. A notice which states that the landlord is so opposed does not have effect unless it also specifies one or more of the statutory grounds<sup>17</sup> as the ground or grounds for his opposition<sup>18</sup>; and a notice which states that the landlord is not so opposed does not have effect unless it sets out the landlord's proposals as to:

- 1408 (1) the property to be comprised in the new tenancy, being either the whole or part of the property comprised in the current tenancy<sup>19</sup>;
- 1409 (2) the rent to be payable under the new tenancy; and
- 1410 (3) the other terms<sup>20</sup> of the new tenancy<sup>21</sup>.

The effect of a valid notice will be to terminate the current tenancy on the date of termination<sup>22</sup> unless the tenant takes the proper steps to apply to the court for a new tenancy, in which case the provisions as to the interim continuation of tenancies<sup>23</sup> will take effect. A notice to terminate may not be given if the tenant has already made a request for a new tenancy<sup>24</sup>.

A single notice can determine several tenancies<sup>25</sup>, but a notice cannot determine a tenancy as to part only of the premises comprised in the tenancy<sup>26</sup>.

Where a landlord has served an invalid notice, he is not estopped from relying upon a later valid notice<sup>27</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 I.e. a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the prescribed form of notice ending a tenancy to which *ibid* Pt II (as amended) applies (1) where the landlord is not opposed to the grant of a new tenancy, see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), (3), Schs 1, 2, Form 1; (2) where the landlord is opposed to the grant of a new tenancy and the tenant is not entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease, see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, Schs 1, 2, Form 2; (3) where the landlord is opposed to the grant of a new tenancy but the tenant may be entitled to buy the freehold or an extended lease, see Schs 1, 2, Form 7; (4) for use in the special cases discussed in PARA 763 *et seq* post, see Schs 1, 2, Forms 8-17 (amended by SI 2005/3226). It has been held that the landlord's use of the wrong form is not material if the tenant does not raise the issue of its validity (see *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Mayhew* [1997] 1 EGLR 88, [1997] 17 EG 163, CA), but the decision in this case was based on the fact that the tenant had assumed the validity of the notice by issuing a counter-notice in accordance with the Landlord and Tenant Act 1954 s 25(5) (now repealed).

In relation to a landlord's notice under the Landlord and Tenant Act 1954 s 4 (see PARA 1212 post) or s 25 (as amended) or under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1) (see PARA 1249 post) terminating a tenancy of premises which are a 'house' for the purposes of the Leasehold Reform Act 1967 (see PARA 1390 post), if (1) no previous notice terminating the tenancy has been given under any of those provisions; and (2) in the case of a notice under the Landlord and Tenant Act 1954 s 25 (as amended), the tenancy is a long tenancy at a low rent for the purposes of the 1967 Act (see PARAS 1398-1404 post) and the tenant is not a company or other artificial person, the landlord's notice does not have effect unless it states (a) that, if a tenant has a right under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 *et seq* post) to acquire the freehold or an extended lease of property comprised in the tenancy, notice of his desire to have the freehold or an extended lease cannot be given more than two months after the service of the landlord's notice; and (b) that in the event of a tenant having that right and giving such a notice within those two months, the landlord's notice will not operate and no further proceedings may be taken by him under the Landlord and Tenant Act 1954 Pt II (as amended); and (c) that, in the event of the tenant giving such a notice within those two months, the landlord will be entitled to apply to the court under the Leasehold Reform Act 1967 s 17 (see PARAS 1485-1486 post) or s 18 (as amended) (see PARAS 1488-1490 post) and proposes to do so or, as the case may be, will not be entitled or does not propose to do so: s 22(1), Sch 3 para 10(1), (2), (2A) (Sch 3 para 10 amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 paras 11, 13; the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5 paras 10, 13).

The landlord must also in the notice give the names and addresses of any other persons known or believed by him to have an interest superior to the tenancy terminated by the notice or to be the agent concerned with the property on behalf of a person having such an interest; and, for these purposes, 'an interest superior to the tenancy terminated by the notice' means the estate in fee simple and any tenancy superior to that tenancy, but includes also a tenancy reversionary on that tenancy: Leasehold Reform Act 1967 Sch 3 para 10(3).

Where a tenant's notice of his desire to have the freehold or an extended lease of a house and premises under the Leasehold Reform Act 1967 Pt I (as amended) is given after the service of a landlord's notice terminating the tenancy under the Landlord and Tenant Act 1954 s 25 (as amended), and the landlord's notice does not comply with the requirements of the Leasehold Reform Act 1967 Sch 3 para 10(2), no application made under s 17 or s 18 (as amended) with respect to the house and premises by the landlord giving the notice may be entertained by the court, other than an application under s 17 after the grant of an extended lease: Sch 3 para 10(4) (amended by the Local Government and Housing Act 1989 Sch 11 para 13(5)(b)).

4 Landlord and Tenant Act 1954 s 25(1). Section 25(1) has effect subject to the provisions of Pt IV (ss 51-70) (as amended) as to the interim continuation of tenancies pending the disposal of applications to the court and, as from 1 June 2004, subject to s 29B(4) (as added) (see PARA 721 post): s 25(1) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 11). As to interim continuation see PARA 729 post.

5 See the prescribed forms mentioned in note 3 *supra*. The notice is invalid if it does not correctly identify the landlord: *Morrow v Nadeem* [1987] 1 All ER 237, [1986] 1 WLR 1381, CA; *Pearson v A'lyo* (1989) 60 P & CR 56, [1990] 1 EGLR 114, CA (notice naming only one of two joint landlords invalid).

6 *Tennant v LCC* (1957) 55 LGR 421, 121 JP 428, CA. If a notice to quit is signed by an agent, evidence of his authority to sign may be essential: *LCC v Farren* [1956] 3 All ER 401, [1956] 1 WLR 1297, CA.

7 *le* for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended). See also PARA 702 ante. In *Milletts (Victoria) Ltd v Northley House Ltd* (1956) 167 Estates Gazette 605, a non-statutory notice served after the Act came into force was held to be a nullity.

8 *Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd* [1958] Ch 437, [1957] 3 All ER 663. The term so cut short will continue under the Landlord and Tenant Act 1954; cf para 713 note 22 ante. See also *Scholl Manufacturing Co Ltd v Clifton (Slim-Line) Ltd* [1967] Ch 41, [1966] 3 All ER 16, CA (notice in the prescribed form held to be sufficient to exercise an option to determine the lease as well as to fulfil its statutory function).



9 Landlord and Tenant Act 1954 s 25(2). See *Sunrose Ltd v Gould* [1961] 3 All ER 1142, [1962] 1 WLR 20, CA (notice valid even though year of termination left blank as year intended was clear from notes on back of form). See also note 13 infra.

10 Ie apart from the Landlord and Tenant Act 1954.

11 For the meaning of 'notice to quit' see PARA 704 note 19 ante.

12 Ie a notice under the Landlord and Tenant Act 1954 s 25 (as amended).

13 Ibid s 25(3)(a). Where apart from Pt II (as amended) more than six months' notice to quit would have been required to bring the tenancy to an end, s 25(2) (see the text and note 9 supra) has effect with the substitution for 12 months of a period six months longer than the length of notice to quit which would have been so required: s 25(3)(b).

14 Ibid s 25(4). See *Ladyman v Wirral Estates Ltd* [1968] 2 All ER 197, (1968) 19 P & CR 781; *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583; *Lewis v MTC (Cars) Ltd* [1975] 1 All ER 874, [1975] 1 WLR 457, CA (competent landlord could terminate a business subtenancy before the mesne tenancy determined).

15 *Commercial Properties Ltd v Wood* [1968] 1 QB 15, [1967] 2 All ER 916, CA; and see *Keith Bayley Rogers & Co v Cubes Ltd* (1975) 31 P & CR 412.

16 Landlord and Tenant Act 1954 s 25(6) (s 25(6)-(8) substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 4(2)). Nothing in the 2003 Order has effect in relation to a notice given by the landlord to the tenant before 1 June 2004: see art 29(1)(a). A notice given under the Landlord and Tenant Act 1954 s 25 (as originally enacted) was of no effect unless it stated whether the landlord would oppose an application to the court for the grant of a new tenancy and, if so, also stated on which of the grounds mentioned in s 30 (as amended) he would do so: see s 25(6) (as originally enacted). It had also to require the tenant, within two months after the giving of the notice, to notify the landlord in writing whether or not the tenant would be willing to give up possession of the property comprised in the tenancy at the date of termination: see s 25(5) (repealed). Once given, the tenant's counter-notice could not be withdrawn: see *Pennycook v Shaws (EAL) Ltd* [2004] EWCA Civ 100, [2004] Ch 296, [2004] 2 All ER 665.

The landlord's intention must be clear and unambiguous to a reasonable recipient of the notice: see *Barclays Bank plc v Bee* [2001] EWCA Civ 1126, [2002] 1 WLR 332, [2001] All ER (D) 123 (Jul) (decided under the Landlord and Tenant Act 1954 s 25 as originally enacted).

17 Ie the grounds specified in the Landlord and Tenant Act 1954 s 30(1) (as amended): see PARA 736 et seq post. This gives statutory effect to *Biles v Caesar* [1957] 1 All ER 151, [1957] 1 WLR 156, CA.

18 Landlord and Tenant Act 1954 s 25(7) (as substituted: see note 16 supra).

19 For the meaning of 'current tenancy' see PARA 713 note 12 ante.

20 For the meaning of 'terms' see PARA 706 note 27 ante.

21 Landlord and Tenant Act 1954 s 25(8) (as substituted: see note 16 supra).

22 The landlord will not necessarily be estopped from denying that the tenant is entitled to a new tenancy or from recovering possession where the tenant fails to apply to the court for an order for a new lease in reliance upon an agreement for lease which is expressed to be 'subject to lease' or 'subject to contract': *Akiens v Salomon* (1992) 65 P & CR 364, sub nom *Salomon v Akiens* [1993] 1 EGLR 101, CA.

23 See PARA 729 post.

24 Landlord and Tenant Act 1954 s 26(4).

25 *Tropis Shipping Co Ltd v Ibex Property Corpn Ltd* (1967) 203 Estates Gazette 133 (one notice for three tenancies).

26 *Kaiser Engineering and Constructors Inc v ER Squibb & Sons Ltd* (1971) 218 Estates Gazette 1731; *Southport Old Links Ltd v Naylor* [1985] 1 EGLR 66, (1984) 273 Estates Gazette 767, CA (contractual provision in the lease whereunder at common law the contractual tenancy could be determined as to part only). Cf *Moss v Mobil Oil Co Ltd* [1988] 1 EGLR 71, CA (two separate tenancies created by one lease). A distinction has to be drawn between a notice directed to only part of the premises comprised in the tenancy (albeit that part is the holding, as in *Kaiser Engineering and Constructors Inc v ER Squibb & Sons Ltd* supra), in which case the notice will fail; and a notice which misdescribes the premises by referring only to part of them, in which case, as long

as the notice sufficiently identifies the tenancy, it will not be invalid: *Castell Bros Ltd v A Jeffries (Hatton Garden) Ltd* (1972) 222 Estates Gazette 1009.

Where the reversion is severed, so that the landlord is one of several landlords in respect of the tenancy, the notice must be given by them collectively: see the Landlord and Tenant Act 1954 s 44(1A) (as added); and PARA 715 ante. The position in relation to a notice by one of several landlords alone is unclear. It was held in *Dodson Bull Carpet Co Ltd v City of London Corp* [1975] 2 All ER 497, [1975] 1 WLR 781 that, prior to the addition of the Landlord and Tenant Act 1954 s 44(1A), a landlord has no authority to serve a notice to terminate a tenancy so as to affect part only of premises which the tenant holds under the tenancy and, accordingly, where the reversion is severed, the landlord of a severed part cannot serve a notice. This decision is irreconcilable with *William Skelton & Son Ltd v Harrison and Pinder Ltd* [1975] QB 361, [1975] 1 All ER 182, where the landlord of a severed part was held to be entitled to give a notice pursuant to the Landlord and Tenant Act 1954 s 24(3)(a) (see PARA 713 ante) to terminate the tenancy of the severed part by virtue of the Law of Property Act 1925 s 140(1) (see PARA 555 ante), notwithstanding that the tenant was in business occupation of the other portion of the demised premises and that, if one tenancy had subsisted, it would have been a tenancy which included premises occupied for business purposes by the tenant, and would have attracted the protection of the Landlord and Tenant Act 1954 Pt II (as amended) necessitating a notice under s 25 (as amended) applying to the whole of the parcels.

27 *Smith v Draper* (1990) 60 P & CR 252, [1990] 2 EGLR 69, CA.

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### **717. Special rules for certain long tenancies.**

Where the tenant may be entitled to enfranchise<sup>1</sup>, a special form of notice to terminate has to be used, designed to alert him to his rights in that connection<sup>2</sup>; and similar adjustments to the ordinary procedure under Part II of the Landlord and Tenant Act 1954<sup>3</sup> are made in order to preserve rights, including putative but ineffective rights, to enfranchise. Thus a landlord's notice to terminate is of no effect if given or served during the currency of a claim<sup>4</sup> to acquire the freehold or an extended lease, and ceases to have effect on the making of such a claim<sup>5</sup>. Where a notice to terminate so ceases to have effect on the making of a claim, but the claim is not effective, then, if within one month after the period of currency of that claim or any subsequent claim<sup>6</sup> a landlord's notice to terminate the tenancy is given, the earliest date which may be specified as the date of termination is the date specified in the previous notice or the expiration of three months from the giving of the new notice, whichever is the later<sup>7</sup>.

If:

- 1411 (1) the landlord commences proceedings under Part II of the 1954 Act; and
- 1412 (2) the tenant subsequently makes a claim to acquire the freehold or an extended lease of the property<sup>8</sup>; and
- 1413 (3) the relevant statutory provision<sup>9</sup> does not render the claim of no effect,

no further steps are to be taken in the proceedings under Part II of the 1954 Act otherwise than for their dismissal and for the making of any consequential order<sup>10</sup>.

1    Ie under the Leasehold Reform Act 1967: see PARA 1389 et seq post.

2    See PARA 716 note 3 ante.

- 3   le the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 718 et seq post.
- 4   For the meaning of 'currency of a claim' see PARA 1434 note 3 post.
- 5   See the Leasehold Reform Act 1967 Sch 3 para 2(2) (as amended); and PARA 1434 post.
- 6   le a claim made by virtue of ibid Sch 3 para 2(1) proviso (as originally enacted) or Sch 3 para 2(1D) (as substituted): see PARA 1430 post.
- 7   See ibid Sch 3 para 2(3) (as amended); and PARA 1434 post.
- 8   See note 1 supra.
- 9   le the Leasehold Reform Act 1967 Sch 3 para 2 (as amended); and see PARA 1434 post.
- 10   Ibid Sch 3 para 2A(1) (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 10, 12). The Landlord and Tenant Act 1954 s 64 (as amended) (interim continuation of tenancies pending determination by the court: see PARA 729 post) has no effect in a case to which the Leasehold Reform Act 1967 Sch 3 para 2A(1) (as so added) applies: Sch 3 para 2A(2) (as so added).

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### **718. Tenant's request for a new tenancy.**

A tenant's request for a new tenancy<sup>1</sup> may be made where the current tenancy<sup>2</sup> is a tenancy granted for a term of years certain<sup>3</sup> exceeding one year, whether or not continued by statute<sup>4</sup> or granted for a term of years certain and thereafter from year to year<sup>5</sup>. Such a request does not have effect unless it is made by notice in the prescribed form<sup>6</sup> given to the landlord<sup>7</sup> and sets out the tenant's proposals as to the property to be comprised in the new tenancy, which may be the whole or part of the property comprised in the current tenancy, as to the rent to be payable under the new tenancy and as to the other terms<sup>8</sup> of the new tenancy<sup>9</sup>. It must be a request for a tenancy beginning with such date, not more than 12 nor less than six months after the making of the request, as may be specified in it, but that date must not be earlier than the date on which the current tenancy would otherwise<sup>10</sup> come to an end by effluxion of time or could be brought to an end by notice to quit<sup>11</sup> given by the tenant<sup>12</sup>.

A request may not be made if the landlord has already given notice to terminate<sup>13</sup> the current tenancy or if the tenant has already given notice to quit or statutory notice ending a fixed term<sup>14</sup>; and no such notice may be given by the landlord or the tenant after the making by the tenant of a request for a new tenancy<sup>15</sup>.

A request will be of no effect if it is made after the landlord has applied for possession under the Leasehold Reform Act 1967<sup>16</sup> or the Leasehold Reform, Housing and Urban Development Act 1993<sup>17</sup>, and a request which has been made will cease to have effect upon the landlord making such an application<sup>18</sup>. A tenant's request is of no effect if it is made during the currency of a claim<sup>19</sup> to enfranchise or to extend the lease under the Leasehold Reform Act 1967<sup>20</sup>; but, once a request for a new tenancy under the Landlord and Tenant Act 1954 has been made, the tenant cannot enfranchise or extend the lease under the 1967 Act<sup>21</sup>.

Where the tenant makes a request for a new tenancy, the current tenancy terminates<sup>22</sup> immediately before the date specified in the request for the beginning of the new tenancy<sup>23</sup>. Within two months of the making of a tenant's request for a new tenancy, the landlord may

give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy<sup>24</sup>. Any such notice must state on which of the statutory grounds<sup>25</sup> he will oppose the application<sup>26</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For the meaning of 'current tenancy' see PARA 713 note 12 ante.

3 A tenancy which is subject to a landlord's option to determine it is still a 'term certain' for this purpose: *Scholl Manufacturing Co Ltd v Clifton (Slim Line) Ltd* [1967] Ch 41, [1966], All ER 16, CA. See also PARA 710 note 3 ante.

4 Ie by the Landlord and Tenant Act 1954 s 24 (as amended): see PARA 713 ante.

5 Ibid s 26(1) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 3). Nothing in the 2003 Order has effect in relation to such a request made before 1 June 2004 or anything done in consequence of it: see art 29(1)(b). Where a tenant or his predecessor in the business held such a tenancy which expired before the 1954 Act came into force and the current tenancy immediately followed on that tenancy, the current tenancy is deemed to be within the Landlord and Tenant Act 1954 s 26(1) (as amended): see s 68(2), Sch 9 para 4.

6 For the prescribed form of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 3. As to the use of the prescribed forms generally see PARA 702 ante.

7 For the meaning of 'the landlord' see PARA 715 ante.

8 For the meaning of 'terms' see PARA 706 note 27 ante.

9 Landlord and Tenant Act 1954 s 26(3). A request for a tenancy 'upon the terms of the current tenancy' implicitly requests a term of the same length as the current term: *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, [1956] 1 All ER 536, CA. If the request is good on its face, evidence that it does not embody the tenant's true intention is inadmissible: *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* supra, applied in *Sun Life Assurance plc v Thales Tracs Ltd* [2001] EWCA Civ 704, [2002] 1 All ER 64, [2001] 1 WLR 1562.

10 Ie apart from the Landlord and Tenant Act 1954.

11 For the meaning of 'notice to quit' see PARA 704 note 19 ante.

12 Landlord and Tenant Act 1954 s 26(2).

13 Ie under ibid s 25 (as amended): see PARA 716 ante.

14 Ie under ibid s 27 (as amended): see PARA 719 post.

15 Ibid s 26(4).

16 Ie under the Leasehold Reform Act 1967 s 17(1) (see PARA 1485 post) or s 18(1) (see PARA 1488 post).

17 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 61: see PARA 1725 post.

18 Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 6(1); Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 6(1); and see PARAS 1495, 1728 post.

19 For the meaning of 'currency of a claim' see PARA 1434 note 3 post.

20 Leasehold Reform Act 1967 s 22(1), Sch 3 para 1(2), (3).

21 See ibid Sch 3 para 1(1), (3) (as amended); and PARAS 1430, 1434 post.

22 Ie subject to the provisions of the Landlord and Tenant Act 1954 s 36(2) (see PARA 757 post) and Pt IV (ss 51-70) (as amended) as to the interim continuation of tenancies and also, with effect from 1 June 2004, subject to the provisions of s 29B(4) (as added) (see PARA 721 post).

23 Ibid s 26(5) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 12).

24 Landlord and Tenant Act 1954 s 26(6). Failure to serve this notice will preclude the landlord from opposing the grant of a new tenancy, although he will still be able to argue about the terms. A landlord who contests the validity of a request is not thereby estopped from relying upon it later: *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529, [1956] 1 All ER 536, CA.

25 Ie the grounds mentioned in the Landlord and Tenant Act 1954 s 30 (as amended): see PARA 735 et seq post.

26 Ibid s 26(6).

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### **719. Tenant's notice terminating a term certain or its continuation.**

Where the tenant under a business tenancy<sup>1</sup> granted for a term of years certain<sup>2</sup> gives to the immediate landlord<sup>3</sup>, not later than three months before the date on which the tenancy would otherwise<sup>4</sup> come to an end by effluxion of time, a notice in writing that the tenant does not desire the tenancy to be continued, the tenancy is not continued by statute<sup>5</sup> unless the notice is given before the tenant has been in occupation in right of the tenancy for one month<sup>6</sup>. Nor, with effect from 1 June 2004<sup>7</sup>, is a business tenancy for a term of years certain continued by statute<sup>8</sup> where the tenant is not in occupation of the property comprised in the tenancy at the time when the tenancy would otherwise<sup>9</sup> come to an end by effluxion of time<sup>10</sup>.

A tenancy granted for a term of years certain which is continuing by virtue of statute<sup>11</sup> may be brought to an end on any day by not less than three months' notice in writing given by the tenant to the immediate landlord, whether the notice is given after the date on which the tenancy would otherwise<sup>12</sup> have come to an end or before that date, but not before the tenant has been in occupation in right of the tenancy for one month<sup>13</sup>. It does not come to an end by reason only of the tenant ceasing to occupy the property<sup>14</sup>. Where a tenancy is terminated under this provision on or after 1 June 2004, any rent payable in respect of a period which begins before, and ends after, the tenancy is terminated must be apportioned, and any rent paid by the tenant in excess of the amount apportioned to the period before termination is recoverable by him<sup>15</sup>.

Neither type of notice will be of any effect if it is served during the currency of a claim<sup>16</sup> to enfranchise or to extend the tenancy under the Leasehold Reform Act 1967<sup>17</sup>, and no such claim under that Act can validly be made after the tenant has served notice terminating a term certain or its continuation under the Landlord and Tenant Act 1954<sup>18</sup>.

Minor errors will not invalidate a tenant's notice so long as it is sufficiently clear and unambiguous to leave a reasonable recipient in no doubt as to how and when it is to take effect<sup>19</sup>.

1 Ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 See PARA 710 note 3 ante.

3 For the meaning of 'the landlord' see PARA 715 ante.

4 le apart from the Landlord and Tenant Act 1954.

5 le *ibid* s 24 (as amended) (see PARA 713 ante) does not have effect in relation to the tenancy.

6 *Ibid* s 27(1) (s 27(1), (2) amended by the Law of Property Act 1969 s 4(2)). There is no prescribed form of notice for these purposes.

7 le the date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante. For transitional provisions see note 13 *infra*.

8 See note 5 *supra*.

9 See note 4 *supra*.

10 Landlord and Tenant Act 1954 s 27(1A) (s 27(1A), (3) added, and s 27(2) amended, by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 25).

11 le by virtue of the Landlord and Tenant Act 1954 s 24 (as amended).

12 See note 4 *supra*.

13 Landlord and Tenant Act 1954 s 27(2) (as amended: see notes 6, 10 *supra*). Nothing in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096 (see note 10 *supra*), has effect in relation to such a notice which was given by the tenant to the immediate landlord before 1 June 2004: see art 29(2)(b).

It was held in *Esselte AB v Pearl Assurance plc* [1997] 2 All ER 41, [1997] 1 WLR 891, CA, following *Morrison Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205, [1976] 1 WLR 533, CA, and not following and doubting *Long Acre Securities Ltd v Electro Acoustic Industries Ltd* (1990) 61 P & CR 177, [1990] 1 EGLR 91, CA, that where a tenant ceases to occupy premises for the purpose of his business before the expiration of the contractual term, the tenancy terminates at the expiration of the term and not on the later expiration of the notice given by the tenant under the Landlord and Tenant Act 1954 s 27(2) (as amended). In relation to a notice given on or after 1 June 2004 see the Landlord and Tenant Act 1954 s 27(1A) (as added); and the text and notes 7-10 *supra*.

14 *Ibid* s 27(2) (as amended: see note 10 *supra*). See also note 13 *supra*.

15 *Ibid* s 27(3) (as added: see note 10 *supra*).

16 For the meaning of 'currency of a claim' see PARA 1434 note 3 post.

17 Leasehold Reform Act 1967 s 22(1), Sch 3 para 1(2), (3); and see PARAS 1430, 1434 post.

18 See *ibid* Sch 3 para 1(1), (3) (as amended); and PARA 1434 post.

19 See *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, [1997] 3 All ER 352, HL (cited in PARA 222 ante), applied in eg *Garston v Scottish Widows' Fund and Life Assurance Society* [1998] 3 All ER 596, [1998] 1 WLR 1583, CA (notice to determine a lease wrongly describing the date of determination as ten years from the date of the lease rather than from the date of commencement of the term held to be valid) and *Havant International Holdings Ltd v Lionsgate (H) Investment Ltd* [1999] 47 LS Gaz R 34, [1999] All ER (D) 1344 (notice to determine lease wrongly given by director of associated company with similar name to lessee; held to be valid); considered in eg *Trafford Metropolitan Borough Council v Total Fitness UK Ltd* [2002] EWCA Civ 1513, [2003] 2 P & CR 8, [2002] All ER (D) 462 (Oct).

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## **E. RENEWAL OF TENANCIES**

## (A) LANDLORD'S OR TENANT'S APPLICATION TO THE COURT

### 720. Right to apply for an order for grant of a new tenancy.

With effect from 1 June 2004<sup>1</sup>, either the landlord<sup>2</sup> or the tenant under a business tenancy<sup>3</sup> may apply to the court<sup>4</sup> for an order for the grant of a new tenancy<sup>5</sup> if the landlord has given a notice to terminate the tenancy<sup>6</sup> or if the tenant has made a request<sup>7</sup> for a new tenancy<sup>8</sup>. The landlord may not withdraw such an application unless the tenant consents to its withdrawal<sup>9</sup>. Prior to that date, only the tenant had a statutory right to make such an application<sup>10</sup>.

Neither the tenant nor the landlord may make such an application:

1414 (1) if the other has made such an application and the application has been served<sup>11</sup>;

1415 (2) if the landlord has made an application for an order for the termination of the tenancy without the grant of a new tenancy<sup>12</sup> and the application has been served<sup>13</sup>.

It is a continuing condition of the tenant's right to a new tenancy that the tenant should continue in occupation of the holding for business purposes throughout the proceedings<sup>14</sup>, but constructive occupation will suffice where the tenant's temporary removal from the premises is involuntary and for reasons beyond the tenant's control<sup>15</sup>.

The court must dismiss the application by the landlord if the tenant informs the court that he does not want a new tenancy<sup>16</sup>. Otherwise, on an application by the landlord or the tenant<sup>17</sup> the court must<sup>18</sup> make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy<sup>19</sup> immediately before the commencement of the new tenancy<sup>20</sup>, unless the landlord opposes the tenant's application and establishes one of the statutory grounds of opposition<sup>21</sup>.

1    I.e. the date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante.

2    For the meaning of 'the landlord' see PARA 715 ante.

3    I.e. a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

4    As to the court's jurisdiction see PARA 722 post; and as to time limits for the application see PARA 721 post. Where there are joint tenants, all of them must apply (*Jacobs v Chaudhuri* [1968] 2 QB 470, [1968] 2 All ER 124, CA), unless the special provisions as to partnerships apply (see PARA 765 post).

5    As to the procedure on such an application see PARA 723 et seq post.

6    I.e. under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

7    I.e. in accordance with *ibid* s 26 (as amended): see PARA 718 ante.

8    *Ibid* s 24(1) (amended by the Law of Property Act 1969 s 3(2); the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 3(1)).

9    Landlord and Tenant Act 1954 s 24(2C) (s 24(2A)-(2C) added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 3(2)).

10   See the Landlord and Tenant Act 1954 s 24(1) (as originally enacted and as amended by the Law of Property Act 1969 s 3(2)). Where the tenant's application was made in consequence of a notice given by the landlord under the Landlord and Tenant Act 1954 s 25 (as originally enacted), it could not be entertained unless the tenant had duly notified the landlord that he would not be willing at the date of termination to give up possession of the property: see s 29(2) (as originally enacted).

- 11 Ibid s 24(2A) (as added: see note 9 supra).
- 12 Ie under ibid s 29(2) (as substituted): see PARA 734 post.
- 13 Ibid s 24(2B) (as added: see note 9 supra).
- 14 *I and H Caplan Ltd v Caplan (No 2)* [1963] 2 All ER 930, [1963] 1 WLR 1247; *Domer v Gulf Oil (Great Britain) Ltd* (1975) 119 Sol Jo 392 (tenant's proceedings struck out as an abuse of the procedure of the court, it being shown that the tenant had vacated the premises).
- 15 *Morrison's Holdings Ltd v Manders Property (Wolverhampton) Ltd* [1976] 2 All ER 205, [1976] 1 WLR 533, CA.
- 16 Landlord and Tenant Act 1954 s 29(5) (s 29 substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 5).
- 17 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see the text and notes 1-8 supra.
- 18 Ie subject to the provisions of the Landlord and Tenant Act 1954.
- 19 For the meaning of 'current tenancy' see PARA 713 note 12 ante.
- 20 Landlord and Tenant Act 1954 s 29(1) (as substituted: see note 16 supra). The statutory wording relating to a tenant's application prior to 1 June 2004 differed in that it referred to 'an order for the grant of a tenancy comprising such property, at such rent and on such other terms as are hereinafter provided': see s 29(1) (as originally enacted).
- 21 As to opposition by the landlord see PARA 734 et seq post.

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## **721. Time limits on applications made on or after 1 June 2004.**

The court may not<sup>1</sup> entertain an application:

- 1416 (1) by the tenant or the landlord<sup>2</sup> for an order for the grant of a new business tenancy<sup>3</sup>; or
- 1417 (2) by the landlord for the termination of such a tenancy without the grant of a new tenancy<sup>4</sup>,

if it is made after the end of the statutory period<sup>5</sup>. 'The statutory period' means a period ending:

- 1418 (a) where the landlord gave a notice terminating the tenancy<sup>6</sup>, on the date specified in his notice; and
- 1419 (b) where the tenant made a request for a new tenancy<sup>7</sup>, immediately before the date specified in his request<sup>8</sup>.

Where the tenant has made a request for a new tenancy<sup>9</sup>, the court may not entertain an application for an order for the grant of a new tenancy<sup>10</sup> which is made before the end of the



period of two months beginning with the date of the making of the request, unless the application is made after the landlord has given a notice<sup>11</sup> that he will oppose the application<sup>12</sup>.

After the landlord has given a notice of termination, or the tenant has made a request for the new tenancy, but before the end of the statutory period, the landlord and tenant may, however, agree that an application such as is mentioned in heads (1) and (2) above may be made before the end of a period specified in the agreement which will expire after the end of the statutory period<sup>13</sup>. They may from time to time by agreement further extend the period for making such an application, but any such agreement must be made before the end of the period specified in the current agreement<sup>14</sup>. Where an agreement is so made, the court may entertain an application such as is mentioned in heads (1) and (2) above if it is made before the end of the period specified in the agreement<sup>15</sup>; and where an agreement is so made, or two or more such agreements are made, the landlord's notice of termination or the tenant's request for a new tenancy is to be treated as terminating the tenancy at the end of the period specified in the agreement or, as the case may be, at the end of the period specified in the last of those agreements<sup>16</sup>.

1    Ie subject to the Landlord and Tenant Act 1954 s 29B (as added): see the text and notes 13-16 infra.

2    For the meaning of 'the landlord' see PARA 715 ante.

3    Ie an application under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

4    Ie an application under ibid s 29(2) (as substituted): see PARA 734 post.

5    Ibid s 29A(1) (ss 29A, 29B added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 10, with effect from 1 June 2004). Prior to that date, no application by the tenant might be entertained unless it was made not less than two nor more than four months after the giving of the landlord's notice of termination or the making of the tenant's request for a new tenancy, or, exceptionally, within three months of the landlord's notice being given: see the Landlord and Tenant Act 1954 s 29(3) (as originally enacted); the Leasehold Reform Act 1967 s 22(1), Sch 3 para 2(4)(b) (repealed).

6    Ie a notice under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

7    Ie under ibid s 26 (as amended): see PARA 718 ante.

8    Ibid s 29A(2) (as added: see note 5 supra).

9    See note 7 supra.

10   See note 3 supra.

11   Ie under the Landlord and Tenant Act 1954 s 26(6): see PARA 718 ante.

12   Ibid s 29A(3) (as added: see note 5 supra).

13   Ibid s 29B(1) (as added: see note 5 supra).

14   Ibid s 29B(2) (as added: see note 5 supra).

15   Ibid s 29B(3) (as added: see note 5 supra).

16   Ibid s 29B(4) (as added: see note 5 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/E. RENEWAL OF TENANCIES/(A) Landlord's or Tenant's Application to the Court/722. Jurisdiction.

## 722. Jurisdiction.

Any jurisdiction conferred on the court by the statutory provisions relating to business tenancies<sup>1</sup> is exercised either by the High Court or by a county court<sup>2</sup>. A county court has jurisdiction to make any declaration as to any matter arising under those provisions whether or not any other relief is sought in the proceedings<sup>3</sup>.

The following provisions have effect as respects transfer of proceedings from or to the High Court or the county court, that is to say:

- 1420 (1) where an application is made to the one but cannot<sup>4</sup> be entertained except by the other, the application may not be treated as improperly made, but any proceedings on it must be transferred to the other court<sup>5</sup>; and
- 1421 (2) any proceedings<sup>6</sup> which are pending before one of those courts may by order of that court made on the application of any person interested be transferred to the other court, if it appears to the court making the order that it is desirable that the proceedings and any proceedings before the other court should both be entertained by the other court<sup>7</sup>.

Except where the county court does not have jurisdiction<sup>8</sup>, claims under the Landlord and Tenant Act 1954 should normally be brought in the county court; only exceptional circumstances justify starting a claim in the High Court<sup>9</sup>.

1    Ie by any provision of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 728 et seq post.

2    Ibid s 63(2) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule Pt I). Nothing in the Landlord and Tenant Act 1954 s 63 (as amended) prejudices the operation of the County Courts Act 1984 s 41 (as amended) (removal of proceedings into the High Court from a county court: see CIVIL PROCEDURE vol 11 (2009) PARA 69): Landlord and Tenant Act 1954 s 63(9) (amended by the High Court and County Courts Jurisdiction Order 1991 Schedule Pt I).

3    Landlord and Tenant Act 1954 s 43A (added by the Law of Property Act 1969 s 13).

4    Ie by virtue of an order under the Courts and Legal Services Act 1990 s 1 (as amended): see COURTS vol 10 (Reissue) PARA 579.

5    Landlord and Tenant Act 1954 s 63(4)(a) (amended by the High Court and County Courts Jurisdiction Order 1991 Schedule Pt I).

6    Ie under the provisions of the Landlord and Tenant Act 1954 Pt II (as amended) or the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) (see PARA 788 et seq post).

7    Landlord and Tenant Act 1954 s 63(4)(b).

8    As to county court jurisdiction see generally para 56 ante.

9    See CPR 56.2; and PARA 57 ante.

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### 723. Procedure for bringing claims; in general.

The following procedural rules apply to a claim for a new tenancy<sup>1</sup> and also to a claim for the termination<sup>2</sup> of a tenancy<sup>3</sup>.

Where the claim is an unopposed claim for a new tenancy<sup>4</sup>, the claimant must use the procedure under Part 8 of the Civil Procedure Rules<sup>5</sup>, with certain modifications<sup>6</sup>. The claim form must be served<sup>7</sup> within two months after the date of issue<sup>8</sup> and the court will give directions about the future management of the claim following receipt of the acknowledgment of service<sup>9</sup>.

Where the claim is an opposed claim<sup>10</sup>, the claimant must use the procedure under Part 7 of the Civil Procedure Rules<sup>11</sup> but the claim form must be served within two months after the date of issue<sup>12</sup>.

Where a claim for a new tenancy is made by a tenant, the person who, in relation to the claimant's current tenancy, is the landlord<sup>13</sup> must be a defendant<sup>14</sup>.

1    Ie a claim under the Landlord and Tenant Act 1954 s 24 (as amended): see PARAS 713, 720 ante.

2    Ie a claim under ibid s 29(2) (as amended): see PARA 734 post.

3    CPR 56.3(1).

4    For these purposes, 'an unopposed claim' means a claim for a new tenancy under the Landlord and Tenant Act 1954 s 24 (as amended) in circumstances where the grant of a new tenancy is not opposed: CPR 56.3(2)(a), (b); and see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.1(1).

5    Ie the procedure under CPR Pt 8 (alternative procedure for claims): see CIVIL PROCEDURE vol 11 (2009) PARA 127.

6    CPR 56.3(3)(a); and see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.1A(1). CPR 8.5, 8.6 do not, however, apply: CPR 56.3(3)(a)(i), (ii).

7    As to service see CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq.

8    CPR 56.3(3)(b). CPR 7.5, 7.6 are modified accordingly: CPR 56.3(3)(b).

9    CPR 56.3(3)(c). As to case management see CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq.

10   For these purposes, 'an opposed claim' means a claim for (1) a new tenancy under the Landlord and Tenant Act 1954 s 24 (as amended) in circumstances where the grant of a new tenancy is opposed; or (2) the termination of a tenancy under s 29(2) (as substituted): CPR 56.3(2)(c); and see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.1(2).

11   Ie the procedure under CPR Pt 7: see CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq.

12   CPR 56.3(4)(a), (b); and see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 2.1A(2). CPR 7.5, 7.6 are modified accordingly: CPR 56.3(4)(b).

13   Ie as defined in the Landlord and Tenant Act 1954 s 44 (as amended): see PARA 715 ante.

14   *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.3.

### UPDATE

### 723 Procedure for bringing claims; in general

TEXT AND NOTE 12--Omit words 'but the claim form must be served within two months after the date of issue': CPR 56.3(4) (substituted by SI 2008/2178).

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**724. Precedence of claim forms where there is more than one application to the court.**

Where more than one application to the court<sup>1</sup> is made, the following provisions apply:

- 1422 (1) once an application to the court for an order for the grant of a new tenancy<sup>2</sup> has been served on a defendant<sup>3</sup>, no further application to the court in respect of the same tenancy<sup>4</sup> may be served by that defendant without the permission of the court<sup>5</sup>;
- 1423 (2) if more than one application to the court for an order for the grant of a new tenancy<sup>6</sup> in respect of the same tenancy is served on the same day, any landlord's application is to stand stayed until further order of the court<sup>7</sup>;
- 1424 (3) if applications to the court under the provisions regarding:  
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  - 159. (a) an order for the grant of a new tenancy<sup>8</sup>; and
  - 160. (b) an order for the determination of a tenancy without such a grant<sup>9</sup>,
 128
- 1425 in respect of the same tenancy are served on the same day, any tenant's application is to stand stayed until further order of the court<sup>10</sup>; and
- 1426 (4) if a defendant is served with an application under the provisions mentioned in head (3)(b) above ('the section 29(2) application') which was issued at a time when an application to the court had already been made by that defendant in respect of the same tenancy under the provisions mentioned in head (3)(a) above ('the section 24(1) application'), the service of the section 29(2) application is to be deemed to be a notice<sup>11</sup> requiring service or discontinuance of the section 24(1) application within a period of 14 days after the service of the section 29(2) application<sup>12</sup>.

1    Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended) (see PARA 720 ante) or s 29(2) (as substituted) (see PARA 734 post).

2    Ie under ibid s 24(1) (as amended): see PARA 720 ante.

3    As to the defendant see PARA 723 the text and notes 13-14 ante.

4    Ie whether under the Landlord and Tenant Act 1954 s 24(1) (as amended) (see PARA 720 ante) or s 29(2) (as substituted) (see PARA 734 post).

5    *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.2(1).

6    See note 2 supra.

7    *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.2(2). As to the stay of proceedings see generally CIVIL PROCEDURE vol 11 (2009) PARA 529 et seq.

8    See note 2 supra.

9    Ie under the Landlord and Tenant Act 1954 s 29(2) (as substituted): see PARA 734 post.

10 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.2(3).

11 le under CPR 7.7.

12 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.2(4).

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## 725. Contents of the claim form.

In all cases<sup>1</sup>, the claim form must contain details of:

- 1427 (1) the property to which the claim relates;
- 1428 (2) the particulars of the current tenancy, including date, parties and duration, the current rent if not the original rent and the date and method of termination;
- 1429 (3) every notice or request given or made under the provisions relating to the determination of a business tenancy by the landlord<sup>2</sup> or the tenant's request for a new tenancy<sup>3</sup>; and
- 1430 (4) the expiry date of the statutory period<sup>4</sup> or any agreed<sup>5</sup> extended period<sup>6</sup>.

Where the claimant is the tenant making a claim for a new tenancy<sup>7</sup>, in addition to the details specified in heads (1) to (4) above, the claim form must contain details of:

- 1431 (a) the nature of the business carried on at the property;
- 1432 (b) whether the claimant relies on:
  - 129 161. (i) the provision relating to occupation or the carrying on of a business by a company in which he has a controlling interest or, if a company, by a person with a controlling interest in it<sup>8</sup>;
  - 162. (ii) the provisions relating to trusts<sup>9</sup>; or
  - 163. (iii) the provisions relating to groups of companies<sup>10</sup>;
  - 130 1433 and, if so, the basis on which he does so;
  - 1434 (c) whether the claimant relies on the provisions regarding the grant of a new tenancy in some cases where the landlord intends to demolish or reconstruct the premises<sup>11</sup> and, if so, the basis on which he does so;
  - 1435 (d) whether any, and if so what part, of the property comprised in the tenancy is occupied neither by the claimant nor by a person employed by the claimant for the purpose of the claimant's business;
  - 1436 (e) the claimant's proposed terms of the new tenancy; and
  - 1437 (f) the name and address of:
    - 131 164. (i) anyone known to the claimant who has an interest in the reversion in the property, whether immediate or in not more than 15 years, on the termination of the claimant's current tenancy and who is likely to be affected by the grant of a new tenancy; or

165. (ii) if the claimant does not know of anyone specified by head (i) above,  
anyone who has a freehold interest in the property<sup>12</sup>.  
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The claim form must be served on the persons referred to in head (f)(i) or head (f)(ii) above as appropriate<sup>13</sup>.

Where the claimant is the landlord making a claim for a new tenancy<sup>14</sup>, in addition to the details specified in heads (1) to (4) above the claim form must contain details of:

- 1438 (A) the claimant's proposed terms of the new tenancy;  
1439 (B) whether the claimant is aware that the defendant's tenancy is one to which the provision relating to cases where the property comprised in the current tenancy includes other property<sup>15</sup> applies and, if so, whether the claimant requires that any new tenancy is to be a tenancy of the whole of the property comprised in the defendant's current tenancy or just of the holding<sup>16</sup>; and  
1440 (C) the name and address of anyone known to the claimant who has an interest such as is mentioned in head (f)(i) above or, if he does not know of anyone so specified, the name and address of anyone who has a freehold interest in the property<sup>17</sup>.

The claim form must be served on the persons referred to in head (c) above as appropriate<sup>18</sup>.

Where the claimant is the landlord making an application for the termination of a tenancy<sup>19</sup>, in addition to the details specified in heads (1) to (4) above the claim form must contain the claimant's grounds of opposition<sup>20</sup>, full details of those grounds of opposition and the terms of a new tenancy that the claimant proposes in the event that his claim fails<sup>21</sup>.

- 1 le in all cases to which the procedure set out in PARA 723 ante applies.
- 2 le under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.
- 3 le under ibid s 26 (as amended): see PARA 718 ante.
- 4 le under ibid 29A(2) (as added): see PARA 721 ante.
- 5 le made under ibid s 29B(1) or 29B(2) (as added): see PARA 721 ante.
- 6 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.4.
- 7 le under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.
- 8 le ibid s 23(1A) (as added): see PARA 706 ante.
- 9 le ibid s 41 (as amended): see PARA 763 post.
- 10 le ibid s 42 (as amended): see PARA 766 post.
- 11 le ibid s 31A (as added and amended): see PARA 744 post.
- 12 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.5.
- 13 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.6.
- 14 See note 7 supra.
- 15 le the Landlord and Tenant Act 1954 s 32(2): see PARA 749 post.
- 16 le as defined by ibid s 23(3): see PARA 706 note 23 ante.

- 17 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.7.
- 18 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.8.
- 19 le under the Landlord and Tenant Act 1954 s 29(2) (as substituted): see PARA 734 post.
- 20 'Grounds of opposition' means: (1) the grounds specified in the Landlord and Tenant Act 1954 s 30(1) (as amended) on which a landlord may oppose an application for a new tenancy under s 24(1) (as amended) or make an application under s 29(2) (as substituted) (see PARA 734 et seq post); or (2) any other basis on which the landlord asserts that a new tenancy ought not to be granted: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.1(3).
- 21 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.9.

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## **726. Acknowledgment of service; defence in opposed claim.**

Where the claim is an unopposed claim<sup>1</sup> and the claimant is the landlord, the acknowledgment of service is to be in the appropriate form<sup>2</sup> and must state with particulars:

- 1441 (1) the nature of the business carried on at the property;
- 1442 (2) if the defendant relies on:
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166. (a) the provision relating to occupation or the carrying on of a business by a company in which he has a controlling interest or, if a company, by a person with a controlling interest in it<sup>3</sup>;
167. (b) the provisions relating to trusts<sup>4</sup>; or
168. (c) the provisions relating to groups of companies<sup>5</sup>,
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- 1443 the basis on which he does so;
- 1444 (3) whether any, and if so what part, of the property comprised in the tenancy is occupied neither by the defendant nor by a person employed by the defendant for the purpose of the defendant's business;
- 1445 (4) the name and address of:
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169. (a) anyone known to the defendant who has an interest in the reversion in the property, whether immediate or in not more than 15 years, on the termination of the defendant's current tenancy and who is likely to be affected by the grant of a new tenancy; or
170. (b) if the defendant does not know of anyone specified by head (a) above, anyone who has a freehold interest in the property; and
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- 1446 (5) whether, if a new tenancy is granted, the defendant objects to any of the terms proposed by the claimant and, if so the terms to which he objects and the terms that he proposes in so far as they differ from those proposed by the claimant<sup>6</sup>.

Where the claim is an opposed claim<sup>7</sup> and the claimant is the tenant, the acknowledgment of service is to be in the appropriate form<sup>8</sup>; and in his defence the defendant<sup>9</sup> must state with particulars:

- 1447 (i) the defendant's grounds of opposition<sup>10</sup>;
- 1448 (ii) full details of those grounds of opposition;
- 1449 (iii) whether, if a new tenancy is granted, the defendant objects to any of the terms proposed by the claimant and if so the terms to which he objects and the terms that he proposes in so far as they differ from those proposed by the claimant;
- 1450 (iv) whether the defendant is a tenant under a lease having less than 15 years unexpired at the date of the termination of the claimant's current tenancy and, if so, the name and address of any person who, to the knowledge of the defendant, has an interest in the reversion in the property expectant, whether immediately or in not more than 15 years from that date, on the termination of the defendant's tenancy;
- 1451 (v) the name and address of any person having an interest in the property who is likely to be affected by the grant of a new tenancy; and
- 1452 (vi) if the claimant's current tenancy is one to which the provision relating to cases where the property comprised in the current tenancy includes other property<sup>11</sup> applies, whether the defendant requires that any new tenancy is to be a tenancy of the whole of the property comprised in the claimant's current tenancy<sup>12</sup>.

Where the claim is an opposed claim and the claimant is the landlord, the acknowledgment of service is to be in the appropriate form<sup>13</sup>; and in his defence the defendant must state with particulars:

- 1453 (A) whether the defendant relies on the provisions referred to in head (2) above and, if so, the basis on which he does so;
- 1454 (B) whether the defendant relies on the provision referred to in head (vi) above and, if so, the basis on which he does so; and
- 1455 (C) the terms of the new tenancy that the defendant would propose in the event that the claimant's claim to terminate the current tenancy fails<sup>14</sup>.

1 For the meaning of 'unopposed claim' see PARA 723 note 4 ante.

2 Ie the form set out in *Practice Direction--Forms* PD 4 para 1.3, Table 1, Form N210. As to acknowledgment of service see generally CIVIL PROCEDURE vol 11 (2009) PARA 184 et seq; and as to the forms in use see generally CIVIL PROCEDURE vol 11 (2009) PARA 14.

3 Ie the Landlord and Tenant Act 1954 s 23(1A) (as added): see PARA 706 ante.

4 Ie *ibid* s 41 (as amended): see PARA 763 post.

5 Ie *ibid* s 42 (as amended): see PARA 766 post.

6 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.11.

7 For the meaning of 'opposed claim' see PARA 723 note 10 ante.

8 Ie the form set out in *Practice Direction--Forms* PD 4 para 1.3, Table 1, Form N9.

9 As to the defendant see PARA 723 the text and notes 13-14 ante.

10 For the meaning of 'grounds of opposition' see PARA 725 note 20 ante.

11 Ie one to which the Landlord and Tenant Act 1954 s 32(2) applies: see PARA 749 post.



- 12 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.12.
- 13 See note 8 *supra*.
- 14 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.13.

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## **727. Evidence and preliminary issues; amendment of statements of case.**

Where the claim is an unopposed claim<sup>1</sup>, no evidence need be filed<sup>2</sup> unless and until the court directs it to be filed<sup>3</sup>. Where the claim is an opposed claim<sup>4</sup>, evidence, including expert evidence<sup>5</sup>, must be filed by the parties as the court directs and the landlord is to be required to file his evidence first<sup>6</sup>.

Unless in the circumstances of the case it is unreasonable to do so, any grounds of opposition<sup>7</sup> must be tried as a preliminary issue<sup>8</sup>.

The fact that things change in the course of an application for the grant of a new tenancy is not out of the ordinary and does not represent a reason to refuse to allow an amendment of the statements of case<sup>9</sup>.

1 For the meaning of 'unopposed claim' see PARA 723 note 4 *ante*.

2 For the meaning of 'filing' see PARA 660 note 20 *ante*.

3 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.14.

4 For the meaning of 'opposed claim' see PARA 723 note 10 *ante*.

5 As to expert evidence see generally CIVIL PROCEDURE vol 11 (2009) PARA 835 *et seq*.

6 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.15.

7 For the meaning of 'grounds of opposition' see PARA 725 note 20 *ante*.

8 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.16. As to the trial of preliminary issues see generally CIVIL PROCEDURE vol 12 (2009) PARA 1135; and see eg *Ambrose v Kaye* [2002] EWCA Civ 91, [2002] 1 EGLR 49, [2002] All ER (D) 91 (Jan) (circumstances in which judge is entitled to take additional evidence into account).

9 See *Benchmark Group plc v Attbrook* [2005] All ER (D) 306 (Oct) (landlord served acknowledgement of service stating that tenant's application not opposed; tenant's proposal was for ten-year lease with tenant-only break clause; landlord later applied to amend its acknowledgement of service so as to include a term that the new lease should contain a landlord's break clause; held on appeal to the High Court that such amendment ought to have been allowed). As to amendments to statements of case see generally CIVIL PROCEDURE vol 11 (2009) PARA 607 *et seq*.

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BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/E.  
RENEWAL OF TENANCIES/(A) Landlord's or Tenant's Application to the Court/728. Costs.

## 728. Costs.

Both in the High Court and in a county court costs are in the court's discretion<sup>1</sup>; and, in making an order as to costs, the court should consider the reasonableness of the offers made by either side<sup>2</sup>. Where a landlord opposes the grant of a new lease but loses, ordinarily costs will follow the event<sup>3</sup>; but, where the parties are unable to agree the rent or terms for the new lease, so that they have to come to court to have those terms decided, it is usual for no order for costs to be made if neither party has behaved unreasonably<sup>4</sup>. If the tenant exercises his right<sup>5</sup> to decline to take up a lease ordered by the court to be granted, and therefore applies for the rescission of the order<sup>6</sup>, the court may, if it thinks fit, revoke or vary any provision for costs<sup>7</sup>; and, where no order for costs was made in the proceedings in which the revoked order had been obtained, the court may award costs in respect of those proceedings<sup>8</sup>.

1 See CPR 44.3(1); and CIVIL PROCEDURE vol 12 (2009) PARA 1738. See also *Decca Navigator Co Ltd v Greater London Council* [1974] 1 All ER 1178, [1974] 1 WLR 748, CA; *Demag Industrial Equipment Ltd v Canada Dry (UK) Ltd* [1969] 2 All ER 936, [1969] 1 WLR 985; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

2 See eg *Le Witt v Cannon Brookes* [1956] 3 All ER 676, [1956] 1 WLR 1438, CA (where it was decided that no order for costs should be made where the judge determined a rental figure approximately midway between the opposing parties' contentions, and where each side had behaved reasonably). Where the dispute is as to rent or terms or as to both, and the court decides on a rent or on terms substantially nearer to the contentions of one side than those of the other side, it may be appropriate that the loser pay all or part of the costs of the more successful party: see *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104 [1958] 1 WLR 108, CA. As to the matters to be taken into account by the court see generally CPR 44.3(4); and CIVIL PROCEDURE vol 12 (2009) PARA 1739; and see note 1 *supra*.

3 *Decca Navigator Co Ltd v Greater London Council* [1974] 1 All ER 1178, [1974] 1 WLR 748, CA; *Demag Industrial Equipment Ltd v Canada Dry (UK) Ltd* [1969] 2 All ER 936, [1969] 1 WLR 985.

4 See eg *Gold v Brighton Corp* [1956] 3 All ER 442, [1956] 1 WLR 1291, CA (where the parties would not agree upon the user covenant, and the court held that there should be no order as to the costs of the trial); *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104, [1958] 1 WLR 108, CA; but see also note 1 *supra*. As to the costs consequences when an offer to settle is made see CPR 36.13-14, CPR 36.20-21; and CIVIL PROCEDURE vol 12 (2009) PARA 1754.

5 Ie his right under the Landlord and Tenant Act 1954 s 36(2): see PARA 757 *post*.

6 Ie under *ibid* s 36(2).

7 *Ibid* s 36(3). Where, however, an order is revoked under s 36(2), any provision of it as to payment of costs does not cease to have effect by reason only of the revocation: s 36(3).

8 *Ibid* s 36(3). The tenant is in any event to be expected to have to pay the costs of both sides in respect of the tenant's application for the revocation of the order. A tenant has been ordered in such circumstances to pay the whole of the landlord's costs: see *Re No 88 High Road, Kilburn, Meakers Ltd v DAW Consolidated Properties Ltd* [1959] 1 All ER 527, [1959] 1 WLR 279; but see note 1 *supra*.

## UPDATE

## 728 Costs

NOTE 4--CPR Pt 36 substituted: see CIVIL PROCEDURE vol 11 (2009) PARA 729 *et seq*.

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## (B) INTERIM CONTINUATION OF TENANCIES AND PAYMENT OF RENT

### **729. Interim continuation pending determination by the court.**

In any case where:

- 1456 (1) a notice to terminate a tenancy<sup>1</sup> has been given<sup>2</sup> or a request for a new tenancy has been made<sup>3</sup>; and
- 1457 (2) an application has been made to the court for an order for a new tenancy<sup>4</sup> or for the termination of a tenancy without the grant of a new tenancy<sup>5</sup>; and
- 1458 (3) the effect of the notice or request would otherwise<sup>6</sup> be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of<sup>7</sup>,

the effect of the notice or request is to terminate the tenancy at the expiration of that period of three months and not at any other time<sup>8</sup>. Thus, in the absence of any contrary agreement, any new tenancy which is ordered by the court must commence at that date<sup>9</sup>. An application for an order for a new tenancy which is doomed to fail because it is premature, or, it would seem, too late, is still for this purpose an application which brings the provisions for interim continuation of the tenancy into operation until that application has been disposed of<sup>10</sup>. Once an order for the grant of a new tenancy has been refused, or the application otherwise disposed of, if 'rent' is accepted by the landlord after the expiry of the interim continuation of the tenancy, it will be a question of with what intent the payment was accepted, and it is unlikely that it will be inferred that the payment was intended to create a new tenancy<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 Ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended). As to notices to terminate a tenancy see PARAS 716, 719 ante.

3 Ie under ibid Pt II (as amended). As to requests for a new tenancy see PARA 718 ante.

4 Ie under ibid s 24(1) (as amended): see PARA 720 ante.

5 Ie under ibid s 29(2) (as substituted): see PARA 734 post.

6 Ie apart from ibid s 64 (as amended): see the text and notes 7-11 infra.

7 The reference to the date on which the application is finally disposed of is to be construed as a reference to the earliest date by which the proceedings on the application, including any proceedings on or in consequence of an appeal, have been determined, and any time for appealing or further appealing has expired, except that, if the application is withdrawn or any appeal is abandoned, the reference is to be construed as a reference to the date of the withdrawal or abandonment: ibid s 64(2). Where leave to appeal to the House of Lords is refused, the proceedings are finally disposed of when the time expires within which a petition can be lodged with the House of Lords for leave to appeal: *Re No 20 Exchange Street, Manchester, Austin Reed Ltd v Royal Insurance Co Ltd (No 2)* [1956] 3 All ER 490, [1956] 1 WLR 1339. The time for appeal to the Court of Appeal cannot be abridged: *Re No 20 Exchange Street, Manchester, Austin Reed Ltd v Royal Insurance Co Ltd* [1956] 2 All ER 509n, [1956] 1 WLR 765; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33; and as to rights of appeal and the time limits within which they must be exercised see generally CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

8 Landlord and Tenant Act 1954 s 64(1) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 9). See *Re No 88 High Road, Kilburn, Meakers Ltd v DAW Consolidated Properties Ltd* [1959] 1 All ER 527, [1959] 1 WLR 279, CA.

9 See PARAS 750-751 post.

10 *Zenith Investments (Torquay) Ltd v Kammins Ballrooms Co Ltd (No 2)* [1971] 3 All ER 1281, [1971] 1 WLR 1751, CA. If, however, the tenancy has already expired and the former tenant applies to the court after the termination date, his 'application' cannot operate to continue an already non-existent tenancy, and it will be of no legal effect: *Meah v Sector Properties Ltd* [1974] 1 All ER 1074, [1974] 1 WLR 547, CA; and see *Surrey County Council v Single Horse Properties Ltd* [2002] EWCA Civ 367, [2002] 4 All ER 143, [2002] 1 WLR 2103, applying *Esselte AB v Pearl Assurance plc* [1997] 2 All ER 41, [1997] 1 WLR 891, CA.

11 The ordinary rules as to acceptance of rent will apply: see PARA 231 ante. For examples (where no new tenancy was created) of the application of those rules to this situation see *Legal and General Assurance Society Ltd v General Metal Agencies Ltd* (1969) 20 P & CR 953 (routine computer-generated demand for rent sent out after the court had refused an order for the grant of a new lease because the landlord had neglected to reprogram the computer); *Raymond Kerry Ltd v Barritt* (1963) 186 Estates Gazette 715 (payments expressly accepted as 'mesne profits'); *Lewis v MTC (Cars) Ltd* [1975] 1 All ER 874, [1975] 1 WLR 457, CA; *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 3 All ER 633, [1986] 1 WLR 368 (tenant holding over pending agreement of new lease terms after successive 'contracted out' leases held to be merely a tenant at will).

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### **730. Landlord's or tenant's application for determination of interim rent.**

With effect from 1 June 2004<sup>1</sup>, if:

- 1459 (1) the landlord<sup>2</sup> of a business tenancy<sup>3</sup> has given notice<sup>4</sup> to terminate the tenancy; or
- 1460 (2) the tenant of such a tenancy has made a request for a new tenancy<sup>5</sup>,

either of them may make an application to the court to determine a rent (an 'interim rent') which the tenant is to pay while the tenancy ('the relevant tenancy') continues by virtue of the statutory provisions<sup>6</sup> and the court may<sup>7</sup> order payment of an interim rent<sup>8</sup>. Neither the tenant nor the landlord may, however, make such an application if the other has made such an application and has not withdrawn it<sup>9</sup>; and no such application may be entertained if it is made more than six months after the termination of the relevant tenancy<sup>10</sup>.

The interim rent determined on such an application is to be payable from the appropriate date<sup>11</sup>. That date is:

- 1461 (a) if such an application is made in a case where the landlord has given a notice to terminate the tenancy<sup>12</sup>, the earliest date of termination that could have been specified in the landlord's notice<sup>13</sup>;
- 1462 (b) if such an application is made in a case where the tenant has made a request for a new tenancy<sup>14</sup>, the earliest date that could have been specified in the tenant's request as the date from which the new tenancy is to begin<sup>15</sup>.

Prior to 1 June 2004, only the landlord might apply for the determination of an interim rent<sup>16</sup>. A rent determined by the court in such proceedings was deemed to be the rent payable under

the tenancy from the date in which the proceedings were commenced or the date specified in the landlord's notice terminating the tenancy or the tenant's request for a new tenancy, whichever was the later<sup>17</sup>.

1     Ie the date when the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, came into force: see PARA 701 ante.

2     For the meaning of 'the landlord' see PARA 715 ante.

3     Ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante.

4     Ie under *ibid* s 25 (as amended): see para 716 ante.

5     Ie under *ibid* s 26 (as amended): see PARA 718 ante.

6     Ie by virtue of *ibid* s 24 (as amended): see PARA 713 ante.

7     Ie in accordance with *ibid* s 24C or s 24D (as substituted): see PARAS 732-733 post.

8     *Ibid* s 24A(1) (ss 24A, 24B substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 18).

9     Landlord and Tenant Act 1954 s 24A(2) (as substituted: see note 8 *supra*).

10    *Ibid* s 24A(3) (as substituted: see note 8 *supra*).

11    *Ibid* s 24B(1) (as substituted: see note 8 *supra*).

12    See note 4 *supra*.

13    Landlord and Tenant Act 1954 s 24B(2) (as substituted: see note 8 *supra*).

14    See note 5 *supra*.

15    Landlord and Tenant Act 1954 s 24B(3) (as substituted: see note 8 *supra*).

16    See the Landlord and Tenant Act 1954 s 24A(1) (as added by the Law of Property Act 1969 s 3(1)). See also *Michael Kramer & Co v Airways Pension Fund Trustees Ltd* [1978] 1 EGLR 49, (1978) 246 Estates Gazette 911, CA; *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726. An interim rent would invariably be ordered if the landlord applied: see *Bloomfield v Ashwright Ltd* (1983) 47 P & CR 78, CA. For cases in which it was held by the Court of Appeal that the court of first instance erred in principle in the exercise of its discretion whether (1) to order an interim rent see *Charles Follett Ltd v Cabtell Investments Ltd* (1987) 55 P & CR 36, [1987] 2 EGLR 88, CA; or (2) whether to 'cushion' see *Conway v Arthur* [1988] 2 EGLR 113, CA; *Department of the Environment v Allied Freehold Property Trust Ltd* [1992] 2 EGLR 100.

A landlord of a tenancy by estoppel can apply to the court to determine rent: *Bell v General Accident Fire & Life Assurance Corp Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA.

17    See the Landlord and Tenant Act 1954 s 24A(2) (as added by the Law of Property Act 1969 s 3(1)); and *Stream Properties Ltd v Davis* [1972] 2 All ER 746, [1972] 1 WLR 645, approved in *Michael Kramer & Co v Airways Pension Fund Trustees Ltd* [1978] 1 EGLR 49, (1978) 246 Estates Gazette 911, CA and followed in *Victor Blake (Menswear) Ltd v Westminster City Council* (1978) 38 P & CR 448, 249 Estates Gazette 543. In determining a rent, the court was to have regard to the rent payable under the terms of the tenancy, but otherwise the Landlord and Tenant Act 1954 s 34(1), (2) (as amended by the Law of Property Act 1969 s 1(1)) (see PARA 755 post) applied to the determination as it would apply to the determination of a rent under that provision if a new tenancy from year to year of the whole of the property comprised in the tenancy were granted to the tenant by order of the court: see the Landlord and Tenant Act 1954 s 24A(3) (as so added). Some cushioning of what would otherwise be the increase in the rent might be made by the court: see *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726, where Megarry J held that, having determined what would be the market rent upon the hypothetical tenancy from year to year (which he found to be £15,000 per annum as opposed to the rent under the new lease which was to be £16,00), the court had further to adjust the figure, if it were appropriate, in order to 'have regard to' the old rent, and he adjusted the £15,000 to £14,000. Dillon J followed this decision and adopted the same course in *Ratners (Jewellers) Ltd v Lemnoll Ltd* [1980] 2 EGLR 65, (1980) 255 Estates Gazette 987. Cf *Regis Property Co Ltd v Lewis and Peat Ltd* [1970] Ch 695, [1970] 3 All ER 227, where Stamp J declined to adjust the amount determined as the value as on a tenancy from year to year in order to 'have regard to' the old rent. In exceptional circumstances the court

might order a stepped or variable interim rent: *Fawke v Viscount Chelsea* [1980] QB 441, [1979] 3 All ER 568, CA (differential rent based on state of disrepair of the premises).

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### **731. Procedure on application for determination of interim rent.**

Where proceedings have already been commenced for the grant of a new tenancy or the termination of an existing tenancy, the claim for interim rent<sup>1</sup> must be made in those proceedings by:

- 1463 (1) the claim form<sup>2</sup>;
- 1464 (2) the acknowledgment of service or defence<sup>3</sup>; or
- 1465 (3) an application<sup>4</sup> on notice<sup>5</sup>.

Where no other proceedings have been commenced for the grant of a new tenancy or termination of an existing tenancy or where such proceedings have been disposed of, an application for interim rent must be made under the Part 8 procedure<sup>6</sup> and the claim form must include details of:

- 1466 (a) the property to which the claim relates;
  - 1467 (b) the particulars of the relevant tenancy, including date, parties and duration, and the current rent, if not the original rent;
  - 1468 (c) every notice of termination given<sup>7</sup> or request for a new tenancy made<sup>8</sup>;
  - 1469 (d) if the relevant tenancy has terminated, the date and mode of termination; and
  - 1470 (e) if the relevant tenancy has been terminated and the landlord has granted a new tenancy of the property to the tenant:
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- 171. (i) particulars of the new tenancy, including date, parties and duration, and the rent; and
  - 172. (ii) in a case where the rent payable under and at the commencement of the new tenancy is also to be the interim rent<sup>9</sup> but the claimant seeks a different rent<sup>10</sup>, particulars and matters on which the claimant relies as satisfying<sup>11</sup> the relevant statutory conditions<sup>12</sup>.
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1 le the claim under the Landlord and Tenant Act 1954 s 24A (as substituted): see PARA 730 ante.

2 As to the contents of the claim form see PARA 725 ante.

3 As to the acknowledgment of service or defence see PARA 726 ante.

4 le under CPR Pt 23: see CIVIL PROCEDURE vol 11 (2009) PARA 303 et seq.

5 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.17. As to applications for a new interim rent in cases to which the Landlord and Tenant Act 1954 s 24D(3) (as substituted) applies see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.18; and PARA 733 post.

- 6    le under CPR Pt 8: see CIVIL PROCEDURE vol 11 (2009) PARA 127.
- 7    le under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.
- 8    le under ibid s 26 (as amended): see PARA 718 ante.
- 9    le where ibid s 24C(2) (as substituted) applies: see PARA 732 post.
- 10   le under ibid s 24C(3) (as substituted): see PARA 732 post.
- 11   le as satisfying ibid s 24C(3) (as substituted): see PARA 732 post.
- 12   *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.19.

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**732. Amount of interim rent where new tenancy of whole premises granted and landlord not opposed.**

The following provisions apply where:

- 1471 (1) the landlord<sup>1</sup> gave a notice to terminate a tenancy<sup>2</sup> at a time when the tenant was in occupation of the whole of the property comprised in the relevant tenancy<sup>3</sup> for business, or business and other, purposes<sup>4</sup> and stated in the notice that he was not opposed to the grant of a new tenancy; or
- 1472 (2) the tenant made a request for a new tenancy<sup>5</sup> at a time when he was in occupation of the whole of that property for such purposes and the landlord did not give notice that he would oppose an application to the court for the grant of a new tenancy<sup>6</sup>,

and the landlord grants a new tenancy of the whole of the property comprised in the relevant tenancy to the tenant, whether as a result of an order for the grant of a new tenancy or otherwise<sup>7</sup>. The rent payable under and at the commencement of the new tenancy is also<sup>8</sup> to be the interim rent<sup>9</sup>; but does not apply where:

- 1473 (a) the landlord or the tenant shows to the satisfaction of the court that that interim rent differs substantially from the relevant rent<sup>10</sup>; or
- 1474 (b) the landlord or the tenant shows to the satisfaction of the court that the terms<sup>11</sup> of the new tenancy differ from the terms of the relevant tenancy to such an extent that that interim rent is substantially different from the rent which the court would have determined<sup>12</sup> to be payable under a tenancy which commenced on the same day as the new tenancy and whose other terms were the same as the relevant tenancy<sup>13</sup>.

In a case where only head (a) above applies<sup>14</sup>, the interim rent is the relevant rent<sup>15</sup>; and in a case where either head (b) above applies, or where both heads (a) and (b) above apply<sup>16</sup>, the interim rent is the rent which it is reasonable for the tenant to pay while the relevant tenancy

continues by virtue of the statutory provisions<sup>17</sup> to that effect<sup>18</sup>. In determining the interim rent which it is reasonable for the tenant to pay in such a case<sup>19</sup>, the court must have regard:

- 1475 (i) to the rent payable under the terms of the relevant tenancy; and
- 1476 (ii) to the rent payable under any subtenancy of part of the property comprised in the relevant tenancy,

but otherwise the statutory principles for determining the rent under a new tenancy<sup>20</sup> apply to the determination as they would apply to the determination of a rent<sup>21</sup> if a new tenancy of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court and the duration of that new tenancy were the same as the duration of the new tenancy which is actually granted to the tenant<sup>22</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

3 For these purposes, 'the relevant tenancy' has the same meaning as in *ibid* s 24A (as substituted) (see PARA 730 ante): s 24C(8) (s 24C substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 18, with effect from 1 June 2004: see art 1(3)).

4 Ie for purposes such as are mentioned in the Landlord and Tenant Act 1954 s 23(1): see PARA 706 ante.

5 Ie under *ibid* s 26 (as amended): see PARA 718 ante.

6 Ie notice under *ibid* s 26(6): see PARA 718 ante.

7 *Ibid* s 24C(1) (as substituted: see note 3 *supra*).

8 Ie subject to *ibid* s 24C(3)-(7) (as substituted): see the text and notes 10-22 *infra*.

9 *Ibid* s 24C(2) (as substituted: see note 3 *supra*).

10 *Ibid* s 24C(3)(a) (as substituted: see note 3 *supra*). For these purposes, 'the relevant rent' means the rent which (in default of agreement between the landlord and the tenant) the court would have determined under *ibid* s 34 (as amended) (see PARAS 753-754 *post*) to be payable under the new tenancy if the new tenancy had commenced on the appropriate date within the meaning of s 24B (as substituted: see PARA 730 ante): s 24C(4) (as so substituted).

11 For the meaning of 'terms' see PARA 706 note 27 ante.

12 Ie, in default of agreement between the landlord and the tenant, under the Landlord and Tenant Act 1954 s 34 (as amended).

13 *Ibid* s 24C(3)(b) (as substituted: see note 3 *supra*).

14 Ie in a case where *ibid* s 24C(2) (as substituted) does not apply by virtue only of s 24C(3)(a) (as substituted).

15 *Ibid* s 24C(5) (as substituted: see note 3 *supra*). For the meaning of 'relevant rent' see note 10 *supra*.

16 Ie in a case where *ibid* s 24C(2) (as substituted) does not apply by virtue only of s 24C(3)(b) (as substituted), or by virtue of s 24C(a) and (b) (as substituted).

17 Ie by virtue of *ibid* s 24 (as amended): see PARA 713 ante.

18 *Ibid* s 24C(6) (as substituted: see note 3 *supra*).

19 Ie in determining the interim rent under *ibid* s 24C(6) (as substituted): see the text and notes 16-17 *supra*.

20 Ie *ibid* s 34(1), (2) (as amended): see PARAS 753-755 *post*.



21 le under *ibid* s 34 (as amended).

22 *Ibid* s 24C(7) (as substituted: see note 3 *supra*). Prior to 1 June 2004, s 34(1), (2) (as amended) was similarly applied to the determination of an interim rent: see s 24A(3) (as added by the Law of Property Act 1969 s 3(1)); and see eg *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726; *Ratners (Jewellers) Ltd v Lemnoll Ltd* [1980] 2 EGLR 65, (1980) 255 Estates Gazette 987; *Regis Property Co Ltd v Lewis and Peat Ltd* [1970] Ch 695, [1970] 3 All ER 227.

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### **733. Amount of interim rent in any other case.**

The interim rent in a case except one where a tenancy of the whole premises is granted and the landlord is not opposed<sup>1</sup> is the rent which it is reasonable for the tenant to pay while the relevant tenancy<sup>2</sup> continues by virtue of the statutory provisions<sup>3</sup> to that effect<sup>4</sup>. In determining that interim rent the court must have regard:

- 1477 (1) to the rent payable under the terms of the relevant tenancy; and
- 1478 (2) to the rent payable under any subtenancy of part of the property comprised in the relevant tenancy,

but otherwise the statutory principles for determining the rent under a new tenancy<sup>5</sup> apply to the determination as they would apply to the determination of a rent<sup>6</sup> if a new tenancy from year to year of the whole of the property comprised in the relevant tenancy were granted to the tenant by order of the court<sup>7</sup>.

If the court has made an order for the grant of a new tenancy and has ordered payment of interim rent<sup>8</sup> but either:

- 1479 (a) it subsequently revokes<sup>9</sup> the order for the grant of a new tenancy; or
- 1480 (b) the landlord<sup>10</sup> and tenant agree not to act on the order,

the court on the application of the landlord or the tenant<sup>11</sup> must determine a new interim rent in accordance with the provisions set out above<sup>12</sup> without a further application<sup>13</sup> for its determination<sup>14</sup>.

1 le in a case where the Landlord and Tenant Act 1954 s 24C (as substituted) (see PARA 732 ante) does not apply.

2 For these purposes, 'the relevant tenancy' has the same meaning as in *ibid* s 24A (as substituted) (see PARA 730 ante): s 24C(8) (ss 24C, 24D substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 18, with effect from 1 June 2004: see art 1(3)).

3 le by virtue of the Landlord and Tenant Act 1954 s 24 (as amended): see PARA 713 ante.

4 *Ibid* s 24D(1) (as substituted: see note 2 *supra*).

5 le *ibid* s 34(1), (2) (as amended): see PARAS 753-755 post.

6 le under *ibid* s 34 (as amended).

7 Ibid s 24D(2) (as substituted: see note 2 supra). As to the application of s 34(1), (2) (as amended) to the determination of interim rents prior to 1 June 2004 see PARA 732 note 22 ante.

8 le in accordance with ibid s 24C (as substituted): see PARA 732 ante.

9 le under ibid s 36(2): see PARA 757 post.

10 For the meaning of 'the landlord' see PARA 715 ante.

11 Any such application must be made by an application on notice under CPR Pt 23 (see CIVIL PROCEDURE vol 11 (2009) PARA 304) in the original proceedings: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 3.18.

12 le in accordance with the Landlord and Tenant Act 1954 s 24D(1), (2) (as substituted): see the text and notes 1-7 supra.

13 le under ibid s 24A(1) (as substituted): see PARA 730 ante.

14 Ibid s 24D(3) (as substituted: see note 2 supra).

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## (C) LANDLORD'S OPPOSITION

### *a. In general*

#### **734. Landlord's application for order terminating tenancy without grant of new tenancy.**

A landlord may apply to the court<sup>1</sup> for an order for the termination of a business tenancy<sup>2</sup> without the grant of a new tenancy:

1481 (1) if he has given notice to terminate<sup>3</sup> stating that he is opposed to the grant of a new tenancy to the tenant; or

1482 (2) if the tenant has made a request for a new tenancy<sup>4</sup> and the landlord has given notice<sup>5</sup> that he is opposed to its grant<sup>6</sup>.

The landlord<sup>7</sup> may not, however, make such an application if either the tenant or the landlord has made an application<sup>8</sup> for an order for the grant of a new tenancy<sup>9</sup>. Furthermore, he may not withdraw it unless the tenant consents to its withdrawal<sup>10</sup>.

Where the landlord makes such an application for an order for termination as is mentioned above:

1483 (a) if he establishes, to the satisfaction of the court, any of the statutory grounds on which he is entitled to make the application<sup>11</sup>, the court must make an order for the termination of the current tenancy<sup>12</sup> without the grant of a new tenancy; and

1484 (b) if not, it must make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy<sup>13</sup>.

1 le on or after 1 June 2004 (see note 6 infra) and subject to the Landlord and Tenant Act 1954 ss 29(3)-70 (as amended): see the text and notes 2-23 infra; and PARA 735 et seq post. As to the mode of application and the procedure on such an application see PARA 723 et seq ante.

2 le a tenancy to which *ibid* Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante.

3 le under *ibid* s 25 (as amended): see PARA 716 ante.

4 le under *ibid* s 26 (as amended): see PARA 718 ante.

5 le under *ibid* s 26(6): see PARA 718 ante.

6 *Ibid* s 29(2) (s 29 substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 5, with effect from 1 June 2004: see art 1(3)). Prior to that date the landlord had no such statutory right to apply for termination and was limited to opposing an application by the tenant for a new tenancy.

7 For the meaning of 'the landlord' see PARA 715 ante.

8 le under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

9 *Ibid* s 29(3) (as substituted: see note 6 supra). On an application under s 24(1) (as amended), the court must order the grant of a new tenancy, unless the landlord establishes one of the statutory grounds of opposition to the tenant's application under s 30 (as amended) (see PARA 735 et seq post) or unless it dismisses the landlord's application because the tenant informs the court that he does not want a new tenancy (see s 29(5) (as substituted); and PARA 720 ante): see s 29(1) (as substituted); and PARA 720 ante. The court will not, however, order the parties to enter into an illegal contract or one which necessitates a breach of planning control by reason of the continuance of the relevant business use (*Turner and Bell v Searles (Stanford-le-Hope) Ltd* (1977) 33 P & CR 208, CA); nor will the court order a new tenancy when the application is made out of time (see PARA 721 ante).

10 Landlord and Tenant Act 1954 s 29(6) (as substituted: see note 6 supra).

11 le in accordance with *ibid* s 30 (as amended): see PARA 735 et seq post.

12 le in accordance with *ibid* s 64 (as amended): see PARA 729 ante. For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

13 *Ibid* s 29(4) (as substituted: see note 6 supra).

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### **735. Grounds of opposition; in general.**

The grounds on which a landlord may make an application to the court<sup>1</sup> for an order for the termination of a business tenancy<sup>2</sup> without the grant of a new tenancy<sup>3</sup>, or on which he may oppose an application by the tenant for an order for the grant of a new tenancy<sup>4</sup>, are such of the statutory grounds as were stated in his notice to terminate<sup>5</sup> or in his notice in reply<sup>6</sup> to the tenant's request for a new tenancy<sup>7</sup>; but, if the landlord<sup>8</sup> is relying upon one of those three grounds which require the court to decide whether after default by the tenant he 'ought not to

be granted' a new tenancy<sup>9</sup>, and if the statutory ground is shown to exist, then other matters, and notably the general conduct of the parties and the history of the current tenancy, may be taken into account by the court in deciding whether to order the grant of a new tenancy<sup>10</sup>, and the court is given a discretion in those cases<sup>11</sup>.

There are seven separately stated grounds of opposition<sup>12</sup>, but several of the grounds themselves contain several alternatives<sup>13</sup>.

1     le on or after 1 June 2004 (see note 6 infra) and subject to the Landlord and Tenant Act 1954 ss 29(3)-70 (as amended): see the text and notes 2-13 infra; and PARA 736 et seq post. As to the mode of application and the procedure on such an application see PARA 723 et seq ante.

2     le a tenancy to which ibid Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante.

3     le under ibid s 25 (as amended): see PARA 716 ante.

4     le under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

5     See note 3 supra.

6     le the notice given by the landlord under the Landlord and Tenant Act 1954 s 26(6): see PARA 718 ante. However, in this respect 'ground' must be taken as an indication of the relevant paragraph of s 30(1) (as amended) upon which the landlord intends to rely, and not of the precise facts upon which reliance will be placed to bring the case within that paragraph: see *Sevenarts Ltd v Busvine* [1969] 1 All ER 392, [1968] 1 WLR 1929, CA. See also *Biles v Caesar* [1957] 1 All ER 151, [1957] 1 WLR 156, CA; *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, [1958] 1 All ER 607, HL; *Marks v British Waterways Board* [1963] 3 All ER 28, [1963] 1 WLR 1008, CA; *Housleys Ltd v Bloomer-Holt Ltd* [1966] 2 All ER 966, [1966] 1 WLR 1244, CA. Once a notice has been given, it cannot be amended: *Nurse v P Currie (Dartford) Ltd* [1959] 1 All ER 497, [1959] 1 WLR 273, CA.

7     Landlord and Tenant Act 1954 s 30(1) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 6(1), with effect from 1 June 2004: see art 1(3)). As to requests for a new tenancy see PARA 718 ante.

8     For the meaning of 'the landlord' see PARA 715 ante.

9     The relevant grounds of opposition are those specified in the Landlord and Tenant Act 1954 s 30(1)(a)-(c): see PARAS 736-738 post. In all these cases the word 'ought' confers upon the court an element of discretion: *Lyons v Central Commercial Properties Ltd* [1958] 2 All ER 767, [1958] 1 WLR 869, CA. The Landlord and Tenant Act 1954 s 30(1)(e) (see PARA 740 post) also uses 'ought', but not in the context of exercising any discretion in the light of the tenant's behaviour.

10    *Eichner v Midland Bank Executor and Trustee Co Ltd* [1970] 2 All ER 597, [1970] 1 WLR 1120, CA. It is easier for a landlord to show that a new tenancy ought not to be granted than for him to show that an existing tenancy ought to be forfeited (or ought not to be relieved from forfeiture), so that breaches of covenant which are not sufficiently severe to entitle the landlord to succeed in a forfeiture claim may still be sufficient to establish a statutory ground of opposition: *Norton v Charles Deane Productions Ltd* (1969) 214 Estates Gazette 559.

11    *Lyons v Central Commercial Properties Ltd* [1958] 2 All ER 767, [1958] 1 WLR 869, CA.

12    le the Landlord and Tenant Act 1954 s 30(1)(a)-(g).

13    Each of the grounds is considered separately: see PARA 736 et seq post.

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## *b. Statutory Grounds of Opposition*

### **736. Disrepair.**

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> where under the current tenancy<sup>4</sup> the tenant has any obligations as respects the repair and maintenance of the holding<sup>5</sup> on the ground that the tenant ought<sup>6</sup> not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with those obligations<sup>7</sup>.

In considering whether the tenant ought not to be granted a new tenancy the court may consider not merely the gravity of the disrepair and the culpability of the tenant for that disrepair, but also such factors as the tenant's financial ability to comply with future repairing obligations<sup>8</sup> and the willingness of the tenant to assume in the new lease express obligations speedily to put the premises into good repair<sup>9</sup>. The court is not bound to refuse a new tenancy where it is shown that the premises comprised in the holding are in a bad state of repair by reason of the tenant's breach of covenant<sup>10</sup>.

The relevant matters must be proved to exist at the date of the hearing<sup>11</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 I.e. under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 I.e. under *ibid* s 29(2) (as substituted): see PARA 734 ante.

4 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

5 For the meaning of 'the holding' see PARA 706 note 23 ante.

6 See PARA 734 notes 9-10 ante.

7 Landlord and Tenant Act 1954 s 30(1)(a). The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante.

8 The disclosure of documents relating to the tenant's financial position will be ordered where the landlord is relying upon *ibid* s 30(1)(a). See *Re St Martin's Theatre, Bright Enterprises Ltd v Lord Willoughby de Broke* [1959] 3 All ER 298, [1959] 1 WLR 872.

9 *Nihad v Chain* (1956) 167 Estates Gazette 139 (county court).

10 *Lyons v Central Commercial Properties Ltd* [1958] 2 All ER 767, [1958] 1 WLR 869, CA. It is immaterial, however, that the tenant has contracted to sell his leasehold interest and any new lease obtained by him under the Act (or, it would seem, his business): *Lyons v Central Commercial Properties Ltd* *supra*.

11 *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, [1958] 1 All ER 607, HL.

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### **737. Persistent delay in paying rent.**

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground that the tenant ought<sup>4</sup> not to be granted a new tenancy in view of his persistent delay in paying rent which has become due<sup>5</sup>. It is sufficient that there is a history of late payment, although it need not be prolonged<sup>6</sup>; nor need there be substantial arrears of rent<sup>7</sup>. Whether the tenant is likely to repeat or continue his default will be of critical significance to the question<sup>8</sup> whether a new tenancy ought to be granted<sup>9</sup>.

Where a tenant has regularly made slightly late payments by cheque and the landlords have in practice assented to this, such assent does not amount to a variation of the terms of the lease, but it does mean that the landlords are estopped from insisting that the tenant is to revert to strict compliance with the lease unless they give reasonable notice to that effect; and assignees of the landlords' interest are subject to the same restraint<sup>10</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended); see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted); see PARA 734 ante.

4 See PARA 734 notes 9-10 ante.

5 Landlord and Tenant Act 1954 s 30(1)(b). The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante); see s 30(1) (as amended); and PARA 734 ante.

6 *Hopcutt v Carver* (1969) 209 Estates Gazette 1069, CA.

7 See *Horowitz v Ferrand* [1956] CLY 4843 (where it was said that a landlord was not expected to be subjected to the 'work and irritation of dunning his tenant for the rent').

8 This is a question of fact: *Hutchinson v Lamberth* [1984] 1 EGLR 75, (1983) 270 Estates Gazette 545, CA.

9 *Hurstfell Ltd v Leicester Square Property Co Ltd* [1988] 2 EGLR 105, CA.

10 See *Hazel v Hassan Akhtar* [2001] EWCA Civ 1883, [2002] 07 EG 124, [2001] All ER (D) 151 (Dec), where the Court of Appeal exercised its discretion to grant a new tenancy.

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### **738. Other substantial breaches of covenant or bad management.**

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground that the tenant ought<sup>4</sup> not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy<sup>5</sup>, or for any other reason connected with the tenant's use or management of the holding<sup>6</sup>. As the specific ground of opposition relating to disrepair<sup>7</sup> relates only to 'the holding', breaches of tenants' repairing covenants in respect of parts of the demised premises which are not within the holding will be relevant under the first limb of this ground, as will breaches of user covenants (including the usual covenant against nuisance and annoyance); and, although the breach has to be substantial, it will still be easier for the

landlord to resist an order for the grant of a new tenancy than for him to resist an order for relief from the forfeiture of an existing tenancy<sup>8</sup>.

It is a sufficient 'other reason connected with the tenant's use or management of the holding' that the tenant's continued business use of the holding would be in breach of planning control<sup>9</sup>, or that such use prevented the landlord from obtaining fire insurance cover upon the demised premises and the landlord's adjacent properties. The tenant does not necessarily have to be in breach of covenant<sup>10</sup>. As this ground of opposition<sup>11</sup> is one which, if established, deprives the tenant of any right to compensation for disturbance<sup>12</sup>, it would seem that some element of fault or mismanagement such as would unfairly prejudice the landlord's interest if it were allowed to continue is implicitly required<sup>13</sup> for the second limb of the ground although the conduct complained of will not be a breach of covenant.

The relevant state of affairs must be shown to exist at the date of the hearing<sup>14</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted): see PARA 734 ante.

4 See PARA 734 notes 9-10 ante.

5 See eg *Khan v Merton London Borough Council* [2001] All ER (D) 335 (Jun). For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

6 Landlord and Tenant Act 1954 s 30(1)(c). For the meaning of 'the holding' see PARA 706 note 23 ante. The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante.

7 Ie ibid s 30(1)(a): see PARA 736 ante.

8 *Norton v Charles Deane Productions Ltd* (1969) 214 Estates Gazette 559. It will also be difficult for the tenant to show that the landlord has acquiesced in the breach: see *Bigos v Trustees of the JSSRT Charitable Trust* (1965) 109 Sol Jo 273, CA.

9 *Turner and Bell v Searles (Stanford-le-Hope) Ltd* (1977) 33 P & CR 208, CA. See also *Beard (formerly Coleman) v Williams* [1986] 1 EGLR 148, CA (tenant unlawfully stationing van on highway).

10 See dicta of Lord Denning MR in *Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page* [1979] 1 All ER 5, [1978] 1 WLR 1329, CA.

11 Ie the Landlord and Tenant Act 1954 s 30(1)(c).

12 See ibid s 37 (as amended); and PARA 758 post.

13 This was the construction accorded to the analogous provisions of the Leasehold Property (Temporary Provisions) Act 1951 s 12 (repealed) in *John Kay Ltd v Kay* [1952] 2 QB 258, [1952] 1 All ER 813, CA. See also *Jones v Christy* (1963) 107 Sol Jo 374, CA.

14 *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, [1958] 1 All ER 607, HL (where it is also suggested that the relevant state of affairs must have existed at the date of the giving of the landlord's notice as well).

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### 739. Alternative accommodation.

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground that the landlord has offered and is willing to provide or secure the provision of alternative accommodation<sup>4</sup> for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy<sup>5</sup> and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements, including the requirement to preserve goodwill, having regard to the nature and class of his business<sup>6</sup> and to the situation and extent of, and facilities afforded by, the holding<sup>7</sup>. As the grounds of opposition must have been stated in the landlord's notice<sup>8</sup>, it would seem that the landlord's offer must have been made before that notice was given, although it must also be shown at the hearing<sup>9</sup> that the accommodation will still be available for the tenant at the date on which the tenancy comes to an end<sup>10</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 I.e. under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 I.e. under *ibid* s 29(2) (as substituted): see PARA 734 ante.

4 Although the wording of *ibid* s 30(1)(d) is close to that used by the Rent Act 1977 (see s 98(1)(a), Sch 15 Pt IV (as amended); and PARA 947 post), moving one's home and one's business enterprise are so different that little assistance can be obtained from the Rent Act cases on alternative accommodation in relation to business tenancies: *Singh v Malayan Theatres Ltd* [1953] AC 632, PC. Nevertheless it has been held in the county court, in reliance upon *Thompson v Rolls* [1926] 2 KB 426, DC, and *Parmee v Mitchell* [1950] 2 KB 199, [1950] 1 All ER 872, CA, that part of the tenant's existing business premises could constitute such alternative accommodation: *Lawrence v Carter* (1956) 106 L Jo 269. Other premises in which the tenant is already carrying on part of his business cannot constitute alternative accommodation unless the same business which the tenant has been carrying on in the holding can also be carried on in the other premises. Thus, where the tenant of a theatre also owned or controlled and carried on business in other theatres in the same city, those other theatres could not be said to be 'alternative accommodation' to the holding: *Singh v Malayan Theatres Ltd* *supra*.

5 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

6 For the meaning of 'business' see PARA 707 ante.

7 Landlord and Tenant Act 1954 s 30(1)(d). For the meaning of 'the holding' see PARA 706 note 23 ante. The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante.

8 I.e. by virtue of *ibid* s 30(1) (as amended): see PARA 734 ante.

9 The willingness to provide alternative accommodation expressed by the landlord in his notice must be continuing willingness, and it must exist at the time of the hearing: see *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20 at 34-35, 47, 51, [1958] 1 All ER 607 at 613, 620, 623, HL.

10 As to the effect of the Landlord and Tenant Act 1954 s 64 (as amended) and the date on which the tenancy will come to an end see PARA 729 ante. Where the necessities of the tenant's business would require that the alternative accommodation be available sooner than the date of the expiry of the tenancy (eg where the business is seasonal, and the season is about to commence), the wording of s 30(1)(d) would seem to require that the landlord demonstrate that the alternative accommodation will be available at an earlier date.



RENEWAL OF TENANCIES/(C) Landlord's Opposition/b. Statutory Grounds of Opposition/740. Subtenancy; landlord desiring to relet the premises as a whole.

**740. Subtenancy; landlord desiring to relet the premises as a whole.**

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> where the current tenancy<sup>4</sup> was created by the subletting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, on the ground that the aggregate of the rents reasonably obtainable on separate lettings of the holding<sup>5</sup> and the remainder of that property would be substantially less<sup>6</sup> than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the property as a whole, and that in view of this the tenant ought<sup>7</sup> not to be granted a new tenancy<sup>8</sup>.

Although 'ought' imports an element of discretion, the statutory ground contains no reference to the behaviour of the tenant as opposed to the requirements of the landlord, and this is confirmed by the fact that upon the landlord succeeding under this ground of opposition he is obliged to compensate the tenant for disturbance<sup>9</sup>. Decisions under analogous statutory provisions show that the landlord 'requires' the premises if he genuinely wants them, so that he does not have to show any hardship or necessity<sup>10</sup>, but the reasonableness of the landlord's proposals will be a relevant consideration<sup>11</sup>. This ground of opposition will not be available to a landlord who himself granted the relevant tenancy; thus it will be available only to a superior landlord who is able to serve notices as 'the landlord' for the purposes of the Landlord and Tenant Act 1954<sup>12</sup> even though he is not at the date of the giving of the notices the tenant's immediate landlord.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted): see PARA 734 ante.

4 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

5 For the meaning of 'the holding' see PARA 706 note 23 ante.

6 For an example of the failure of this rarely used ground of opposition where the difference in rents was not substantial see *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 Estates Gazette 725.

7 See PARA 734 notes 9-10 ante.

8 Landlord and Tenant Act 1954 s 30(1)(e). The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante.

9 See ibid s 37 (as amended); and PARA 758 post.

10 *Ireland v Taylor* [1949] 1 KB 300, [1948] 2 All ER 450, CA (construing the Landlord and Tenant Act 1927 s 5(3) (repealed)); *Kennealy v Dunne* [1977] QB 837, [1977] 2 All ER 16, CA (construing the Rent Act 1968 s 10(2), Sch 3 Pt II, Case 10 (repealed)).

11 Reasonableness will become relevant by reason of the use by the draftsman of the word 'ought': see PARA 734 notes 9-10 ante.

12 See PARA 715 ante.

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#### **741. Intended demolition, reconstruction or substantial work of construction.**

A landlord<sup>1</sup> may oppose an application for a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground that on the termination<sup>4</sup> of the current tenancy<sup>5</sup> he intends<sup>6</sup> to demolish or reconstruct the premises<sup>7</sup> comprised in the holding<sup>8</sup> or a substantial<sup>9</sup> part of those premises, or to carry out substantial work of construction on the holding or part of it, and that he could not reasonably do so without obtaining possession of the holding<sup>10</sup>. Thus this ground contains a number of alternative possibilities<sup>11</sup>.

1 For these purposes, 'landlord' means the landlord having the legal title: *Biles v Caesar* [1957] 1 All ER 151, [1957] 1 WLR 156, CA. For the meaning of 'the landlord' generally in the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) see PARA 715 ante. The intention to demolish or reconstruct may be established even where the landlord intends that the work of demolition and reconstruction is to be done by a building lessee: *Gilmour Caterers Ltd v Governors of St Bartholomew's Hospital* [1956] 1 QB 387, [1956] 1 All ER 314, CA. As to the position where the landlord is a trustee see PARAS 763-764 post.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted): see PARA 734 ante.

4 As to when the tenancy terminates see PARA 729 ante.

5 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

6 As to the existence of such an intention see PARA 742 post.

7 For these purposes, the word 'premises' does not apply only to parts of a built structure which perform some structural function but can include the internal skin of the part of the building occupied with no load-bearing parts of the building being included (an 'eggshell' within a building): see *Pumpninks of Piccadilly Ltd v Land Securities plc* [2002] EWCA Civ 621, [2002] Ch 332, [2002] 3 All ER 609.

8 For the meaning of 'the holding' see PARA 706 note 23 ante.

9 See *Atkinson v Bettison* [1955] 3 All ER 340, [1955] 1 WLR 1127, CA (installation of a new shop front held not to be a substantial reconstruction). The question what is a substantial part of the premises for this purpose is a question of degree and of fact (*Atkinson v Bettison* supra), and the substantiality of any work has to be considered in relation to the premises or structure in question (*Cook v Mott* (1961) 178 Estates Gazette 637). The giving of a notice stating an intention to reconstruct the whole of the premises does not preclude the landlord from establishing opposition by showing an intention to reconstruct only a substantial part of the premises: *Biles v Caesar* [1957] 1 All ER 151 at 153, [1957] 1 WLR 156 at 158, CA. As to demolition of part see PARA 744 post.

10 Landlord and Tenant Act 1954 s 30(1)(f). The grounds must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be, s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante. As to what constitutes reconstruction or demolition see PARA 743 post.

11 Ie an intention (1) to demolish the premises; (2) to demolish a substantial part of the premises; (3) to reconstruct the premises; (4) to reconstruct a substantial part of the premises; (5) to carry out substantial work of construction on the holding; (6) to carry out substantial work of construction on part of the holding: see ibid s 30(1)(f).

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#### **742. Intention to demolish or reconstruct or to carry out substantial work of construction.**

To be an effective ground of opposition<sup>1</sup> to the grant of a new tenancy the landlord's intention to demolish or reconstruct the premises or to carry out substantial work of construction<sup>2</sup> on the holding or part of the holding must be genuine, not colourable; it must be a firm and settled intention, not likely to be altered<sup>3</sup>. Usually it will be conclusive if the landlord gives an undertaking<sup>4</sup> to the court to carry out the work; but to have a fixed intention he must show that on the balance of probabilities he will be able to carry out his decision<sup>5</sup>, surmounting whatever obstacles are in his path<sup>6</sup> such as the need to raise finance or to obtain planning consent<sup>7</sup>. It is irrelevant that the landlord's object in carrying out the work could be achieved by smaller building operations; the test is whether he really intends to do the work<sup>8</sup>. The intention to demolish or reconstruct need not be his motive or his only or primary intention<sup>9</sup>, so that a landlord who intends to adapt the premises for occupation by himself for the purposes of his own business may still rely upon this ground of opposition, notwithstanding that he may be unable<sup>10</sup> to rely upon his intention to occupy the premises<sup>11</sup> as a ground of opposition<sup>12</sup>. A landlord can 'intend' to do the relevant work by granting a building agreement to another, who upon completion of the work will become the tenant<sup>13</sup>. The critical time when the intention must be shown to exist is the time of the hearing when it must be shown that the landlord is likely to be able to implement his decision to carry out the relevant work when the tenancy comes to an end<sup>14</sup>; the landlord's intention need not be shown to have existed previously<sup>15</sup>. Whether the necessary intention exists is a question of fact<sup>16</sup>. Where the landlord is a body corporate, the most convenient way for its intention to be evidenced is by a formal resolution embodying the intention; but this is not a necessity, and the intentions of a corporate landlord may be inferred from any relevant evidence<sup>17</sup>. Where the landlord is an individual, the court is entitled to rely upon his sworn evidence as to what he intends to do, even if there is nothing to corroborate what he says<sup>18</sup>.

Where a lease requires the tenant to remove all buildings and erections at its termination, the landlord cannot realistically be said to have an intention to demolish those buildings<sup>19</sup>.

<sup>1</sup> le for the purposes of the Landlord and Tenant Act 1954 s 30(1)(f): see PARA 741 ante.

<sup>2</sup> As to what is a work of 'construction' see *Housleys Ltd v Bloomer-Holt Ltd* [1966] 2 All ER 966, [1966] 1 WLR 1244, CA; *Botterill v Bedfordshire County Council* [1985] 1 EGLR 82, CA; *Barth v Pritchard* [1990] 1 EGLR 109, CA; *Globalgrange Ltd v Merazzi* [2002] EWHC 3010 (Ch), [2002] All ER (D) 334 (Dec). See further PARA 743 post.

<sup>3</sup> *Cunliffe v Goodman* [1950] 2 KB 237 at 253, [1950] 1 All ER 720 at 724, CA, per Asquith LJ (decided under the Landlord and Tenant Act 1927); *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1957] Ch 67 at 91-92, [1957] 1 All ER 1 at 13, CA (for the subsequent proceedings see [1959] AC 20, [1958] 1 All ER 607, HL); *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 QB 78 at 84, 92, [1956] 2 All ER 78 at 80, 84, CA; *DAF Motoring Centre (Gosport) Ltd v Hutfield and Wheeler Ltd* [1982] 2 EGLR 59, (1982) 263 Estates Gazette 976, CA; *Yoga for Health Foundation v Guest* [2002] EWHC 2658 (Ch), [2003] 1 P & CR D27, [2002] All ER (D) 81 (Dec), applying *Capocci v Goble* [1987] 2 EGLR 102, 284 Estates Gazette 230, CA. In *Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99, [1956] 1 WLR 1027, CA, the contrary was assumed. See also *Gregson v Cyril Lord Ltd* [1962] 3 All ER 907, [1963] 1 WLR 41, CA (decided under the Landlord and Tenant Act 1954 s 30(1)(g): see PARA 745 post).

4 *Espresso Coffee Machine Co Ltd v Guardian Assurance Co Ltd* [1959] 1 All ER 458, [1959] 1 WLR 250, CA. Therefore, where such an undertaking is offered by a body which is susceptible to the penal consequences of breaking it, disclosure will not be ordered against that body in respect of the issue of intention: *John Miller (Shipping) Ltd v Port of London Authority* [1959] 2 All ER 713, [1959] 1 WLR 910. See also *Lennox v Bell* (1957) 169 Estates Gazette 753, CA (undertaking rejected). Cf *London Hilton Jewellers Ltd v Hilton International Hotels Ltd* [1990] 1 EGLR 112, CA (where undertaking held to be 'decisive').

5 *Reohorn v Barry Corpn* [1956] 2 All ER 742, [1956] 1 WLR 845, CA; *Edwards v Thompson* (1990) 60 P & CR 222, [1990] 2 EGLR 71, CA.

6 *Gregson v Cyril Lord Ltd* [1962] 3 All ER 907, [1963] 1 WLR 41, CA; *Marks v British Waterways Board* [1963] 3 All ER 28, [1963] 1 WLR 1008, CA. See also *Capocci v Goble* [1987] 2 EGLR 102, 284 Estates Gazette 230, CA; *A Levy & Son Ltd v Martin Brent Developments Ltd* [1987] 2 EGLR 93.

7 In respect of the planning hurdle pursuant to the Landlord and Tenant Act 1954 s 30(1)(f) or s 30(1)(g) (see PARA 745 post), the landlord must show that there is a real, not merely a fanciful, chance that such permission will be granted: see eg *Dogan v Semali Investments Ltd* [2005] EWCA Civ 1036, [2005] 3 EGLR 51, [2005] All ER (D) 25 (Aug). If necessary, the court has to make findings on the evidence presented to it as to what are the landlord's chances of success in making a planning application or of successfully challenging a refusal of planning consent: see *Westminster City Council v British Waterways Board* [1985] AC 676, [1984] 3 All ER 737, HL, affg (1983) 49 P & CR 102, 268 Estates Gazette 745, CA (decided under the Landlord and Tenant Act 1954 s 30(1)(g): see PARA 745 post). See also *Palisade Investments Ltd v Collin Estates Ltd* [1992] 2 EGLR 94, CA (landlord's proposed works would have contravened conservation area consent; judge entitled to decide there was genuine intention to demolish).

8 *Decca Navigator Co Ltd v Greater London Council* [1974] 1 All ER 1178, [1974] 1 WLR 748, CA.

9 *Fisher v Taylors Furnishing Stores Ltd* [1956] 2 QB 78, [1956] 2 All ER 78, CA (explaining *Atkinson v Bettison* [1955] 3 All ER 340, [1955] 1 WLR 1127, CA and *JW Smart (Modern Shoe Repairs) Ltd v Hinckley and Leicestershire Building Society* [1952] 2 All ER 846, CA); *Craddock v Hampshire County Council* [1958] 1 All ER 449, [1958] 1 WLR 202, CA (intention to demolish ancillary to the main object of incorporating land in a smallholding); *Turner v Wandsworth London Borough Council* (1994) 69 P & CR 433, [1994] 1 EGLR 134, CA (landlord intended demolition work to be carried out by the company to whom it proposed to grant a short-term lease; irrelevant that the real motive was the eventual sale of the freehold).

10 Eg by reason of the Landlord and Tenant Act 1954 s 30(2) (as amended) (the 'five-year rule'): see PARA 746 post.

11 Ie the ground under ibid s 30(1)(g): see PARA 745 post.

12 See *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20 at 37, 44-45, [1958] 1 All ER 607 at 614, 619, HL.

13 *Gilmour Caterers Ltd v Governors of St Bartholomew's Hospital* [1956] 1 QB 387, [1956] 1 All ER 314, CA; *PF Ahern & Sons Ltd v Hunt* [1988] 1 EGLR 74, CA; *Spook Erection Ltd v British Railways Board* [1988] 1 EGLR 76, CA.

14 This date will necessarily be after three months plus the time for appealing: see PARA 729 ante.

15 *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20 at 36, 43-44, 51, [1958] 1 All ER 607 at 613, 618, 623, HL. See also *Reohorn v Barry Corpn* [1956] 2 All ER 742 at 745, [1956] 1 WLR 845 at 850, CA, per Denning LJ. It follows that, where the landlord for the purposes of the Landlord and Tenant Act 1954 (see PARA 715 ante) has changed between the giving of the notice and the hearing date, it is the intention of the person who is the landlord at the date of the hearing which is relevant; and he may rely upon a notice given by a previous landlord: see *AD Wimbush & Son Ltd v Franmills Properties Ltd* [1961] Ch 419, [1961] 2 All ER 197. This will still be the case notwithstanding that the previous landlord (who gave the notice) never himself intended to do any work to the premises: *Marks v British Waterways Board* [1963] 3 All ER 28, [1963] 1 WLR 1008, CA. If the tenant negotiates a settlement of the proceedings, it does not follow that the landlord is under an obligation to carry out the works: *Al-Malik Carpets (Private) Ltd v London Buildings (Highgate) Ltd* [1999] All ER (D) 971.

16 *Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99, [1956] 1 WLR 1027, CA; and see *Peter Goddard & Sons Ltd v Hounslow London Borough Council* [1992] 1 EGLR 281, CA.

17 *Poppett's (Caterers) Ltd v Maidenhead Borough Council* [1970] 3 All ER 289, [1971] 1 WLR 69, CA (intention of a local authority held to be proved by committee minutes and the oral evidence of its officers); *Manchester Garages Ltd v Petrofina (UK) Ltd* (1974) 233 Estates Gazette 509, CA (company's intention proved by the evidence of a regional manager to whom appropriate authority had been delegated). The intention of a

company for the purposes of the Landlord and Tenant Act 1954 may be inferred from the intention of its directors and officers having regard to all the circumstances: see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 172-173, [1956] 3 All ER 624 at 630, CA.

18 *Mirza v Nicola* [1990] 2 EGLR 73, CA.

19 See *Wessex Reserve Forces and Cadets Association v White* [2005] EWCA Civ 1744, [2006] 1 EGLR 56, [2005] All ER (D) 18 (Dec).

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### **743. What constitutes demolition or reconstruction or substantial construction; need for possession.**

The reconstruction which is contemplated in the statutory ground of opposition to the grant of a new tenancy<sup>1</sup> is work of rebuilding<sup>2</sup>, that is work involving a substantial interference with the premises<sup>3</sup>, although, where there is some such structural work, the totality of what is intended to be done may be considered in order to see whether the intended work is substantial<sup>4</sup>. Work which the landlord is anyway entitled to do under the terms of the tenancy falls to be disregarded in assessing whether the totality of the work intended by the landlord is 'substantial'<sup>5</sup>. An intention to demolish whatever buildings are on the site is an intention to demolish 'the premises comprised in the holding'<sup>6</sup>; but an intention to effect a change of identity without a physical reconstruction is not sufficient<sup>7</sup>. In order for any works to be sufficient, it must be shown that the landlord could not carry them out without obtaining legal (as opposed to actual or physical) possession of the premises, so that, where a lease contains terms which would permit the landlord to enter and do the work, and the premises will be substantially the same after the work has been completed, the court will order the renewal of the tenancy<sup>8</sup>. Furthermore, if the tenant agrees to the inclusion in the terms<sup>9</sup> of the new tenancy<sup>10</sup> of terms giving the landlord<sup>11</sup> access and other facilities for carrying out the work intended, and the landlord could reasonably carry out the work, given that access and those facilities, without obtaining possession of the holding and without interfering to a substantial extent<sup>12</sup> or for a substantial time<sup>13</sup> with the use<sup>14</sup> of the holding for the purposes of the business<sup>15</sup> carried on by the tenant, the court may not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding<sup>16</sup>.

1 The ground of opposition set out in the Landlord and Tenant Act 1954 s 30(1)(f): see PARA 741 ante.

2 *Percy E Cadle & Co Ltd v Jacmarch Properties Ltd* [1957] 1 QB 323, [1957] 1 All ER 148, CA.

3 *Joel v Swaddle* [1957] 3 All ER 325, [1957] 1 WLR 1094, CA. The ordinary meaning of the words 'demolish' and 'reconstruct' is, however, wide enough to apply to an 'eggshell' with no structural element: see *Pumpninks of Piccadilly Ltd v Land Securities plc* [2002] EWCA Civ 621, [2002] Ch 332, [2002] 3 All ER 609, considering *City Offices (Regent Street) Ltd v Europa Acceptance Group plc* [1990] 1 EGLR 63, [1990] 05 EG 71, CA.

4 *Bewlay (Tobacconists) Ltd v British Bata Shoe Co Ltd* [1958] 3 All ER 652, [1959] 1 WLR 45, CA; *Romulus Trading Co Ltd v Henry Smith's Charity Trustees* (1989) 60 P & CR 62, [1990] 2 EGLR 75, CA. See also *Morar v Chauhan* [1985] 3 All ER 493, [1985] 1 WLR 1263, CA; *Blackburn v Hussain* [1988] 1 EGLR 77, CA. There is, however, nothing in the statutory wording which requires the demolition or construction of structural or load-bearing features as a condition of the applicability of this ground and the court is not bound by any judicial

authority to read in such a condition: *Ivorygrove Ltd v Global Grange Ltd* [2003] EWHC 1409 (Ch), [2004] 4 All ER 144, [2003] 1 WLR 2090, considering *Pumpninks of Piccadilly Ltd v Land Securities plc* [2002] EWCA Civ 621, [2002] Ch 332, [2002] 3 All ER 609.

5 See *Romulus Trading Co Ltd v Henry Smith's Charity Trustees* [1990] 2 EGLR 75 at 77, CA, per Farquharson LJ.

6 *Housleys Ltd v Bloomer-Holt Ltd* [1966] 2 All ER 966, [1966] 1 WLR 1244, CA. To concrete over the whole site would appear to be a 'substantial work of construction on the holding': *Housleys Ltd v Bloomer-Holt Ltd* supra. For the meaning of 'the holding' see PARA 706 note 23 ante.

7 *Percy E Cadle & Co Ltd v Jacmarch Properties Ltd* [1957] 1 QB 323, [1957] 1 All ER 148, CA.

8 *Heath v Drown* [1973] AC 498, [1972] 2 All ER 561, HL.

9 For the meaning of 'terms' see PARA 706 note 27 ante.

10 For the meaning of 'tenancy' see PARA 706 note 2 ante.

11 For the meaning of 'the landlord' see PARA 715 ante.

12 What is substantial in this context is a question of fact and degree: *Redfern v Reeves* (1978) 37 P & CR 364, [1978] 2 EGLR 52, CA; *Cerex Jewels Ltd v Peachey Property Corp plc* (1986) 52 P & CR 127, [1986] 2 EGLR 65, CA. For other examples see *Blackburn v Hussain* [1988] 1 EGLR 77, CA; *Mularczyk v Azralnove Investments Ltd* [1985] 2 EGLR 141, CA (total demolition of factory used by the tenant).

13 Interference with the tenant's business after the completion of the work is not relevant: *Price v Esso Petroleum Co Ltd* [1980] 2 EGLR 58, (1980) 255 Estates Gazette 243, CA (landlord entitled under the terms of the lease to reconstruct the buildings demised). If, however, the landlord proposes by his building works so to change the holding as to make it impossible for the tenant to trade, the landlord will need possession to do such works: see *Leathwoods Ltd v Total Oil Great Britain Ltd* (1985) 51 P & CR 20, [1985] 2 EGLR 237, CA. See also *Redfern v Reeves* (1978) 37 P & CR 364, [1978] 2 EGLR 52, CA.

14 The court must look at the use of the premises from a physical, and not from a business, point of view; thus the fact that the tenant's goodwill would not be interfered with because her business could be carried on in temporary alternative accommodation was irrelevant in determining whether there would be a substantial interference with use: *Redfern v Reeves* (1978) 37 P & CR 364, [1978] 2 EGLR 52, CA.

15 For the meaning of 'business' see PARA 707 ante.

16 Landlord and Tenant Act 1954 s 31A(1)(a) (added by the Law of Property Act 1969 s 7(1); amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 8); and see eg *Wessex Reserve Forces and Cadets Association v White* [2005] EWCA Civ 1744, [2006] 1 EGLR 56, [2005] All ER (D) 18 (Dec). *Fernandez v Walding* [1968] 2 QB 606, [1968] 1 All ER 994, CA illustrates the position before the amendments made by the 1969 Act. See also *Whittingham v Davies* [1962] 1 All ER 195, [1962] 1 WLR 142, CA; *Little Park Service Station Ltd v Regent Oil Co Ltd* [1967] 2 QB 655, [1967] 2 All ER 257, CA. The decisions in *Redfern v Reeves* (1978) 37 P & CR 364, [1978] 2 EGLR 52, CA, and *Price v Esso Petroleum Co Ltd* [1980] 2 EGLR 58, (1980) 255 Estates Gazette 243, CA, illustrate the position before the amendments made by the 2003 Order.

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#### **744. Demolition or reconstruction of part of holding.**

Where the landlord<sup>1</sup> opposes an application for an order for the grant of a new tenancy<sup>2</sup> or applies for an order terminating a tenancy without such a grant<sup>3</sup> on the ground that he intends to carry out demolition, reconstruction or construction work<sup>4</sup>, the court may not hold that he

could not reasonably carry out the intended work without obtaining possession of the holding<sup>5</sup> if the tenant is willing to accept a tenancy of an economically separable part of the holding<sup>6</sup> and either:

1485 (1) with respect to that part, the following condition is satisfied, that is that the tenant agrees to the inclusion in the terms<sup>7</sup> of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent<sup>8</sup> or for a substantial time<sup>9</sup> with the use<sup>10</sup> of the holding for the purposes of the business<sup>11</sup> carried on by the tenant<sup>12</sup>; or

1486 (2) possession of the remainder of the holding would be reasonably sufficient to enable the landlord to carry out the intended work<sup>13</sup>.

Where the court makes an order<sup>14</sup> for the grant of a tenancy in a case where the tenant is so willing to accept a tenancy of part of the holding, the order must be an order for the grant of a new tenancy of that part only<sup>15</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted): see PARA 734 ante.

4 Ie on the ground specified in ibid s 30(1)(f): see PARA 741 ante.

5 For the meaning of 'the holding' see PARA 706 note 23 ante.

6 For these purposes, a part of a holding is deemed to be an economically separable part if, and only if, the aggregate of the rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of that part and the remainder of the premises affected by or resulting from the work would not be substantially less than the rent which would then be reasonably obtainable on a letting of those premises as a whole: Landlord and Tenant Act 1954 s 31A(2) (s 31A added by the Law of Property Act 1969 s 7(1)).

7 For the meaning of 'terms' see PARA 706 note 27 ante.

8 See PARA 743 note 12 ante.

9 See PARA 743 note 13 ante.

10 See PARA 743 note 14 ante.

11 For the meaning of 'business' see PARA 707 ante.

12 Landlord and Tenant Act 1954 s 31A(1)(a) (as added (see note 6 supra); amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 8).

13 Landlord and Tenant Act 1954 s 31A(1)(b) (as added and amended: see notes 6, 12 supra).

14 Ie under ibid s 29 (as substituted) (see PARAS 720, 734 ante) by virtue of s 31A(1)(b) (as added and amended: see notes 6, 12 supra).

15 Ibid s 32(1A) (added by the Law of Property Act 1969 s 7(2)).

RENEWAL OF TENANCIES/(C) Landlord's Opposition/b. Statutory Grounds of Opposition/745. Landlord's intention to occupy holding.

#### **745. Landlord's intention to occupy holding.**

A landlord<sup>1</sup> may oppose an application for the grant of a new tenancy<sup>2</sup> or may make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground that on the termination of the current tenancy<sup>4</sup> he intends<sup>5</sup> to occupy<sup>6</sup> the holding<sup>7</sup> for the purposes, or partly for the purposes, of a business<sup>8</sup> to be carried on by him therein, or as his residence<sup>9</sup>. The landlord must intend to occupy the same premises as existed during the occupation by the tenant; and, if the landlord's intention is to demolish those premises and to reconstruct new premises and occupy them, he should rely upon the appropriate ground of opposition<sup>10</sup>. He need not show that he intends to make physical use of the whole of the premises comprised in the holding<sup>11</sup>.

Where the landlord has a controlling interest<sup>12</sup> in a company, either he or that company is entitled to rely upon this ground of opposition<sup>13</sup>. Similarly, where the landlord is a company and a person has a controlling interest in the company, either the landlord or that person may rely upon this ground<sup>14</sup>, but this is subject to the five-year rule discussed below<sup>15</sup>. The landlord is also entitled to rely upon this ground if the business which is to be carried on is the business of a partnership of which he is a member<sup>16</sup>, or is the business of a beneficiary for whom he holds the reversion as trustee<sup>17</sup>.

1 Not every landlord can rely upon this ground: see the Landlord and Tenant Act 1954 s 30(2) (as amended) (the 'five-year rule'); and PARA 746 post. For the meaning of 'the landlord' generally see PARA 715 ante; and for the extended meaning of references to the landlord for these purposes see the text and notes 12-15 infra. Where a freeholder accepts the surrender of the interest of a mesne tenant, if that interest would have been of less than 14 months' duration at the relevant date (so that the mesne tenant would not have been the landlord for the purposes of the 1954 Act), the landlord will not be prevented by the 'five-year rule' from relying upon s 30(1)(g), even if the transaction is a purchase: see *Diploma Laundry Ltd v Surrey Timber Co Ltd* [1955] 2 QB 604, [1955] 2 All ER 922, CA.

2 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie under ibid s 29(2) (as substituted): see PARA 734 ante.

4 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

5 The same qualities of fixity of intention are required as under the Landlord and Tenant Act 1954 s 30(1)(f) (see PARA 742 ante). Thus the landlord must show that he has a reasonable prospect of being able to occupy the premises, and of eg obtaining any planning consent which is necessary for his own proposed business use of the premises: *Gregson v Cyril Lord Ltd* [1962] 3 All ER 907, [1963] 1 WLR 41, CA. If a landlord has established that he intends to set up a business in the premises on the expiry of an existing business lease and that it is reasonably practical to do so, the court should not embark on a detailed inquiry into the likely success of the planned business: *Dolgellau Golf Club v Hett* (1998) 76 P & CR 526, [1998] 2 EGLR 75, CA. See also *Lennox v Bell* (1957) 169 Estates Gazette 753, CA; *Westminster City Council v British Waterways Board* [1985] AC 676, [1984] 3 All ER 737, HL (cited in PARA 742 note 7 ante).

6 The landlord need not occupy personally, so that it is sufficient that he intends to occupy the premises through his employees: see *Hills (Patents) Ltd v University College Hospital Board of Governors* [1956] 1 QB 90, [1955] 3 All ER 365, CA; *Skeet v Powell-Shedden* [1988] 2 EGLR 112, CA; *Teesside Indoor Bowls Ltd v Stockton-on-Tees Borough Council* [1990] 2 EGLR 87, CA. He will not, however, occupy premises for the purpose of a business merely because his spouse occupies them for her own business: *Zafiris v Liu* [2005] EWCA Civ 1698, (2005) Times, 3 March, [2005] All ER (D) 261 (Jan).

7 For the meaning of 'the holding' see PARA 706 note 23 ante.

8 For the meaning of 'business' see PARA 707 ante. As to the effectiveness of a landlord's intention where a transfer of his business is in contemplation see *Willis v Association of Universities of the British Commonwealth* [1965] 1 QB 140, [1964] 2 All ER 39, CA. For the purposes of the Landlord and Tenant Act 1954 s 30(1)(g) a landlord may require premises 'for the purposes of a business to be carried on by him therein' if the purpose for



which he intends to use the premises is for visitors to his nearby business premises to park their cars there: *Hunt v Decca Navigator Co Ltd* (1972) 222 Estates Gazette 625.

9 Landlord and Tenant Act 1954 s 30(1)(g). The ground must be stated in the landlord's notice under s 25 (as amended) (see PARA 716 ante) or, as the case may be, s 26(6) (see PARA 718 ante): see s 30(1) (as amended); and PARA 734 ante. A landlord claiming to have the intention to occupy premises for the purpose of carrying on a business has to prove that he has a genuine intention to do so, and that he has a reasonable prospect of being able to bring that about by his own act of volition, but there is nothing in principle or practice which requires a judge to deal with those two limbs sequentially: *Zarvos v Pradhan* [2003] EWCA Civ 208, [2003] 2 P & CR 122, [2003] All ER (D) 92 (Mar), applying *Gregson v Cyril Lord Ltd* [1962] 3 All ER 907, [1963] 1 WLR 41, CA. See also *Gatwick Parking Services Ltd v Sargent* [2000] 2 EGLR 45, [2000] 25 EG 141, CA (landlord does not have to demonstrate on a balance of probabilities that planning permission will be granted; but he has to show that there is a real, not merely a fanciful, chance); and see the authorities cited in note 5 supra.

A licensor's request that the court determines whether a new tenancy can be opposed on this ground does not prevent him denying the existence of a tenancy: see *Wroe (t/a Telepower) v Exmos Cover Ltd* [2000] 1 EGLR 66, [2000] All ER (D) 143, CA.

10 Ie upon the Landlord and Tenant Act 1954 s 30(1)(f): see PARAS 741-744 ante. See *Nursey v P Currie (Dartford) Ltd* [1959] 1 All ER 497, [1959] 1 WLR 273, CA. Cf *McKenna v Porter Motors Ltd* [1956] AC 688, [1956] 3 All ER 262, PC (decided under a New Zealand statute); *Cam Gears Ltd v Cunningham* [1981] 2 All ER 560, [1981] 1 WLR 1011, CA. See also *Leathwoods Ltd v Total Oil Great Britain Ltd* (1985) 51 P & CR 20, [1985] 2 EGLR 237, CA.

11 *Method Developments Ltd v Jones* [1971] 1 All ER 1027, [1971] 1 WLR 168, CA.

12 For the meaning of 'controlling interest' see PARA 706 note 8 ante.

13 See the Landlord and Tenant Act 1954 s 30(1A) (s 30(1A), (1B) added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 14(1), with effect from 1 June 2004: see art 1(3)). For the similar provision prior to that date see the Landlord and Tenant Act 1954 s 30(3) (repealed).

14 See the Landlord and Tenant Act 1954 s 30(1B) (as added: see note 13 supra).

15 Ie subject to *ibid* s 30(2A) (as added): see PARA 746 post.

16 *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583, CA, following *Clift v Taylor* [1948] 2 KB 394, [1948] 2 All ER 113, CA (decided under the Landlord and Tenant Act 1927 s 5 (repealed)). As to the position of joint owners see PARA 763 post.

17 See the Landlord and Tenant Act 1954 s 41(2). Except in the case of a trust arising under a will or on the intestacy of any person, s 30(2) (as amended) (the 'five-year rule') (see PARA 746 post) is applied so that the creation of the relevant trust is treated as the creation of the landlord's interest: see s 41(2). Proposed occupation by a beneficiary under a trust, where the beneficiary has no right as against the trustees to occupy the premises, will not suffice, so that this ground of opposition will not be available to the landlords: see *Frish Ltd v Barclays Bank Ltd* [1955] 2 QB 541, [1955] 3 All ER 185, CA; *Meyer v Riddick* (1989) 60 P & CR 50, [1990] 1 EGLR 107, CA. A landlord who holds the premises on trust may oppose the application pursuant to this ground of opposition if either he himself or his beneficiary intends to occupy the premises for the purpose of a business to be carried on there by the landlord or the beneficiary respectively: *Sevenarts Ltd v Busvine* [1969] 1 All ER 392, [1968] 1 WLR 1929, CA. As to the position with regard to trusts generally see PARA 763 post.

The position of public bodies occupying property vested in an emanation of the Crown for their and/or its purposes requires to be considered on a case to case basis. See *Hills (Patents) v University College Hospital Board of Governors* [1956] 1 QB 90, [1955] 3 All ER 365, CA; *Linden v Department of Health and Social Security* [1986] 1 All ER 691, [1986] 1 WLR 164.

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## **746. The 'five-year rule'.**

The landlord<sup>1</sup> is not entitled to oppose an application for a new tenancy<sup>2</sup> or make an application for the termination of a tenancy without the grant of new tenancy<sup>3</sup> on the ground of his intention to occupy the holding for business or residential purposes<sup>4</sup> if two conditions are satisfied<sup>5</sup>. The first condition is that the landlord's interest, or an interest which has merged in it and but for the merger would be the landlord's interest, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy<sup>6</sup>. 'Purchased' has its popular meaning of 'bought for money'<sup>7</sup>, so that a landlord's acquisition of a mesne tenant's interest by a voluntary surrender on the part of the mesne tenant does not prevent the landlord from relying upon this ground of opposition<sup>8</sup>, although a landlord who is a co-owner of premises and who buys out the other co-owner will be caught by the rule<sup>9</sup>. The second condition is that at all times since the purchase or creation of the landlord's interest the holding<sup>10</sup> has been comprised in a tenancy or successive tenancies of the description to which Part II of the Landlord and Tenant Act 1954<sup>11</sup> applies<sup>12</sup>.

Further, where the landlord is a company and a person has a controlling interest<sup>13</sup> in that company, the extended meaning of 'landlord' which enables either the landlord or that person to rely on the ground of such intention to occupy the holding<sup>14</sup> does not apply if the controlling interest was acquired after the beginning of the period of five years which ends with the termination of the current tenancy<sup>15</sup>, and at all times since the acquisition of the controlling interest the holding has been comprised in a tenancy or successive tenancies of the specified<sup>16</sup> description<sup>17</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante. See also PARA 745 note 1 ante.

2 I.e. under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 I.e. under ibid s 29(2) (as substituted): see PARA 734 ante.

4 I.e. under ibid s 30(1)(g): see PARA 745 ante.

5 See ibid s 30(2) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 6(2)); and the text and notes 5-12 infra.

6 Landlord and Tenant Act 1954 s 30(2) (as amended: see note 5 supra). For these purposes, the date of termination is to be regarded as the date specified in the landlord's notice to terminate or the tenant's request for a new tenancy: *Frederick Lawrence Ltd v Freeman, Hardy and Willis Ltd* [1959] Ch 731, [1959] 3 All ER 77, CA. For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

7 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA. For cases on 'landlord by purchase' decided under the Rent Acts see PARA 957 post. The word 'created' in the statute indicates that the decision in *Powell v Cleland* [1948] 1 KB 262, [1947] 2 All ER 672, CA (see PARA 957 post) does not apply.

8 *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA. See also *Frederick Lawrence Ltd v Freeman Hardy and Willis Ltd* [1959] Ch 731, [1959] 3 All ER 77, CA.

9 *Carshalton Beeches Bowling Club v Cameron* [1979] 1 EGLR 80, (1978) 249 Estates Gazette 1279, CA. Cf *Morar v Chauhan* [1985] 3 All ER 493, [1985] 1 WLR 1263, CA (see PARA 764 post).

10 For the meaning of 'the holding' see PARA 706 note 23 ante.

11 I.e. tenancies of the description specified in the Landlord and Tenant Act 1954 s 23(1): see PARA 706 ante.

12 Ibid s 30(2) (as amended: see note 5 supra). It should be noted that a tenancy in respect of which the parties have contracted out of certain provisions of the Landlord and Tenant Act 1954 pursuant to the provisions of s 38A (as added) (see PARAS 711-712 ante) or under s 38(4) (repealed) (see PARA 710 ante) will still be a tenancy which is within the description of tenancies to which the Act applies, that is to say within the definition contained in s 23(1). Section 30(2) (as amended) refers to the landlord's interest from the time when it originally arose: *Artemiou v Procopiou* [1966] 1 QB 878, [1965] 3 All ER 539, CA (landlord's interest had already been created when he was granted a fresh lease); applied in *VCS Car Park Management Ltd v Regional*

*Railways North East Ltd* [2001] Ch 121, [2000] 1 All ER 403, CA. The landlord's interest is created on the date of execution of the lease and not on the date of the commencement of the term: *Northcote Laundry Ltd v Frederick Donnelly Ltd* [1968] 2 All ER 50, [1968] 1 WLR 562, CA. See also *Cornish v Brook Green Laundry Ltd* [1959] 1 QB 394, [1959] 1 All ER 373, CA. It follows that, provided that the landlord's own interest predates that of the tenant, and that there was an interval of time (however short) between the creation of the landlord's interest and the commencement of the tenant's interest during which no business tenancy of the tenant subsisted (as opposed to any superior business tenancy held by the landlord), this second condition will not be satisfied notwithstanding that the landlord had purchased his interest or that that interest had been created less than five years before the relevant date: see *Northcote Laundry Ltd v Frederick Donnelly Ltd* supra. The phrase 'tenancy or successive tenancies' in the Landlord and Tenant Act 1954 s 30(2) (as amended) refers to interests of the tenant: *Artemiou v Procopiou* supra.

13 For the meaning of 'controlling interest' see PARA 706 note 8 ante.

14 I.e. the Landlord and Tenant Act 1954 s 30(1B) (as added): see PARA 745 ante.

15 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

16 I.e. of the description specified in the Landlord and Tenant Act 1954 s 23(1): see PARA 706 ante. See also note 12 supra.

17 Ibid s 30(2A) (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 14(2), with effect from 1 June 2004: see art 1(3)).

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## (D) REFUSAL OF NEW TENANCY

### **747. Refusal of new tenancy.**

If the landlord<sup>1</sup> opposes an application for an order for the grant of a new tenancy<sup>2</sup> on the grounds on which he is entitled to oppose it<sup>3</sup>, and establishes any of those grounds to the court's satisfaction, the court must not make an order for the grant of a new tenancy<sup>4</sup>.

Where the landlord opposes such an application, or makes an application for the termination of a tenancy without the grant of a new tenancy<sup>5</sup>, on one or more of the grounds of:

- 1487 (1) opposition relating to alternative accommodation<sup>6</sup>;
- 1488 (2) reletting formerly sublet premises as a whole<sup>7</sup>; or
- 1489 (3) his intention to demolish or reconstruct the premises<sup>8</sup>,

but establishes none of those grounds, and none of the other statutory grounds of opposition<sup>9</sup>, to the satisfaction of the court, then if the court would have been satisfied on any of the grounds specified in heads (1) to (3) above if the date of termination specified in the landlord's notice, or the date<sup>10</sup> specified in the tenant's request for a new tenancy, had been such later date as the court may determine, but being a date not more than one year later than the date so specified, the court must make a declaration to that effect<sup>11</sup>, but must not make an order for the grant of a new tenancy<sup>12</sup>. If within 14 days after the making of the declaration the tenant so requires, the court must make an order substituting the date it has determined for the date in the landlord's notice or the tenant's request, and the notice or request then has effect accordingly<sup>13</sup>.

If the court is precluded from making an order for the grant of a new tenancy by reason of the grounds of opposition specified in head (2) or head (3) above, or by reason of the landlord's intention to occupy the premises<sup>14</sup>, the court must certify that fact on the application of the tenant<sup>15</sup>. In such a case the tenant is entitled to compensation on quitting the holding<sup>16</sup>. Where the court makes an order for the termination of the current tenancy without making an order for the grant of a new tenancy, or where it refuses an order for the grant of a new tenancy, and the order was obtained or the court was induced to refuse the grant by misrepresentation or the concealment of material facts, the court may order the landlord to pay compensation to the tenant<sup>17</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 Ie an application under the Landlord and Tenant Act 1954 s 24(1) (as amended); see PARA 720 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the grounds of opposition see *ibid* s 30(1)(a)-(g); and PARA 736 et seq ante.

4 *Ibid* s 31(1).

5 Ie under *ibid* s 29(2) (as substituted); see PARA 734 ante.

6 Ie under *ibid* s 30(1)(d); see PARA 739 ante.

7 Ie under *ibid* s 30(1)(e); see PARA 740 ante.

8 Ie under *ibid* s 30(1)(f); see PARAS 741-744 ante.

9 See note 3 *supra*.

10 Ie the date from which the new tenancy is to begin.

11 Landlord and Tenant Act 1954 s 31(2)(a). The declaration must state of which of the grounds the court would have been satisfied and must specify the date determined: s 31(2)(a).

12 *Ibid* s 31(2)(a).

13 *Ibid* s 31(2)(b). In exceptional circumstances the Court of Appeal will vary the substituted termination date in the light of events occurring subsequent to the hearing: see *Accountancy Personnel Ltd v Salters' Co* (1972) 222 Estates Gazette 1589, CA.

14 Ie under the Landlord and Tenant Act 1954 s 30(1)(g); see PARA 745 ante.

15 See *ibid* s 37(4) (as amended); and PARA 758 post. A personal representative must have obtained a grant of probate or of letters of administration before he applies for a certificate: *Re Crowhurst Park, Sims-Hilditch v Simmons* [1974] 1 All ER 991, [1974] 1 WLR 583 (executor omitted to obtain probate in the United Kingdom).

16 See the Landlord and Tenant Act 1954 s 37 (as amended); and PARAS 758-760 post.

17 See *ibid* s 37A (as added); and PARA 761 post.

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## (E) TERMS OF NEW TENANCY

### 748. Determination of terms.

In the absence of agreement<sup>1</sup> as to the terms of a new tenancy the court must determine them<sup>2</sup>. There is authority to the effect that the court must hear evidence as to whether the terms are reasonable, even if the landlord has defaulted under the procedural rules<sup>3</sup>.

1 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante. Such an agreement must not be 'subject to contract' or 'without prejudice', so that, even where a lease has been engrossed (but not executed) on that basis, the tenants may still fall back on their statutory rights: see *Derby & Co Ltd v ITC Pension Trust Ltd* [1977] 2 All ER 890.

2 See the Landlord and Tenant Act 1954 ss 32(1), 33, 34(1), 35 (as amended); and PARAS 749-755 post.

3 *Morgan v Jones* [1960] 3 All ER 583, [1960] 1 WLR 1220, CA (landlord's answer omitted to state whether he opposed the terms proposed by the tenant); *Desbroderie Ltd v Segalov* (1956) 106 L Jo 764 (in a county court landlord who failed to file an answer not allowed to resist the grant of a new lease, but allowed to defend as to the rent and terms). As to the caution, however, to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33; and as to the procedure under the Civil Procedure Rules see PARA 723 et seq ante.

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#### **749. Property comprised in new tenancy.**

In general<sup>1</sup> an order for the grant of a new tenancy<sup>2</sup> is an order for the grant of a new tenancy<sup>3</sup> of the holding<sup>4</sup> and, in the absence of agreement<sup>5</sup> between the landlord and the tenant as to the property which constitutes the holding, the court must in the order designate that property by reference to the circumstances existing at the date of the order<sup>6</sup>.

In three instances, however, the new demise may differ from the old:

- 1490 (1) the above provision<sup>7</sup> does not apply in a case where the property comprised in the current tenancy<sup>8</sup> includes other property besides the holding and the landlord requires any new tenancy ordered to be granted<sup>9</sup> to be a tenancy of the whole of the property comprised in the current tenancy<sup>10</sup>; in any such case any order<sup>11</sup> for the grant of a new tenancy must be an order for the grant of a new tenancy of the whole of the property comprised in the current tenancy<sup>12</sup>;
- 1491 (2) where the current tenancy includes rights<sup>13</sup> enjoyed by the tenant<sup>14</sup> in connection with the holding, those rights must be included in a tenancy ordered to be granted<sup>15</sup> except as otherwise agreed between the landlord and the tenant or, in default of such agreement, determined by the court<sup>16</sup>;
- 1492 (3) the court may order the grant of a new tenancy of part only of the holding where the landlord has opposed the renewal of the tenancy on the ground that he intends to demolish or reconstruct the holding<sup>17</sup> but is able to do so with possession of the other part only of the holding, the tenant is willing to accept such a new tenancy and the new holding will be an economically separable part<sup>18</sup>.

1 ie subject to the Landlord and Tenant Act 1954 s 32(1A)-(3) (as amended): see the text and notes 2-18 infra; and PARA 744 ante.

2 ie under ibid s 29 (as substituted): see PARA 720 ante.

- 3 For the meaning of 'tenancy' see PARA 706 note 2 ante.
- 4 For the meaning of 'the holding' see PARA 706 note 23 ante.
- 5 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante.
- 6 Landlord and Tenant Act 1954 s 32(1) (s 32(1), (3) amended by the Law of Property Act 1969 ss 7(2), 8). The court must designate the holding as at the date of the order even where the tenant's application for a new lease has been partly determined by a previous hearing: *I and H Caplan Ltd v Caplan* [1961] 3 All ER 1174, [1962] 1 WLR 55, HL.
- 7 Ie the Landlord and Tenant Act 1954 s 32(1) (as amended). Nor does s 32(1A) (as added) (see PARA 744 ante) apply: s 32(2).
- 8 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.
- 9 See note 2 supra.
- 10 Landlord and Tenant Act 1954 s 32(2). The landlord may require that any new tenancy should be a tenancy of the whole, even if part is sublet: *Atkey v Collman* (1955) 105 L Jo 396.
- 11 See note 2 supra.
- 12 Landlord and Tenant Act 1954 s 32(2)(a). In such circumstances, references in ss 32(3)-46 (as amended) to the holding are to be construed as references to the whole of that property: s 32(2)(b).
- 13 Ie even purely personal rights: see *Re No 1 Albemarle Street* [1959] Ch 531, [1959] 1 All ER 250.
- 14 Ie enjoyed by virtue of the tenancy: see *G Orlik (Meat Products) Ltd v Hastings and Thanet Building Society* (1974) 29 P & CR 126, CA. Not every right conferred by the tenancy agreement will, however, have been conferred expressly, eg the right may have been (and will be again by the new tenancy agreement) 'swept up' by the Law of Property Act 1925 s 62 (see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236); and, where the old tenancy agreement was intended to include premises which were misdescribed or in part omitted from the parcels clause, evidence will be admitted to show the true extent of the old demise, even without a formal claim for rectification: see *IS Mills (Yardley) Ltd v Curdworth Investments Ltd* (1975) 119 Sol Jo 302, CA (evidence showed that, although the lease referred to a shop only, it was intended to relate to the shop and rear store room); but see also *G Orlik (Meat Products) Ltd v Hastings and Thanet Building Society* supra.
- 15 See note 2 supra.
- 16 Landlord and Tenant Act 1954 s 32(3) (as amended: see note 6 supra). There is thus no absolute right to the renewal of the tenancy upon the same terms as to rights ancillary to the demise, so that the new demise may differ in the ancillary rights conferred in the exercise of the court's discretion.
- 17 Ie under the Landlord and Tenant Act 1954 s 30(1)(f): see PARAS 741-744 ante.
- 18 See *ibid* ss 31A(1)(b), 32(1A) (as added); and PARA 744 ante.

## UPDATE

### 749 Property comprised in new tenancy

NOTE 14--See also *Picture Warehouse Ltd v Cornhill Investments Ltd* [2008] EWHC 45 (QB), [2008] 12 EG 98 (parking rights in new lease).

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## 750. Length of term.

Where on an application<sup>1</sup> the court makes an order for the grant of a new tenancy<sup>2</sup>, the new tenancy is such tenancy as may be agreed<sup>3</sup> between the landlord and the tenant or, in default of such an agreement, is such a tenancy as may be determined by the court to be reasonable<sup>4</sup> in all the circumstances<sup>5</sup>. These circumstances will include the length of the previous tenancy or tenancies<sup>6</sup> or an intention by the landlord to redevelop the premises in the future<sup>7</sup> balanced, where appropriate, against the expenditure by the tenant upon improvements to the premises<sup>8</sup>. They may also include an intention by the landlord to occupy the premises so soon as he is no longer prevented from relying on that ground of opposition by the 'five-year rule'<sup>9</sup>.

The court may insert an option for the landlord to determine the term in appropriate cases<sup>10</sup>, notably where such a clause was included in the current tenancy agreement<sup>11</sup>.

Where the length of the term is determined by the court, the new tenancy, if for a term of years certain, must not exceed 15 years<sup>12</sup>. The new tenancy begins on the coming to an end of the current tenancy<sup>13</sup>, but because the coming to an end of the current tenancy may be deferred unpredictably by the interim continuation<sup>14</sup> of the tenancy, the court should direct in its order for a new lease that the term of the new lease is to be a term ending on a specified date<sup>15</sup>. The duration of the new tenancy which is ordered will reflect the fact that the new tenancy will itself be one which is protected<sup>16</sup> by statute<sup>17</sup>. Where the tenant applies for an unreasonably short tenancy, the court may order that the new tenancy is to be longer than that which the tenant desires in order to enable the landlord to relet the premises without an interval<sup>18</sup>, but ordinarily the court will not impose any longer term upon the tenant than the tenant requests<sup>19</sup>.

1     le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 751 et seq post. As to applications for the grant of a new tenancy see PARA 720 ante; and as to applications by the landlord for the termination of a business tenancy without the grant of a new tenancy see PARA 734 ante.

2     See *ibid* s 29 (as substituted); and PARAS 720, 734 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3     For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante. See also PARA 748 note 1 ante.

4     The court's discretion as to the length of the new term, and as to the other terms of the new tenancy, is wider than the discretion conferred upon it under the Landlord and Tenant Act 1954 s 30(1)(a)-(c), (e) by the word 'ought' (see PARA 734 notes 9-10 ante): *Lyons v Central Commercial Properties Ltd* [1958] 2 All ER 767 at 775, [1958] 1 WLR 869 at 880-881, CA, per Harman LJ (where it was therefore relevant that the tenant had contracted to sell his estate, and was in fact applying as a trustee for the purchaser).

5     Landlord and Tenant Act 1954 s 33. Cf *Lambert v Ve-Ri-Best Manufacturing Co Ltd* [1954] 1 QB 524, [1954] 1 All ER 961, CA (decided under the Landlord and Tenant Act 1927 s 5 (repealed)) (where it was held that the court was entitled on the grant of a new lease to require the landlord to pay such compensation as the court might determine at a future date in the event of notice to determine the lease being given by the landlord before its expiration). As to compensation where a new tenancy is refused see generally paras 758-761 post.

6     *Betty's Cafés Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20, [1958] 1 All ER 607, HL. The duration of the period since the time at which the tenancy would have expired contractually will also be relevant: *Frederick Lawrence Ltd v Freeman, Hardy and Willis Ltd* (1960) 176 Estates Gazette 11; *London and Provincial Millinery Stores Ltd v Barclays Bank Ltd* [1962] 2 All ER 163, [1962] 1 WLR 510, CA.

7     *Reohorn v Barry Corp*n [1956] 2 All ER 742, [1956] 1 WLR 845, CA; *London and Provincial Millinery Stores Ltd v Barclays Bank Ltd* [1962] 2 All ER 163, [1962] 1 WLR 510, CA ('ripeness' of the premises for redevelopment). See also *Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99, [1956] 1 WLR 1027, CA.

8     *Amika Motors Ltd v Colebrook Holdings Ltd* [1981] 2 EGLR 62, (1981) 259 Estates Gazette 243, CA; *Becker v Hill Street Properties Ltd* [1990] 2 EGLR 78, CA.

9 le by the Landlord and Tenant Act 1954 s 30(2) (as amended): see PARA 746 ante. See *Upsons Ltd v E Robins Ltd* [1956] 1 QB 131, [1955] 3 All ER 348, CA (where greater hardship, and the fact that the tenant was a large company with many branches whereas the landlord had only one shop with the risk that he might have to vacate it, were considered to be relevant factors); *Wig Creations Ltd v Colour Film Services Ltd* (1969) 20 P & CR 870, CA.

10 *McCombie v Grand Junction Co Ltd* [1962] 2 All ER 65n, [1962] 1 WLR 581, CA; *Adams v Green* [1978] 2 EGLR 46, (1978) 247 Estates Gazette 49, CA. See also *Becker v Hill Street Properties Ltd* [1990] 2 EGLR 78, CA.

11 *Leslie & Goodwin Investments Ltd v Prudential Assurance Co Ltd* [1987] 2 EGLR 95; cf *JH Edwards & Sons Ltd v Central London Commercial Estates Ltd*, *Easter Bazaar Ltd v Central London Commercial Estates Ltd* (1985) 271 Estates Gazette 697, CA. See also *Peter Millett & Sons Ltd v Salisbury Handbags Ltd* [1987] 2 EGLR 104 (where a three-year lease with a break clause exercisable only where the landlord required the premises for its own use was directed to reflect the fragility of the landlord's case under the Landlord and Tenant Act 1954 s 30(1)(g)).

12 Ibid s 33 (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 26, with effect from 1 June 2004: see art 1(3)). Prior to that amendment the length of the tenancy was not to exceed 14 years: see the Landlord and Tenant Act 1954 s 33 (as originally enacted). For the meaning of 'term of years certain' see PARA 710 note 3 ante.

13 Ibid s 33. The current tenancy will be determined three months after the final disposal of the proceedings or at the date stated in the landlord's notice or tenant's request, whichever is later: see PARA 729 ante. See *Re No 88 High Rd, Kilburn, Meakers Ltd v DAW Consolidated Properties Ltd* [1959] 1 All ER 527, [1959] 1 WLR 279. For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

14 As to interim continuation see PARA 729 ante.

15 *Warwick and Warwick (Philately) Ltd v Shell UK Ltd* (1980) 42 P & CR 136, 257 Estates Gazette 1042, CA.

16 le by the Landlord and Tenant Act 1954 Pt II (as amended).

17 *National Car Parks Ltd v Paternoster Consortium Ltd* [1990] 1 EGLR 99.

18 *Re Sunlight House, Quay St, Manchester* (1959) 173 Estates Gazette 311, CA. The actual circumstances of this case were that the hearing took place on 3 February 1959, so that (as was put to the court), if the order were drawn up within a week, the effect of the Landlord and Tenant Act 1954 s 64 (now as amended) (see PARA 729 ante) would have been that the old tenancy came to an end on 20 June 1959; but the tenant sought a new term to expire on 4 August 1959. Having regard to the provisions of (inter alia) s 27 (as originally enacted), Danckwerts J ordered the grant of a new lease to expire on 25 December 1959. A tenant who is dissatisfied with the duration of the new term may always apply to the court under s 36(2) for revocation of the order, and in that situation only the court may substitute a new termination date in the notice or request which brought the tenancy to an end, expressly 'to afford the landlord a reasonable opportunity for reletting or otherwise disposing of the premises': see PARA 757 post.

19 *CBS United Kingdom Ltd v London Scottish Properties Ltd* [1985] 2 EGLR 125 (tenant wanted, and obtained, a term of approximately one year and the landlords sought to impose a 14-year term).

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## **751. Commencement of new tenancy.**

The new tenancy commences on the coming to an end of the current tenancy<sup>1</sup>. It follows that, because the current tenancy may be prolonged by the subsequent history of the application<sup>2</sup>, at the trial the exact commencement date cannot be known, unless the parties specifically agree a date<sup>3</sup>. If they do so agree, that date can be earlier than would otherwise be the result of the interim continuation of the current tenancy. Because of this uncertainty as to commencement and the fact that, if the new tenancy is a short one, its effect may be



significantly altered by an appeal, courts should delimit the term of the new tenancy by specifying its expiration, rather than merely designating a period<sup>4</sup>.

1 See the Landlord and Tenant Act 1954 s 33 (as amended); and PARA 750 ante. For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

2 le because of interim continuation by ibid s 64 (as amended): see PARA 729 ante.

3 The grant and taking up of the new lease will effect a surrender of the current tenancy despite the fact that ibid s 33 (as amended) does not make the commencement of the new tenancy subject to agreement between the parties: see PARA 750 ante.

4 *Michael Chipperfield v Shell UK Ltd, Warwick & Warwick (Philately) Ltd v Shell UK Ltd* (1980) 42 P & CR 136, CA; *Turone v Howard de Walden Estates Ltd* (1983) 267 Estates Gazette 440, CA.

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## **752. Other terms excluding rent.**

The terms of a tenancy<sup>1</sup> granted by order of the court<sup>2</sup>, other than terms as to the duration of it and as to the rent payable under it<sup>3</sup>, but including, where different persons own interests which fulfil the specified conditions<sup>4</sup> in different parts of it, terms as to the apportionment of the rent, are such as may be agreed<sup>5</sup> between the landlord and the tenant or as, in default of such agreement, may be determined by the court<sup>6</sup>. In determining those terms the court must have regard to the terms of the current tenancy and to all relevant circumstances<sup>7</sup>; and this reference to all relevant circumstances includes, without prejudice to its generality, a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995<sup>8</sup>. Where a tenancy is being renewed, the burden of showing that it is reasonable to renew it on terms different from those of the current tenancy lies upon the party who is urging the change<sup>9</sup>.

If a cogent reason is shown for making a change from the terms of the old lease, then, where relevant, it falls to be considered whether, if the party making the change is successful, the party resisting the suggested change will be adequately compensated by any consequential adjustment in the open market rent, although such a rental adjustment will not justify the transfer of a major risk appropriate to the ownership of the property to the tenant<sup>10</sup>. If the landlord seeks to introduce new terms into the new lease, it becomes necessary to consider whether those terms would materially impair the tenant's security in carrying on his business; in all cases any change from the terms of the current tenancy must be fair and reasonable as between the landlord and the tenant<sup>11</sup>. Provisions for the payment of service charges to vary in accordance with the amount of the landlord's expenditure on the provision of the services will ordinarily be inserted in the new lease by the court, even if the old lease contained no provision for the payment of a service charge<sup>12</sup>, although a distinction is to be drawn between a service charge which includes a contribution towards the cost of structural repairs and one which does not<sup>13</sup>. The court will not enlarge the holding<sup>14</sup> or otherwise confer upon the tenant under the new lease a right which the tenant did not enjoy under the current tenancy<sup>15</sup>, but may impose a term that sureties join in the new lease<sup>16</sup>. The court will not order the tenant to pay the landlord's conveyancing costs<sup>17</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 753 et seq post.

3 As to those terms see PARA 750 ante, PARAS 753-755 post. The service charge, even where it is reserved as an additional rent, falls to be considered with other terms of the new lease under ibid s 35 (as amended) and, therefore, before the rent is determined under s 34 (as amended): see *O'May v City of London Real Property Co Ltd* [1981] Ch 216, [1980] 3 All ER 466, CA (affd on other grounds [1983] 2 AC 726, [1982] 1 All ER 660, HL).

4 le the conditions specified in the Landlord and Tenant Act 1954 s 44(1) (as amended): see PARA 715 ante.

5 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante. See also PARA 748 note 1 ante.

6 Landlord and Tenant Act 1954 s 35(1) (numbered as such by the Landlord and Tenant (Covenants) Act 1995 s 30(1), Sch 1 para 4(1); amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 27(3), with effect from 1 June 2004: see art 1(3)).

7 Landlord and Tenant Act 1954 s 35(1) (as amended: see note 6 supra). See *Cardshops Ltd v Davies* [1971] 2 All ER 721, [1971] 1 WLR 591, CA. The Landlord and Tenant Act 1954 s 35 (as amended) confers the widest possible discretion (*Re No 1 Albemarle Street* [1959] Ch 531, [1959] 1 All ER 250), but does not enable the court to enlarge the holding (*G Orlik (Meat Products) Ltd v Hastings and Thanet Building Society* (1974) 29 P & CR 126, CA). The fact that the tenant has contracted to sell his interest, and so is applying as trustee for his purchaser, is relevant: see *Lyons v Central Commercial Properties Ltd* [1958] 2 All ER 767, [1958] 1 WLR 869, CA. See also *Bullen v Goodland* (1961) 105 Sol Jo 231, CA. The right to continue the existing business will not be cut down without strong reasons: *Gold v Brighton Corpn* [1956] 3 All ER 442, [1956] 1 WLR 1291, CA. It seems, however, that user will normally be confined to the existing business, even if there was no such restriction in the current tenancy: *Gold v Brighton Corpn* supra. 'All relevant circumstances' includes the provisions of a local Act of Parliament (*R v Huddersfield County Court Judge, ex p Beaumont Ashton Ltd* (1967) 19 P & CR 62, DC) and may, on an appeal, include circumstances arising after the trial date, where evidence of those circumstances is before the court (*Davy's of London (Wine Merchants) Ltd v City of London Corpn* [2004] EWHC 2224 (Ch), [2004] 49 EG 136, [2004] All ER (D) 63 (Oct)). See also the text and note 8 infra.

8 Landlord and Tenant Act 1954 s 35(2) (added by the Landlord and Tenant (Covenants) Act 1995 Sch 1 para 4(2)). As to the operation of that 1995 Act see PARA 578 et seq ante. The provisions of the new lease may not entitle the landlord to require, in all cases, an authorised guarantee agreement under s 16 (see PARA 593 ante) as a condition of consent for an assignment, but may only do so where such a requirement is reasonable: *Wallis Fashion Group Ltd v CGU Life Assurance Ltd* (2000) 81 P & CR 393, [2000] 2 EGLR 49. In practice, however, an authorised guarantee agreement is almost invariably required on assignment.

9 *Cardshops Ltd v Davies* [1971] 2 All ER 721, [1971] 1 WLR 591, CA; *O'May v City of London Real Property Co Ltd* [1981] Ch 216, [1980] 3 All ER 466, CA (affd on other grounds [1983] 2 AC 726, [1982] 1 All ER 660, HL). A new term restricting the use of the premises to a narrower use than previously permitted will not be introduced at the tenant's behest where to do so would depress the rental value of the premises (*Aldwych Club Ltd v Cophall Property Co Ltd* (1962) 185 Estates Gazette 219); but it would seem that the user clause will not be widened at the landlord's behest so as to increase the rental value, where the tenant does not need any such modification (see *Charles Clements (London) Ltd v Rank City Wall Ltd* [1978] 1 EGLR 47, (1978) 246 Estates Gazette 739). See also *Gorleston Golf Club v Links Estate (Gorleston)* [1959] CLY 1830. For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

10 *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726, [1982] 1 All ER 660, HL (where no cogent reason existed for making a change in the terms of the letting such as would have transferred to the occupying tenants under a short lease of a small part of a large office building the risk of structural deterioration in that building, thus creating a clear lease for the reversioner). This factor will not always be of significance, as some changes of circumstance may make the old terms so inapposite to the new tenancy that it is difficult or impossible to see what the required adjustment to the rent would be, eg where a full repairing lease of a large building is to be replaced by a new lease of a small portion only of one floor; and it may be that a tenant's covenant for internal and decorative repairs only plus the imposition of an obligation to contribute to the cost of structural and external repairs would more appropriately carry forward into the new lease the burden of the cost of repairs carried by the tenant under the old lease than to repeat in the same terms the old repairing covenant in the new lease.

11 *O'May v City of London Real Property Co Ltd* [1981] Ch 216, [1980] 3 All ER 466, CA (affd on other grounds [1983] 2 AC 726, [1982] 1 All ER 660, HL).

12 *Hyams v Titan Properties Ltd* (1972) 24 P & CR 359, CA; and see *O'May v City of London Real Property Co Ltd* [1981] Ch 216, [1980] 3 All ER 466, CA (affd on other grounds [1983] 2 AC 726, [1982] 1 All ER 660, HL), where it was held that this question fell to be considered under the Landlord and Tenant Act 1954 s 35 (now as amended) and not s 34(3) (as added) (see PARA 755 post).

13 As to the inclusion of a provision for a service charge of the former, ie onerous, type see eg *Leslie & Godwin Investments Ltd v Prudential Assurance Co Ltd* [1987] 2 EGLR 95; as to the latter, wider, provision see *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726, [1982] 1 All ER 660, HL.

14 *G Orlik (Meat Products) Ltd v Hastings and Thanet Building Society* (1974) 29 P & CR 126, CA.

15 *Kirkwood v Johnson* (1979) 38 P & CR 392, 250 Estates Gazette 239, CA (where the court refused to order that the new lease include an option enabling the tenant to acquire the freehold, such an option having been included under the old lease and having lapsed). It seems that the court has no power to order the inclusion of such an option in any event (or should not do so), as the effect would be to put a new saleable asset into the tenant's hands rather than to protect his goodwill.

16 *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 All ER 315, [1984] 1 WLR 696, CA. The court has an express statutory power in certain circumstances to require guarantors where the lease is renewed by one or some only of the former tenants: see the Landlord and Tenant Act 1954 s 41A(6) (as added and amended); and PARA 765 post.

17 *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 All ER 315, [1984] 1 WLR 696, CA. To do so would violate the principle established by the Costs of Leases Act 1958: see PARA 121 ante.

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### 753. Rent; general provisions.

The rent payable under a tenancy<sup>1</sup> granted by order of the court<sup>2</sup> is such as may be agreed<sup>3</sup> between the landlord and the tenant or as, in default of such agreement, may be determined by the court to be that at which the holding<sup>4</sup> might reasonably<sup>5</sup> be expected to be let in the open market by a willing lessor having regard to the terms of the tenancy, other than those relating to rent<sup>6</sup>, so that the amount of the new rent should not be determined until the other terms of the new tenancy have been determined<sup>7</sup>. To ascertain what rent might reasonably be expected for this purpose, the court must take into account all the circumstances relating to the transaction<sup>8</sup>, including any local or other legal provisions which apply to the premises<sup>9</sup>, and including any effect on rent of the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 754 et seq post.

3 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante.

4 For the meaning of 'the holding' see PARA 706 note 23 ante.

5 The court must take notice of and assess the rental value of the premises by reference to the other terms of the new tenancy: see *O'May v City of London Real Property Co Ltd* [1983] 2 AC 726 at 740, [1982] 1 All ER 660 at 665, HL, per Lord Hailsham of St Marylebone LC. There is no jurisdiction for the court to determine the rent in an amount less than the court's assessment of the market rent because of the inability of the tenant to pay such market rent: *Giannoukakis v Saltfleet Ltd* [1988] 1 EGLR 73, CA.

6 Landlord and Tenant Act 1954 s 34(1) (numbered as such, and amended, by the Law of Property Act 1969 s 1(1)). The date at which the property falls to be valued (the 'valuation date') will be the date of the hearing, but the valuation has to have regard to matters which can reasonably be expected to happen between that

date and the date at which the new tenancy will commence: see PARA 729 note 7 ante (effect of the Landlord and Tenant Act 1954 s 64 (as amended)). See also *Lovely and Orchard Services Ltd v Daejan Investments (Grove Hall) Ltd* [1978] 1 EGLR 44, (1977) 121 Sol Jo 711. The court therefore has to value a lease commencing on a future date, but at such rent for that lease as would be agreed on the hearing date. Cf *Rose v Hurst* [1949] 2 KB 372, [1949] 2 All ER 24, CA (decided under the Landlord and Tenant Act 1927 s 5 (repealed)), where it was held that, although premises might be protected by the Rent Restrictions Acts, the court could fix a rent higher than that recoverable under those Acts. As to the proper approach to be taken in fixing a rent see PARA 754 post; and see eg *Rombus Materials Ltd v WT Lamb Properties Ltd* [1999] All ER (D) 161, CA (trial judge in error in ignoring expert evidence).

7 *Cardshops Ltd v Davies* [1971] 2 All ER 721, [1971] 1 WLR 591, CA. The court should not introduce a new term into the tenancy in order to depress the letting value: *Aldwych Club Ltd v Copthall Property Co Ltd* (1962) 185 Estates Gazette 219. See also PARA 752 ante.

8 See *Oscroft v Benabo* [1967] 2 All ER 548, [1967] 1 WLR 1087, CA (presence of a statutory tenant in part of the premises depressed the value).

9 *R v Huddersfield County Court Judge, ex p Beaumont Ashton Ltd* (1967) 19 P & CR 62, DC (local Act of Parliament affected the rights of the landlord and tenant).

10 Landlord and Tenant Act 1954 s 34(4) (added by the Landlord and Tenant (Covenants) Act 1995 s 30(1), Sch 1 para 3). As to the operation of that 1995 Act see PARA 578 et seq ante.

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#### **754. Determination of rent; in general.**

The court must determine the amount of the new rent in the light of the evidence, which ordinarily will be the opinion of experienced valuers<sup>1</sup> who will usually form their opinion by reliance upon other comparable transactions, adjusting for the distinctions to be made between the different properties<sup>2</sup>. Where the premises are unusual or unique, so that evidence of comparable transactions is unavailable or hard to come by, the circumstances and profitability of the tenant's undertaking will be relevant, and disclosure of the tenant's business accounts may therefore be ordered although ordinarily only those accounts and documents which a purchaser in the hypothetical market would be likely to be able to obtain<sup>3</sup>. Disclosure will not, however, be ordered for the purpose of seeing what rent the tenant can afford to pay, as this is a subjective factor irrelevant to the determination of the market value<sup>4</sup>.

Rating assessments are of little significance in relation to the valuation of the rent under any new lease, since rating assessments are made upon assumptions<sup>5</sup> which invariably differ from the actual contractual terms of the tenancy, and also will have been made by reference to values existing at an earlier date than the valuation date for the statutory purposes<sup>6</sup> which is the date upon which the new lease is to commence<sup>7</sup>. As their evidence must be given at the hearing but the tenancy is continued<sup>8</sup> until a subsequent date, the valuers must testify at the hearing as to their opinion of the rental value of the premises upon a letting to commence over three months later<sup>9</sup>.

1 As to expert evidence generally see CIVIL PROCEDURE vol 11 (2009) PARA 835 et seq. See also the general observations on the duties and responsibilities of expert witnesses made by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (the Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, [1993] 2 EGLR 183 (revsd on other grounds [1995] 1 Lloyd's Rep 455, CA); but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33. As to the proper approach to be taken in fixing a rent see eg *Rombus Materials Ltd v WT Lamb Properties Ltd* [1999] All ER (D) 161, CA (trial judge in error in ignoring expert evidence).

2 If the comparable transactions involve properties in respect of which a wider, and therefore a more valuable, use is permitted to a tenant than will be allowed under the new lease, such an adjustment may be by reduction: *UDS Tailoring Ltd v BL Holdings Ltd* [1982] 1 EGLR 61, (1981) 261 Estates Gazette 49. If there are no comparables available, the valuation may have to be made by reference to general trends: see *National Car Parks v Colbrook Estates Ltd* [1983] 1 EGLR 78, (1982) 266 Estates Gazette 810.

3 See *Cornwall Close Country Club v Cardgrange Ltd* [1987] 1 EGLR 146 (rent review); *Electricity Supply Nominees Ltd v London Clubs Ltd* [1988] 2 EGLR 152, CA.

4 As to the admissibility and relevance in ordinary circumstances of such evidence see *Harewood Hotels Ltd v Harris* [1958] 1 All ER 104, [1958] 1 WLR 108, CA; *WJ Barton Ltd v Long Acre Securities Ltd* [1982] 1 All ER 465, [1982] 1 WLR 398, CA; cf *Re St Martin's Theatre, Bright Enterprises Ltd v Lord Willoughby de Broke* [1959] 3 All ER 298, [1959] 1 WLR 872 (discovery (now known as 'disclosure') ordered in order to know whether the tenant's finances were such that he was able to fulfil his obligations, as this was relevant to whether he ought to be granted a new tenancy). Where the premises are such that the rent is customarily calculated on a 'grouped basis', the court may so order: see *Naylor v Uttoxeter UDC* (1974) 231 Estates Gazette 619 (rent of cattle market let to auctioneers). See also *Skrzypkowski v Silvan Investments Ltd* [1963] 1 All ER 886, [1963] 1 WLR 525, CA; *Leizer v Ostim Properties Ltd* (1965) 109 Sol Jo 456, CA. For other illustrations of the method of calculating the rent for a new tenancy see *Re Nos 52-56 Osnaburgh Street and Nos 23-43 Longford Street, NW1* (1957) 169 Estates Gazette 656; *Commercial Veneer Co Ltd v Printing House Properties Ltd* (1957) 169 Estates Gazette 757; *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415, [1973] 1 All ER 726. For an illustration of the method of calculating the rent for a new tenancy under the somewhat different provisions of the Landlord and Tenant Act 1927 s 4(3) (repealed) see *Rialto Cinemas Ltd v Wolfe* [1955] 2 All ER 530, [1955] 1 WLR 693. Cf *John Kay Ltd v Kay* [1952] 2 QB 258 at 266-267, [1952] 1 All ER 813 at 816-817, CA, per Evershed MR (where it was held that the rent to be paid under the new tenancy is rent arrived at by applying the subjective test of what the judge thinks is right and fair, as distinct from eg the objective test of what the evidence shows is the rent of the premises obtainable in the open market, and that, when all the evidence has been given and attention has been directed to the right considerations, the exact quantification must be arrived at in the same way as eg that in which a jury fixes a figure when it comes to assess damages). This was a decision under the Leasehold Property (Temporary Provisions) Act 1951 s 12(1) (repealed). All that is said as to the determination of a new rent applies also mutatis mutandis to the determination of an interim rent (see PARA 730 ante). For an example of how both rent and interim rent are determined by the court see *English Exporters (London) Ltd v Eldonwall Ltd* supra.

5 As to rating assumptions see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 286 et seq. In theory an up-to-date rating assessment could correspond to market value, if market value falls to be determined under a periodic tenancy upon the terms to be assumed for rating purposes: see *Chambers Wharf & Cold Stores Ltd v Denny* (1956) 168 Estates Gazette 120 (county court); *Jefferys v Hutton Investment Ltd* (1956) 168 Estates Gazette 203 (county court).

6 Ie the Landlord and Tenant Act 1954 s 34(1) (as amended): see PARA 753 ante.

7 See *ibid* s 64 (as amended); and PARA 729 ante.

8 Ie by *ibid* s 64 (as amended) or, if the termination date specified in the notice under s 25 or the date specified for the proposed commencement of the new term in the tenant's request for a new tenancy under s 26 (as amended) has not passed, by s 24 (as amended): see PARA 713 ante.

9 The precise date is unpredictable, since at the date of the trial it will not be known whether the tenant will appeal or not. In practical terms, the valuer has to be asked to value at the trial but by reference to a date four and a half months later.

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## **755. Rent; general disregards and special valuation provisions.**

In assessing the new rent the court must disregard<sup>1</sup>:

- 1493 (1) any effect on rent of the fact that the tenant or his predecessors in title have been in occupation of the holding<sup>2</sup>;
- 1494 (2) any goodwill attached to the holding as a result of the business carried on there by the tenant or by a predecessor of his in that business<sup>3</sup>;
- 1495 (3) any effect on rent of any improvement<sup>4</sup> carried out by a person who at the time it was carried out was the tenant<sup>5</sup> but only if it was carried out otherwise than in pursuance of an obligation to his immediate landlord<sup>6</sup>, and either it was carried out during the current tenancy<sup>7</sup> or the following conditions are satisfied, that is to say:
- 139 173. (a) that it was completed not more than 21 years before the application to the court was made<sup>8</sup>; and
174. (b) that the holding or any part of it affected by the improvement has at all times since the completion of the improvement been comprised in business tenancies of the specified<sup>9</sup> description<sup>10</sup>; and
175. (c) that at the termination of each of those tenancies the tenant did not quit<sup>11</sup>.
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Where the rent is determined by the court, then, if it thinks fit, the court may further determine that the terms of the tenancy are to include such provision for varying the rent as may be specified in the determination<sup>12</sup>.

In proceedings for an order for a new lease an appeal lies<sup>13</sup> from a county court to a senior court<sup>14</sup> which, in the absence of any findings that the trial judge based upon the demeanour or reliability of the experts' evidence, will broadly speaking be in as good a position as the trial judge to assess the merits of the expert valuation evidence and to make findings on it accordingly<sup>15</sup>.

1 There is no part of the new rent must be attributable to these factors. As to the special provisions relating to the rent of licensed premises see the Landlord and Tenant Act 1954 s 34(1)(d) (as amended); and PARA 776 post. Section 34 (as amended) contains all the guidance needed for determining a rent on the hypothesis of an open market value, and only permits those specific matters laid out within it to be disregarded: see *J Murphy & Sons Ltd v Railtrack plc (in railway administration)* [2002] EWCA Civ 679, [2003] 1 P & CR 91, [2002] All ER (D) 288 (Apr), CA (the fact that the property in question was landlocked was not to be disregarded).

2 Landlord and Tenant Act 1954 s 34(1)(a) (s 34(1) numbered as such, s 34(1)(c) (see head (3) in the text) substituted and s 34(2) added, by the Law of Property Act 1969 s 1(1)). For the meaning of 'the holding' see PARA 706 note 23 ante.

3 Landlord and Tenant Act 1954 s 34(1)(b) (as amended: see note 2 supra). For the meaning of 'business' see PARA 707 ante.

4 As to the distinction between improvements and the installation of tenant's fixtures and fittings see *New Zealand Government Property Corp v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA. The 21-year period (see head (3)(a) in the text) is irrelevant to tenant's fixtures and fittings which always fall to be disregarded in the valuation.

5 The work must have been done at a time when the person who carried it out had at least an equitable right to call for a lease: *Euston Centre Properties Ltd v H & J Wilson Ltd* [1982] 1 EGLR 57, (1981) 262 Estates Gazette 1079. The tenant need not have physically carried out the work but may not satisfy the statutory requirements in a case where a third party has carried them out unless he can establish some involvement in identifying, supervising and/or financing the works, resulting in the specific improvements concerned: see *Durley House Ltd v Cadogan* [2000] 1 WLR 246, [1999] All ER (D) 1126.

6 Landlord and Tenant Act 1954 s 34(1)(c), (2) (as respectively substituted and added: see note 2 supra). The statutory provisions give no guidance on how one 'disregards' the effect on rent of any relevant improvements; but it would seem that it is wrong to seek to apply the 'disregard' by valuing the premises as if the improvements did not exist, as that would reduce from the full rent ('entirety value') of the premises complete with improvements both (1) an allowance for the cost of notionally repeating the installation of the

improvements; and (2) an allowance for wasted rent for the time that the premises could not be used whilst notionally the work was being done. It would seem that the second element in the reduction from full value (that is to say the reduction for notionally wasted rent) should not be subtracted from the full value. See the decisions of Forbes J (both decided on the construction of rent review clauses which employed phraseology indistinguishable, other than by context, from the statutory provisions) in *GREA Real Property Investments Ltd v Williams* [1979] 1 EGLR 121, (1979) 250 Estates Gazette 651 and *Estates Projects Ltd v Greenwich London Borough* [1979] 2 EGLR 85, (1979) 251 Estates Gazette 851. As to the position in respect of tenants' fixtures and fittings see note 4 supra; and PARA 792 the text and note 6 post. For the meaning of 'the landlord' see PARA 715 ante.

7 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

8 Landlord and Tenant Act 1954 s 34(2)(a) (as added (see note 2 supra); amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 9). Prior to the amendments made to the Landlord and Tenant Act 1954 s 34 by the Law of Property Act 1969 s 1 (which became effective on 1 January 1970) improvements carried out by the tenant under a tenancy earlier than the current tenancy were not disregarded: *East Coast Amusement Co Ltd v British Transport Board* [1965] AC 58, [1963] 2 All ER 775, HL.

9 le tenancies of a description specified in the Landlord and Tenant Act 1954 s 23(1): see PARA 706 ante.

10 Ibid s 34(2)(b) (as added: see note 2 supra).

11 Ibid s 34(2)(c) (as added: see note 2 supra).

12 Ibid s 34(3) (added by the Law of Property Act 1969 s 2). The statutory provision confirms the practice which had already begun with *Re No 88 High Road, Kilburn, Meakers Ltd v DAW Consolidated Properties Ltd* [1959] 1 All ER 527, [1959] 1 WLR 279. Such a rent review may be ordered to be 'upwards only' or 'up or down': see *Janes (Gowns) Ltd v Harlow Development Corpn* [1980] 1 EGLR 52, (1979) 253 Estates Gazette 799 (up or down); *Blythewood Plant Hire Ltd v Spiers Ltd (in receivership)* [1992] 2 EGLR 103, CA (upwards only).

13 le to the Court of Appeal, but subject to the provisions of the County Courts Act 1984 s 77 (as amended) and to any order made under the Access to Justice Act 1999 s 56(1), and in such manner and subject to such conditions as may be provided by Civil Procedure Rules: County Courts Act 1984 s 77(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(7); and by the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 8).

14 See the County Courts Act 1984 s 77(1) (as amended: see note 13 supra); and CIVIL PROCEDURE vol 12 (2009) PARA 1679.

15 *French v Commercial Union Life Assurance Co plc* [1993] 1 EGLR 113, CA. Previously (and prior to the extension of the right to appeal on issues of fact) it had been held that the Court of Appeal would not entertain an appeal on the pure question of quantum or on the ground that the judge's order was against the weight of the evidence (*Aviagents Ltd v Balstravest Investments Ltd* [1966] 1 All ER 450, [1966] 1 WLR 150, CA) and that an appellant was not entitled to complain of the weight which the judge, in fixing the rent, had attached to individual items of evidence but had to show that the judge misdirected himself, as by giving weight to matters which were wholly inadmissible (*Harewood Hotels Ltd v Harris* [1958] 1 All ER 104, [1958] 1 WLR 108, CA). See also *Turone v Howard de Walden Estates Ltd* (1983) 267 Estates Gazette 440, CA.

The Court of Appeal will not put the parties to the delay and expense of a new trial on the rent payable, unless the figure estimated by the judge who has seen the property and seen and heard the expert evidence is so obviously wrong that some substantial wrong or miscarriage has been thereby occasioned: *Halberstam v Tandalco Corpn NV* [1985] 1 EGLR 90, (1984) 274 Estates Gazette 393, CA. Where, however, the applicant was unable through illness and absence of legal representation effectively to challenge the respondent's expert evidence as to the rent payable under the new lease ordered to be granted, a rehearing was directed on terms as to costs and payment into court: *Miah v Bromley Park Garden Estates Ltd* [1992] 1 EGLR 98, CA. In *Khalique v Law Land plc* [1989] 1 EGLR 105, CA, the Court of Appeal declined to give leave to appeal out of time and to adduce evidence of new lettings made shortly after the trial judge's decision as to the rent to be paid under a new lease, since such evidence bore upon matters falling within the field of uncertainty in which the judge's estimate had previously been made. Where, owing to a mistake induced by the tenant, the landlord's surveyor had failed to take a garage into account in assessing the value of the premises for the purposes of the rent under a new lease, the Court of Appeal upheld the judge's decision to order a new trial: *Skrzypkowski v Silvan Investments Ltd* [1963] 1 All ER 886, [1963] 1 WLR 525, CA. Where the judge had expressed the view that it would be wrong to split the difference between the tenant's and the landlord's estimate of the proper rent and, in the absence of other evidence, decided to accept the tenant's figure, the Court of Appeal declined to say that the judge had fallen into the error of thinking that he was bound to accept one figure or the other and that no other figure was open to him: *Leizer v Ostim Properties Ltd* (1965) 109 Sol Jo 456, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/E. RENEWAL OF TENANCIES/(F) Carrying out the Order/756. Execution of lease or agreement.

## (F) CARRYING OUT THE ORDER

### 756. Execution of lease or agreement.

Where the court makes an order<sup>1</sup> for the grant of a new tenancy<sup>2</sup>, then, unless the order is revoked<sup>3</sup> or the landlord<sup>4</sup> and the tenant agree<sup>5</sup> not to act upon the order, the landlord is bound to execute or make in favour of the tenant, and the tenant is bound to accept, a lease or agreement<sup>6</sup> for a tenancy of the holding<sup>7</sup> embodying the terms<sup>8</sup> agreed between the landlord and the tenant or determined<sup>9</sup> by the court<sup>10</sup>. Where the landlord executes or makes such a lease or agreement, the tenant is bound to execute a counterpart or duplicate if required to do so by the landlord<sup>11</sup>.

1    Ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 757 et seq post.

2    For the meaning of 'tenancy' see PARA 706 note 2 ante.

3    Ie under the Landlord and Tenant Act 1954 s 36(2): see PARA 757 post.

4    For the meaning of 'the landlord' see PARA 715 ante.

5    For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante. As to the position of potential subtenants see *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 Estates Gazette 725.

6    Such a lease or agreement, in a case where the lessor's interest is subject to a mortgage, is deemed to be one authorised by the Law of Property Act 1925 s 99 (as amended) (which confers powers of leasing on mortgagors in possession: see MORTGAGE vol 77 (2010) PARA 346 et seq); and s 99(13) (as amended) (which allows those powers to be restricted or excluded by agreement) does not have effect in relation to such a lease or agreement: Landlord and Tenant Act 1954 s 36(4). For the meaning of 'mortgage', 'mortgagor' and 'mortgagee' see PARA 704 note 15 ante.

7    For the meaning of 'the holding' see PARA 706 note 23 ante.

8    For the meaning of 'terms' see PARA 706 note 27 ante.

9    Ie in accordance with the Landlord and Tenant Act 1954 ss 23-35 (as amended). As to determination of the terms see PARA 748 et seq ante.

10   Ibid s 36(1).

11   See note 10 supra.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/E. RENEWAL OF TENANCIES/(F) Carrying out the Order/757. Revocation; continuance of current tenancy.



## 757. Revocation; continuance of current tenancy.

If, within 14 days after the making of an order<sup>1</sup> for the grant of a new tenancy<sup>2</sup>, the tenant applies to the court for the revocation of the order, the court must revoke it<sup>3</sup>. Where the order is so revoked, then, if it is so agreed<sup>4</sup> between the landlord and the tenant or determined by the court, the current tenancy continues beyond the date at which it would otherwise have come to an end; and the continuance is for such a period as may be so agreed or determined to be necessary to afford to the landlord a reasonable opportunity for reletting or otherwise disposing of the premises which would have been comprised in the new tenancy<sup>5</sup>. Where an order is so revoked, any provision of the order as to payment of costs does not cease to have effect by reason only of the revocation<sup>6</sup>. The court may, however, if it thinks fit, revoke or vary any such provision, or, where no costs have been awarded in the proceedings for the revoked order, award such costs<sup>7</sup>.

1     le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 758 et seq post.

2     For the meaning of 'tenancy' see PARA 706 note 2 ante.

3     Landlord and Tenant Act 1954 s 36(2). There is no discretion, and where an application for new leases was made in respect of the tenancies of two adjoining premises, and the tenant sought the revocation of the order for a new lease in respect of one of them only, the order had to be made: *Broadmead Ltd v Corben-Brown* (1966) 201 Estates Gazettes 111.

4     For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante.

5     Landlord and Tenant Act 1954 s 36(2). While the current tenancy continues by virtue of s 36(2), it is not a tenancy to which Pt II (as amended) applies: s 36(2). As to the tenancies to which Pt II (as amended) applies see PARAS 706-708 ante; and for the meaning of 'the current tenancy' see PARA 713 note 12 ante.

6     Ibid s 36(3).

7     Ibid s 36(3). In *Re No 88 High Road, Kilburn, Meakers Ltd v DAW Consolidated Properties Ltd* [1959] 1 All ER 527, [1959] 1 WLR 279, the court ordered the tenant to pay the whole of the landlord's costs of the abortive proceedings, including those incurred in respect of the application for revocation.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/F. COMPENSATION FOR DISTURBANCE/758. Compensation cases.

## **F. COMPENSATION FOR DISTURBANCE**

### 758. Compensation cases.

In a case specified in head (1), head (2) or head (3) below (a 'compensation case') the tenant is entitled on quitting the holding<sup>1</sup> to recover from the landlord<sup>2</sup> by way of compensation an amount determined<sup>3</sup> in accordance with the relevant statutory provisions<sup>4</sup>. The compensation cases are as follows:

- 1496 (1) the first compensation case is where on the making of an application by the tenant for an order for the grant of a new tenancy<sup>5</sup> the court is precluded<sup>6</sup> from

making an order for the grant of a new tenancy by reason of any of the following grounds (the 'compensation grounds'):

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- 176. (a) reletting formerly sublet premises as a whole<sup>7</sup>; or
- 177. (b) the landlord's intention to demolish or reconstruct the premises<sup>8</sup>; or
- 178. (c) the landlord's intention to occupy the premises<sup>9</sup>,

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1497 and not of any other statutory grounds<sup>10</sup> of opposition<sup>11</sup>;

1498 (2) the second compensation case is where on the making of an application by the landlord for an order for the termination of a business tenancy without the grant of a new tenancy<sup>12</sup> the court is precluded<sup>13</sup> from making an order for the grant of a new tenancy by reason of any of the compensation grounds and not of any other statutory grounds<sup>14</sup> of opposition<sup>15</sup>;

1499 (3) the third compensation case is where:

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- 179. (a) the landlord's notice of termination<sup>16</sup> or, as the case may be, his notice in reply to the tenant's request for a new tenancy<sup>17</sup>, states his opposition to the grant of a new tenancy on any of the compensation grounds and not on any other statutory grounds<sup>18</sup> of opposition; and
- 180. (b) either no application is made by the tenant for an order for the grant of a new tenancy<sup>19</sup> or by the landlord for an order for the termination of a business tenancy without the grant of a new tenancy<sup>20</sup> or such an application is made but is subsequently withdrawn<sup>21</sup>.

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There is no statutory provision<sup>22</sup> for compensation to be paid to a tenant in whose favour an order for a new lease of part only of his holding is made<sup>23</sup> in respect of that part of the former holding which is excluded from the new tenancy. Landlords and tenants cannot contract out of these provisions as to compensation in respect of business tenancies where the occupation of the tenant, or of a person who is the successor to the tenant's business, exceeds five years<sup>24</sup>. Special but analogous provisions apply in respect of tenancies which were current on 1 October 1954<sup>25</sup>, and in respect of compulsory purchase<sup>26</sup> and where the tenant is precluded from obtaining a new tenancy on the grounds of public interest<sup>27</sup>.

The statutory provisions are modified in relation to tenancies subject to a compulsory rights order in connection with opencast coal mining<sup>28</sup>.

Where a business subtenancy terminates in accordance with the Leasehold Reform, Housing and Urban Development Act 1993<sup>29</sup>, the subtenant is entitled to a share of the compensation payable to the tenant under that Act<sup>30</sup>.

1 'On quitting' means that the right to compensation does not arise until the tenant has actually removed, so that the law applying at that date has to be applied to ascertain the amount of the compensation: *International Military Services Ltd v Capital and Counties plc* [1982] 2 All ER 20, [1982] 1 WLR 575; *Cardshops Ltd v John Lewis Properties Ltd* [1983] QB 161, [1982] 3 All ER 746, CA. For the meaning of 'the holding' see PARA 706 note 23 ante.

2 For the meaning of 'the landlord' see PARA 715 ante.

3 Ie determined in accordance with the Landlord and Tenant Act 1954 s 37 (as amended): see PARAS 759-760 post. As to compensation payable by the Chancellor of the Duchy of Lancaster or payable by the person representing the Duke of Cornwall see the Landlord and Tenant Act 1954 s 56(2), Sch 8 paras 4, 5.

4 Ibid s 37(1) (s 37(1), (1A)-(1C) substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 19(1), with effect from 1 June 2004: see art 1(3)).

5 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

6    le whether by *ibid* s 31(1) or s 31(2) (as amended): see PARA 747 ante. Where the court is precluded from making an order for the grant of a new tenancy under Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante, PARA 759 et seq post) in a compensation case, the court must on the application of the tenant certify that fact: s 37(4) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 19(4)).

7    le under the Landlord and Tenant Act 1954 s 30(1)(e): see PARA 740 ante.

8    le under *ibid* s 30(1)(f): see PARA 741-744 ante.

9    le under the Landlord and Tenant Act 1954 s 30(1)(g): see PARA 745 ante.

10   le any of the grounds specified in any other paragraph of *ibid* s 30(1) (as amended): see PARA 735 et seq ante.

11   *Ibid* s 37(1A) (as substituted: see note 4 supra). This compensation case corresponds with the first set of circumstances in which compensation was payable to the tenant prior to 1 June 2004: see s 37(1) (as originally enacted and amended by the Law of Property Act 1969 s 11).

12   le under the Landlord and Tenant Act 1954 s 29(2) (as substituted): see PARA 734 ante.

13   le whether by *ibid* s 29(4)(a) (as substituted) (see PARA 734 ante) or s 31(2) (as amended) (see PARA 747 ante). See also s 37(4) (as amended), cited in note 6 supra.

14   See note 10 supra.

15   Landlord and Tenant Act 1954 s 37(1B) (as substituted: see note 4 supra). There was no previous corresponding provision.

16   le under *ibid* s 25 (as amended): see PARA 716 ante.

17   le under *ibid* s 26(6): see PARA 718 ante.

18   See note 10 supra.

19   See note 5 supra.

20   See note 12 supra.

21   Landlord and Tenant Act 1954 s 37(1C) (as substituted: see note 4 supra). This compensation case corresponds to the second set of circumstances in which compensation was payable to the tenant prior to 1 June 2004, except that the landlord was not able to make such an application as is described in the text to note 20: see s 37(1) (as originally enacted and amended by the Law of Property Act 1969 s 11). Before the coming into effect on 1 January 1970 of the amendments made by the Law of Property Act 1969 s 11, it was necessary in order for the tenant to obtain compensation that he should have applied for a new tenancy and that the court should have dismissed the application upon one of the relevant grounds (ie those set out in the Landlord and Tenant Act 1954 s 30(1)(e)-(g)). As the alterations effected by the Law of Property Act 1969 s 11 were not retrospective, a tenant who had lost his right to compensation by not applying before 1 January 1970 did not become entitled to compensation upon the coming into force of s 11: *Re 14 Grafton Street, W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] Ch 935, [1971] 2 All ER 1.

22   le in the Landlord and Tenant Act 1954 Pt II (as amended).

23   le an order made under *ibid* s 31A (as added and amended) in respect of an economically separable part: see PARA 744 ante.

24   See *ibid* s 38(2) (as amended); and PARA 709 ante. The tenant must have continued the actual undertaking of the previous tenant for the occupation of the previous tenant to count towards satisfying the five-year requirement, and it is not enough that the tenant carries on a business of the same type: *Cramas Properties Ltd v Connaught Fur Trimmings Ltd* [1965] 2 All ER 382, [1965] 1 WLR 892, HL.

25   See the Landlord and Tenant Act 1954 s 68(2), Sch 9 para 5.

26   See the Land Compensation Act 1973 s 37(4); and COMPULSORY ACQUISITION OF LAND VOL 18 (2009) PARA 838.

27   As to the modification of the effect of the Landlord and Tenant Act 1954 on grounds of public interest see PARAS 769-770 post; and as to compensation in such circumstances see PARA 774 post. As to compensation for improvements see PARA 788 et seq post.

28 See PARA 779 post.

29 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 3: see PARA 1727 post.

30 See ibid Sch 14 para 6(2); and PARA 1728 post.

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### **759. Amount of compensation where no domestic property included.**

Where compensation is recoverable by the tenant in a compensation case<sup>1</sup> and the tenancy does not include any domestic property<sup>2</sup>, the amount is normally the product of the appropriate multiplier<sup>3</sup> and the rateable value<sup>4</sup> of the holding<sup>5</sup>. The amount of compensation is, however, the product of the appropriate multiplier and twice the rateable value where the following conditions are satisfied in relation to the whole of the holding:

1500 (1) during the whole<sup>6</sup> of the 14 years immediately preceding the date for termination of the current tenancy<sup>7</sup> specified in the landlord's notice<sup>8</sup> or, as the case may be, the date specified in the tenant's request for a new tenancy as the date from which the new tenancy is to begin, premises being or comprised in the holding<sup>9</sup> have been occupied for the purpose of a business<sup>10</sup> carried on by the occupier or for those and other purposes<sup>11</sup>; and

1501 (2) if during those 14 years there was a change in the occupier of the premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change<sup>12</sup>.

If the conditions specified in heads (1) and (2) above are satisfied in relation to part of the holding but not in relation to the other part, the amount of compensation is to be the aggregate of sums calculated separately as compensation in respect of each part<sup>13</sup>.

Where different persons collectively satisfy the statutory definition of 'the landlord'<sup>14</sup>, the compensation is to be determined separately for each part and compensation determined for any part is to be recoverable only from the person who is the owner of an interest in that part which fulfils the specified<sup>15</sup> statutory conditions<sup>16</sup>.

Any dispute arising, whether in proceedings before the court or otherwise, as to the determination for these purposes of the rateable value of the holding is to be referred to the Commissioners for Revenue and Customs<sup>17</sup> for decision by a valuation officer<sup>18</sup> whose decision, subject to a right of appeal to the Lands Tribunal<sup>19</sup>, is final<sup>20</sup>.

1 le under the Landlord and Tenant Act 1954 s 37 (as amended) (see PARA 758 ante) and subject to s 37(3)-(9) (as amended) (see the text and notes 2-20 infra; and PARA 760 post).

2 As to compensation when domestic property is included see PARA 760 post.

3 For these purposes, 'the appropriate multiplier' means such multiplier as the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may prescribe by order made

by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament; and different multipliers may be so prescribed in relation to different cases: see the Landlord and Tenant Act 1954 s 37(8), (9) (added by the Local Government, Planning and Land Act 1980 Sch 33 para 4(2); amended by the Local Government and Housing Act 1989 s 149(6), Sch 7 para 2(1), (4)). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante. In exercise of the power so conferred, and prior to that transfer of functions, the Secretary of State made the Landlord and Tenant Act 1954 (Appropriate Multiplier) Order 1990, SI 1990/363, which came into force on 1 April 1990: art 1. Where the date which, apart from the Local Government and Housing Act 1989 s 149(6), Sch 7 para 4 (special basis for compensation where tenancy concerned was entered into before 1 April 1990 or was entered into on or after that date in pursuance of a contract made before that date, and the landlord's notice under the Landlord and Tenant Act 1954 s 25 (as originally enacted) or, as the case might be, s 26(6), was given before 1 April 2000) is relevant for determining the rateable value of the holding is (1) before 1 April 1990, the appropriate multiplier is three; (2) on or after 1 April 1990, the appropriate multiplier is one except in a case where that special basis has effect, when it is eight: Landlord and Tenant Act 1954 (Appropriate Multiplier) Order 1990, SI 1990/363, arts 2-4.

4 For these purposes, the rateable value of the holding is to be determined as follows: (1) where in the valuation list in force at the date on which the landlord's notice under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante) is given, a value is then shown as the annual value of the holding, the rateable value of the holding is taken to be that value; (2) where no such value is so shown with respect to the holding, but such a value or such values is or are so shown with respect to premises comprised in or comprising the holding or part of it, the rateable value of the holding is to be taken to be such value as is found by a proper apportionment or aggregation of the value or values so shown; (3) where the rateable value of the holding cannot be ascertained in accordance with heads (1)-(2) supra, it is to be taken to be the value which apart from any exemption from assessment to rates would on a proper assessment be the value to be entered in the valuation list as the annual value of the holding: Landlord and Tenant Act 1954 s 37(5). Any deduction made under the Local Government Finance Act 1988 s 56(1), Sch 6 para 2A (as added) (deduction from valuation of hereditaments used for breeding horses etc: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 97) must be disregarded, to the extent that it relates to the holding, in determining the rateable value of the holding under the Landlord and Tenant Act 1954 s 37(5): s 37(5E) (added by the Local Government Finance (Miscellaneous Amendments and Repeal) Order 1990, SI 1990/1285, art 2). The expression 'annual value' means rateable value except that, where the rateable value differs from the net annual value, that expression means net annual value: Landlord and Tenant Act 1954 s 37(7). Changes in the law which come into operation between the date the landlord gives the notice and the date the tenant quits the premises will, however, affect the amount payable: see PARA 758 note 1 ante. For the meaning of 'the holding' see PARA 706 note 23 ante; but see also note 13 infra.

5 Ibid s 37(2)(b) (amended by the Local Government, Planning and Land Act 1980 Sch 33 para 4(1); the Local Government and Housing Act 1989 Sch 7 para 2(1), (2); the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 19(2)(a)).

6 'Whole' is to be construed strictly and no de minimis principle applies, so that a tenant whose occupation was two days short of the requisite 14 years was held to be entitled only to the lower amount of compensation: *Department of the Environment v Royal Insurance plc* (1986) 54 P & CR 26, [1987] 1 EGLR 83.

7 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

8 Ie the landlord's notice to terminate under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

9 It was previously sufficient that part of the holding has been occupied for 14 years for the higher tariff to apply: *Edicron Ltd v William Whitely Ltd* [1984] 1 All ER 219, [1984] 1 WLR 59, CA.

10 For the meaning of 'business' see PARA 707 ante.

11 Landlord and Tenant Act 1954 s 37(2)(a), (3)(a), (7) (amended by the Local Government, Planning and Land Act 1980 Sch 33 para 4(1); the Local Government and Housing Act 1989 Sch 7 para 2(1), (2); and by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 19(2), with effect from 1 June 2004: see art 1(3)). As to the appropriate multiplier see note 3 supra.

12 Landlord and Tenant Act 1954 s 37(2)(a), (3)(b) (as amended: see note 11 supra). As to the appropriate multiplier see note 3 supra. As to continuous occupation see *Cramas Properties Ltd v Connaught Fur Trimmings Ltd* [1965] 2 All ER 382, [1965] 1 WLR 892, HL. The 14-year period of occupation must be satisfied up to the date of termination of the tenancy specified in the landlord's notice under the Landlord and Tenant Act 1954 s 25 (as amended): *Sight and Sound Education Ltd v Books etc Ltd* [1999] 3 EGLR 45, [1999] 43 EG 161 (tenant giving up possession shortly before the contractual term date lost the right to compensation).

13 Landlord and Tenant Act 1954 s 37(3A) (s 37(3A), (3B) added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 19(3)). Accordingly, for the purpose of calculating compensation in respect of a part any reference in the Landlord and Tenant Act 1954 s 37 (as amended) to the holding is to be construed as a reference to that part: s 37(3A) (as so added).

14 Ie where ibid s 44(1A) (as added) applies: see PARA 715 ante.

15 Ie the conditions specified in ibid s 44(1) (as amended): see PARA 715 ante.

16 Ibid s 37(3B) (as added: see note 13 supra).

17 The Commissioners for Revenue and Customs may by statutory instrument make rules prescribing the procedure in connection with references under ibid s 37 (as amended): s 37(6) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)). In exercise of the power so conferred the commissioners made the Landlord and Tenant (Determination of Rateable Value Procedure) Rules 1954, SI 1954/1255, which came into force on 1 October 1954: r 1. Any reference to the commissioners must be in the prescribed form or one substantially to the like effect, and a separate form must be completed in respect of each holding: see r 3(1), Schedule, Form A. A reference may be made either by one of the parties or jointly by two or more parties to the dispute; but, where the reference is not made by all the parties jointly, the party or parties making the reference must on that day send a copy of it to the other party or parties: r 3(2). The commissioners must send a copy of the reference to the valuation officer who must then inform the parties that the dispute has been referred to him for determination, and that they may make written representations within 28 days, or such longer time as he may allow: rr 4, 5. The valuation officer may require information from the parties, and before making his determination hold a meeting of the parties: see rr 6, 7. Notification of the determination in the prescribed form must be sent to the commissioners and to each of the parties together with a statement of their right to appeal: see r 8, Schedule, Form B. A separate notification must be sent in respect of each holding: r 8.

18 For these purposes, 'valuation officer' means any officer of the Commissioners for Her Majesty's Revenue and Customs for the time being authorised by a certificate of the commissioners to act in relation to a valuation list: Landlord and Tenant Act 1954 s 37(7) (definition amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).

19 As to the procedure on appeal see the Lands Tribunal Rules 1996, SI 1996/1022, rr 6-8 (as amended); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 723.

20 Landlord and Tenant Act 1954 s 37(5) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)). If any dispute as to the rateable value of any holding has been so referred to the commissioners for decision by a valuation officer, any document purporting to be a statement of the valuation officer of his decision is admissible as evidence of the matters contained in it: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 4.2.

## UPDATE

### 759 Amount of compensation where no domestic property included

NOTE 17--SI 1954/1255 amended: SI 2009/1307.

TEXT AND NOTE 20--Reference to the Lands Tribunal is now to the Upper Tribunal: Landlord and Tenant Act 1954 s 37(5) (amended by SI 2009/1307).

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### 760. Amount of compensation where domestic property included.

If part of the holding<sup>1</sup> is domestic property<sup>2</sup>, the domestic property must be disregarded in determining the rateable value<sup>3</sup> of the holding<sup>4</sup>. If the tenant occupied<sup>5</sup> the whole or any part of the domestic property, the amount of compensation to which he is entitled<sup>6</sup> must be increased by the addition of a sum equal to his reasonable expenses in removing from the domestic property<sup>7</sup>. Any question as to the amount of that sum must be determined by agreement<sup>8</sup> between the landlord and the tenant or, in default of agreement, by the court<sup>9</sup>. Otherwise the compensation is determined on the usual basis<sup>10</sup>.

If, however, the whole of the holding is domestic property, the rateable value of the holding is to be taken to be an amount equal to the rent at which it is estimated the holding might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes<sup>11</sup> and to bear the cost of the repairs<sup>12</sup> and insurance and the other expenses, if any, necessary to maintain the holding in a state to command that rent<sup>13</sup>. In the determination of such an amount, the date by reference to which the determination is to be made is the date on which the landlord's notice<sup>14</sup> is given<sup>15</sup>. Any dispute arising, whether in proceedings before the court or otherwise, as to such a determination must be referred to the Commissioners for Revenue and Customs for decision by a valuation officer<sup>16</sup> whose decision, subject to a right of appeal to the Lands Tribunal<sup>17</sup>, is final<sup>18</sup>.

1 For the meaning of 'the holding' see PARA 706 note 23 ante. See also PARA 759 note 13 ante.

2 I.e. as defined in the Local Government Finance Act 1988 s 66 (as amended): see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 120.

3 I.e. under the Landlord and Tenant Act 1954 s 37(5): see PARA 759 ante.

4 Ibid s 37(5A)(a) (s 37(5A)-(5D) added by the Local Government and Housing Act 1989 s 149(6), Sch 7 para 2; for transitional provisions see Sch 7 paras 3, 4).

5 I.e. on the date specified in the Landlord and Tenant Act 1954 s 37(5)(a): see PARA 759 ante.

6 I.e. under ibid s 37(1) (as substituted): see PARA 758 ante.

7 Ibid s 37(5A)(b) (as added: see note 4 supra).

8 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante; and for the meaning of 'the landlord' see PARA 715 ante. See also PARA 759 the text and notes 14-16 ante.

9 Landlord and Tenant Act 1954 s 37(5B) (as added: see note 4 supra).

10 See PARA 759 ante.

11 As to what are usual tenant's rates and taxes see PARA 524 et seq ante.

12 For these purposes, 'repairs' includes any work of maintenance, decoration or restoration, and references to repairing, to keeping or yielding up in repair and to state of repair are to be construed accordingly: Landlord and Tenant Act 1954 s 69(1).

13 Ibid s 37(5C) (as added: see note 3 supra).

14 I.e. the landlord's notice under the Landlord and Tenant Act 1954 s 25 (as amended) (see PARA 716 ante) or, as the case may be s 26(6) (see PARA 718 ante).

15 Ibid s 37(5D)(a) (as added: see note 4 supra).

16 For the meaning of 'valuation officer' see PARA 759 note 18 ante. As to the procedure on such a reference see PARA 759 note 17 ante.

17 As to the procedure on such an appeal see PARA 759 note 19 ante.

18 Landlord and Tenant Act 1954 s 37(5D)(b), (c) (as added (see note 4 supra); amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).

**UPDATE****760 Amount of compensation where domestic property included**

TEXT AND NOTE 18--Reference to the Lands Tribunal is now to the Upper Tribunal:  
Landlord and Tenant Act 1954 s 37(5D) (amended by SI 2009/1307).

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**761. Compensation for possession obtained by misrepresentation.**

Where the court makes an order for the termination of the current tenancy<sup>1</sup> but does not make an order for the grant of a new tenancy, or where it refuses an order for the grant of a new tenancy<sup>2</sup>, and it is subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or the concealment of material facts, the court may order the landlord<sup>3</sup> to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal<sup>4</sup>.

Where the tenant has quit the holding<sup>5</sup> either:

- 1502 (1) after making but withdrawing an application for an order for the grant of a new tenancy<sup>6</sup>; or
- 1503 (2) without making such an application;

and it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of quitting the holding<sup>7</sup>.

These provisions do not have effect where the tenant quit the holding before 1 June 2004<sup>8</sup>.

1 For the meaning of 'current tenancy' see PARA 713 note 12 ante.

2 As to refusal of a new tenancy see PARA 747 ante.

3 For the meaning of 'the landlord' see PARA 715 ante.

4 Landlord and Tenant Act 1954 s 37A(1) (s 37A added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 20, with effect from 1 June 2004: see art 1(3)).

5 For the meaning of 'the holding' see PARA 706 note 23 ante.

6 ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

7 Ibid s 37A(2) (as added: see note 4 supra).

8 Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 29(5). In such cases, where the court refused the grant of a new tenancy and it is subsequently made to appear to the court that it was induced to refuse the grant by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss



sustained by the tenant as the result of the refusal: see the Landlord and Tenant Act 1954 s 55(1) (repealed subject to transitional provisions). For these purposes, 'the landlord' means the person opposing an application for the grant of a new tenancy and 'the tenant' means the person to whom the grant of a new tenancy was refused: s 55(2) (as so repealed). The misrepresentation or concealment must be to the court, so that if as the result of what the landlord misrepresented or concealed to the tenant the tenant settled the case and did not proceed, he will be unable to recover compensation: *Deeley v Maison AEL Ltd* (28 July 1989, unreported), CA, distinguishing *Thorn v Smith* [1947] KB 307, [1947] 1 All ER 39, CA (a Rent Act decision). As to the position under the Rent Act 1977 see PARA 959 post.

## UPDATE

### 761 Compensation for possession obtained by misrepresentation

NOTE 4--See *Inclusive Technology v Williamson* [2009] EWCA Civ 718, [2010] 1 P & CR 7, [2009] All ER (D) 63 (Sep) (misrepresentation where landlord told tenant that new tenancy would not be granted because he intended to refurbish premises, but failed to inform tenant when he changed his mind).

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## G. MESNE AND SUPERIOR LANDLORDS

### 762. Provisions as to mesne and superior landlords.

Special provisions have effect where the immediate landlord of the tenant is not the owner of the fee simple in respect of the holding<sup>1</sup>.

Any notice given by the competent landlord<sup>2</sup> to terminate the relevant tenancy<sup>3</sup> binds the interest of any mesne landlord<sup>4</sup> notwithstanding that he has not consented<sup>5</sup> to the giving of the notice<sup>6</sup>; but, where the competent landlord has given a notice<sup>7</sup> to terminate the relevant tenancy and, within two months after the giving of the notice, a superior landlord<sup>8</sup> becomes the competent landlord and gives to the tenant notice in the prescribed form<sup>9</sup> that he withdraws the notice previously given, the notice to terminate ceases to have effect<sup>10</sup>.

Any agreement between the competent landlord and the tenant as to the granting, duration or terms<sup>11</sup> of a future tenancy, being an agreement made for the statutory purposes<sup>12</sup>, also binds the interest of any mesne landlord notwithstanding that he was not a party to it<sup>13</sup>. Such an agreement does not, however, have effect in a case where the competent landlord is himself a tenant, and the agreement would otherwise operate as respects any period after the coming to an end of the interest of the competent landlord, unless every superior landlord who will be the immediate landlord of the tenant during any part of that period is a party to the agreement<sup>14</sup>. Subject thereto, the competent landlord has power<sup>15</sup> to give effect to any agreement with the tenant for the grant of a new tenancy beginning with the coming to an end of the relevant tenancy, notwithstanding that the competent landlord will not be the immediate landlord at the commencement of the new tenancy, and any instrument made in the exercise of the power so conferred has effect as if the mesne landlord had been a party to it<sup>16</sup>.

If the competent landlord's interest in the property comprised in the relevant tenancy is a tenancy which will come, or can be brought, to an end within 16 months or any further time by which it might be continued by statute<sup>17</sup>, and he gives to the tenant under the relevant tenancy a notice to terminate the tenancy<sup>18</sup> or is given by him a notice requesting a new tenancy<sup>19</sup>, the

competent landlord must forthwith send a copy of the notice to his immediate landlord, and any superior landlord whose interest in the property is a tenancy must forthwith send to his immediate landlord any copy which has been so sent to him<sup>20</sup>.

Where the period for which it is agreed or determined<sup>21</sup> by the court that a new tenancy should be granted<sup>22</sup> will extend beyond the date on which the interest of the immediate landlord will come to an end, the power of the court to order such a grant includes power to order the grant of a new tenancy until the expiration of that interest and also to order the grant of such a reversionary tenancy or such reversionary tenancies as may be required to secure that the combined effects of those grants will be equivalent to the grant of a tenancy for that period<sup>23</sup>. A tenant who has the benefit of an order for a new lease is in the like position to one who holds under an agreement for a lease<sup>24</sup> so that the tenant can make agreements which will bind his landlord if that landlord accepts a surrender<sup>25</sup>.

1 See the Landlord and Tenant Act 1954 s 44(3), Sch 6 (as amended); and the text and notes 2-25 infra. For the meaning of 'the holding' see PARA 706 note 23 ante.

2 Ie under ibid Pt II (ss 23-46) (as amended): see PARA 701 et seq ante, PARA 763 et seq post. For these purposes, 'the competent landlord' means the person who in relation to the tenancy is for the time being the landlord (as defined by s 44 (as amended): see PARA 715 ante) for the purposes of Pt II (as amended): Sch 6 para 1. For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 Ie the tenancy referred to in ibid Sch 6 (as amended).

4 For these purposes, 'mesne landlord' means a tenant whose interest is intermediate between the relevant tenancy and the interest of the competent landlord: ibid Sch 6 para 1.

5 If the competent landlord, not being the immediate landlord, gives any such notice or makes any such agreement as is mentioned in ibid Sch 6 para 3(1) (see the text and notes 2-4 supra, 6 infra) without the consent of every mesne landlord, any mesne landlord whose consent has not been given thereto is entitled to compensation from the competent landlord for any loss arising in consequence of the giving of the notice or the making of the agreement: Sch 6 para 4(1). If the competent landlord applies to any mesne landlord for his consent to such a notice or agreement, that consent must not be unreasonably withheld, but may be given subject to any conditions which may be reasonable, including conditions as to the modification of the proposed notice of agreement or as to the payment of compensation by the competent landlord: Sch 6 para 4(2). Any question arising under these provisions whether consent has been unreasonably withheld or whether any conditions imposed on the giving of consent are unreasonable must be determined by the court (Sch 6 para 4(3)); and the mesne landlord to whose consent a claim for the determination of any question arising under Sch 6 para 4(3) relates must be made a defendant to the claim (*Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 4.1).

6 Landlord and Tenant Act 1954 Sch 6 para 3(1). Nothing in the provisions of Sch 6 para 3 prejudices the provisions of Sch 6 para 4 (see note 5 supra): Sch 6 para 3(3).

7 Ie under ibid s 25 (as amended): see PARA 716 ante.

8 For these purposes, 'superior landlord' means a person, whether the owner of the fee simple or a tenant, whose interest is superior to the interest of the competent landlord: ibid Sch 6 para 1.

9 For the prescribed form of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 6. As to the use of the prescribed forms generally see PARA 702 ante.

10 Landlord and Tenant Act 1954 Sch 6 para 6 (Sch 6 paras 6, 7 added by the Law of Property Act 1969 s 14(2)). The Landlord and Tenant Act 1954 Sch 6 para 6 (as so added) is without prejudice to the giving of a further notice under s 25 (as amended) by the competent landlord: Sch 6 para 6 (as so added).

11 For the meaning of 'terms' see PARA 706 note 27 ante.

12 Ie for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended).

13 Ibid Sch 6 para 3(1). See also note 6 supra. For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante.

14 Ibid Sch 6 para 5.

- 15 See note 12 *supra*.
- 16 Landlord and Tenant Act 1954 Sch 6 para 3(2). See also note 6 *supra*.
- 17 *Ie* under *ibid* s 36(2) (see PARA 757 *ante*) or s 64 (as amended) (see PARA 729 *ante*).
- 18 See note 7 *supra*.
- 19 *Ie* under the Landlord and Tenant Act 1954 s 26(3): see PARA 718 *ante*.
- 20 *Ibid* Sch 6 para 7 (as added: see note 10 *supra*).
- 21 *Ie* in accordance with the provisions of *ibid* Pt II (as amended).
- 22 *Ie* under *ibid* Pt II (as amended).
- 23 *Ibid* Sch 6 para 2. The provisions of Pt II (as amended) apply, subject to the necessary modifications, in relation to the grant of a tenancy together with one or more reversionary tenancies as they apply in relation to the grant of one new tenancy: Sch 6 para 2. As to reversions when a tenancy is continued by statute see PARA 714 *ante*. As to the rights of the landlord and tenant to require information about interested parties see PARAS 704-705 *ante*.
- 24 As to the position of a tenant under an agreement for a lease generally see PARA 78 *ante*.
- 25 Where a tenant has obtained an order for a new lease and has contracted to sublet part of the premises, but then agrees with the landlord not to enforce the order and vacates the premises, the intended subtenant will be able to obtain an order for specific performance of the agreement for a sublease against the landlord, *ie* against the person to whom the surrender is made: *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* (1973) 228 Estates Gazette 725.

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## **H. SPECIAL CASES**

### **(A) TRUSTS**

#### **763. Business tenancies held on trust.**

Where a tenancy<sup>1</sup> is held on trust, occupation by all or any of the beneficiaries under the trust and the carrying on of a business<sup>2</sup> by all or any of the beneficiaries is treated<sup>3</sup> as equivalent to occupation or the carrying on of a business by the tenant<sup>4</sup>, but the beneficiary who intends to occupy must have an interest under the trust such as either to entitle him to be put in occupation or, at all events, to justify the trustees on his application, if they think fit to do so, in letting him into occupation<sup>5</sup>. In all cases save where the tenants have been in partnership<sup>6</sup>, it is the person in whom the legal estate is vested, that is the trustee, who must make application to the court for a new tenancy<sup>7</sup>, albeit that he will hold any new tenancy upon the same trusts as he held the old tenancy. A change in the persons of the trustees is not to be treated as a change in the person of the tenant<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 *ante*.

2 For the meaning of 'business' see PARA 707 *ante*.

3 le for the purposes of the Landlord and Tenant Act 1954 s 23 (as amended): see PARA 706 ante.

4 Ibid s 41(1). In relation to a tenancy to which Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante, PARA 764 et seq post) applies by virtue of s 41(1), references, however expressed, in Pt II (as amended) and in Sch 9 (transitional provisions) to the business of, or to carrying on of business, use, occupation or enjoyment by, the tenant are to be construed as including references to the business of, or to carrying on of business, use, occupation or enjoyment by, the beneficiaries or beneficiary: s 41(1)(a). Thus s 41 applied to protect a tenancy of premises let for the purpose of a members' club, where the lease was held by two members of the club as trustees for the club: see *Teba Fabrics Ltd v Conn* (1958) 171 Estates Gazette 495.

5 *Frish Ltd v Barclays Bank Ltd* [1955] 2 QB 541 at 554, [1955] 3 All ER 185 at 192, CA, per Jenkins LJ.

6 As to partnerships see PARA 765 post.

7 *Jacobs v Chaudhuri* [1968] 2 QB 470, [1968] 2 All ER 124, CA (one of two joint tenants alone occupied the premises and sought unsuccessfully to apply to the court in his own name alone for a new tenancy). The effect of that decision has been reversed by the Landlord and Tenant Act 1954 s 41A (as added and amended) in the situations to which that provision applies: see PARA 765 post.

8 Ibid s 41(1)(c). Section 41 does not dispense with the need for trustees to act together in seeking the renewal of the tenancy: *Hackney London Borough Council v Hackney African Association* [1998] EGCS 139, [1998] All ER (D) 455, CA. See also *Meyer v Riddick* (1989) 60 P & CR 50, [1990] 1 EGLR 107, CA.

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## **764. Reversion to business tenancy held on trust.**

Where the landlord's interest is held on trust, the intention of the beneficiaries or any of them to occupy the holding<sup>1</sup> for the purposes, or partly for the purposes, of a business, or as a residence, may be a ground on which an application for a new tenancy may be opposed<sup>2</sup>. For the purposes of the five-year rule<sup>3</sup>, the creation of a trust, except a trust arising under a will or on the intestacy of any person, in relation to the landlord's interest within the relevant five-year period is treated as the creation of the landlord's interest<sup>4</sup>. In order to rely upon the intended occupation of a beneficiary<sup>5</sup> the landlord must intend that the beneficiary shall occupy the premises in right of the trust<sup>6</sup> so that the trustees under a public charitable trust cannot rely upon the intended occupation of an object of their charity<sup>7</sup>. It follows that, if the landlord intends to grant a tenancy to the beneficiary, or to one or some of the beneficiaries, who will thereafter occupy in right of that tenancy, the landlord will be unable to rely upon the intended occupation of the beneficiary<sup>8</sup>. If, however, the landlord declares a trust of his interest in the premises but retains the legal estate and himself intends to trade in the premises, he may rely upon his intention and is not caught by the five-year rule<sup>9</sup>.

1 For the meaning of 'the holding' see PARA 706 note 23 ante.

2 See the Landlord and Tenant Act 1954 s 41(2). By virtue of s 41(2) the ground of opposition to a new tenancy open to a landlord under s 30(1)(g) (see PARA 745 ante) is extended to landlord trustees whose beneficiaries have the necessary intention of occupying the holding. For the meaning of 'the landlord' see PARA 715 ante.

3 As to the five-year rule see *ibid* s 30(2) (as amended); and PARA 746 ante.

4 See *ibid* s 41(2). See also *Sevenarts Ltd v Busvine* [1969] 1 All ER 392, [1968] 1 WLR 1929, CA.

5 le to rely upon the ground of opposition provided by the Landlord and Tenant Act 1954 s 30(1)(g) as expanded by s 41(2).

6 *Frish Ltd v Barclays Bank Ltd* [1955] 2 QB 541, [1955] 3 All ER 185, CA.

7 *Wood v Hodson* (1967) unreported (Mayor's Court) (trustees of an Inn of Court held not to be entitled to rely upon the Landlord and Tenant Act 1954 s 30(1)(g) and s 41(2) in relation to the proposed occupation of the relevant chambers by practising barrister members of that Inn, since the trust was a charitable one).

8 *Meyer v Riddick* (1989) 60 P & CR 50, [1990] 1 EGLR 107, CA.

9 *Morar v Chauhan* [1985] 3 All ER 493, [1985] 1 WLR 1263, CA.

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## (B) PARTNERSHIPS

### **765. Business tenancy held by partnership.**

The following provisions apply where:

- 1504 (1) a tenancy<sup>1</sup> is held jointly by two or more persons ('the joint tenants'); and
- 1505 (2) the property comprised in the tenancy is or includes premises occupied for the purposes of a business<sup>2</sup>; and
- 1506 (3) the business, or some other business, was at some time during the existence of the tenancy carried on in partnership by all the persons who were then the joint tenants or by those and other persons, and the joint tenants' interest in the premises was then partnership property; and
- 1507 (4) the business is carried on, whether alone or in partnership with other persons, by one or some only of the joint tenants and no part of the property comprised in the tenancy is occupied, in right of the tenancy, for the purposes of a business carried on, whether alone or in partnership with other persons, by the other or others<sup>3</sup>.

Any notice given by the business tenants<sup>4</sup> which, had it been given by all the joint tenants, would have been a tenant's request for a new tenancy<sup>5</sup> or a notice terminating a fixed term<sup>6</sup> is to be treated as such if it states that it is given by virtue of these provisions<sup>7</sup> and sets out the facts by virtue of which the persons giving it are the business tenants<sup>8</sup>. A notice given by the landlord<sup>9</sup> to the business tenants which, had it been given to all the joint tenants, would have been a notice terminating the tenancy<sup>10</sup> is to be treated as such a notice<sup>11</sup>.

An application for a new tenancy<sup>12</sup> may, instead of being made by all the joint tenants, be made by the business tenants alone<sup>13</sup>. The business tenants are then liable, to the exclusion of the other joint tenants, for the payment of rent and the discharge of any other obligation under the current tenancy<sup>14</sup> for any rental period beginning after the date specified in the landlord's notice to terminate<sup>15</sup> or on or after the date specified in the business tenants' request<sup>16</sup> for a new tenancy<sup>17</sup>.

Where the court makes an order for the grant of a new tenancy<sup>18</sup> it may order the grant to be made to the business tenants or to them jointly with the persons carrying on the business in partnership with them, and may order the grant to be made subject to the satisfaction, within a

specified time, of such conditions as to guarantors, sureties or otherwise as appear to the court equitable, having regard to the omission of the other joint tenants from the persons who will be the tenant under the new tenancy<sup>19</sup>.

The business tenants are entitled to recover any amount payable<sup>20</sup> by way of compensation<sup>21</sup>.

The above provisions<sup>22</sup> do not, however, avoid notices given to or requests or applications made by those persons who would ordinarily be regarded as the tenants notwithstanding that they are not the business tenants<sup>23</sup>; nor are they of any assistance unless all of the conditions referred to are satisfied<sup>24</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For the meaning of 'business' see PARA 707 ante.

3 Landlord and Tenant Act 1954 s 41A(1) (s 41A added by the Law of Property Act 1969 s 9). For most purposes these provisions reverse the effect of the decision in *Jacobs v Chaudhuri* [1968] 2 QB 470, [1968] 2 All ER 124, CA (where it was held that, if a lease remained vested in a retired partner, the continuing partner (who would now be termed the business tenant: see note 4 infra) was unable to apply for an order for a new tenancy in his own name and without the concurrence of the retired partner since, for the purposes of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) 'the tenant' was the aggregate of all the persons in whom was vested the legal estate created by the lease).

4 For these purposes, those of the joint tenants who for the time being carry on the business are referred to as the business tenants and the others as the other joint tenants: *ibid* s 41A(2) (as added: see note 3 supra).

5 *le* a request made in accordance with *ibid* s 26 (as amended): see PARA 718 ante.

6 *le* a notice under *ibid* s 27(1) (as amended) or s 27(2) (as amended): see PARA 719 ante.

7 *le* *ibid* s 41A(3) (as added: see note 3 supra).

8 *Ibid* s 41A(3) (as added: see note 3 supra). References in s 24A (as substituted), s 26 (as amended) and s 27 (as amended) to the tenant are to be construed accordingly: s 41A(3) (as so added).

9 For the meaning of 'the landlord' see PARA 715 ante.

10 *le* a notice under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

11 *Ibid* s 41A(4) (as added: see note 3 supra). References in s 25 (as amended) to the tenant are to be construed accordingly: s 41A(4) (as so added).

12 *le* under *ibid* s 24(1) (as amended): see PARA 720 ante.

13 *Ibid* s 41A(5) (as added: see note 3 supra). Where an application is made by the business tenants alone, Pt II (as amended) has effect as if references to the tenant included references to the business tenants alone: s 41A(5)(a) (as so added).

14 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

15 *le* under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

16 *le* under *ibid* s 26 (as amended): see PARA 718 ante.

17 *Ibid* s 41A(5)(b) (as added: see note 3 supra).

18 *le* under *ibid* s 29 (as amended): see PARAS 720, 734 ante.

19 *Ibid* s 41A(6) (as added (see note 3 supra); amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 5). This provision does not prejudice the court's general power under the Landlord and Tenant Act 1954 s 35 (as amended) (see PARA 752 ante) to require a tenant to provide a guarantor in respect of the tenant's obligations under a new lease: *Cairnplace Ltd v CBL (Property Investment) Co Ltd* [1984] 1 All ER 315, [1984] 1 WLR 696, CA.

20 *le* under the Landlord and Tenant Act 1954 s 37 (as amended) (see PARAS 758-760 ante) or s 59 (as amended) (see PARA 774 post).

21 Ibid s 41A(7) (as added: see note 3 supra).

22 Ie ibid s 41A (as added: see note 3 supra). The main effect of these provisions is to protect the business tenant from what otherwise would be the consequences if a retired partner, in whom (with others) the lease and current tenancy are vested, will not co-operate, eg if he has emigrated and cannot be traced. For an example of the consequences of such disputes and non-co-operation between retired and continuing partners in a business see *Jacobs v Chaudhuri* [1968] 2 QB 470, [1968] 2 All ER 124, CA.

23 If partners choose not to rely upon the special provisions, then *Jacobs v Chaudhuri* [1968] 2 QB 470, [1968] 2 All ER 124, CA, will still apply, so that all of the original tenants must act conjointly in taking each step under the statutory procedure for renewing the tenancy.

24 It frequently occurs that all of the partners in whom the old lease was vested have retired, and that they hold the current tenancy as trustees for their successors in the partnership, either by reason of a declaration of trust or (more often) informally as a result of selling out their interest in the partnership to the continuing partners. In such circumstances, the special provisions as to trusts apply (see PARAS 763-764 ante) but the special provisions as to partnerships are of no assistance at all as the current partners in the business are not the business tenants for the purposes of the Landlord and Tenant Act 1954 s 41A (as added).

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## (C) GROUPS OF COMPANIES

### **766. Business tenancy held by member of a group of companies.**

Where a tenancy<sup>1</sup> is held by a member of a group<sup>2</sup> of companies, occupation and the carrying on of a business<sup>3</sup> by another member of the group is treated<sup>4</sup> as equivalent to occupation or the carrying on of a business by the member of the group holding the tenancy<sup>5</sup>. An assignment of the tenancy from one member of the group to another is not to be treated as a change in the person of the tenant<sup>6</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For these purposes, two bodies corporate are taken to be members of a group if and only if one is a subsidiary of the other or both are subsidiaries of a third body corporate or the same person has a controlling interest in both: Landlord and Tenant Act 1954 s 42(1) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 16, 28(2), Sch 6). For the meanings of 'subsidiary' and 'controlling interest' see PARA 706 note 8 ante.

3 For the meaning of 'business' see PARA 707 ante.

4 Ie for the purposes of the Landlord and Tenant Act 1954 s 23 (as amended): see PARA 706 ante.

5 Ibid s 42(2). In relation to a tenancy to which Pt II (ss 23-46) (as amended) applies by virtue of s 42(1) (as amended), references, however expressed, in Pt II (as amended) to the business of, or to use, occupation or enjoyment by, the tenant, are to be construed as including references to the business of, or to use, occupation or enjoyment by, the other member: s 42(2)(a).

6 Ibid s 42(2)(c).

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### **767. Reversion held by member of the same group.**

Where the landlord's<sup>1</sup> interest is held by a member of the same group<sup>2</sup> of companies, the landlord is entitled to rely upon the intended occupation of the premises by another member of the group for the purposes of that other member's business in order to oppose the making of an order for the grant of a new tenancy<sup>3</sup>. For the purposes of the 'five-year rule'<sup>4</sup>, the reference in that rule to the purchase or creation of any interest is to be construed as a reference to a purchase from or creation by a person other than a member of the group<sup>5</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 For the meaning of 'group' see PARA 766 note 2 ante.

3 Where the landlord's interest is held by a member of a group, the reference in the Landlord and Tenant Act 1954 s 30(1)(g) (see PARA 745 ante) to intended occupation by the landlord for the purposes of a business to be carried on by him is to be construed as including intended occupation by any member of the group for the purposes of a business to be carried on by that member: s 42(3)(a) (substituted by the Law of Property Act 1969 s 10). Cf para 764 ante.

4 I.e. the Landlord and Tenant Act 1954 s 30(2) (as amended): see PARA 746 ante.

5 Ibid s 42(3)(b) (substituted by the Law of Property Act 1969 s 10).

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## **(D) THE CROWN, PUBLIC BODIES AND STATUTORY UNDERTAKERS**

### **768. Tenancies held by the Crown and government departments.**

The statutory protection of business tenancies<sup>1</sup> applies where there is an interest belonging to Her Majesty in right of the Crown or the Duchy of Lancaster or belonging to the Duchy of Cornwall<sup>2</sup>, or belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, in like manner as if that interest were an interest not so belonging or held<sup>3</sup>. Thus in general those provisions bind the Crown; and, if the Crown is tenant, it is accordingly entitled to the statutory protection.

Where a tenancy<sup>4</sup> is held by or on behalf of a government department and the property comprised in it is or includes premises occupied for any purposes of a government department, the tenancy is one to which the statutory protection applies<sup>5</sup>. For the purposes of any relevant statutory provision<sup>6</sup> which is applicable only if either or both of the following conditions is or are satisfied, that is to say:



- 1508 (1) that any premises have during any period been occupied for the purposes of the tenant's business<sup>7</sup>;  
 1509 (2) that on any change of occupier of any premises the new occupier succeeded to the business of the former occupier,

those conditions are deemed to be satisfied respectively, in relation to such a tenancy, if during that period or, as the case may be, immediately before and immediately after the change, the premises were occupied for the purposes of a government department<sup>8</sup>. These provisions<sup>9</sup> apply in relation to any premises provided by a government department without any rent being payable to the department for them as if the premises were occupied for the purposes of a government department<sup>10</sup>.

1    Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

2    Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, then for the purposes of ibid Pt II (ss 23-46) (as amended) the Chancellor of the Duchy represents Her Majesty and is deemed to be the owner of the interest: s 56(2), Sch 8 para 1. Similarly, where the interest belongs to the Duchy of Cornwall, such person as the Duke of Cornwall, or other the possessor for the time being of the Duchy, appoints, must represent the Duke of Cornwall, or that other possessor, and is deemed to be the owner of the interest and may do any act or thing under Pt II (as amended) which the owner of the interest is authorised or required to do: Sch 8 para 2. As to the special provisions which apply in relation to the payment of compensation see PARA 758 note 3 ante.

3    Ibid s 56(1).

4    For the meaning of 'tenancy' see PARA 706 note 2 ante.

5    Landlord and Tenant Act 1954 s 56(3).

6    Ie any provision of ibid Pt II (as amended) or s 68(2), Sch 9 (as amended) (transitional provisions).

7    For the meaning of 'business' see PARA 707 ante. The processes of government and administration were held in any event to be a 'business' for the purposes of the Counter-Inflation (Business Rents) Order 1972, SI 1972/1850, and the Counter-Inflation (Business Rents) Order 1973, SI 1973/741 (both revoked) (which used the wording of the Landlord and Tenant Act 1954 s 23 (as amended) in defining 'business' but omitted any provision corresponding to s 56(3)): see *Town Investments Ltd v Department of the Environment* [1978] AC 359, [1977] 1 All ER 813, HL; and PARA 790 note 5 post.

8    Landlord and Tenant Act 1954 s 56(3). See *Linden v Department of Health and Social Security* [1986] 1 All ER 691, [1986] 1 WLR 164 (the Landlord and Tenant Act 1954 Pt II (as amended) applied where the tenant was the Secretary of State for Social Services but property was managed by an area health authority who used it to provide accommodation for constantly changing health service employees). As to the position of health service bodies on and after 1 April 1991 see the National Health Service and Community Care Act 1990 s 60 (as amended); and HEALTH SERVICES VOL 54 (2008) PARAS 94, 136.

9    Ie the Landlord and Tenant Act 1954 s 56(3): see the text and notes 4-8 supra.

10   Ibid s 56(4).

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## **769. Modification on grounds of public interest.**

Where the interest of the landlord<sup>1</sup> or any superior landlord in the property comprised in any tenancy<sup>2</sup> belongs to or is held for the purposes of a government department<sup>3</sup> or is held by a local authority<sup>4</sup> or one of certain other public bodies<sup>5</sup>, statutory undertakers<sup>6</sup> or a development corporation<sup>7</sup>, the Secretary of State or Minister<sup>8</sup> in charge of any government department or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister concurrently with any Minister of the Crown by whom this function is exercisable<sup>9</sup> ('the Minister or board') may certify that it is requisite<sup>10</sup> for the purposes of such landlord or superior landlord that the use or occupation of the property, or part of it, be changed by a specified date<sup>11</sup>. Such a certificate may not be given unless the owner of the interest so belonging or held has given to the tenant a notice stating that the question of the giving of the certificate is under consideration by the Minister or board specified in the notice<sup>12</sup>, and that, if within 21 days of the giving of the notice the tenant makes representations in writing to that Minister or board with respect to that question, they will be considered before the question is determined<sup>13</sup>. If the tenant makes any such representations within the time permitted, the Minister or board must consider them before determining whether to give the certificate<sup>14</sup>.

Where such a certificate has been given in relation to any tenancy, then:

- 1510 (1) if a landlord's notice to terminate<sup>15</sup> specified as the date of termination a date not earlier than the date specified in the certificate and contains a copy of the certificate, no application for a new tenancy may be made<sup>16</sup> by the tenant<sup>17</sup>;
- 1511 (2) if such a notice specifies an earlier date as the date of termination and contains a copy of the certificate<sup>18</sup>, then, if the court makes an order<sup>19</sup> for the grant of a new tenancy, the new tenancy must be for a term expiring not later than the date specified in the certificate and is not a tenancy to which the statutory protection<sup>20</sup> applies<sup>21</sup>.

Where a tenant makes a request for a new tenancy<sup>22</sup> and the interest of the landlord or any superior landlord in the property comprised in the current tenancy<sup>23</sup> belongs or is held as mentioned above, the following provisions have effect<sup>24</sup>. If a certificate has been given<sup>25</sup> in relation to the current tenancy, and within two months after the making of the request the landlord gives notice to the tenant that the certificate has been given and the notice contains a copy of the certificate, then:

- 1512 (a) if the date specified in the certificate is not later than that specified in the tenant's request for a new tenancy, the tenant may not make an application<sup>26</sup> for the grant of a new tenancy;
- 1513 (b) if, in any other case, the court makes an order<sup>27</sup> for the grant of a new tenancy, the new tenancy must be for a term expiring not later than the date specified in the certificate and is not a tenancy to which the statutory protection applies<sup>28</sup>.

If no such certificate has been given but notice stating that the giving of such a certificate is under consideration<sup>29</sup> has been given before the making of the request or within two months thereafter, the request does not have effect, but without prejudice to the making of a new request when the Minister or board has determined whether to give a certificate<sup>30</sup>.

Where the interest of the landlord or any superior landlord in the property comprised in any tenancy belongs to the National Trust<sup>31</sup>, the Secretary of State may certify that it is requisite for the purpose of securing that the property will as from a specified date be used or occupied in a manner better suited to its nature that the use or occupation of the property should be changed<sup>32</sup>. The above provisions apply<sup>33</sup> accordingly<sup>34</sup>.

Where an application is made to the court for the grant of a new tenancy, the Minister or board in certain circumstances<sup>35</sup> may certify that it is necessary in the public interest that, if the

landlord applies in that behalf, the court shall determine as a term of the new tenancy that it be terminable by six months' notice to quit given by the landlord<sup>36</sup>.

1 For these purposes, 'landlord' has the same meaning as in the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 715 ante): s 57(8).

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For this purpose and for the purpose of the Landlord and Tenant Act 1954 s 58 (as amended) (see PARAS 770-771 post), 'government department' does not include the Crown Estate Commissioners: s 57(8); Crown Estate Act 1961 s 1. As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

4 For these purposes, 'local authority' means any local authority within the meaning of the Town and Country Planning Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 3 note 3), any National Park authority, the Broads Authority, the London Fire and Emergency Planning Authority or a joint authority established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq); Landlord and Tenant Act 1954 s 69(1) (definition amended by the Local Government Act 1985 s 84, Sch 14 para 36; the Education Reform Act 1988 s 237, Sch 13 Pt I; the Environment Act 1995 s 78, Sch 10 para 3; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 1). As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526; as to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734; and as to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

The provisions of the Landlord and Tenant Act 1954 s 57(1)-(5) (as amended) apply also to an interest held by a Health Authority or Special Health Authority as they apply to an interest held by a local authority, but with the substitution, for the references to the purposes of the authority, of a reference to the purposes of the National Health Service Act 1977: Landlord and Tenant Act 1954 s 57(6) (amended by the National Health Service Act 1977 s 129, Sch 15 para 13; the Health Authorities Act 1995 s 2(1), Sch 1 para 89). As to the position of health service bodies on and after 1 April 1991 see the National Health Service and Community Care Act 1990 s 60 (as amended); and HEALTH SERVICES vol 54 (2008) PARAS 94, 136.

5 References to a local authority in the Landlord and Tenant Act 1954 s 57 (as amended) also apply to any body to which the Leasehold Reform Act 1967 s 28 (as amended) applies: s 38(2). As to the bodies to which s 28 (as amended) applies see PARA 1487 post.

6 For these purposes, 'statutory undertakers' has the same meaning as in the Town and Country Planning Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1009): Landlord and Tenant Act 1954 s 69(1) (amended by the Coal Industry Act 1994 s 67, Sch 9 para 5, Sch 11 Pt II); Planning (Consequential Provisions) Act 1990 s 2(4). The following are also deemed to be statutory undertakers for these purposes: (1) a gas transporter (see the Gas Act 1995 s 16(1), Sch 4 para 2(1)(vii)); (2) the Environment Agency, every water undertaker and every sewerage undertaker (see the Water Act 1989 s 190(1), Sch 25 para 1(1), (2)(vi) (amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 3, Sch 2, PARA 4)); (3) the holder of a licence under the Electricity Act 1989 s 6 (as substituted and amended) (see s 112(1), Sch 16 para 1(1)(ix)); and (4) a licence holder under the Transport Act 2000 Pt I Ch I (ss 1-40) (as amended) (air traffic services) (see s 37, Sch 5 para 1(1), (2)(e)).

7 For these purposes, 'development corporation' has the same meaning as in the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq): Landlord and Tenant Act 1954 s 69(1); Interpretation Act 1978 s 17(2)(a).

8 The statutory wording is 'the Minister or board' (the latter being a reference to the Board of Trade, whose functions are now exercised by the relevant Secretary of State). As to the transfer of functions of the Secretary of State so far as exercisable in relation to Wales see PARA 27 note 4 ante; but see the text and note 9 infra.

9 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. See also PARA 27 note 4 ante.

10 'Requisite' in this context does not mean 'indispensable', but merely connotes 'reasonably necessary': *R v Secretary of State for the Environment, ex p Powis* [1981] 1 All ER 788, [1981] 1 WLR 584, CA.

11 Landlord and Tenant Act 1954 s 57(1).

12 Ibid s 57(2)(a). As to the nature of the function of the Minister or board see *R v Minister of Transport, ex p WH Beech-Allen Ltd* (1963) 16 P & CR 145, DC.

13 Landlord and Tenant Act 1954 s 57(2)(b).

14 Ibid s 57(2).

15 Ie under ibid s 25(1) (as amended): see PARA 716 ante. For the prescribed forms of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 8 (where the tenant is not entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease), or Form 13 (where he may be so entitled) As to the use of the prescribed forms generally see PARA 702 ante. See also PARA 716 note 3 ante.

16 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

17 Ibid s 57(3)(a) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 7). The Landlord and Tenant Act 1954 s 25(6) (as substituted) (see PARA 716 ante) does not apply to the notice: s 57(3)(a). Compensation is payable to the tenant: see PARA 774 post.

18 For the prescribed forms of notice see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, Schs 1, 2, Form 9 (where the landlord opposes the grant of a new tenancy and the tenant is not entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease), Form 10 (where the landlord does not oppose the grant of a new tenancy and the tenant is not so entitled to buy the freehold or an extended lease), or Form 14 (where the landlord opposes the grant of a new tenancy and the tenant may be so entitled). See also PARA 716 note 3 ante.

19 Ie under the Landlord and Tenant Act 1954 Pt II (as amended).

20 Ie ibid Pt II (as amended).

21 Ibid s 57(3)(b).

22 Ie under ibid s 26 (as amended): see PARA 718 ante.

23 For the meaning of 'the current tenancy' see PARA 713 note 12 ante.

24 Landlord and Tenant Act 1954 s 57(4).

25 Ie under ibid s 57(1)

26 See note 16 supra.

27 See note 19 supra.

28 Landlord and Tenant Act 1954 s 57(4)(a). Compensation is payable to the tenant: see PARA 774 post.

29 Ie notice under ibid s 57(2).

30 Ibid s 57(4)(b). If a public authority acquires a landlord's interest in premises after the tenant has served on the landlord a request for a new tenancy, the request will cease to have effect if the new landlord gives notice under s 57(2) within the two months mentioned in the text: *XL Fisheries Ltd v Leeds Corpn* [1955] 2 QB 636, [1955] 2 All ER 875, CA.

31 For these purposes, 'National Trust' means the National Trust for Places of Historic Interest or Natural Beauty (see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 979 et seq): Landlord and Tenant Act 1954 s 57(8).

32 Ibid s 57(7); Secretary of State for the Environment Order 1970, SI 1970/1681, arts 2, 6.

33 Ie the Landlord and Tenant Act 1954 s 57(2)-(4) (as amended) applies in relation to certificates under s 57(7), and to cases where the interest of the landlord or any superior landlord belongs to the National Trust, as it applies in relation to certificates under s 57(1) and to cases where the interest of the landlord or any superior landlord belongs or is held as mentioned in s 57(1).

34 Ibid s 57(7).

35 Ie where the landlord's interest in the property comprised in the tenancy belongs or is held as is mentioned in ibid s 57(1).

36 Ibid s 57(5). Section 57(2) applies in relation to a certificate under s 57(5); and, if notice under s 57(2) has been given to the tenant: (1) the court must not determine the application for the grant of a new tenancy until the Minister or board has determined whether to give a certificate; and (2) if a certificate is given, the

court must on the landlord's application determine as a term of the new tenancy that it be so terminable, and s 25 (as amended) (see PARA 716 ante) applies accordingly: s 57(5).

## UPDATE

### 769 Modification on grounds of public interest

NOTE 4--Definition of 'local authority' in the Landlord and Tenant Act 1954 s 69(1) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 25; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 1.

Reference to Health Authority is now to Local Health Board; and reference to National Health Service Act 1977 is now to National Health Service Act 2006 or National Health Service (Wales) Act 2006: Landlord and Tenant Act 1954 s 57(6) (amended by the National Health Service (Consequential Provisions) Act 2006 Sch 1 para 15; and the References to Health Authorities Order 2007, SI 2007/961).

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### 770. Termination on grounds of national security.

Where the landlord's<sup>1</sup> interest in the property comprised in any tenancy<sup>2</sup> belongs to or is held for the purposes of a government department<sup>3</sup>, and the Secretary of State or Minister<sup>4</sup> in charge of any government department or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister concurrently with any Minister of the Crown by whom this function is exercisable<sup>5</sup> ('the Minister or board') certifies that it is necessary for reasons of national security that the use or occupation of the property should be discontinued or changed, then:

1514 (1) if the landlord gives a notice of termination<sup>6</sup> containing a copy of the certificate, no application for a new tenancy may be made<sup>7</sup> by the tenant<sup>8</sup>;

1515 (2) if, whether before or after the giving of the certificate, the tenant makes a request for a new tenancy<sup>9</sup> and within two months after the making of the request the landlord gives notice to the tenant that the certificate has been given and the notice contains a copy of the certificate:

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181. (a) the tenant may not make an application<sup>10</sup> for the grant of a new tenancy; and

182. (b) if the notice specifies as the date on which the tenancy is to terminate a date earlier than that specified in the tenant's request as the date on which the new tenancy is to begin, but neither earlier than six months from the giving of the notice nor earlier than the earliest date at which the tenancy would otherwise<sup>11</sup> come to an end or could be brought to an end, the tenancy terminates on the date specified in the notice instead of that specified in the request<sup>12</sup>.

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Where the landlord's interest in the property comprised in any tenancy belongs to or is held for the purposes of a government department:

- 1516 (i) nothing in the statutory protection of business tenancies<sup>13</sup> invalidates an agreement<sup>14</sup> to the effect that, on the giving of such a certificate, the tenancy may be terminated by notice to quit<sup>15</sup> given by the landlord of such length as may be specified in the agreement, if the notice contains a copy of the certificate, and that after the giving of such a notice containing such a copy the tenancy shall not be one to which the statutory protection applies<sup>16</sup>; and
- 1517 (ii) where the court makes an order<sup>17</sup> for the grant of a new tenancy and the Minister or board in charge of any government department certifies that the public interest requires the tenancy to be subject to such a term, the court must on the application of the landlord determine as a term of the new tenancy that such an agreement as is mentioned in head (i) above and specifying such length of notice as is mentioned in the certificate must be embodied in the new tenancy<sup>18</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the meaning of 'government department' see PARA 769 note 3 ante.

4 The statutory wording is 'the Minister or board' (the latter being a reference to the Board of Trade, whose functions are now exercised by the relevant Secretary of State). As to the transfer of functions of the Secretary of State so far as exercisable in relation to Wales see PARA 27 note 4 ante; but see the text and note 5 infra.

5 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. See further PARA 27 note 4 ante.

6 Ie under the Landlord and Tenant Act 1954 s 25(1) (as amended): see PARA 716 ante. For the prescribed form of landlord's notice to terminate a business tenancy on grounds of national security see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 11. As to the use of the prescribed forms generally see PARA 702 ante. If the landlord gives such a notice to terminate, the Landlord and Tenant Act 1954 s 25(6) (as substituted) does not apply to the notice: s 58(1)(a) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 7).

7 Ie under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

8 Ibid s 58(1)(a) (as amended: see note 6 supra).

9 Ie under ibid s 26 (as amended): see PARA 718 ante.

10 See note 7 supra.

11 Ie apart from the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended).

12 Ibid s 58(1)(b). Compensation is payable to the tenant: see PARA 774 post.

13 Ie ibid Pt II (as amended): see PARA 701 et seq ante.

14 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante.

15 For the meaning of 'notice to quit' see PARA 704 note 19 ante.

16 Landlord and Tenant Act 1954 s 58(2). As to contracting out see PARA 709 et seq ante; and as to the transitional provisions whereby agreements for service of a notice to quit and for excluding the Act when a certificate has been granted are valid see ss 58(2), 68(2), Sch 9 para 6.

17 Ie under ibid Pt II (as amended).

18 Ibid s 58(4)(a). Cf s 38A (as added) (see PARAS 711-712 ante) which speaks only of excluding the provisions of ss 24-28 (as amended).

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### **771. Termination required for proper operation of statutory undertaking.**

Where the landlord's<sup>1</sup> interest in the property comprised in any tenancy<sup>2</sup> is held by statutory undertakers<sup>3</sup>:

1518 (1) nothing in the statutory provisions relating to business tenancies<sup>4</sup> invalidates an agreement<sup>5</sup> to the effect:

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183. (a) that, where the Secretary of State or Minister<sup>6</sup> in charge of any government department<sup>7</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister concurrently with any Minister of the Crown by whom this function is exercisable<sup>8</sup> ('the Minister or board') certifies that possession of the property comprised in the tenancy or a part of it is urgently required for carrying out repairs<sup>9</sup>, whether on that property or elsewhere, which are needed for the proper operation of the landlord's undertaking, the tenancy may be terminated by notice to quit<sup>10</sup> given by the landlord of such length as may be specified in the agreement, if the notice contains a copy of the certificate; and

184. (b) that, after the giving of such a notice containing such a copy, the tenancy shall not be one to which the statutory protection<sup>11</sup> applies<sup>12</sup>;

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1519 (2) where the court makes an order<sup>13</sup> for the grant of a new tenancy and the Minister or board in charge of any government department certifies that the public interest requires the tenancy to be subject to such a term, the court must on the application of the landlord determine as a term of the new tenancy that such an agreement as is mentioned in head (1) above and specifying such length of notice as is mentioned in the certificate must be embodied in the new tenancy<sup>14</sup>.

1 For the meaning of 'the landlord' see PARA 715 ante.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the meaning of 'statutory undertakers' see PARA 769 note 6 ante.

4 Ie the Landlord and Tenant Act 1954.

5 For the meaning of references to an agreement between the landlord and the tenant see PARA 709 note 2 ante.

6 The statutory wording is 'the Minister or board' (the latter being a reference to the Board of Trade, whose functions are now exercised by the relevant Secretary of State). As to the transfer of functions of the Secretary of State so far as exercisable in relation to Wales see PARA 27 note 4 ante; but see the text and notes 7-8 infra.

7 For the meaning of 'government department' see PARA 769 note 3 ante.

8 See the National Assembly for Wales (Transfer of Functions) Order 1999, SI 1999/672, art 2, Sch 1 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS. See further PARA 27 note 4 ante.

9 For the meaning of 'repairs' see PARA 760 note 12 ante.

10 For the meaning of 'notice to quit' see PARA 704 note 19 ante.

11 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended); see PARA 701 et seq ante. As to contracting out see PARA 709 et seq ante; and as to the transitional provisions whereby agreements for service of a notice to quit and for excluding the Act when a certificate has been granted are valid see ss 58(3), 68(2), Sch 9 para 6.

12 Ibid s 58(3).

13 Ie under ibid Pt II (as amended).

14 Ibid s 58(4)(b). Cf s 38A (as added) (see PARAS 711-712 ante) which speaks only of excluding the provisions of ss 24-28 (as amended).

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## **772. Premises needed for industry in England.**

Where the property comprised in a tenancy<sup>1</sup> consists of premises of which the Secretary of State<sup>2</sup> or the Urban Regeneration Agency<sup>3</sup> is the landlord<sup>4</sup> and the premises are situated in a locality which is either a development area<sup>5</sup> or intermediate area<sup>6</sup> and the Secretary of State certifies that it is necessary or expedient, for the purpose of providing employment appropriate (having regard to the circumstances of the area generally and of any particular description of persons in it) to the needs of the area<sup>7</sup>, that the use or occupation of the property should be changed, the tenant may be precluded<sup>8</sup> from obtaining a new tenancy<sup>9</sup>.

Where the court makes an order for the grant of a new tenancy of any such premises<sup>10</sup>, and the Secretary of State certifies that it is necessary or expedient for achieving the above purpose that the tenancy should be subject to a term, specified in the certificate, prohibiting or restricting the tenant from assigning the tenancy or subletting, charging or parting with possession of the premises or any part of them or changing their use, or the use of any part of them, the court must determine that the terms<sup>11</sup> of the tenancy are to include the terms so specified<sup>12</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 As to the transfer of functions of the former Minister of Technology to the Secretary of State see the Secretary of State for Trade and Industry Order 1970, SI 1970/1537, art 2(2).

3 As to the Urban Regeneration Agency (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1306-1308; TRADE AND INDUSTRY vol 97 (2010) PARA 945. As to the position in Wales see PARAS 773-774 post.

4 For the meaning of 'the landlord' see PARA 715 ante.

5 For these purposes, 'development area' means an area for the time being specified as such by an order made, or having effect as if made, under the Industrial Development Act 1982 s 1 (as amended) (see TRADE AND INDUSTRY vol 97 (2010) PARA 937); Landlord and Tenant Act 1954 s 60(3) (substituted by the Industrial Development Act 1982 s 19, Sch 2 Pt II para 2(b)).



6 For these purposes, 'intermediate area' means an area for the time being specified as such by an order made, or having effect as if made, under the Industrial Development Act 1982 s 1 (as amended) (see TRADE AND INDUSTRY vol 97 (2010) PARA 938): Landlord and Tenant Act 1954 s 60(3) (as substituted: see note 5 supra).

7 le for achieving the purpose mentioned in the Local Employment Act 1972 s 2(1) (repealed with savings).

8 le the Landlord and Tenant Act 1954 s 58(1)(a), (b) (as amended) (see PARA 770 ante) applies for this purpose as it applies where such a certificate is given as is mentioned in s 58(1) (as amended).

9 Ibid s 60(1) (amended by the Local Employment Act 1970 s 5, Schedule; the Local Employment Act 1972 s 22(1), Sch 3; the Industry Act 1972 Sch 4 Pt I; the English Industrial Estates Corporation Act 1981 s 9(1); the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 2). See also note 2 supra. For the prescribed forms of the landlord's notice to terminate the tenancy under the Landlord and Tenant Act 1954 s 60(1) (as so amended) see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 12 (where the tenant is not entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease) or Form 15 (where the tenant may be so entitled and the landlord opposes the grant of a new lease). As to the use of the prescribed forms generally see PARA 702 ante. See also PARA 716 note 3 ante.

10 le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

11 For the meaning of 'terms' see PARA 706 note 27 ante.

12 Landlord and Tenant Act 1954 s 60(2) (amended by the Local Employment Act 1970 s 5, Schedule). See also note 2 supra.

## UPDATE

### 772 Premises needed for industry in England

TEXT AND NOTE 3--Urban Regeneration Agency abolished: Housing and Regeneration Act 2008 s 49; SI 2008/2358.

NOTE 9--Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 2 repealed: SI 2008/3002.

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### 773. Premises of which the former Welsh Development Agency was the landlord.

Where the property comprised in a tenancy<sup>1</sup> consists of premises of which the National Assembly for Wales is the landlord<sup>2</sup> by virtue of the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005<sup>3</sup> or by virtue of the Assembly exercising its functions under that Order, and the Assembly certifies that it is necessary or expedient, for the purpose of providing employment appropriate to the needs of the area in which the premises are situated, that the use or occupation of the property should be changed, the tenant may be precluded<sup>4</sup> from obtaining a new tenancy<sup>5</sup>. Where the court makes an order for the grant of a new tenancy of such premises<sup>6</sup>, and the Assembly certifies that it is necessary or expedient for achieving the above purpose that the tenancy should be subject to a term, specified in the certificate, prohibiting or restricting the tenant from assigning the tenancy or subletting, charging or parting with possession of the premises or any

part of them or changing their use, the court must determine that the terms<sup>7</sup> of the tenancy are to include the terms so specified<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For the meaning of 'the landlord' see PARA 715 ante.

3 Ie by virtue of the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226, which came into force on 23 November 2005 and specifies 1 April 2006 as the transfer date: see art 1(2). As to the former Welsh Development Agency see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1309; TRADE AND INDUSTRY vol 97 (2010) PARA 954; as to its abolition see the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226, art 5; and as to the transfer of its functions, property, rights and liabilities to the Assembly see art 2, Schs 1, 2. For transitional provisions see art 3.

The Secretary of State for Wales may by order provide for the transfer to the Welsh ministers, the First Minister, the Counsel General or the Assembly Commission of any specified property, rights or liabilities, or property, rights or liabilities of any specified description, to which the Assembly constituted by the Government of Wales Act 1998 is entitled or subject or to which that Assembly was entitled or subject immediately before the end of the initial period; and such an order may provide for the transfer of any property, rights or liabilities to have effect subject to exceptions or reservations specified in or determined under the order: Government of Wales Act 2006 s 162(1), Sch 11 para 41(1), (2). For the meaning of 'the initial period' see PARA 27 note 4 ante. See further Sch 11 paras 41(3)-(9), 42; and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

4 Ie the Landlord and Tenant Act 1954 s 58(1)(a), (b) (as amended) (see PARA 770 ante) applies for this purpose as it applies where such a certificate is given as is mentioned in s 58(1) (as amended).

5 Ibid s 60A(1) (s 60A added by the Welsh Development Agency Act 1975 s 11(1); amended by the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226, art 7(1)(b), Sch 2 Pt 1 para 1(3), (4)). For the prescribed forms of the landlord's notice to terminate the tenancy under the Landlord and Tenant Act 1954 s 60A(1) (as so added and amended) see the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004, SI 2004/1005, regs 2(2), 3, Schs 1, 2, Form 16 (where the tenant is not entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease) or Form 17 (where the tenant may be so entitled) (Forms 16, 17 both amended by SI 2005/3226). As to the use of the prescribed forms generally see PARA 702 ante. See also PARA 716 note 3 ante.

6 Ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

7 For the meaning of 'terms' see PARA 706 note 27 ante.

8 Landlord and Tenant Act 1954 s 60A(2) (as added and amended: see note 5 supra).

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## **774. Compensation.**

Where by virtue of any certificate given for the purposes of the public interest<sup>1</sup> or national security<sup>2</sup>, or (subject to the restrictions set out in heads (1) and (2) below) for the purposes of industrial development in Wales<sup>3</sup>, a tenant is precluded from obtaining an order for the grant of a new tenancy<sup>4</sup> or of a new tenancy for a term expiring later than a specified date, he is entitled on quitting the premises to recover from the owner of the interest by virtue of which the certificate was given an amount by way of compensation<sup>5</sup>. The compensation is to be assessed in like manner and amount as if the court had refused an order for a new tenancy where the landlord had established an ordinary ground of opposition<sup>6</sup>. No compensation is,

however, payable under these provisions where the tenant is entitled to compensation under the Leasehold Reform Act 1967<sup>7</sup>, or where:

1520 (1) the premises vested in the former Welsh Development Agency in certain circumstances<sup>8</sup> and were transferred to the National Assembly for Wales on the abolition of that Agency<sup>9</sup>; or

1521 (2) the tenant was not the tenant of the premises when the interest by virtue of which the certificate was given was acquired by the former Welsh Development Agency or, if the interest was acquired on or after 1 April 2006, by the National Assembly for Wales in exercise of functions transferred<sup>10</sup> to the Assembly<sup>11</sup>.

1    Ie for the purposes of the Landlord and Tenant Act 1954 s 57 (as amended): see PARA 769 ante.

2    Ie for the purposes of ibid s 58 (as amended): see PARA 770 ante.

3    Ie for the purposes of ibid s 60A (as added and amended): see PARA 773 ante.

4    For the meaning of 'tenancy' see PARA 706 note 2 ante.

5    Landlord and Tenant Act 1954 s 59(1) (amended by the Government of Wales Act 1998 s 129, Sch 15 para 1; the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5 paras 1, 8). The Landlord and Tenant Act 1954 s 38(2), (3) (as amended) (modification by agreement of right to compensation: see PARA 709 ante) applies to compensation under s 59 (as amended) as it applies to compensation under s 37 (as amended): s 59(2). For transitional provisions see s 68(2), Sch 9 para 5.

6    Ie ibid s 37(2), (3)-(3B), (5)-(7) (as amended) (see PARA 759 ante) applies with the necessary modifications for ascertaining the amount: s 59(1) (as amended: see note 5 supra).

7    Where the tenancy is one to which the Leasehold Reform Act 1967 (see PARA 1389 et seq post) applies, and a tenant is precluded from enfranchising or from obtaining a new lease by a certificate of a Minister, the tenant may obtain compensation from the relevant landlord for the purposes of that Act in the same manner as on the buying out of the tenant's extended lease under s 17 (as amended): see s 28(1); and PARA 1487 post. Where a tenancy is one to which both the Leasehold Reform Act 1967 and the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante) apply, and by virtue of the Leasehold Reform Act 1967 s 28(1)(b) the tenancy is to be treated as if it had been extended, no compensation is payable under the Landlord and Tenant Act 1954 s 59 (as amended) in respect of the tenancy or any immediate or derivative subtenancy: Leasehold Reform Act 1967 s 28(3); and see PARA 1487 post.

8    Ie under the Welsh Development Agency Act 1975 s 7 or s 8 (repealed).

9    Ie they were transferred to the Assembly by virtue of the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226: see PARA 773 ante.

10   Ie by the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226: see PARA 773 ante.

11   Landlord and Tenant Act 1954 s 59(1A) (added by the Welsh Development Agency Act 1975 s 11(2); amended by the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226, art 7(1)(b), Sch 2 Pt 1 para 1(1), (2)).

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## (E) LICENSED PREMISES

### **775. Former exclusion; phasing in of protection.**

Tenancies of premises licensed for the sale of intoxicating liquor for consumption on the premises were originally excluded<sup>1</sup>, subject to certain exceptions<sup>2</sup>, from the protection afforded to business tenancies<sup>3</sup>. This exclusion did not apply to tenancies of off-licences.

The statutory exclusion ceased to have effect:

- 1522 (1) on 1 January 1991, in relation to any such tenancy<sup>4</sup> entered into on or after 11 July 1989, otherwise than in pursuance of a contract made before that date<sup>5</sup>;  
 1523 (2) on 11 July 1992, in relation to any such tenancy in existence on that date which did not fall under head (1) above<sup>6</sup>.

1 le by the Landlord and Tenant Act 1954 s 43(1)(d) (repealed).

2 The former exclusion did not apply in respect of tenancies of licensed premises which were structurally adapted to be used, and were bona fide used, for: (1) a business which comprised one or both of the following: (a) the reception of guests and travellers desiring to sleep on the premises; or (b) the carrying on of a restaurant, being a business a substantial proportion of which consisted of transactions other than the sale of intoxicating liquor; (2) only for one or more of the following purposes: (a) judicial or public administrative purposes; (b) as a theatre or place of public or private entertainment; (c) public gardens; (d) picture galleries; (e) exhibitions, or for any similar purpose to which holding the licence was merely ancillary; (3) railway station refreshment rooms: see *ibid* s 43(1)(d) (substituted by the Finance Act 1959 s 2(6), Sch 2 para 5; repealed by the Landlord and Tenant (Licensed Premises) Act 1990 s 2).

3 Where premises were used for the storage of liquor for the purposes of the business of an adjacent public house, it was held that this use was for storage and the tenancy of those premises was thus protected (*Ye Old Cheshire Cheese Ltd v Daily Telegraph plc* [1988] 3 All ER 217, [1988] 1 WLR 1173); and, where the tenant of a public house provided in the premises the facilities of a restaurant and the activities on the premises comprised overall the carrying on of a restaurant business, the tenancy of those premises was held to be protected (*Taylor v Courage Ltd* [1993] 2 EGLR 127, [1993] 44 EG 116, CA).

4 For these purposes, 'tenancy' has the same meaning as in the Landlord and Tenant Act 1954 Pt II (ss 23-46 (as amended): see PARA 706 note 2 ante): Landlord and Tenant (Licensed Premises) Act 1990 s 1(4).

5 *Ibid* ss 1(1), 2(3).

6 *Ibid* s 1(2). The Landlord and Tenant Act 1954 s 24(3)(b) (which, in certain cases, preserves the effect of a notice to quit given in respect of a tenancy which becomes one to which Pt II (as amended) applies: see PARA 713 ante) does not have effect in the case of a tenancy which became one to which Pt II (as amended) applies by virtue of the Landlord and Tenant (Licensed Premises) Act 1990 s 1(2): s 1(2). In relation to a tenancy falling within s 1(2), before 11 July 1992 the following notices might be given and any steps might be taken in consequence thereof as if the Landlord and Tenant Act 1954 s 43(1)(d) (repealed) had already ceased to have effect: (1) a notice under s 25 (now as amended) (termination of tenancy by landlord: see PARA 716 ante) specifying as the date of termination 11 July 1992 or any later date; (2) a notice under s 26 (now as amended) (tenant's request for a new tenancy: see PARA 718 ante) requesting a new tenancy beginning not earlier than that date; and (3) a notice under s 27(1) (as amended) (termination by tenant of tenancy for fixed term: see PARA 719 ante) stating that the tenant did not desire his tenancy to be continued: Landlord and Tenant (Licensed Premises) Act 1990 s 1(3).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/H. SPECIAL CASES/(E) Licensed Premises/776. Rent of licensed premises.

## **776. Rent of licensed premises.**

In the case of a holding<sup>1</sup> comprising licensed premises<sup>2</sup>, the rent payable under a tenancy granted by order of the court<sup>3</sup> falls to be assessed in the manner and subject to the disregards

applicable to ordinary business tenancies<sup>4</sup>. There must, however, also be disregarded any addition to the value of the holding attributable to the licence, if it appears to the court that, having regard to the terms<sup>5</sup> of the current tenancy<sup>6</sup> and to any other relevant circumstances, the benefit of the licence belongs to the tenant<sup>7</sup>.

1 For the meaning of 'the holding' see PARA 706 note 23 ante.

2 For the meaning of 'licensed premises' see PARA 775 ante.

3 le under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

4 See PARAS 753-755 ante.

5 For the meaning of 'terms' see PARA 706 note 27 ante.

6 For the meaning of 'current tenancy' see PARA 713 note 12 ante.

7 Landlord and Tenant Act 1954 s 34(1)(d). If Pt II (as amended) applies by virtue of s 23(1A) (as added) (see PARA 706 ante), the reference in s 34(1)(d) to the tenant is to be construed as including (1) a company in which the tenant has a controlling interest; or (2) where the tenant is a company, a person with a controlling interest in the company: s 34(2A) (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, arts 2, 15). For the meanings of 'company' and 'controlling interest' see PARA 706 note 8 ante.

Where a tenancy is held on trust, the reference to the tenant is to be construed as including the beneficiaries or beneficiary: Landlord and Tenant Act 1954 s 41(1)(b) (amended by the Law of Property Act 1969 s 1(2)). As to trusts generally see PARAS 763-764 ante. Where a tenancy is held by a member of a group of companies, the reference to the tenant is to be construed as including another member of the group occupying the premises and carrying on business there: Landlord and Tenant Act 1954 s 42(2)(b) (amended by the Law of Property Act 1969 s 1(2)). See further PARA 766 ante.

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## (F) OPENCAST MINING

### **777. Business tenancies subject to compulsory rights order.**

Where any of the land comprised in a compulsory rights order<sup>1</sup> in connection with the opencast mining of coal is land which, immediately before the operative date<sup>2</sup> of the order, was subject to a business tenancy<sup>3</sup>, special statutory provisions<sup>4</sup> apply<sup>5</sup> so that, as far as possible, the making and operation of the compulsory rights order does not prejudice the position of the tenant for the purposes of the Landlord and Tenant Act 1954 both as to his security of tenure and rights to a new lease<sup>6</sup> and as to his rights in respect of compensation for disturbance<sup>7</sup>. The power to make a compulsory rights order ceased to be exercisable after 31 December 1999<sup>8</sup>.

As from the operative date of the order and so long thereafter as the tenancy<sup>9</sup> continues and the order continues to have effect<sup>10</sup>, so much of the land comprised in the order as:

1524 (1) is comprised in the tenancy; and

1525 (2) immediately before the operative date was occupied by the tenant for the purposes of the relevant business<sup>11</sup> or for those and other purposes, or was

occupied by a person employed by the tenant for the purposes of the relevant business; and  
 1526 (3) is not for the time being so occupied by the tenant or by such a person,

is treated for the purposes of the statutory protection of business tenancies<sup>12</sup> as if it had continued to be so occupied<sup>13</sup>.

In relation to such a tenancy, the specified statutory grounds of opposition to an application for a new tenancy which turn upon the landlord's intention<sup>14</sup> apply for certain purposes<sup>15</sup> as if any reference to the termination of the current tenancy were a reference to the end of the period of occupation<sup>16</sup>.

1 For these purposes, 'compulsory rights order' means an order under the Opencast Coal Act 1958 for the compulsory acquisition of temporary rights of occupation and use of land for the purpose of facilitating the working of coal by opencast operations: see s 4(1) (as substituted and amended), s 51(1); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 422 et seq. Such orders may no longer be made: see the text and note 8 infra. As to the operation and scope of the Opencast Coal Act 1958 generally see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 404 et seq.

2 For these purposes, 'operative date' means the date on which the compulsory rights order became operative: see *ibid* s 4(2)(a) (s 4(2) substituted by the Coal Industry Act 1975 s 4, Sch 3 para 1).

3 *Ie* a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante.

4 *Ie* the Opencast Coal Act 1958 s 37, Sch 7 Pt V (paras 19-24) (as amended): see the text and notes 5-16 infra; and PARAS 778-779 post. The court has a general power to vary the terms of tenancies, other than tenancies of agricultural holdings, where the premises are subject to a compulsory rights order: see PARA 147 ante.

5 *Ibid* Sch 7 para 19(1), (2).

6 As to security of tenure and rights to a new lease generally see PARA 713 et seq ante.

7 As to compensation where an order for a new tenancy is precluded on certain grounds see the Landlord and Tenant Act 1954 s 37 (as amended); and PARAS 758-760 ante. Section 37 (as amended) is applied, with modifications, to tenancies subject to a compulsory rights order: see the Opencast Coal Act 1958 Sch 7 para 24 (as amended); and PARA 779 post. The right to compensation is also preserved indirectly by the provisions of Sch 7 para 20 and the deemed occupation created thereby.

8 See the Coal Industry Act 1994 s 52(1); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 404-405.

9 For these purposes, any reference to a tenancy to which the Opencast Coal Act 1958 Sch 7 Pt V (paras 19-24) (as amended) applies is a reference to a tenancy which (1) immediately before the operative date of the compulsory rights order was a tenancy to which the Landlord and Tenant Act 1954 Pt II (as amended) applied; and (2) comprises the whole or part of the land comprised in that order: Opencast Coal Act 1958 Sch 7 para 19(1), (2).

10 The duration of a compulsory rights order may not exceed 20 years: see *ibid* s 4(2)(b) (as substituted: see note 2 supra).

11 For these purposes, 'business' has the same meaning as in the Landlord and Tenant Act 1954 Pt II (as amended) (see PARA 707 ante) (Opencast Coal Act 1958 Sch 7 para 19(2)); and 'the relevant business' means the business by reason of which, immediately before the operative date, the tenancy was a tenancy to which those provisions applied (Sch 7 para 20(2)).

12 *Ie* the Landlord and Tenant Act 1954 Pt II (as amended): see PARA 701 et seq ante.

13 Opencast Coal Act 1958 Sch 7 para 20(1). This preserves the tenant's right to renewal, as the land will be deemed still to be within the holding: see PARA 706 ante.

14 *Ie* the grounds specified in the Landlord and Tenant Act 1954 s 30(1)(f) (see PARAS 741-744 ante) or s 30(1)(g) (see PARAS 745-746 ante).

15 Those purposes are the purposes of the operation of: (1) *ibid* s 25(6) (as substituted) (which requires a notice by the landlord terminating a tenancy to state whether the landlord would oppose an application for a new tenancy: see PARA 716 ante) in relation to the service of a notice under s 25 (as amended) at any time on or after the operative date of the order in question and before the end of the period of occupation; (2) s 26(6) (which enables a landlord, where the tenant has requested a new tenancy, to give notice that he will oppose an application for a new tenancy, and requires him to state on which of the grounds mentioned in s 30 (as amended) he will do so: see PARA 718 ante) in relation to the service of a notice under s 26(6) at any time; (3) s 30 (as amended) and s 31 (as amended) (which relates to the dismissal of an application for a new tenancy where the landlord successfully opposes it: see PARA 747 ante) in relation to the determination by the court of an application for a new tenancy, where that application falls to be determined at any such time: *Opencast Coal Act 1958* Sch 7 para 21(2). For the meaning of 'period of occupation' see ss 5, 51(1) (as amended); and *MINES, MINERALS AND QUARRIES* vol 31 (2003 Reissue) PARA 424.

16 *Ibid* Sch 7 para 21(1).

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### **778. Order for new tenancy when compulsory rights order applies.**

Where an application for a new tenancy<sup>1</sup> falls to be determined by the court at a time when the current tenancy<sup>2</sup> comprises land which is subject to a compulsory rights order<sup>3</sup>, being a time on or after the operative date<sup>4</sup> of the order in question and before the end of the period of occupation<sup>5</sup>, and on that application an order for the grant of a new tenancy is made<sup>6</sup>, the following provisions have effect<sup>7</sup>.

If it falls to the court<sup>8</sup> to determine the rent payable under the new tenancy, the court must determine that rent as if the compulsory rights order had not been made and as if so much of the property comprised in the current tenancy as is also comprised in the compulsory rights order were still in the state in which it was immediately before the operative date<sup>9</sup>.

If it falls to the court to determine any of the terms and conditions of the new tenancy, other than any term or condition as to the rent payable thereunder, the court must determine those terms or conditions as if the compulsory rights order had not been made; but, in so far as any such terms or conditions of the new tenancy impose an obligation or restriction in respect of land comprised in the compulsory rights order, the court may suspend the operation of that obligation or restriction during the period of occupation<sup>10</sup>.

If the new tenancy continues until after the end of the period of occupation, the landlord or the tenant may by notice in writing served on his tenant or landlord demand a reference to the court of the question whether any of the terms and conditions of the tenancy, including any term or condition as to rent, should be varied, having regard to the state of the land and other circumstances existing at the time when the reference is determined by the court<sup>11</sup>. The court may not, however, entertain such a reference unless the proceedings are begun within 12 months after the end of the period of occupation<sup>12</sup>. On such a reference, the court must determine what variations, if any, should be made in the terms and conditions of the tenancy<sup>13</sup> and the date, not being earlier than the end of the period of occupation, from which such variations are to take effect or are to be treated as having taken effect<sup>14</sup>.

Where an application for an order for a new tenancy<sup>15</sup> is made by the tenant:

- 1527 (1) before the end of the period of occupation but falls to be determined by the court after the end of that period; or  
 1528 (2) within 12 months after the end of that period,

and the landlord opposes the application on grounds consisting of or including any of the statutory grounds relating to the state of repair of the holding and to the tenant's use or management of the holding during the current tenancy<sup>16</sup>, the court, in so far as it considers it reasonable to do so in the circumstances, may disregard the matters to which the objection in question relates in determining whether to make an order for the grant of a new tenancy if it is satisfied that those matters are attributable to a change in the state of the land resulting from its occupation and use in the exercise of rights conferred by the compulsory rights order<sup>17</sup>.

1 le made under the Landlord and Tenant Act 1954 s 24(1) (as amended): see PARA 720 ante.

2 For the meaning of references to a tenancy for these purposes see PARA 777 note 9 ante.

3 For the meaning of 'compulsory rights order' see PARA 777 note 1 ante.

4 For the meaning of 'operative date' see PARA 777 note 2 ante.

5 For the meaning of 'period of occupation' see the Opencast Coal Act 1958 ss 5, 51(1) (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 424.

6 le under the Landlord and Tenant Act 1954 s 29 (as substituted): see PARAS 720, 734 ante.

7 Opencast Coal Act 1958 s 37, Sch 7 para 22(1).

8 For these purposes, 'the court' means the court exercising the jurisdiction conferred on the tribunal by the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) (see PARA 788 et seq post) in accordance with the provisions of the Landlord and Tenant Act 1954 s 63 (as amended) (see PARA 722 ante); and the provisions of s 63 (as amended) apply as they apply in relation to matters which, by virtue of the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) are required to be determined by the tribunal thereunder: Opencast Coal Act 1958 Sch 7 para 12(4) (applied by Sch 7 para 19(3)).

9 Ibid Sch 7 para 22(2).

10 Ibid Sch 7 para 22(3).

11 Ibid Sch 7 para 22(4).

12 Ibid Sch 7 para 22(4) proviso.

13 le as mentioned in ibid Sch 7 para 22(4).

14 Ibid Sch 7 para 22(5). As from that date the tenancy has effect or, as the case may be, is treated as having had effect, subject to any variations so determined by the court: Sch 7 para 22(5).

15 See note 1 supra.

16 le on the ground mentioned in the Landlord and Tenant Act 1954 s 30(1)(a) (disrepair: see PARA 736 ante) or in s 30(1)(c) (breach of obligations or mismanagement: see PARA 738 ante).

17 Opencast Coal Act 1958 Sch 7 para 23(1), (2). The provisions of Sch 7 para 23(2) are without prejudice to the operation of Sch 7 para 14 (see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 435) in relation to things done or omitted during the period of occupation: Sch 7 para 23(3).



BUSINESS TENANCIES/(i) Scope of Protection; Continuation and Termination of Tenancies/H.  
SPECIAL CASES/(F) Opencast Mining/779. Compensation where grant of new tenancy refused.

### **779. Compensation where grant of new tenancy refused.**

The statutory provisions under which a tenant is entitled to compensation from the landlord if an order for the grant of a new tenancy is precluded on certain specified grounds<sup>1</sup> apply with modifications in relation to an application<sup>2</sup> which falls to be determined by the court<sup>3</sup> at a time, on or after the operative date<sup>4</sup> of the compulsory rights order<sup>5</sup> in question and before the end of the period of occupation<sup>6</sup>, when the current tenancy is a tenancy<sup>7</sup> subject to such an order<sup>8</sup>.

1    le the Landlord and Tenant Act 1954 s 37 (as amended): see PARAS 758-760 ante.

2    le made under ibid s 24(1) (as amended): see PARA 720 ante.

3    For the meaning of 'the court' see PARA 778 note 8 ante.

4    For the meaning of 'operative date' see PARA 777 note 2 ante.

5    For the meaning of 'compulsory rights order' see PARA 777 note 1 ante.

6    For the meaning of 'period of occupation' see the Opencast Coal Act 1958 ss 5, 51(1) (as amended); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 424.

7    For the meaning of references to a tenancy for these purposes see PARA 777 note 9 ante.

8    Opencast Coal Act 1958 s 37, Sch 7 para 24(1). For the specified modifications see Sch 7 para 24(2)-(4) (amended by the Housing and Planning Act 1986 s 39(3), Sch 8 para 17). These modifications of the Landlord and Tenant Act 1954 s 37 (as amended) apply without prejudice to the operation, in relation to s 37 (as amended), of the Opencast Coal Act 1958 Sch 7 para 20 (see PARA 777 ante): Sch 7 para 24(5). As to compensation for improvements see s 30; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 481.

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### **(G) PROTECTION OF SERVICE PERSONNEL**

#### **780. Qualifications for protection.**

Part III of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951<sup>1</sup> empowers the court to order the grant of new tenancies in cases where:

1529 (1) immediately before beginning a period of relevant service<sup>2</sup>, other than a short period of training<sup>3</sup>, a serviceman<sup>4</sup> was the working proprietor<sup>5</sup> of a business or professional practice carried on in the premises or part of the premises comprised in a tenancy<sup>6</sup> vested in him<sup>7</sup>; and

1530 (2) the tenancy ('the expiring tenancy') would otherwise come to an end before the date of the ending of that period of service or before the expiration of two months from that date, and would so come to an end by effluxion of time or by the expiration of a notice to quit<sup>8</sup> given by the landlord<sup>9</sup>; and

1531 (3) at the time when an application for the grant of a new tenancy is made<sup>10</sup> the business or practice is still being carried on in the premises or part of the

premises comprised in the expiring tenancy and the serviceman is still the proprietor<sup>11</sup>.

This protection does not apply if at the time when the application might otherwise be made the premises comprised in the expiring tenancy:

- 1532 (a) are an agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy in relation to which that Act applies<sup>12</sup>;
- 1533 (b) are a holding, other than a holding excepted from this provision<sup>13</sup>, held under a farm business tenancy<sup>14</sup>; or
- 1534 (c) consist of or comprise premises, other than premises excepted from this provision<sup>15</sup>, which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>16</sup> for consumption on the premises<sup>17</sup>.

The protection applies where there is an interest belonging to Her Majesty in right of the Crown or of a government department, or held on behalf of Her Majesty for the purposes of a government department, in like manner as where no such interest subsists<sup>18</sup>; but, where an interest in any land belongs to a government department or is held on behalf of Her Majesty for the purposes of a government department, and the Minister or board<sup>19</sup> in charge of any government department is satisfied that for reasons of national security it is necessary that the use or occupation of the land should be discontinued or changed, the Minister or board may certify accordingly, in which case no order for the grant of a new tenancy comprising that land or any part of it may be made<sup>20</sup>.

1     le the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended): see the text and notes 2-20 infra; and PARA 781 et seq post. The provisions of the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) (see PARA 788 et seq post) do not apply in relation to tenancies granted under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended): s 33(1), (2). Nothing in Pt III (as amended) affects the time at which a tenancy is to be treated as terminating for the purposes of the Landlord and Tenant Act 1927 Pt I (as amended); and a tenant who by virtue of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (as amended) remains in occupation of any premises or part of premises after the expiring tenancy would otherwise have come to an end is to be treated for those purposes as having quitted his holding on the termination of that tenancy: s 33(3). Sections 27-36 (as amended) apply to England and Wales only: s 26.

2     For these purposes, 'relevant service' means the discharge, after 15 July 1950, of naval, military or air force duties of a description specified in ibid s 64(1), Sch 1 (as amended) (see ARMED FORCES vol 2(2) (Reissue) PARA 79), including training for the discharge of such duties: s 64(1). Any service rendered by virtue of the Reserve Forces Act 1980 ss 14(1), 34 (repealed) was relevant service for these purposes: see s 146(1) (repealed).

3     For these purposes, 'short period of training' means a period of relevant service of a description specified in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Sch 1 para 7 (see ARMED FORCES vol 2(2) (Reissue) PARA 79) performed under an obligation or voluntary arrangements under which its continuous duration is limited to less than three months: s 64(1) (definition amended by the Statute Law (Repeals) Act 1977).

4     For these purposes, 'serviceman' means a man or woman who performs a period of relevant service: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 64(1).

5     For these purposes, a serviceman is deemed to have been at any time the working proprietor of a business or professional practice carried on as mentioned in ibid s 27(1)(a) (see head (1) in the text) if, and only if, he was the proprietor of the business or practice during the whole of the period of one year immediately preceding that time, and during more than one-half of that period either (1) he worked whole-time in the actual management or conduct of that business or practice; or (2) he worked whole-time in the actual management or conduct of a business or professional practice of which that business or practice was a branch, and was mainly engaged in the management or conduct of that branch: s 27(2). 'Proprietor' means: (a) in the case of a business or practice carried on by a partnership firm, a partner in the firm on terms and conditions entitling him to not less than one-half of such profits of the firm as are from time to time distributable among the partners in it; (b) in the case of a business or practice carried on by a company, a person holding shares (including stock) in the

company amounting in nominal value to not less than one-half of the issued share capital of the company: s 27(3), (5)(a), (c). In relation to a business or practice carried on by a partnership firm or by a company, references in these provisions to the proprietor of the business or practice include references to a person being one of two such partners in the firm, or, as the case may be, being one of two persons each holding such shares in the company, and references to the working proprietor of the business or practice are to be construed accordingly: s 27(3). Shares held by a person's spouse or civil partner or held by him jointly with his spouse or civil partner are treated as shares held by that person: s 27(5) (amended by the Civil Partnership Act 2004 s 257, Sch 26 para 23). 'Company' has the same meaning as in the Companies Act 1985 (see COMPANIES vol 14 (2009) PARA 1): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(5)(b); Companies Consolidation (Consequential Provisions) Act 1985 s 31(6).

6 For these purposes, 'tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but does not include any relationship between a mortgagor and a mortgagee as such, and 'tenant' is to be construed accordingly: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 36(1). References to the premises comprised in a tenancy are references to the aggregate of the land comprised in the tenancy: s 36(2). 'Mortgage' includes any charge, and 'mortgagor' and 'mortgagee' are to be construed accordingly: s 36(1).

7 Ibid s 27(1)(a). In relation to a business or practice carried on by a partnership firm or by a company, references to a tenancy vested in the serviceman include references to a tenancy vested in one or more partners of the firm, or vested in the company, as the case may be; and for these purposes a tenancy is treated as having been vested at any time in a person if it was then vested in trustees, or held as part of the estate of a deceased person, and the first-mentioned person then had a right or permission to occupy the premises comprised in the tenancy, or the part of those premises in which the business or practice was being carried on, being a right or permission arising by reason of a beneficial interest, whether direct or derivative, under the trusts or, as the case may be, in the estate of the deceased person or under trusts of which the deceased person was trustee: s 27(4).

8 For these purposes, 'notice to quit' includes a notice to determine a term of years certain, but does not include a notice requiring possession where the Lands Clauses Consolidation Act 1845 s 121 (as amended) applies (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 699): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 36(1).

9 Ibid s 27(1)(b). For these purposes, 'the landlord', in relation to a tenancy, means the person for the time being entitled to the reversion and, where the reversion is subject to a mortgage and the mortgagee is in possession or he or a receiver appointed by him or by the court is in receipt of the rents and profits, includes that mortgagee and any such receiver as aforesaid; and 'the reversion', in relation to a tenancy, means the interest which, not being a mortgage term and apart from any such term, is for the time being in reversion immediately expectant upon the termination of the tenancy: s 36(1).

10 Ie under ibid Pt III (as amended): see PARA 781 et seq post.

11 Ibid s 27(1)(c). It follows that in all such cases the provisions of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) will also apply.

12 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(1) proviso (a) (s 27(1) proviso (a)-(c) substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 9(2)). As to such agricultural holdings see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

13 The reference in head (b) in the text to a holding excepted from the provision is a reference to a holding held under a farm business tenancy in which there is comprised a dwelling house occupied by the person responsible for the control (whether as tenant or servant or agent of the tenant) of the management of the holding: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(5A) (added by the Agricultural Tenancies Act 1995 Schedule para 9(4)). For these purposes, the expressions 'farm business tenancy' and 'holding', in relation to such a tenancy, have the same meaning as in the Agricultural Tenancies Act 1995 (see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(5)(bb) (added by the Agricultural Tenancies Act 1995 s 40, Schedule para 9(3)).

14 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(1) proviso (b) (as substituted: see note 12 supra).

15 The reference in head (c) in the text to premises excepted from the provision is a reference to premises in respect of which: (1) the excise licence for the time being in force is a licence the duty for which is the reduced duty payable under the Finance (1909-10) Act 1910 s 45; or (2) the Commissioners of Customs and Excise certify that no application for payment of such reduced duty has been made but that if it had such a licence could have been granted: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(6) (amended by the Agricultural Tenancies Act 1995 Schedule para 9(5)). However, as the relevant provisions of

the Finance (1909-10) Act 1910 were repealed and replaced by the Customs and Excise Act 1952, and the replacing provisions were in turn repealed and excise licences for the sale of intoxicating liquor by retail abolished by the Finance Act 1967 (see s 5, Sch 16 Pt I), it would seem that the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(6) (as amended) has no present application so that all on-licence premises are excluded. The redundant words in s 27(1) proviso and s 27(6) survive, however, the repeal of other spent phraseology by the Statute Law Repeals Act 1989 s 1(1), Sch 1 Pt I. On-licence premises are no longer excluded from the protection of the Landlord and Tenant Act 1954 Pt II (as amended): see PARA 775 ante.

16     le within the meaning of the Licensing Act 2003 s 14.

17     Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(1) proviso (c) (as substituted (see note 12 supra); amended by the Licensing Act 2003 s 198(1), Sch 6 paras 21, 24).

18     Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 35(1).

19     le in practice, the Secretary of State.

20     Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 35(2).

## **UPDATE**

### **780 Qualifications for protection**

NOTE 5--Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 27(5)(b) amended: SI 2009/1941.

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### **781. Application for grant of new tenancy.**

An order for the grant of a new tenancy<sup>1</sup> may not be made except upon an application to the county court made by the tenant<sup>2</sup> under the expiring tenancy<sup>3</sup>; and any such application must<sup>4</sup> be made:

- 1535 (1) if the expiring tenancy would otherwise expire by effluxion of time, not later than one month before the date on which that tenancy would so expire;
- 1536 (2) if the expiring tenancy would otherwise come to an end by notice to quit<sup>5</sup> given by the landlord<sup>6</sup>, after the giving of the notice to quit and not later than one month before the notice is due to expire<sup>7</sup>.

Where the expiring tenancy would otherwise come to an end by effluxion of time, or by notice to quit given by the landlord so as to expire not less than four months after the giving of the notice, the landlord may at any time not earlier than the beginning of the serviceman's<sup>8</sup> period of service in question nor earlier than four months before the date on which that tenancy would so come to an end serve on the tenant notice in the prescribed form<sup>9</sup> requiring him within the period of one month from the date of the service of the notice to elect whether or not to make an application for the grant of a new tenancy<sup>10</sup>. Where such a notice is served, no such application may be made in relation to the expiring tenancy after the end of that period of one month<sup>10</sup>; but the court to which an application could be made within the time so limited<sup>11</sup> has power, on an application made in that behalf either before or after the expiration of that time, to extend the time limited for making the application if the court is satisfied that there are or

were adequate reasons for not making that application within the time so limited and that in all the circumstances of the case it is reasonable to extend the time<sup>12</sup>.

- 1     le under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended): see PARA 780 ante; the text and notes 2-12 infra; and PARA 782 et seq post.
- 2     For the meaning of 'tenant' see PARA 780 note 6 ante.
- 3     For the meaning of 'the expiring tenancy' see PARA 780 ante.
- 4     le subject to the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(3).
- 5     For the meaning of 'notice to quit' see PARA 780 note 8 ante.
- 6     For the meaning of 'the landlord' see PARA 780 note 9 ante.
- 7     Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(1). In a case falling within s 29(1)(b) (see head (2) in the text), an application may be made at any time not later than one month after the giving of the notice to quit, if the latest time limited by s 29(1)(b) would fall before the end of that month: s 29(1) proviso. There are no special rules of procedure.
- 8     For the meaning of 'serviceman' see PARA 780 note 4 ante.
- 9     le in such form and containing such particulars as to the provisions of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (as amended) as may be prescribed by regulations made by the Lord Chancellor by statutory instrument. For the prescribed form of notice see the Reserve and Auxiliary Forces (Protection of Civil Interests) (Business Premises) Regulations 1951, SI 1951/1402, reg 3, Schedule. The Law of Property Act 1925 s 196 (as amended) (service of notices) (see PARA 621 ante) applies to notices for these purposes: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(6).
- 10    Ibid s 29(2).
- 11    le limited by ibid s 29(1), (2).
- 12    Ibid s 29(3).

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## 782. Continuation of expiring tenancy.

Where an application for the grant of a new tenancy is duly made<sup>1</sup> and the expiring tenancy<sup>2</sup> would otherwise come to an end before the relevant date, then, if the expiring tenancy would so come to an end after the application is made, it is treated as continuing until the relevant date<sup>3</sup>. If the expiring tenancy would have so come to an end at a time before the application is made, it is treated as having continued since that time until the application is made and as continuing thereafter until the relevant date<sup>4</sup>.

The relevant date for these purposes in relation to an application is the date falling one month after the date on which the proceedings on the application, including any proceedings on or in consequence of an appeal<sup>5</sup>, are finally determined, unless the application is withdrawn<sup>6</sup>. If the application is withdrawn, the relevant date is the date falling within one month after that withdrawal<sup>7</sup>.

- 1 le under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(1): see PARA 781 ante.
- 2 For the meaning of 'the expiring tenancy' see PARA 780 ante.
- 3 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(4)(a).
- 4 Ibid s 29(4)(b).
- 5 As to appeals see PARA 787 post.
- 6 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(5)(a).
- 7 Ibid s 29(5)(b).

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### **783. Court's discretionary power to grant new tenancy.**

On an application duly made<sup>1</sup> the court may, if in all the circumstances of the case it appears reasonable to do so, order that there shall be granted to the tenant<sup>2</sup> a tenancy<sup>3</sup> for such period, at such rent and on such terms and conditions as the court in all the circumstances thinks reasonable<sup>4</sup>. The parties are deemed thereafter to have entered into a lease of the premises or part of premises, as the case may be, creating such a tenancy<sup>5</sup>. In fixing the rent the court must disregard any consideration arising from the personal circumstances of any of the parties<sup>6</sup>.

Where the grant of a new tenancy has been so ordered, the statutory provisions for protection and for renewal of tenancies apply thereafter in relation to the new tenancy as if the required conditions<sup>7</sup> were fulfilled in relation to the new tenancy and the new tenancy were the expiring tenancy<sup>8</sup>.

- 1 le under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended): see PARA 782 ante.
- 2 For the meaning of 'tenant' see PARA 780 note 6 ante.
- 3 For the meaning of 'tenancy' see PARA 780 note 6 ante.
- 4 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(1).
- 5 Ibid s 30(1).
- 6 Ibid s 30(1) proviso.
- 7 le the conditions set out in ibid s 27(1)(a): see PARA 780 ante.
- 8 Ibid s 31. For the meaning of 'the expiring tenancy' see PARA 780 ante.

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#### **784. Grounds for refusal.**

The court<sup>1</sup> must not order the grant of a new tenancy<sup>2</sup> if it is satisfied:

- 1537 (1) that the tenant<sup>3</sup> has broken any of the terms or conditions of the expiring tenancy<sup>4</sup>, and that in view of the nature and circumstances of the breach a new tenancy ought not to be granted<sup>5</sup>; or
- 1538 (2) that the landlord<sup>6</sup> has offered to afford to the tenant, on terms and conditions which in the opinion of the court are reasonable, alternative accommodation which in the opinion of the court is suitable for the business or professional practice carried on under the expiring tenancy<sup>7</sup>; or
- 1539 (3) that the landlord reasonably requires possession in order that the premises<sup>8</sup> or a substantial part of those premises may be demolished or reconstructed<sup>9</sup>; or
- 1540 (4) where there subsists in the premises an interest belonging to a public authority<sup>10</sup>, that in the public interest a new tenancy ought not to be granted<sup>11</sup>; or
- 1541 (5) that, having regard to all the circumstances, greater hardship would be caused by ordering the grant of a new tenancy than by refusing to do so<sup>12</sup>.

1 The question whether a new tenancy should be granted is primarily a matter for the judge and the Court of Appeal will be slow to intervene unless he has misdirected himself: *Morrison's Associated Companies v Manfield & Sons* (1952) 159 Estates Gazette 342, CA; *JW Smart (Modern Shoe Repairs) Ltd v Hinckley and Leicestershire Building Society* [1952] 2 All ER 846, CA; *Dew v Bentley* (1953) 161 Estates Gazette 320, CA. In deciding whether it is reasonable to grant a new tenancy, the judge must take into account all the relevant circumstances as they exist at the date of the hearing and exercise his powers in a broad commonsense way as a man of the world: *John Kay Ltd v Kay* [1952] 2 QB 258, [1952] 1 All ER 813, CA. The failure of a tenant to exercise an option to renew his lease did not debar him from applying for a new tenancy: see *Valentine Productions (Fareham) Ltd v Southampton Properties Securities Ltd* (1951) 101 L Jo 724. All these cases were decisions under the Leasehold Property (Temporary Provisions) Act 1951 s 12(3) (repealed).

2 As to the court's power to make such an order see PARA 783 ante. For the meaning of 'tenancy' see PARA 780 note 6 ante.

3 For the meaning of 'tenant' see PARA 780 note 6 ante.

4 For the meaning of 'the expiring tenancy' see PARA 780 ante.

5 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(4)(a). A breach which does not prejudice or cause damage to the landlord ought not to be the ground for refusal of an order: see *John Kay Ltd v Kay* [1952] 2 QB 258 at 272, [1952] 1 All ER 813 at 818, CA.

6 For the meaning of 'the landlord' see PARA 780 note 9 ante.

7 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(4)(b).

8 I.e. the premises which are the subject of the expiring tenancy.

9 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(4)(c). Cf the Landlord and Tenant Act 1954 s 30(1)(f) (see PARA 741 ante); and *JW Smart (Modern Shoe Repairs) Ltd v Hinckley and Leicestershire Building Society* [1952] 2 All ER 846, CA.

10 The reference to an interest belonging to a public authority is a reference to an interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, or held by a local authority (as defined in the Town and Country Planning Act 1990: see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 3 note 3), by statutory undertakers (as so defined: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1009) or by a development corporation (as defined in the New Towns Act 1981: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq): Reserve and Auxiliary Forces (Protection of Civil

Interests) Act 1951 s 30(4); Interpretation Act 1978 s 17(2)(a); Planning (Consequential Provisions) Act 1990 s 2(4). The following are also deemed to be statutory undertakers for these purposes: (1) a gas transporter (see the Gas Act 1995 s 16(1), Sch 4 para 2(1)(vi)); (2) the Environment Agency, every water undertaker and every sewerage undertaker (see the Water Act 1989 s 190(1), Sch 25 para 1(1), (2)(v) (amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 3, Sch 2, PARA 4)); (3) the holder of a licence under the Electricity Act 1989 s 6 (as substituted and amended) (see s 112(1), Sch 16 para 1(1)(viii)); and (4) a licence holder under the Transport Act 2000 Pt I Ch I (ss 1-40) (as amended) (air traffic services) (see s 37, Sch 5 para 1(1), (2)(d)).

11 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(4)(d).

12 Ibid s 30(4)(e). The mere fact that a landlord could, if the court did not order a new lease, let the premises to a third person at a higher rent does not by itself amount to greater hardship: *John Kay Ltd v Kay* [1952] 2 QB 258, [1952] 1 All ER 813, CA. The statutory provision is primarily directed to the kind of case where the landlord has in mind some project with respect to the premises or requires them for some purpose or scheme of disposal for which vacant possession is essential: see *John Kay Ltd v Kay* supra at 274 and at 820 per Jenkins LJ (decided under the Leasehold Property (Temporary Provisions) Act 1951 s 12 (repealed)).

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## **785. Terms of a new tenancy.**

Any new tenancy<sup>1</sup> granted to a serviceman<sup>2</sup> must in general be a tenancy of the whole of the premises comprised in the expiring tenancy<sup>3</sup>. If, however, at the time of the application for a new tenancy the business or practice is being carried on in a separate part of those premises, whether that part is used exclusively for the purposes of the business or practice or not, any new tenancy so granted must be a tenancy of the whole of the premises comprised in the expiring tenancy, if the landlord<sup>4</sup> so requires, but otherwise must be a tenancy of that separate part<sup>5</sup>. Where in such a case the landlord does not require the new tenancy to be a tenancy of the whole of the premises comprised in the existing tenancy and those premises include such a separate part and also another separate part consisting of living accommodation occupied wholly or mainly by one or more dependants<sup>6</sup> of the serviceman or by a person who is employed for the purposes of the business or practice so carried on, and an application is made in that behalf, the new tenancy must include the residential part also<sup>7</sup>, unless the court in its discretion otherwise determines<sup>8</sup>.

The period, rent and terms and conditions of the tenancy must be such as the court considers reasonable; but, in fixing the rent, the court must disregard the personal circumstances of the parties<sup>9</sup>. Any period for which a tenancy is ordered to be granted<sup>10</sup> must begin with the end of the expiring tenancy, whether it ends in accordance with the terms thereof or after being continued<sup>11</sup> by statute<sup>12</sup>. In ordering the grant of a new tenancy the court must so limit the period of the tenancy, or must order the grant subject to such terms and conditions, as in the opinion of the court may be most suitable for securing that the tenancy does not extend beyond, or may be terminated by the landlord not later than, the expiration of four months from the end of the period of service in consequence of which the application was made<sup>13</sup>.

1 For the meaning of 'tenancy' see PARA 780 note 6 ante.

2 Ie under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended). For the meaning of 'serviceman' see PARA 780 note 4 ante.

3 Ibid s 28(1). For the meaning of 'the expiring tenancy' see PARA 780 ante; and for the meaning of references to premises comprised in a tenancy see PARA 780 note 6 ante.



4 For the meaning of 'the landlord' see PARA 780 note 9 ante.

5 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 28(2).

6 For these purposes, 'dependant' has the meaning assigned to it by *ibid* s 23(1) (as amended) (see PARA 1074 note 2 post) and thus means the serviceman's spouse or civil partner and any other member of his family who was wholly or mainly maintained by him immediately before the beginning of the period of service in question: s 28(4). The test whether living accommodation is occupied wholly or mainly by a dependant is to determine for what purpose the accommodation is being used and not how much of the accommodation is occupied: see *Berthelemey v Neale* [1952] 1 All ER 437 at 438, CA (decided under the Leasehold Property (Temporary Provisions) Act 1951 s 10 (repealed)).

7 Ie the new tenancy must be a tenancy of the separate part in which the business or practice is carried on and also of the separate part consisting of the living accommodation.

8 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 28(2) proviso. Any question arising under s 28(2) whether a part of the premises is to be treated as a separate part for the purposes of the grant of a new tenancy must be determined by the court on the hearing of the application: s 28(3).

9 See *ibid* s 30(1); and PARA 783 ante.

10 Ie under *ibid* s 30(1).

11 Ie by *ibid* s 29(4): see PARA 782 ante.

12 *Ibid* s 30(2).

13 *Ibid* s 30(3). Nothing in s 30(3) is to be construed as restricting the discretion of the court in a case where the court thinks it reasonable that the tenancy should come to an end, or be capable of being terminated by the landlord, at any earlier time: s 30(3) proviso. A tenancy ordered to be granted under s 30 is deemed to be a tenancy created by a lease authorised by the Law of Property Act 1925 s 99 (as amended) (see MORTGAGE vol 77 (2010) PARA 346 et seq) where the reversion is subject to a mortgage: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 30(6). For the meaning of 'mortgage' see PARA 780 note 6 ante.

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## 786. Provisions as to reversions.

Where in the case of a tenancy<sup>1</sup> the reversion<sup>2</sup> is itself a tenancy, and the period for which the court proposes<sup>3</sup> to order the grant of a new tenancy will extend beyond the date on which the reversion will come to an end, the power of the court<sup>4</sup> includes power to order such a grant until the end of the reversion and also to order the grant of such a reversionary tenancy or reversionary tenancies as may be required to secure that the combined effect of those grants will be equivalent to the grant of a tenancy for that period<sup>5</sup>.

Where a tenancy ('the inferior tenancy') is continued or granted<sup>6</sup> for a period such as to extend to or beyond the end of the term of a superior tenancy, the superior tenancy is deemed<sup>7</sup> so long as it subsists to be an interest in reversion expectant upon the termination of the inferior tenancy and, if there is no intermediate tenancy, to be the interest in reversion immediately expectant upon that termination<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 780 note 6 ante.

2 For the meaning of 'the reversion' see PARA 780 note 9 ante.

3 le in accordance with the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 26-31 (as amended): see PARA 780 et seq ante.

4 le under ibid ss 26-31 (as amended).

5 Ibid s 32(1). Part III (ss 26-40) (as amended) applies, subject to the necessary modifications, to the grant of a tenancy and of one or more reversionary tenancies: s 32(1).

6 le by virtue of any of the provisions of ibid Pt III (as amended).

7 le for the purposes of ibid Pt III (as amended) and of any other enactment and of any rule of law.

8 Ibid s 32(2). In the case of a tenancy continuing by virtue of s 29(4) (see PARA 782 ante) after the coming to an end of the reversion, the Law of Property Act 1925 s 139(1) (effect of the extinguishment of a reversion: see PARAS 638, 641 ante) applies as if references therein to the surrender or merger of the reversion included references to the determination of the reversion for any reason other than surrender or merger: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 32(3).

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## **787. Appeals.**

No appeal may be brought from any determination or order of the court<sup>1</sup> except with leave<sup>2</sup>. The court granting leave to appeal may direct<sup>3</sup> that, during the period beginning with the granting of leave to appeal and ending with the date to which a tenancy<sup>4</sup> is continued by statute where an application for a new tenancy is made<sup>5</sup>, the tenancy is to have effect subject to such modifications, terms or conditions as that court may specify<sup>6</sup>.

1 le under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt III (ss 26-40) (as amended): see PARA 780 et seq ante.

2 le except with the leave of the court or of the Court of Appeal: see ibid s 34(1). As to leave to appeal, and the routes of appeal, see generally CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

3 le notwithstanding anything in ibid s 29(4): see PARA 782 ante.

4 For the meaning of 'tenancy' see PARA 780 note 6 ante.

5 le under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 29(4).

6 Ibid s 34(2).

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## **(ii) Improvements**

### **A. SCOPE OF THE LEGISLATION**

## 788. The legislation.

On the termination of a tenancy of business premises a tenant<sup>1</sup> may have a right, under the Landlord and Tenant Acts 1927 and 1954<sup>2</sup>, to compensation for improvements on the property demised made either by him or his predecessors in title<sup>3</sup>. This right is limited to holdings within the Landlord and Tenant Act 1927, that is to say most tenancies of business premises<sup>4</sup>. That Act also conferred a right of compensation for goodwill<sup>5</sup> and a right to a new lease of a tenancy of business premises<sup>6</sup>, but these rights have been superseded by the relevant provisions of the Landlord and Tenant Act 1954<sup>7</sup>. The 1927 Act applies to land belonging to Her Majesty in right of the Crown or the Duchy of Lancaster, to land belonging to the Duchy of Cornwall and to land belonging to any government department<sup>8</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 The Landlord and Tenant Act 1927 came into operation on 25 March 1928: s 26(2) (repealed). The Landlord and Tenant Act 1954 came into operation on 1 October 1954 (s 70(2)), and Pt III (ss 47-50) amends and supplements the 1927 Act in relation to improvements. Both Acts extend to England and Wales only: Landlord and Tenant Act 1927 s 26(3); Landlord and Tenant Act 1954 s 70(3).

3 See the Landlord and Tenant Act 1927 s 1(1). For these purposes, 'predecessor in title' means any person through whom the tenant or landlord has derived title, whether by assignment, by will, by intestacy or by operation of law: s 25(1). For the meaning of 'landlord' see PARA 486 note 3 ante.

4 As to what premises are business premises for this purpose see PARA 790 post.

5 See the Landlord and Tenant Act 1927 s 4 (repealed). As to the former jurisdiction see *Hudd v Matthews* [1930] 2 KB 197, DC; *Whiteman Smith Motor Co Ltd v Chaplin* [1934] 2 KB 35, DC; and *Charrington & Co Ltd v Simpson* [1935] AC 325, HL.

6 See the Landlord and Tenant Act 1927 s 5 (repealed).

7 See PARA 701 et seq ante.

8 Landlord and Tenant Act 1927 s 24(1). The Crown Estate Commissioners, or other proper officer or body having charge of the land in question, or, if there is no other proper officer or body, such person as Her Majesty may appoint in writing under the royal sign manual, are or is deemed to be the landlord of land belonging to Her Majesty in right of the Crown, or to a government department: s 24(1), Sch 2 Pt I para 1(a); Crown Estate Act 1961 s 1. The Chancellor of the Duchy of Lancaster is deemed to be the landlord of land belonging to Her Majesty in right of the Duchy: Landlord and Tenant Act 1927 Sch 2 Pt I para 2(a). Such person as the Duke of Cornwall, or the possessor of the Duchy for the time being, appoints is deemed to be the landlord of land belonging to the Duchy of Cornwall: Sch 2 Pt I para 3(a). As to the further administrative provisions with regard to compensation in relation to Crown land see Sch 2 Pt I paras 2(b), 3; and as to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

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## 789. Contracting out.

Part I of the Landlord and Tenant Act 1927<sup>1</sup> applies notwithstanding any contract to the contrary made after 8 February 1927<sup>2</sup>; but, if on the hearing of a claim or application it appears to the tribunal<sup>3</sup> that a contract made after that date and before 10 December 1953 was made, in so far as it deprives any person of a right under the Act, for adequate consideration, the tribunal must give effect to the contract in determining the matter<sup>4</sup>. The onus of proof of the adequacy of the consideration is on the landlord<sup>5</sup>.

1 le the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 ante; the text and notes 2-4 infra; and PARA 790 et seq post.

2 Landlord and Tenant Act 1927 s 9 (amended by the Landlord and Tenant Act 1954 s 49).

3 'The tribunal' for the purposes of the Landlord and Tenant Act 1927 Pt I (as amended) means the court exercising jurisdiction in accordance with the provisions of the Landlord and Tenant Act 1954 s 63 (as amended) (see PARA 722 ante): Landlord and Tenant Act 1927 s 21 (substituted by the Landlord and Tenant Act 1954 s 63(10)). This is normally the county court: see PARA 722 ante. As to procedure see further PARA 805 post.

4 Landlord and Tenant Act 1927 s 9 (as amended: see note 2 supra); Landlord and Tenant Act 1954 ss 49, 50.

5 *Holt v Cadogan* (1930) 46 TLR 271, CA.

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## **790. Premises to which the right of compensation for improvements applies.**

Subject to certain exceptions<sup>1</sup>, the holdings to which Part I of the Landlord and Tenant Act 1927<sup>2</sup> applies are any premises held under a lease<sup>3</sup> and used wholly or partly for carrying on there any trade or business<sup>4</sup>. There is, however, no statutory definition of 'trade or business' for these purposes<sup>5</sup>. Premises regularly used for carrying on a profession are deemed, in relation to improvements, to be premises used for carrying on a trade or business<sup>6</sup>, but premises used for the carrying on there of any profession are not otherwise deemed for these purposes to be used for the purpose of carrying on a trade or business<sup>7</sup>.

Premises are not deemed for these purposes to be premises used for the carrying on there of a trade or business by reason that the tenant of them carries on the business of subletting those premises as residential flats, whether or not the provision of meals or any other service for the occupants of the flats is undertaken by him<sup>8</sup>.

1 See PARA 791 post.

2 le the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARAS 788-789 ante, PARA 791 et seq post.

3 For these purposes, 'lease' means a lease, underlease or other tenancy, assignment operating as a lease or underlease, or an agreement for such lease, underlease, tenancy or assignment: *ibid* s 25(1). This definition is wide enough to cover a weekly tenancy: see *Morris v Hillier* (1949) 153 Estates Gazette 284.

4 Landlord and Tenant Act 1927 s 17(1). It is immaterial whether the lease was made before or after the commencement of the Act: s 17(1). The premises to which the Act applies are described in it as 'holdings': see s 17(1). 'The holding' is given a different meaning for the purposes of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 706 note 23 ante.

5 The following definitions or instances from cases on other subjects may be helpful. A person carries on a trade or business when he 'habitually does and contracts to do a thing capable of producing profit' (*Erichsen v Last* (1881) 8 QBD 414, CA, per Cotton LJ), but it has been said that it is not necessary in order to constitute the carrying on of a trade that the persons engaged in it should make or desire to make a profit by it (*Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1888) 22 QBD 279, DC, per Lord Coleridge CJ). Almost anything which is an occupation, as distinguished from a pleasure, and which is an occupation or duty which requires attention is a business: *Rolls v Miller* (1884) 27 ChD 71 at 88, CA, per Lindley

LJ. 'Business' denotes the carrying on of a serious occupation, not necessarily confined to commercial or profit-making undertakings, and includes the administrative functions of Her Majesty's government: see *Town Investments Ltd v Department of the Environment* [1978] AC 359 at 402, [1977] 1 All ER 813 at 835, HL, per Lord Kilbrandon (where the decision that the carrying on of the administrative functions of government by servants of the Crown was the carrying on of 'business' or of 'a business' by the Crown has to be read in the light of the wording of the Counter-Inflation (Business Rents) Order 1972, SI 1972/1850, art 2(2) (revoked)). What a person does with his spare time in his home is most unlikely to qualify for the description of 'business' unless it has some direct commercial involvement in it, whether it be a hobby or a recreation or the performance of a social duty: *Abernethie v AM and J Kleiman Ltd* [1970] 1 QB 10, [1969] 2 All ER 790, CA, per Widgery LJ. See also *Smith v Anderson* (1880) 15 ChD 247, CA; and *Brighton College v Marriott* [1925] 1 KB 312, CA; affd [1926] AC 192, HL. In other contexts 'business' can attract quite different meanings: eg for the purposes of the Criminal Evidence Act 1965 (repealed) a national health service hospital was not a 'business': see *R v Crayden* [1978] 2 All ER 700, [1978] 1 WLR 604, CA (where *Town Investments Ltd v Department of the Environment* supra and *Rolls v Miller* supra were distinguished). The absence of a definition of 'business' in the Landlord and Tenant Act 1927 is to be contrasted with the expanded meaning given to that word for the purposes of the Landlord and Tenant Act 1954 Pt II (as amended) by s 23(2) (see PARA 707 ante), and it follows that it is possible for a tenancy to attract the security of tenure afforded to 'business tenants' by Pt II (as amended) and yet not to attract the benefits of the Landlord and Tenant Act 1927 Pt I (as amended).

6 Ibid s 17(3) proviso. 'Profession' is not defined, but some help may be gained from cases decided for the purposes of income tax: see INCOME TAXATION vol 23(1) (Reissue) PARA 135; and see also *Stuchbery v General Accident, Fire and Life Assurance Corp Ltd* [1949] 2 KB 256, [1949] 1 All ER 1026, CA (insurance and building society agency carried on by solicitors).

7 Landlord and Tenant Act 1927 s 17(3)(a).

8 Ibid s 17(3)(b). This does not, however, exclude a guest house: *Ireland v Taylor* [1949] 1 KB 300, [1948] 2 All ER 450, CA. Different considerations apply in respect of security of tenure: see *Lee Verhulst (Investments) Ltd v Harwood Trust* [1973] QB 204, [1972] 3 All ER 619, CA; *Lewis v Weldcrest Ltd* [1978] 3 All ER 1226, [1978] 1 WLR 1107, CA; and see PARA 706 ante.

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## 791. Excluded premises.

Part I of the Landlord and Tenant Act 1927<sup>1</sup> does not apply to:

- 1542 (1) premises held under a mining lease<sup>2</sup>;
- 1543 (2) agricultural holdings within the meaning of the Agricultural Holdings Act 1986 held under leases in relation to which that Act applies<sup>3</sup>;
- 1544 (3) holdings held under farm business tenancies within the meaning of the Agricultural Tenancies Act 1995<sup>4</sup>;
- 1545 (4) any holding let to a tenant<sup>5</sup> as the holder of any office, appointment or employment from the landlord<sup>6</sup> and continuing so long as the tenant holds that post<sup>7</sup>, but, in the case of a tenancy created after 24 March 1928, only if the contract is in writing and expresses the purpose for which the tenancy is created<sup>8</sup>;
- 1546 (5) a tenancy granted under the statutory provisions protecting certain business tenancies held by servicemen<sup>9</sup>;
- 1547 (6) a Concession lease<sup>10</sup> granted by the Secretary of State under the Channel Tunnel Act 1987<sup>11</sup>;
- 1548 (7) a development agreement lease<sup>12</sup> granted by the Secretary of State in connection with the Channel Tunnel Rail Link or a lease granted by him which is one on the grant of which a development agreement, or an agreement connected with such an agreement<sup>13</sup>, is conditional, or which contains a statement to the

effect that it is granted for purposes connected with the construction or operation of the rail link<sup>14</sup>.

Where a long mixed (that is, business and residential) tenancy to which the provisions of the Leasehold Reform Act 1967 apply<sup>15</sup> is terminated on or after its contractual expiry date by an order made on the ground that the landlord intends to redevelop<sup>16</sup> or to reside in the premises<sup>17</sup>, the tenant is not entitled to compensation under the Landlord and Tenant Act 1927<sup>18</sup> but is entitled to compensation under the 1967 Act<sup>19</sup>. Similarly, where a new lease or sublease is terminated under the Leasehold Reform, Housing and Urban Development Act 1993<sup>20</sup>, the tenant is entitled to compensation under the 1993 Act<sup>21</sup> and not under the 1927 Act<sup>22</sup>.

1    ie the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante, PARA 792 et seq post.

2    Ibid s 17(1). For the meaning of 'mining lease' see ibid s 25(1); and PARA 708 note 6 ante. The Act applies, however, with modifications, where the premises are subject to a compulsory rights order under the Opencast Coal Act 1958: see s 30; and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 481.

3    Landlord and Tenant Act 1927 s 17(1)(a) (s 17(1)(a), (b) substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 5). As to agricultural holdings see PARA 806 post; and AGRICULTURAL LAND vol 1 (2008) PARA 323. The Agricultural Holdings Act 1986 contains its own code of provisions relating to compensation: see Pt V (ss 60-78) (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 414 et seq. As to compensation under that Act in relation to smallholdings and market gardens see ss 79-81; and as to compensation on quitting allotments see AGRICULTURAL LAND vol 1 (2008) PARA 567 et seq.

4    Landlord and Tenant Act 1927 s 17(1)(b) (as substituted: see note 3 supra). As to farm business tenancies see PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302. The Agricultural Tenancies Act 1995 contains its own code of provisions relating to compensation: see Pt III (ss 15-27) (as amended); and AGRICULTURAL LAND vol 1 (2008) PARA 310 et seq.

5    For the meaning of 'tenant' see PARA 703 note 9 ante.

6    For the meaning of 'landlord' see PARA 486 note 3 ante; and for the meaning of 'lease' see PARA 790 note 3 ante.

7    Landlord and Tenant Act 1927 s 17(2).

8    Ibid s 17(2). The legislation will not apply, however, where there is a service occupancy, ie a licence (see PARA 15 ante) and not a tenancy.

9    See the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 33(1), (2); and PARA 780 note 1 ante.

10   For the meaning of 'Concession lease' see PARA 708 note 24 ante.

11   See the Channel Tunnel Act 1987 s 16(2); and see further PARA 708 note 25 ante

12   For the meanings of 'development agreement lease' and 'development agreement' see PARA 708 note 26 ante.

13   As to when an agreement is connected with a development agreement see PARA 708 note 27 ante.

14   See the Channel Tunnel Rail Link Act 1996 s 40(1), (2). See further RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 324.

15   See PARA 1389 et seq post.

16   See the Leasehold Reform Act 1967 s 17; and PARAS 1485-1486 post.

17   See ibid s 18 (as amended); and PARAS 1488-1490 post.

18   Ibid ss 17(3), 18(5), Sch 2 para 6(1); and see PARAS 1492, 1495 post.

19 See *ibid* Sch 2 (as amended); and PARA 1491 et seq post.

20 *Ie* in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 (as amended): see PARA 1725 et seq post.

21 See *ibid* Sch 14 (as amended); and PARAS 1726-1731 post.

22 *Ibid* Sch 14 para 6(1); and see PARA 1728 post.

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### **792. Improvements to which right to compensation applies.**

There is no statutory definition of 'improvement' in the Landlord and Tenant Act 1927<sup>1</sup>, but it includes the erection of any building<sup>2</sup>. Demolition and rebuilding, not necessarily for the same purpose as the original, may be an improvement<sup>3</sup>.

In the case of premises used partly for the purposes of a trade or business and partly for other purposes, the statutory right to compensation<sup>4</sup> applies to improvements only if and so far as they are improvements in relation to the trade or business<sup>5</sup>.

A trade or other fixture which the tenant is by law entitled to remove does not constitute an improvement for the statutory purposes<sup>6</sup>.

1 Some guidance may be had from the cases concerning the withholding of consent to improvements under covenants against making improvements without consent where the Landlord and Tenant Act 1927 s 19(2) applies: see PARA 470 ante.

2 See *ibid* s 1(1).

3 *National Electric Theatres Ltd v Hudgell* [1939] Ch 553, [1939] 1 All ER 567.

4 *Ie* the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante, PARA 793 et seq post.

5 *Ibid* s 17(4).

6 See *ibid* s 1(1). As to fixtures see PARA 172 et seq ante. For the purposes of the Landlord and Tenant Act 1954 s 34 (as amended) (assessment of rent under new tenancy: see PARAS 753-755 ante), such fixtures and fittings are also to be disregarded since they either belong to the tenant or, if annexed, may be detached and removed by the tenant. See *New Zealand Government Property Corp'n v HM & S Ltd* [1982] QB 1145, [1982] 1 All ER 624, CA (a decision relating to a rent review).

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### **793. Nature of the right to compensation.**

A tenant<sup>1</sup> of a holding to which Part I of the Landlord and Tenant Act 1927<sup>2</sup> applies is entitled, if a claim for the purpose is made in the prescribed manner<sup>3</sup> and within the statutory time limit<sup>4</sup>, to be paid compensation by his landlord<sup>5</sup> at the termination of his tenancy in respect of any improvement<sup>6</sup> on his holding made on or after 25 March 1928<sup>7</sup> by the tenant or his predecessors in title<sup>8</sup> which adds at the termination of the tenancy to the letting value of the holding<sup>9</sup>. The landlord may give notice of objection to a proposed improvement, but, if he does so, the tenant may apply to the tribunal for a certificate that the improvement is proper<sup>10</sup>. If the tribunal so certifies, or if the landlord does not give notice of objection, then as against the landlord and any superior landlord the tenant may execute the improvement notwithstanding anything in the lease<sup>11</sup>. Compensation is not payable for any improvement made in pursuance of a statutory obligation unless it was begun on or after 1 October 1954<sup>12</sup>; nor for any improvement which the tenant or his predecessors in title were under an obligation to make in pursuance of a contract<sup>13</sup> entered into whether before or after 25 March 1928 for valuable consideration, including a building lease<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 The Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante, PARA 794 et seq post.

3 As to notice of intention to carry out an improvement see PARA 795 post; and as to making a claim see PARA 799 post.

4 The time limited by the Landlord and Tenant Act 1954 s 47: see PARA 799 post.

5 For the meaning of 'landlord' see PARA 486 note 3 ante. The designation of landlord and tenant continues to apply to the parties until the conclusion of any proceedings taken under or in pursuance of the Landlord and Tenant Act 1927 in respect of compensation: s 25(2).

6 As to what constitutes an improvement see PARA 792 ante. Certain improvements are excepted: see the text and notes 12-14 infra.

7 See the Landlord and Tenant Act 1927 s 2(1)(a).

8 For the meaning of 'predecessor in title' see PARA 788 note 3 ante. The person who made the improvement must have been the predecessor in title to the tenancy not the business: see *Williams v Viscount Portman* [1951] 2 KB 948, [1951] 2 All ER 539, CA (new tenancy granted to assignee of business); *Corsini v Montague Burton Ltd* [1953] 2 QB 126, [1953] 2 All ER 8, CA (improvement by licensee of previous tenant); *Pasmore v Whitbread & Co Ltd* [1953] 2 QB 226, [1953] 1 All ER 361, CA (improvement by subtenant). As to the rights of a mesne landlord who has paid compensation see PARA 794 post.

9 Landlord and Tenant Act 1927 s 1(1) (amended by the Landlord and Tenant Act 1954 s 47(5)).

10 See the Landlord and Tenant Act 1927 s 3(1); and PARA 796 post. For the meaning of 'the tribunal' see PARA 789 note 3 ante.

11 See *ibid* s 3(4); and PARA 796 post.

12 *Ibid* s 2(1)(a); Landlord and Tenant Act 1954 s 48(1).

13 This includes a contract with a third person: *Owen Owen Estate Ltd v Livett* [1956] Ch 1, [1955] 2 All ER 513 (where the contract was with an undertenant).

14 Landlord and Tenant Act 1927 s 2(1)(b).

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## 794. Mesne landlords.

Where, in the case of any holding, there are several persons standing in the relation to each other of lessor and lessee, the following provisions apply<sup>1</sup>.

Any mesne landlord<sup>2</sup> who has paid or is liable to pay compensation<sup>3</sup> is entitled, at the end of his term, to compensation from his immediate landlord in the like manner and on the same conditions as if he himself had made the improvement<sup>4</sup> in question, except that it is sufficient if the claim for compensation is made at least two months before the expiration of his term<sup>5</sup>. The claim must be similar in form and contents to that made by a tenant<sup>6</sup>.

A mesne landlord is not, however, entitled to make such a claim unless he has, within the time and in the manner prescribed<sup>7</sup>, served on his immediate superior landlord copies of all documents relating to proposed improvements and claims which have been sent<sup>8</sup> to him<sup>9</sup>. A mesne landlord must immediately serve a copy of the claim on his immediate superior landlord; and if the person so served is not the freeholder, he must serve a copy of the document on his landlord and so on from landlord to landlord<sup>10</sup>.

Where copies of such documents are served upon any superior landlord, he, in addition to the mesne landlord, has the same statutory powers<sup>11</sup> as if he were the immediate landlord of the occupying tenant<sup>12</sup>. He may thus, in the manner and to the extent prescribed, appear before the tribunal<sup>13</sup> and will be bound by the proceedings<sup>14</sup>.

1 Landlord and Tenant Act 1927 s 8(1).

2 For these purposes, references to a landlord include references to his predecessors in title: *ibid* s 8(2). For the meaning of 'landlord' see PARA 486 note 3 ante; and for the meaning of 'predecessor in title' see PARA 788 note 3 ante.

3 *Ie* under *ibid* Pt I (ss 1-17) (as amended): see PARA 788 et seq ante, PARA 795 et seq post.

4 As to what constitutes an improvement see PARA 792 ante.

5 Landlord and Tenant Act 1927 s 8(1) (amended by the Landlord and Tenant Act 1954 ss 45, 68(1), Sch 7).

6 See *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.8. As to the contents of the claim form see PARA 799 post.

7 For these purposes, 'prescribed' means prescribed by rules of court or by a practice direction: Landlord and Tenant Act 1927 s 25(1) (definition amended by the Civil Procedure (Modification of Enactments) Order 2001, SI 2001/2717, art 3).

8 *Ie* in pursuance of the Landlord and Tenant Act 1927 Pt I (as amended).

9 *Ibid* s 8(1).

10 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.9. At this stage, 'claim' does not relate to proceedings before the court: para 5.9.

11 *Ie* the powers conferred by or in pursuance of the Landlord and Tenant Act 1927 Pt I (as amended).

12 *Ibid* s 8(1).

13 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

14 Landlord and Tenant Act 1927 s 8(1).

PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/ (1) PROTECTION OF BUSINESS TENANCIES/(ii) Improvements/B. MAKING THE IMPROVEMENT/795. Notice of proposed improvement.

## **B. MAKING THE IMPROVEMENT**

### **795. Notice of proposed improvement.**

Where a tenant<sup>1</sup> of a holding<sup>2</sup> proposes to make an improvement on his holding, he must serve on his landlord<sup>3</sup> notice of his intention to make such improvement, together with a specification and plan showing the proposed improvement and the part of the existing premises affected by it<sup>4</sup>. There is no prescribed form for such a notice and a letter will suffice<sup>5</sup>. Where appropriate, he must wait until the landlord's time for objection has elapsed or his objection has been disposed of<sup>6</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 I.e. a holding to which the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) applies: see PARA 788 et seq ante, PARA 796 et seq post.

3 For the meaning of 'landlord' see PARA 486 note 3 ante.

4 Landlord and Tenant Act 1927 s 3(1). As to the service of notices see PARA 703 ante. At the request of any superior landlord or at the request of the tribunal the tenant must supply such copies of the plans and specifications of the proposed improvement as may be required: s 3(3). For the meaning of 'the tribunal' see PARA 789 note 3 ante.

5 *Deerfield Travel Services Ltd v Wardens and Society of the Mystery or Art of the Leathersellers of the City of London* (1982) 46 P & CR 132, CA.

6 See PARA 796 post.

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### **796. Landlord's objection.**

If the improvement consists of works which are carried out by the tenant<sup>1</sup> in pursuance of a statutory obligation, he may proceed with the work as soon as he has given the landlord notice of his intention to do so<sup>2</sup>. In all other cases, if the landlord<sup>3</sup> objects<sup>4</sup> to the proposed improvement, he must, within three months<sup>5</sup> after the service of the tenant's notice, serve on the tenant notice of his objection to it<sup>6</sup>. The tenant may then apply in the prescribed manner<sup>7</sup> to the tribunal<sup>8</sup>, which, after ascertaining that the notice of intention has been served upon any superior landlords interested and after giving them an opportunity of being heard, and if it is satisfied that the improvement:

1549 (1) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy; and

1550 (2) is reasonable and suitable to its character<sup>9</sup>; and

1551 (3) will not diminish the value of any other property belonging to the same landlord or to any superior landlord from whom the immediate landlord of the tenant directly or indirectly holds,

and after making such modifications, if any, in the specification or plan as the tribunal thinks fit, or imposing such other conditions as it may think reasonable, may certify in the prescribed manner<sup>10</sup> that the improvement is a proper one<sup>11</sup>.

If, however, the landlord proves that he has offered to execute the improvement himself in consideration of a reasonable increase of rent or of such increase of rent as the tribunal may determine, the tribunal may not give such a certificate unless it is subsequently shown to the satisfaction of the tribunal that the landlord has failed to carry out his undertaking<sup>12</sup>. The court has no power to give a retrospective certificate in relation to work already done by the tenant<sup>13</sup>.

Where no notice of objection by the landlord to a proposed improvement has been served within the time allowed, or where the tribunal has certified an improvement to be a proper improvement, it is lawful for the tenant, as against the immediate and any superior landlord, to execute the improvement according to the plan and specification served on the landlord, or according to such plan and specification as modified by the tribunal or by agreement between him and his landlord or the landlords affected, notwithstanding anything to the contrary in any lease of the premises<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 This is so because the Landlord and Tenant Act 1927 s 3(1) does not have effect in relation to an improvement made in pursuance of a statutory obligation except so much of it as requires the tenant to serve on the landlord notice of his intention to make the improvement together with such a plan and specification as are mentioned therein, and copies of them at the request of any superior landlord, and enables the tenant to obtain at his expense a certificate from the landlord or the tribunal (see PARA 798 post) that the improvement has been duly executed: Landlord and Tenant Act 1954 s 48(1). As to what constitutes an improvement see PARA 792 ante.

3 For the meaning of 'landlord' see PARA 486 note 3 ante.

4 As to the position where the landlord unreasonably refuses consent required under a covenant cf para 471 ante.

5 Where an informal notice from the tenant is incomplete, time will run only from the date the relevant particulars necessary to complete the document as a notice of intention are delivered: *Deerfield Travel Services v Wardens and Society of the Mystery or Art of the Leathersellers of the City of London* (1982) 46 P & CR 132, CA.

6 See the Landlord and Tenant Act 1927 s 3(1). As to the service of notices see PARA 703 ante.

7 For the meaning of 'prescribed' see PARA 794 note 7 ante.

8 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

9 In considering whether an improvement is reasonable and suitable to the character of the holding, the tribunal must have regard to the evidence brought before it by the landlord or any superior landlord (but not by any other person) that the improvement is calculated to injure the amenity or convenience of the neighbourhood: Landlord and Tenant Act 1927 s 3(2).

10 The certificate is embodied in a court order: see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.7.

11 Landlord and Tenant Act 1927 s 3(1). The tribunal may defer making any order as to the costs of proceedings before it until after the expiration of the time fixed for the completion of the improvement: see s 3(5).

12 *Ibid* s 3(1) proviso. The landlord or any person authorised by him may at all reasonable times enter on the holding or any part of it to execute any improvement he has undertaken to execute and to make any inspection

of the premises which may reasonably be required for the purposes of Pt I (ss 1-17) (as amended): s 10. The tenant is, however, permitted to change his mind and withdraw his notice under s 3(1), in which case s 3(1) proviso does not entitle the landlord to proceed to execute the improvement; the ordinary meaning of that proviso is merely to preclude the court being able to give a certificate, thereby precluding authorisation for the tenant to carry out the work under s 3(4): see *Norfolk Capital Group Ltd v Cadogan Estates Ltd* [2004] EWHC 384 (Ch), [2004] 3 All ER 889, [2004] 1 WLR 1458.

13 *Hogarth Health Club Ltd v Westbourne Investments Ltd* (1989) 59 P & CR 212, [1990] 1 EGLR 89, CA.

14 Landlord and Tenant Act 1927 s 3(4). This does not, however, authorise a tenant to execute any improvement in contravention of any restriction created or imposed for naval, military or air force purposes or for civil aviation purposes under the powers of the Civil Aviation Act 1982, or for securing any rights of the public over the foreshore or the bed of the sea: Landlord and Tenant Act 1927 s 3(4) proviso; Interpretation Act 1978 s 17(2)(a).

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### **797. Conditions precedent to right to compensation.**

A tenant<sup>1</sup> is not entitled to claim compensation<sup>2</sup> in respect of any improvement<sup>3</sup> unless:

- 1552 (1) he has, or his predecessors in title<sup>4</sup> have, served notice of the proposal to make the improvement<sup>5</sup> and, in case the landlord<sup>6</sup> has served notice of objection to it, the improvement has been certified by the tribunal<sup>7</sup> to be a proper improvement and the tenant has complied with the conditions, if any, imposed by the tribunal<sup>8</sup>;
- 1553 (2) the improvement is completed within such time after the service on the landlord of the notice of the proposed improvement as may be agreed between the tenant and the landlord or may be fixed by the tribunal<sup>9</sup>.

The tenant must make his claim in the prescribed form and within the prescribed time limit when his tenancy determines<sup>10</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 Ie under the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante, PARA 798 et seq post.

3 As to what constitutes an improvement see PARA 792 ante.

4 For the meaning of 'predecessor in title' see PARA 788 note 3 ante.

5 Ie notice under the Landlord and Tenant Act 1927 s 3 of his proposal to make the improvement, delivering a plan and specification: see PARA 795 ante.

6 For the meaning of 'landlord' see PARA 486 note 3 ante.

7 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

8 Landlord and Tenant Act 1927 s 3(5). As to certification by the tribunal see PARA 796 ante.

9 Ibid s 3(5).

10 See PARA 799 post.

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### **798. Certificate of execution.**

Where the tenant<sup>1</sup> has executed an improvement<sup>2</sup> of which he has duly served notice<sup>3</sup> and with respect to which either no notice of objection has been served by the landlord<sup>4</sup> or a certificate that it is a proper improvement has been obtained from the tribunal<sup>5</sup>, the tenant may require the landlord to furnish to him a certificate that the improvement has been duly executed<sup>6</sup>. Where the landlord furnishes such a certificate, the tenant is liable to pay any reasonable expenses incurred for the purpose by the landlord; and, if any question arises as to the reasonableness of such expenses, it must be determined by the tribunal<sup>7</sup>.

If the landlord refuses or fails to furnish the certificate within one month after the service of the request to do so, the tenant may apply to the tribunal, which, if satisfied that the improvement has been duly executed, must give a certificate to that effect<sup>8</sup>.

1 For the meaning of 'tenant' see PARA 703 note 9 ante.

2 As to what constitutes an improvement see PARA 792 ante.

3 Ie in accordance with the Landlord and Tenant Act 1927 s 3: see PARA 795 ante.

4 For the meaning of 'landlord' see PARA 486 note 3 ante.

5 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

6 Landlord and Tenant Act 1927 s 3(6). There is no prescribed form of certificate for this purpose. If the court intends to certify under s 3 that an improvement is a proper improvement or has been duly executed, it must do so by way of an order: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.7.

7 Landlord and Tenant Act 1927 s 3(6).

8 Ibid s 3(6).

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## **C. COMPENSATION**

### **799. Claim for compensation.**

To obtain compensation the tenant or the mesne landlord must make a claim in writing, signed by the claimant or his solicitor or agent, which includes details of:

- 1554 (1) the name and address of the claimant and of the landlord against whom the claim is made;

- 1555 (2) the property to which the claim relates;
- 1556 (3) the nature of the business carried on at the property;
- 1557 (4) a concise statement of the nature of the claim;
- 1558 (5) particulars of the improvement, including the date when it was completed and costs; and
- 1559 (6) the amount claimed<sup>1</sup>.

Where a tenancy is terminated by notice to quit<sup>2</sup>, whether given by the landlord<sup>3</sup> or by the tenant<sup>4</sup>, or by a notice given by any person under Part I<sup>5</sup> or Part II<sup>6</sup> of the Landlord and Tenant Act 1954, the time for making a claim for compensation at the termination of the tenancy<sup>7</sup> is a time falling within the period of three months beginning on the date on which the notice is given<sup>8</sup>. Where a tenancy comes to an end by effluxion of time, the claim must be made not earlier than six nor later than three months before the coming to an end of the tenancy<sup>9</sup>. Where it is terminated by forfeiture or re-entry, the claim must be made within the period of three months beginning with the effective date of the order of the court for the recovery of the land comprised in the tenancy<sup>10</sup> or, if the tenancy is terminated by re-entry without such an order, the period of three months beginning with the date of the re-entry<sup>11</sup>.

1 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.8. As to service of a copy of the claim by the mesne landlord see PARA 5.9; and PARA 794 note 10 ante. At this stage, 'claim' does not relate to proceedings before the court: para 5.9.

The practice direction prescribes the manner of making a claim pursuant to the Landlord and Tenant Act 1927 s 1(1) (as amended) (see PARA 793 ante) or s 8(1) (as amended) (see PARA 794 ante) while the Landlord and Tenant Act 1954 s 47 (see the text and notes 2-11 infra) prescribes the time limits. When a claim is made, the omission of the required particulars is fatal and leave will not be given to amend out of time: *British and Colonial Furniture Co Ltd v McIlroy Ltd* [1952] 1 KB 107, [1952] 1 All ER 12. As to the service of the claim and of other notices under the Landlord and Tenant Act 1927 see PARA 703 ante.

2 As to how far the making of a claim estops the tenant from disputing the validity of a notice to quit see *W Davis (Spitalfields) Ltd v Huntley* [1947] 1 All ER 246; affd [1947] 2 All ER 371n, CA, where the point was left open; *Adler v Blackman* [1952] 2 All ER 41; affd [1953] 1 QB 146, [1952] 2 All ER 945, CA.

3 For the meaning of 'landlord' see PARA 486 note 3 ante.

4 For the meaning of 'tenant' see PARA 703 note 9 ante.

5 Ie the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq post.

6 Ie ibid Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

7 In ibid Pt III (ss 47-50), 'compensation' means compensation under the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) in respect of an improvement: Landlord and Tenant Act 1954 s 50.

8 Ibid ss 47(1), 50. Where, however, the tenancy is terminated by a tenant's request for a new tenancy under s 26 (as amended) (see PARA 718 ante), the time is a time falling within the period of three months beginning on the date on which the landlord gives notice or, if he has not given such a notice, the latest date on which he could have given notice under s 26(6) or, as the case may be, s 57(4)(a) (see PARA 769 ante) or s 58(1) (b) (see PARA 770 ante): s 47(1) proviso.

9 Ibid s 47(2).

10 For these purposes, the reference to the effective date of an order is a reference to the date on which the order is to take effect according to its terms or the date when it ceases to be subject to appeal, whichever is the later: ibid s 47(4).

11 Ibid s 47(3). The provisions of s 47 bind the Crown and apply to land belonging to Her Majesty in right of the Crown or the Duchy of Lancaster, or belonging to the Duchy of Cornwall or any government department: s 56(5).

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### **800. Amount of compensation.**

The sum to be paid as compensation for any improvement<sup>1</sup> must not exceed either the net addition to the value of the holding as a whole which may be determined to be the direct result of the improvement<sup>2</sup> or the reasonable cost of carrying out the improvement at the termination of the tenancy<sup>3</sup>. Such cost is, however, subject to a deduction of an amount equal to the cost, if any, of putting the works constituting the improvement into a reasonable state of repair, except so far as such cost is covered by the liability of the tenant<sup>4</sup> under any covenant or agreement as to the repair of the premises<sup>5</sup>.

In determining the amount of the net addition to the value of the holding, regard must be had to the purposes for which it is intended that the premises are to be used after the termination of the tenancy<sup>6</sup>. If it is shown that it is intended to demolish or to make structural alterations in the premises or any part of them, or to use the premises for a different purpose, regard must be had to the effect of such demolition, alteration or change of user on the additional value attributable to the improvement and to the length of time likely to elapse between the termination of the tenancy and the demolition, alteration or change of user<sup>6</sup>. If the tribunal<sup>7</sup> determines that, on account of the intention to demolish or alter or to change the user of the premises, no compensation or a reduced amount of compensation is to be paid, the tribunal may authorise the tenant to make a further application for compensation if effect is not given to the intention within such time as may be fixed by the tribunal<sup>8</sup>.

In determining the compensation for an improvement, the tribunal must also take into consideration, in reduction of the tenant's claim, any benefits which the tenant or his predecessors in title<sup>9</sup> may have received from the landlord<sup>10</sup> or his predecessors in title in consideration expressly or impliedly of the improvement<sup>11</sup>.

In the absence of agreement between the parties, all questions as to the right to, or amount of, compensation are to be determined by the tribunal<sup>12</sup>.

1 As to what constitutes an improvement see PARA 792 ante.

2 Landlord and Tenant Act 1927 s 1(1) proviso (a).

3 Ibid s 1(1) proviso (b).

4 For the meaning of 'tenant' see PARA 703 note 9 ante.

5 Landlord and Tenant Act 1927 s 1(1) proviso (b). Thus, the amount of compensation must not exceed the cost of the improvement less the cost of putting it in repair, if the tenant is not bound to put it in repair at his own expense.

6 Ibid s 1(2).

7 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

8 Landlord and Tenant Act 1927 s 1(3).

9 For the meaning of 'predecessor in title' see PARA 788 note 3 ante.

10 For the meaning of 'landlord' see PARA 486 note 3 ante.

11 Landlord and Tenant Act 1927 s 2(3). In cases where the amount payable by a landlord as compensation was determined by agreement or award and the landlord had before 22 December 1927 granted or agreed to grant a reversionary lease commencing on or after the termination of the then existing tenancy, provision has

been made for the rent payable under the reversionary lease to be increased, on the direction of the tribunal, by an amount which, failing agreement, has been determined by the tribunal having regard to the addition to the letting value attributable to the improvement: see s 15(1). In order to obtain such an increase in rent the landlord must have served on the reversionary tenant copies of all documents relating to the improvement which were duly sent to him: see s 15(1) proviso. Under s 15(2) the reversionary tenant's right of objection to the improvement and of appearing before the tribunal were safeguarded, and it was laid down that, where the amount of compensation was determined by the tribunal, any question as to the increase of rent under the reversionary lease should, where practicable, be settled in the course of the same proceedings.

12 Ibid s 1(3).

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### **801. Payment of compensation.**

The landlord<sup>1</sup> is entitled to deduct any sum due to him from the tenant<sup>2</sup> under or in respect of the tenancy from any sum payable to the tenant by way of statutory compensation for improvements<sup>3</sup>. Similarly, a tenant is entitled to deduct any sum payable to him by way of such compensation from any money due from him to his landlord under or in respect of the tenancy<sup>4</sup>.

When a landlord has paid his tenant the amount due to him for compensation, or when, after giving notice<sup>5</sup>, he has expended the necessary amount to execute an improvement which he has undertaken to execute, he may obtain from the Secretary of State ('the Minister')<sup>6</sup> an order in favour of himself and the persons deriving title under him charging the holding or any part of it with repayment of the amount so paid or expended, with such interest and by such instalments, and with such directions for giving effect to the charge, as the Minister thinks fit<sup>7</sup>. The sum charged<sup>8</sup> is a charge on the holding for the landlord's interest in it and for interest in the reversion immediately expectant on the termination of the lease; but in no case where the landlord's interest is an interest in a leasehold may the charge extend beyond that leasehold interest<sup>9</sup>.

Where the landlord obtaining the charge is not an absolute owner of the holding for his own benefit, no instalment or interest may be made payable after the time when the improvement in respect of which compensation is paid will, in the Minister's opinion, have become exhausted<sup>10</sup>.

Notwithstanding anything in any deed, will or instrument to the contrary effect, where the estate or interest of a landlord is determinable or liable to forfeiture by reason of his creating or suffering any charge on it, that estate or interest is not determined or forfeited by reason of his obtaining such a charge on the holding<sup>11</sup>.

1 For the meaning of 'landlord' see PARA 486 note 3 ante.

2 For the meaning of 'tenant' see PARA 703 note 9 ante.

3 Landlord and Tenant Act 1927 s 11(1).

4 Ibid s 11(2).

5 In accordance with ibid Pt I (ss 1-17) (as amended): see s 3(1) proviso; and PARA 796 the text and note 12 ante. As to service of notices see PARA 703 ante.



6 The statutory wording is, by virtue of the Transfer of Functions (Ministry of Food) Order 1955, SI 1955/554, 'the Minister of Agriculture, Fisheries and Food'; but see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794. As to the Secretary of State generally see PARA 27 note 3 ante.

7 Landlord and Tenant Act 1927 s 12, Sch 1 para (1) (amended by the Landlord and Tenant Act 1954 s 45, Sch 7 Pt I; and see note 6 supra). Where such a charge may be made for compensation due under an award, the tribunal making the award must, at the request and cost of the person entitled to obtain the charge, certify the amount to be charged and the term for which the charge may properly be made, having regard to the time at which each improvement in respect of which compensation is given is to be deemed to be exhausted: Landlord and Tenant Act 1927 Sch 1 para (6) (as so amended). Such a charge may be registered under the Land Charges Act 1972 s 2(2)(a), Sch 2 para 1(c) (see LAND CHARGES vol 26 (2004 Reissue) PARA 624) as a Class A land charge: Landlord and Tenant Act 1927 Sch 1 para (7); Interpretation Act 1978 s 17(2)(a).

Any company incorporated under Act of Parliament and having power to advance money for land improvement may take an assignment of any such charge upon such terms as may be agreed between it and the person entitled to the charge, and may assign any charge so acquired: Landlord and Tenant Act 1927 Sch 1 para (5).

8 The amount of the charge may include any proper costs, charges or expenses incurred by the landlord in opposing any proposal by the tenant to execute an improvement or in contesting a claim for compensation, and all costs properly incurred by the landlord in obtaining the charge with any interest and by such instalments as the Minister thinks fit: *ibid* Sch 1 para (1); and see note 6 supra.

9 *Ibid* Sch 1 para (4).

10 *Ibid* Sch 1 para (2) (amended by the Landlord and Tenant Act 1954 Sch 7 Pt I).

11 Landlord and Tenant Act 1927 Sch 1 para (3).

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## ***D. SPECIAL CASES***

### **802. Ecclesiastical and charity land.**

Where lands are assigned or secured as the endowment of a see, the statutory powers of a landlord to charge land<sup>1</sup> may not be exercised by the bishop in respect of those lands except with the previous approval in writing of the Assets Committee of the Church Commissioners<sup>2</sup>.

The Church Commissioners<sup>3</sup> may, if they think fit, on behalf of an ecclesiastical corporation<sup>4</sup>, out of any money in their hands pay to the tenant<sup>5</sup> the amount of compensation due to him; and thereupon the commissioners, instead of the corporation, may obtain from the Secretary of State<sup>6</sup> a charge on the holding in respect thereof in favour of themselves<sup>7</sup>.

The statutory powers of a landlord in respect of charging land may not be exercised by trustees for ecclesiastical or charitable purposes<sup>8</sup> except with the approval in writing of the Charity Commissioners or the Secretary of State<sup>9</sup>, as the case may require<sup>10</sup>.

1 See PARA 801 ante.

2 Landlord and Tenant Act 1927 s 24(2), Sch 2 Pt II para 1(a). The Estates and Finance Committee of the Church Commissioners superseded the Estates Committee of the Ecclesiastical Commissioners referred to in the 1927 Act (see the Church Commissioners Measure 1947 s 6 (as amended)); and the Assets Committee of the Church Commissioners superseded the Estates and Finance Committee (see the Church Commissioners Measure 1964 s 1; and ECCLESIASTICAL LAW vol 14 paras 381, 383).

3 The Church Commissioners are the successors of the Ecclesiastical Commissioners referred to in the Landlord and Tenant Act 1927: see ECCLESIASTICAL LAW vol 14 para 363.

4 As to ecclesiastical corporations see ECCLESIASTICAL LAW vol 14 para 1252 et seq.

5 For the meaning of 'tenant' see PARA 703 note 9 ante.

6 See PARA 801 note 6 ante.

7 Landlord and Tenant Act 1927 Sch 2 Pt II para 1(c) (amended by the Endowments and Glebe Measure 1976 s 47(4), Sch 8).

8 Where land is vested in the official custodian for charities in trust for any charity, the trustees of the charity and not the custodian are deemed to be the landlord for the purposes of the Landlord and Tenant Act 1927: s 24(4) (amended by the Charities Act 1960 s 48(1), Sch 6). As to the official custodian for charities see CHARITIES vol 8 (2010) PARA 297 et seq.

9 The statutory wording is 'the Board of Education'; but, by virtue of the Education Act 1944 s 2(1) (now repealed) and a number of orders transferring functions in connection with education in matters only affecting Wales, the reference is now to the Secretary of State for Education or, in relation to Wales, the Secretary of State for Wales. In relation to Wales, the functions of the Secretary of State are, in general, transferred to the National Assembly for Wales (see EDUCATION vol 15(1) (2006 Reissue) PARA 53) or the relevant Welsh minister (see PARA 27 note 4 ante).

10 Landlord and Tenant Act 1927 Sch 2 Pt II para 2; and see note 9 supra.

## UPDATE

### 802 Ecclesiastical and charity land

TEXT AND NOTES 8-10--1927 Act Sch 2 Pt II para 2 amended: Charities Act 2006 s 75, Sch 8 para 20.

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### 803. Limited owners and trustees.

Where the landlord<sup>1</sup> liable to pay compensation for an improvement<sup>2</sup> is a tenant for life or in a fiduciary position, he may require any such sum and any costs, charges and expenses incidental to it to be paid out of any capital money held upon the same trusts as the settled land<sup>3</sup>.

Capital money arising under the Settled Land Act 1925<sup>4</sup>, or under the Universities and College Estates Act 1925<sup>5</sup>, may be applied in payment of:

1560 (1) any money expended and costs incurred by a landlord in and about the execution of an improvement;

1561 (2) any sum due to a tenant<sup>6</sup> in respect of compensation for an improvement and any costs, charges and expenses incidental to it; and

1562 (3) the costs, charges and expenses of opposing any proposal by a tenant to execute any improvement<sup>7</sup>;

and a tenant for life or statutory owner may raise money under the Settled Land Act 1925<sup>8</sup> to satisfy any claim for such compensation<sup>9</sup>.

- 1 For the meaning of 'landlord' see PARA 486 note 3 ante.
- 2 As to what constitutes an improvement see PARA 792 ante.
- 3 Landlord and Tenant Act 1927 s 13(3) (s 13(1), (3) amended by the Landlord and Tenant Act 1954 s 45, Sch 7 Pt I). For these purposes, 'capital money' includes any personal estate held on the same trusts as the land: Landlord and Tenant Act 1927 s 13(3) (s 13(1)-(3) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4; for transitional provisions see s 25(4), (5)). Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.
- 4 As to such capital money see SETTLEMENTS vol 42 (Reissue) PARA 795.
- 5 See EDUCATION vol 15(2) (2006 Reissue) PARA 1379.
- 6 For the meaning of 'tenant' see PARA 703 note 9 ante.
- 7 Landlord and Tenant Act 1927 s 13(1) (as amended: see note 3 supra).
- 8 ie under the Settled Land Act 1925 s 71 (as amended): see SETTLEMENTS vol 42 (Reissue) PARA 849.
- 9 Landlord and Tenant Act 1927 s 13(2) (as amended: see note 3 supra).

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## ***E. RECOVERY OF INCREASED RATES OR PREMIUMS***

### **804. In general.**

Where the landlord<sup>1</sup> is liable to pay any rates, including water rate, in respect of the premises, or has undertaken to pay the premiums on any fire insurance policy on any such premises, and in consequence of any improvement executed by the tenant<sup>2</sup> on the premises<sup>3</sup> the assessment of the premises or the rate of premium on the policy is increased, the tenant is liable to pay to the landlord the amount of the increase of the rates and premium<sup>4</sup>. The sums so payable by the tenant are deemed to be in the nature of rent and are recoverable as such from him<sup>4</sup>.

- 1 For the meaning of 'landlord' see PARA 486 note 3 ante.
- 2 For the meaning of 'tenant' see PARA 703 note 9 ante.
- 3 ie an improvement under the Landlord and Tenant Act 1927: see PARA 792 ante.
- 4 Ibid s 16 (amended by the Finance Act 1963 s 73(7), Sch 13 Pt IV; the Housing Act 1980 s 152(3), Sch 26). As to the abolition of domestic rates see PARA 521 ante.

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BUSINESS TENANCIES/(ii) Improvements/F. JURISDICTION AND PROCEDURE/805. Jurisdiction and procedure.

## ***F. JURISDICTION AND PROCEDURE***

### **805. Jurisdiction and procedure.**

The jurisdiction conferred on the tribunal<sup>1</sup> by Part I of the Landlord and Tenant Act 1927<sup>2</sup> is exercised by either the High Court or a county court<sup>3</sup>. The general procedure for starting a landlord and tenant claim has already been discussed<sup>4</sup>.

The following procedure applies where a claim is brought under Part I of the 1927 Act<sup>5</sup>. The claim form must include details of:

- 1563 (1) the nature of the claim or the matter to be determined;
- 1564 (2) the property to which the claim relates;
- 1565 (3) the nature of the business carried on at the property;
- 1566 (4) particulars of the lease or agreement for the tenancy including:
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  - 185. (a) the names and addresses of the parties to the lease or agreement;
  - 186. (b) its duration;
  - 187. (c) the rent payable;
  - 188. (d) details of any assignment or other devolution of the lease or agreement;
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  - 1567 (5) the date and mode of termination of the tenancy;
  - 1568 (6) if the claimant has left the property, the date on which he did so;
  - 1569 (7) particulars of the improvement or proposed improvement to which the claim relates; and
  - 1570 (8) if the claim is for payment of compensation, the amount claimed<sup>6</sup>.

The court will fix a date for a hearing when it issues the claim form<sup>7</sup>.

The claimant's immediate landlord must be a defendant to the claim<sup>8</sup>. The defendant must immediately serve a copy of the claim form and any document served with it and of his acknowledgment of service on his immediate landlord. If the person so served is not the freeholder, he must serve a copy of those documents on his landlord and so on from landlord to landlord<sup>9</sup>.

Evidence need not be filed<sup>10</sup> with the claim form or acknowledgment of service<sup>11</sup>.

1 For the meaning of 'the tribunal' see PARA 789 note 3 ante.

2 Ie the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante.

3 See the Landlord and Tenant Act 1954 s 63(2) (amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(8), Schedule Pt I). Nothing in the Landlord and Tenant Act 1954 s 63 (as amended) prejudices the operation of the County Courts Act 1984 s 41 (as amended) (removal of proceedings into the High Court from a county court: see CIVIL PROCEDURE vol 11 (2009) PARA 69); Landlord and Tenant Act 1954 s 63(9) (amended by the High Court and County Courts Jurisdiction Order 1991 Schedule Pt I).

4 See PARA 722 ante.

5 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.1.

6 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.2.

7 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.3.

8 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.4.

9 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.5. As to service of documents see generally CIVIL PROCEDURE vol 11 (2009) PARA 138 et seq; and as to acknowledgment of service see generally CIVIL PROCEDURE vol 11 (2009) PARA 184 et seq.

10 For the meaning of 'filing' see PARA 660 note 20 ante.

11 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 5.6.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/(2) PROTECTION OF AGRICULTURAL TENANCIES/806. Protection of tenancies of agricultural holdings; in general.

## **(2) PROTECTION OF AGRICULTURAL TENANCIES**

### **806. Protection of tenancies of agricultural holdings; in general.**

The statutory protection of business tenancies<sup>1</sup> does not apply to a tenancy<sup>2</sup> of an agricultural holding which is a tenancy in relation to which the Agricultural Holdings Act 1986 applies<sup>3</sup> or to certain related tenancies<sup>4</sup>. Nor does Part I of the Landlord and Tenant Act 1927<sup>5</sup> apply to agricultural holdings within the meaning of the Agricultural Holdings Act 1986 held under leases in relation to which that 1986 Act applies<sup>6</sup>. Instead, such tenancies are governed by the provisions of the 1986 Act with respect to the following matters:

- 1571 (1) the continuation of such tenancies from year to year<sup>7</sup>;
- 1572 (2) the right to a written tenancy agreement and other provisions affecting the tenancy during its continuance<sup>8</sup>;
- 1573 (3) notices to quit<sup>9</sup>;
- 1574 (4) succession on the death or retirement of the tenant<sup>10</sup>; and
- 1575 (5) compensation on the termination of the tenancy<sup>11</sup>.

The 1986 Act also contains special provisions with regard to market gardens and smallholdings<sup>12</sup> and miscellaneous and supplemental provisions<sup>13</sup>.

The provisions of the 1986 Act are discussed in detail elsewhere in this work<sup>14</sup>. That Act does not, however, apply in relation to any tenancy beginning on or after 1 September 1995, subject to certain statutory exceptions<sup>15</sup>. The majority of agricultural tenancies entered into on or after that date are farm business tenancies which are governed by the Agricultural Tenancies Act 1995<sup>16</sup>.

1 *Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.*

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 'Agricultural holding' means the aggregate of the land, whether agricultural land or not, comprised in a contract of tenancy which is a contract for an agricultural tenancy, not being a contract under which the land is let to the tenant during his continuance in any office, appointment or employment held under the landlord: Agricultural Holdings Act 1986 s 1(1). For these purposes, a contract of tenancy relating to any land is a contract for an agricultural tenancy if, having regard to (1) the terms of the tenancy; (2) the actual or contemplated use of the land at the time of the conclusion of the contract and subsequently; and (3) any other relevant circumstances, the whole of the land comprised in the contract, subject to such exceptions only as do not substantially affect the character of the tenancy, is let for use as agricultural land: s 1(2). A change in user of the land concerned subsequent to the conclusion of a contract of tenancy which involves any breach of the terms of the tenancy is to be disregarded for the purpose of determining whether a contract which was not

originally a contract for an agricultural tenancy has subsequently become one unless it is effected with the landlord's permission, consent or acquiescence: s 1(3). 'Agricultural land' means (a) land used for agriculture which is so used for the purposes of a trade or business; and (b) any other land which, by virtue of a designation under the Agriculture Act 1947 s 109(1), is agricultural land within the meaning of that Act; and 'contract of tenancy' means a letting of land, or agreement for letting land, for a term of years or from year to year: Agricultural Holdings Act 1986 s 1(4), (5). For the purposes of the latter definition, a letting of land, or an agreement for letting land, which by virtue of the Law of Property Act 1925 s 149(6) (as amended) (see PARA 240 ante) takes effect as such a letting of land or agreement for letting land as is mentioned therein is to be deemed to be a letting of land or, as the case may be, an agreement for letting land, for a term of years: Agricultural Holdings Act 1986 s 1(5).

4 See the Landlord and Tenant Act 1954 s 43(1)(a) (as amended); and PARA 708 ante at head (1) in the text.

5 See the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante.

6 See *ibid* s 17(1)(a) (as substituted); and PARA 791 ante.

7 See the Agricultural Holdings Act 1986 Pt I (ss 1-5).

8 See *ibid* Pt II (ss 6-24) (as amended).

9 See *ibid* Pt III (ss 25-33).

10 See *ibid* Pt IV (ss 34-59) (as amended).

11 See *ibid* Pt V (ss 60-78) (as amended).

12 See *ibid* Pt VI (ss 79-82).

13 See *ibid* Pt VII (ss 83-102) (as amended).

14 See AGRICULTURAL LAND vol 1 (2008) PARA 321 et seq.

15 See the Agricultural Tenancies Act 1995 s 4 (amended by the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order 2006, SI 2006/2805, art 13); and AGRICULTURAL LAND vol 1 (2008) PARA 301.

16 See PARA 807 post; and AGRICULTURAL LAND vol 1 (2008) PARA 302.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/15. BUSINESS AND AGRICULTURAL TENANCIES/(2) PROTECTION OF AGRICULTURAL TENANCIES/807. Protection of farm business tenancies; in general.

### **807. Protection of farm business tenancies; in general.**

The statutory protection of business tenancies<sup>1</sup> does not apply to a farm business tenancy<sup>2</sup>. Nor does Part I of the Landlord and Tenant Act 1927<sup>3</sup> apply to holdings held under farm business tenancies<sup>4</sup>. Instead, such tenancies are governed by the provisions of the Agricultural Tenancies Act 1995 with respect to the following matters:

- 1576 (1) compliance with notice conditions in cases of surrender and regrant<sup>5</sup>;
- 1577 (2) termination of the tenancy<sup>6</sup>;
- 1578 (3) the tenant's right to remove fixtures and buildings<sup>7</sup>;
- 1579 (4) rent review<sup>8</sup>; and
- 1580 (5) compensation on termination of the tenancy<sup>9</sup>.

The 1995 Act also contains miscellaneous and supplemental provisions<sup>10</sup>.

The provisions of the 1995 Act are discussed in detail elsewhere in this work<sup>11</sup>.

1 le the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

2 See *ibid* s 43(1)(aa) (as added); and PARA 708 ante at head (2) in the text. A tenancy is a 'farm business tenancy' for the purposes of the Agricultural Tenancies Act 1995 if: (1) it meets the business conditions together with either the agriculture condition or the notice conditions; and (2) it is not a tenancy which, by virtue of s 2 (tenancies beginning before 1 September 1995 or to which, by reason of s 4 (special cases), the Agricultural Holdings Act 1986 (see PARA 806 ante) applies), cannot be a farm business tenancy: Agricultural Tenancies Act 1995 s 1(1). The business conditions are: (a) that all or part of the land comprised in the tenancy is farmed for the purposes of a trade or business; and (b) that, since the beginning of the tenancy, all or part of the land so comprised has been so farmed: s 1(2). The agriculture condition is that, having regard to (i) the terms of the tenancy; (ii) the use of the land comprised in the tenancy; (iii) the nature of any commercial activities carried on on that land; and (iv) any other relevant circumstances, the character of the tenancy is primarily or wholly agricultural: s 1(3). The notice conditions are: (A) that, on or before the relevant day, the landlord and the tenant each gave the other a written notice identifying (by name or otherwise) the land to be comprised in the tenancy or proposed tenancy, and containing a statement to the effect that the person giving the notice intends that the tenancy or proposed tenancy is to be, and remain, a farm business tenancy; and (B) that, at the beginning of the tenancy, having regard to the terms of the tenancy and any other relevant circumstances, the character of the tenancy was primarily or wholly agricultural; and for these purposes 'the relevant day' means whichever is the earlier of the following: (aa) the day on which the parties enter into any instrument creating the tenancy, other than an agreement to enter into a tenancy on a future date; or (bb) the beginning of the tenancy: s 1(4), (5). The written notice must not be included in any instrument creating the tenancy: s 1(6). If in any proceedings any question arises as to whether a tenancy was a farm business tenancy at any time, and it is proved that all or part of the land comprised in the tenancy was farmed for the purposes of a trade or business at that time, it is to be presumed, unless the contrary is proved, that all or part of the land so comprised has been so farmed since the beginning of the tenancy: s 1(7). Any use of land in breach of the terms of the tenancy, any commercial activities carried on in breach of those terms, and any cessation of such activities in breach of those terms, are to be disregarded in determining whether at any time the tenancy meets the business conditions or the agriculture condition, unless the landlord or his predecessor in title has consented to the breach or the landlord has acquiesced in the breach: s 1(8).

3 le the Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended): see PARA 788 et seq ante.

4 See *ibid* s 17(1)(b) (as substituted); and PARA 791 ante.

5 See the Agricultural Tenancies Act 1995 s 3.

6 See *ibid* ss 5-7 (as amended).

7 See *ibid* s 8 (as amended).

8 See *ibid* Pt II (ss 9-14) (as amended).

9 See *ibid* Pt III (ss 15-27) (as amended).

10 See *ibid* Pt IV (ss 28-41).

11 See AGRICULTURAL LAND vol 1 (2008) PARA 301 et seq.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(1) INTRODUCTION/(i) Outline of Legislation/808. Purpose and scope of the Rent Acts.

## **16. TENANCIES UNDER THE**

### **(1) INTRODUCTION**

#### **(i) Outline of Legislation**

##### **808. Purpose and scope of the Rent Acts.**

The general purpose of the Rent Acts<sup>1</sup> was to mitigate hardship to tenants resulting from a scarcity of housing<sup>2</sup>. Parliament sought to do this firstly by preventing landlords from increasing the rent of premises within the Acts above a permitted maximum<sup>3</sup>, and secondly by conferring on tenants of such premises a status of irremovability by forbidding landlords to evict them without a court order and limiting the grounds on which such an order may be made<sup>4</sup>. In addition, to prevent the provisions as to rent restriction being circumvented and tenants from turning their statutory privileges into a financial profit, it was necessary to prohibit the receipt or requiring of premiums on the grant, continuance, renewal or assignment of protected tenancies or the transfer of statutory tenancies<sup>5</sup>. These three elements, rent restriction, security of tenure and prohibition of premiums, have been present in one form or another throughout the history of the Rent Acts. As the Rent Acts are phased out and replaced by the regime of assured shorthold and assured tenancies under the Housing Act 1988<sup>6</sup>, many of the features of Rent Act jurisprudence are losing their significance<sup>7</sup>.

1 Only since 1957 have the major statutes on this subject been entitled 'Rent Act', ie the Rent Acts of 1957, 1965, 1968, 1974 and 1977. The first 'Rent Act' was the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 which froze rents of certain unfurnished dwelling houses at August 1914 levels. That Act was variously elaborated and extended until in 1920 all such existing legislation was repealed and replaced by the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 which provided the basis of the rent legislation until its repeal by, and consolidation in, the Rent Act 1968. The Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(1)(g) introduced the concept of the statutory tenant by succession.

2 It is clear that the early Rent Acts had rent restriction for their primary purpose, security of tenure being conferred to prevent any such restriction being rendered nugatory: see *Twomey v Cronin* [1937] IR 324 at 329 per Gavan Duffy J. It has since been said, however, that the fundamental object of the Acts is 'protecting a tenant from being turned out of his home': *Curl v Angelo* [1948] 2 All ER 189 at 192, CA, per Lord Greene MR. Between 1923 and 1938 there was a process of gradual decontrol (see eg the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 (repealed)) which was halted on the outbreak of war in 1939 (see the Rent and Mortgage Interest Restrictions Act 1939 (repealed)). The Rent Act 1957 (repealed) was primarily a decontrolling measure. The Rent Act 1965 (repealed) created regulated tenancies: see further PARA 854 post. In 1968 almost all the Rent Acts then in force were repealed and consolidated in the Rent Act 1968 (itself now repealed and replaced by the Rent Act 1977). Although a consolidating measure, the Rent Act 1968 seems to have changed the law to some extent, in particular by affording statutory protection to the tenancy (s 1) and not to the dwelling house as had the Rent and Mortgage Interest Restrictions Acts 1920-1939. Decisions relating to subtenants under those earlier Acts (see eg *Gidden v Mills* [1925] 2 KB 713, DC) must, therefore, be applied with caution. Between 1968 and 1977 the most important developments were the conversion of controlled tenancies into regulated tenancies (see further PARA 848 et seq post) and the inclusion in protection of furnished tenancies (see the Rent Act 1974 s 1 (repealed)). In 1976 agricultural workers who were service licensees and thus excluded from the Rent Acts were given equivalent protection: see the Rent (Agriculture) Act 1976; and PARA 1134 et seq post. With the exception of that Act, all existing provisions were repealed with effect from 29 August 1977 and consolidated into the Rent Act 1977, which incorporates a number of technical amendments suggested by the Law Commission: see the Report on the Consolidation of the Rent Acts (Law Com no 81). For general transitional provisions see PARA 814 post. Subsequent amendments to the Rent Act 1977 are noted in the following paragraphs.

3 For the current rent restriction provisions see PARA 891 et seq post.

4 For the current security of tenure provisions see PARA 942 et seq post.

5 For the current provisions relating to premiums see PARA 925 et seq post. As to the objects of premium prohibition see *Woods v Wise* [1955] 2 QB 29 at 51, [1955] 1 All ER 767 at 780, CA, per Birkett LJ; *Farrell v Alexander* [1977] AC 59 at 87, [1976] 2 All ER 721 at 738, HL, per Lord Simon of Glaisdale; and PARA 925 post.

6 See PARA 1011 et seq post. The Rent Act 1977 cannot in general apply to tenancies created after 15 January 1989: see the Housing Act 1988 s 34 (as amended); and PARA 1012 post.

7 Eg statutory tenancies are replaced by the new concept of statutory periodic tenancies. For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 post.



PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(1) INTRODUCTION/(i) Outline of Legislation/809. Legislation in force.

### **809. Legislation in force.**

There are currently two principal and separate codes of protection<sup>1</sup> afforded to tenants of privately-owned dwelling houses. In general, the Rent Act 1977, which has been amended in many important respects by the Housing Act 1980 and the Housing Act 1988, applies to tenancies entered into before 15 January 1989 and the Housing Act 1988 applies to tenancies entered into on or after that date<sup>2</sup>. Provisions concerning unlawful eviction and harassment of residential occupiers and the duration and content of notices to quit dwelling houses are contained in the Protection from Eviction Act 1977 as subsequently amended<sup>3</sup>; these provisions are supplemented by the Housing Act 1996 which restricts a landlord's right to terminate a tenancy for failure to pay a service charge<sup>4</sup>. The Landlord and Tenant Act 1985 contains provisions relating to information to be given to tenants<sup>5</sup>, the provision of rent books<sup>6</sup>, implied repairing obligations in short leases<sup>7</sup> and service charges generally<sup>8</sup>. The Landlord and Tenant Act 1987 contains further provisions relating to information to be given to tenants<sup>9</sup> and provisions concerning the appointment of managers<sup>10</sup> and the variation of leases<sup>11</sup>. Of the legislation enacted before 1977 there remains in force the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 which extends protection to service personnel who are not regulars in certain cases where the Rent Act 1977 or the Housing Act 1988 would not normally apply<sup>12</sup> and the Rent (Agriculture) Act 1976 which embodies a separate code, closely related to the Rent Act 1977 and also being phased out (in favour of a regime of assured agricultural occupancies) under the Housing Act 1988<sup>13</sup>, giving security of tenure to agricultural workers in tied housing<sup>14</sup>.

1 The other than the legislation affecting long tenancies at low rents, namely the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post), the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post), the Leasehold Reform Act 1967 (see PARA 1389 et seq post) and the Leasehold Reform, Housing and Urban Development Act 1993 (see PARA 1532 et seq post).

2 See PARAS 1011-1012 post. As to the conditions necessary for the Rent Act 1977 to apply see PARA 818 et seq post; and as to the conditions necessary for the Housing Act 1988 to apply see PARA 1018 et seq post.

3 See PARAS 653-655 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609.

4 See PARA 610 ante.

5 See PARAS 52, 553 ante.

6 See PARAS 253-255 ante.

7 See PARAS 416-420 ante.

8 See PARA 325 et seq ante.

9 See PARAS 53, 257 ante.

10 See PARA 399 et seq ante.

11 See PARA 149 et seq ante.

12 See PARA 1073 et seq post.

13 See PARAS 1183-1186 post.

14 See PARA 1134 et seq post.

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### **810. Terminology.**

Unless the rateable value is too high<sup>1</sup> or the tenancy is outside the higher or lower rent limits<sup>2</sup> or falls within a number of further exceptions<sup>3</sup>, a tenancy of the whole or part of a privately-owned dwelling house which was entered into before 15 January 1989 is protected by the Rent Act 1977<sup>4</sup>. While the contract of tenancy still subsists, that is so long as it has not expired by effluxion of time or been determined by notice to quit, forfeiture, surrender or in some other way, a tenancy so protected is called a 'protected tenancy'<sup>5</sup>. After the termination of a protected tenancy, so long as the former tenant remains in occupation of the dwelling as his residence, the dwelling is said to be 'subject to a statutory tenancy'<sup>6</sup> and the former tenant is called the 'statutory tenant'<sup>7</sup> of it.

Until 28 November 1980, when all controlled tenancies were converted to regulated tenancies, both protected and statutory tenancies might be either 'controlled' or 'regulated' according to the date at which and the Act under which the benefit of the legislation first accrued to the premises or tenancy<sup>8</sup>. It must be stressed that the expressions 'controlled tenancy' and 'regulated tenancy' described the position both during and after the end of the contractual term created by the tenancy agreement or lease<sup>9</sup>. The distinction has now only a very limited relevance<sup>10</sup>.

Although, in general, a tenancy entered into on or after 15 January 1989<sup>11</sup> will be an assured tenancy under the Housing Act 1988<sup>12</sup> and cannot be a protected tenancy, any protected or statutory tenancy already in existence on that date continues to be a protected or statutory tenancy under the Rent Act 1977<sup>13</sup>.

1 See PARAS 855-859 post. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

2 See PARAS 860-862 post.

3 See PARA 863 et seq post.

4 See the Rent Act 1977 s 1.

5 See *ibid* ss 1, 152(1). As to protected tenancies see further PARA 818 et seq post.

6 See *ibid* s 2(2). As to statutory tenancies see further PARA 831 et seq post.

7 See *ibid* s 2(1)(a).

8 See *ibid* s 17 (repealed), s 18 (as amended); and PARA 854 post. For the meaning of 'controlled tenancy' see PARA 849 post; and for the meaning of 'regulated tenancy' see PARA 854 post.

9 See *ibid* s 17(6) (repealed), s 18(2).

10 See PARA 848 post.

11 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

12 For the meaning of 'assured tenancy' see PARA 1018 post.

13 See PARAS 1011-1012 post.

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### **811. Rent restriction.**

Controlled and regulated tenants enjoyed substantially the same security of tenure, but the manner in which the rent recoverable from the two categories of tenant was limited was completely different. The rent recoverable from a controlled tenant was based on the 1956 gross value of the dwelling multiplied by the appropriate factor with additions being made in respect of rates, services and furniture<sup>1</sup>. The rent recoverable from a regulated tenant may not exceed the 'fair rent' for the premises if one has been determined and registered by a rent officer<sup>2</sup>.

1 See the Rent Act 1977 Pt II (ss 27-43) (repealed by the Housing Act 1980 s 152(3), Sch 26). As to the conversion of controlled tenancies into regulated tenancies see PARA 848 post.

2 See PARA 909 et seq post.

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### **812. Furnished tenancies under the Rent Act 1977.**

Until 14 August 1974 the general provisions of the Rent Acts did not apply to a dwelling house bona fide let at a rent which included to a sufficient degree payments in respect of the use of furniture<sup>1</sup>. Tenancies of such premises are called 'furnished tenancies'<sup>2</sup>, but it must be appreciated that this term does not apply to all tenancies under which furniture is or was provided. Contracts for the letting or licensing of houses at rents which included payment for the use of furniture were brought within a separate system of rent control through rent tribunals in 1946, but the Rent Act 1974 made 'furnished tenancies' capable of being protected tenancies and this protection is continued under the Rent Act 1977<sup>3</sup>. The rent tribunal system<sup>4</sup> applies to a miscellaneous group of tenancies exempted from being protected, the most important of which are lettings entered into before 15 January 1989<sup>5</sup> by landlords resident in the same building as the tenant; these tenancies are called 'restricted contracts'<sup>6</sup>.

1 See eg the Rent Act 1968 s 2(1)(b) (repealed). For the history of the legislation relating to furnished lettings see PARA 985 post.

2 See the Rent Act 1977 s 152(1) (definitions of 'protected furnished tenancy', 'regulated furnished tenancy' and 'statutory furnished tenancy'). A furnished tenancy could not be 'controlled': see s 17(7)(c) (repealed); and PARA 849 note 12 post. See further PARA 870 et seq post.

3 See PARA 870 post.

4 As to the rent tribunal system see PARA 988 et seq post.

5 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (now as amended) came into force: see s 141(3).

6 As to restricted contracts see PARA 985 et seq post. There is no protection under the Housing Act 1988 similar to that afforded by the Rent Act 1977 in the case of a restricted contract: see PARA 1035 post.

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### 813. Contracting out of the Rent Acts.

A tenant cannot contract out of his right under the Rent Acts, and therefore cannot bind himself to pay more than the proper rent<sup>1</sup>. Similarly, so long as a statutory tenant remains in occupation, he cannot by any contractual arrangement forfeit his rights to be protected; nor is it possible to incorporate into a tenancy a term which in effect provides a ground for possession if it is unconnected with the user of the premises<sup>2</sup>. Even if a tenant contracts to vacate the premises and later refuses to leave, the landlord cannot rely on the agreement but must show some ground on which an order for possession may be made under the Acts<sup>3</sup>. Even an admission by the tenant that the landlord is entitled to possession does not, where possession is being claimed on any of the discretionary grounds, absolve the court from its duty to consider whether it is reasonable to make an order<sup>4</sup>. Where, however, the landlord and the tenant agree that the tenant will vacate the premises at a future date and that the landlord will then pay the tenant for giving up possession, the tenant is entitled, if the landlord later repudiates the agreement, to enforce it, as the agreement is not void on the ground of public policy, or want of mutuality, or as an attempt to contract out of the Rent Acts<sup>5</sup>.

The parties cannot be prevented by any estoppel from relying on their rights under the Acts whether the estoppel results from agreement or conduct<sup>6</sup>, or, it seems, from a decision of the court<sup>7</sup>. Where, however, a landlord obtained a benefit in proceedings on the footing that a permitted increase of rent under the Acts was applicable, he was precluded from obtaining subsequently in the same proceedings relief on the basis that the tenant was not a statutory tenant<sup>8</sup>.

By agreement a statutory tenant can validly turn his statutory tenancy into a contractual tenancy<sup>9</sup> and a contractual tenancy may be surrendered in return for the grant of a licence<sup>10</sup>; but parties to an agreement cannot thereby bring unprotected premises within the protection of the Rent Acts<sup>11</sup>.

1 *Schmit v Christy* [1922] 2 KB 60, DC. There was, however, nothing to prevent the parties from so arranging their lease that it fell, from the outset, outside the scope of the Acts (*Maclay v Dixon* [1944] 1 All ER 22, CA); but the courts will look at the legal substance of the transaction and not at the form alone (*Samrose Properties Ltd v Gibbard* [1958] 1 All ER 502, [1958] 1 WLR 235, CA, where a lump sum payment was held to be commuted rent). The latter point is so in particular where the legislation refers to a bona fide letting: see *Furnival Properties Ltd v Edwards* [1950] WN 395, CA. Cf the principle that the description of a transaction does not conclude the question whether a premium is paid: see PARA 926 post. An arrangement purporting to create a non-exclusive licence will be scrutinised by the court to see if it reflects the true substance of the agreement: see the cases cited in PARA 7 et seq ante. As to what constitutes a 'sham' see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528, CA, per Diplock LJ.

2 *RMR Housing Society Ltd v Combs* [1951] 1 KB 486, [1951] 1 All ER 16, CA.

3 *Barton v Fincham* [1921] 2 KB 291, CA; *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA. The contract to quit might be construed by the court as a notice to quit served by the tenant and thereby constitute a ground for an order for possession by the landlord: see the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 5; and PARA 953 post.

4 *Smith v McGoldrick* [1977] 1 EGLR 53, (1976) 242 Estates Gazette 1047, CA. As to the discretionary grounds for possession see PARA 949 et seq post.

5 *Rajbenback v Mamon* [1955] 1 QB 283, [1955] 1 All ER 12. As to illegal payments for giving up possession see PARA 940 post.

6 *Langford Property Co Ltd v Goldrich* as reported in [1948] 2 All ER 439 at 443; *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA; *Welch v Nagy* [1950] 1 KB 455, [1949] 2 All ER 868, CA; *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA.

7 *Griffiths v Davies* [1943] KB 618, [1943] 2 All ER 209, CA. Similarly, estoppel does not confer jurisdiction under the Rent Acts (see *J and F Stone Lighting and Radio Ltd v Levitt* [1947] AC 209, [1946] 2 All ER 653, HL), and a representation concerning the application of these Acts is a representation of law (see ESTOPPEL vol 16(2) (Reissue) PARA 1078); but a tenancy created by estoppel may be a tenancy for the purposes of the Acts (see PARA 820 post).

8 *Baxter v Eckersley* [1950] 1 KB 480, [1950] 1 All ER 139, CA (election between inconsistent rights).

9 *Bungalows (Maidenhead) Ltd v Mason* [1954] 1 All ER 1002, [1954] 1 WLR 769, CA. Variations in the terms of an existing relationship do not, however, necessarily show an intention to terminate that relationship and enter into a new contractual relationship: *Steel v Cockcroft* [1951] 2 KB 429, [1951] 2 All ER 175, CA (variation by which the tenant paid rates direct did not alter the relationship of the statutory tenant to the landlord). See also *Jenkin R Lewis & Son Ltd v Herman* [1971] Ch 477, [1970] 1 All ER 833.

10 *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA; *Murray, Bull & Co Ltd v Murray* [1953] 1 QB 211, [1952] 2 All ER 1079; *Scrimgeour v Waller* (1980) 257 Estates Gazette 61, CA. It is doubtful whether a statutory tenancy can be exchanged for a licence: see *Murray, Bull & Co Ltd v Murray* supra at 217 and at 1083, commenting on dicta of Lord Asquith in *Rogers v Hyde* [1951] 2 KB 923 at 930, [1951] 2 All ER 79 at 81, CA; *Bungalows (Maidenhead) Ltd v Mason* [1954] 1 All ER 1002 at 1003, [1954] 1 WLR 769 at 770-771, CA; but cf *Collins v Cloughton* [1959] 1 All ER 95, [1959] 1 WLR 145, CA. As to the position of a tenant who purchases the reversion and remains in possession pending completion see PARA 820 note 3 post.

11 *Rogers v Hyde* [1951] 2 KB 923 at 931, [1951] 2 All ER 79 at 81, CA.

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#### **814. General transitional provisions in the consolidating Acts.**

Both the Rent Act 1968 (now repealed) and the Rent Act 1977 provide that, in so far as anything done, or having effect as if done, under an enactment repealed thereby could have been done under a corresponding provision of the consolidating Act, it is not to be invalidated by the repeal but is to have effect as if done under the consolidating Act<sup>1</sup>. This applies, in particular, to any regulation, order, scheme, agreement, dissent, election, application, reference, representation, appointment or apportionment made, notice served, certificate issued, statement supplied, undertaking or direction given or rent registered<sup>2</sup>.

Any document made, served or issued at any time containing a reference to a repealed enactment is to be construed<sup>3</sup> as referring to or including a reference to the corresponding provision of the Rent Act 1977<sup>4</sup>.

Where a period of time specified in a repealed enactment was current at the commencement of the consolidating Act, the consolidating Act has effect as if the corresponding provision of it had been in force when that period began to run<sup>5</sup>.

Nothing in the Rent Act 1977 affects the enactments repealed by it in their operation in relation to offences committed before its commencement<sup>6</sup>; and a conviction for an offence under a repealed enactment is treated for the purposes of the Rent Act 1977 as a conviction for an offence under the corresponding provisions of that Act<sup>7</sup>.

Any reference in any document or enactment to a dwelling house let on or subject to a protected or statutory tenancy or to which the Rent and Mortgage Interest Restrictions Acts 1920 to 1939 (or any of them) apply is to be construed<sup>8</sup> as a reference to a dwelling house let on or subject to a protected or statutory tenancy within the meaning of the Rent Act 1977<sup>9</sup>. Any reference in any document or enactment to a Part VI contract within the meaning of the Rent Act 1968 is to be construed<sup>10</sup> as a reference to a restricted contract<sup>11</sup>.

Persons who were statutory tenants by virtue of repealed enactments remained statutory tenants for the purposes of the consolidating Acts and retained their status (as original tenant or first or second successor) for the purposes of the provisions relating to statutory succession<sup>12</sup>.

There are special provisions for giving security to tenants whose unprotected tenancies ended before the commencement of legislation which would have protected them and who retained possession beyond those dates<sup>13</sup>.

1 Rent Act 1968 s 117(3), Sch 16 para 1 (repealed); Rent Act 1977 s 155(3), Sch 24 para 1(1).

2 Rent Act 1968 Sch 16 para 1 (repealed); Rent Act 1977 Sch 24 para 1(2).

3 *le* subject to *ibid* Sch 24 (as amended) and except in so far as a contrary intention appears.

4 This is the combined effect of the Rent Act 1968 Sch 16 para 2 (repealed) and the Rent Act 1977 Sch 24 para 1(3).

5 Rent Act 1968 Sch 16 para 3 (repealed); Rent Act 1977 Sch 24 para 1(4).

6 *Ibid* Sch 24 para 1(5).

7 *Ibid* Sch 24 para 1(6).

8 *le* subject to the provisions of the Rent Act 1977 and except in so far as the context otherwise requires.

9 This is the combined effect of the Rent Act 1968 Sch 16 para 5 (repealed) and the Rent Act 1977 Sch 24 para 1(7). For the meaning of 'protected tenancy' see PARA 818 post; and for the meaning of 'statutory tenancy' see PARA 831 post.

10 *le* subject to the provisions of the Rent Act 1977 and except in so far as the context otherwise requires.

11 *Ibid* Sch 24 para 1(8). As to restricted contracts see PARA 985 et seq post.

12 See the Rent Act 1968 Sch 16 paras 6-9 (repealed); the Rent Act 1977 Sch 24 paras 2-4. As to statutory succession see PARA 842 et seq post.

13 See PARA 946 post.

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## **(ii) Administration**

### **815. Powers of the Secretary of State or the Assembly etc.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup>, is empowered to make regulations or, as the case may be, orders:

- 1581 (1) prescribing the form of any notice or document to be given or used under the provisions concerning rent under regulated tenancies<sup>3</sup> and anything required or authorised to be prescribed under those provisions<sup>4</sup>;
- 1582 (2) prescribing the form of any notice, application, register or other document to be given, made or used under the provisions<sup>5</sup> concerning registration of rents under regulated tenancies<sup>6</sup>, prescribing anything required or authorised to be prescribed under those provisions<sup>7</sup>, and regulating the procedure to be followed by rent officers under the Rent Act 1977 and by rent assessment committees, whether under that Act or otherwise<sup>8</sup>;
- 1583 (3) specifying educational institutions for the purpose of the student letting exemption<sup>9</sup>;
- 1584 (4) prescribing the information to be contained in notices to quit<sup>10</sup>;
- 1585 (5) prescribing the contents of rent books<sup>11</sup>;
- 1586 (6) providing that no dwelling house exceeding a specified rateable value, or of any class or description, in an area in which he or the Assembly or minister is satisfied that there is no substantial excess of demand for such houses over supply, should be the subject of a regulated tenancy<sup>12</sup>; and
- 1587 (7) directing that specified provisions<sup>13</sup> shall apply to the Isles of Scilly with exceptions, adaptations or modifications<sup>14</sup>.

Regulations and orders made under the above powers must be made by statutory instrument which is, in most cases, subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament<sup>15</sup>.

The Secretary of State by statutory instrument might also make regulations generally for carrying into effect the provisions<sup>16</sup> relating to restricted contracts<sup>17</sup>. The transitional provisions of the Rent Act 1968 and the Rent Act 1977 retain in force regulations made under the enactments repealed by and consolidated in those Acts<sup>18</sup>.

The power to give financial assistance to persons providing general advice about landlord and tenant law, so far as relating to residential tenancies, has already been discussed<sup>19</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions under the statutory provisions set out in the text and notes 3-18 infra so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 I.e. the Rent Act 1977 Pt III (ss 44-61) (as amended): see PARA 892 et seq post.

4 Ibid s 60(1).

5 I.e. ibid Pt IV (ss 62-75) (as amended): see PARA 909 et seq post.

6 Ibid s 74(1)(a).

7 Ibid s 74(1)(c).

8 Ibid s 74(1)(b) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), (2), Sch 21 para 7, Sch 22). Regulations under the Rent Act 1977 s 74(1)(b) (as so amended) may contain provisions modifying the Rent Act 1977 s 67 (as amended) (see PARA 915 post) or s 72 (as substituted) (see PARA 923 post), or Sch 11 Pt I (paras 1-9 (as amended): see PARAS 917-918 post); but no regulations containing such provisions and made by the Secretary of State have effect unless approved by a resolution of each House of Parliament: s 74(2) (amended by the Housing Act 1988 s 140(2), Sch 18).

In exercise of the power conferred by s 74 (as amended), and prior to the transfer of functions in relation to Wales, the Secretary of State made the following regulations:

151 (1) the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696;

152 (2) the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697 (as amended);

153 (3) the Rent Regulation (Cancellation of Registration of Rent) Regulations 1980, SI 1980/1698;

154 (4) the Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700 (as amended);

155 (5) the Rent Act 1977 (Forms etc) (Welsh Forms and Particulars) Regulations 1993, SI 1993/1511,

and subsequent amending regulations. In addition, by virtue of the Rent Act 1977 s 155(3), Sch 24 para 1 (see PARA 814 ante), the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065 (as amended), have effect as if made thereunder.

9 Rent Act 1977 s 8(2). See the Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967 (as amended). As to lettings to students see PARA 874 post.

10 See the Protection from Eviction Act 1977 s 5(2); and PARA 214 ante.

11 See the Landlord and Tenant Act 1985 s 5(3); and PARA 254 ante.

12 See the Rent Act 1977 s 143(1); and PARA 854 post.

13 Ie the Rent Act 1977 with the exception of Pt V (ss 77-85) (as amended) and ss 102A-106A (as amended) which do not apply to the Isles of Scilly: see s 153(1) (amended by the Housing Act 1980 s 152, Sch 25 para 54).

14 Rent Act 1977 s 153(1), (2). An order so made may be varied or revoked by a subsequent order: s 153(3). At the date at which this title states the law no such order had been made and none had effect as if so made by virtue of Sch 24 para 1.

15 See *ibid* ss 8(3), 60(2), 74(3), 153(2); the Protection from Eviction Act 1977 s 5(3); and the Landlord and Tenant Act 1985 s 5(3)(b).

In the case of an order under the Rent Act 1977 s 143(1) (see head (6) in the text), however, no such order has effect unless approved by a resolution of each House of Parliament: s 143(3).

As to parliamentary procedure in the case of regulations and orders made by the Assembly see CONSTITUTIONAL LAW AND HUMAN RIGHTS.

16 Ie the Rent Act 1977 ss 77-85 (as amended) ss 103-106 (as amended): see PARA 989 et seq post. As to the phasing out of restricted contracts see PARA 1014 post.

17 *Ibid* s 84(c), (d).

18 See the Rent Act 1968 s 117(3), Sch 16 para 1 (repealed); the Rent Act 1977 Sch 24 para 1; and PARA 814 ante.

19 See the Housing Act 1996 s 94; and PARA 54 ante.

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## **816. Powers of local authorities.**

Certain local authorities<sup>1</sup> are empowered:

1588 (1) to publish information for the assistance of landlords<sup>2</sup> and tenants<sup>3</sup> and others as to their rights and duties under certain Acts<sup>4</sup> and as to the procedure for enforcing those rights or securing the performance of those duties<sup>5</sup>;

1589 (2) to publish information, for the assistance of owners and occupiers of dwelling houses and others, as to their rights and duties under the Rent



- (Agriculture) Act 1976<sup>6</sup> and as to the procedure for enforcing those rights or securing the performance of those duties<sup>7</sup>;
- 1590 (3) to make any such information available in any other way<sup>8</sup>; and
- 1591 (4) to furnish particulars as to the availability, extent and character of alternative accommodation<sup>9</sup>.

Proceedings for an offence under the Rent Act 1977 or the Protection from Eviction Act 1977 may be instituted by any local authority having the above powers<sup>10</sup>.

Local authorities<sup>11</sup> also have power to publish information regarding the provisions<sup>12</sup> relating to restricted contracts<sup>13</sup>.

The powers of local housing authorities under the Housing Act 2004 with regard to:

- 1592 (a) selective licensing of houses let by private sector landlords<sup>14</sup>; and
- 1593 (b) interim and final management orders in respect of houses so licensed<sup>15</sup>,

are discussed elsewhere in this work<sup>16</sup>.

1 The local authorities so empowered are: (1) councils of districts, councils of counties in England in which there are no districts having district councils and councils of London boroughs; (2) councils of Welsh counties and county boroughs; (3) the Common Council of the City of London; and (4) the Council of the Isles of Scilly: Rent Act 1977 s 149(2) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 3(5); and by the Local Government Changes (Rent Act) Regulations 1995, SI 1995/2451, regs 2, 7). As to the counties and districts in England and their councils and the counties and county boroughs in Wales see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq; as to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT 29(2) (Reissue) PARA 31 et seq; and as to the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36. As to the application of the Rent Act 1977 to the Isles of Scilly see PARA 815 note 13 ante.

2 For these purposes, 'landlord' includes any person from time to time deriving title under the original landlord and also includes, in relation to any dwelling house, any person other than the tenant who is, or but for ibid Pt VII (ss 98-107) (as amended), would be, entitled to possession of the dwelling house: s 152(1). For the meaning of 'tenant' see note 3 infra.

3 For these purposes, 'tenant' includes statutory tenant and also includes a subtenant and any person deriving title under the original tenant or subtenant: ibid s 152(1). For the meaning of 'statutory tenant' see PARA 831 post.

4 I.e. the Landlord and Tenant Act 1985 ss 4-7 (as amended) (see PARAS 253-255 ante) ss 18-30 (as amended) (see PARA 325 et seq ante); the Protection from Eviction Act 1977 (see PARAS 215, 653 ante); the Rent Act 1977 (see PARA 810 et seq ante, PARA 817 et seq post); the Housing Act 1980 Pt II (ss 51-79) (as amended) (see PARA 1009 post); and the Housing Act 1988 Pt I Chs I-III (ss 1-26) (as amended) (see PARA 1011 et seq post).

5 Rent Act 1977 s 149(1)(a) (amended by the Housing (Consequential Provisions) Act 1985 ss 3, 4, Sch 1 Pt I, Sch 2 para 35(1), (11); the Housing Act 1980 s 152, Sch 25 para 53; the Housing Act 1988 s 43).

6 As to the Rent (Agriculture) Act 1976 see PARA 1134 et seq post.

7 Rent Act 1977 s 149(1)(b).

8 Ibid s 149(1)(c).

9 Ibid s 149(1)(d).

10 Ibid s 150(2) (amended by the Housing Act 1980 s 152(3), Sch 26); Protection from Eviction Act 1977 s 6 (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 4(2)). As to the local authorities in question see note 1 supra; but note that the Protection from Eviction Act 1977 s 6 (as amended) does not reproduce the wording in note 1 head (1) supra, referring instead to 'councils of districts and London boroughs'. Offences under the Rent Act 1977 are punishable summarily: s 150(1).

11 For the purposes of ibid Pt V (ss 77-85) (as amended) (see PARA 989 et seq post), the local authority is (1) in a London borough or district, the council of the London borough or district in question or, where the district is in a county in England and does not have a district council, the council of the county in question; (2) in a Welsh

county or county borough, the council of the county or county borough in question; and (3) in the City of London, the Common Council: s 83(1) (amended by the Local Government (Wales) Act 1994, s 22(2), Sch 8, PARA 3(3); and by the Local Government Changes (Rent Act) Regulations 1995, SI 1995/2451, reg 5). 'Local authority' does not, however, include the Council of the Isles of Scilly: see the Rent Act 1977 ss 83(1), 153(1) (as amended); and PARA 815 note 13 ante.

12    Ibid Pt V (ss 77-85) (as amended) and ss 103-106 (as amended) (see PARAS 1002-1007 post). As to the phasing out of restricted contracts see PARA 1014 post.

13    Ibid s 83(2).

14    Ibid the Housing Act 2004 Pt 3 (ss 79-100).

15    Ibid Pt 4 Ch I (ss 101-131).

16    See HOUSING vol 22 (2006 Reissue) PARA 498 et seq.

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### **817. Service of notices.**

Any document authorised or required by the Rent Act 1977 to be served by the tenant<sup>1</sup> of a dwelling house on the landlord<sup>2</sup> is deemed to be duly served on him if it is served:

- 1594   (1)   on any agent of the landlord named as such in the rent book or other similar document<sup>3</sup>; or
- 1595   (2)   on the person who receives the rent of the dwelling house<sup>4</sup>.

Where a dwelling house is subject to a regulated tenancy<sup>5</sup>, the above provisions apply also in relation to any document authorised or required by the Act to be served on the landlord by a person other than the tenant<sup>6</sup>.

If, for the purpose of any proceedings, whether civil or criminal, brought or intended to be brought under the Rent Act 1977, any person serves upon any such agent or other person as is referred to in head (1) or head (2) above a notice in writing requiring the agent or other person to disclose to him the landlord's full name and place of abode or place of business, that agent or other person must forthwith comply with the notice<sup>7</sup>. If any such agent or other person fails or refuses forthwith to comply with a notice so served on him, he is liable on summary conviction to a fine not exceeding level 4 on the standard scale, unless he shows to the satisfaction of the court that he did not know, and could not with reasonable diligence have ascertained, such of the facts required by the notice to be disclosed as were not disclosed by him<sup>8</sup>.

1    For the meaning of 'tenant' see PARA 816 note 3 ante. So far as the Rent Act 1977 s 151 (as amended) relates to Pt V (ss 77-85) (as amended) (see PARA 989 et seq post), Pt IX (ss 119-128) (as amended) (see PARA 925 et seq post), or ss 103-107 (as amended) (see PARA 1003 et seq post), references to a landlord and to a tenant are respectively to include references to a lessor and to a lessee as defined by s 85 (see PARAS 987 note 8, 986 note 7 respectively post): s 151(5).

2    For the meaning of 'landlord' see PARA 816 note 2 ante. See also note 1 supra.

3    Rent Act 1977 s 151(1)(a).

4    Ibid s 151(1)(b).

5 For the meaning of 'regulated tenancy' see PARA 854 post.

6 Rent Act 1977 s 151(2).

7 Ibid s 151(3).

8 Ibid ss 150(1), 151(4) (amended by the Criminal Justice Act 1982 ss 39, 46, Sch 3). As to the standard scale see PARA 52 note 6 ante. Proceedings may be brought by the local authority: see the Rent Act 1977 s 150(2) (as amended); and PARA 816 ante.

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## **(2) PROTECTED AND STATUTORY TENANCIES**

### **(i) Definitions and Classes**

#### **A. PROTECTED TENANCIES**

##### **(A) IN GENERAL**

##### **818. Meaning of 'protected tenancy'.**

A tenancy<sup>1</sup> entered into before 15 January 1989<sup>2</sup> under which a dwelling house, which may be a house or part of a house, is let as a separate dwelling<sup>3</sup> is, subject to the provisions of Part I of the Rent Act 1977<sup>4</sup>, a protected tenancy for the purposes of that Act<sup>5</sup>. A tenancy is not, however, a protected tenancy if:

1596 (1) the tenancy was entered into before 1 April 1990 and the rateable value of the house exceeds certain limits<sup>6</sup>; or

1597 (2) the tenancy was entered into on or after 1 April 1990 and the rent for the time being exceeds £25,000 a year<sup>7</sup>; or

1598 (3) the tenancy was entered into before 1 April 1990 and is one under which no rent is payable or, subject to a different rule in the case of tenancies which were controlled<sup>8</sup>, the rent is less than two-thirds of the rateable value of the house on the appropriate day<sup>9</sup>; or

1599 (4) the tenancy was entered into on or after 1 April 1990 and is one under which no rent is payable or the rent payable is £1,000 a year or less if the house is in Greater London or £250 a year or less if the house is elsewhere<sup>10</sup>; or

1600 (5) the tenancy is a qualifying shared ownership lease<sup>11</sup>; or

1601 (6) the house is let together with other land<sup>12</sup>; or

1602 (7) the house is bona fide let at a rent which includes payments in respect of board or attendance<sup>13</sup>; or

1603 (8) the tenancy is granted to a person pursuing or intending to pursue a course of study provided by a specified educational institution and is so granted by that or another specified institution<sup>14</sup>; or

1604 (9) the tenancy confers the right to occupy the house for a holiday<sup>15</sup>; or

- 1605 (10) the house is comprised in either an agricultural holding or the holding held under a farm business tenancy and is occupied by the persons responsible for the control of the farming or management of the holding<sup>16</sup>; or
- 1606 (11) the house consists of or comprises premises licensed for the sale of intoxicating liquors for consumption on the premises<sup>17</sup>; or
- 1607 (12) the landlord's interest is vested in a resident landlord<sup>18</sup>, the Crown<sup>19</sup>, a local authority or development corporation<sup>20</sup>, a housing association which is a registered social landlord or a co-operative housing association<sup>21</sup>, a housing co-operative<sup>22</sup> or one of certain other bodies<sup>23</sup>; or
- 1608 (13) the tenancy is an old-style assured tenancy within the meaning of the Housing Act 1980<sup>24</sup>.

1 For these purposes, 'tenancy' includes 'subtenancy': Rent Act 1977 s 152(1).

2 le the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to tenancies entered into on or after that date which may be protected see PARA 1012 post.

3 For the meaning of 'dwelling house ... let as a separate dwelling' see PARA 820 et seq post.

4 le subject to the Rent Act 1977 Pt I (ss 1-26) (as amended): see the text and notes 4-24 infra; and PARA 819 et seq post.

5 Ibid s 1. 'Protected tenancy' and 'protected tenant' are to be construed in accordance with s 1: s 152(1). A 'protected tenancy' is a regulated tenancy but only during its contractual, not its statutory, period. The expression was first introduced by the Rent Act 1968 (repealed) even though that Act was purely a consolidating Act. All Acts prior to the Rent Act 1965 (repealed) had their scope defined by reference to the house to which the Act applied rather than the tenancy: see eg the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(2) (repealed); cf the Rent Act 1965 s 1 and the Rent Act 1968 s 1 (both repealed). The Rent Act 1977 does not apply to a tenancy which has been extended under the Leasehold Reform Act 1967 s 14 (as amended): see s 16(1A) (as added); and PARA 1483 post.

6 See the Rent Act 1977 s 4(1)-(3) (as amended); and PARAS 855-859 post.

7 See ibid s 4(4) (as added); and PARA 860 post.

8 See ibid s 17(2) (repealed); and PARA 849 post.

9 See ibid s 5(1) (as amended); and PARA 861 post. For the meaning of 'rateable value' and 'appropriate day' see PARA 859 post. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

10 See ibid s 5(2A) (as added); and PARA 861 post.

11 See ibid s 5A (as added); and PARAS 863-866 post.

12 See ibid s 6; and PARA 867 post.

13 See ibid s 7; and PARA 869 post.

14 See ibid s 8; and PARA 874 post.

15 See ibid s 9; and PARA 874 post.

16 See ibid s 10 (as amended); and PARA 868 post.

17 See ibid s 11; and PARA 881 post.

18 See ibid s 12 (as amended); and PARAS 875-879 post.

19 See ibid s 13 (as substituted); and PARA 883 post.

20 See ibid s 14 (as amended); and PARA 884 post.

21 See ibid s 15 (as amended); and PARAS 885, 887 post.

22 See *ibid* s 16 (as amended); and PARA 888 post.

23 See *ibid* ss 13-15 (as amended); and PARAS 883-887 post.

24 See *ibid* s 16A (added by the Housing Act 1980 s 56(5), (6); repealed with savings by the Housing Act 1988 s 140(2), Sch 18); and PARA 890 post. As to old-style assured tenancies and their conversion into assured tenancies for the purposes of the Housing Act 1988 see PARA 890 post.

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## (B) BASIC REQUIREMENTS

### **819. Dwelling house let as separate dwelling.**

For a tenancy to be a protected tenancy<sup>1</sup>, it must normally have been entered into before 15 January 1989<sup>2</sup> and the premises let under the tenancy must satisfy the following basic requirements<sup>3</sup>:

- 1609 (1) they must be a dwelling house, which may be a house or part of a house<sup>4</sup>;
- 1610 (2) they must be let<sup>5</sup>;
- 1611 (3) they must be let as a dwelling<sup>6</sup>; and
- 1612 (4) the dwelling must be a separate dwelling<sup>7</sup>.

1 For the full meaning of 'protected tenancy' see PARA 818 ante.

2 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to tenancies entered into on or after that date which may be protected see PARA 1012 post.

3 Rent Act 1977 s 1.

4 For the meaning of 'dwelling house' see PARAS 821-822 post.

5 For the meaning of 'let' see PARA 820 post.

6 As to the purpose of the letting see PARA 823 post.

7 As to the sharing of premises see PARAS 824-827 post.

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### **820. Meaning of 'let'.**

The Rent Act 1977 protects tenants but not licensees or lodgers<sup>1</sup>. Subtenants are included by definition<sup>2</sup>. Tenancies at will at a rent<sup>3</sup> and tenancies arising by estoppel<sup>4</sup> are capable of being

protected. The Act does not, however, protect employee licensees as opposed to employee tenants<sup>5</sup>, or a caretaker<sup>6</sup>, or a person allowed to remain temporarily on premises without any title<sup>7</sup>, or a mortgagor who attorns tenant to the mortgagee, at any rate after the contractual relationship created by the attornment clause has ceased<sup>8</sup>. It would seem that a tenancy at sufferance cannot in principle arise if the tenant is entitled to remain in possession as a statutory tenant<sup>9</sup>.

Where premises are let under a mutual misapprehension that they are not within the Rent Acts, or in reliance upon a fraudulent misrepresentation, the lease may be set aside and the court may make such order as is necessary to do justice between the parties<sup>10</sup>.

1 As to the distinction between a licence and a tenancy see PARA 7 et seq ante.

2 'Let' includes 'sublet' and 'tenancy' includes 'subtenancy': Rent Act 1977 s 152(1).

3 See *Chamberlain v Farr* [1942] 2 All ER 567, CA (agreement to purchase a house in course of construction; as the house was not ready by the date fixed for completion, the vendor allowed the purchaser to occupy another house as tenant at will at an agreed rent). Where a purchaser of property has been let into possession before completion in his capacity as purchaser under the terms of the contract of sale, he has been held not to be a tenant entitled to the protection of the Rent Acts: *Dunthorne and Shore v Wiggins* [1943] 2 All ER 678, CA (purchaser was to pay weekly instalments towards the discharge of a mortgage, payment of outgoings and the purchase of the equity of redemption, and completion was to take place when all the instalments had been paid); *Hopwood v Hough* [1944] 11 LJCCR 80. See also *Bradley v Morley* (1921) cited in 100 L Jo 490 at 501; *Keates v Jacobs* (1946) 147 Estates Gazette 318 (purchaser took possession without the vendor's consent); *Mansell v Turner* [1948] EGD 112, CA; *Hartmann v Jarvis* (1950) 156 Estates Gazette 4. A purchaser in possession under an agreement, collateral to the contract for sale, by which he was to make periodic payments has, however, been held to be a tenant entitled to protection: *Francis Jackson Developments Ltd v Stemp* [1943] 2 All ER 601, CA; *Finch v Thorpe* (1950) 100 L Jo 472; and see *Dunthorne and Shore v Wiggins* supra; *Hopwood v Hough* supra at 83; *Turley v Whitfield* (1944) 88 Sol Jo 160. A contract by which a person who is already in occupation of premises as a statutory tenant agrees to purchase the reversion does not, it seems, put an end to the statutory tenancy unless there is some provision in the contract inconsistent with the continuance of the tenancy: *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA (sale subject to the existing tenancy of the purchaser), distinguishing *Turner v Watts* (1928) 97 LJB 403, CA).

4 *Stratford v Syrett* [1958] 1 QB 107 at 111-112, 115, [1957] 3 All ER 363 at 365, 367, CA; and see *Mackley v Nutting* [1949] 2 KB 55, [1949] 1 All ER 413, CA.

5 *Thompsons (Funeral Furnishers) Ltd v Phillips* [1945] 2 All ER 49, CA; *Torbett v Faulkner* [1952] 2 TLR 659, CA; *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA. Where a tenant agrees to give up his security of tenure in exchange for a rent-free licence, there is no presumption of undue influence arising out of the relationship of employer and employee or landlord and tenant or both: *Mathew v Bobbins* (1980) 41 P & CR 1, [1980] 2 EGLR 97, CA. As to the distinction between employee licensees and employee tenants see PARA 15 ante. Certain employee licensees are given limited protection as if they were assured tenants under the Housing Act 1988: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18 (as amended); and PARA 1078 post.

6 *Ecclesiastical Comrs v Hilder* (1920) 36 TLR 771.

7 The Rent Acts have made the courts less ready to infer a tenancy from mere acceptance of rent: *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA. See also PARA 831 the text and note 10 post.

8 *Portman Building Society v Young* [1951] 1 All ER 191, CA; *Alliance Building Society v Pinwill* [1958] Ch 788, [1958] 2 All ER 408.

9 See, however, *Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301 at 304.

10 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA; *Peters v Batchelor* (1950) 100 L Jo 718, CA; *Killick v Roberts* [1991] 4 All ER 289, [1991] 1 WLR 1146, CA.

STATUTORY TENANCIES/(i) Definitions and Classes/A. PROTECTED TENANCIES/(B) Basic Requirements/821. Meaning of 'dwelling house'.

## 821. Meaning of 'dwelling house'.

'Dwelling house' means premises which are suitable for all the major activities of residential life, particularly sleeping, cooking and eating, and which are actually used for those purposes<sup>1</sup>. If the tenant carries on some of these activities elsewhere, the premises are not a dwelling house<sup>2</sup>. Premises used merely for the purpose of affording additional accommodation for guests of a hotel owned by the tenant do not constitute a dwelling house<sup>3</sup>.

It is expressly stated that a dwelling house may be part of a house<sup>4</sup>. A flat<sup>5</sup>, therefore, or a maisonette or a suite of rooms or a single room<sup>6</sup> in a house may constitute a dwelling house. Moreover, physically distinct entities such as rooms on different floors<sup>7</sup> or separate flats in a block, whether contiguous or not<sup>8</sup>, or a house and cottage<sup>9</sup> may also together constitute a dwelling house if they are let together on a single letting to one tenant for joint occupation as his home<sup>10</sup>. This is so even where there is no means of inter-communication between the two parts and even though the tenant has sublet one of them<sup>11</sup>. If the rateable value of the resulting dwelling house exceeds the limits for the statutory protection, the fact that it is made up of two units each of whose rateable value is within those limits will not bring the entire premises within protection<sup>12</sup>.

In deciding whether a structure is capable of being a house, regard must be had to the circumstances of the letting and the essential nature, degree of permanence and immobility of the structure. Each case turns on its own facts. Presumably a cave or other form of natural structure which is permanent in form might constitute a house if suitably adapted. Even though the original purpose of a structure was not that of a dwelling house, it may be that adaptation could bring it within the meaning of the expression. Thus a bathing-hut<sup>13</sup> or an immobilised caravan<sup>14</sup> or perhaps a watchman's shed or wheelless railway carriage may, by adaptation, become a dwelling house<sup>15</sup>.

1 *Curl v Angelo* [1948] 2 All ER 189 at 190. CA. Cooking facilities are not, however, necessary for premises to constitute a dwelling house: see *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, [2002] 1 All ER 46 (a decision on the meaning of 'dwelling house' for the purposes of the Housing Act 1988 s 1 (as amended) (see PARA 1018 post)).

2 *Wright v Howell* (1947) 92 Sol Jo 26, CA (single room without cooking facilities, the occupant of which slept elsewhere, held not to be a dwelling house); *Wimbush v Cibulia*, *Wimbush v Levinski* [1949] 2 KB 564, [1949] 2 All ER 432, CA (essential activities of residential life divided between different parts of a house let to the same tenant; matter referred to the court to decide if there were separate lettings or a combined letting); *Metropolitan Properties Co (FGC) Ltd v Barder* [1968] 1 All ER 536, [1968] 1 WLR 286, CA (servant's bedroom held not to be a dwelling house).

3 *Curl v Angelo* [1948] 2 All ER 189, CA.

4 See the Rent Act 1977 s 1; and PARA 818 ante.

5 *Langford Property Co Ltd v Goldrich* [1949] 1 KB 511 at 517, [1949] 1 All ER 402 at 404, CA, per Somervell LJ.

6 See *Curl v Angelo* [1948] 2 All ER 189 at 190-191, CA, per Lord Greene MR (to constitute a dwelling house the room must be the only place where the tenant 'moves and has his being'). Cf the cases cited in note 2 supra.

7 *Wimbush v Cibulia*, *Wimbush v Levinski* [1949] 2 KB 564, [1949] 2 All ER 432, CA. It appears from this case, as explained in *Metropolitan Properties Co (FGC) Ltd v Barder* [1968] 1 All ER 536 at 539, [1968] 1 WLR 286 at 290, CA, per Willmer LJ that there can be a single letting even though there are separate tenancy agreements, at any rate if they are coterminous.

8 *R and P Properties Ltd v Baldwin* [1939] 1 KB 461, [1938] 4 All ER 845, CA (contiguous flats); *Langford Property Co Ltd v Goldrich* [1949] 1 KB 511 at 517, [1949] 1 All ER 402 at 404, CA, per Somervell LJ (non-contiguous flats).

9 *Whitty v Scott-Russell* [1950] 2 KB 32, [1950] 1 All ER 884, CA.

10 This is not the case if the two parts were let separately and it was intended that they should continue to be separate: *Lewis v Purvis* (1947) 177 LT 267, CA.

11 *Whitty v Scott-Russell* [1950] 2 KB 32, [1950] 1 All ER 884, CA.

12 *Rider v Rollit* (1920) 36 TLR 687; *Langford Property Co Ltd v Goldrich* [1949] 1 KB 511, [1949] 1 All ER 402, CA. As to the limits on rateable value for the purposes of protection under the Rent Act 1977 see PARAS 855-859 post; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

13 *Spraggs v Prentice* (1950) 100 L Jo 541.

14 *Makins v Elson* [1977] 1 All ER 572, [1977] 1 WLR 221 ('dwelling house' construed for the purposes of the Finance Act 1965 s 29 (repealed)); *Norton v Knowles* [1969] 1 QB 572, [1967] 3 All ER 1061, DC (occupier of a caravan held to be a 'residential occupier' of 'premises' for the purposes of the Rent Act 1965 s 30 (repealed)); *R v Rent Officer of the Nottinghamshire Registration Area, ex p Allen* (1985) 52 P & CR 41, 17 HLR 481 (stationary but not immobile caravan held not to constitute a house; cf *Chelsea Yacht and Boat Co Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1941, CA (houseboat not a dwelling house for the purposes of the Housing Act 1988 (assured tenancies: see PARA 1011 et seq post)). See also *Morgan v Taylor* (1948) 99 L Jo 290; *R v Guildford Area Rent Tribunal, ex p Grubey* [1951] EGD 286, DC. As to the separate system of more limited statutory protection for the occupiers of mobile homes see PARA 1267 et seq post.

15 The dominant question would seem to be whether the premises can reasonably be said to be anybody's 'home': see *Curl v Angelo* [1948] 2 All ER 189 at 190, CA, per Lord Greene MR.

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## **822. Premises used partly for business purposes.**

A tenancy of premises which are occupied by the tenant partly for the purpose of a business carried on by him<sup>1</sup> cannot be a protected regulated tenancy<sup>2</sup>, but may become regulated if the tenant's business occupation ceases<sup>3</sup> as long as the tenancy is of a dwelling house let as a separate dwelling<sup>4</sup>. The test of whether a building used partly for business purposes constitutes a dwelling house within the meaning of the Rent Acts is not whether the residential part constitutes a substantial portion of the whole<sup>5</sup>; nor is it correct to consider what is the predominant use of the premises<sup>6</sup>. It would seem, however, that, where only a very small part of the premises is used for residential purposes, the whole premises would not constitute a dwelling house<sup>7</sup>. Whether a building is a dwelling house or not depends on the particular facts of each case<sup>8</sup>; but houses even a substantial part of which are used for business purposes may come within the meaning of the expression<sup>9</sup>.

1 ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see s 23 (as amended); and PARAS 706-708 ante.

2 See the Rent Act 1977 s 24(3); and PARA 880 post. Section 24(3) is without prejudice to the application of any other provision of the Act to a subtenancy of any part of the premises comprised in such a tenancy: s 24(3). For the meaning of 'regulated tenancy' see PARA 854 post. If the statutory tenant of a dwelling house (ie one whose contract of tenancy has come to an end) commences to occupy the house for a significant business purpose, it seems that he will remain a statutory regulated tenant (so long as he also occupies the house as his



residence) because the Landlord and Tenant Act 1954 s 23 (as amended) applies only to contractual tenancies, and so the Rent Act 1977 s 24(3) will not take the statutory tenancy out of the ambit of the Rent Act 1977.

3     le because the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) will then cease to apply. The same is true if the tenant sublets the business part. Mixed residential and business premises such as flats above shops may fall within the scope of Pt II (as amended) but a subtenant may be afforded protection against the business tenant: see *Wellcome Trust Ltd v Hamad*, *Ebied v Hopkins*, *Church Comrs for England v Baines* [1998] QB 638, [1998] 1 All ER 657, CA.

4     See the Rent Act 1977 s 1; and PARA 818 ante, PARA 823 post.

5     *Cohen v Benjamin* (1922) 39 TLR 10; *Hicks v Snook* (1928) 93 JP 55, CA; *Vickery v Martin* [1944] KB 679, [1944] 2 All ER 167, CA.

6     *Whiteley v Wilson* [1953] 1 QB 77, [1952] 2 All ER 940, CA; *Levermore v Jobey* [1956] 2 All ER 362 at 370, [1956] 1 WLR 697 at 707, CA.

7     See *Hicks v Snook* (1928) 93 JP 55 at 56, CA, per Greer LJ; *Pender v Reid* 1948 SC 381, Ct of Sess; *Green v Coggins* [1949] 2 All ER 815 at 816, CA; *Cargill v Phillips* 1951 SC 67, Ct of Sess; *Feyereisel v Turnidge* [1952] 2 QB 29 at 33, [1952] 1 All ER 728 at 731, CA.

8     *Whiteley v Wilson* [1953] 1 QB 77 at 83, [1952] 2 All ER 940 at 943, CA. Thus, where the business part and the residential part are self-contained, slight circumstances may determine whether the building is a dwelling house or not. No clear definition of a dwelling house entitled to protection can be given; it is a question of degree: *Maunsell v Olins* [1975] AC 373 at 389, [1975] 1 All ER 16 at 24, HL, per Lord Wilberforce.

9     See the cases cited in PARA 823 notes 13, 15 post.

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### **823. The purpose of the letting.**

The dwelling house must be let as a dwelling for there to be a protected tenancy<sup>1</sup>. This is a different question from that of whether the premises are a dwelling house<sup>2</sup>. In determining whether premises are let as a dwelling the following propositions apply<sup>3</sup>:

- 1613 (1) where the terms of a tenancy agreement provide for or contemplate the use of the premises for some particular purpose, then, subject to the qualification in head (2) below, that purpose is the essential factor in deciding the question whether or not the house can be said to have been let 'as a separate dwelling house' so as to fall within the Rent Acts<sup>4</sup>;
- 1614 (2) nevertheless, where the original tenancy agreement provided for or contemplated the use of the premises for some particular purpose but, by the time when the possession proceedings are begun, that agreement has been superseded by a subsequent contract providing for a different user, the subsequent contract may be looked at in deciding the latter question;
- 1615 (3) if a tenant changes the user of the premises and the fact of the change is fully known to, and accepted by, the landlord, it may be possible for the court to infer a subsequent contract to let them 'as a separate dwelling house' although this would be a contract different in essentials from the original tenancy agreement;
- 1616 (4) however, unless a contract of the last-mentioned nature can be spelt out, a mere unilateral change of user will not enable a tenant to claim the protection of the Rent Acts in a case where the terms of the tenancy agreement itself provide for and contemplate the use of the premises for some particular purpose which does

not attract the protection of those Acts, for example as a shop or an agricultural holding<sup>5</sup>;

- 1617 (5) where the tenancy agreement itself does not provide for or contemplate the use of the premises for any particular purpose, actual subsequent user has to be looked at in determining whether a house is 'let as a separate dwelling house' so as to attract the protection of the Rent Acts<sup>6</sup>.

If the letting is of part business and part residential accommodation under a lease which provides that the business part is to be used for business purposes and the residential part for residential purposes, there is no letting of a dwelling house as a separate dwelling<sup>7</sup>. If the tenant ceases to occupy any part of the premises for business purposes and continues to reside in the premises, the tenancy cannot become a regulated tenancy under the Rent Act 1977<sup>8</sup> since there is no letting as a separate dwelling<sup>9</sup>. Similarly, if a dwelling house is let together with agricultural land so that the tenancy when granted is of an agricultural holding, the tenancy will not become a regulated tenancy if the tenant ceases all agricultural use since there was never a letting as a separate dwelling<sup>10</sup>.

If the agreement provides that premises are to be used only for business purposes, the tenant cannot bring himself within the protection of the Rent Acts by using the premises as a residence in breach of the terms of the agreement<sup>11</sup>. If, however, the facts show that by the consent of both parties the provision prohibiting residential use was relaxed so as to give rise to a new or modified letting, such a letting may amount to a letting for residential purposes<sup>12</sup>. The landlord's knowledge that the premises are being used as living accommodation may in some circumstances amount to consent to such user<sup>13</sup>.

The principle that a tenancy is not protected where its terms provide for the user of the premises for a particular purpose other than as a residence applies only if on its true construction the stipulation in question defines the whole purpose of the letting or precludes their use as a dwelling<sup>14</sup>. If part of the premises is designed for living in, the court will be reluctant to construe a term that the tenant will not use the premises otherwise than as a shop or for a particular business so as to prohibit him from living on the premises<sup>15</sup>. In construing the agreement in such a case the court must pay regard to the surrounding circumstances, in particular the subject matter of the letting<sup>16</sup>.

Residential use need not be the only use permitted or contemplated for premises to be let as a dwelling<sup>17</sup>. Protection is given not merely to single, identifiable, pure dwelling houses, but also to houses of a mixed character<sup>18</sup>.

Whereas more than one house or flat may be a dwelling house<sup>19</sup>, plural being read for singular<sup>20</sup>, it is settled that to be protected a tenancy must be of a house let as a single dwelling<sup>21</sup>. Accordingly a tenancy of a building which at the date of the letting contained several separate and self-contained flats is not protected<sup>22</sup>, although a tenancy of a building containing one flat and one shop may be<sup>23</sup>. A person may have two dwelling houses, each of which he occupies as his home, so that, if either of them is let to him, his tenancy of it is protected by the Rent Act 1977<sup>24</sup>.

If premises are let as a dwelling, the fact that, owing to damage, the tenant is prevented from living in them, even though he is able to use them as business premises, does not change the character of the letting<sup>25</sup>.

Where there has been a separate letting of each of the two parts of the premises, one part being residential and the other subject to business user, then, unless the transaction is a sham, and even though the leases may have been to the same tenant, the tenancy of the whole will not be protected, only that of the residential part<sup>26</sup>.

1 See the Rent Act 1977 s 1; and PARA 818 ante.

- 2 *Ponder v Hillman* [1969] 3 All ER 694 at 696, [1969] 1 WLR 1261 at 1264 per Goff J.
- 3 *Russell v Booker* [1982] 2 EGLR 86 at 90, (1982) 263 Estates Gazette 513 at 516, CA, per Slade LJ.
- 4 See *Wolfe v Hogan* [1949] 2 KB 194 at 205, [1949] 1 All ER 570 at 575, CA, per Denning LJ; *Whitty v Scott-Russell* [1950] 2 KB 32, [1950] 1 All ER 884, CA; *Levermore v Jobey* [1956] 2 All ER 362 at 364, [1956] 1 WLR 697 at 704, CA, per Jenkins LJ.
- 5 See *Whitty v Scott-Russell* [1950] 2 KB 32 at 39-40, CA, per Asquith LJ; *Horford Investments Ltd v Lambert* [1976] Ch 39 at 52, [1974] 1 All ER 131 at 139, CA, per Scarman LJ.
- 6 See *Gidden v Mills* [1925] 2 KB 713, DC, considered in *Wolfe v Hogan* [1949] 2 KB 194, [1949] 1 All ER 570, CA; *Alexander Cowan & Sons Ltd v Acton* 1952 SC 73, Ct of Sess. These decisions must, however, be treated with caution in relation to subtenants: see PARA 808 note 2 ante. The court may also look at the circumstances of the letting; if the premises were constructed or have been adapted for use as a dwelling, it will be reasonable to infer that they were let as a dwelling: *Wolfe v Hogan* supra at 205 and at 575 per Denning LJ; *Levermore v Jobey* [1956] 2 All ER 362 at 364, [1956] 1 WLR 697 at 704, CA, per Jenkins LJ.
- 7 The tenancy may be protected by the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante. A tenancy cannot be a regulated tenancy under the Rent Act 1977 if it is one to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see the Rent Act 1977 s 24(3); and PARA 880 post.
- 8 For the meaning of 'regulated tenancy' see PARA 854 post.
- 9 *Pulleng v Curran* (1980) 44 P & CR 58, CA; *Cheryl Investments Ltd v Saldanha, Royal Life Saving Society v Page* [1979] 1 All ER 5 at 9, [1978] 1 WLR 1329 at 1334, CA, per Lord Denning MR; *Wagle v Trustees of Henry Smith's Charity Kensington Estate* [1990] QB 42, [1989] 2 WLR 669, CA; *Webb v London Borough of Barnet* (1988) 21 HLR 228, [1989] 1 EGLR 49, CA.
- 10 *Russell v Booker* [1982] 2 EGLR 86, (1982) 263 Estates Gazette 513, CA.
- 11 *Williams v Perry* [1924] 1 KB 936; *Macmillan & Co Ltd v Rees* [1946] 1 All ER 675, CA; *Wolfe v Hogan* [1949] 2 KB 194, [1949] 1 All ER 570, CA; *Court v Robinson* [1951] 2 KB 60, [1951] 1 All ER 209, CA; and see the cases cited in note 9 supra.
- 12 *Levermore v Jobey* [1956] 2 All ER 362 at 364, [1956] 1 WLR 697 at 700, CA, per Jenkins LJ; *Russell v Booker* [1982] 2 EGLR 86, (1982) 263 Estates Gazette 513, CA.
- 13 *Hazell, Watson and Viney Ltd v Malvermi* [1953] 2 All ER 58, [1953] 1 WLR 782; but cf *Court v Robinson* [1951] 2 KB 60, [1951] 1 All ER 209, CA (knowledge of a rent collector without authority to grant a new lease or consent to a variation did not affect the landlord). Mere acceptance of rent is not enough, unless it can properly be inferred that the landlord has assented to the change of user: *Wolfe v Hogan* [1949] 2 KB 194 at 206, [1949] 1 All ER 570 at 579, CA, per Denning LJ; *Russell v Booker* [1982] 2 EGLR 86, (1982) 263 Estates Gazette 513, CA.
- 14 *Levermore v Jobey* [1956] 2 All ER 362, [1956] 1 WLR 697, CA.
- 15 *R v Brighton and Area Rent Tribunal, ex p Slaughter* [1954] 1 QB 446, [1954] 1 All ER 423, DC; *R v Folkestone Rent Tribunal, ex p Webb* [1954] 1 QB 454n, [1954] 1 All ER 427, DC; *Levermore v Jobey* [1956] 2 All ER 362, [1956] 1 WLR 697, CA. A covenant not to use premises otherwise than as a hotel or boarding house may be observed, not violated, by the tenant sleeping on the premises: *Vickery v Martin* [1944] KB 679, [1944] 2 All ER 167, CA; *Kitchen's Trustee v Madders* [1950] Ch 134, [1949] 2 All ER 1079, CA; *Court v Robinson* [1951] 2 KB 60 at 69, [1951] 1 All ER 209 at 213, CA. Cf *Luttrell v Addicott* [1946] 2 All ER 625, CA (dwelling house with café used as a boarding house held to be suitable alternative accommodation under what is now the Rent Act 1977 s 98 (as amended) (see PARA 947 post). The fact that at the time of the demise the residential part of premises is occupied by a sitting tenant may afford conclusive evidence of the intention of the parties as to the use of that part: *British Land Co Ltd v Herbert Silver (Menswear) Ltd* [1958] 1 QB 530, [1958] 1 All ER 833, CA.
- 16 *Levermore v Jobey* [1956] 2 All ER 362 at 365, [1956] 1 WLR 697 at 706, CA, per Jenkins LJ. This dictum was applied in *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733, where *Levermore v Jobey* supra was distinguished on its facts.
- 17 See *Callaghan v Bristowe* (1920) 89 LJB 817, DC (garage with flat above); *Colls v Parnham* [1922] 1 KB 325; *Greig v Francis and Champion Ltd* (1922) 38 TLR 519, DC; *Vickery v Martin* [1944] KB 679, [1944] 2 All ER 167, CA (guest house in which tenant reserves rooms for own occupation); *Levermore v Jobey* [1956] 2 All ER 362, [1956] 1 WLR 697, CA; *British Land Co Ltd v Herbert Silver (Menswear) Ltd* [1958] 1 QB 530, [1958] 1 All ER 833, CA (shop with living accommodation above or attached). See also note 15 supra.

- 18 *Maunsell v Olins* [1975] AC 373 at 389, [1975] 1 All ER 16 at 24, HL, per Lord Wilberforce.
- 19 See PARA 821 notes 7-10 ante.
- 20 See the Interpretation Act 1978 ss 6(c), 22(1), Sch 2 para 2.
- 21 *Horford Investments Ltd v Lambert* [1976] Ch 39, [1974] 1 All ER 131, CA; followed in *St Catherine's College v Dorling* [1979] 3 All ER 250, [1980] 1 WLR 66, CA, and in *Grosvenor (Mayfair) Estates v Amberton* (1983) 265 Estates Gazette 693. The decision in *Horford Investments Ltd v Lambert* supra was anticipated in *R and P Properties Ltd v Baldwin* [1939] 1 KB 461, [1938] 4 All ER 845, CA. The point was not taken in *Murgatroyd v Tresarden* [1947] KB 316, [1946] 2 All ER 723, CA. Subsequent conversion into several self-contained units will not, however, exclude the protection of the Rent Acts if there was only one unit at the date of letting, even if the conversion was intended at the time of the letting: *Carter v SU Carburetter Co Ltd* [1942] 2 KB 288, [1942] 2 All ER 228, CA; *Lower v Porter* [1956] 1 QB 325, [1956] 1 All ER 150, CA.
- 22 *Horford Investments Ltd v Lambert* [1976] Ch 39, [1974] 1 All ER 131, CA. The position may be otherwise if the flats are not self-contained or the building is not converted into separate units: *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA.
- 23 See eg *British Land Co Ltd v Herbert Silver (Menswear) Ltd* [1958] 1 QB 530, [1958] 1 All ER 833, CA, and the other cases cited in note 15 supra.
- 24 See *Hampstead Way Investments Ltd v Lewis-Weare* [1985] 1 All ER 564, [1985] 1 WLR 164, HL (tenant did not, on the facts, have two homes); and see further PARA 835 post.
- 25 *Morleys (Birmingham) Ltd v Slater* [1950] 1 KB 506, [1950] 1 All ER 331, CA.
- 26 *Phillips v Hallahan* [1925] 1 KB 756, DC; *Cumbes v Robinson* [1951] 2 KB 83, [1951] 1 All ER 661, CA.

## UPDATE

### 823 The purpose of the letting

NOTE 9--See also *Tan v Sitkowski* [2007] EWCA Civ 30, [2007] 1 WLR 1628.

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## (C) SHARING OF ACCOMMODATION

### 824. Separate dwelling; sharing.

The requirement that, for a tenant to be protected, the premises must be let as a separate dwelling<sup>1</sup> does not make it necessary for each dwelling to be self-contained or partitioned off<sup>2</sup>. Special statutory provisions apply where a tenant shares accommodation with his landlord or with other persons<sup>3</sup>. Apart from those provisions, where an essential living room is shared, there is no separate dwelling and the premises are outside the scope of protection<sup>4</sup>. For this purpose, it has been held that a kitchen is an essential living room<sup>5</sup>, but that a bathroom or lavatory is not<sup>6</sup>. Each case must be decided on its own facts in the light of the whole arrangement and the surrounding circumstances, sharing being a matter of degree<sup>7</sup>. For there to be use in common there must be a right of simultaneous user by both parties<sup>8</sup>. The right of sharing must be clearly defined or the court will not give effect to it so as to exclude protection otherwise than under the special statutory provisions<sup>9</sup>.

A distinction can, however, be made between two situations. Where a landlord lets rooms without some essential living accommodation and then grants the tenant the right to use other essential accommodation in common with himself, the tenant has in fact no separate dwelling let to him. If, however, the landlord lets the whole of the premises to a tenant and then reserves to himself the right to utilise an essential living room, there has been a letting of a separate dwelling and the tenant is protected<sup>10</sup>. Similarly, if a tenant sublets and gives his subtenant a right to use his kitchen, the tenant does not thereby cease to have a separate dwelling and he remains protected as against the landlord; but there has been no letting of a separate dwelling to the subtenant and, apart from the special statutory provisions<sup>11</sup>, the subtenant will not be protected<sup>12</sup>. There is sufficient sharing to exclude protection otherwise than under those provisions even if the landlord has no need to use the shared accommodation and does not in fact utilise it<sup>13</sup>. A distinction must, however, be made between the sharing of an essential living room and a mere right of access which will not exclude protection even apart from the statutory provisions. Thus the right to draw water, or to use a gas stove once a week<sup>14</sup> will not be sufficient to constitute sharing.

1 See PARAS 818-819 ante.

2 *Darrall v Whitaker* (1923) 92 LJB 882, DC.

3 See PARAS 825-827 post.

4 *Neale v Del Soto* [1945] KB 144, [1945] 1 All ER 191, CA. Cf *Goodrich v Paisner* [1957] AC 65, [1956] 2 All ER 176, HL.

5 *Neale v Del Soto* [1945] KB 144, [1945] 1 All ER 191, CA. See also *Sharpe v Nicholls* [1945] KB 382, [1945] 2 All ER 55, CA; *Krauss v Boyne* [1946] 1 All ER 543; *Kenyon v Walker* [1946] 2 All ER 595, CA; *Winters v Dance* [1949] LJR 165, CA. Cf *Fredo Estates Ltd v Bryant* [1961] 1 All ER 34, [1961] 1 WLR 76, CA.

6 *Cole v Harris* [1945] KB 474, [1945] 2 All ER 146, CA.

7 *Goodrich v Paisner* [1957] AC 65, [1956] 2 All ER 176, HL.

8 *Rogers v Hyde* [1951] 2 KB 923, [1951] 2 All ER 79, CA.

9 *Goodrich v Paisner* [1957] AC 65, [1956] 2 All ER 176, HL.

10 *Rogers v Hyde* [1951] 2 KB 923, [1951] 2 All ER 79, CA.

11 See PARAS 825-827 post.

12 *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834, HL.

13 *Black v M'Garvie* 1946 SLT 7, Sh Ct; *Stanley v Compton* [1951] 1 All ER 859, CA.

14 *Hayward v Marshall, Winchester v Sharpe* [1952] 2 QB 89 [1952] 1 All ER 663, CA. See also *Marsh Ltd v Cooper* [1969] 2 All ER 498, [1969] 1 WLR 803, CA (limited right of access to the kitchen and bathroom for the landlord's employees; held to be a separate dwelling).

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## **825. Sharing with the landlord.**

The principle that, where essential living accommodation is shared, a house is not let as a separate dwelling<sup>1</sup> has been modified by statute<sup>2</sup>. Where under any contract entered into before 15 January 1989:

- 1618 (1) a tenant<sup>3</sup> has the exclusive occupation of any accommodation; and
- 1619 (2) the terms on which he holds the accommodation include the use of other accommodation in common with his landlord<sup>4</sup> or in common with his landlord and other persons; and
- 1620 (3) by reason only of the circumstances mentioned in head (2) above, or by reason of those circumstances and the fact that the landlord resides in another part of the building<sup>5</sup>, the accommodation referred to in head (1) above is not a dwelling house let<sup>6</sup> on a protected tenancy<sup>7</sup>,

the contract is a restricted contract<sup>8</sup>, notwithstanding that the rent does not include payment for the use of furniture or for services<sup>9</sup>.

The fact that the landlord has the right at the date proceedings are brought<sup>10</sup> to share some of the accommodation, even if he does not exercise the right, is sufficient to prevent the tenancy being a protected tenancy<sup>11</sup>.

1 As to this principle see PARA 824 ante.

2 Ie by the Rent Act 1977 s 21 (repealed by the Housing Act 1988 s 140(2), Sch 18 save in respect of a tenancy or contract entered into before 15 January 1989 (ie the date when Pt I (ss 1-45) (as amended) came into force: see s 141(3)) or in respect of a transitional case governed by s 36, Sch 18 para 1: see the text and notes 3-11 infra; and PARAS 985 et seq, 1014 post.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 The presence of a resident landlord will in some circumstances suffice on its own to make a tenancy a restricted contract and not a protected tenancy: see the Rent Act 1977 s 12 (as amended); and PARA 875 post.

6 For the meaning of 'let' see PARA 820 ante.

7 For the meaning of 'protected tenancy' see PARA 818 ante.

8 Restricted contracts enjoy a system of rent restriction and security of tenure different from that enjoyed by protected tenancies: see PARA 985 et seq post. There is no similar protection afforded under the Housing Act 1988 in respect of accommodation shared with the landlord: see PARA 1035 post.

9 Rent Act 1977 s 21 (repealed with savings: see note 2 supra). There is a sharing with the landlord where some accommodation was originally shared between tenants but one of them has become the landlord: *Tovey v Tyack* [1955] 1 QB 57, [1954] 3 All ER 210, CA. Where one tenant vacates the premises, it is a question of construction of the terms of the agreement whether the landlord has a right to share: *Lockwood v Lowe* [1954] 2 QB 267, [1954] 1 All ER 472, CA; *Isaacs v Titus* [1954] 1 All ER 470, [1954] 1 WLR 398, CA.

10 *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834, HL; *Tovey v Tyack* [1955] 1 QB 57, [1954] 3 All ER 210, CA.

11 *Stanley v Compton* [1951] 1 All ER 859, CA.

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## 826. Sharing between tenants.

Where a tenant<sup>1</sup> has the exclusive occupation<sup>2</sup> of any accommodation ('the separate accommodation') and:

- 1621 (1) the terms as between the tenant and his landlord<sup>3</sup> on which the tenant holds that accommodation include the use of other accommodation ('the shared accommodation') in common with another person or other persons not being or including the landlord<sup>4</sup>; and
- 1622 (2) by reason only of the circumstances mentioned in head (1) above, the separate accommodation would not otherwise be a dwelling house let<sup>5</sup> on or subject to a protected<sup>6</sup> or statutory tenancy<sup>7</sup>,

the separate accommodation is deemed to be a dwelling house let on a protected tenancy or, as the case may be, subject to a statutory tenancy and the following provisions have effect<sup>8</sup>.

While the tenant is in possession of the separate accommodation, whether as a protected or statutory tenant, any term or condition of the contract of tenancy terminating or modifying, or providing for the termination or modification of, his right to the use of any of the shared accommodation which is living accommodation<sup>9</sup> is of no effect<sup>10</sup>. Where, however, the terms and conditions of the contract of tenancy are such that at any time during the tenancy the persons in common with whom the tenant is entitled to the use of the shared accommodation could be varied, or their number could be increased, nothing in the above provisions prevents those terms and conditions from having effect so far as they relate to any such variation or increase<sup>11</sup>.

Without prejudice to the enforcement of any order made by a county court<sup>12</sup>, while the tenant is in possession of the separate accommodation no order may be made for possession of any of the shared accommodation, whether on the application of the immediate landlord of the tenant or on the application of any person under whom that landlord derives title, unless a like order has been made, or is made at the same time, in respect of the separate accommodation<sup>13</sup>. The statutory provisions<sup>14</sup> which restrict the landlord's right to possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy apply accordingly<sup>15</sup>. On the landlord's application, the county court may, however, make such order as it thinks just for:

- 1623 (a) terminating the tenant's right to use the whole or any part of the shared accommodation other than living accommodation; or
- 1624 (b) modifying the tenant's right to use the whole or any part of the shared accommodation, whether by varying the persons or increasing the number of persons entitled to the use of that accommodation or otherwise<sup>16</sup>.

No such order may be made so as to effect any termination or modification of rights of the tenant which could not otherwise<sup>17</sup> be effected by or under the terms of the contract of tenancy<sup>18</sup>.

1 For the meaning of 'tenant' see PARA 816 note 3 ante.

2 As to exclusive occupation see PARAS 6-7 ante.

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 Terms by a landlord who did not live on the premises that a tenant renting a room could share the house with 'whosoever I choose' were not sufficiently specific to show that he was reserving the right to live there

himself and did not therefore operate to deprive the tenant of protection under the Rent Act 1977 s 22 (see the text and notes 1-3 supra, 5-18 infra): *Gray v Brown* (1992) 25 HLR 144, [1993] 1 EGLR 119, CA.

5 For the meaning of 'let' see PARA 820 ante.

6 For the meaning of 'protected tenancy' see PARA 818 ante.

7 For the meaning of 'statutory tenancy' see PARA 831 post.

8 Rent Act 1977 s 22(1). Where, for the purpose of determining the rateable value of the separate accommodation, it is necessary to make an apportionment under s 25(1) (see PARA 859 post), regard must be had to the circumstances mentioned in s 22(1)(a) (see head (1) in the text): s 22(2). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

9 For these purposes, 'living accommodation' means accommodation of such a nature that the fact that it constitutes or is included in the shared accommodation is (or, if the tenancy has ended, was) sufficient, apart from ibid s 22, to prevent the tenancy from constituting a protected tenancy of a dwelling house: s 22(8). See PARA 824 ante.

10 Ibid s 22(3).

11 Ibid s 22(4).

12 Ie under ibid s 22(6): see the text to note 16 infra.

13 Ibid s 22(5).

14 Ie ibid s 98(1): see PARA 942 post.

15 Ibid s 22(5).

16 Ibid s 22(6).

17 Ie apart from ibid s 22(3): see the text to notes 9-10 supra.

18 Ibid s 22(7). It has been said that the combined effect of what is now s 22(3), (6), (7) is obscure and contradictory: see *Lockwood v Lowe* [1954] 2 QB 267 at 270, [1954] 1 All ER 472 at 473, CA, per Denning LJ. Cf the Housing Act 1988 s 10; and PARA 1020 post. As to applications to a county court see PARA 980 et seq post.

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### **827. Sharing with a subtenant.**

Where the tenant<sup>1</sup> of any premises, consisting of a house or part of a house, has sublet a part, but not the whole, of the premises, no part of the premises is, as against his landlord<sup>2</sup> or any superior landlord, to be treated as not being a dwelling house let on or subject to a protected<sup>3</sup> or statutory<sup>4</sup> tenancy by reason only that:

- 1625 (1) the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons; or
- 1626 (2) part of the premises is let to any such person at a rent which includes payments in respect of board or attendance<sup>5</sup>.

Nothing in the above provisions affects the rights against, and liabilities to, each other of the tenant and any person claiming under him, or of any two such persons<sup>6</sup>.



If, therefore, the subtenant shares with the tenant, he will not be protected as against the tenant, although the tenant is protected as against the head landlord. If the head landlord obtains possession against the tenant, the subtenant is not protected<sup>7</sup>.

1 For the meaning of 'tenant' see PARA 816 note 3 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 For the meaning of 'statutory tenancy' see PARA 831 post.

5 Rent Act 1977 s 23(1). Section 23(1) confirms the decision in *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834, HL, and reverses that in *Barrell v Fordree* [1932] AC 676, HL. Cf the Housing Act 1988 s 4; and PARA 1021 post. For the meaning of 'board' and 'attendance' see PARA 871 post; and as to the normal exclusion from Rent Act protection of houses let with board or attendance see PARA 869 post.

6 Rent Act 1977 s 23(2).

7 *Stanley v Compton* [1951] 1 All ER 859, CA; *Shackleton v Greenhalgh* [1951] 1 KB 725, [1950] 2 All ER 1223, CA.

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## (D) IMPLIED TERMS

### **828. Access for repairs.**

It is a condition of a protected tenancy<sup>1</sup> of a dwelling house that the tenant<sup>2</sup> shall afford to the landlord<sup>3</sup> access to the dwelling house and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute<sup>4</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 For the meaning of 'tenant' see PARA 816 note 3 ante.

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 Rent Act 1977 s 148. Cf s 3(2); and PARA 837 post (statutory tenancies); the Housing Act 1988 s 16; and PARA 1064 post (assured tenancies).

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### **829. Sublettings.**

If the tenant<sup>1</sup> of a dwelling house let on or subject to a protected tenancy<sup>2</sup> sublets any part of the dwelling house on a protected tenancy, he must supply his landlord<sup>3</sup> within 14 days after the subletting with a statement in writing of the subletting, giving particulars of occupancy, including the rent charged<sup>4</sup>. This provision does not, however, require the supply of such a statement in relation to a subletting of any part of a dwelling house if the particulars which would be required to be included would be the same as in the last statement so supplied with respect to a previous subletting of that part<sup>5</sup>. A tenant who is so required to supply a statement and who, without reasonable excuse, fails to supply a statement or supplies one which is false in any material particular is liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>6</sup>.

1 For the meaning of 'tenant' see PARA 816 note 3 ante.

2 For this purpose 'protected tenancy' includes a protected occupancy under the Rent (Agriculture) Act 1976 (see PARAS 1144-1145 post): Rent Act 1977 s 139(4)(a).

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 Rent Act 1977 s 139(1).

5 Ibid s 139(2).

6 Ibid s 139(3) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by the local authority: see s 150(2) (as amended); and PARA 816 ante.

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### **830. Improvements.**

It is a term of every protected and statutory tenancy<sup>1</sup> that the tenant will not make any improvement<sup>2</sup> without the written consent of the landlord<sup>3</sup>, which consent is not to be unreasonably withheld and, if unreasonably withheld, is to be treated as given<sup>4</sup>. These provisions are discussed in more detail below in the context of statutory tenancies<sup>5</sup>.

1 For these purposes, 'protected tenancy' and 'statutory tenancy' have the same meaning as in the Rent Act 1977 (see PARA 818 ante, PARA 831 post): Housing Act 1980 ss 85(1), 150. For cases in which the provisions set out in the text do not apply see s 81(4); and PARA 838 note 1 post.

2 For the meaning of 'improvement' for these purposes see ibid s 81(5); and PARA 838 note 2 post.

3 Ibid s 81(2). The Landlord and Tenant Act 1927 s 19(2) (see PARA 470 ante) is expressly excluded in such cases: Housing Act 1980 s 81(1) (amended by the Housing (Consequential Provisions) Act 1985 s 3, Sch 1). As to the application of these provisions see PARA 838 note 3 post.

4 Housing Act 1980 s 81(3).

5 See PARA 838 post.

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## **B. STATUTORY TENANCIES**

### **(A) DEFINITION AND CREATION**

#### **831. Meaning of 'statutory tenancy'.**

After the termination<sup>1</sup> of a protected tenancy<sup>2</sup> of a dwelling house the person<sup>3</sup> who, immediately before that termination, was the protected tenant of the dwelling house is, if and so long as he occupies the dwelling house as his residence<sup>4</sup>, the statutory tenant of it<sup>5</sup>. A dwelling house is referred to as subject to a statutory tenancy when there is a statutory tenant of it<sup>6</sup>. All statutory tenancies are now regulated tenancies<sup>7</sup>.

A statutory tenant may not be evicted without a court order<sup>8</sup>; and the court is precluded from making an order for possession unless one of the grounds set out in the Rent Act 1977 is satisfied<sup>9</sup>.

Where a tenant is or may be entitled to hold over as a statutory tenant after the expiry of his contractual term, the fact that he does so and that rent is paid and accepted will not of itself give rise to the inference that it was the intention of the parties to create a new contractual tenancy<sup>10</sup>.

1    Ie after the contractual term has been duly determined by effluxion of time, notice to quit or forfeiture. In one instance a statutory tenancy can arise even though the contractual tenancy subsists: see *Moodie v Hosegood* [1952] AC 61, [1951] 2 All ER 582, HL; and PARA 847 post. The court will be cautious about inferring a statutory tenancy where no evidence is produced as to the termination of the contractual tenancy: see *Thomas Pocklington's Gift Trustees v Hill* [1989] 2 EGLR 97 at 99, CA, per Bingham LJ.

2    For the meaning of 'protected tenancy' see PARA 818 ante.

3    Where there are joint tenants, each of the joint tenants who remain in occupation after the termination of the contractual term becomes a statutory tenant, even though they do not all so remain: *Lloyd v Sadler* [1978] QB 774, [1978] 2 All ER 529, CA, applied in *de Rothschild v Bell (a bankrupt)* [2000] QB 33, [1999] 2 All ER 722, CA (a case on the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post)). Cf *McIntyre v Hardcastle* [1948] 2 KB 82, [1948] 1 All ER 696, CA; *Tilling v Whiteman* [1980] AC 1, [1979] 1 All ER 737, HL (cases on the provisions now contained in the Rent Act 1977 s 98(1), (2), Sch 15 Pt I, Case 9 (as amended) (see PARA 956 post) and Sch 15 Pt II, Case 11 (as amended) (see PARA 963 post)).

4    The phrase 'if and so long as he occupies the dwelling house as his residence' is to be construed as it was under the Rent Act 1968 s 3(2) (repealed): Rent Act 1977 s 2(3). Case law has given an extended scope to the concept of occupation: see PARA 833 post. See also PARA 875 note 7 post.

5    Ibid s 2(1)(a). If the court makes an order for rescission of a protected tenancy, the statutory tenancy which has arisen on the termination of the protected tenancy will also be brought to an end: *Killick v Roberts* [1991] 4 All ER 289, [1991] 1 WLR 1146, CA. Where a mortgagor after the execution of the mortgage grants a lease of the mortgaged premises without the consent of the mortgagee, on the expiry of the lease the tenant does not become a statutory tenant as against the mortgagee: *Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA. A person who becomes a statutory tenant of a dwelling house as mentioned in the Rent Act 1977 s 2(1)(a) is referred to as a statutory tenant by virtue of his previous protected tenancy: s 2(4). As to statutory tenants by succession see PARA 842 et seq post.

6    Ibid s 2(2). 'Statutory tenant' and 'statutory tenancy' are to be construed in accordance with s 2 (as amended): s 152(1).

7    See PARA 854 post. As to the ultimate conversion of all controlled tenancies to regulated tenancies see PARA 848 post.

8 See the Protection from Eviction Act 1977 ss 1, 2 (as amended); CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609; and PARA 653 ante.

9 See the Rent Act 1977 s 98 (as amended); *Cruise v Terrell* [1922] 1 KB 664, CA; and PARA 949 et seq post. The fact that the lease could have been forfeited will not prevent a statutory tenancy arising on its termination: *Tideway Investment and Property Holdings Ltd v Wellwood* [1952] Ch 791, [1952] 2 All ER 514, CA. Cf the position where the contract of tenancy is rescinded: see note 5 supra.

10 *Morrison v Jacobs* [1945] KB 577, [1945] 2 All ER 430, CA; *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271; *Murray, Bull & Co Ltd v Murray* [1953] 1 QB 211, [1952] 2 All ER 1079; *Dealex Properties Ltd v Brooks* [1966] 1 QB 542, [1965] 1 All ER 1080, CA. Cf *Lewis v MTC (Cars) Ltd* [1975] 1 All ER 874, [1975] 1 WLR 457, CA (same principle applied to a business tenancy protected by the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended)); *Longrigg, Burrough and Trounson v Smith* [1979] 2 EGLR 42, (1979) 251 Estates Gazette 847, CA; *Epping Forest District Council v Pomphrett* (1990) 22 HLR 475, [1990] 2 EGLR 46, CA (a decision relating to whether a secure tenancy had been established). As to secure tenancies see PARA 1300 et seq post.

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## (B) NATURE OF STATUTORY TENANCY

### 832. In general.

A statutory tenant has no estate or property as tenant, but merely a personal right to retain possession of the property<sup>1</sup> which has been described as a status of irremovability<sup>2</sup>. It follows that:

- 1627 (1) a limited company, not being capable of personal residence, cannot be a statutory tenant<sup>3</sup>, although it may enjoy the benefit of the financial provisions of the Rent Acts during the contractual term as a protected tenant<sup>4</sup>;
- 1628 (2) a statutory tenant has no interest to assign<sup>5</sup> or to transmit by will<sup>6</sup> or to his trustee in bankruptcy<sup>7</sup>;
- 1629 (3) a purported subletting of the whole of the premises by a statutory tenant is a nullity (save that as between tenant and subtenant there would be a tenancy by estoppel), but it has been held that a statutory tenant may sublet part of the premises so as to give the subtenant protection against the head landlord<sup>8</sup>;
- 1630 (4) there cannot be a statutory tenancy where residence is not possible because the dwelling house has been destroyed or so damaged as substantially to have ceased to exist<sup>9</sup>; and
- 1631 (5) there cannot be a statutory tenancy unless at the time when the contractual tenancy comes to an end the person in whom the tenancy is vested<sup>10</sup> is residing in the dwelling house<sup>11</sup> except where the absence is purely temporary<sup>12</sup> or the tenant has always intended to return<sup>13</sup>.

1 *Roe v Russell* [1928] 2 KB 117 at 131, CA, per Sargant LJ; *Skinner v Ceary* [1931] 2 KB 546 at 559, CA, per Scrutton LJ; *Sutton v Dorf* [1932] 2 KB 304.

2 *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685 at 686, CA, per Lush J; cf *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496 at 501, [1951] 2 All ER 271 at 274, CA, per Evershed MR. Where the assignee of a lease lost the right to a statutory tenancy because of negligent legal advice, she could recover damages against the solicitors responsible: see *Murray v Lloyd* [1990] 2 All ER 92, [1989] 1 WLR 1060. A statutory tenant has

standing to apply to have a lease vested in him under the Insolvency Act 1986 s 181; but, where he declines to accept a vesting order under s 181, s 182(4) does not apply to deprive him of his status as a statutory tenant: *Re Vedmay Ltd* (1993) 69 P & CR 247, [1994] 1 BCLC 676. See further COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARAS 876-877.

3 *Reidy v Walker* [1933] 2 KB 266; *Hiller v United Dairies (London) Ltd* [1934] 1 KB 57, CA (both applied in *Firstcross Ltd (formerly Welgelegen NV) v East West (Export/Import) Ltd* (1980) 41 P & CR 145, 255 Estates Gazette 355, CA); *GE Stevens (High Wycombe) Ltd v High Wycombe Corpn* [1962] 2 QB 547, [1961] 2 All ER 738. The letting to the company must be genuine and not a sham: see *Estavest Investments Ltd v Commercial Investments Ltd and Sachak* (1987) 21 HLR 106, [1988] 2 EGLR 91, CA; *Hilton v Plustitle Ltd* [1988] 3 All ER 1051, [1989] 1 WLR 149, CA; *Kaye v Massbetter Ltd* (1990) 62 P & CR 558, [1991] 2 EGLR 97, CA.

4 *Carter v SU Carburetter Co Ltd* [1942] 2 KB 288, [1942] 2 All ER 228, CA. The same applies to a non-resident individual: *Feather Supplies Ltd v Ingham* [1971] 2 QB 348, [1971] 3 All ER 556, CA.

5 *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685, CA. A declaration of trust of a statutory tenancy is a nullity: *Wilkins v Carlton Shoe Co Ltd* (1930) 46 TLR 415, CA. Cf the Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 7(2) whereby it is a condition of a statutory tenancy under that Act that the tenant will not assign, sublet or part with possession of the dwelling house, or any part of it: see PARA 1151 post. As to the statutory provisions for facilitating the transfer of statutory tenancies see PARA 841 post; and as to transfer of a statutory tenancy to a spouse or civil partner on separation, divorce etc see PARA 836 post.

6 *John Lovibond & Sons Ltd v Vincent* [1929] 1 KB 687, CA.

7 *Sutton v Dorf* [1932] 2 KB 304; *Smith v Odder* (1949) 93 Sol Jo 433, CA. After 14 January 1989, a protected tenancy in respect of which no premium can lawfully be required as a condition of assignment is normally excluded from the bankrupt's estate: see the Insolvency Act 1986 s 283(3A)(b) (as added); para 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216. Such a tenancy may, however, vest in the trustee in bankruptcy on service of a notice under s 308A (as added): see PARA 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 393.

8 *Roe v Russell* [1928] 2 KB 117, CA. As to the effect of subletting by a statutory tenant see PARA 834 post.

9 *Ellis & Sons Amalgamated Properties Ltd v Sisman* [1948] 1 KB 653, [1948] 1 All ER 44, CA (contractual tenancy terminated before rebuilding completed); *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, [1951] 2 All ER 587, HL (flats subject to statutory tenancies demolished by enemy action). The fact that premises are temporarily unusable for a dwelling house but are used by the tenant for business purposes is not sufficient to deprive the tenant of his right: *Morleys (Birmingham) Ltd v Slater* [1950] 1 KB 506, [1950] 1 All ER 331, CA. However, after a long absence by the tenant from the premises the onus may be on him to show an intention to return: *Bushford v Falco* [1954] 1 All ER 957, [1954] 1 WLR 672, CA. Cf the position where premises are restored before the contractual tenancy is ended: *Simper v Coombs* [1948] 1 All ER 306; *Denman v Brise* [1949] 1 KB 22, [1948] 2 All ER 141, CA. If a statutory tenant was forced to leave the premises owing to a closing order, and the order was subsequently revoked after the premises had been rendered fit for human habitation, the question whether the statutory tenancy continued was held to depend upon whether the premises had lost their original identity in the course of the reconstruction: see *Ferguson v Pittman* 1958 SLT 18 (Sh Ct) at 21. As to prohibition orders (which have replaced closing orders) and the right of an owner to obtain possession where such an order has been made see the Housing Act 2004 s 33; para 944 post; and HOUSING vol 22 (2006 Reissue) PARA 399.

10 Thus, there is no protection if the tenancy is vested in the tenant's trustee in bankruptcy, whether or not he disclaims: *Reeves v Davies* [1921] 2 KB 486, CA; *Stafford v Levy* [1946] 2 All ER 256, CA; *Smalley v Quarrier* [1975] 2 All ER 688, [1975] 1 WLR 938, CA; *Fletcher v Davies* (1980) 257 Estates Gazette 1149, CA; *Eyre v Hall* (1986) 18 HLR 509, [1986] 2 EGLR 95, CA. See also note 7 supra.

11 *John M Brown Ltd v Bestwick* [1951] 1 KB 21, [1950] 2 All ER 338, CA.

12 *Skinner v Geary* [1931] 2 KB 546 at 562, CA, per Scrutton LJ; *Dixon v Tommis* [1952] 1 All ER 725, CA.

13 See PARA 833 post.

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### 833. Effect of tenant's absence.

A statutory tenant will lose the benefit of the Rent Acts if he abandons the premises without any intention of returning<sup>1</sup> or in circumstances such that the prospect of his returning is remote<sup>2</sup>. The onus of proving that the tenant has gone out of residence<sup>3</sup> is, in the first place, on the landlord<sup>4</sup>; but, where the tenant's absence is sufficiently long or continuous to raise the inference that he has ceased to occupy the premises as his residence, the onus shifts to the tenant to rebut this inference by showing both:

- 1632 (1) that he had throughout an intention to return<sup>5</sup>; and
- 1633 (2) some outward and visible sign of that intention<sup>6</sup>, for example occupation by a caretaker or licensee or the presence of the tenant's furniture<sup>7</sup>.

Thus a tenant who for business or other reasons is away from the premises, but who uses them as a residence for his immediate family and intends ultimately to occupy them himself, is entitled to the benefit of the Rent Acts<sup>8</sup>; but a tenant who has no intention of living on the premises does not retain such entitlement by leaving a licensee, whether a relative or not, on the premises<sup>9</sup>, except in the special case of a deserted spouse or civil partner<sup>10</sup>. A tenant may retain the benefit of the Rent Acts even though his absence is very prolonged, provided he genuinely intends to return<sup>11</sup>. A statutory tenant may maintain a claim for trespass<sup>12</sup> but a person who has lost his statutory rights by reason of his absence from the premises may not<sup>13</sup>.

1 If a tenant is forced to leave his house owing to the lack of repairs, he should have little difficulty in proving that his departure was an unwelcome and temporary removal: see *Bushford v Falco* [1954] 1 All ER 957 at 960, [1954] 1 WLR 672, CA (where, however, the fact that the departure of the tenant was attributable to disrepair did not avail him after a long absence in establishing an intention to return).

2 The absence of the tenant due to illness which is probably but not certainly incurable may produce a borderline case as in *Tickner v Hearne* [1961] 1 All ER 65, [1960] 1 WLR 1406, CA.

3 As to the distinction between possession, occupation and residence see *Poland v Earl Cadogan* [1980] 3 All ER 544, (1980) 40 P & CR 321, CA (decided under the Leasehold Reform Act 1967 s 1 (as amended): see PARA 1389 post).

4 *Roland House Gardens Ltd v Cravitz* (1974) 29 P & CR 432, 119 Sol Jo 167, CA.

5 If the contingencies attached to a tenant's intention to return are too remote, there will be insufficient intention to retain the protection of a statutory tenancy: *Robert Thackray's Estates Ltd v Kaye* (1988) 21 HLR 160, [1989] 1 EGLR 127, CA.

6 Where the tenant slept elsewhere and used the premises as a storehouse for his furniture, he was held to have lost his statutory rights: *Parkin v Scott* (1965) 196 Estates Gazette 989, CA. An ineffective purported transfer of a statutory tenancy will not as a matter of law destroy the tenant's statutory rights in a case where as a matter of fact the tenant intends to return: *Atyeo v Fardoe* (1979) 37 P & CR 494, CA. It may, however, be evidence relevant to the question whether the purported assignor has, in fact, retained the necessary intention.

7 *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA; *Brown v Brash and Ambrose* [1948] 2 KB 247, [1948] 1 All ER 922, CA; *Hallwood Estates Ltd v Flack* (1950) 66 (pt 2) TLR 368, CA; *Wigley v Leigh* [1950] 2 KB 305, [1950] 1 All ER 73, CA. The correct approach for the court to apply in determining whether the tenant is entitled to the protection of the Rent Act 1977 as the statutory tenant is set out in *Brickfield Properties Ltd v Hughes* [1988] 1 EGLR 106 at 107-108, CA, per Neill LJ.

8 *Skinner v Geary* [1931] 2 KB 546, CA; *Atyeo v Fardoe* (1979) 37 P & CR 494, CA.

9 *SL Dando Ltd v Hitchcock* [1954] 2 QB 317, [1954] 2 All ER 335, CA (applied in *Firstcross Ltd (formerly Welgelegen NV) v East West (Export/Import) Ltd* (1980) 41 P & CR 145, 255 Estates Gazette 355, CA); *Cove v Flick* [1954] 2 QB 326n, [1954] 2 All ER 441, CA; *Metropolitan Properties Co Ltd v Cronan* (1982) 44 P & CR 1, CA (abandoned child). The relative of the statutory tenant does not become a statutory tenant in these

circumstances: *Hanstown Properties Ltd v Green* [1978] 1 EGLR 185, (1977) 246 Estates Gazette 917, CA; *Brickfield Properties Ltd v Hughes* (1987) 20 HLR 108, [1988] 1 EGLR 106, CA.

10 See PARA 836 post.

11 *Gofor Investments Ltd v Roberts* (1975) 29 P & CR 366, CA; *Richards v Green* (1983) 11 HLR 1, [1983] 2 EGLR 104, CA; *Duke v Porter* (1986) 19 HLR 1, [1986] 2 EGLR 101, CA. See also *Stephens v Kerr* [2006] EWCA Civ 187, [2006] All ER (D) 186 (Feb) (tenant spending most of her time at a friend's home because the behaviour of new neighbours upset her; held that the judge had been entitled to find, as a matter of fact and degree, that she had been continuously resident at the property); *Carphone Warehouse UK Ltd v Malekout* [2006] EWCA Civ 767, [2006] 25 EG 209 (CS), [2006] All ER (D) 134 (Jun) (statutory tenant and his then landlord in dispute for some years about the state of the premises, which were in such a state of disrepair they became uninhabitable, and the tenant paid no rent; reversion assigned and landlord by assignment commenced proceedings for arrears of rent, contending that the statutory tenancy had terminated; proceedings compromised and terms embodied in a Tomlin order which provided, inter alia, that the claimant agreed to carry out items of work, upon the completion of which the defendant would become liable for rent; held that that agreement settled between the parties the issue of the defendant's intention to return to actual occupation once the premises were habitable and that the statutory tenancy continued).

12 *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685, CA.

13 *Thompson v Ward* [1953] 2 QB 153, [1953] 1 All ER 1169, CA.

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### **834. Effect of subletting on statutory tenancy.**

If a statutory tenant sublets parts of the premises as dwellings and uses the part he retains as business premises, he has ceased to occupy the premises as his residence and an order for possession may be made against him<sup>1</sup>. The same is the case if he sublets the whole of the premises<sup>2</sup>. The fact that part of the premises has been sublet does not necessarily imply that the tenant has abandoned possession and does not intend to return to that part<sup>3</sup>. If, however, it is established that he has no intention of occupying or reoccupying that part, he loses his statutory right to remain and an order for possession may be made in respect of the part sublet<sup>4</sup>. Such an order may also be made if the tenant has granted a licence for the use of part of the premises for business purposes<sup>5</sup>.

These principles apply only to statutory tenants. A contractual tenancy does not cease to be protected because the tenant sublets the whole or part of the premises, even if the sublettings are themselves not protected tenancies<sup>6</sup>.

1 *Haskins v Lewis* [1931] 2 KB 1, CA (where the court held, dissenting on this point from *Gidden v Mills* [1925] 2 KB 713, DC, that an order for possession could be made against the tenant of the whole of the premises, notwithstanding that the subtenants were protected); *John M Brown Ltd v Bestwick* [1951] 1 KB 21, [1950] 2 All ER 338, CA.

2 See *Ujima Housing Association v Ansah* (1997) 30 HLR 831, [1997] NPC 144, CA (decided under the Housing Act 1988 s 1(1): see PARA 1018 post). In theory even a tenant who sublets the whole could have an intention to return, but it is submitted that, where the subtenancy is protected, it will be possible for the tenant to establish such an intention only if he has served the appropriate notices under the Rent Act 1977 s 98(2), Sch 15 Pt II, Cases 11-14 (as amended) (see PARAS 963-965 post). See also *Poland v Earl Cadogan* [1980] 3 All ER 544, (198) 40 P & CR 321, CA (where it was held that, for the purposes of the Leasehold Reform Act 1967 s 1 (as amended) (see PARA 1389 post), a tenant who sublets the whole house ceases to occupy it as his residence during, at any rate, the intended period of the subletting). It is questionable, however, whether a statutory tenant who does not intend to reoccupy is capable of granting an effective subtenancy of the whole of the

demised premises: *Trustees of Henry Smith's Charity v Wilson* [1983] QB 316, [1983] 1 All ER 73, CA; and see *RC Glaze Properties Ltd v Alabdinboni* (1992) 25 HLR 150, [1992] EGCS 141, CA (where the point was left undecided). A statutory tenant who permitted part of the premises to be used by members of his wider family was not in breach of a covenant not to sublet: *Blanway Investments Ltd v Lynch* [1993] EGCS 8, CA. Cf the Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 7(2) whereby it is a condition of a statutory tenancy under that Act that the tenant will not assign, sublet or part with possession of the dwelling house, or any part of it: see PARA 1151 post.

3 *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834, HL; *Berkeley v Papadoyannis* [1954] 2 QB 149, [1954] 2 All ER 409, CA; *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA; *Regalian Securities Ltd v Ramsden* [1981] 2 All ER 65, [1981] 1 WLR 611, HL.

4 *Murgatroyd v Tresarden* [1947] KB 316, [1946] 2 All ER 723, CA; *Crowhurst v Maidment* [1953] 1 QB 23, [1952] 2 All ER 808, CA. In *Murgatroyd v Tresarden* supra, however, the point that the premises as a whole were not protected because they were not 'let as a dwelling' was not argued: see *Horford Investments Ltd v Lambert* [1976] Ch 39 at 48, [1974] 1 All ER 131 at 136, CA, per Russell LJ. *Crowhurst v Maidment* supra was applied in *Baron v Phillips* (1978) 38 P & CR 91, 247 Estates Gazette 1079, CA, which was decided under the Leasehold Reform Act 1967 but turned on whether the tenant would have been a statutory tenant of the whole of the demised premises or only part, had the tenancy not been at a low rent.

5 *Gee v Hazleton* [1932] 1 KB 179, DC.

6 See the Rent Act 1977 s 23(1); and PARA 827 ante.

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### 835. Effect of tenant having another house.

The fact that the tenant has another house elsewhere<sup>1</sup> does not preclude his becoming or remaining a statutory tenant so long as he genuinely occupies each set of premises as a home<sup>2</sup>, as where business requires him to maintain a second residence<sup>3</sup> or where he is in the process of moving<sup>4</sup>. This principle is, however, to be applied with some reserve<sup>5</sup>, although relatively brief periods of actual occupation by the tenant may suffice<sup>6</sup>. A mere holiday house is not a home for this purpose<sup>7</sup>.

Where a person is a tenant of two different parts of the same house under different lettings by the same landlord, and carries on some of his living activities in one part of the house and the rest of them in the other part, neither tenancy will normally be protected<sup>8</sup>. If, however, the true view of the facts is that there is, in substance, a single combined or composite letting of the two parts of the house as a whole, then the tenancies of both parts together will, or may, be protected<sup>9</sup>.

1 There is no requirement in the Rent Act 1977 s 2 that the premises be the tenant's only or main residence; cf the Housing Act 1985 s 81 (see PARA 1300 post); the Housing Act 1988 s 1(1)(b) (see PARA 1018 post).

2 It is a question of fact and degree whether the tenant occupies each premises as a home: *Hampstead Way Investments Ltd v Lewis-Weare* [1985] 1 All ER 564, [1985] 1 WLR 164, HL.

3 *Longford Property Co Ltd v Tureman* [1949] 1 KB 29, [1948] 2 All ER 722, CA; *Green v Coggins* [1949] 2 All ER 815, CA.

4 *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA.

5 *Hallwood Estates Ltd v Flack* (1950) 66 (pt 2) TLR 368 at 369, CA, per Evershed MR; *Dixon v Tommis* [1952] 1 All ER 725 at 727, CA; *Beck v Scholz* [1953] 1 QB 570, [1953] 1 All ER 814, CA; *Regalian Securities Ltd*



*v Scheuer* (1982) 47 P & CR 362, 263 Estates Gazette 973, CA; *DJ Crocker Securities (Portsmouth) Ltd v Johal* [1989] 2 EGLR 102, CA.

6 *Bevington v Crawford* (1974) 232 Estates Gazette 191, CA.

7 *Menzies v Mackay* 1938 SC 74, Ct of Sess; *Walker v Ogilvy* (1974) 28 P & CR 288, CA.

8 If, however, the tenant occupies one part of the house as a complete home in itself, the tenancy of that part will be protected: see *Kavanagh v Lyroudias* [1985] 1 All ER 560, (1983) 10 HLR 20, CA; *Hampstead Way Investments Ltd v Lewis-Weare* [1985] 1 All ER 564, [1985] 1 WLR 164, HL.

9 *Hampstead Way Investments Ltd v Lewis-Weare* [1985] 1 All ER 564, [1985] 1 WLR 164, HL (no composite letting on the facts).

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### **836. Family homes.**

Cases decided before 1968 established that occupation of the matrimonial home by a tenant's wife after the tenant had left counted as occupation by the tenant so as to preserve the statutory tenancy<sup>1</sup> for as long as the marriage itself subsisted<sup>2</sup>. In those circumstances the landlord could not properly be granted an order for possession against the husband unless there were available grounds for possession against both husband and wife<sup>3</sup>. The tenant could not abandon his rights while his wife remained; nor could the landlord evict the wife even if the tenant consented or purported to surrender his statutory tenancy.

The present position between husband and wife and between civil partners<sup>4</sup> is governed by the Family Law Act 1996. Where one spouse<sup>5</sup> or civil partner ('A') is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or any enactment giving that spouse or partner the right to remain in occupation, the spouse or civil partner not so entitled ('B') has the following rights ('home rights'):

1634 (1) if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it by A except with the leave of the court given by an order under the relevant statutory provisions<sup>6</sup>;

1635 (2) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house<sup>7</sup>.

B's occupation by virtue of these statutory provisions is to be treated, for the purposes of the Rent Act 1977, other than those provisions of that Act relating to restricted contracts<sup>8</sup>, and also for the purposes of the Rent (Agriculture) Act 1976<sup>9</sup> as occupation by A as A's residence<sup>10</sup>. These provisions do not, however, apply to a dwelling house which:

1636 (a) in the case of spouses, has at no time been, and was at no time intended by them to be, a matrimonial home of theirs; and

1637 (b) in the case of civil partners, has at no time been, and was at no time intended by them to be, a civil partnership home of theirs<sup>11</sup>.

Cohabitants have more limited rights of occupation. If:

- 1638 (i) one cohabitant or former cohabitant is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation;
- 1639 (ii) the other cohabitant or former cohabitant is not so entitled; and
- 1640 (iii) that dwelling house is the home in which they cohabit or a home in which they at any time cohabited or intended to cohabit,

the cohabitant or former cohabitant not so entitled may apply to the court for an order against the other cohabitant or former cohabitant ('the respondent') containing provision:

- 1641 (A) if the applicant is in occupation, giving him the right not to be evicted or excluded from the dwelling house or any part of it by the respondent for the period specified in the order and prohibiting the respondent from evicting or excluding the applicant during that period;
- 1642 (B) if the applicant is not in occupation, giving him the right to enter into and occupy the dwelling house for the period specified in the order and requiring the respondent to permit the exercise of that right<sup>12</sup>.

Other specified matters may be included in such an order<sup>13</sup>. An order so made may not be made after the death of either of the parties and ceases to have effect on the death of either of them<sup>14</sup>. It must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months<sup>15</sup>. So long as the order remains in force, the applicant's occupation by virtue of these statutory provisions is to be treated, for the purposes of the Rent Act 1977, other than those provisions of that Act relating to restricted contracts<sup>16</sup>, and also for the purposes of the Rent (Agriculture) Act 1976<sup>17</sup> as occupation by the respondent as the respondent's residence<sup>18</sup>.

If one spouse or civil partner is entitled, either in his own right or jointly with the other spouse or civil partner, to occupy a dwelling house by virtue of a relevant tenancy<sup>19</sup>, the court may make an order transferring the tenancy from one of them to the other<sup>20</sup> on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter<sup>21</sup>, or at any time when it has power to make a property adjustment order<sup>22</sup> with respect to the civil partnership<sup>23</sup>. Similarly, if one cohabitant is entitled, either in his own right or jointly with the other cohabitant, to occupy a dwelling house by virtue of a relevant tenancy, then if the cohabitants cease to cohabit, the court may make an order transferring the tenancy from one of them to the other<sup>24</sup>. Such an order may not be made, however, unless the dwelling house is or was a matrimonial home, a civil partnership home, or a home in which the cohabitants cohabited, as the case may be<sup>25</sup>.

Rights of occupation in respect of family homes are discussed in detail elsewhere in this work<sup>26</sup>.

1 *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA; *Middleton v Baldock* [1950] 1 KB 657, [1950] 1 All ER 708, CA; *Old Gate Estates Ltd v Alexander* [1950] 1 KB 311, [1949] 2 All ER 822, CA; *Bendall v McWhirter* [1952] 2 QB 466, [1952] 1 All ER 1307, CA.

2 *Robson v Headland* (1948) 64 TLR 596, CA; *Vaughan v Vaughan* [1953] 1 QB 762, [1953] 1 All ER 209, CA.

3 *Middleton v Baldock* [1950] 1 KB 657, [1950] 1 All ER 708, CA, explained and followed in *Grange Lane South Flats Ltd v Cook* (1979) 254 Estates Gazette 499, CA. The wife is entitled to be a party to the proceedings; but, if an order for possession is made against the husband tenant and takes effect without her applying to be joined, the order is effective against her: see *Penn v Dunn* [1970] 2 QB 686, [1970] 2 All ER 858, CA. She may, however, now apply for a stay, suspension or postponement of the order even if the date fixed for possession is past: see the Rent Act 1977 s 100(4A), (4B) (as added); and PARA 972 post.

4 Ie within the meaning of the Civil Partnership Act 2004: see generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 2.

5 For the more limited rights available to cohabitants see the text and notes 12-18 *infra*.

6 See the Family Law Act 1996 s 30(1), (2)(a) (s 30 amended by the Civil Partnership Act 2004 s 82, Sch 9 para 1(1), (2)(b); for transitional provisions see Sch 9 Pt 3). The 'relevant statutory provisions' referred to in head (1) in the text are the provisions of the Family Law Act 1996 s 33 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 292-293.

7 See *ibid* s 30(1), (2)(b) (as amended: see note 6 *supra*).

8 *Ie* the Rent Act 1977 Pt V (ss 77-85) (as amended) and ss 103-106 (as amended): see PARA 985 *et seq post*.

9 See PARA 1134 *et seq post*.

10 See the Family Law Act 1996 s 30(4)(a) (as amended: see note 6 *supra*).

11 See *ibid* s 30(7) (as amended: see note 6 *supra*).

12 See *ibid* s 36(1)-(4) (s 36(1) amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 34(1), (2)).

13 See the Family Law Act 1996 s 36(5).

14 *Ibid* s 36(9).

15 *Ibid* s 36(10).

16 See note 8 *supra*.

17 See note 9 *supra*.

18 See the Family Law Act 1996 s 36(13) (amended by the Civil Partnership Act 2004 Sch 9 para 7), applying the Family Law Act 1996 s 30(4)(a) (as amended: see note 6 *supra*).

19 For these purposes, 'relevant tenancy' means, *inter alia*, a protected tenancy or statutory tenancy within the meaning of the Rent Act 1977 or a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976: Family Law Act 1996 s 53, Sch 7 para 1.

20 *Ie* an order under *ibid* Sch 7 Pt II (paras 6-9) (as amended): see note 23 *infra*.

21 *Ie* whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute.

22 *Ie* under the Civil Partnership Act 2004 Sch 5 Pt 2.

23 Family Law Act 1996 s 53, Sch 7 para 2(1), (2) (Sch 7 para 2(1) amended, and Sch 7 para 2(2) substituted, by the Civil Partnership Act 2004 s 82, Sch 9 Pt 1 para 16(1)-(4)).

If a spouse, civil partner or cohabitant is entitled to occupy the dwelling house by virtue of a protected tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from such date as may be specified in the order, there is, by virtue of the order and without further assurance, to be transferred to, and vested in, the other spouse, civil partner or cohabitant: (1) the estate or interest which the spouse, civil partner or cohabitant so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and (2) where the spouse, civil partner or cohabitant so entitled is an assignee of such lease or agreement, the liability of that spouse, civil partner or cohabitant under any covenant of indemnity by the assignee express or implied in the assignment of the lease or agreement to that spouse, civil partner or cohabitant: Family Law Act 1996 Sch 7 para 7(1) (amended for these purposes by the Civil Partnership Act 2004 Sch 9, Pt 1 para 16(1), (8)). If an order is so made, any liability or obligation to which the spouse, civil partner or cohabitant so entitled is subject under any covenant having reference to the dwelling house in the lease or agreement, being a liability or obligation falling due to be discharged or performed on or after the date so specified, is not to be enforceable against that spouse, civil partner or cohabitant: Family Law Act 1996 Sch 7 para 7(2) (as so amended). References in Schedule 7 Pt II (as amended) to a spouse, a civil partner or a cohabitant being entitled to occupy a dwelling house by virtue of a relevant tenancy apply whether that entitlement is in his own right or jointly with the other spouse, civil partner or cohabitant: Sch 7 para 6 (amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (7)).

If the spouse, civil partner or cohabitant is entitled to occupy the dwelling house by virtue of a statutory tenancy within the meaning of the Rent Act 1977, the court may by order direct that, as from the date specified

in the order (a) that spouse, civil partner or cohabitant is to cease to be entitled to occupy the dwelling house; and (b) the other spouse, civil partner or cohabitant is to be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy: Family Law Act 1996 Sch 7 para 8(1) (Sch 7 para 8 amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (12)). The question whether the provisions of the Rent Act 1977 Sch 1 paras 1-3 (as amended), or (as the case may be) Sch 1 paras 5-7 (as amended) (see PARA 843 et seq post), as to the succession by the surviving spouse or surviving civil partner of a deceased tenant, or by a member of the deceased tenant's family, to the right to retain possession are capable of having effect in the event of the death of the person deemed by such an order to be the tenant or sole tenant under the statutory tenancy is to be determined according as those provisions have or have not already had effect in relation to the statutory tenancy: Family Law Act 1996 Sch 7 para 8(2) (as so amended). For similar provisions in relation to statutory tenancies within the meaning of the Rent (Agriculture) Act 1976 see the Family Law Act 1996 Sch 7 para 9 (as amended).

24 See *ibid* Sch 7 para 3(1), (2) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 42(1), (2)); and see also note 23 *supra*.

25 See the Family Law Act 1996 Sch 7 para 4 (amended by the Civil Partnership Act 2004, s 261(4), Sch 9 Pt 1 para 16(1), (5), Sch 30). For matters which the court must take into account see the Family Law Act 1996 Sch 7 para 5 (amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (6)).

26 See *MATRIMONIAL AND CIVIL PARTNERSHIP LAW* vol 72 (2009) PARA 285 et seq.

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### **837. Terms of statutory tenancies.**

So long as he retains possession, a statutory tenant<sup>1</sup> must observe and is entitled to the benefit of all the terms and conditions<sup>2</sup> of the original contract of tenancy<sup>3</sup>, so far as they are consistent with the provisions of the Rent Act 1977<sup>4</sup>. Thus he has a right to quiet enjoyment of the premises<sup>5</sup> together with any ancillary rights, such as the right to a supply of hot water or electricity<sup>6</sup>, which may have been included in the tenancy, expressly or by implication<sup>7</sup>, and a right to the benefit of such terms as were implied in the tenancy by statute<sup>8</sup>. An option for renewal may be carried into a statutory tenancy<sup>9</sup> but not, it seems, an option to buy the freehold<sup>10</sup>. An option for payment of a sum in lieu of dilapidations at the end of the tenancy may be incorporated in a statutory tenancy<sup>11</sup> but not a covenant to reinstate alterations<sup>12</sup>. Provisions setting or reducing the rent below the permitted limit are not consistent with the provisions of the Act<sup>13</sup>. After the end of the contractual period rent may be increased on account of an increase in the rates, notwithstanding that the tenancy contained a covenant by the landlord to pay the rates<sup>14</sup>.

It is a condition of a statutory tenancy of a dwelling house that the statutory tenant shall afford to the landlord<sup>15</sup> access to the dwelling house and all reasonable facilities for executing in it any repairs which the landlord is entitled to execute<sup>16</sup>.

A statutory tenant of a dwelling house is entitled to give up possession of the dwelling house if, and only if, he gives such notice as would have been required under the provisions of the original contract of tenancy (subject to the statutory minimum requirement of four weeks' notice<sup>17</sup>) or, if no notice would have been so required, on giving not less than three months' notice<sup>18</sup>. Notwithstanding anything in the contract of tenancy, a landlord who obtains an order for possession of a dwelling house as against a statutory tenant is not required to give to the statutory tenant any notice to quit<sup>19</sup>. He may not, however, forcibly evict the tenant himself but must apply for a warrant for possession to be executed by the court bailiff<sup>20</sup>.

If the tenant of a dwelling house let on or subject to a statutory tenancy<sup>21</sup> sublets any part of the dwelling house on a protected tenancy<sup>22</sup>, he must supply his landlord within 14 days after the subletting with a statement in writing of the subletting, giving particulars of occupancy, including the rent charged<sup>23</sup>. This provision does not, however, require the supply of such a statement in relation to a subletting of any part of a dwelling house if the particulars which would be required to be included would be the same as in the last statement so supplied with respect to a previous subletting of that part<sup>24</sup>. A tenant who is so required to supply a statement and who, without reasonable excuse, fails to supply a statement or supplies one which is false in any material particular is liable on summary conviction to a fine not exceeding level 2 on the standard scale<sup>25</sup>.

1 For the meaning of 'statutory tenant' see PARA 831 ante.

2 A right of assignment is not a term or condition for this purpose but an ordinary incident of property: *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685 at 698, CA. A term that the tenant is to remain in a particular employment is not an obligation of the tenancy for breach of which possession may be recovered: *RMR Housing Society Ltd v Combs* [1951] 1 KB 486, [1951] 1 All ER 16, CA.

3 'Original contract of tenancy' refers to the tenancy under which the tenant was holding immediately before he became a statutory tenant: *Oxley v Regional Properties Ltd* [1944] KB 733n, [1944] 2 All ER 510, CA (revsd on a different point sub nom *Regional Properties Ltd v Oxley*) [1945] AC 347, [1945] 2 All ER 418, HL.

4 Rent Act 1977 s 3(1). It was held in *Jessamine Investment Co v Schwartz* [1978] QB 264, [1976] 3 All ER 521, CA, following *Moses v Lovegrove* [1952] 2 QB 533, [1952] 1 All ER 1279, CA, that there is nothing to prevent a statutory tenant from acquiring a possessory title against his landlord by ceasing to pay rent. See also LIMITATION PERIODS vol 68 (2008) PARA 940 et seq; LAND REGISTRATION vol 26 (2004 Reissue) PARAS 841, 1021-1022.

5 *Lavender v Betts* [1942] 2 All ER 72. See further PARA 508 et seq ante.

6 *Engvall v Ideal Flats Ltd* [1945] KB 205, [1945] 1 All ER 230, CA. Where a landlord cut off the gas and electricity to a flat with the object of evicting the tenant, the tenant recovered general and special damages for breach of covenant but not punitive damages as the landlord's actions did not amount to trespass: *Perera v Vandiyar* [1953] 1 All ER 1109, [1953] 1 WLR 672, CA. Cf *Drane v Evangelou* [1978] 2 All ER 437, [1978] 1 WLR 455, CA. As to the granting of an injunction see *Wolff v Smith* [1923] 2 Ch 393. See also *Branchett v Beaney, Branchett v Swale Borough Council* [1992] 3 All ER 910, (1992) 24 HLR 348, CA, disapproving *McCall v Abelesz* [1976] QB 585, [1976] 1 All ER 727, CA; and PARAS 514-515, 519 ante. As to damages for unlawful eviction and harassment see PARAS 654-655 ante.

7 As to the rights implied under the Law of Property Act 1925 s 62(1) see *Wright v Macadam* [1949] 2 KB 744, [1949] 2 All ER 565, CA; *Goldberg v Edwards* [1950] Ch 247, CA; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.

8 Eg by the Landlord and Tenant Act 1985 s 8 (landlord to keep house fit for human habitation: see PARA 424 ante) and s 11 (as amended) (landlord to keep in repair structure, exterior and certain installations: see PARA 416 et seq ante).

9 *William McIlroy Ltd v Clements* [1923] WN 81; affd [1923] WN 149, CA.

10 *Longmuir v Hew* [1960] 3 All ER 26, [1960] 1 WLR 862.

11 *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA.

12 *Byrne v Herbert* [1966] 2 QB 121, [1966] 3 All ER 705. As to improvements see PARA 838 post.

13 *Phillips v Copping* [1935] 1 KB 15, CA; *Capital and Counties Properties Ltd v Butler* [1944] KB 730, [1944] 2 All ER 223, CA; *Regional Properties Ltd v Oxley* [1945] AC 347, [1945] 2 All ER 418, HL; *Stobbs & Sons v Hislop* 1948 SC 216, Ct of Sess; *Dean v Bruce* [1952] 1 KB 11, [1951] 2 All ER 926, CA.

14 See the Rent Act 1977 s 46; para 895 post; and *Westminster and Kensington Freeholds Ltd v Holme* [1955] 1 All ER 581, [1955] 1 WLR 272, CA. As to the abolition of domestic rates see PARA 521 ante. The tenant is normally liable to pay council tax: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

15 For the meaning of 'landlord' see PARA 816 note 2 ante.

16 Rent Act 1977 s 3(2). An identical term is implied into protected tenancies by s 148 (see PARA 828 ante) and into assured tenancies by the Housing Act 1988 s 16 (see PARA 1064 post).

17 lie under the Protection from Eviction Act 1977 s 5 (as amended): see PARA 214 ante.

18 Rent Act 1977 s 3(3). If a tenant leaves without giving the required notice, he remains liable for rent: *King's College, Cambridge v Kershman* (1948) 64 TLR 547, CA; *Boyer v Warbey* [1953] 1 QB 234, [1953] 1 All ER 269, CA.

19 Rent Act 1977 s 3(4). This provision has been interpreted as meaning that a landlord need not give a notice to quit to a statutory tenant before bringing proceedings for possession: see *Shuter v Hersh* [1922] 1 KB 438, CA (where the similar wording of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 15(1) (repealed) was considered). Although it is not the natural meaning of the statutory provision, this proposition is undoubtedly good law: see *Morrison v Jacobs* [1945] KB 577, [1945] 2 All ER 430, CA.

20 *Haniff v Robinson* [1993] QB 419, [1993] 1 All ER 185, CA.

21 For this purpose 'protected tenancy' includes a protected occupancy under the Rent (Agriculture) Act 1976 (see PARAS 1144-1145 post): Rent Act 1977 s 139(4)(a).

22 For this purpose, 'statutory tenancy' includes a statutory tenancy under the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 post): Rent Act 1977 s 139(4)(b).

23 Ibid s 139(1).

24 Ibid s 139(2).

25 Ibid s 139(3) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale' see PARA 52 note 6 ante. Proceedings may be instituted by the local authority: see s 150(2) (as amended); and PARA 816 ante.

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### **838. Terms as to improvements.**

It is a term of every protected and statutory tenancy<sup>1</sup> that the tenant will not make any improvement<sup>2</sup> without the written consent of the landlord<sup>3</sup>, which consent is not to be unreasonably withheld and, if unreasonably withheld, is to be treated as given<sup>4</sup>. If any question arises whether the withholding of a consent so required was unreasonable, it is for the landlord to show that it was not<sup>5</sup>. In determining the question, the court<sup>6</sup> must have regard, in particular, to the extent to which the improvement would be likely:

- 1643 (1) to make the dwelling house or any other premises less safe for occupiers;
- 1644 (2) to cause the landlord to incur expenditure which he would be unlikely to incur if the improvement were not made; or
- 1645 (3) to reduce the price which the dwelling house would fetch if sold on the open market or the rent which the landlord would be able to charge on letting the dwelling house<sup>7</sup>.

Such a consent may be validly given notwithstanding that it follows, instead of preceding, the action requiring it and may be given subject to a condition<sup>8</sup>.

Where the tenant has applied in writing for consent to make an improvement, then:

- 1646 (a) if the landlord refuses to give his consent, he must give to the tenant a written statement of his reasons why the consent was refused; and
- 1647 (b) if the landlord neither gives nor refuses to give his consent within a reasonable time, the consent is to be taken to have been withheld; and, if the landlord consents but subject to an unreasonable condition, his consent is to be taken to have been unreasonably withheld<sup>9</sup>.

If any question arises whether a condition attached to a consent was reasonable, it is for the landlord to show that it was<sup>10</sup>.

Any failure by a protected or statutory tenant to satisfy a reasonable condition imposed by the landlord in giving consent to an improvement which the tenant proposes to make, or has made, is to be treated<sup>11</sup> as a breach by the tenant of an obligation of his tenancy or, as the case may be, of an obligation of the previous protected tenancy which is applicable to the statutory tenancy<sup>12</sup>.

The above provisions do not apply in relation to certain specified<sup>13</sup> housing associations<sup>14</sup>.

1 For these purposes, 'protected tenancy' and 'statutory tenancy' have the same meaning as in the Rent Act 1977 (see PARAS 818, 831 ante): Housing Act 1980 ss 85(1), 150. Section 81(1)-(3) (see the text and notes 2-4 infra) does not apply in any case where the tenant has been given a notice that possession may be recovered under the Rent Act 1977 s 98(2), Sch 15 Pt II, Cases 11-18 (as amended) (see PARAS 963-969 post) or Sch 15 Pt II, Case 20 (as added) (see PARA 971 post), or a notice that a tenancy is to be a protected shorthold tenancy under the Housing Act 1980 s 52(1)(b) (repealed with savings: see PARA 1009 post), unless the tenant proves that, at the time when the landlord gave the notice, it was unreasonable for the landlord to expect to be able in due course to recover possession of the dwelling house under the Rent Act 1977 Sch 15 Pt II, Cases 11-20 (as amended): Housing Act 1980 s 81(4). Where this exception applies, the tenancy will be governed by the Landlord and Tenant Act 1927 s 19(2): see PARA 470 ante. For these purposes, 'landlord' and 'tenant' have the same meaning as in the Rent Act 1977 (see PARA 816 notes 2-3 ante): Housing Act 1980 s 85(1).

2 For these purposes, 'improvement' means any alteration in, or addition to, a dwelling house and includes: (1) any addition to, or alteration in, landlord's fixtures and fittings and any addition or alteration connected with the provision of any services to a dwelling house; (2) the erection of any wireless or television aerial; and (3) the carrying out of external decoration; but head (3) supra does not apply in relation to a protected or statutory tenancy if the landlord is under an obligation to carry out external decoration or to keep the exterior of the dwelling house in repair (as eg he will be where the Landlord and Tenant Act 1985 s 11 (as amended) (see PARA 416 et seq ante) applies): Housing Act 1980 s 81(5).

3 Ibid s 81(2). The Landlord and Tenant Act 1927 s 19(2) (see PARA 470 ante) is expressly excluded in such cases: Housing Act 1980 s 81(1) (amended by the Housing (Consequential Provisions) Act 1985 s 3, Sch 1). The Housing Act 1980 s 81 (as amended) came into force on 3 October 1980 and applies to tenancies granted before as well as after that date: ss 85(2), 153(4); Housing Act 1980 (Commencement No 1) Order 1980, SI 1980/1406.

4 Housing Act 1980 s 81(3).

5 See ibid s 82(1).

6 A county court has jurisdiction to determine any question arising under ibid Pt III (ss 81-85) (as amended) and to entertain any proceedings brought thereunder; and the jurisdiction so conferred includes jurisdiction to entertain proceedings on any question whether any consent required by s 81 (as amended) was withheld or unreasonably withheld, notwithstanding that no other relief is sought than a declaration: s 86(1), (2) (substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 44(1), (2)).

7 Housing Act 1980 s 82(1). Cf the cases in connection with the withholding of consent under the Landlord and Tenant Act 1927 s 19(2) cited in PARA 470 ante.

8 Housing Act 1980 s 82(2).

9 Ibid s 82(3).

10 Ibid s 82(4).

11 le for the purposes of the Rent Act 1977.

12 Housing Act 1980 s 83 (amended by the Housing (Consequential Provisions) Act 1985 s 3, Sch 1 Pt I). Such a breach would furnish the landlord with a ground for possession under the Rent Act 1977 Sch 15 Pt I, Case 1: see PARA 949 post.

13 le in relation to any housing association which falls within *ibid* s 15(3)(b) (as substituted and amended): see PARA 885 post.

14 Housing Act 1980 s 84.

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### **839. Tenant's consent to works.**

Where a dwelling house is subject to a statutory tenancy<sup>1</sup> and the landlord<sup>2</sup> wishes to carry out works which cannot be carried out without the tenant's<sup>3</sup> consent the following provisions apply<sup>4</sup>. If the tenant is unwilling to give his consent, then, if either of the specified conditions<sup>5</sup> is satisfied, the county court, on the landlord's application<sup>6</sup>, may make an order empowering him to enter and carry out the works<sup>7</sup>. The specified conditions are:

- 1648 (1) that the works were specified in an application for a grant under the relevant provisions of the Housing Grants, Construction and Regeneration Act 1996<sup>8</sup> and the application has been approved<sup>9</sup>; or
- 1649 (2) that assistance was or is to be provided in relation to the carrying out of the works under the relevant provision<sup>10</sup> of the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002<sup>11</sup>.

An order may be made subject to such conditions as to the time at which the works are to be carried out and as to any provision to be made for the accommodation of the tenant and his household whilst they are carried out as the court may think fit<sup>12</sup>. In determining whether to make such an order and, if it is made, what conditions, if any, it should be subject to, the court must have regard to all the circumstances and, in particular, to:

- 1650 (a) any disadvantage to the tenant that might be expected to result from the works;
- 1651 (b) the accommodation that might be available for him whilst the works are carried out; and
- 1652 (c) the tenant's age and health;

but the court may not take into account the tenant's means or resources<sup>13</sup>.

1 For the meaning of 'statutory tenancy' see PARA 831 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 Rent Act 1977 s 116(1) (substituted by the Housing Act 1980 s 152(1), Sch 25 para 47(1), (2)).



5 le either of the conditions specified in the Rent Act 1977 s 116(3), (3A) (as respectively amended and added): see heads (1)-(2) in the text.

6 As to applications to the county court see PARA 980 et seq post.

7 Rent Act 1977 s 116(2) (s 116(2), (3) amended, and s 116(3A) added, by the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, SI 2002/ 1860, arts 9, 12, 15(1), Sch 1 para 1, Sch 4 para 1, Sch 6).

8 le under the Housing Grants, Construction and Regeneration Act 1996 Pt I Ch I (ss 1-59) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 621 et seq.

9 Rent Act 1977 s 116(3) (substituted by the Housing Grants, Construction and Regeneration Act 1996 s 103, Sch 1 para 1; amended as set out in note 7 supra).

10 le under the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, SI 2002/1860, art 3: see HOUSING vol 22 (2006 Reissue) PARA 233.

11 Rent Act 1977 s 116(3A) (as added: see note 7 supra).

12 Rent Act 1977 s 116(4). Where such an order is made subject to any condition as to time, compliance with that condition is deemed to be also compliance with any condition imposed by the local housing authority under the Housing Grants, Construction and Regeneration Act 1996 s 37 (see HOUSING vol 22 (2006 Reissue) PARA 661): Rent Act 1977 s 116(5) (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (9); the Housing Grants, Construction and Regeneration Act 1996 Sch 1 para 1).

13 Rent Act 1977 s 116(6).

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## (C) TERMINATION AND SUCCESSION

### **840. Termination of statutory tenancy.**

A statutory tenancy comes to an end if:

- 1653 (1) the dwelling house ceases to exist<sup>1</sup>; or
- 1654 (2) an order for possession<sup>2</sup> is made; or
- 1655 (3) the tenant permanently ceases to occupy the house as his residence<sup>3</sup>; or
- 1656 (4) the tenant gives up possession by agreement<sup>4</sup> or consents to somebody else becoming tenant<sup>5</sup>; or
- 1657 (5) the tenant changes the character of his occupation<sup>6</sup>; or
- 1658 (6) the tenant enters into a new contractual tenancy<sup>7</sup>.

Mere payment of rent, if it can be referred to the statutory tenancy, does not give rise to the inference of a new contractual tenancy<sup>8</sup>; nor did an agreement varying the method of paying the rates<sup>9</sup>. It is unlawful for a statutory tenant to ask or receive any payment or other consideration from any person other than the landlord as a condition of giving up possession<sup>10</sup>.

If the court makes an order for rescission of a protected tenancy, the statutory tenancy which has sprung from it will also come to an end<sup>11</sup>.

1 See PARA 832 note 9 ante.

2 A suspended order for possession probably does not determine a statutory tenancy: see *Mills v Allen* [1953] 2 QB 341, [1953] 2 All ER 534, CA; and PARA 973 post.

3 See PARAS 833-836 ante. A statutory tenant loses his status of irremovability by ceasing to reside, but his obligation to pay the rent continues unless he has given the appropriate notice: see PARA 837 note 18 ante.

4 *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA. Handing over the keys and vacating the property for 24 hours was held to constitute a sufficient delivery of possession in *Bolnore Properties Ltd v Cobb* (1996) 75 P & CR 127, 29 HLR 202, CA, so that the new tenancy subsequently entered into by the same parties was not protected.

5 A statutory tenancy is capable of being validly surrendered expressly or by operation of law: *Collins v Cloughton* [1959] 1 All ER 95, [1959] 1 WLR 145, CA; *Dibbs v Campbell* [1988] 2 EGLR 122 at 126, CA, per Heilbron J.

6 *J and F Stone Lighting and Radio Ltd v Levitt* [1947] AC 209, [1946] 2 All ER 653, HL (tenant at low rent); *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA (applied in *Scrimgeour v Waller* (1980) 257 Estates Gazette 61, CA); *Rogers v Hyde* [1951] 2 KB 923, [1951] 2 All ER 79, CA (sharing arrangement); *Murray Bull & Co Ltd v Murray* [1953] 1 QB 211, [1952] 2 All ER 1079 (change to licensee). As to a contract by the tenant to buy the freehold see *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA. A statutory tenant who takes a transfer of a mortgage may remain a statutory tenant although entitled to possession as mortgagee: *Silsby v Holliman* [1955] Ch 552, [1955] 2 All ER 373.

7 *Bungalows (Maidenhead) Ltd v Mason* [1954] 1 All ER 1002, [1954] 1 WLR 769, CA. The significance of the grant of a new contractual tenancy is (1) that it may necessitate service of a notice to quit; and (2) that it may affect questions of statutory succession. The significance of the latter point is now diminished by the rule that a successor remains a successor even if granted a new contractual tenancy: see the Rent Act 1977 s 2(1)(b), Sch 1 para 10 (as amended); and PARAS 843-844 post.

8 See *Davies v Bristow* [1920] 3 KB 428, DC; and the cases cited in PARA 831 note 10 ante. Additional circumstances may lead to the inference being drawn: *Coplands v King* [1947] 2 All ER 393, CA.

9 *Steel v Cockcroft* [1951] 2 KB 429, [1951] 2 All ER 175, CA. As to the abolition of domestic rates see PARA 521 ante.

10 See the Rent Act 1977 s 3(5), Sch 1 para L2 (as amended); and PARA 940 post.

11 *Killick v Roberts* [1991] 4 All ER 289, [1991] 1 WLR 1146, CA.

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### **841. Transfer of statutory tenancy.**

A statutory tenancy<sup>1</sup> cannot be assigned<sup>2</sup>. Where, however, it is so agreed in writing between the statutory tenant ('the outgoing tenant') and a person proposing to occupy the dwelling<sup>3</sup> ('the incoming tenant'), the incoming tenant is deemed to be the statutory tenant of the dwelling as from such date as may be specified in the agreement ('the transfer date')<sup>4</sup>. Such an agreement does not have effect unless the landlord<sup>5</sup> is a party thereto and, if the consent of any superior landlord would have been required to an assignment of the previous contractual tenancy, unless the superior landlord is a party to the agreement<sup>6</sup>.

The rules for determining whether there can be a succession to the statutory tenancy by the widow of the incoming tenant or a member of his family are as follows:

- 1659 (1) the incoming tenant steps into the shoes of the outgoing tenant and is treated accordingly as a statutory tenant by virtue of a protected tenancy or a first or second successor, as the case may be<sup>7</sup>;
- 1660 (2) if the outgoing tenant is a statutory tenant by succession, the agreement may provide that the Rent Act 1977 is nevertheless to have effect as if the incoming tenant had become the statutory tenant by virtue of a previous protected tenancy<sup>8</sup>;
- 1661 (3) where a person becomes a statutory tenant by virtue of these provisions<sup>9</sup>, there can be only one succession to his statutory tenancy<sup>10</sup>.

It is unlawful to require a pecuniary consideration for entering into such an agreement, but the outgoing tenant may charge the incoming tenant for apportioned outgoings, improvements and goodwill<sup>11</sup>.

1 For the meaning of 'statutory tenancy' see PARA 831 ante.

2 See *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685, CA; and PARA 832 ante. As to the transfer of a statutory tenancy on separation, divorce etc see PARA 836 ante.

3 For these purposes, 'the dwelling' means the aggregate of the premises comprised in the statutory tenancy of the outgoing tenant: Rent Act 1977 s 3(5), Sch 1 para 13(7).

4 Ibid Sch 1 para 13(1). See *Daejan Properties Ltd v Mahoney* (1995) 28 HLR 498, [1995] 45 EG 128, CA (letter from managing agents acknowledging that applicant and her mother were joint tenants of the flat in question did not satisfy the statutory requirements; however, in the circumstances the landlords were estopped from denying that the applicant was a joint statutory tenant).

5 For the meaning of 'landlord' see PARA 816 note 2 ante.

6 Rent Act 1977 Sch 1 para 13(2).

7 See *ibid* Sch 1 para 13(3), (4).

8 See *ibid* Sch 1 para 13(5).

9 *Ie* by virtue of *ibid* Sch 1 para 13.

10 See *ibid* Sch 1 para 13(6).

11 See *ibid* Sch 1 para 14 (as amended) and PARA 941 post.

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#### **842. Succession to a statutory tenancy; in general.**

On the death of a protected<sup>1</sup> or statutory tenant<sup>2</sup> there may be a transmission to a person<sup>3</sup> who becomes a statutory or assured tenant by succession. The provisions which apply differ according to whether:

- 1662 (1) the tenant or first successor, as the case may be, died on or before 15 January 1989<sup>4</sup>; or
- 1663 (2) the death occurred after that date; and

1664 (3) in the case of a death falling within head (2) above, whether the reforms introduced by the Civil Partnership Act 2004 were in force at the date of that death<sup>5</sup>.

1 For the meaning of 'protected tenant' see PARA 818 ante.

2 For the meaning of 'statutory tenant' see PARA 831 ante.

3 It has been held in the county court that a minor is capable of succeeding to a statutory tenancy: see *Portman Registrars and Nominees v Mohammed Latif* [1987] CLY 2239.

4 ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

5 See PARA 843 et seq post.

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#### **843. Succession where relevant death occurred on or before 15 January 1989.**

The following provisions have effect<sup>1</sup> for the purpose of determining who is the statutory tenant<sup>2</sup> of a dwelling house by succession after the death of the person ('the original tenant') who died on or before 15 January 1989<sup>3</sup> and who, immediately before his death, was a protected tenant<sup>4</sup> of the dwelling house or the statutory tenant of it by virtue of his previous protected tenancy<sup>5</sup>.

The surviving spouse<sup>6</sup>, if any, of the original tenant, if residing<sup>7</sup> in the dwelling house immediately before the death of the original tenant, became the statutory tenant after the death if and so long as he or she occupied the dwelling house as his or her residence<sup>8</sup>.

If the original tenant left no such surviving spouse, a person who was a member of his or her family<sup>9</sup> and was residing with him or her at the time of and for six months immediately before the death became the statutory tenant if and so long as he occupied the dwelling house as his residence<sup>10</sup>. If there was more than one qualifying member of the deceased's family, the question of who was to be the statutory tenant was to be decided by agreement<sup>11</sup> between the members of the family or in default of agreement by the county court<sup>12</sup>. A person who became the statutory tenant by virtue of these provisions is called 'the first successor'<sup>13</sup>.

If immediately before his death the first successor was still a statutory tenant, then, subject to certain exceptions<sup>14</sup>, the surviving spouse, if any, of the first successor or, if the first successor leaves no such surviving spouse, a member of his or her family<sup>15</sup> becomes the statutory tenant after his death subject to the same conditions, but no further succession is possible thereafter<sup>16</sup>. If a person became a statutory tenant by a second succession to a controlled tenancy<sup>17</sup>, his tenancy became a regulated tenancy<sup>18</sup>.

Where after a succession<sup>19</sup> the successor becomes the tenant of the dwelling house by the grant to him of another tenancy, 'the original tenant' and 'the first successor' in relation to that other tenancy mean the persons who were respectively the original tenant and the first successor at the time of the succession, and accordingly:

1665 (1) if the successor was the first successor, and immediately before his death he was still the tenant, whether protected or statutory, the provisions relating to a second succession<sup>20</sup> apply on his death; but

1666 (2) if he was not the first successor, no person may become a statutory tenant by succession on his death<sup>21</sup>;

and this applies even if a successor enters into more than one other tenancy of the dwelling house and even if both the first successor and the successor on his death enter into other tenancies of the dwelling house<sup>22</sup>.

The statutory tenancy which passes to a successor is subject to the same limitations as affected it before the death of the deceased tenant<sup>23</sup>. If a person whose right to succeed to a statutory tenancy is in doubt is allowed to remain for a time on the premises and pays rent, it is a question of fact whether a new contractual tenancy arises and no inference that a new tenancy has been granted is to be drawn merely from the fact that the tenant has held over<sup>24</sup>.

1    le subject to the Rent Act 1977 s 2(3): see PARA 831 ante.

2    For the meaning of 'statutory tenant' see PARA 831 ante.

3    le the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to the position where the death occurs after that date see PARA 844 post.

4    For the meaning of 'protected tenant' see PARA 818 ante.

5    Rent Act 1977 s 2(1)(b), Sch 1 para 1 (as originally enacted).

6    'Spouse' does not include cohabitant; cf the position where the death occurs after 15 January 1989 (see PARA 844 post); and the Housing Act 1988 s 17(4) (as amended) (see PARA 1084 post).

7    If the original tenant died before 28 November 1980, the widow must have been 'residing with' the tenant at his death in order to succeed to his statutory tenancy: Rent Act 1977 Sch 1 para 2 (as originally enacted). If, however, the death occurred after that date, the spouse must have been 'residing in the dwelling house' immediately before the death in order to succeed to the statutory tenancy: Sch 1 para 2 (as substituted by the Housing Act 1980 s 76(1)). In order for a member of the original tenant's family to succeed, he or she must have been 'residing with' the original tenant for the relevant period: Rent Act 1977 Sch 1 para 3 (as originally enacted). A person may 'reside' at a house even though absent on business or for other reasons for most of the time: see *Middleton v Bull* [1951] 2 TLR 1010, CA; and PARA 833 ante. Cf *Greenway v Rawlings* (1952) 102 L Jo 360. A person may reside with another even though they lead separate lives, if there is no subletting: *Collier v Stoneman* [1957] 3 All ER 20, [1957] 1 WLR 1108, CA, distinguishing *Edmunds v Jones* (1952) [1957] 3 All ER 23n, [1957] 1 WLR 1118n, CA. See also *Morgon v Murch* [1970] 2 All ER 100, sub nom *Morgan v Murch* [1970] 1 WLR 778, CA, and cf *Foreman v Beagley* [1969] 3 All ER 838, [1969] 1 WLR 1387, CA (an actual or intended common household held to be necessary).

A member of the tenant's family who makes regular visits three or four nights a week to nurse the sick tenant while retaining a home of her own is not 'residing with' the tenant: *Swanbrae Ltd v Elliott* (1986) 19 HLR 86, [1987] 1 EGLR 99, CA. Cf *Hildebrand v Moon* (1989) 22 HLR 1, [1989] 2 EGLR 100, CA (daughter who had dwelt continuously with the tenant for the last nine months of her life, nursing her, held to have been 'residing with' her, despite retaining her own flat which she contemplated selling). A person may 'reside with' the tenant notwithstanding that the tenant is absent for a temporary period: *Hedgedale Ltd v Hards* (1990) 23 HLR 158, [1991] 1 EGLR 118, CA. In the case of a surviving spouse it is expressly provided that he or she must have resided in the dwelling house but there is no similar provision in relation to a member of the tenant's family. It seems that a member of the tenant's family need not have resided in the dwelling house for the relevant period as well as residing with the tenant: see *Waltham Forest London Borough Council v Thomas* [1992] 2 AC 198, [1992] 3 All ER 244, HL (decided under the Housing Act 1985 s 87). Cf the position under the Rent Act 1977 where the relevant death occurs after 15 January 1989: see PARA 844 post.

8    Ibid Sch 1 para 2 (as amended by the Housing Act 1980 s 76(1)). For the meaning of 'if and so long as he occupies the dwelling house as his residence' see the Rent Act 1977 s 2(3); and PARA 831 note 4 ante. The amendments made to Sch 1 paras 2, 6 by the Housing Act 1980 s 76(1), (2) came into force on 28 November 1980 and have effect only in relation to deaths occurring on or after that date: ss 76(4), 153(4); Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706. Before that date, the Rent Act 1977 Sch 1 paras 2, 6 referred to 'a man who died leaving a widow who was residing with him at his death'. See also note 7 supra.

9 For the meaning of 'member of his family' see PARA 846 post.

10 Rent Act 1977 Sch 1 para 3 (as originally enacted).

11 There is no need for the landlord to be a party to the agreement as to which member of the family is to be the statutory tenant, nor does the statutory tenancy come to an end because no such agreement is made or no such application is made to the court within a reasonable time: *General Management Ltd v Locke* [1980] 2 EGLR 83, (1980) 255 Estates Gazette 155, CA.

12 Rent Act 1977 Sch 1 para 3 (as originally enacted). The jurisdiction of a county court under this provision was confined to deciding between the rival claims of members of the family (*Butler v Hudson* [1953] 2 QB 407, [1953] 2 All ER 418, CA), but a declaration as to whether a person is a statutory tenant may be obtained under the Rent Act 1977 s 141(1)(a) (as amended) (see PARA 981 post). Relevant factors are the wishes of the deceased (*Trayfoot v Lock* [1957] 1 All ER 423, [1957] 1 WLR 351, CA) and need and merit (*Williams v Williams* [1970] 3 All ER 988, [1970] 1 WLR 1530, CA, where a necessitous father was preferred to the meritorious son).

13 Rent Act 1977 Sch 1 para 4 (as originally enacted).

14 See PARA 845 post.

15 On a second transmission the relevant family is that of the first successor and not that of the original tenant: *Sefton Holdings Ltd v Cairns* [1988] 2 FLR 109, [1988] 1 EGLR 99, CA.

16 See the Rent Act 1977 Sch 1 paras 5-7 (as amended by the Housing Act 1980 s 76(2)). See also note 7 *supra*.

17 For the meaning of 'controlled tenancy' see PARA 849 post. As to the conversion of all controlled tenancies to regulated tenancies see PARA 848 post.

18 Rent Act 1977 s 18(3) (repealed). For the meaning of 'regulated tenancy' see PARA 854 post.

19 For these purposes, 'succession' means the occasion on which a person becomes the statutory tenant of a dwelling house by virtue of *ibid* Sch 1 Pt I (paras 1-11) (as amended); and 'successor' is to be construed accordingly: Sch 1 para 10(3).

20 *Ie* *ibid* Sch 1 para 6 or Sch 1 para 7.

21 *Ibid* Sch 1 para 10(1) (as originally enacted). This rule was first introduced by the Housing Finance Act 1972 s 47 (repealed) and reverses the previous law: see *Bungalows (Maidenhead) Ltd v Mason* [1954] 1 All ER 1002, [1954] 1 WLR 769, CA. The rule applies to successions which took place before 27 August 1972 only if the first tenancy granted after the succession was granted on or after that date; if it does not apply as respects an earlier succession, no account is to be taken of that succession in applying the rule as respects any later succession: Rent Act 1977 Sch 1 para 10(4).

22 *Ibid* Sch 1 para 10(2). See also note 21 *supra*.

23 *Bolsover Colliery Co Ltd v Abbott* [1946] KB 8, CA (letting in consequence of employment); *American Economic Laundry Ltd v Little* [1951] 1 KB 400, [1950] 2 All ER 1186, CA (unconditional order for possession); *Mills v Allen* [1953] 2 QB 341, [1953] 2 All ER 534, CA; *Sherrin v Brand* [1956] 1 QB 403, [1956] 1 All ER 194, CA (conditional orders).

24 See *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA; and the cases cited in PARA 831 note 10 *ante*.

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#### **844. Succession where relevant death occurs after 15 January 1989.**

The following provisions have effect<sup>1</sup> for the purpose of determining who is the statutory tenant<sup>2</sup> of a dwelling house by succession after the death of the person ('the original tenant') who died after 15 January 1989<sup>3</sup> and who, immediately before his death, was a protected tenant<sup>4</sup> of the dwelling house or the statutory tenant of it by virtue of his previous protected tenancy<sup>5</sup>.

The surviving spouse or surviving civil partner, if any, of the original tenant, if residing<sup>6</sup> in the dwelling house immediately before the death of the original tenant, becomes the statutory tenant after the death if and so long as he or she occupies the dwelling house as his or her residence<sup>7</sup>; and for these purposes:

- 1667 (1) a person who was living with the original tenant as his or her wife or husband is treated as the spouse of the original tenant; and
- 1668 (2) a person who was living with the original tenant as if they were civil partners is treated as the civil partner of the original tenant<sup>8</sup>.

If, immediately after the death of the original tenant, there is, by virtue of heads (1) and (2) above, more than one person who fulfils the statutory conditions, such one of them as may be decided by agreement<sup>9</sup> or, in default of agreement, by the county court is to be treated (according to whether that one of them is of the opposite sex to, or of the same sex as, the original tenant) as the surviving spouse or the surviving civil partner<sup>10</sup>. A person who becomes the statutory tenant by virtue of these provisions is referred to as 'the first successor'<sup>11</sup>.

If the original tenant leaves no such surviving spouse or surviving civil partner, a person who was a member of the original tenant's family<sup>12</sup> and was residing with him in the dwelling house at the time of and for the period of two years<sup>13</sup> immediately before his death becomes entitled to an assured tenancy<sup>14</sup> of the dwelling house by succession<sup>15</sup>. If there is more than one qualifying member of the original tenant's family, the question as to who is to be entitled to an assured tenancy of the dwelling house by succession is to be decided by agreement<sup>16</sup> or in default of agreement by the county court<sup>17</sup>.

If the first successor dies and immediately before his death he was still a statutory tenant, the person who was a member of the original tenant's family immediately before that tenant's death and was a member of the first successor's family immediately before the first successor's death and who was residing in the dwelling house at the time of, and for the period of two years<sup>18</sup> immediately before the first successor's death becomes entitled to an assured tenancy of the dwelling house by succession<sup>19</sup>. If there is more than one such person, the question as to who is to be entitled to an assured tenancy by succession is to be decided by agreement<sup>20</sup> or in default of agreement by the county court<sup>21</sup>.

Where after a succession<sup>22</sup> the successor becomes the tenant of the dwelling house by the grant to him of another tenancy, 'the original tenant' and 'the first successor' in relation to that other tenancy mean the persons who were respectively the original tenant and the first successor at the time of the succession, and accordingly:

- 1669 (a) if the successor was the first successor, and immediately before his death he was still the tenant, whether protected or statutory, the provisions relating to a second succession<sup>23</sup> apply on his death; but
- 1670 (b) if he was not the first successor, no person may become a statutory tenant by succession on his death<sup>24</sup>,

and this applies even if a successor enters into more than one other tenancy of the dwelling house and even if both the first successor and the successor on his death enter into other tenancies of the dwelling house<sup>25</sup>.

- 1   le subject to the Rent Act 1977 s 2(3): see PARA 831 ante.
- 2   For the meaning of 'statutory tenant' see PARA 831 ante.
- 3   le the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to the position where the death occurred before that date see PARA 843 ante.
- 4   For the meaning of 'protected tenant' see PARA 818 ante.
- 5   Rent Act 1977 s 2(1)(b), Sch 1 para 1 (amended by the Housing Act 1988 s 39, Sch 4 para 1).
- 6   See PARA 843 note 7 ante.
- 7   Rent Act 1977 Sch 1 para 2(1) (substituted by the Housing Act 1980 s 76(1); renumbered by virtue of the Housing Act 1988 s 39(2), Sch 4 para 2; amended by the Civil Partnership Act 2004 s 81, Sch 8 para 13(1), (2)).
- 8   Rent Act 1977 Sch 1 para 2(2) (Sch 1 para 2(2), (3) added by the Housing Act 1988 Sch 4 para 2; the Rent Act 1977 Sch 1 para 2(2) substituted, and Sch 1 para 2(3) amended, by the Civil Partnership Act 2004 Sch 8 para 13(1), (3), (4) with effect from 5 December 2005). The previous position whereby a statutory tenancy was not awarded to an original tenant's homosexual partner was held to constitute unlawful sexual discrimination on the grounds of sexual orientation: see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, sub nom *Ghaidan v Mendoza* [2004] 3 All ER 411.
- 9   See PARA 843 note 11 ante.
- 10   Rent Act 1977 Sch 1 para 2(3) (as added and amended: see note 8 supra). See also PARA 843 note 12 ante.
- 11   Rent Act 1977 Sch 1 para 4 (amended by the Housing Act 1988 Sch 4 para 4).
- 12   For the meaning of 'member of his family' see PARA 846 post.
- 13   If the original tenant died between 15 January 1989 and 15 July 1990, a person who was residing in the dwelling house with the original tenant at the time of his death and for the period which began before 15 July 1988 and ended at the time of his death is to be taken to have been residing with the original tenant for the period of two years immediately before his death: Rent Act 1977 Sch 1 paras 3(2), 11A (added by the Housing Act 1988 Sch 4 paras 3, 9).
- 14   For the meaning of 'assured tenancy' see PARA 1018 post.
- 15   Rent Act 1977 Sch 1 para 3(1) (numbered as such and amended by the Housing Act 1988 Sch 4 para 4).
- 16   See PARA 843 note 11 ante.
- 17   Rent Act 1977 Sch 1 para 3(1) (as amended: see note 15 supra). See PARA 843 note 12 ante. A joint tenancy cannot be acquired under these provisions. As to the position where one claimant purports to assign his rights of succession to another see *Clare v MacNicol* [2004] EWCA Civ 1055, [2004] All ER (D) 208 (Jul).
- 18   If the first successor died between 15 January 1989 and 15 July 1990, a person who was residing in the dwelling house with the first successor at the time of his death and for the period which began before 15 July 1988 and ended at the time of his death is to be taken to have been residing with the first successor for the period of two years immediately before his death: Rent Act 1977 Sch 1 paras 6(2), 11A (respectively substituted and added by the Housing Act 1988 Sch 4 paras 6, 9).
- 19   Rent Act 1977 Sch 1 paras 5, 6(1) (respectively amended and substituted by the Housing Act 1988 Sch 4 paras 5, 6).
- 20   See PARA 843 note 11 ante.
- 21   Rent Act 1977 Sch 1 para 6(1) (as substituted: see note 19 supra). See PARA 843 note 12 ante.
- 22   For these purposes, 'succession' means the occasion on which a person becomes the statutory tenant of a dwelling house by virtue of ibid Sch 1 Pt I (paras 1-11) (as amended); and 'successor' is to be construed accordingly: Sch 1 para 10(3).
- 23   le ibid Sch 1 para 6 (as substituted): see supra.
- 24   Ibid Sch 1 para 10(1) (amended by the Housing Act 1988 Sch 4 para 8).



25 Rent Act 1977 Sch 1 para 10(2).

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#### **845. Second succession excluded.**

A person cannot become a statutory tenant<sup>1</sup> or an assured tenant<sup>2</sup> by a second succession<sup>3</sup> if:

- 1671 (1) there has been a change of the statutory tenancy by agreement<sup>4</sup>; or
- 1672 (2) the statutory tenancy of the original tenant arose by virtue of certain specified<sup>5</sup> statutory provisions<sup>6</sup>; or
- 1673 (3) the tenancy of the original tenant was granted on or after 1 January 1977<sup>7</sup> and both that tenancy and the statutory tenancy of the first successor would have been a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976 had they been tenancies at a low rent<sup>8</sup>; or
- 1674 (4) the first successor died before 8 December 1965<sup>9</sup>.

1 For the meaning of 'statutory tenant' see PARA 831 ante.

2 For the meaning of 'assured tenant' see PARA 1018 post.

3 I.e. under the Rent Act 1977 s 2(1)(b), Sch 1 paras 5-7 (as amended) (see PARA 843 ante) or under those provisions as amended (and, in the case of Sch 1 para 7, repealed) by the Housing Act 1988 with respect to the death of an original tenant or first successor after 15 January 1989 (see PARA 844 ante).

4 See the Rent Act 1977 s 3(5), Sch 1 para 13(6); and PARA 841 ante at head (2) in the text. Cf *Daejan Properties Ltd v Mahoney* (1995) 28 HLR 498, [1995] 2 EGLR 75, CA.

5 I.e. under the Requisitioned Houses and Housing (Amendment) Act 1955 s 4 (repealed) (whereby a local authority was empowered to invite owners of requisitioned houses to accept the occupants as statutory tenants) or the Rent Act 1965 s 20 (repealed) (whereby persons holding over after the termination before 8 December 1965 of tenancies which would have been regulated had the Rent Act 1965 then been in force became statutory tenants).

6 Rent Act 1977 Sch 1 para 9.

7 I.e. the operative date within the meaning of the Rent (Agriculture) Act 1976: see s 1(6); and PARA 1134 post. For forestry workers the operative date is 1 October 1977: see s 1(7), Sch 3 para 8; and PARA 1134 post. If the tenants under both the relevant tenancies were forestry workers to whom s 40(3), Sch 9 para 7 applies, 1 October 1977 is to be substituted for 1 January 1977: Rent Act 1977 Sch 1 para 11(2).

8 I.e. both the tenancies were tenancies to which *ibid* s 99 (see PARA 943 post) applies: Sch 1 para 11(1). For the meaning of 'protected occupancy' see PARAS 1144-1145 post; and for the meaning of 'statutory tenancy' for these purposes see PARAS 1146-1149 post.

9 See *Brown v Conway* [1968] 1 QB 222, [1967] 2 All ER 793, CA; and the Rent Act 1965 s 20(1) (repealed). The rule in *Brown v Conway* *supra* may still be important for establishing that a person holding over after the death of a first successor before 8 December 1965 did so as a new contractual tenant and not as a second successor.

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#### **846. Meaning of 'member of the tenant's family'.**

The expression 'member of the tenant's family' is broadly construed, the test being whether an ordinary person would answer affirmatively the question whether the relevant person was a member of the tenant's family<sup>1</sup>. The test is to be applied as at the date of the tenant's death<sup>2</sup>.

The following persons have been held to be members of the tenant's family: children<sup>3</sup>, grandchildren<sup>4</sup>, stepchildren and adoptive children (whether the adoption is formal or informal<sup>5</sup>), a husband<sup>6</sup>, brothers and sisters<sup>7</sup>, a person who, though not married to the tenant, bore him children<sup>8</sup>, a person who lived with the tenant for a substantial period as though his wife<sup>9</sup> or her husband<sup>10</sup> (there being no children of the union), and more distant relatives of the tenant by blood or marriage where there was an element of filial conduct<sup>11</sup>.

The following persons have been held not to be members of the tenant's family: a man who had cohabited with the tenant for three years<sup>12</sup>, an unrelated younger housekeeper<sup>13</sup>, a younger man who had lived with the elderly lady tenant for 18 years on affectionate but platonic terms<sup>14</sup>, and first cousins of the same age<sup>15</sup>. Persons unconnected to the tenant by blood, affinity, adoption<sup>16</sup> or regular sexual intercourse<sup>17</sup> cannot establish artificially a familial nexus by their behaviour<sup>18</sup>. Only one person can succeed to the statutory tenancy; it cannot be transmitted to a number of persons jointly<sup>19</sup>.

1 *Brock v Wollams* [1949] 2 KB 388, [1949] 1 All ER 715, CA; *Dyson Holdings Ltd v Fox* [1976] QB 503 at 508, [1975] 3 All ER 1030 at 1032, CA, per Lord Denning MR; *Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084 at 1087, [1979] 1 WLR 928 at 931, HL.

2 *Dyson Holdings Ltd v Fox* [1976] QB 503, [1975] 3 All ER 1030, CA.

3 *Standingford v Probert* [1950] 1 KB 377, [1949] 2 All ER 861, CA (where a question of suitable alternative accommodation under what is now the Rent Act 1977 s 98(1)(a), (4), Sch 15 Pt IV para 5 (as amended) (see PARA 947 post) was determined).

4 This was assumed in *Collier v Stoneman* [1957] 3 All ER 20, [1957] 1 WLR 1108, CA.

5 *Brock v Wollams* [1949] 2 KB 388, [1949] 1 All ER 715, CA; *Evans v Ferguson* (1956) 168 Estates Gazette 37, CA; *Jankovitch v Baines* [1965] CLY 3406.

6 *Salter v Lask* [1925] 1 KB 584, DC. In the case of deaths on or after 28 November 1980, the husband of the deceased tenant may become the statutory tenant as a 'surviving spouse': see PARA 843 the text and notes 6-8 ante.

7 *Price v Gould* (1930) 143 LT 333.

8 *Hawes v Evenden* [1953] 2 All ER 737, [1953] 1 WLR 1169, CA.

9 *Dyson Holdings Ltd v Fox* [1976] QB 503, [1975] 3 All ER 1030, CA, not following *Gammans v Ekins* [1950] 2 KB 328, [1950] 2 All ER 140, CA. Cf *Chios Property Investment Co Ltd v Lopez* [1988] 1 EGLR 98, 20 HLR 20, CA. See also *Perry v Dembowski* [1951] 2 KB 420, [1951] 2 All ER 50, CA. In the case of a death after 15 January 1989, a cohabitant may be treated as a surviving spouse or, in the case of a death on or after 15 December 2005, as a surviving civil partner: see PARA 844 ante.

10 *Watson v Lucas* [1980] 3 All ER 647, [1980] 1 WLR 1493, CA. See also note 9 supra.

11 *Hastings v Vinson* [1943] EGD 197 (nephew of tenant's wife); *Jones v Whitehill* [1950] 2 KB 204, [1950] 1 All ER 71, CA (niece by marriage); *Stewart v Higgins* (1951) 157 Estates Gazette 470, CA (brother-in-law);

*Dawdney's Executors v Tewkesbury* (1953) 162 Estates Gazette 91 (son-in-law); *Waller v Game* [1954] JPL 446 (great-niece by marriage); *Evans v Ferguson* (1956) 168 Estates Gazette 37, CA (second cousin).

12 *Helby v Rafferty* [1978] 3 All ER 1016, [1979] 1 WLR 13, CA. See also note 9 supra.

13 *Ross v Collins* [1964] 1 All ER 861, [1964] 1 WLR 425, CA.

14 *Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084, [1979] 1 WLR 928, HL, affg *Joram Developments Ltd v Sharratt* [1978] 2 All ER 948, [1979] 1 WLR 3, CA.

15 *Langdon v Horton* [1951] 1 KB 666, [1951] All ER 60, CA.

16 'Adoption' refers to the legal adoption of a minor; an adult coming to live in the tenant's household and being treated as a child of the family cannot thereby establish a familial nexus: see *Sefton Holdings Ltd v Cairns* [1988] 2 FLR 109, [1988] 1 EGLR 99, CA.

17 Homosexual or lesbian partners who lived together were formerly unable to establish a familial nexus (see eg *Harrogate Borough Council v Simpson* [1986] 2 FLR 91, 17 HLR 205, CA (decided on the differently worded provisions of the Housing Act 1980 ss 30, 50(3) (repealed)) but this position was reversed by *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, [1999] 4 All ER 705, HL (where, however, the court rejected the applicant's contention that he should be treated as a surviving 'spouse'). The statutory distinction between same-sex and opposite-sex cohabitants which obtained when that case was decided has since been held to constitute unlawful sexual discrimination on the grounds of sexual orientation (see *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, sub nom *Ghaidan v Mendoza* [2004] 3 All ER 411) and amendments made by the Civil Partnership Act 2004 now provide that a surviving same-sex cohabitant may be treated as a surviving civil partner (see PARA 844 ante).

18 *Carega Properties SA (formerly Joram Developments Ltd) v Sharratt* [1979] 2 All ER 1084, [1979] 1 WLR 928, HL, approving dicta of Russell LJ in *Ross v Collins* [1964] 1 All ER 861 at 866, [1964] 1 WLR 425 at 432, CA. See also *Kavanagh v Lyrudias* [1985] 1 All ER 560 at 563, CA, per Sir John Arnold P.

19 *Dealex Properties Ltd v Brooks* [1966] 1 QB 542, [1965] 1 All ER 1080, CA. In the case of joint statutory tenants it is submitted that the succession provisions operate only on the death of the last survivor: see *Lloyd v Sadler* [1978] QB 774, [1978] 2 All ER 529, CA.

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#### **847. Succession where the contractual tenancy still subsists.**

'Tenant' includes any person deriving title under the original tenant<sup>1</sup>. Thus, if a personal representative of a deceased tenant is residing in the house when the contractual tenancy vested in him is determined, he is entitled to remain as a statutory tenant<sup>2</sup>. It is otherwise if the contractual tenancy vested in the Public Trustee<sup>3</sup> on the death of a tenant intestate and the landlord serves a notice to quit which expires before the grant of letters of administration<sup>4</sup>.

The provisions as to succession apply whether the tenant was a protected (that is contractual) tenant or a statutory tenant at the time of his death<sup>5</sup>. Where the tenancy was contractual, the right of the statutory successor will take precedence over that of the person on whom the contractual tenancy devolves, the contractual tenancy being suspended<sup>6</sup>. If a person entitled to a tenancy by succession remains in possession and pays rent, it is a question of fact whether he does so in right of the contractual tenancy or as statutory tenant<sup>7</sup>.

<sup>1</sup> See the Rent Act 1977 s 152(1) and PARA 816 note 3 ante.

<sup>2</sup> *Lawrence v Hartwell* [1946] KB 553, [1946] 2 All ER 257, CA; *Harrison v Hopkins* [1950] 1 KB 124, [1949] 2 All ER 597, CA.

3     Ie under the Administration of Estates Act 1925 s 9 (as substituted): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

4     *Fred Long & Son Ltd v Burgess* [1950] 1 KB 115, [1949] 2 All ER 484, CA.

5     See the Rent Act 1977 s 2(1)(b), Sch 1 para 1 (as originally enacted and as amended); and PARAS 843-844 ante.

6     *Moodie v Hosegood* [1952] AC 61, [1951] 2 All ER 582, HL; *Mills v Allen* [1953] 2 QB 341, [1953] 2 All ER 534, CA; *Grant's Trustee v Arrol* 1954 SC 306.

7     *Phillips v Welton* [1948] 2 All ER 845, CA; *Whitmore v Lambert* [1955] 2 All ER 147, [1955] 1 WLR 495, CA.

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### **C. FORMER CONTROLLED TENANCIES**

#### **848. Conversion of controlled tenancies to regulated tenancies.**

On 28 November 1980<sup>1</sup> every controlled tenancy<sup>2</sup> ceased to be a controlled tenancy and became a regulated tenancy<sup>3</sup>. The only exception is where the demised premises subject to the controlled tenancy were occupied wholly or in part by the tenant for the purpose or partly for the purpose of a business carried on by him<sup>4</sup>, in which case from the conversion date the tenancy is treated as a tenancy continuing by virtue of the Landlord and Tenant Act 1954<sup>5</sup> after the expiry of a term of years certain<sup>6</sup>.

Whether a tenancy was previously controlled is, however, of importance in determining whether it is to be treated as a tenancy at a low rent<sup>7</sup> and in connection with certain transitional arrangements relating to the phasing of rent increases<sup>8</sup>.

1     Ie the date of commencement of the Housing Act 1980 s 64: see s 153(4); the Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706.

2     For the meaning of 'controlled tenancy' see PARA 849 post.

3     Housing Act 1980 s 64(1). For the meaning of 'regulated tenancy' see PARA 854 post. The Rent Act 1977 s 17 (meaning of 'controlled tenancy': see PARA 849 post) was repealed by the Housing Act 1980 s 152(3), Sch 26. As to the conversion of some controlled tenancies by previous statutes see PARA 849 note 13 post.

4     Ie the controlled tenancy was one to which the Landlord and Tenant Act 1954 Pt II (ss 23-46 (as amended)) (see PARA 701 et seq ante) would apply, apart from the Rent Act 1977 s 24(2) (repealed), or would so apply if it were a tenancy within the meaning of the Landlord and Tenant Act 1954 (see PARAS 706-708 ante): Housing Act 1980 s 64(2).

5     Ie by virtue of the Landlord and Tenant Act 1954 s 24 (as amended): see PARA 713 ante.

6     Housing Act 1980 s 64(2).

7     Despite the repeal of the Rent Act 1977 s 17 (see note 3 supra), s 5 (as amended) (tenancies at low rents: see PARA 861 post) continues not to apply to any tenancy which immediately before 28 November 1980 was a controlled tenancy by virtue of s 17(2) (repealed) (see PARA 849 post): Housing Act 1980 s 152(2), Sch 25 para 75.

<sup>8</sup> le the Rent Act 1977 s 55, Sch 8 (repealed with savings by the Rent (Relief from Phasing) Order 1987, SI 1987/264, arts 2(1), 3, Sch 2).

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#### **849. Meaning of 'controlled tenancy'.**

Before 28 November 1980, a protected<sup>1</sup> or statutory<sup>2</sup> tenancy of a dwelling house was a controlled tenancy unless:

- 1675 (1) the rateable value of the dwelling house on 7 November 1956<sup>3</sup> exceeded £30 or, if the house was in the metropolitan police district<sup>4</sup> or the City of London, £40<sup>5</sup>; or
- 1676 (2) the contractual tenancy was created by a lease or agreement coming into operation on or after 6 July 1957 or was a renewal of such a tenancy<sup>6</sup>; or
- 1677 (3) the contractual tenancy was a long tenancy<sup>7</sup>; or
- 1678 (4) the dwelling house consisted only of premises which were erected after 29 August 1954<sup>8</sup> or were separate<sup>9</sup> and self-contained premises produced by conversion<sup>10</sup> after that date of other premises<sup>11</sup>; or
- 1679 (5) the tenancy was a protected or statutory furnished tenancy<sup>12</sup>; or
- 1680 (6) the tenancy had become converted into a regulated tenancy<sup>13</sup>.

A tenancy was a controlled tenancy and not a tenancy at a low rent<sup>14</sup> if, notwithstanding that the rent was less than two-thirds of the rateable value of the dwelling house on the appropriate day<sup>15</sup>, the rent payable under the tenancy was not less than two-thirds of the 1939 rateable value<sup>16</sup> and the tenancy otherwise qualified as controlled<sup>17</sup>.

<sup>1</sup> For the meaning of 'protected tenancy' see PARA 818 ante.

<sup>2</sup> For the meaning of 'statutory tenancy' see PARA 831 ante.

<sup>3</sup> As to the method of determining the 1956 rateable value see the Rent Act 1977 s 17(1)(a), Sch 3 Pt I (repealed); and PARA 851 post.

<sup>4</sup> For the meaning of 'metropolitan police district' see POLICE vol 36(1) (2007 Reissue) PARA 137.

<sup>5</sup> Rent Act 1977 s 17(1)(a) (repealed: see PARA 848 note 3 ante). Moreover, if the house was within those rateable value limits, the tenancy was controlled despite the fact that the house was not within the 1965 rateable value limits: see s 155(1), Sch 22 para 4 (repealed); and PARA 855 post. As to the general rateable value limits for protected tenancies see PARA 855 post; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

<sup>6</sup> See *ibid* s 17(1)(b) (repealed). As to renewals see s 17(3)-(5) (repealed); and PARA 850 post.

<sup>7</sup> *Ibid* s 17(7)(a) (repealed). For these purposes, 'long tenancy' means a tenancy granted for a term of years certain exceeding 21 years, whether or not subsequently extended by act of the parties or by any enactment: s 152(1).

<sup>8</sup> Premises were to be treated as converted or erected after 29 August 1954 if the conversion or erection was completed after that date, notwithstanding that it might have been begun on or before that date: *ibid* s 17(9) (repealed).

9 For premises to be 'separate' they had to be distinct but not necessarily partitioned or cut off from other premises: *Smith v Prime* (1923) 129 LT 441; *Darrell v Whitaker* (1923) 92 LJB 882, DC (both decided under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(9) (repealed)).

10 A dwelling was not 'produced by conversion of other premises' unless the conversion was so substantial as to change the identity of the premises: *Higgins v Silverston* [1956] 2 QB 525, [1956] 2 All ER 893, CA (decided under the similar wording of the Housing Repairs and Rent Act 1954 s 35(1) (repealed)).

11 Rent Act 1977 s 17(7)(b), (8) (repealed). Such premises were not excluded from control if they consisted of a dwelling house provided by works in respect of which a grant became payable under the Housing Act 1949 s 20 (repealed) or the Housing (Financial Provisions) Act 1958 s 30 (repealed), both of which related to improvement grants: Rent Act 1977 s 17(8) (repealed).

12 *Ibid* s 17(7)(c) (repealed). 'Protected furnished tenancy', 'statutory furnished tenancy' and 'regulated furnished tenancy' mean a protected or, as the case may be, a statutory or regulated tenancy under which the dwelling house concerned is bona fide let at a rent which includes payments in respect of furniture, and in respect of which the amount of rent which is fairly attributable to the use of furniture, having regard to the value of that use to the tenant, forms a substantial part of the whole rent: s 152(1). Until the passing of the Rent Act 1974 furnished tenancies were not protected and they were never capable of being controlled. See further PARA 869 et seq post.

13 See the Rent Act 1977 s 17(7)(d)-(f) (repealed). A tenancy might have become converted (1) on the issue of a certificate under s 108 (repealed); (2) on a second succession by virtue of s 18(3) (repealed); or (3) by reference to rateable value under the Housing Finance Act 1972 s 36 (repealed).

14 For the meaning of 'tenancy at a low rent' see PARA 861 post.

15 For the meaning of 'appropriate day' see PARA 859 post.

16 As to the method of determining the 1939 rateable value see PARA 852 post.

17 Rent Act 1977 s 17(2) (repealed).

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## **850. Provisions as to renewals.**

There are two exceptions to the general rule<sup>1</sup> that tenancies created on or after 6 July 1957 could not be controlled:

1681 (1) where a protected tenancy<sup>2</sup> was granted to a person who, immediately before it was granted, was the tenant<sup>3</sup> of any premises under a controlled tenancy and the premises comprised in that tenancy and those comprised in the new tenancy were the same or one of them consisted of or included part of the other, the new tenancy was a controlled tenancy<sup>4</sup>;

1682 (2) where a controlled tenancy came to an end on the landlord recovering possession<sup>5</sup> by virtue of the dwelling house being overcrowded, the first protected tenancy thereafter created of the whole or any part of the premises comprised in the previous controlled tenancy was a controlled tenancy<sup>6</sup>.

1 ie the rule under the Rent Act 1977 s 17(1)(b) (repealed): see PARA 849 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 Rent Act 1977 s 17(3) (repealed), which applied in relation to agreements coming into operation on or after 29 August 1977. The effect of the corresponding provisions as to agreements coming into operation between 5 July 1957 and 29 August 1977, ie the Rent Act 1968 Sch 2 paras 4(1)-(3) and the Rent Act 1957 s 11(2), was preserved by the Rent Act 1977 s 17(5) (repealed).

5 Ie under ibid s 101(1) (as originally enacted): see PARA 944 post.

6 See ibid s 17(4) (repealed). As to agreements coming into operation before 29 August 1977 see s 17(5) (repealed); and note 4 supra.

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### **851. The 1956 rateable value.**

For the purpose of determining whether a tenancy was a controlled tenancy<sup>1</sup> the rateable value of a dwelling house on 7 November 1956 meant:

- 1683 (1) if the dwelling house was a hereditament for which a rateable value was then shown in the valuation list<sup>2</sup>, that value or, if different, the net annual value<sup>3</sup>;
- 1684 (2) if the house formed part only of such a hereditament, such proportion of the figure for rateable or net annual value shown in the list as might be or might have been agreed<sup>4</sup> in writing between the landlord and tenant or determined by the county court<sup>5</sup>;
- 1685 (3) if the house consisted of or formed part of more than one such hereditament, the aggregate of the rateable values of those hereditaments or parts ascertained in accordance with heads (1) and (2) above<sup>6</sup>.

Where, after 7 November 1956, the valuation list was altered with effect from a date not later than that date in pursuance of a proposal made before 1 April 1957, the rateable value on 7 November 1956 of any dwelling house consisting of or wholly or partly comprised in that hereditament was to be ascertained as if the amount of the rateable or net annual value then shown in the list had been the amount shown in the list as altered<sup>7</sup>. Where, however, such a proposal for the reduction of the rateable value was still pending on 6 July 1957 and the rateable value on 31 March 1956 was such that, if it had remained unaltered, the rateable value on 7 November 1956 would have exceeded the specified limits<sup>8</sup>, any alteration made pursuant to the proposal was to be disregarded<sup>9</sup>.

Where a controlled tenancy was current on 6 July 1957<sup>10</sup> and the tenant or any previous tenant had made on the premises comprised in the tenancy an improvement, or contributed to the cost of an improvement, consisting of the execution before 7 November 1956 of works amounting to structural alteration, extension or addition, then not later than six weeks after 6 July 1957 the tenant might serve notice on the landlord requiring him to agree to a reduction of the rateable value<sup>11</sup>. It was then open to the parties to agree the reduction or have it determined by a procedure involving the county court and the valuation officer<sup>12</sup>. Where the amount of such a reduction had been agreed or determined, the rateable value of the premises was to be taken as being reduced by that amount<sup>13</sup>.

- 1 The provisions of the Rent Act 1977 s 17, Sch 3 (see the text and notes 2-13 *infra*) are all repealed by the Housing Act 1980 s 15(3), Sch 26, but remain significant in determining whether a tenancy was controlled before 28 November 1980 (see PARAS 848-849 *ante*).
- 2 A value was shown in the list for this purpose even though at the date in question the premises were shown not as a separate entity but as part of a composite hereditament: *Holland v Ong* [1958] 1 QB 425, [1958] 1 All ER 574, CA.
- 3 Rent Act 1977 s 17(1)(a), Sch 3 para 1(1)(a) (repealed).
- 4 If at the time of making such an agreement the landlord was himself a tenant under a tenancy having a term with seven years or less to run, the agreement was not to have effect for the purposes of the Rent Act 1977 except with the concurrence in writing of his immediate landlord: Sch 3 para 5 (repealed).
- 5 *Ibid* Sch 3 para 1(1)(b) (repealed). Any apportionment made by the county court was final: Sch 3 para 1(2) (repealed). As to the principles of apportionment and the meaning of 'final' see PARA 859 notes 4-5 *post*.
- 6 *Ibid* Sch 3 para 1(1)(c) (repealed).
- 7 *Ibid* Sch 3 para 2 (repealed).
- 8 *Ie* the limits specified in *ibid* s 17(1)(a) (repealed): see PARA 849 *ante*.
- 9 *Ibid* Sch 3 para 3 (repealed).
- 10 *Ie* the date of commencement of the Rent Act 1957 (repealed).
- 11 See *ibid* s 25(1), Sch 5 para 11 (repealed).
- 12 See *ibid* Sch 5 paras 12-13 (repealed).
- 13 See the Rent Act 1977 Sch 3 para 4 (repealed).

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## **852. The 1939 rateable value.**

It was necessary to ascertain the 1939 rateable value in order to determine whether a tenancy was a controlled tenancy or a tenancy at a low rent<sup>1</sup>. The 1939 rateable value of a dwelling house meant the rateable value (or net annual value, if different) shown in the valuation list on 6 April 1939 if the premises were in the then administrative county of London, or on 1 April 1939 if they were elsewhere<sup>2</sup>. If a house was first assessed after those dates, the 1939 rateable value meant the rateable value (or net annual value, if different) shown in the list on the day the house was first assessed<sup>3</sup>. A county court had power on application by either party to make such apportionment as seemed just of the 1939 rateable value of the property in which the dwelling was comprised; and the decision of the county court was final<sup>4</sup>.

- 1 See PARA 849 text to notes 14-17 *ante*. A tenancy at a low rent is not a protected tenancy within the meaning of the Rent Act 1977: see PARA 861 *post*.
- 2 See *ibid* s 17(2)(a), Sch 3 paras 6-8 (repealed).
- 3 See *ibid* Sch 3 para 9 (repealed).
- 4 See *ibid* Sch 3 para 10 (repealed). As to the principles of apportionment and the meaning of 'final' see PARA 859 notes 4-5 *post*. The words used in the previous corresponding legislation were 'final' and 'conclusive': see eg



the Rent Act 1968 Sch 2 para 9 (repealed). If property in which the dwelling was comprised was rated as a whole on the relevant day, the rateable value of the dwelling had to be found by apportionment even though the dwelling may subsequently have been separately rated, unless the dwelling had since the relevant day been converted into a new entity: *Temple v National Mutual Life Association of Australasia Ltd* [1955] 2 QB 461, [1955] 2 All ER 758, CA. A court had power to make an apportionment if a dwelling was separately let even though the rateable value of the whole property was outside the limits of control: *Barrett v Hardy Bros (Alnwick) Ltd* [1925] 2 KB 220, DC; *Lindop v Quaife* [1949] 1 All ER 456, CA. It was otherwise if a property comprising more than one dwelling was let under one lease to one tenant: *Amphlett v Dorrell* [1949] 1 KB 276, [1948] 2 All ER 674, CA.

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### **853. Modifications of the Rent Act 1977 for converted tenancies.**

In relation to controlled tenancies converted into regulated tenancies by statute<sup>1</sup>, certain provisions of the Rent Act 1977 are modified as follows<sup>2</sup>:

- 1686 (1) in relation to any rental period<sup>3</sup> beginning after the conversion<sup>4</sup>, the provisions as to the rent limit during statutory periods<sup>5</sup> have effect as if references therein to the last contractual period were references to the last rental period beginning before the conversion<sup>6</sup>;
- 1687 (2) the exclusion from protection of tenancies at a low rent<sup>7</sup> does not apply to the converted tenancy after the conversion<sup>8</sup>;
- 1688 (3) the provisions relating to the determination of a fair rent<sup>9</sup> apply in relation to the converted tenancy as if certain references<sup>10</sup> therein to the tenant under the regulated tenancy included references to the tenant under the tenancy before the conversion<sup>11</sup>;
- 1689 (4) the provisions converting the tenancies<sup>12</sup> do not affect any court proceedings instituted under the Rent Act 1977 before the conversion which may affect the recoverable rent before the conversion, or the rent under the regulated tenancy after the conversion so far as that depends on the previous rent<sup>13</sup>;
- 1690 (5) a tenant is entitled to deduct overpayments of rent from current rent<sup>14</sup> after the conversion to the same extent as he could have done so before<sup>15</sup>.

Special provisions apply for the protection of tenants having security of tenure who enter into rent agreements after conversion<sup>16</sup>.

1 In the Rent Act 1968 s 7(1), Sch 2 para 5 superseded by the Rent Act 1977 s 18(3) (repealed) (conversion by second succession: see PARA 849 note 13 ante); the Housing Finance Act 1972 Pt III (ss 27-34) superseded by the Rent Act 1977 Pt VIII (ss 108-118) (largely repealed) (conversion by qualification certificate: see PARA 849 note 13 ante); the Housing Finance Act 1972 Pt IV (ss 35-48) (repealed) (conversion by rateable value: see PARA 849 note 13 ante); and the Housing Act 1980 s 64 (conversion of remaining controlled tenancies into regulated tenancies: see PARA 848 ante).

2 Rent Act 1977 s 18A, Sch 17 para 1 (respectively added and amended by the Housing Act 1980 s 152, Sch 25 paras 35, 59).

3 For these purposes, 'rental period' means a period in respect of which a payment of rent falls to be made: Rent Act 1977 s 152(1).

4 For these purposes, 'the conversion' means the time when the tenancy became a regulated tenancy: *ibid* Sch 17 para 1. For the meaning of 'regulated tenancy' see PARA 854 post.

- 5    Ibid ss 45-47 (as amended): see PARAS 893-897 post.
- 6    Ibid Sch 17 para 2.
- 7    Ibid s 5(1) (as amended): see PARA 861 post.
- 8    Ibid Sch 17 para 5.
- 9    Ibid s 70 (as amended): see PARA 921 post.
- 10   Ibid the references in s 70(3) (as amended): see PARA 921 post.
- 11   Ibid Sch 17 para 6.
- 12   Ibid the provisions mentioned in note 1 *supra*.
- 13   Rent Act 1977 Sch 17 para 7 (amended by the Housing Act 1980 Sch 25 para 59(c)).
- 14   Ibid under the Rent Act 1977 s 38 (repealed).
- 15   Ibid Sch 17 para 9.
- 16   See *ibid* s 52 (as substituted); and PARA 900 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(2) PROTECTED AND STATUTORY TENANCIES/(i) Definitions and Classes/D. REGULATED TENANCIES/854. Meaning of 'regulated tenancy'.

## ***D. REGULATED TENANCIES***

### **854. Meaning of 'regulated tenancy'.**

For the purposes of the Rent Act 1977, a 'regulated tenancy' is a protected or statutory tenancy<sup>1</sup>. Where a regulated tenancy is followed by a statutory tenancy of the same dwelling house, the two are to be treated for the purposes of that Act as together constituting one regulated tenancy<sup>2</sup>. These provisions are subject:

- 1691 (1) to the rule<sup>3</sup> that a tenancy cannot be regulated if it is a business tenancy<sup>4</sup>; and
- 1692 (2) to the power of the Secretary of State<sup>5</sup> or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister<sup>6</sup> to provide by order<sup>7</sup> that no dwelling house:
  - 2
  - 1. (a) exceeding a specified rateable value<sup>8</sup>, or
  - 2. (b) of any class or description,
  - 3
- 1693 in an area in which he or the Assembly or minister is satisfied that there is no substantial excess of demand for such houses over supply, is to be the subject of a regulated tenancy<sup>9</sup>.

1    Rent Act 1977 s 18(1) (amended by the Housing Act 1980 s 152(3), Sch (3), Sch 26). For the meaning of 'protected tenancy' see PARA 818 ante; and for the meaning of 'statutory tenancy' see PARA 831 ante. As to the conversion of all controlled tenancies to regulated tenancies on 28 November 1980 see PARA 848 ante. As to rents under regulated tenancies see PARA 891 et seq post.

- 2 Rent Act 1977 s 18(2).
- 3 *Ie* under *ibid* s 24(3): see PARA 822 ante.
- 4 See *ibid* s 18(1). Cf para 880 the text and note 6 post.
- 5 As to the Secretary of State see PARA 27 note 3 ante.
- 6 As to the transfer of functions under the Rent Act 1977 so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 7 *Ie* under the Rent Act 1977 s 143(1). Such an order may contain such transitional provisions, including provisions to avoid or mitigate hardship, as appear to the Secretary of State or the Assembly or minister to be desirable: s 143(2). As to the making of orders generally see PARA 815 ante. This power has existed with regard to regulated tenancies since 1965 (see the Rent Act 1965 s 12 (repealed)), but at the date at which this title states the law had never been exercised.
- 8 As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.
- 9 See the Rent Act 1977 s 18(1).

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## **(ii) Exceptions and Special Cases**

### ***A. CERTAIN TENANCIES WHERE RATEABLE VALUE EXCEEDS SPECIFIED LIMITS***

#### **855. The rateable value limits; in general.**

A tenancy<sup>1</sup> which is entered into before 1 April 1990<sup>2</sup>, or, where the dwelling house had a rateable value on 31 March 1990<sup>3</sup>, is entered into on or after 1 April 1990 in pursuance of a contract made before that date, is not a protected tenancy<sup>4</sup> if the dwelling house falls within one of the specified<sup>5</sup> classes<sup>6</sup>.

The reason for the complexity of the provisions relating to rateable values is historical. The limits imposed by the Rent Act 1965 and the Rent Act 1968 were simply £400 for Greater London<sup>7</sup> and £200 elsewhere<sup>8</sup>. These were amended by the Counter-Inflation Act 1973<sup>9</sup> for two purposes: firstly, to meet the new rateable values which came into effect on 1 April 1973 by reason of the general rating reassessment<sup>10</sup>, and secondly to increase the limits in real terms<sup>11</sup> so as to bring a class of more valuable properties into the ambit of the Rent Acts<sup>12</sup>.

No account is to be taken of the provisions relating to rateable values in determining whether a dwelling house was let on or subject to a controlled tenancy<sup>13</sup> if the rateable value on 23 March 1965 exceeded £400 in Greater London or £200 elsewhere but on 7 November 1956 did not exceed £40 in the metropolitan police district<sup>14</sup> or the City of London or £30 elsewhere<sup>15</sup>.

If any question arises in any proceedings<sup>16</sup> whether a dwelling house falls within one of the specified classes by virtue of its rateable value at any time, it is deemed not to fall within that class<sup>17</sup> unless the contrary is shown<sup>18</sup>.

- 1 For the meaning of 'tenancy' see PARA 818 note 1 ante.
- 2 Ie the date when the domestic rating system was replaced by the community charge, itself now replaced by the council tax: see PARA 521 ante.
- 3 As to the certification of a rateable value in certain cases see PARA 523 ante.
- 4 For the meaning of 'protected tenancy' see PARA 818 ante.
- 5 Ie one of the classes set out in the Rent Act 1977 s 4(2): see PARAS 856-858 post.
- 6 Ibid s 4(1) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 15). As to the rateable value limits for the purposes of the Housing Act 1988 Pt I (ss 1-45) (as amended) (assured tenancies) see PARA 1027 post.
- 7 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.
- 8 See the Rent Act 1965 s 1(1) (repealed); the Rent Act 1968 s 1(1)(a) (repealed).
- 9 Ie by the Counter-Inflation Act 1973 s 14 (repealed).
- 10 Ie under the General Rate Act 1967 Pt V (ss 67-95) (repealed).
- 11 The 1973 rating reassessment increased rateable values by about two and one-half times on average; thus a £600 or £300 rateable value before 1 April 1973 was approximately equivalent to a £1,500 or £750 rateable value on and after that date.
- 12 Where the contractual tenancy of a dwelling house had come to an end before 22 March 1973 and the tenancy would have been a regulated tenancy if the Counter-Inflation Act 1973 s 14 (repealed) had been in force, a tenant who retained possession is deemed to have done so under a statutory tenancy under the terms of the previous tenancy subject to the power of the High Court or a county court to vary those terms in any way appearing to be just and equitable: see the Rent Act 1977 s 155(3), Sch 24 para 5.
- 13 For the meaning of 'controlled tenancy' see PARA 849 ante.
- 14 For the meaning of 'metropolitan police district' see POLICE vol 36(1) (2007 Reissue) PARA 137.
- 15 Rent Act 1977 s 155(1), Sch 22 para 4 (repealed). Thus tenancies already controlled and not decontrolled by the Rent Act 1957 were not excluded from protection by the rateable value limits introduced by the Rent Act 1965. As to determining the 1956 rateable value see PARA 851 ante. As to the conversion of all controlled tenancies to regulated tenancies on 28 November 1980 see PARA 848 ante.
- 16 For these purposes, 'proceedings' includes any proceedings of a legal nature even though they do not take place in a court of law; thus, if an application to register a fair rent is made to a rent officer and no separate rateable value is shown in the valuation list for the house in question, he is entitled to rely on the statutory presumption and assume jurisdiction: *R v Westminster (City) London Borough Council Rent Officer, ex p Rendall* [1973] QB 959, [1973] 3 All ER 119, CA.
- 17 Ie deemed to be within the rateable value limits and therefore within the operation of the Rent Act 1977.
- 18 Ibid s 4(3).

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## 856. Class A.

A dwelling house falls within Class A<sup>1</sup> if the appropriate day<sup>2</sup> in relation to the dwelling house fell on or after 1 April 1973<sup>3</sup> and the dwelling house on the appropriate day had a rateable value<sup>4</sup> exceeding £1,500 if the dwelling house is in Greater London<sup>5</sup> or £750 if it is elsewhere<sup>6</sup>.

- 1    le for the purposes of the Rent Act 1977 s 4(1) (as amended): see PARA 855 ante.
- 2    For the meaning of 'the appropriate day' see PARA 859 post.
- 3    le the date on which the new valuation lists prepared pursuant to the General Rate Act 1967 s 68(1) (repealed) came into force: see PARA 855 ante.
- 4    For the meaning of 'rateable value' see PARA 859 post.
- 5    As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.
- 6    Rent Act 1977 s 4(2), Class A.

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### **857. Class B.**

A dwelling house falls within Class B<sup>1</sup> if the appropriate day<sup>2</sup> in relation to the dwelling house fell on or after 22 March 1973<sup>3</sup>, but before 1 April 1973<sup>4</sup>, and the dwelling house:

- 1694 (1)    on the appropriate day had a rateable value<sup>5</sup> exceeding £600 if the dwelling house is in Greater London<sup>6</sup> or £300 if it is elsewhere; and
- 1695 (2)    on 1 April 1973 had a rateable value exceeding £1,500 if the dwelling house is in Greater London or £750 if it is elsewhere<sup>7</sup>.

- 1    le for the purposes of the Rent Act 1977 s 4(1) (as amended): see PARA 855 ante.
- 2    For the meaning of 'the appropriate day' see PARA 859 post.
- 3    le the date on which the Counter-Inflation Act 1973 was passed.
- 4    See PARA 856 note 3 ante.
- 5    For the meaning of 'rateable value' see PARA 859 post.
- 6    As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.
- 7    Rent Act 1977 s 4(2), Class B.

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### **858. Class C.**

A dwelling house falls within Class C<sup>1</sup> if the appropriate day<sup>2</sup> in relation to the dwelling house fell before 22 March 1973<sup>3</sup> and the dwelling house:

- 1696 (1) on the appropriate day had a rateable value<sup>4</sup> exceeding £400 if the dwelling house is in Greater London<sup>5</sup> or £200 if it is elsewhere; and
- 1697 (2) on 22 March 1973 had a rateable value exceeding £600 if the dwelling house is in Greater London or £300 if it is elsewhere; and
- 1698 (3) on 1 April 1973<sup>6</sup> had a rateable value exceeding £1,500 if the dwelling house is in Greater London or £750 if it is elsewhere<sup>7</sup>.

1 le for the purposes of the Rent Act 1977 s 4(1) (as amended): see PARA 855 ante.

2 For the meaning of 'the appropriate day' see PARA 859 post.

3 le the date on which the Counter-Inflation Act 1973 was passed.

4 For the meaning of 'rateable value' see PARA 859 post.

5 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

6 See PARA 856 note 3 ante.

7 Rent Act 1977 s 4(2), Class C.

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### **859. Meaning of 'rateable value' and 'the appropriate day'.**

Except where otherwise provided, for the purposes of the Rent Act 1977 the rateable value of a dwelling house<sup>1</sup> on any day is the rateable value then shown in the valuation list<sup>2</sup>. If, however, the dwelling house forms part only of a hereditament, or consists of or forms part of more than one hereditament, its rateable value is to be taken to be such value as is found by a proper apportionment or aggregation of the rateable value or values so shown<sup>3</sup>. Any question arising<sup>4</sup> as to the proper apportionment or aggregation of any value or values must be determined by the county court, whose decision is final<sup>5</sup>.

In the Rent Act 1977 'the appropriate day' means 23 March 1965<sup>6</sup> in the case of any dwelling house which was or formed part of a hereditament, or more than one hereditament, for which a rateable value was shown in the valuation list then in force<sup>7</sup>; in the case of any other house it means the date on which a rateable value was first shown in the valuation list<sup>8</sup>.

Where, after the date which is the appropriate day in relation to any dwelling house, the valuation list was altered so as to vary the rateable value of the relevant hereditament with effect from a date not later than the appropriate day, the rateable value on the appropriate day is to be ascertained as if the value then shown in the valuation list had been the value shown in the list as altered<sup>9</sup>.

The above provisions apply in relation to any other land as they apply in relation to a dwelling house<sup>10</sup>.

- 1 The Rent Act 1977 s 25 also applies to land: see the text to note 10 infra.
- 2 Ibid s 25(1)(a). For these purposes, except where the context otherwise requires, 'rateable value' is to be construed in accordance with s 25: s 152(1). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.
- 3 Ibid s 25(1)(b); and see *Neville v Cowdray Trust Ltd* [2006] EWCA Civ 709, [2006] 1 WLR 2097, [2006] All ER (D) 65 (May), cited in PARA 1404 note 7 post.
- 4 Where there is agreement as to a proper apportionment or where no attempt is made to displace the statutory presumption that a dwelling falls within the statutory limits at all material times (see *ibid* s 4(3); and PARA 855 ante), no question arises and an apportionment does not have to be made by the county court; where, therefore, on an application to fix a fair rent, a rent officer is satisfied that the dwelling is within the statutory limits and no challenge or objection is made to his apportionment, he need not refer the question to the court: *R v Westminster (City) London Borough Council Rent Officer, ex p Rendall* [1973] QB 959, [1973] 3 All ER 119, CA.
- 5 Rent Act 1977 s 25(2). This means that the decision of the county court cannot be appealed against: *Field v Gover* [1944] KB 200, sub nom *Gover v Field* [1944] 1 All ER 151, CA. It was held under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (repealed), which used the words 'final and conclusive', that an apportionment by the county court operated in rem: *Pearman v Dyer* [1935] 2 KB 149, CA. As to the factors to be taken into consideration on an apportionment see *Bainbridge v Congdon* [1925] 2 KB 261, DC, approved in *Beck v Newbold* as reported in [1952] 2 All ER 412 at 415, CA, per Somervell LJ.
- 6 I.e. the date on which the bill preceding the Rent Act 1965 was introduced into the House of Commons. In connection with controlled tenancies it is also necessary to ascertain the 1939 and 1956 rateable values (see PARAS 851-852 ante) but the appropriate day is the same for all protected tenancies whether controlled or regulated. As to the conversion of all controlled tenancies to regulated tenancies on 28 November 1980 see PARA 848 ante.
- 7 Rent Act 1977 s 25(3)(a). For these purposes, except where the context otherwise requires, 'the appropriate day' has the meaning assigned to it by s 25(3): s 152(1).
- 8 Ibid s 25(3)(b).
- 9 Ibid s 25(4). This provision applies only where the valuation list was altered retrospectively with effect from a date not later than the appropriate day and does not apply where there was merely a partial refund of rates in respect of a period beginning before the appropriate day under the General Rate Act 1967 s 9 (repealed): see *Rodwell v Gwynne Trusts Ltd* [1970] 1 All ER 314, [1970] 1 WLR 327, HL. An alteration of the valuation list with effect from a date after the appropriate day cannot be taken into account: *Guestheath Ltd v Mirza* (1990) 22 HLR 399, [1990] 2 EGLR 111.
- 10 Rent Act 1977 s 25(5).

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## **B. CERTAIN TENANCIES AT A HIGH RENT**

### **860. Tenancies at a high rent entered into on or after 1 April 1990.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> if:

- 1699 (1) it is entered into on or after 1 April 1990<sup>3</sup>, otherwise than, where the dwelling house had a rateable value<sup>4</sup> on 31 March 1990, in pursuance of a contract made before 1 April 1990; and

1700 (2) under it the rent<sup>5</sup> payable for the time being is payable at a rate exceeding £25,000 a year<sup>6</sup>.

If any question arises in any proceedings whether a tenancy is so precluded from being a protected tenancy, the tenancy is deemed to be a protected tenancy unless the contrary is shown<sup>7</sup>.

In practice there will be few tenancies affected by these provisions, since no new protected tenancies can be created after 15 January 1989<sup>8</sup> except in certain transitional cases<sup>9</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 I.e. the date when the domestic rating system was replaced by the community charge, itself now replaced by the council tax: see PARA 521 ante. High-quality rented accommodation was previously precluded from protection by reference to rateable values: see PARA 855 et seq ante.

4 For the meaning of 'rateable value' see PARA 859 ante; and as to the certification of a rateable value where no entry appears on the valuation list at the date at which the domestic rating system was abolished see PARA 523 ante.

5 For these purposes, 'rent' does not include any sum payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates, council tax, services, repairs, maintenance or insurance, unless it could not have been regarded by the parties as a sum so payable: Rent Act 1977 s 4(5) (s 4(4)-(7) added by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 16; the Rent Act 1977 s 4(5) amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 3).

6 Rent Act 1977 s 4(4) (as added: see note 5 supra). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace the amount referred to in the Rent Act 1977 s 4(4) (as so added) by an amount specified in the order; and such an order must be made by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 4(7) (as so added). At the date at which this title states the law, no such order had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Ibid s 4(6) (as added: see note 5 supra).

8 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

9 See PARA 1012 et seq post. Tenancies at high rents are also excluded from protection as assured tenancies under the Housing Act 1988: see PARA 1026 post.

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### **C. TENANCIES AT A LOW RENT**

#### **861. Meaning of 'tenancy at a low rent'; tenancies where no rent is payable.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> if:

- 1701 (1) under the tenancy for the time being no rent<sup>3</sup> is payable<sup>4</sup>; or
- 1702 (2) it is a tenancy at a low rent<sup>5</sup>, that is a tenancy which:



- 4
3. (a) was entered into before 1 April 1990<sup>6</sup> or, where the dwelling house under the tenancy had a rateable value<sup>7</sup> on 31 March 1990, is entered into on or after 1 April 1990 in pursuance of a contract made before that date; and
4. (b) under which the rent payable is less than two-thirds of the rateable value which is or was the rateable value of the dwelling house on the appropriate day<sup>8</sup>; or
- 5
- 1703 (3) it is entered into on or after 1 April 1990, otherwise than, where the dwelling house under the tenancy had a rateable value on 31 March 1990, in pursuance of a contract made before 1 April 1990, and the rent is payable at a rate of £1,000<sup>9</sup> or less a year if the dwelling house is in Greater London and £250<sup>9</sup> or less a year if it is elsewhere<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For the meaning of 'rent' see PARA 862 post.

4 Rent Act 1977 s 5(1), (2A)(b) (respectively amended and added by the Housing Act 1980 s 152, Sch 25 para 75, Sch 26; the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule paras 17-18).

5 For the purposes of the Rent Act 1977, a tenancy falling within s 5(1) (as amended: see note 4 supra) is referred to as a 'tenancy at a low rent': ss 5(3), 152(1).

6 I.e. the date when the domestic rating system was replaced by the community charge, itself now replaced by the council tax: see PARA 521 ante.

7 For the meaning of 'rateable value' see PARA 859 ante. As to the certification of a rateable value where no entry appeared on the valuation list at the date at which the domestic rating system was abolished see PARA 523 ante.

8 Rent Act 1977 s 5(1) (as amended: see note 4 supra). For the meaning of 'the appropriate day' see PARA 859 ante. Where a tenancy has been converted from a controlled tenancy to a regulated tenancy, the above rule does not apply after conversion: see the Rent Act 1977 s 18A (as added), Sch 17 para 5; the Housing Act 1980 s 152(2), Sch 25 para 75. As to the conversion of controlled tenancies to regulated tenancies see PARA 848 ante. For the meaning of 'controlled tenancy' see PARA 849 ante; and for the meaning of 'regulated tenancy' see PARA 854 ante.

Where the appropriate day in relation to a dwelling house fell before 22 March 1973 and the dwelling house had on the appropriate day a rateable value exceeding, if it is in Greater London, £400 or, if it is elsewhere, £200, the Rent Act 1977 s 5(1) (as amended) applies in relation to the dwelling house as if the reference to the appropriate day were a reference to 22 March 1973: s 5(2). Where a tenancy granted before 28 November 1980 becomes, or would but for its low rent become, a protected tenancy by virtue of the Housing Act 1980 s 73 (as amended) (Crown property: see PARA 883 post), the Rent Act 1977 s 5 (as amended) applies as if in relation to the dwelling house the appropriate day were 28 November 1980: Housing Act 1980 s 73(5), Sch 8 para 1. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

9 The Rent Act 1977 s 4(7) (as added) (see PARA 860 note 6 ante) applies to any amount referred to in s 5(2A) (as added) (see the text and note 10 infra) as it applies to the amount referred to in s 4(7) (as so added): s 5(2B) (s 5(2A), (2B) added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 18).

10 Rent Act 1977 s 5(2A) (as added: see note 9 supra). As to the statutory protection for tenants under long tenancies at low rents under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) see PARA 1196 et seq post; and as to the exclusion from protection as assured tenancies under the Housing Act 1988 of tenancies at low rents see PARA 1028 post.

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## 862. Meaning of 'rent'.

'Rent' means the total monetary payment due under the instrument of letting<sup>1</sup>; thus sums paid to the landlord in respect of rates<sup>1</sup> or service charges<sup>2</sup> will fall to be included. However, in determining whether a long tenancy<sup>3</sup> is a tenancy at a low rent<sup>4</sup>, such part, if any, of the sums payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates<sup>5</sup>, council tax, services, repairs, maintenance or insurance, unless it could not have been regarded by the parties as a part so payable, is to be disregarded<sup>6</sup>.

Where the sum expressed in a lease to be payable as rent is less than two-thirds of the rateable value but, as consideration for the grant of the lease, the tenant has paid to the landlord a lump sum which, on a true view of the transaction, is to be treated as commuted rent, the tenancy is protected if the rent, taking the lump sum into account, exceeds two-thirds of the rateable value<sup>7</sup>.

In the Rent Acts 'rent' means pecuniary rent; thus a tenancy under which rent is payable not in money but by way of goods or services is not protected<sup>8</sup> unless the parties have by agreement quantified the rent in terms of money<sup>9</sup>.

It is the rent payable when the exemption from protection is sought to be applied which is material<sup>10</sup>. It would appear to follow that a tenancy may move into and out of protection where there is a variable rent<sup>11</sup>.

1 *Mackworth v Hellard* [1921] 2 KB 755, CA; *Sidney Trading Co Ltd v Finsbury Borough Council* [1952] 1 All ER 460, DC.

2 *Property Holding Co Ltd v Clark* [1948] 1 KB 630, [1948] 1 All ER 165, CA; *Alliance Property Co v Schaffer* [1949] 1 KB 367, [1949] 1 All ER 312, CA; *Investment and Freehold English Estates Ltd v Casement* [1988] 1 EGLR 100, CA.

3 For these purposes, 'long tenancy' means a tenancy granted for a term certain exceeding 21 years, other than a tenancy which is, or may become, terminable before the end of that term by notice given to the tenant: Rent Act 1977 s 5(5).

4 For the meaning of 'tenancy at a low rent' see PARA 861 ante.

5 In the Rent Act 1977, except where the context otherwise requires, 'rates' includes water rates and charges but does not include an owner's drainage rate as defined in the Land Drainage Act 1976 s 63(2)(a) (repealed in relation to financial years beginning after 1992 by the Water Consolidation (Consequential Provisions) Act 1991 ss 2(2), 3(1), Sch 2 para 15(1), Sch 3 Pt I: see now the Land Drainage Act 1991 s 40; and WATER AND WATERWAYS vol 101 (2009) PARA 627); Rent Act 1977 s 152(1).

6 *Ibid* s 5(4) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 4). Cf the Rent Act 1977 s 146 (similarly worded; amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, Sch 1 para 11) in relation to whether a long tenancy was at any time a tenancy at a low rent within the meaning of the Rent Act 1968 (repealed) or a tenancy to which the Rent Acts did not apply by virtue of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(7) (repealed).

7 *Samrose Properties Ltd v Gibbard* [1958] 1 All ER 502, [1958] 1 WLR 235, CA; cf *O'Connor v Hume* [1954] 2 All ER 301, [1954] 1 WLR 824, CA (lump sum, even if treated as rent, held to be referable to the first year of the tenancy only with the result that thereafter the tenancy, being at a low rent, was not protected). As to restrictions on the demanding of premiums and the payment of rent in advance see PARA 925 et seq post.

8 *Hornsby v Maynard* [1925] 1 KB 514, DC; approved in *Barnes v Barratt* [1970] 2 QB 657, [1970] 2 All ER 483, CA. The discharge by the tenant of gas and electricity bills does not constitute rent for the purposes of the Rent Act 1977: *Bostock v Bryant* (1990) 61 P & CR 23, CA.

9 *Montague v Browning* [1954] 2 All ER 601, [1954] 1 WLR 1039, CA (tenant allowed to set off his wages in diminution and later in extinction of an agreed rent).

10 *J and F Stone Lighting and Radio Ltd v Levitt* [1947] AC 209 at 215, 217-218, [1946] 2 All ER 653 at 654-655, 657, HL (where it was not necessary to decide whether the material date was when the notice to quit was given or when it expired or when a decision on the landlord's claim for possession was given by the court).

11 This seems to be implicit in the alternative ratio decidendi in *Woozley v Woodall Smith* [1950] 1 KB 325 at 334, [1949] 2 All ER 1055 at 1059, CA, construing the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(7) (repealed), where the words 'where the rent payable ... is less than two-thirds' etc were read as meaning 'if and so long as the rent payable' etc. Moreover the cases cited in notes 1-2 supra all involved rents which were variable and could, at least in theory, have fallen below two-thirds of the rateable value if the rates or service charge element had been sufficiently small. It is implicit in the decision in *O'Connor v Hume* [1954] 2 All ER 301, [1954] 1 WLR 824, CA (assuming that a lump sum payment was to be treated as rent for the first year only) that a tenancy may cease to be protected by reason of a fall in the rent.

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## **D. CERTAIN SHARED OWNERSHIP LEASES**

### **863. Meaning of 'qualifying shared ownership lease'.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> if it is a qualifying shared ownership lease, that is a lease<sup>3</sup>:

- 1704 (1) granted in pursuance of the former right to be granted a shared ownership lease under the Housing Act 1985<sup>4</sup>; or
- 1705 (2) a lease granted by a housing association<sup>5</sup> and which complies with the statutory conditions<sup>6</sup>.

The statutory conditions are that the lease:

- 1706 (a) was granted for a term of 99 years or more and is not, and cannot become, terminable except in pursuance of a provision for re-entry or forfeiture;
- 1707 (b) was granted at a premium, calculated by reference to the value of the dwelling house<sup>7</sup> or the cost of providing it, of not less 25%, or such other percentage as may be prescribed<sup>8</sup>, of the figure by reference to which it was calculated;
- 1708 (c) provides for the tenant<sup>9</sup> to acquire additional shares in the dwelling house on terms specified in the lease and complying with such requirements as may be prescribed<sup>10</sup>;
- 1709 (d) does not restrict the tenant's powers to assign, mortgage or charge his interest in the dwelling house;
- 1710 (e) if it enables the landlord<sup>11</sup> to require payment for outstanding shares in the dwelling house, does so only in such circumstances as may be prescribed<sup>12</sup>;

1711 (f) provides, in the case of a house, for the tenant to acquire the landlord's interest on terms specified in the lease and complying with such requirements as may be prescribed<sup>13</sup>; and

1712 (g) states the landlord's opinion that by virtue of these provisions the lease is excluded from the operation of the Rent Act 1977<sup>14</sup>.

In any proceedings the court may, if of opinion that it is just and equitable to do so, treat a lease as a qualifying shared ownership lease notwithstanding that the condition specified in head (g) above is not satisfied<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For these purposes, 'lease' includes an agreement for a lease and references to the grant of a lease are to be construed accordingly: Rent Act 1977 s 5A(6) (s 5A added by the Housing and Planning Act 1986 s 18, Sch 4 paras 1(2), 11(1)).

4 Under the Housing Act 1985 Pt V (ss 118-188) (as amended): see s 143 (as originally enacted). As to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

5 For these purposes, 'housing association' means a society, body of trustees or company (1) which is established for the purpose of, or amongst whose objects or powers are included those of, providing, constructing, improving or managing, or facilitating or encouraging the construction or improvement of, housing accommodation; and (2) which does not trade for profit or whose constitution or rules prohibit the issue of capital with interest or dividend exceeding such rate as may be prescribed by the Treasury, whether with or without differentiation as between share and loan capital: Housing Associations Act 1985 s 1(1) (applied by the Rent Act 1977 s 5A(6) (as added: see note 3 supra)).

6 Rent Act 1977 s 5A(1) (as added: see note 3 supra).

7 For these purposes, 'house' has the same meaning as in the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1390 post): *ibid* s 5A(6) (as added: see note 3 supra).

8 The Secretary of State (see PARA 27 note 3 ante) or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister (see PARA 27 note 4 ante) may by regulations prescribe anything requiring to be prescribed for the purposes of *ibid* s 5A(2) (as added: see note 3 supra); and the regulations may (1) make different provision for different cases or descriptions of case, including different provision for different areas; and (2) contain such incidental, supplementary or transitional provisions as the Secretary of State or the Assembly or minister considers appropriate, and must, if made by the Secretary of State, be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 5A(3), (4) (as so added). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, which came into force on 11 December 1987: reg 1. The regulations do not prescribe any percentage for these purposes.

9 For the meaning of 'tenant' see PARA 816 note 3 ante.

10 As to the prescribed requirements see PARA 864 post.

11 For the meaning of 'landlord' see PARA 816 note 2 ante.

12 As to the prescribed circumstances see PARA 865 post.

13 As to the prescribed requirements see PARA 866 post.

14 Rent Act 1977 s 5A(2) (as added: see note 3 supra).

15 *Ibid* s 5A(5) (as added: see note 3 supra).

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#### **864. Prescribed requirements relating to acquisition of additional shares by the tenant.**

The requirements<sup>1</sup> as to the provision for the tenant to acquire additional shares in the dwelling house are that:

1713 (1) the tenant is to be entitled to acquire additional shares up to a maximum of 100%, in instalments of 25% or such lesser percentage, if any, as may be specified in the lease;

1714 (2) the tenant is to be able to exercise this entitlement by serving notice in writing on the landlord at any time during the term of the lease, stating the additional shares he proposes to acquire;

1715 (3) the price for the additional shares is to be an amount no greater than the same percentage of the market value price<sup>2</sup> at the date of service of the tenant's notice under head (2) above, as the percentage of the additional shares;

1716 (4) the rent payable by the tenant under the lease, excluding any amount payable, directly or indirectly, for services, repairs, maintenance, insurance or management costs, is to be reduced, upon the purchase of any additional shares, in the same proportion as the reduction in the percentage of shares remaining unpurchased by the tenant<sup>3</sup>.

<sup>1</sup> See the requirements prescribed for the purposes of the conditions in the Leasehold Reform Act 1967 s 33A, Sch 4A para 3(2)(c) (as added) (see PARA 1412 post) and the Rent Act 1977 s 5A(2)(c) (as added) (see PARA 863 ante at head (c) in the text).

<sup>2</sup> For these purposes, 'market value price' means the amount agreed between or determined in a manner agreed between the parties or, in default of such agreement or determination, determined by an independent expert agreed between the parties or, in default of agreement, appointed on the application of either party by or on behalf of the President of the Royal Institution of Chartered Surveyors, as the amount which the interest of the tenant would fetch, if sold on the open market by a willing vendor, on the assumption that the tenant had previously purchased 100% of the shares in the dwelling house, disregarding the following matters: (1) any mortgage of the tenant's interest; (2) any interest in or right over the dwelling house created by the tenant; (3) any improvement made by the tenant or any predecessor in title of his; (4) any failure by the tenant or any predecessor in title to carry out any repairing obligations under the lease: Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 2, Sch 1 para 1.

<sup>3</sup> Ibid Sch 1 para 2. As to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

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#### **865. Prescribed circumstances relating to payment for outstanding shares.**

If the lease enables the landlord to require payment for the outstanding shares in the dwelling house, the circumstances in which the landlord is entitled to do so<sup>1</sup> are that:

- 1717 (1) there has been a disposal, other than an exempt disposal<sup>2</sup>, of any interest in the dwelling house by the tenant;
- 1718 (2) the amount payable by the tenant is an amount no greater than the same percentage of the market value price<sup>3</sup> at the date of the disposal as the percentage of the shares in the dwelling house remaining unpurchased by the tenant<sup>4</sup>.

1    le the circumstances prescribed for the purposes of the conditions in the Leasehold Reform Act 1967 s 33A, Sch 4A para 3(2)(e) (as added) (see PARA 1412 post) and the Rent Act 1977 s 5A(2)(e) (as added) (see PARA 863 ante at head (e) in the text).

2    For these purposes, 'exempt disposal' means: (1) a disposal under a will or intestacy; (2) a disposal under the Matrimonial Causes Act 1973 s 24 (as originally enacted or as prospectively substituted) (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 498 et seq) or the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (as amended) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 691 et seq); (3) a grant of a subtenancy in respect of which a notice has been given under the Housing Act 1980 s 52(1)(b) (repealed with savings) (notice that a tenancy is to be a protected shorthold tenancy: see PARA 1009 post) or of a kind mentioned in any of the Rent Act 1977 s 98, Sch 15 Pt II, Cases 11-18 (as amended) (see PARAS 963-969 post) or Sch 15 Pt II, Case 20 (as added) (see PARA 971 post); (4) a grant of a subtenancy of part of the dwelling house, if any other part of the dwelling house remains in the possession of the tenant; (5) a grant of a mortgage: Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 2, Sch 1 para 3(2).

3    For the meaning of 'market value price' see PARA 864 note 2 ante.

4    Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, Sch 1 para 3(1). As to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

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## **866. Prescribed requirements relating to tenant's acquisition of landlord's interest.**

The provision in the lease of a house for the tenant to acquire the landlord's interest must<sup>1</sup>:

- 1719 (1) be exercisable at any time by the tenant by giving notice in writing, to take effect not before he has acquired 100% of the shares in the dwelling house;
- 1720 (2) require the landlord's interest to be transferred, as soon as practicable after the coming into effect of that notice, to the tenant or to such other person as the tenant may direct;
- 1721 (3) not entitle the landlord to make any charge for the conveyance or assignment of his interest<sup>2</sup>.

1    le in order to fulfil the requirements prescribed for the purposes of the conditions in the Leasehold Reform Act 1967 s 33A, Sch 4A para 3(2)(f) (as added) (see PARA 1412 post) and the Rent Act 1977 s 5A(2)(f) (as added) (see PARA 863 ante at head (f) in the text).

2    Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 2, Sch 1 para 4. As to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

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## **E. HOUSES LET WITH OTHER LAND**

### **867. Land and premises let with dwelling house.**

Any land or premises let together with a dwelling house<sup>1</sup> is treated as part of the dwelling house unless the land or premises so let consists of agricultural land<sup>2</sup> exceeding two acres<sup>3</sup> in extent<sup>4</sup>. There need not be a single letting or comprehensive rent for the dwelling and the other land to be let together<sup>5</sup>; nor need the hereditaments be contiguous<sup>6</sup>; nor will severance of the reversion prevent land being let together with the house<sup>7</sup>.

Subject to the above rule, a tenancy<sup>8</sup> is not a protected tenancy<sup>9</sup> if the dwelling house which is subject to the tenancy is let together with land other than the site of the dwelling house<sup>10</sup>. Whether the rule or the exclusion applies depends on whether the land is, or premises let are, an adjunct to the dwelling house or vice versa. If the house is an adjunct to the land, the whole entity is not protected; thus, if a factory or a business is the main object of the letting and the dwelling is merely an adjunct to it, the tenancy is not protected<sup>11</sup>. Where, however, the premises let are a single structure, part of which is used as living accommodation, no question of predominant user arises; the only question is whether there is a dwelling house let as a dwelling<sup>12</sup>.

1 For the purpose of applying the Rent Act 1977 ss 6, 26 (see the text and notes 2-12 *infra*), the relevant date at which the use of the land must be considered is either the date of the application or the date of the hearing: *Mann v Merrill* [1945] 1 All ER 708, CA; *Bradshaw v Smith* [1980] 2 EGLR 89, (1980) 255 Estates Gazette 699, CA; *Russell v Booker* [1982] 2 EGLR 86, (1982) 263 Estates Gazette 513, CA (where the point was left open).

2 For these purposes, 'agricultural land' means any land used as arable meadow or pasture ground only, land used for a plantation or a wood or for the growth of saleable underwood, land exceeding 0.10 hectare used for the purposes of poultry farming, cottage gardens exceeding 0.10 hectare, market gardens, nursery grounds, orchards or allotments, including allotment gardens within the meaning of the Allotments Act 1922, but does not include land occupied together with a house as a park, gardens, other than as aforesaid, pleasure grounds, or land kept or preserved mainly or exclusively for purposes of sport or recreation, or land used as a racecourse; and, for these purposes, the expression 'cottage garden' means a garden attached to a house occupied as a dwelling by a person of the labouring classes: General Rate Act 1967 s 26(3)(a) (amended by the Rating Enactments (Agricultural Land and Agricultural Buildings) (Amendment) Regulations 1978, SI 1978/318; applied by the Rent Act 1977 s 26(2)). The General Rate Act 1967 s 26(3)(a) (as so amended) continues to have effect after 31 March 1990 for these purposes as if the Local Government Finance Act 1988 s 117(1) (now as amended) (rates and precepts; abolition) had not been enacted: References to Rating (Housing) Regulations 1990, SI 1990/434, reg 3.

3 I.e 0.8 hectare approximately.

4 Rent Act 1977 s 26(1); cf the Housing Act 1988 s 1(2), Sch 1 para 6; and PARA 1031 *post*.

5 *Mann v Merrill* [1945] 1 All ER 708, CA; *Falconer v Chisholm's Trustees* 1925 SC 742, Ct of Sess. See also *Wimbush v Cibulia* [1949] 2 KB 564, [1949] 2 All ER 432, CA (referred to the county court on this point); and cf *Metropolitan Properties Co (FGC) Ltd v Barder* [1968] 1 All ER 536, [1968] 1 WLR 286, CA; *Gaidowski v Gonville and Caius College, Cambridge* [1975] 2 All ER 952, [1975] 1 WLR 1066, CA (construing the Leasehold Reform Act 1967 s 2(3) (now as amended): see PARA 1391 *post*).

6 *Langford Property Co Ltd v Batten* [1951] AC 223, [1950] 2 All ER 1079, HL.

7 *Jelley v Buckman* [1974] QB 488, [1973] 3 All ER 853, CA; cf *Knight v Olive* [1954] 1 QB 514, [1954] 1 All ER 701, CA (other land not protected as against the superior landlord as he had never had any interest in the dwelling house let with the land by the mesne tenant).

8 For the meaning of 'tenancy' see PARA 818 note 1 ante.

9 For the meaning of 'protected tenancy' see PARA 818 ante.

10 Rent Act 1977 s 6. Cf the Housing Act 1988 s 2; and PARA 1022 post.

11 *Feyereisel v Turnidge* [1952] 2 QB 29, [1952] 1 All ER 728, CA; *Pender v Reid* 1948 SC 381, Ct of Sess; *Cargill v Phillips* 1951 SC 67, Ct of Sess.

12 *Whiteley v Wilson* [1953] 1 QB 77, [1952] 2 All ER 940, CA.

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## **868. Houses in agricultural holdings etc.**

A tenancy is not a protected tenancy<sup>1</sup> if:

1722 (1) the dwelling house is comprised<sup>2</sup> in an agricultural holding<sup>3</sup> and is occupied by the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the farming of the holding; or

1723 (2) the dwelling house is comprised in the holding held under a farm business tenancy<sup>4</sup> and is occupied by the person responsible for the control (whether as tenant or as servant or agent of the tenant) of the management of the holding<sup>5</sup>.

It has been held that head (1) above does not prevent a subtenant of a purely residential part of the holding comprised in the head tenancy from being protected as against his immediate landlord<sup>6</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 A dwelling house does not cease to be 'comprised in' an agricultural holding merely because, without the landlord's consent, the holding is partitioned between the tenants, one taking the dwelling and the other the land: *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA (decided under the Leasehold Reform Act 1967 s 1(3)(b) (as amended): see PARA 1415 post).

3 For these purposes, 'agricultural holding' means any agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy in relation to which that Act applies: Rent Act 1977 s 10(2) (s 10 substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 27). As to such agricultural holdings see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

4 For these purposes, 'farm business tenancy', and 'holding' in relation to such a tenancy, have the same meaning as in the Agricultural Tenancies Act 1995: Rent Act 1977 s 10(2) (as substituted: see note 3 supra). As to such tenancies and holdings see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302.

5 Rent Act 1977 s 10(1) (as substituted: see note 3 supra). Cf the Housing Act 1988 s 1(2), Sch 1 para 7 (as substituted); and PARA 1032 post.



6 *Critchley v Clifford* [1962] 1 QB 131, [1961] 3 All ER 288, CA. As to whether such a subtenant will be protected as against the head landlord see *Maunsell v Olins* [1975] AC 373, [1975] 1 All ER 16, HL; the Rent Act 1977 s 137(3) (as amended); and PARAS 974-979 post.

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## **F. HOUSES LET WITH BOARD OR ATTENDANCE**

### **869. Exclusion from protection.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> if under the tenancy the dwelling house is bona fide let<sup>3</sup> at a rent<sup>4</sup> which includes payments in respect of board or attendance<sup>5</sup>. A dwelling house is not to be taken to be bona fide let at a rent which includes payments in respect of attendance unless the amount of the rent which is fairly attributable to attendance, having regard to the value of the attendance to the tenant<sup>6</sup>, forms a substantial part of the whole rent<sup>7</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 'Bona fide' in the context of 'bona fide let' means genuinely as opposed to a merely colourable use of words which do not correspond to what is really provided: *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 310, [1948] 1 All ER 1 at 7, HL. See *Furnival Properties Ltd v Edwards* (1950) 94 Sol Jo 578, CA (agreement by the landlords to hire furniture from the tenant's wife in order to prevent the tenancy from being protected at a time when furnished tenancies were excluded from protection (see PARA 870 post) held to be a colourable transaction).

4 'Rent' in this context is not confined to rent in the strict sense but covers other payments under the instrument of letting, even though in the instrument such payments are provided for separately from the rent: see *LH Woods & Co Ltd v City and West End Properties Ltd* (1921) 38 TLR 98; *Wilkes v Goodwin* [1923] 2 KB 86 at 105-106, CA; *Nadler v Wilson* (1924) 40 TLR 639; *Artillery Mansions Ltd v Mabartney* [1947] KB 594, [1947] 1 All ER 686 (affd sub nom *Artillery Mansions Ltd v Macartney* [1949] 1 KB 164, [1948] 2 All ER 875, CA); *Property Holding Co Ltd v Clark* [1948] 1 KB 630 at 642-648, [1948] 1 All ER 165 at 170-173, CA, per Asquith LJ and at 649 and 173-174 per Evershed LJ; *Alliance Property Co Ltd v Shaffer* [1949] 1 KB 367, [1949] 1 All ER 312, CA.

5 Rent Act 1977 s 7(1). For the meaning of 'board' and 'attendance' see PARA 871 post.

6 'Tenant' means the actual tenant, not a hypothetical normal or average tenant, or an assignee of the original tenant: *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 309, 314, [1948] 1 All ER 1 at 5, 9-10, HL; *Artillery Mansions Ltd v Macartney* [1949] 1 KB 164, [1948] 2 All ER 875, CA.

7 Rent Act 1977 s 7(2). For a tenancy to have been a furnished tenancy the same test as to the amount of rent which is fairly attributable to the use of furniture applied: see s 152(1); and PARAS 870, 872-873 post.

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### **870. Furnished tenancies.**

Until 14 August 1974<sup>1</sup> tenancies under which a dwelling was bona fide let at a rent which included payments in respect of the use of furniture were excluded from protection<sup>2</sup>. It remains important to be able to distinguish between furnished<sup>3</sup> and unfurnished tenancies:

- 1724 (1) for the purposes of deciding whether a tenancy was controlled or regulated<sup>4</sup>; and  
 1725 (2) in connection with the exclusion from protection of tenancies granted before 14 August 1974 where there is a resident landlord<sup>5</sup>.

As the tests as to good faith and the amount of attributable rent are the same in relation to use of furniture and to board and attendance<sup>6</sup>, it is convenient to treat furnished tenancies together with board and attendance provided that it is borne in mind that furnished tenancies are no longer excluded from protection.

1 The date of commencement of the Rent Act 1974: see s 17(5) (repealed).

2 See the Rent Act 1968 s 2(1)(b) (repealed), which was amended by the Rent Act 1974 s 1(4)(a) so as to delete the words 'or use of furniture'.

3 'Furnished tenancy' means a tenancy under which the dwelling house concerned is bona fide let at a rent which includes payments in respect of furniture and in respect of which the amount of rent which is fairly attributable to the use of furniture, having regard to the value of that use to the tenant, forms a substantial part of the whole rent: see the Rent Act 1977 s 152(1); and PARA 849 note 12 ante. For the meaning of 'furniture' see PARA 872 post.

4 A furnished tenancy could not be controlled: see *ibid* s 17(7)(c) (repealed); and PARA 849 ante. As to regulated tenancies see PARA 854 ante.

5 See PARA 875 post.

6 Cf the Rent Act 1977 s 7 (see PARA 869 ante) and s 152(1) (see note 3 supra). As to the tests see PARAS 871-873 post.

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### **871. Meaning of 'board' and 'attendance'.**

'Board' includes any board provided and is not confined to full board, but it may be that the items alleged to constitute board are so small that they will be ignored, for example, an early morning cup of tea<sup>1</sup>.

'Attendance' means service personal to the tenant<sup>2</sup> provided by the landlord in accordance with the contract for the use of the premises<sup>3</sup>. Services which are not for the tenant's exclusive benefit, such as the heating of the communal water supply of a block of flats, or the cleaning of the common passages and hallways, cannot amount to attendance<sup>4</sup>. Where, however, the services, although of the same nature as those supplied to other tenants, have some personal element, they will amount to attendance, as, for example, the carrying of fuel to an individual flat<sup>5</sup> or the taking away of dirty linen and supply linen of clean linen<sup>6</sup>.

Where attendance is given by an employee of the landlord, in order to value that service the employee's wages must be apportioned among the tenants to whom the service is given, after the deduction of any part of the wages which is not paid in respect of attendance<sup>7</sup>.

1 See *Wilkes v Goodwin* [1923] 2 KB 86 at 110, CA (where the Oxford English Dictionary definition of 'board' was cited, namely 'daily meals provided in a boarding house according to stipulation; the supply of daily provisions'). The bona fide provision by the landlord of a daily continental breakfast with bread rolls, butter and jam or marmalade and unlimited tea or coffee with sugar and milk is more than de minimis and constitutes 'board': *Otter v Norman* [1989] AC 129, [1988] 2 All ER 897, HL.

2 *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 310, [1948] 1 All ER 1 at 8, HL.

3 Thus, even though greater services may be rendered, the court may look only at the services for which the contract stipulates: *Michael v Phillips* [1924] 1 KB 16 at 25, CA. There may be evidence of a variation or a new contract for the provision of additional services: *Seabrook v Mervyn* [1947] 1 All ER 295, CA.

4 *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 311, [1948] 1 All ER 1 at 8, HL; *Engvall v Ideal Flats Ltd* as reported in [1945] 1 All ER 230 at 233, CA. See also *Feigenbaum v Sutcliffe* (1942) 86 Sol Jo 27, CA; *Ainslie Estates (1936) Ltd v Holland* (1946) 148 Estates Gazette 9.

5 See *King v Millen* [1922] 2 KB 647, DC; *Nye v Davis* [1922] 2 KB 56, DC; *Dick v Duncan* (1923) 92 LJ Ch 320; *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 310-311, [1948] 1 All ER 1 at 8, HL.

6 *Nelson Developments Ltd v Taboada* (1992) 24 HLR 462, [1992] 2 EGLR 107, CA.

7 *Palser v Grinling* [1946] KB 631 at 637-638, [1946] 2 All ER 287 at 290, CA; on appeal [1948] AC 291 at 318-319, [1948] 1 All ER 1 at 12, HL. As to the valuation of services see also *Maltby v Butler* (1950) 155 Estates Gazette 247 (where the court took into account what the tenant would have to pay if the landlord did not provide the service); *Nelson Developments Ltd v Taboada* (1992) 24 HLR 462, [1992] 2 EGLR 107, CA (where reference was made to the practice in the county courts of taking 10% as the lower end, and 20% as the higher end, of the proportion of the rent attributable to the value of services).

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## 872. Meaning of 'furniture'.

'Furniture' means articles which are commonly and currently regarded as furniture, irrespective of how they may be described in a contract of tenancy<sup>1</sup>. Furniture provided in the hall or common staircases of a block of flats was not to be considered in deciding whether any individual flat was furnished or not<sup>2</sup>.

Where the letting included furniture which the landlord had no right to remove, there was a presumption that the rent included some element attributable to that furniture and that the furniture was of some value to the tenant<sup>3</sup>.

1 *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291, [1948] 1 All ER 1, HL (where it was held that a refrigerator was furniture but not a built-in kitchen cabinet). See also *Maddox Properties Ltd v Klass* [1946] 1 All ER 487 (crockery and cutlery, bedding and kitchen utensils); *Gray v Fidler* [1943] KB 694, [1943] 2 All ER 289, CA (fittings); *R v Hampstead and St Pancras Furnished Houses Rent Tribunal, ex p Ascot Lodge Ltd* [1947] KB 973, [1947] 2 All ER 12, DC (immersion heaters and panel fires). As to cooking stoves see *R v Blackpool Rent Tribunal, ex p Ashton* [1948] 2 KB 277, [1948] 1 All ER 900, DC; *Roppel v Bennett* [1949] 1 KB 115, [1948] 2 All ER 627, CA. Furniture supplied by a landlord must, subject to certain exceptions, comply with statutory standards of fire safety: see PARA 426 the text and notes 10-11 ante.

2 *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 312, [1948] 1 All ER 1 at 8, HL.

3 *Seabrook v Mervyn* [1947] 1 All ER 295, CA (where the furniture was of value to the tenant although he would have preferred to use his own stored furniture). The distinction between furnished and unfurnished tenancies is now only relevant in certain very limited circumstances: see PARA 870 ante.

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### **873. Meaning of 'substantial portion of whole rent'.**

In estimating whether a substantial portion of the whole rent is fairly attributable to furniture or attendance<sup>1</sup>, the test is prima facie the position existing when the lease was originally made<sup>2</sup>. The burden of showing that the amount is substantial rests upon the landlord<sup>3</sup>. Although there is no fixed percentage which can be taken as a rule as to what constitutes a substantial proportion, something considerable and solid is required<sup>4</sup>.

Where the lease makes a genuine pre-estimate of the value of the furniture or the value of the attendance, this will normally be accepted by the courts<sup>5</sup>.

1 le for the purposes of the Rent Act 1977 s 7(2) (see PARA 869 ante) or s 152(1) (see PARA 870 note 3 ante).

2 *Jozwiak v Hierowski* [1948] 2 All ER 9, CA; *Bowness v O'Dwyer* [1948] 2 KB 219, [1948] 2 All ER 181, CA; *Stagg v Brickett* [1951] 1 KB 648, [1951] 1 All ER 152, CA; *Woodward v Docherty* [1974] 2 All ER 844, [1974] 1 WLR 966, CA.

3 *Hern v Palmer* [1955] 1 All ER 396, [1955] 1 WLR 123, CA; *Woodward v Docherty* [1974] 2 All ER 844, [1974] 1 WLR 966, CA.

4 *Palser v Grinling, Property Holding Co Ltd v Mischeff* [1948] AC 291 at 316-317, [1948] 2 All ER 1 at 11, HL; *Woodward v Docherty* [1974] 2 All ER 844, [1974] 1 WLR 966, CA. The judge is not bound to quantify the amount: *Roppel v Bennett* [1949] 1 KB 115, [1948] 2 All ER 627, CA.

5 *Artillery Mansions Ltd v Macartney* [1949] 1 KB 164, [1948] 2 All ER 875, CA.

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## **G. STUDENT AND HOLIDAY LETTINGS**

### **874. Student and holiday lettings.**

A tenancy<sup>1</sup>:

- 1726 (1) granted to a person who is pursuing, or intends to pursue, a course of study provided by a specified<sup>2</sup> educational institution<sup>3</sup> and so granted either by that institution or by another specified institution or body of persons; or

1727 (2) the purpose of which is to confer on the tenant the right to occupy the dwelling house for a holiday<sup>4</sup>;

is not a protected tenancy<sup>5</sup>. These provisions are now of little practical effect as such tenancies are, by their nature, normally granted for short periods of time only and no such tenancy granted since 15 January 1989 is in any case capable of being a protected tenancy<sup>6</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For these purposes, 'specified' means specified, or of a class specified, for the purposes of the Rent Act 1977 s 8 by regulations made by statutory instrument by the Secretary of State (see PARA 27 note 3 ante) or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister (see PARA 27 note 4 ante): see s 8(2). A statutory instrument containing any such regulations is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 8(3). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967, which came into force on 1 September 1998: reg 1.

3 The following institutions are specified as educational institutions for these purposes and for the purposes of the Housing Act 1988 s 1(2), Sch 1 para 8 (see PARA 1033 post): (1) any university or university college and any constituent college, school or hall or other institution of a university; (2) any other institution which provides further education or higher education or both and which is publicly funded; (3) the David Game Tutorial College, London: Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967, regs 2, 3. For these purposes, 'further education' has the meaning assigned to it by the Education Act 1996 s 2(3), (5); 'higher education' means education provided by means of a course of any description mentioned in the Education Reform Act 1988 s 120(1), Sch 6; 'publicly funded' means that the relevant institution is (a) provided or assisted by a local education authority; (b) in receipt of grant under regulations made under the Education Act 1996 s 485; (c) within the higher education sector within the meaning of the Further and Higher Education Act 1992 s 91(5), other than a university; or (d) within the further education sector within the meaning of s 91(3); and 'assisted' has the same meaning as in the Education Act 1996 s 579(5), (6): Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967, reg 2.

4 It seems, however, that a tenancy of a house which a tenant chose to use as a holiday house over a period was protected but that the tenant would not have become a statutory tenant when the contractual period ended: *Walker v Ogilvy* (1974) 28 P & CR 288, CA.

5 Rent Act 1977 ss 8(1), 9. Similarly, a right to occupy for a holiday could not have been a restricted contract: see the Rent Act 1977 s 19(7) (repealed with savings) and PARAS 986-987 post. Cf the Housing Act 1988 s 1(2), Sch 1 para 9; and PARA 1034 post. For the meaning of 'protected tenancy' see PARA 818 ante.

With regard to student lettings cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 14, which provides a landlord who lets to students with a mandatory ground for possession against persons to whom the premises are let during vacations: see PARA 965 post. The following bodies of persons, whether unincorporated or bodies corporate, are specified as bodies for the purposes of head (1) in the text and for the purposes of the Housing Act 1988 Sch 1 para 8: (1) the governing body of any educational institution specified in the Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967, reg 3 (see note 3 supra); (2) the body, other than a local education authority, providing any such educational institution; and (3) a body listed in Sch 1, ie International Students House and the London Goodenough Trust for Overseas Graduates: reg 4, Sch 1. Moreover, a letting to an educational institution the terms of which contemplate the subletting to students of separate bed-sitting rooms in the building was not protected because the building was not let as a separate dwelling: *St Catherine's College v Dorling* [1979] 3 All ER 250, [1978] 1 WLR 66, CA, following *Harford Investments v Lambert* [1976] Ch 39, [1974] 1 All ER 131, CA. See also PARA 823 ante.

With regard to holiday lettings, if the tenancy agreement states the purpose of the tenancy, the burden is on the tenant to prove that statement a sham: *Buchmann v May* [1978] 2 All ER 993, CA (explained in *R v Rent Officer for London Borough of Camden, ex p Plant* (1980) 7 HLR 15, [1981] 1 EGLR 73); *McHale v Daneham* (1979) 249 Estates Gazette 969. As to what constitutes a 'sham' see *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802, [1967] 1 All ER 518 at 528, CA, per Diplock LJ. Out of season lettings may be protected, but there is a mandatory ground for possession available to landlords who have let to holiday makers: see the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 13; and PARA 965 post.

6 See PARA 1011 post.

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## **H. RESIDENT LANDLORDS**

### **875. The resident landlord exemption.**

A tenancy of a dwelling house<sup>1</sup> granted on or after 14 August 1974<sup>2</sup> is not a protected tenancy<sup>3</sup> at any time if:

- 1728 (1) the dwelling house forms part only of a building<sup>4</sup> which is not a purpose-built block of flats<sup>5</sup>; and
- 1729 (2) the tenancy was granted by a person<sup>6</sup> who, at the time when he granted it, occupied as his residence<sup>7</sup> another dwelling house which also forms part of that building<sup>8</sup>; and
- 1730 (3) at all times<sup>9</sup> since the tenancy was granted the interest of the landlord<sup>10</sup> under the tenancy has belonged to a person who, at the time he owned that interest occupied as his residence another dwelling house which also formed part of the building<sup>11</sup>.

Tenancies of parts of flats in purpose-built blocks granted on or after 28 November 1980<sup>12</sup> are also excluded from being protected tenancies provided that the landlord was at the date of grant and continued to be resident in another part of the flat<sup>13</sup>.

The exemption does not apply to a tenancy of a dwelling house which forms part of a building if the tenancy is granted to a person who, immediately before it was granted, was a protected or statutory tenant<sup>14</sup> of that dwelling house or of any other dwelling house in that building<sup>15</sup>.

1 A dwelling house let under a protected tenancy for the purposes of the Rent Act 1977 may be a house or part of a house: see s 1; and PARA 818 ante. For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 I.e. the commencement date of the Rent Act 1974 which introduced the resident landlord exemption at the same time as making furnished tenancies protected. As to tenancies granted before 14 August 1974 see PARA 879 post.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 'Building' is not defined in the Rent Act 1977 and its meaning is a question of fact; the word is to be construed in the light of the mischief at which the resident landlord exemption is aimed, namely the social embarrassment arising from a close proximity of landlord and tenant which the landlord had accepted in the belief that he could bring it to an end at any time allowed by the contract of tenancy: *Bardrick v Haycock* (1976) 31 P & CR 420 at 424, CA, per Scarman LJ. Cf the Housing Act 1988 s 1(2), Sch 1 para 10; and PARA 1035 post. For examples of cases where the tenant's dwelling house has been held to form part of the same building as is occupied by the landlord see *Griffiths v English* (1981) 2 HLR 126, [1982] 1 EGLR 86, CA; *Wolff v Waddington* (1989) 22 HLR 72, [1989] 2 EGLR 108, CA; *Lewis-Graham v Conacher* (1991) 24 HLR 132, [1992] 1 EGLR 111, CA.

5 Rent Act 1977 s 12(1)(a) (s 12(1)(a)-(c) substituted by the Housing Act 1980 s 65(1)). See also text and notes 12-13 infra. For these purposes, a building is a purpose-built block of flats if as constructed it contained, and it contains, two or more flats; and for this purpose 'flat' means a dwelling house which (1) forms part only of a building; and (2) is separated horizontally from another dwelling house which forms part of the same building: Rent Act 1977 s 12(4), Sch 2 para 4. It is necessary to consider the nature of the building as it was originally designed and built; if it was constructed as a single private dwelling house, it does not become a purpose-built block of flats by being converted into several flats: *Barnes v Gorsuch* (1982) 43 P & CR 294, 263 Estates Gazette 253, CA. As to 'separated horizontally' cf the Leasehold Reform Act 1967 s 2(1); *Peck v Anicar Properties Ltd* [1971] 1 All ER 517, (1970) 21 P & CR 919, CA; and PARA 1390 post.

6 Where the tenancy is granted by joint landlords, residence by only one of them is sufficient: *Cooper v Tait* (1984) 48 P & CR 460, 271 Estates Gazette 105, CA.

7 For these purposes, a person is treated as occupying a dwelling house as his residence if, so far as the nature of the case allows, he fulfils the same conditions as, by virtue of the Rent Act 1977 s 2(3) (see PARA 831 ante), are required to be fulfilled by a statutory tenant of a dwelling house: Sch 2 para 5. The landlord must accordingly occupy as his residence another dwelling house which also forms part of the building. As to what constitutes sufficient occupation see PARAS 833-836 ante; and *Lyons v Caffery* (1982) 5 HLR 63, [1983] 1 EGLR 102, CA; *Jackson v Pekic* (1989) 22 HLR 9, [1989] 2 EGLR 104, CA; *Wolff v Waddington* (1989) 22 HLR 72, [1989] 2 EGLR 108, CA; *Palmer v McNamara* (1990) 23 HLR 168, [1991] 1 EGLR 121, CA. Where a landlord intends to occupy new premises with a tenant and the tenant moves into those premises shortly before the landlord, the landlord still 'occupies' for these purposes: see *Barnett v O'Sullivan* [1994] 1 WLR 1667, [1995] 1 EGLR 93, CA.

8 Rent Act 1977 s 12(1)(b) (as substituted: see note 5 supra). See also text and notes 12-13 infra.

9 This requirement is subject to *ibid* Sch 2 para 1 (as amended), which enables certain periods when a landlord is not resident to be disregarded: see PARA 876 post.

10 For the meaning of 'landlord' see PARA 816 note 2 ante.

11 Rent Act 1977 s 12(1)(c) (as substituted: see note 5 supra). See also text and notes 12-13 infra. As to the periods of non-residence to be disregarded for this purpose see PARA 876 post.

12 As to the date of commencement of the Housing Act 1980 s 65: see s 153(4); the Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706.

13 See the Rent Act 1977 s 12(1) (as amended: see note 5 supra).

14 For the meaning of 'statutory tenant' see PARA 831 ante.

15 Rent Act 1977 s 12(2) (substituted by the Housing Act 1980 s 69(4) with effect from 28 November 1980). The Rent Act 1977 s 12(2) (as so substituted) re-enacts the former s 12(2)(a). Before 28 November 1980, the resident landlord exemption also did not apply if the tenancy was for a term of years certain and was granted to a person who, immediately before it was granted, was the tenant under an earlier tenancy of any dwelling house in the same building which was not protected by reason of the resident landlord exemption: see s 12(2)(b) (as originally enacted). Where, immediately before 28 November 1980, a tenancy was by virtue of s 12(2)(b) a protected tenancy and not a restricted contract (see PARA 986 post), the Rent Act 1977 continues to apply in relation to that tenancy as if the Housing Act 1980 s 69(4) had not been enacted: s 152(2), Sch 25 para 67. The purpose of the Rent Act 1977 s 12(2)(b) (as originally enacted) was to prevent resident landlords depriving their tenants of the limited security of tenure then available to periodic tenants under restricted contracts (see PARAS 1002-1007 post) by granting a succession of terms certain. Section 12(2) (as originally enacted) did not apply to furnished tenancies already existing on 14 August 1974 to which the resident landlord exemption applied by virtue of s 155(3), Sch 24 para 6(1): see Sch 24 para 6(2); and PARA 879 post.

A fixed period of less than a year is a term of years certain: *Re Land and Premises at Liss, Hants* [1971] Ch 986, [1971] 3 All ER 380 (decided under the Landlord and Tenant Act 1954 s 38 (as amended): see PARAS 709-710 ante). For the purposes of the Rent Act 1977 s 12(2) as originally enacted, a tenancy was to be treated as being for a term of years certain notwithstanding that it was liable to determination by re-entry or on the happening of any event other than the giving of notice by the landlord to determine the term: s 12(3) (as originally enacted).

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## **876. Periods of non-residence to be disregarded.**

In determining whether the requirement that the landlord should be resident in the same building constantly since the date of grant of the tenancy<sup>1</sup> is fulfilled, the following periods are to be disregarded:

1731 (1) any period of not more than 28 days beginning with the date on which the landlord's interest under the tenancy becomes vested at law and in equity in an individual who, during that period, does not occupy as his residence another dwelling house which forms part of the building or, as the case may be, flat concerned<sup>2</sup>;

1732 (2) if, within a period falling within head (1) above, the individual concerned notifies the tenant<sup>3</sup> in writing of his intention to occupy as his residence another dwelling house in the building or, as the case may be, flat concerned, the period beginning with the date on which the interest of the landlord under the tenancy becomes vested as mentioned in head (1) above and ending:

6

5. (a) at the expiry of a period of six months beginning on that date; or

6. (b) on the date on which that interest ceases to be so vested; or

7. (c) on the date on which the landlord's interest again belongs to a person who, at the time he owns that interest, occupies as his residence another dwelling house forming part of the building or flat concerned,

7

1733 whichever is the earlier<sup>4</sup>; and

1734 (3) any period of not more than two years beginning with the date on which the landlord's interest under the tenancy becomes, and during which it remains, vested in trustees as such<sup>5</sup> or in the Probate Judge or the Public Trustee<sup>6</sup>.

Throughout any period which falls to be so disregarded, no order may be made for possession of the dwelling house other than an order which might be made if the tenancy were or, as the case may be, had been a regulated tenancy<sup>7</sup>.

The effect of the determination of the contractual term during a period of disregard is that the tenant becomes a person holding over without any right to do so against whom an order for possession cannot, temporarily and by virtue of statute, be made; and at the end of the period he does not become a statutory tenant and may be evicted<sup>8</sup>.

1. The requirement contained in the Rent Act 1977 s 12(1)(c) (as substituted): see PARA 875 ante. For the meaning of 'landlord' see PARA 816 note 2 ante; and for the meaning of 'tenancy' see PARA 818 note 1 ante.

2. Ibid s 12(4), Sch 2 para 1(a) (Sch 1 para 1(a)-(c) amended by the Housing Act 1980 s 65(2)-(4), 152(3), Sch 26). Subject to the Housing Act 1980 s 65(7) (see PARA 877 note 9 post), the amendments made to the Rent Act 1977 Sch 2 by the Housing Act 1980 s 65(2)-(5) apply to tenancies granted before as well as those granted after 28 November 1980: s 65(6). Cf the amendments made to the Rent Act 1977 s 12(1) by the Housing Act 1980 s 65(1): see PARA 875 ante.

3. For the meaning of 'tenant' see PARA 816 note 3 ante.

4. Rent Act 1977 Sch 2 para 1(b) (as amended: see note 2 supra).

5. Ibid Sch 2 para 1(c)(ii) (as amended: see note 2 supra). 'Trustees as such' are not confined to trustees of a settlement between living persons or a family arrangement but can apply to trustees under a will or intestacy: *Williams v Mate* (1983) 46 P & CR 43, CA.

6. Rent Act 1977 Sch 2 para 1(c)(iii) (as amended (see note 2 supra); further amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 8). As to the vesting of the estate of an intestate in the Probate Judge or the Public Trustee see the Administration of Estates Act 1925 s 9 (as substituted); and EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

7. Rent Act 1977 Sch 2 para 3. For the meaning of 'regulated tenancy' see PARA 854 ante. As to the orders for possession which may be made in relation to regulated tenancies see PARA 963 et seq post. As to periods of disregard for the purposes of the Housing Act 1988 Pt I (ss 1-45) (as amended) see PARA 1036 post.

8. *Landau v Sloane* [1982] AC 490, [1981] 1 All ER 705, HL.



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### **877. Deemed fulfilment of landlord's residence condition.**

During any period when:

- 1735 (1) the interest of the landlord<sup>1</sup> under the tenancy<sup>2</sup> is vested in trustees as such; and
- 1736 (2) that interest is held on trust for any person<sup>3</sup> who occupies as his residence a dwelling house which forms part of the building or, as the case may be, flat in question,

the landlord's residence requirement<sup>4</sup> is deemed to be fulfilled and, accordingly, no part of that period is to be disregarded<sup>5</sup>.

If the interest of the landlord under the tenancy becomes vested in the personal representatives (acting in that capacity)<sup>6</sup> of a person who dies on or after 28 November 1980<sup>7</sup>, the residence requirement<sup>8</sup> is deemed to be fulfilled for any period, beginning with the date on which the interest becomes vested in the personal representatives and not exceeding two years, during which the landlord's interest remains so vested<sup>9</sup>.

1 For the meaning of 'landlord' see PARA 816 note 2 ante.

2 I.e. the tenancy referred to in the Rent Act 1977 s 12(1) (as amended): see PARA 875 ante. For the meaning of 'tenancy' see PARA 818 note 1 ante.

3 Occupation by one of several beneficiaries will probably suffice: see *Cooper v Tait* (1984) 48 P & CR 460, CA.

4 I.e. the requirement contained in the Rent Act 1977 s 12(1)(c) (as substituted): see PARA 875 ante.

5 Ibid s 12(4), Sch 2 para 2 (amended by the Housing Act 1980 s 65(2), (4); the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). This applies to tenancies granted before as well as after 28 November 1980: see PARA 876 note 2 ante. As to the periods which are to be disregarded see generally para 876 ante.

6 If a personal representative takes up occupation of the house in the course of the period of disregard, it does not matter that he has not executed a vesting assent in his own favour: *Beebe v Mason* [1980] 1 EGLR 81, (1980) 254 Estates Gazette 987, CA. Despite the warning in the judgments that the decision was limited to a case of a solvent administered estate where the personal representative was absolutely beneficially entitled to the property, the principle would seem to apply wherever the owner of the legal estate (eg a trustee) goes into occupation in time.

7 I.e. the date of commencement of the Housing Act 1980 s 65: see PARA 875 note 12 ante.

8 See note 4 supra.

9 Rent Act 1977 Sch 2 para 2A(1), (2) (added by the Housing Act 1980 s 65(5)). See also PARA 876 note 2 ante. In any case where the landlord's interest under a tenancy vested in the personal representatives (acting in that capacity) of a person who died before 28 November 1980, the Rent Act 1977 Sch 2 (now as amended) applies as if Sch 2 para 2A had not been added and Sch 2 para 1(c)(i) had not been repealed: Housing Act 1980 s 65(7). Section 65 does, however, have some retrospective effect: see *Williams v Mate* (1983) 46 P & CR 43, CA; *Caldwell v McAteer* (1983) 14 HLR 38, 269 Estates Gazette 1039, CA. The effect of the Rent Act 1977 Sch 2

para 1(c)(i) (repealed) was the same as that of Sch 2 para 2A (as so added) but there was a restriction on the making of orders for possession during the period in question (ie Sch 2 para 3 applied: see PARA 876 ante).

As to deemed fulfilment of the landlord's residence condition for the purposes of the Housing Act 1988 Pt I (ss 1-45) (as amended) see PARA 1037 post.

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### **878. Exemption ceasing to apply.**

If and so long as a tenancy was precluded from being a protected tenancy by virtue only of the resident landlord exemption<sup>1</sup>, it was to be treated as a restricted contract<sup>2</sup> notwithstanding that the rent might not include payment for the use of furniture or for services<sup>3</sup>, and so might be referred to a rent tribunal for the registration of a reasonable rent<sup>4</sup>. If a rent was registered by a rent tribunal for such a tenancy and subsequently the tenancy became a protected tenancy, the amount so registered was deemed to be registered under Part IV of the Rent Act 1977<sup>5</sup> as from the day the tenancy became protected<sup>6</sup>. If, before the date on which such a tenancy became protected, a notice to quit had been served and the period at the end of which it was to take effect had been extended<sup>7</sup> and that period had not expired, the notice was to take effect on the day following that on which the tenancy became protected and, accordingly, the protected tenancy then became a statutory tenancy<sup>8</sup>.

1    Ie by the Rent Act 1977 s 12(1) (as amended): see PARA 875 ante.

2    For the meaning of 'restricted contract' see PARA 986 post. As to the phasing out of restricted contracts see PARA 1014 post.

3    See the Rent Act 1977 s 20 (repealed by the Housing Act 1988 s 140(2), Sch 18). The repeal does not apply to any tenancy or contract entered into before 15 January 1989 or to any tenancy or contract entered into since that date which is a transitional case under the Housing Act 1988 s 36: see Sch 18 para 1. See further s 36(1)-(3); and PARA 1014 post.

4    Ie under the Rent Act 1977 Pt V (ss 77-85) (as amended): see PARA 989 et seq post.

5    Ie ibid Pt IV (ss 62-75) (as amended) (registration of rents under regulated tenancies): see PARA 909 et seq post.

6    Ibid s 12(4), Sch 2 para 6(1).

The rule restricting the making of applications for re-registration within two years (see s 67(3) (as amended); and PARA 915 post) does not apply in the case of such a deemed registration: Sch 2 para 6(2).

If, immediately before a tenancy so became a protected tenancy, the rates in respect of the dwelling house concerned were borne as mentioned in s 79(3) (see PARA 996 post) and the fact that they were so borne was noted as required thereby, then, in the application of Pt IV (ss 62-75) (as amended) in relation to the protected tenancy, s 71(2) (see PARA 922 post) is deemed to apply: Sch 2 para 6(4). For the meaning of 'protected tenancy' see PARA 818 ante; and for the meaning of 'rates' see PARA 862 note 5 ante. As to the abolition of domestic rates see PARA 521 ante.

7    Ie under ibid Pt VII (ss 98-107) (as amended): see PARAS 1003-1004 post.

8    Ibid Sch 2 para 7. For the meaning of 'statutory tenancy' see PARA 831 ante.

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### **879. Tenancies granted before 14 August 1974.**

The Rent Act 1977 applies, if:

- 1737 (1) before 14 August 1974<sup>1</sup> a dwelling was subject to a furnished tenancy which was not protected<sup>2</sup>; and
- 1738 (2) the dwelling forms part only of a building and that building is not a purpose-built block of flats<sup>3</sup>; and
- 1739 (3) on that date the lessor's interest under the tenancy belonged to a person who occupied as his residence another dwelling which also formed part of that building, or was vested in trustees as such and was or, if it was held on trust for sale, the proceeds of its sale were, held on trust for a person who occupied as his residence another dwelling which also formed part of that building; and
- 1740 (4) the tenancy would otherwise<sup>4</sup> have become a protected furnished tenancy,

as if the tenancy had been granted on 14 August 1974 and as if the grantor was resident in the building<sup>5</sup> at the date of the grant<sup>6</sup>. In other words, a landlord who resided in another part of the building in question on 14 August 1974 may rely upon the residence exemption in the case of a pre-existing tenancy if, but only if, that tenancy was previously not protected because the dwelling house was bona fide let at a rent which included payments in respect of the use of furniture which formed a substantial part of the whole rent<sup>7</sup>.

If on 14 August 1974 the interest of the lessor was vested in the personal representatives of a deceased person acting in that capacity or in the Probate Judge<sup>8</sup> or in trustees as such, then, if the deceased immediately before his death or, as the case may be, the settlor immediately before the creation of the trust occupied as his residence another part of the building, the above provisions apply as if the condition set out in head (3) above were fulfilled<sup>9</sup>, and the period of up to 12 months' non-residence which falls to be disregarded<sup>10</sup> is calculated from 14 August 1974 instead of the date of vesting<sup>11</sup>.

1    Ie the date of commencement of the Rent Act 1974: see s 17(5) (repealed).

2    Ie which was a Part VI contract within the meaning of the Rent Act 1968 (repealed). As to furnished tenancies previously not protected see PARA 870 ante. If the tenancy was already a statutory or protected tenancy on 14 August 1974, it remained one.

3    Ie within the meaning of the Rent Act 1977 s 12 (as amended): see PARA 875 note 5 ante.

4    Ie apart from the Rent Act 1974 Sch 3 para 1 (repealed).

5    Ie as if the condition in the Rent Act 1977 s 12(1)(b) (as substituted) were fulfilled: see PARA 875 ante.

6    Ibid s 155(3), Sch 24 para 6(1). In the application of the Rent Act 1977 to a tenancy by virtue of these provisions: (1) s 12(2) (as substituted) (see PARA 875 ante) is to be omitted; and (2) in s 20 (repealed with savings) (see PARA 986 post) and Sch 2 Pt II (paras 6-7) (as amended) (see PARA 878 ante) any reference to s 12 (as amended) is to be construed as including a reference to Sch 24 para 6 (as amended): Sch 24 para 6(2).

7    See note 2 supra.

8    Ie by virtue of and within the meaning of the Administration of Estates Act 1925 s 9 (now as substituted): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

- 9 Rent Act 1977 Sch 24 para 6(3).
- 10 Ie under *ibid* Sch 2 para 1(c) (as amended): see PARA 876 ante.
- 11 *Ibid* Sch 24 para 6(4) (amended by the Housing Act 1980 Sch 25 para 60(a)).

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## ***I. BUSINESS AND LICENSED PREMISES***

### **880. Business premises.**

Tenancies of business premises may be excluded from the protection of the Rent Act 1977 for several separate reasons. Firstly, the premises themselves may not be a dwelling house<sup>1</sup>. Secondly, the premises may not as a matter of construction of the tenancy agreement or in all the circumstances be let as a dwelling<sup>2</sup>. In both of those cases the tenancy is not a protected tenancy<sup>3</sup>. Thirdly, if the tenancy remains contractual, the tenant may occupy the let property or part of it for the purposes of a business carried on by him or for those and other purposes, in which case the tenancy falls within the legislation relating to business tenancies<sup>4</sup> and cannot be a protected regulated tenancy<sup>5</sup>. If, however, the tenant does not commence business use until after the tenancy has become a statutory tenancy, the tenancy will remain a statutory tenancy<sup>6</sup> so that the Rent Act 1977 will still apply provided that the tenant continues to live in the premises<sup>7</sup>.

The fact that part of the let premises comprised in a dwelling house was used as a shop or office or for business, trade or professional purposes did not prevent the dwelling house from being let on or subject to a controlled tenancy<sup>8</sup>. If a tenancy was a controlled tenancy or would have been such a tenancy if it were not a tenancy at a low rent<sup>9</sup>, the legislation relating to business premises did not apply<sup>10</sup>.

1 See PARAS 821-822 ante.

2 See PARA 823 ante.

3 See the Rent Act 1977 s 1; and PARA 818 ante.

4 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante. As to the tenancies to which Pt II (ss 23-46) (as amended) applies, and for the meaning of 'business' see PARAS 706-708 ante.

5 See the Rent Act 1977 s 24(3); and PARA 822 note 2 ante. Cf the Housing Act 1988 s 1(2), Sch 1 para 4; and PARA 1029 post.

6 This result follows from the method adopted by the Rent Act 1977 s 24(3) to exclude business tenancies, which is to exclude only those which are 'a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies'; those provisions apply only to tenancies (ie terms of years) and not to the mere status of irremovability of a statutory tenant.

7 It may be that, if living in the premises becomes merely a subsidiary purpose of the tenant's occupation of them, the same result will follow.

8 Rent Act 1977 s 24(1) (repealed). Section 24(1) (repealed) was subject to s 11 (now as amended) (licensed premises: see PARA 881 post): s 24(1) (repealed). As to the conversion of controlled tenancies on 28 November 1980 see PARA 848 ante. Upon such conversion tenancies of 'mixed premises' (ie containing residential and

business premises) were deemed to be tenancies continued by the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended); see the Housing Act 1980 s 64(2); and PARA 848 note 4 ante. For the meaning of 'controlled tenancy' see PARA 849 ante.

9 For the meaning of 'tenancy at a low rent' see PARA 861 ante.

10 Rent Act 1977 s 24(2) (repealed). Such tenancies subsisting on 28 November 1980 are treated as continuing by virtue of the Landlord and Tenant Act 1954 after the expiry of a term of years certain: see PARA 848 ante.

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### **881. Licensed premises.**

A tenancy<sup>1</sup> of a dwelling house which consists of or comprises premises which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>2</sup> for consumption on<sup>3</sup> the premises is not a protected tenancy<sup>4</sup>, nor can such a dwelling house be the subject of a statutory tenancy<sup>5</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 Ie within the meaning of the Licensing Act 2003 s 14.

3 This provision does not apply to tenancies of off-licences, which will usually fall within the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended); see PARA 701 et seq ante. If a tenancy of an off-licence was controlled, acts jeopardising the licence gave the landlord grounds for possession: see the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 7 (repealed).

4 For the meaning of 'protected tenancy' see PARA 818 ante.

5 Rent Act 1977 s 11 (amended by the Licensing Act 2003 s 198(1), Sch 6 para 67); and see *Carroll v Manek* (1999) 79 P & CR 173, [1999] All ER (D) 813. For the meaning of 'statutory tenancy' see PARA 831 ante. Cf the Housing Act 1988 s 1(2), Sch 1 para 5 (as amended); and PARA 1030 post. With effect from 1 January 1991, tenancies of licensed premises will usually fall within the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended); see the Landlord and Tenant (Licensed Premises) Act 1990 ss 1, 2(2), (3); and PARA 775 ante.

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## **J. PARSONAGE HOUSES**

### **882. Parsonage houses.**

Where a dwelling house belongs to an ecclesiastical benefice<sup>1</sup> for the occupation of the incumbent, the premises are outside the Rent Acts. There is no statutory provision giving effect to this exemption but it has been held that owing to the special legislation to which such

dwellings are subject the Rent Acts must be excluded as they conflict with the special legislation<sup>2</sup>.

Once it has been decided that a parsonage house is outside the Rent Acts, it is immaterial for what purpose possession is sought. Thus, even if the incumbent does not require it for his own occupation but intends to relet it at a higher rental, this will not prevent him from regaining possession<sup>3</sup>. It may be, however, that the dwelling for which the title of parsonage house is claimed is not one which is primarily and continuously used as a residence of the incumbent, as, for example, where a diocesan trust has a house bequeathed to it with a term that the trustees may allow the curate to live there or not in their unfettered discretion<sup>4</sup>. In such cases the exemption will not apply. The exemption extends not only to the residence but also to the buildings, gardens, orchards or appurtenances necessary for the convenient occupation of the parsonage house<sup>5</sup>. Whether a building is necessary for such occupation is a question of fact in each case<sup>6</sup>.

1 This only applies to the Church of England (*Forbes v Partick Congregational Church* 1949 64 Sh Ct Rep 184); but, where a house is held for the purpose of being available for occupation by a minister of religion, of whatever denomination, as a residence and certain other conditions are also satisfied, there is a mandatory ground for possession (see the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 15; and PARA 966 post).

2 *Bishop of Gloucester v Cunningham* [1943] KB 101, [1943] 1 All ER 61, CA.

3 *Brandon v Grundy* [1943] 2 All ER 208, CA.

4 *Worcester Diocesan Trust Registered v Taylor* (1947) 177 LT 581, CA.

5 See the Pluralities Act 1838 s 59 (as amended); and ECCLESIASTICAL LAW vol 14 para 1157.

6 Cf *Culverwell v Larcombe* (1945) 61 TLR 385, CA; *Neale v Jennings* [1946] KB 238, [1946] 1 All ER 224, CA (decisions as to cottages within the parsonage house grounds).

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## **K. CROWN PROPERTY**

### **883. Crown property.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> at any time when the interest of the landlord<sup>3</sup> under the tenancy belongs to Her Majesty in right of the Crown<sup>4</sup> or to a government department<sup>5</sup> or is held in trust for Her Majesty for the purposes of a government department<sup>6</sup>. A person is not at any time a statutory tenant<sup>7</sup> of a dwelling house if the interest of his immediate landlord would at that time so belong or be so held<sup>8</sup>. An interest belonging to Her Majesty in right of the Crown does not, however, prevent a tenancy from being a protected tenancy or a person from being a statutory tenant if the interest is under the management of the Crown Estate Commissioners<sup>9</sup>.

Subject to the above provisions, the Rent Act 1977 applies in relation to premises in which there subsists, or at any material time subsisted, a Crown interest<sup>10</sup> as it applies in relation to premises in which no such interest subsists or ever subsisted<sup>11</sup>. Accordingly, a subtenancy may be protected even though the head landlord is the Crown, and the tenancy itself may become protected if the reversion is transferred by the Crown. The immunity of Crown property extends to property held for the public purposes of the country by a servant or agent of the Crown<sup>12</sup>.

- 1 For the meaning of 'tenancy' see PARA 818 note 1 ante.
- 2 For the meaning of 'protected tenancy' see PARA 818 ante.
- 3 For the meaning of 'landlord' see PARA 816 note 2 ante.
- 4 Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, or to the Duchy of Cornwall, then, for the purposes of the Rent Act 1977, the Chancellor of the Duchy of Lancaster or, as the case may be, the Secretary of the Duchy of Cornwall is deemed to be the owner of the interest: Housing Act 1980 s 73(5), Sch 8 paras 9, 10.
- 5 As to the removal of Crown immunity from NHS Trusts and health service bodies see HEALTH SERVICES vol 54 (2008) PARAS 94, 111, 136, 155.
- 6 Rent Act 1977 s 13(1)(a) (s 13 substituted by the Housing Act 1980 s 73(1)). As to transfer of existing tenancies from the public to the private sector see PARA 1015 post. Cf the Housing Act 1988 s 1(2), Sch 1 para 11(1) (as amended); and PARA 1039 post.
- 7 For the meaning of 'statutory tenant' see PARA 831 ante.
- 8 Rent Act 1977 s 13(1)(b) (as substituted: see note 6 supra).
- 9 Ibid s 13(2) (as substituted: see note 6 supra). This provision was brought into operation on 28 November 1980 and does not have retrospective effect: *Crown Estate Comrs v Wordsworth* (1982) 44 P & CR 302, 264 Estates Gazette 439, CA. As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.
- 10 For these purposes, 'Crown interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall, or to a government department, or which is held in trust for Her Majesty for the purposes of a government department: Rent Act 1977 s 154(2). See also notes 4-5 supra.
- 11 Ibid s 154(1).
- 12 See *Tamlin v Hannaford* [1950] 1 KB 18, [1949] 2 All ER 327, CA; *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA; *Territorial Forces Association v Philpot* [1947] 2 All ER 376.

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## **L. LETTINGS BY LOCAL AUTHORITIES AND OTHER EXEMPT BODIES**

### **884. Local authorities and other public bodies.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> at any time<sup>3</sup> when the interest of the landlord<sup>4</sup> under that tenancy<sup>5</sup> belongs to:

- 1741 (1) the council of a county or county borough<sup>6</sup>;
- 1742 (2) the council of a district<sup>7</sup> or, in so far as the Rent Act 1977 applies to the Isles of Scilly<sup>8</sup>, the Council of the Isles of Scilly;
- 1743 (3) the Broads Authority<sup>9</sup>;
- 1744 (4) a National Park authority<sup>10</sup>;
- 1745 (5) the council of a London borough or the Common Council of the City of London<sup>11</sup>;

- 1746 (6) a police authority<sup>12</sup>;
- 1747 (7) a joint authority established by Part IV of the Local Government Act 1985<sup>13</sup>;
- 1748 (8) the London Fire and Emergency Planning Authority<sup>14</sup>;
- 1749 (9) the Commission for the New Towns<sup>15</sup>;
- 1750 (10) a development corporation established by an order made, or having effect as if made, under the New Towns Act 1981<sup>16</sup>;
- 1751 (11) an urban development corporation<sup>17</sup>; or
- 1752 (12) a housing action trust<sup>18</sup>;

nor is a person at any time a statutory tenant<sup>19</sup> of a dwelling house if the interest of his immediate landlord would belong at that time to any of those bodies<sup>20</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 If, therefore, the immediate reversion upon a particular protected tenancy is acquired or disposed of by an exempt body, the tenancy may respectively cease to be or become a protected tenancy. If premises subject to a statutory tenancy (see PARA 831 ante) are acquired by an exempt body, the statutory tenant becomes a trespasser. It seems that a tenancy becoming protected upon disposal by an exempt body before 15 January 1989 was always regulated: see the Rent Act 1977 s 18(1) (as amended); and PARA 854 ante. As to disposal after that date see PARA 1015 post. Cf s 92(1) (as amended) in relation to housing associations: see PARA 886 post.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 The exemption applies only to a tenancy held directly from an exempt body. Subtenants, although not protected against the exempt body when the head tenancy comes to an end, are not deprived of protection against their immediate landlord merely because the head landlord is an exempt body.

6 As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq.

7 As to districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

8 As to the application of the Rent Act 1977 to the Isles of Scilly see s 153 (as amended); and PARA 815 ante.

9 As to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

10 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

11 As to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq. A tenancy could not have been protected at any time when the landlord's interest belonged to the former Greater London Council or the former Inner London Education Authority: see the Rent Act 1977 s 14(c) (as originally enacted), s 14(ca) (added by the Local Government Act 1985 s 84 Sch 14 para 56; repealed by the Education Reform Act 1988 s 237(2), Sch 13 Pt 1).

12 If established under the Police Act 1996 s 3: see POLICE vol 36(1) (2007 Reissue) PARA 139.

13 If established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

14 As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

15 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

16 As to new town development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq. A tenancy could not have been protected at any time when the landlord's interest belonged to the former Development Board for Rural Wales: see the Rent Act 1977 s 14(f) (repealed by the Government of Wales Act 1998 s 152, Sch 18 Pt IV).



17 le within the meaning of the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172) (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1426 et seq.

18 le established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

19 For the meaning of 'statutory tenant' see PARA 831 ante.

20 Rent Act 1977 s 14 (amended by the Local Government, Planning and Land Act 1980 s 155(1); the New Towns Act 1981 s 81, Sch 12 para 24; the Local Government Act 1985 ss 84, 102(2), Sch 14 para 56, Sch 17; the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 18; the Housing Act 1988 s 62(7); the Education Reform Act 1988 s 237(2), Sch 13 Pt 1; the Local Government (Wales) Act 1994 ss 22(2), 39, Sch 8 para 3(1), Sch 13 para 28; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 53; the Environment Act 1995 s 78, Sch 10 para 18; the Police Act 1996 s 103, Sch 7 para 1(2)(n); the Police Act 1997 s 134(1), Sch 9 para 39; the Government of Wales Act 1998 s 152, Sch 18 Pt IV; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 26; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 3 para 63, Sch 7 Pt 5(1)). Cf the Housing Act 1988 s 1(2), Sch 1 para 12 (as amended); and PARA 1040 post.

There is no requirement that the property of the exempt body is to be in any particular area or held for any particular purpose. The only fetters on the powers of such bodies would appear to be (1) the existence of a separate code of protection for secure tenants of certain public bodies (see PARA 889 post); (2) that local authorities are required to charge 'reasonable' rents (see the Housing Act 1985 s 24(1); and HOUSING vol 22 (2006 Reissue) PARA 255); and (3) that such bodies may not act ultra vires (*Cannock Chase District Council v Kelly* [1978] 1 All ER 152, [1978] 1 WLR 1, CA; *Associated Provincial Picture House Ltd v Wednesbury Corp'n* [1948] 1 KB 223, [1947] 2 All ER 680, CA).

## UPDATE

### 884 Local authorities and other public bodies

TEXT AND NOTE 20--Rent Act 1977 s 14 further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 35; Housing and Regeneration Act 2008 Sch 8 para 23; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 46.

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### 885. Housing associations.

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> at any time<sup>3</sup> when the interest of the landlord<sup>4</sup> under that tenancy<sup>5</sup> belongs to a housing association<sup>6</sup> which:

- 1753 (1) is a registered social landlord<sup>7</sup>; or
- 1754 (2) is a co-operative housing association<sup>8</sup>;

nor is a person at any time a statutory tenant<sup>9</sup> of a dwelling house if the interest of his immediate landlord would belong at that time to such a housing association<sup>10</sup>.

Although a housing association tenancy may not be protected, the rents of houses let under such tenancies are registrable in the same way as rents under regulated tenancies and there are limits on the rent which is recoverable from the tenant<sup>11</sup>.

- 1 For the meaning of 'tenancy' see PARA 818 note 1 ante.
  - 2 For the meaning of 'protected tenancy' see PARA 818 ante.
  - 3 See PARA 884 note 3 ante. As to the position when a tenancy ceases to be a housing association tenancy after 14 January 1989 see PARA 1015 post.
  - 4 For the meaning of 'landlord' see PARA 816 note 2 ante.
  - 5 See PARA 884 note 5 ante.
  - 6 For the meaning of 'housing association' see PARA 863 note 5 ante.
  - 7 le within the meaning of the Housing Act 1985: see s 5(4), (5) (as substituted and amended); and HOUSING vol 22 (2006 Reissue) PARAS 11, 67.
  - 8 For these purposes, 'co-operative housing association' means a fully mutual housing association which is a society registered under the Industrial and Provident Societies Act 1965; and 'fully mutual', in relation to a housing association, means that the rules of the association (1) restrict membership to persons who are tenants or prospective tenants of the association; and (2) preclude the granting or assignment of tenancies to persons other than members: Housing Associations Act 1985 s 1(2) (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 4(1), Sch 1 Pt I); applied by the Rent Act 1977 s 15(3) (substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (2)). See further HOUSING vol 22 (2006 Reissue) PARA 11.
  - 9 For the meaning of 'statutory tenant' see PARA 831 ante.
  - 10 Rent Act 1977 s 15(1) (amended by the Housing Act 1980 s 152, Sch 26); Rent Act 1977 s 15(3) (as substituted (see note 8 supra); amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 6).
- Before 28 November 1980 certain conditions also had to be fulfilled before a housing association letting was exempted from protection: see the Rent Act 1977 s 15(1), (4) (as originally enacted). Section 15(4) and the relevant part of s 15(1) were repealed as from that date by the Housing Act 1980 s 74(1), but those repeals do not affect any tenancy which was, immediately before 28 November 1980, a protected or statutory tenancy but which would have ceased to be such a tenancy by virtue of the repeal of the Rent Act 1977 s 15(4)(f) (which relates to registered industrial and provident societies): Housing Act 1980 s 152(2), Sch 25 para 68.
- 11 See the Rent Act 1977 Pt VI (ss 86-97) (as amended); and PARAS 886 et seq, 905 et seq post. As to the circumstances in which a tenancy was not a housing association tenancy but an old-style assured tenancy see PARA 890 post; and as to the phasing out of the special regime for housing association tenancies see PARA 1013 post.

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### **886. Conversion of housing association tenancies into regulated tenancies.**

If at any time a tenancy<sup>1</sup> becomes a protected tenancy<sup>2</sup> because the landlord housing association<sup>3</sup> ceases to satisfy the conditions for exemption<sup>4</sup>, the tenancy is a regulated tenancy<sup>5</sup> and the housing association which is the landlord<sup>6</sup> under the tenancy must give notice in writing to the tenant<sup>7</sup> informing him that his tenancy is no longer excluded from protection<sup>8</sup>. If the housing association fails, without reasonable excuse, to give such notice within the period of 21 days beginning on the day on which the tenancy becomes protected, the association is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>9</sup>. Where such an offence is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director,

manager or secretary or any similar officer of that body or any person purporting to act in that capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly<sup>10</sup>.

If a tenancy under which the landlord's interest belonged to a housing association came to an end before 1 April 1975 and was, when it came to an end, excluded from protection<sup>11</sup> but would have been a protected tenancy if it had come to an end on that date<sup>12</sup>, certain persons who duly retained possession<sup>13</sup> on that date are deemed to have done so as to statutory tenants<sup>14</sup>. If the tenant under the determined tenancy duly retained possession, he is deemed to have done so as a statutory tenant on the termination of a protected tenancy under which he was the tenant<sup>15</sup>. If the tenant or any lawful subtenant of the whole or part of the house had died and, if the deceased had been a protected or statutory tenant<sup>16</sup>, the person duly retaining possession would have been entitled to a statutory tenancy as a first or second successor<sup>17</sup>, he is deemed to have retained possession as the statutory tenant under a regulated tenancy and as a first or second successor, as the case may be<sup>18</sup>. The High Court or the county court may vary all or any of the terms of a statutory tenancy so imposed in any way appearing to the court to be just and equitable<sup>19</sup>. Subject thereto, the statutory tenant holds upon the terms of the original housing association letting<sup>20</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For these purposes, 'housing association' has the same meaning as in the Housing Associations Act 1985 (see PARA 863 note 5 ante): Rent Act 1977 s 92(5) (amended by the Housing Act 1980 s 152(3), Sch 26; the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 15(1), (7)).

4 If the tenancy ceases by virtue of the Rent Act 1977 s 15(1), (3) (as amended) (see PARA 885 ante) to be one to which Pt VI (ss 86-97) (as amended) applies: s 92(1).

5 For the meaning of 'regulated tenancy' see PARA 854 ante.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 For the meaning of 'tenant' see PARA 816 note 3 ante.

8 Rent Act 1977 s 92(1) (amended by the Housing Act 1980 ss 77, 152, Sch 10 para 4, Sch 26). See, however, the Housing Act 1988 s 38 (as amended); and PARA 1015 post.

9 Rent Act 1977 s 92(2) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by the local authority: see s 150(2) (as amended); and PARA 816 ante.

10 Ibid s 92(3).

11 If because it was a tenancy to which the Housing Finance Act 1972 Pt VIII (ss 81-88) (superseded by the Rent Act 1977 Pt VI (ss 86-97) (as amended)) applied.

12 If by virtue of the Housing Act 1974 s 18(1) (now replaced by the Rent Act 1977 s 15(3) (as substituted)).

13 A person duly retained possession if he retained possession without any order for possession having been made or, where such an order was made, during any period while its operation was postponed or its execution suspended or after it had been rescinded: *ibid* s 92(4), Sch 14 para 1(6).

14 See *ibid* Sch 14 para 1(1)-(4). For the meaning of 'statutory tenant' see PARA 831 ante.

15 *Ibid* Sch 14 para 1(2).

16 If 'the original tenant' within the meaning of the Rent Act 1968 s 3(1)(b), Sch 1 para 1 (repealed).

17 As to succession to a statutory tenancy see PARAS 842-847 ante.

18 See the Rent Act 1977 Sch 14 para 1(3)-(5).

19 Ibid Sch 14 para 1(8). This power is not restricted to cases where the rates, services or furniture have changed (see ss 46, 47; and PARAS 895, 897 post): Sch 14 para 1(8).

20 Ibid Sch 14 para 1(7). As to the transitional provisions relating to the recoverable rent see Sch 14 paras 2, 3.

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### **887. The Housing Corporation; charitable housing trusts.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> at any time<sup>3</sup> when the interest of the landlord<sup>4</sup> under that tenancy<sup>5</sup> belongs to the Housing Corporation<sup>6</sup> or a housing trust which is a charity<sup>7</sup>; nor is a person at any time a statutory tenant<sup>8</sup> of a dwelling house if the interest of his immediate landlord would belong at that time to any of those bodies<sup>9</sup>. For these purposes, 'housing trust' means a corporation or body of persons which:

1755 (1) is required by the terms of its constituent instrument to use the whole of its funds, including any surplus which may arise from its operations, for the purpose of providing housing accommodation; or

1756 (2) is required by the terms of its constituent instrument to devote the whole, or substantially the whole, of its funds to charitable purposes and in fact uses the whole, or substantially the whole, of its funds for the purpose of providing housing accommodation<sup>10</sup>.

As with housing association tenancies, however, the rent under tenancies excluded from protection by these provisions is registrable and the rent recoverable from the tenant is limited<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 See PARA 884 note 3 ante.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 See PARA 884 note 5 ante.

6 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18. Similarly, a tenancy was not protected at any time when the landlord's interest belonged to the former Housing for Wales; see the Rent Act 1977 s 15(2)(aa) (added by the Housing Act 1988 s 140(1), Sch 17 para 99; repealed by the Government of Wales Act 1988 ss 141, 152, Sch 18 Pt VI).

7 I.e a charity within the meaning of the Charities Act 1993: see CHARITIES vol 8 (2010) PARA 1. For the meaning of 'housing trust' see the text and notes 8-11 infra. As to protected or statutory tenancies which, by virtue of the landlord becoming a 'housing trust', ceased to be such tenancies see the Housing Act 1980 s 74, Sch 9 (as amended).

8 For the meaning of 'statutory tenant' see PARA 831 ante.

9 Rent Act 1977 s 15(2) (as amended (see note 6 supra); further amended by the Charities Act 1993 s 98(1), Sch 6 para 30).

10 Rent Act 1977 s 15(5) (substituted by the Housing Act 1980 s 74(2)).

11 See the Rent Act 1977 Pt VI (ss 86-97) (as amended); and PARAS 905-907 post.

## **UPDATE**

### **887 The Housing Corporation; charitable housing trusts**

TEXT AND NOTE 6--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### **888. Housing co-operatives.**

A tenancy<sup>1</sup> is not a protected tenancy<sup>2</sup> at any time<sup>3</sup> when the interest of the landlord<sup>4</sup> under that tenancy<sup>5</sup> belongs to a housing co-operative<sup>6</sup> and the dwelling house is comprised in a housing co-operative agreement<sup>7</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 See PARA 884 note 3 ante.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 See PARA 884 note 5 ante.

6 Ie within the meaning of the Housing Act 1985 s 27B (as substituted and amended) (agreements with housing co-operatives under certain superseded provisions): see HOUSING vol 22 (2006 Reissue) PARA 259.

7 Rent Act 1977 s 16 (amended by the Housing and Planning Act 1986 s 24(2), Sch 5 para 15). 'Housing co-operative agreement' means a housing co-operative agreement within the meaning of the Housing Act 1985 s 27B (as substituted and amended): Rent Act 1977 s 16 (as so amended).

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### **889. Secure tenancies.**

Although a tenancy is incapable of being a protected tenancy at any time when the landlord's interest belongs to a local authority or certain other public bodies<sup>1</sup>, certain housing associations<sup>2</sup>, the Housing Corporation or a housing trust<sup>3</sup> or a housing co-operative<sup>4</sup>, in those

circumstances the tenancy, if granted before 15 January 1989<sup>5</sup>, will generally be a secure tenancy<sup>6</sup> provided that the tenant or one of the tenants occupies the dwelling house as his only or principal home<sup>7</sup>. Housing associations, the Housing Corporation and housing trusts cannot generally grant secure tenancies after that date although other public bodies may continue to do so<sup>8</sup>.

Secure tenants enjoy security of tenure under a code separate from but in some respects similar to that applicable to protected tenants<sup>9</sup>, and a secure tenancy is capable of one statutory succession on death<sup>10</sup>. Secure tenants may also have the right to buy the dwelling house at a discount<sup>11</sup>.

1 See PARA 884 ante.

2 See PARAS 885-886 ante.

3 See PARA 887 ante.

4 See PARA 888 ante.

5 ie the date when the Housing Act 1988 Pt 1 (ss 1-45) (as amended) came into force: see s 141(3).

6 See the Housing Act 1985 s 79. For the meaning of 'secure tenancy' see PARA 1300 post.

7 See *ibid* s 81; and PARA 1300 post.

8 See the Housing Act 1988 s 35(4) (as amended); and PARA 1301 post.

9 As to secure tenancies generally see PARA 1300 et seq post.

10 See the Housing Act 1985 ss 87-90 (as amended); and PARAS 1319-1322 post.

11 See PARA 1795 et seq post.

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## ***M. OLD-STYLE ASSURED TENANCIES***

### **890. Exemption from protection of old-style assured tenancies.**

A tenancy<sup>1</sup> was not a protected tenancy<sup>2</sup> at any time when it was an assured tenancy within the meaning of the Housing Act 1980<sup>3</sup>. Under the Housing Act 1988, old-style assured tenancies were, subject to certain transitional provisions<sup>4</sup>, converted into assured tenancies for the purposes of that Act<sup>5</sup> and no new 1980 Act tenancies may now be created<sup>6</sup>. The repealed provisions of the 1980 Act<sup>7</sup> may, however, still be relevant in some circumstances in order to ascertain the status of a tenancy created before 15 January 1989<sup>8</sup>.

Instead of enacting new detailed statutory provisions to govern the concept of the assured tenancy, the 1980 Act applied Part II of the Landlord and Tenant Act 1954<sup>9</sup> with certain alterations necessitated by the fact that the subject matter of the tenancy was residential premises, as opposed to business premises which would ordinarily be the case where Part II of the Landlord and Tenant Act 1954 was applied<sup>10</sup>.

A tenancy under which a dwelling house<sup>11</sup> was let as a separate dwelling<sup>12</sup> and which otherwise would have been either a protected tenancy or a housing association tenancy<sup>13</sup> was instead an assured tenancy under the 1980 Act if the interest of the landlord had, since the creation of the tenancy, belonged to an approved body<sup>14</sup> and either set of statutory conditions was fulfilled<sup>15</sup>. The first set of statutory conditions was that:

- 1757 (1) the dwelling house was, or formed part of, a building which was erected, and on which construction work first began, on or after 8 August 1980<sup>16</sup>; and  
 1758 (2) before the tenant first occupied the dwelling house under the tenancy, no part of it had been occupied by any person as his residence except under an assured tenancy<sup>17</sup>.

The second set of statutory conditions was that:

- 1759 (a) qualifying works<sup>18</sup> had been carried out<sup>19</sup>;  
 1760 (b) the dwelling house was fit for human habitation<sup>20</sup> at the relevant date<sup>21</sup>; and  
 1761 (c) since the qualifying works were carried out, no part of the dwelling house had been occupied by any person as his residence except under an assured tenancy,

and, in the case of the first relevant tenancy<sup>22</sup>, that the person or persons to whom the tenancy was granted was not, or did not include, a person who was a secure occupier<sup>23</sup> of the dwelling house before the works were carried out<sup>24</sup>.

If all the conditions for the grant of an assured tenancy were satisfied but the approved landlord did not wish the tenancy to be an assured tenancy, the landlord could prevent its being one only by giving to the tenant before the grant of the tenancy a valid notice<sup>25</sup> in the prescribed form<sup>26</sup> stating that the tenancy was instead to be a protected tenancy or a housing association tenancy and not an assured tenancy<sup>27</sup>. For there to be an assured tenancy the rateable value of the premises had to be within the relevant limits<sup>28</sup> applying under the Rent Act 1977<sup>29</sup>.

The ability to contract out of the protection of the Landlord and Tenant Act 1954 which the Housing Act 1980 originally contemplated<sup>30</sup> was subsequently removed<sup>31</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 Rent Act 1977 s 16A (added by the Housing Act 1980 s 56(5); repealed with savings by the Housing Act 1988 s 140(2), Sch 18).

4 See PARA 1011 et seq post.

5 See the Housing Act 1988 s 37; and PARA 1017 post.

6 See ibid s 1(3); and PARA 1017 post.

7 Ie the Housing Act 1980 ss 56-58 (as amended; repealed with savings by the Housing Act 1988 s 140(2), Sch 18).

8 See PARA 1012 et seq post.

9 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

10 As to the protection enjoyed by business tenants see PARA 701 et seq ante. The Landlord and Tenant Act 1954 Pt II (as amended) and Pt IV ss 51-70 (as amended) applied to assured tenancies with modifications: see the Housing Act 1980 s 58, Sch 5 (amended by the Housing and Planning Act 1986 s 13(5); repealed with

savings (see note 7 supra)). Thus the tenancy would have continued indefinitely unless determined in accordance with the 1954 Act, and the tenant might then have applied to the court for an order for the grant by the landlord of a new assured tenancy. Such a new tenancy was at a full market rent, save that that rent was to be assessed subject to the like 'disregards' as applied in respect of business tenancies. During the assured tenancy the tenant enjoyed no greater security of occupation than a business tenant or a tenant who was unprotected by any statute, and after the forfeiture of an assured tenancy, the tenant would not have become a statutory tenant of the premises, and the landlord did not have to establish a ground under the Rent Act 1977 or any other ground in order to obtain an order for possession. The Protection from Eviction Act 1977 would, however, have applied: see PARAS 215, 653 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609.

In relation to an assured tenancy the Landlord and Tenant Act 1954 was modified in its application so that 'the holding' meant the property comprised in the tenancy: Housing Act 1980 Sch 5 para 3 (as so repealed). It follows that, provided that the dwelling house was 'let as a separate dwelling', the tenant remained entitled to renew the tenancy as to the whole of the demised premises, notwithstanding that the tenant might have sublet part or might not have been in occupation of the whole of the premises when the current assured tenancy came to an end. As property remained 'comprised in a tenancy' even though it was sublet, on a literal construction of Sch 5 para 3 (as so repealed), premises which were wholly sublet remained within 'the holding' and the tenant would have remained entitled to renew the tenancy; but this is so plainly contrary to the purposes of the legislation that it seems likely that a purposive construction would have been applied to Sch 5 (as so repealed) to defeat such a claim, perhaps by inferring from the reference in s 56A(b) (as added and so repealed) (see head (2) in the text) to the period 'before the tenant first occupied the dwelling house under the tenancy' that in order to have remained entitled to renew the tenancy the tenant must still have been in occupation. Subtenants of assured tenants would have been protected as against their immediate landlords (ie the assured tenants) by the Rent Act 1977. As to the position under that Act of a subtenant in respect of a superior landlord after the expiry of the intermediate landlord's unprotected tenancy see PARA 976 post. Cf the position under the Housing Act 1988 where the landlord is a subtenant: see PARA 1085 post.

The landlord was entitled to oppose the renewal of an assured tenancy in like manner and on like grounds as in respect of a business tenancy, save that, instead of offering 'alternative accommodation', the landlord must have offered and have been willing to provide or secure the provision of suitable alternative accommodation: see the Landlord and Tenant Act 1954 s 30 (as originally enacted; modified by the Housing Act 1980 s 58(1), Sch 5 para 4(1) (as so repealed)). The Landlord and Tenant Act 1954 s 30(4)-(7) (added, in relation to assured tenancies, by the Housing Act 1980 Sch 5 para 4(2) (as so repealed)), defined 'suitable alternative accommodation' in detail, closely imitating the Rent Act 1977 s 98(4), Sch 15 Pt IV paras 4-6 (as amended) (see PARA 947 post), but permitting other premises let on an assured tenancy to qualify as 'suitable'. As with business tenancies, the 'five-year rule' applied so as to prevent a landlord, who would, in any case, have also to have been an approved body, from relying on its intention itself to occupy or to reside in the premises where the landlord had become landlord by purchase within the previous five years: see the Landlord and Tenant Act 1954 s 30(2) (as originally enacted).

If the tenant under an assured tenancy applied to the court for an order for a new tenancy and the court was precluded from making an order only by reason of one of the grounds of opposition set out in the Landlord and Tenant Act 1954 s 30(1)(e)-(g) (see PARAS 740-741, 745 ante), the tenant was entitled on quitting the premises to compensation of the amount of the product of the appropriate multiplier and the rateable value of the holding: see s 37(2) (substituted, in relation to assured tenancies, by the Housing Act 1980 Sch 5 para 7 (as so amended and repealed)).

11 There was no statutory definition of 'dwelling house' for these purposes; cf the Housing Act 1988; and PARA 1012 note 4 post. For the purposes of the Housing Act 1980 Pt I (ss 1-50) (repealed: see now the Housing Act 1985 Pt IV (ss 79-117) (as amended) and Pt V (ss 118-188) (as amended)), all dwelling houses were classified as either 'houses' or 'flats': see s 3 (repealed; replaced by the Housing Act 1985 s 183).

12 For the meaning of 'let as a separate dwelling' in the context of the Rent Act 1977 see PARA 819 et seq ante.

13 For these purposes, 'housing association tenancy' means a housing association tenancy within the meaning of the Rent Act 1977 s 86 (as amended) (see PARA 905 post): Housing Act 1980 s 56(1) (repealed with savings: see note 7 supra).

14 For these purposes, 'approved body' means a body, or one of a description of bodies, for the time being specified for the purposes of ibid Pt II (ss 51-79) (as amended) in an order made by the Secretary of State: s 56(4) (repealed with savings: see note 7 supra). Numerous bodies were approved from time to time by statutory instrument for these purposes: see eg the Assured Tenancies (Approved Body) (No 1) Order 1980, SI 1980/1694; the Assured Tenancies (Approved Bodies) (No 4) Order 1988, SI 1988/2018.

If the landlord under an assured tenancy ceased to be an approved body by reason only of a variation in the bodies or descriptions of bodies for the time specified, then in relation to: (1) that tenancy; and (2) any further tenancy granted by the landlord to the person who immediately before the grant was in possession of the dwelling house as an assured tenant, the landlord was to be treated for the purposes of head (2) in the text as if



it had remained an approved body: Housing Act 1980 s 57(1) (amended by the Housing and Planning Act 1986 s 12(3); repealed with savings (see note 7 supra)). The tenancy thus remained an assured tenancy. If, however, the landlord's interest ceased to belong to an approved body for any other reason, such as the sale of the reversion by an approved landlord to a non-approved landlord, the tenancy after three months became either a protected tenancy or a housing association tenancy, according to the status of the new landlord; but, if during the three months after the landlord's interest ceased to belong to an approved body that interest once again became held by an approved body, whether by the new landlord becoming 'approved' or by a further transfer or conveyance of the reversion, the tenancy continued as an assured tenancy: see s 57(2) (as so amended and repealed). The special provisions of the Landlord and Tenant Act 1954 applying in respect of government departments and modifying the protection afforded by the Act where certain public bodies are landlord did not apply in respect of assured tenancies: see the Housing Act 1980 Sch 5 para 2 (as so repealed). Cf the position under the Housing Act 1988 where Crown tenancies and certain public body tenancies cannot be assured tenancies for the purposes of that Act: see PARAS 1039-1040 post.

15 Housing Act 1980 s 56(1) (amended by the Housing and Planning Act 1986 s 12(1); repealed with savings (see note 7 supra)). In the Housing Act 1980 Pt II (ss 51-79) (as amended), 'assured tenant' meant the tenant under an assured tenancy: s 56(2) (as so repealed).

16 Ie the date of the passing of the Housing Act 1980.

17 Ibid s 56A (added by the Housing and Planning Act 1986 s 12(2); repealed with savings (see note 7 supra)).

18 For these purposes, 'qualifying works' meant works involving expenditure attributable to the dwelling house of not less than the prescribed amount which were carried out within the period of two years preceding the relevant date at a time when the premises constituting the dwelling house at the relevant date either were not a dwelling house or no part of them was occupied by a person as his residence: Housing Act 1980 s 56B(2) (added by the Housing and Planning Act 1986 s 12(2); repealed with savings (see note 7 supra)). Expenditure was attributable to a dwelling house if it was incurred on works carried out to the premises constituting the dwelling house at the relevant date or to other land or buildings let with the dwelling house under the first relevant tenancy; and, where the dwelling house was a flat, there was also attributable to the dwelling house a proportion of any expenditure incurred on works carried out to the structure, exterior or common parts of, or to common facilities in, the building of which the dwelling house formed part, the proportion so attributable being taken to be the amount produced by dividing the total amount of such expenditure by the number of units of occupation in the building at the relevant date: Housing Act 1980 s 56B(3)-(5) (as so added and repealed).

For these purposes, 'flat' meant a separate set of premises, whether or not on the same floor, which formed part of a building and was divided horizontally from some other part of the building; 'the relevant date' meant the date of the grant of the first relevant tenancy; and 'the prescribed amount' meant the amount which at the relevant date was prescribed for these purposes by order of the Secretary of State: s 56B(6) (as so added and repealed). For the meaning of 'the first relevant tenancy' see note 22 infra. The prescribed amounts, as from 25 February 1987, were: (1) in the case of a dwelling house in Greater London, £7,000; and (2) in the case of a dwelling house elsewhere in England and Wales, £5,000: Assured Tenancies (Prescribed Amount) Order 1987, SI 1987/122, art 2. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

19 Ie whether before or after the commencement of the Housing Act 1980 s 56B (as added and repealed) ie 7 January 1987.

20 In determining for these purposes whether a dwelling house was, or would be, fit for human habitation, regard was to be had to its condition in respect of repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for the preparation and cooking of food and the disposal of waste water, and the dwelling house was deemed to be unfit only if it was, or would be, so far defective in one or more of those matters as to be not reasonably suitable for occupation in that condition: ibid s 56D (added by the Housing and Planning Act 1986 s 12(2); repealed with savings (see note 7 supra)).

21 An approved body having an interest in a dwelling house which it proposed to let on an assured tenancy might apply in writing to the local housing authority for a certificate that the dwelling house was fit for human habitation, or submit to the local housing authority a list of works which it proposed to carry out to the dwelling house with a request in writing for the authority's opinion whether the dwelling house would, after the execution of the works, be fit for human habitation; and the authority was to take the matter into consideration as soon as might be after receiving the application or request and upon payment of such reasonable fee as it might determine: Housing Act 1980 s 56C(1) (added by the Housing and Planning Act 1986 s 12(2); repealed with savings (see note 7 supra)). If the authority was of opinion that the dwelling house was fit for human habitation, the authority was to give the approved authority a certificate to that effect; if of opinion that it would be so fit after the execution of the proposed works, the authority was so to inform the approved body; and in any other case, the authority was to give the approved body a list of the works which in its opinion were required to make the dwelling house so fit: Housing Act 1980 s 56C(2)-(4) (as so added and repealed). Where the authority responded in accordance with s 56C(3) or (4) (as so added and repealed) and the works in

question had been executed to its satisfaction, the authority was, if the approved body applied in writing and on payment of such reasonable fee as the authority might determine, to give that body a certificate that the dwelling house was fit for human habitation: s 56C(5) (as so added and repealed). For the purposes of determining whether the condition in s 56B(1)(b) (as so added and repealed) (see head (b) in the text) was satisfied, but not for any other purpose, a certificate given under s 56C (as added and repealed) was conclusive evidence that the dwelling house was fit for human habitation on the date on which the certificate was given: s 56C(6) (as so added and repealed). For these purposes, 'local housing authority' had the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Housing Act 1980 s 56C(7) (as so added and repealed).

22 For these purposes, 'the first relevant tenancy' meant the first tenancy after the carrying out of the qualifying works under which a person was entitled to occupy the dwelling house as his residence: *ibid* s 56B(6) (as added and repealed: see note 18 *supra*).

23 For these purposes, 'secure occupier' meant a person who, whether alone or jointly with others, occupied or was entitled to occupy the dwelling house as (1) a protected or statutory tenant within the meaning of the Rent Act 1977 (see PARAS 818, 831 *ante*); (2) a secure tenant within the meaning of the Housing Act 1985 Pt IV (ss 79-117) (as amended) (see PARA 1300 post); or (3) a protected occupier or statutory tenant within the meaning of the Rent (Agriculture) Act 1976 (see PARA 1144 *et seq post*): Housing Act 1980 s 56B(6) (as added and repealed: see note 18 *supra*).

24 *Ibid* s 56B(1) (added by the Housing and Planning Act 1986 s 12(2); repealed with savings: see note 7 *supra*).

25 A notice was not valid for these purposes unless it complied with the requirements of regulations made by the Secretary of State: Housing Act 1980 s 56(7) (repealed with savings: see note 7 *supra*).

26 For the prescribed form of notice see the Assured Tenancies (Notice to Tenant) Regulations 1981, SI 1981/591, reg 2, Schedule. A form substantially to the like effect might be used: reg 2.

27 See the Housing Act 1980 s 56(6) (repealed with savings: see note 7 *supra*).

28 *Ie* the limits set out in the Rent Act 1977 s 4 (as amended): see PARAS 855-859 *ante*.

29 This was because the premises had to be such that, but for the Housing Act 1980 s 56 (as amended and repealed with savings), the tenancy would be a protected tenancy or housing association tenancy. As to the abolition of domestic rates see PARA 521 *ante*.

30 The Housing Act 1980 Sch 5 para 8 in its original form modified the Landlord and Tenant Act 1954 s 38 (as amended) (see PARAS 709-710 *ante*) in its application to assured tenancies; but the changes which were made adapted the business tenancy rules to the new concept of assured tenancies without making significant substantive alterations. The modification of s 38 (as amended) in its application to assured tenancies was undesirably obscure. Technically an intending landlord and intending tenant could have applied under s 38(4) (as added and now repealed) to the court for an order authorising the exclusion from the tenancy of those sections of the 1954 Act which, as applied to assured tenancies, conferred security of tenure.

31 See the Housing Act 1980 Sch 5 para 8 (substituted by the Housing and Planning Act 1986 s 13(7); repealed with savings (see note 7 *supra*)). Thereafter the only contracting out permitted in relation to an assured tenancy was that permitted by the Landlord and Tenant Act 1954 s 38(2) (as originally enacted but read as if the words from the beginning of s 38(2) to the end of s 38(2)(b) were omitted).

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### **(3) RENT UNDER REGULATED TENANCIES**

#### **(i) Rent Limits during Contractual and Statutory Periods**

##### **891. Contractual period where no rent is registered.**

Where a regulated tenancy<sup>1</sup> is already in existence, the landlord<sup>2</sup> may not agree with the tenant<sup>3</sup> to increase the rent under that tenancy, nor effectively provide for a higher rent in a new regulated tenancy whether granted to that tenant or to someone who might succeed him on his death as a statutory tenant<sup>4</sup>, except by entering into a 'rent agreement with a tenant having security of tenure'<sup>5</sup>; otherwise the excess of the new increased rent over the previously agreed rent is irrecoverable from the tenant<sup>6</sup>. Special rules apply for certain regulated tenancies granted before 1 January 1973<sup>7</sup> and for tenancies which became regulated tenancies by virtue of the increase in the rateable value eligibility limits<sup>8</sup> in 1973<sup>9</sup>.

1 For the meaning of 'regulated tenancy' see PARA 854 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 I.e. under the provisions of the Rent Act 1977 ss 2, 3, Sch 1 (as amended). As to succession on the death of a regulated tenant see PARAS 842-847 ante.

5 See *ibid* s 51 (as amended), s 52 (as substituted), s 54 (as amended) and PARAS 898-900 post. For the meaning of 'rent agreement with a tenant having security of tenure' see PARA 898 post.

6 See *ibid* s 54(1)-(3) (as amended); and PARA 899 post.

7 The Rent Act 1968 ss 20(3), 21 previously laid down a rent limit by reference to the rent recoverable under a previous tenancy. Those provisions were repealed by the Housing Finance Act 1972 ss 42(1), 108(4), Sch 11 (repealed), but by s 42(2) (repealed) this repeal was not effective in the case of a tenancy granted before 1 January 1973 if the rent under the tenancy (as varied by any agreement made before that date) exceeded the rent limit; and this saving is now re-enacted in the Rent Act 1977 s 155(3), Sch 24 para 27(1)(a), (2). These special provisions are of limited scope and cease to apply either if the landlord and tenant enter into a rent agreement with a tenant having security of tenure or if they enter into a formal agreement complying with s 51(4) (as amended) (see PARA 898 post) that Sch 24 para 27 is to cease to apply: Sch 24 para 27(3).

8 I.e. increases from £400 to £600 and then to £1,500 in the case of Greater London and from £200 to £300 and then to £750 elsewhere: see the Counter-Inflation Act 1973 s 14 (repealed). As to Greater London see LONDON GOVERNMENT VOL 29(2) (Reissue) PARA 29.

9 See the Rent Act 1977 s 44(4), Sch 7 (as amended). The relevant tenancies are those granted before 8 March 1973 which would not have been regulated but for the increase in rateable value eligibility limits: Sch 7 para 1(1). The rent limit for such a tenancy is the rent payable under it on 22 March 1973 or as further reduced by the Counter-Inflation (Rents) (England and Wales) Order 1972, SI 1972/1851, art 10 (spent): Rent Act 1977 Sch 7 paras 1(2), 2. The recoverable rent for any contractual period of such a tenancy may not exceed this limit and the amount of any excess is irrecoverable from the tenant: Sch 7 para 1(2). The limit is subject to adjustment for repairs, services or rates which, in the event of an increase in the limit, does not require the service of a notice of increase: see Sch 7 para 3. Any question whether or by what amount the limit is increased or decreased is determined by the county court: Sch 7 para 3(7). This special rent limit ceases to apply if the landlord and tenant so agree in accordance with the formal requirements of s 51(4) (as amended): Sch 7 para 1(4).

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## **892. Contractual period where rent is registered.**

Where a rent for a dwelling house is registered<sup>1</sup>, the rent recoverable for any contractual period<sup>2</sup> of a regulated tenancy of the dwelling house is limited<sup>3</sup> to the rent so registered<sup>4</sup>; and,

where a limit is so imposed, the amount by which the rent payable under the tenancy exceeds that limit is<sup>5</sup> irrecoverable from the tenant<sup>6</sup>.

Where any rates<sup>7</sup> in respect of the dwelling house are borne by the landlord<sup>8</sup> or a superior landlord, the amount of the rates for any rental period<sup>9</sup> must be added to the above limit and is recoverable from the tenant as far as the contract of tenancy allows<sup>10</sup>.

In many cases prior to 4 May 1987<sup>11</sup>, and in limited circumstances thereafter<sup>12</sup>, the rent payable could not be immediately increased to the contractual rent limit but the increases were to be phased<sup>13</sup>.

1     le under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq post. A registration under Pt IV (ss 62-75) (as amended) is deemed to exist in the case of a furnished letting which became a protected or statutory tenancy by virtue of the Rent Act 1974 where any rent registered under the Rent Act 1968 Pt VI (ss 68-84) (repealed) (the predecessor of the restricted contract provisions) is deemed to be registered under the Rent Act 1977 Pt IV (ss 62-75) (as amended) with effect from 14 August 1974: see s 155(3), Sch 24 paras 7(3), 8(1). If the amount registered under the Rent Act 1968 Pt VI (ss 68-84) (repealed) included rates, the landlord cannot recover these rates twice by treating the deemed registration under the Rent Act 1977 Pt IV (ss 62-75) (as amended) as exclusive of rates: *Dominal Securities Ltd v McLeod* (1978) 37 P & CR 411, CA. As to the abolition of domestic rates see PARA 521 ante.

2     For these purposes, 'contractual period' means a rental period of a regulated tenancy which is a period beginning before the expiry or termination of the protected tenancy: Rent Act 1977 s 61(1). For the meaning of 'rental period' see PARA 853 note 3 ante; for the meaning of 'regulated tenancy' see PARA 854 ante; and for the meaning of 'protected tenancy' see PARA 818 ante.

3     This limitation is additional to any limitations in the contract of tenancy.

4     Rent Act 1977 s 44(1). This limit is called 'the contractual rent limit': ss 44(3), 61(1). Exceptionally, the rent limit may be higher than the registered rent for tenancies which became regulated by virtue of the Counter-Inflation Act 1973 s 14 (repealed). As to the limit for such tenancies see PARA 891 note 9 ante. This special limit applies where the registered rent is less than the limit: Rent Act 1977 s 44(4), Sch 7 para 1(3), (5). Prior to 1 April 2006, the rent limit might in any case be increased above the registered rent by an order under the Fire Precautions Act 1971 s 28(3)(b) (now repealed and replaced by provisions of the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541) (see PARA 473 ante) in respect of the cost of fire precautions work borne by the landlord: see the Rent Act 1977 ss 44(1), 140, Sch 20 para 3(1), (2)(a), (4) (as amended and repealed).

5     le notwithstanding anything in any agreement.

6     Rent Act 1977 s 44(2). Once a fair rent is registered for particular premises, that rent remains the recoverable rent for the dwelling house in respect of which the rent was payable until either the demised premises undergo such a change in their structure as to render them no longer the dwelling house referred to in s 44 (as amended) or there is a cancellation of the registration under s 73 (as amended) (see PARA 924 post) or a new registration consequent on a fresh application pursuant to s 67(3) (as amended) (see PARA 915 post): *Rakhit v Carty* [1990] 2 QB 315, [1990] 2 All ER 202, CA (not following *Kent v Millmead Properties Ltd* (1982) 44 P & CR 353, CA, and *Cheniston Investments Ltd v Waddock* (1988) 20 HLR 652, [1988] 2 EGLR 136, CA).

7     For the meaning of 'rates' for these purposes see PARA 895 note 2 post. The amount of the rates must be ascertained in the accordance with the Rent Act 1977 s 71(3) (as amended), Sch 5 (see PARA 896 post): s 71(3).

8     For the meaning of 'landlord' see PARA 816 note 2 ante.

9     In ascertaining for the purposes of the Rent Act 1977 Pt III (ss 44-61) (as amended) whether there is any difference with respect to rents or rates between one rental period and another, whether of the same tenancy or not, or the amount of any difference, any necessary adjustments must be made to take account of periods of different lengths: s 59. For the purposes of such an adjustment, a period of one month is to be treated as equivalent to one-twelfth of a year and a period of one week as equivalent to one-fifty-second of a year: s 59.

10    See *ibid* ss 44(1), 71(2), (3) (amended by the Housing Act 1980 s 152(3), Sch 26; the Rent (Relief from Phasing) Order 1987, SI 1987/264, Sch 1 paras 1, 4).

11    le the date when the Rent (Relief from Phasing) Order 1987, SI 1987/264, came into force: see art 1.

12    le in the circumstances set out in *ibid* art 3, Sch 2.

13    As to the operation of phasing see the Rent Act 1977 Sch 8 (repealed).

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### **893. Statutory period where no rent is registered.**

Where the rent payable for any statutory period<sup>1</sup> of a regulated tenancy of a dwelling house would exceed the rent recoverable<sup>2</sup> for the last contractual period<sup>3</sup> of the regulated tenancy, the amount of the excess is<sup>4</sup>, notwithstanding anything in any agreement, irrecoverable from the tenant<sup>5</sup>. Where, however, no rent for the dwelling house is registered<sup>6</sup>, certain adjustments are permitted<sup>7</sup> with respect to the rent recoverable for any statutory period under a regulated tenancy of the dwelling house<sup>8</sup>.

1 For these purposes, 'statutory period' means any rental period of a regulated tenancy which is not a contractual period: Rent Act 1977 s 61(1). For the meaning of 'rental period' see PARA 853 note 3 ante; for the meaning of 'regulated tenancy' see PARA 854 ante; and for the meaning of 'contractual period' see PARA 892 note 2 ante.

2 The rent recoverable for the last contractual period may be less than the rent limit for that period (see PARA 891 ante) if the provisions of the contract of tenancy did not allow an increase in recoverable rent up to the rent limit. In such a case it is the lower figure which is the rent limit for the statutory period prior to registration.

3 Exceptionally for the reference in the Rent Act 1977 s 45(1) to 'the last contractual period' there is substituted a reference to another rental period. Thus, in the case of a statutory tenancy of formerly requisitioned premises converted into a regulated tenancy by the Rent Act 1965 s 10 (repealed), the relevant rental period is the last one before 31 March 1966 and the rent recoverable for that period is treated as including any sum payable by the local authority to the landlord under the Requisitioned Houses and Housing (Amendment) Act 1955 s 4(4) (repealed): see the Rent Act 1977 s 155(3), Sch 24 para 9. Further, where a controlled tenancy was converted into a regulated tenancy by virtue of the Rent Act 1968 s 7(1), Sch 2 para 5 (repealed), or the Housing Act 1969 Pt III (ss 43-57) (repealed), or the Housing Finance Act 1972 Pt III (ss 27-34) (repealed) or s 35 (repealed), the relevant rental period is the last one before the tenancy became a regulated tenancy: see the Rent Act 1977 s 18A (as added), s 155(3), Sch 17 para 2, Sch 24 para 28(1), (4).

4 *Ie* except as otherwise provided by the Rent Act 1977: see the text and notes 5-8 *infra*.

5 *Ibid* s 45(1). Section 45(1) does not apply to a statutory regulated tenancy brought into existence under the provisions of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 *et seq post*), which has its own provisions relating to rent: see the Leasehold Reform Act 1967 s 39(1), (2), Sch 5 para 3(1), (2)(b) (amended by the Rent Act 1977 s 155(2), Sch 23 para 46); and PARA 1217 *post*. It is apprehended that by the reference in the Rent Act 1977 Sch 23 para 46(b) to s 45(2) is meant a reference to s 45(1).

6 *Ie* under *ibid* Pt IV (ss 62-75) (as amended): see PARA 909 *et seq post*.

7 *Ie* *ibid* s 46 (see PARA 895 *post*) and s 47 (see PARA 897 *post*) have effect.

8 *Ibid* s 45(4) (amended by the Housing Act 1980 s 152(1), Sch 25 para 37).

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## 894. Statutory period where rent is registered.

Where a rent for a dwelling house is registered<sup>1</sup>, the following provisions apply with respect to the rent for any statutory period<sup>2</sup> of a regulated tenancy<sup>3</sup> of the dwelling house<sup>4</sup>. If the rent payable<sup>5</sup> for any statutory period would exceed the amount so registered, the amount of the excess is, notwithstanding anything in any agreement, irrecoverable from the tenant<sup>6</sup>; but, if the rent payable<sup>7</sup> for any statutory period would be less than the rent so registered, it may be increased up to the amount of that registered rent by a notice of increase<sup>8</sup> served by the landlord<sup>9</sup> on the tenant and specifying the date from which the increase is to take effect<sup>10</sup>, subject in certain limited circumstances<sup>11</sup> to phasing of the increases<sup>12</sup>. The recoverable rent may be increased above the registered rent on account of rates<sup>13</sup> without the service of any notice of increase<sup>14</sup>.

1     le under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq post. See further PARA 892 note 1 ante.

2     For the meaning of 'statutory period' see PARA 893 note 1 ante.

3     For the meaning of 'regulated tenancy' see PARA 854 ante.

4     Rent Act 1977 s 45(2).

5     The rent payable may be limited as set out in PARA 893 ante.

6     Rent Act 1977 s 45(2)(a). For the meaning of 'tenant' see PARA 816 note 3 ante. Exceptionally, the rent limit may be higher than the registered rent for tenancies which became regulated by virtue of the Counter-Inflation Act 1973 s 14 (repealed): see the Rent Act 1977 s 45(2), Sch 7 para 1(3); and PARA 892 note 4 ante. Schedule 7 para 1(3) does not, however, apply to a statutory tenancy arising under s 155(3), Sch 24 para 5(2) (see PARA 855 note 12 ante): Sch 24 para 5(5). Prior to 1 April 2006, the rent limit might in any case be increased above the registered rent by an order under the Fire Precautions Act 1971 s 28(3)(b) (now repealed and replaced by provisions of the Regulatory Reform (Fire Safety) Order 2005, SI 2005/1541) (see PARA 473 ante) in respect of the cost of fire precautions work borne by the landlord: see the Rent Act 1977 ss 45(2), 140, Sch 20 para 3(1), (2)(b), (4) (as amended and repealed).

7     See note 5 supra.

8     For the prescribed forms of notice of increase see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(1)(a), (b), Sch 1, Form 1 or (in cases where phasing applied) Form 2 (each substituted by SI 1987/266 and amended by SI 1993/655) or a form substantially to the like effect. As to notices of increase generally see PARA 901 post.

9     For the meaning of 'landlord' see PARA 816 note 2 ante.

10    Rent Act 1977 s 45(2)(b). The date specified in such a notice of increase must not be earlier than the date from which the registration of the rent took effect nor earlier than four weeks before the service of the notice: s 45(3) (amended by the Housing Act 1980 s 61(4)).

11    le in the circumstances set out in the Rent (Relief from Phasing) Order 1987, SI 1987/264, art 3, Sch 2.

12    As to the operation of phasing see the Rent Act 1977 Sch 8 (repealed).

13    As to the abolition of domestic rates see PARA 521 ante.

14    See the Rent Act 1977 ss 45(2), 71(3) (as amended): and PARA 892 the text and notes 7-10 ante.

## UPDATE

### 894 Statutory period where rent is registered

NOTE 8--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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## **(ii) Adjustments of Recoverable Rent for Statutory Periods before Registration**

### **895. Adjustment with respect to rates.**

Where no rent for a dwelling house is registered<sup>1</sup> and any rates<sup>2</sup> in respect of it are, or were during the last contractual period<sup>3</sup>, borne by the landlord or a superior landlord, then, for any statutory period<sup>4</sup> for which the amount of the rates<sup>5</sup> differs from the amount of the rates for the last contractual period, the recoverable rent<sup>6</sup> is increased or decreased by the amount of the difference<sup>7</sup>.

Where the amount of the recoverable rent is so increased, the increase does not take effect except in pursuance of a notice of increase<sup>8</sup> served by the landlord on the tenant specifying the increase and the date from which it is to take effect<sup>9</sup>. The date so specified must not be earlier than six weeks before the service of the notice and, if it is earlier than the date of service of the notice, any unpaid increase in rent becomes due on the day after service of the notice<sup>10</sup>.

1    Ie where the Rent Act 1977 s 45(4) (as amended) applies: see PARA 893 ante.

2    For the purposes of *ibid* Pts III, IV (ss 44-75) (as amended), references to rates include references to such proportion of any rate in respect of a hereditament of which the dwelling house forms part as may be agreed in writing between the landlord and the tenant or determined by the county court: ss 61(2), 75(2). For the meaning of 'landlord' see PARA 816 note 2 ante; for the meaning of 'tenant' see PARA 816 note 3 ante; for the meaning of 'rates' generally see PARA 862 note 5 ante; and as to the abolition of domestic rates see PARA 521 ante. As to applications to the court generally see PARA 980 et seq post.

3    For the meaning of 'contractual period' see PARA 892 note 2 ante; and for the meaning of 'the last contractual period' see PARA 893 note 3 ante.

4    For the meaning of 'statutory period' see PARA 893 note 1 ante.

5    Ie ascertained in accordance with the Rent Act 1977 s 27(1)(b) (repealed), Sch 5: see PARA 896 post.

6    For these purposes, 'recoverable rent' means rent which, under a regulated tenancy, is or was for the time being recoverable, having regard to the provisions of *ibid* Pt II (ss 44-61) (as amended): s 61(1).

7    *Ibid* s 46(1). For the meaning of 'regulated tenancy' see PARA 854 ante.

8    For the prescribed form of notice of increase see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(1)(c), Sch 1, Form 4, or a form substantially to the same effect. As to notices of increase generally see PARA 901 post.

9    Rent Act 1977 s 46(2). The requirement of a notice of increase is a condition precedent to the operation of the increase in the recoverable rent and it is not open to a statutory tenant to waive the requirement of a notice of increase and by agreement render himself liable to a rent which is not recoverable under the Rent Act 1977: *Aristocrat Property Investments Ltd v Harounoff* (1982) 43 P & CR 284, CA.

10   Rent Act 1977 s 46(3).

## **UPDATE**

## 895 Adjustment with respect to rates

NOTE 8--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 896. Calculation of rates.

For the purposes of the Rent Act 1977 the amount of rates<sup>1</sup> for any rental period<sup>2</sup> was normally an amount which bore to the total rates payable during the relevant rating period<sup>3</sup> the same proportion as the length of the rental period bore to the length of that rating period<sup>4</sup>.

As respects any rental period which preceded the making, by the authority levying the rates, of its first demand for, or for an instalment of, the rates for the relevant rating period, the amount was calculated on the basis that the rates for that period would be the same as for the last preceding rating period<sup>5</sup>. On the making by that authority of its first such demand, and on the making by it of any subsequent such demand, the amount was, if necessary, to be recalculated on the basis that the rates for the relevant rating period would be such as appeared from the information given in the demand and any previous demands<sup>6</sup>. Any such recalculation did not affect the ascertainment of the rates for any rental period beginning more than six weeks before the date of the service of the demand giving rise to the recalculation<sup>7</sup>. If, as a result of the settlement of a proposal<sup>8</sup>, the rates payable for any rating period were decreased, the amount was to be recalculated so as to give effect to the decrease; but any such recalculation did not affect the ascertainment of the rates for any rental period beginning more than six weeks before the date of the settlement<sup>9</sup> of the proposal<sup>10</sup>. In computing the rates for any rental period for these purposes, any discount and any allowance made under any of the enactments relating to allowances where rates were paid by the owner instead of by the occupier<sup>11</sup>, were to be left out of account and accordingly the rates were to be computed as if no such discount and no such allowances had fallen to be, or had been, allowed or made<sup>12</sup>.

1 For the meaning of 'rates' for these purposes see PARA 895 note 2 ante. As to the abolition of domestic rates see PARA 521 ante.

2 For the meaning of 'rental period' see PARA 853 note 3 ante.

3 For these purposes, 'the relevant rating period' in relation to a rental period means the rating period during which the rent for that rental period is payable: Rent Act 1977 s 46(1), Sch 5 para 2. The rating period was, in practice, a year or a half-year: see the General Rate Act 1967 s 115(1) (repealed).

4 Rent Act 1977 Sch 5 para 1. As to adjustments necessary in comparing rates for different rental periods see s 59; and PARA 892 note 9 ante.

5 Ibid Sch 5 para 3.

6 Ibid Sch 5 para 4(1).

7 Ibid Sch 5 para 4(2).

8 Ie a proposal for the alteration of the valuation list under the General Rate Act 1967 s 69 (repealed).



9 As to the date when a proposal was deemed to be settled see *ibid* s 115(4) (repealed).

10 Rent Act 1977 Sch 5 para 5.

11 In general the liability to pay rates fell upon the person who had beneficial occupation of the dwelling house, namely the tenant. However, the landlord might become liable for rates in place of the tenant either as a result of a direction by the rating authority under the General Rate Act 1967 s 55 (repealed) or by agreement under s 56 (repealed). In relation to council tax the tenant is generally liable but may be jointly and severally liable with the landlord: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 237.

12 Rent Act 1977 Sch 5 para 6.

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### **897. Adjustment with respect to services and furniture.**

Where no rent for a dwelling house is registered<sup>1</sup> and for any statutory period<sup>2</sup> there is, with respect to the provision of services<sup>3</sup> for the tenant<sup>4</sup> by the landlord<sup>5</sup> or a superior landlord, or with respect to the use of furniture by the tenant or with respect to any circumstances relating thereto, any difference, in comparison with the last contractual period<sup>6</sup>, such as to affect the amount of rent which it is reasonable to charge, the recoverable rent<sup>7</sup> for the statutory period is to be increased or decreased by an appropriate amount<sup>8</sup>.

Any question whether, or by what amount, the recoverable rent for any period is so increased or decreased is determinable by agreement in writing between the landlord and the tenant or by the county court; and any such determination may be made so as to relate to past statutory periods and has effect with respect to statutory periods subsequent to the periods to which it relates until revoked or varied by a fresh agreement or by the county court<sup>9</sup>.

No notice of increase is necessary.

1 *Ie* where the Rent Act 1977 s 45(4) (as amended) applies: see PARA 893 ante.

2 For the meaning of 'statutory period' see PARA 893 note 1 ante.

3 There is no statutory definition of 'services' for these purposes. For the construction of 'services' in the Housing Repairs and Rents Act 1954 (repealed) see *R v Paddington North and St Marylebone Rent Tribunal, ex p Perry* [1956] 1 QB 229, [1955] 3 All ER 391, DC. For the meaning of 'services' in the Rent Act 1977 Pt V (ss 77-85) (as amended) see PARA 986 note 4 post.

4 For the meaning of 'tenant' see PARA 816 note 3 ante.

5 For the meaning of 'landlord' see PARA 816 note 2 ante.

6 For the meaning of 'the last contractual period' see PARA 893 note 3 ante.

7 For the meaning of 'recoverable rent' see PARA 895 note 6 ante.

8 Rent Act 1977 s 47(1).

9 *Ibid* s 47(2). As to applications to the court generally see PARA 980 et seq post.

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### **(iii) Rent Agreements with Tenants having Security of Tenure**

#### **898. Protection of tenants with security of tenure.**

A 'rent agreement with a tenant having security of tenure' means:

- 1762 (1) an agreement increasing the rent payable under a protected tenancy<sup>1</sup> which is a regulated tenancy<sup>2</sup>; or
- 1763 (2) the grant to the tenant under a regulated tenancy, or to any person who might succeed him as a statutory tenant<sup>3</sup>, of another regulated tenancy of the dwelling house at a rent exceeding the rent under the previous tenancy<sup>4</sup>.

Where any rates<sup>5</sup> in respect of the dwelling house are borne by the landlord<sup>6</sup> or a superior landlord, any increase of rent is disregarded for the purposes of heads (1) and (2) above if the increase is no more than one corresponding to an increase in the rates so borne in respect of the dwelling house<sup>7</sup>.

If a rent agreement was made at a time when no rent is registered<sup>8</sup>, the following requirements must be observed as respects the agreement<sup>9</sup>:

- 1764 (a) the agreement must be in writing signed by the landlord and the tenant<sup>10</sup>; and
  - 1765 (b) the document containing the agreement must contain a statement, in characters not less conspicuous<sup>11</sup> than those used in any other part of the agreement:
- 8
  - 8. (i) that the tenant's security of tenure under the Rent Act 1977 will not be affected if he refuses to enter into the agreement<sup>12</sup>; and
  - 9. (ii) that the entry into the agreement will not deprive the tenant or landlord of the right to apply at any time to the rent officer for the registration<sup>13</sup> of a fair rent<sup>14</sup>;
  - 9
  - 1766 or words to that effect<sup>15</sup>; and
  - 1767 (c) the statement mentioned in head (b) above must be set out at the head of the document containing the agreement<sup>16</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante. A corporate body can be a protected tenant; accordingly, although a corporate body cannot have 'security of tenure' as a statutory tenant, this part of the definition of 'rent agreement with a tenant having security of tenure' can apply to an agreement made with a protected tenant which is a corporate body. The definition of 'rent agreement with a tenant having security of tenure' does not expressly deal with an agreement increasing the rent payable under a statutory tenancy; it seems to assume that such agreement will be the grant of another contractual regulated tenancy within the second part of the definition. For the meaning of 'tenant' see PARA 816 note 3 ante.

2 For the meaning of 'regulated tenancy' see PARA 854 ante.

3 As to succession see PARA 842 et seq ante. For the meaning of 'statutory tenant' see PARA 831 ante.

4 Rent Act 1977 ss 51(1), 61(1). Neither a rent review clause nor its operation constitutes a rent agreement with a tenant having security of tenure within the meaning of s 51 (as amended): *Sopwith v Stutchbury* (1983) 17 HLR 50, CA.

5 For the meaning of 'rates' for these purposes see PARA 895 note 2 ante; and as to their calculation generally see PARA 896 ante. As to the abolition of domestic rates see PARA 521 ante.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 Rent Act 1977 s 51(2).

8 Ie under ibid Pt IV (ss 62-75) (as amended): see PARA 909 et seq post. The provisions of s 51 (as amended) apply only to agreements taking effect on or after the commencement of the Rent Act 1977 (ie on or after 29 August 1977: see s 156(2)): s 51(3) (amended by the Housing Act 1980 s 152(3), Sch 26). However, these provisions were previously enacted in the Housing Finance Act 1972 s 43 (repealed) in respect of agreements taking effect after 1 January 1973. See also the Rent Act 1977 s 155(3), Sch 24 para 18 (cited in PARA 899 note 3 post).

9 Ibid s 51(3) (as amended: see note 8 supra). As to the consequences of non-compliance see PARA 899 post.

10 Ibid s 51(4)(a).

11 For a decision on similar wording in the Leasehold Property (Repairs) Act 1938 s 1(4) see *Middlegate Properties Ltd v Messimeris* [1973] 1 All ER 645, [1973] 1 WLR 168, CA (cited in PARA 455 note 13 ante).

12 Rent Act 1977 s 51(4)(b)(i).

13 Ie under ibid Pt IV (ss 62-75) (as amended). For the meaning of 'rent officer' for those purposes see PARA 911 note 6 post.

14 Ibid s 51(4)(b)(ii).

15 Ibid s 51(4)(b) (amended by the Housing Act 1980 s 68(1); the Rent (Relief from Phasing) Order 1987, SI 1987/264, art 2(1), Sch 1 para 3). Where phasing of rent increases still applies by virtue of art 3, Sch 2, there is an additional requirement that the document must contain a statement that, if the agreement were not made but instead a rent were registered under the Rent Act 1977 Pt IV (ss 62-75) (as amended), then part only of any increase over the rent previously recoverable by the landlord would be payable by the tenant during the first year: s 51(4)(b)(ia) (added by the Housing Act 1980 s 68(1); repealed with savings by the Rent (Relief from Phasing) Order 1987, SI 1987/264, Sch 1 para 3).

16 Rent Act 1977 s 51(4)(c).

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### **899. Failure to comply with provisions to protect tenant.**

If, in the case of the variation of the terms of a regulated tenancy<sup>1</sup>, there is a failure to observe any of the statutory requirements<sup>2</sup>, any excess of the rent payable under the terms as varied over the terms without the variation is irrecoverable from the tenant<sup>3</sup>. If, in the case of the grant of a tenancy, there is a failure to observe any of those requirements, any excess of the rent payable under the tenancy so granted for any contractual<sup>4</sup> or any statutory period<sup>5</sup> of the tenancy over the previous limit<sup>6</sup> is irrecoverable from the tenant<sup>7</sup>.

1 For the meaning of 'regulated tenancy' see PARA 854 ante.

2 Ie the requirements of the Rent Act 1977 s 51 (as amended): see PARA 898 ante.

3 Ibid s 54(1) (amended by the Housing Act 1980 s 152(3), Sch 26). For the meaning of 'tenancy' see PARA 818 note 1 ante. The Rent Act 1977 s 54 (as so amended) applies in relation to a failure to observe any of the

requirements of the Housing Finance Act 1972 ss 43, 44(5) or s 45 (repealed) as it applies in relation to a failure to observe any of the corresponding requirements of the Rent Act 1977 s 51 (as amended) or s 52(6) (as substituted) (see PARA 900 post): s 155(3), Sch 24 para 18.

4 For the meaning of 'contractual period' see PARA 892 note 2 ante.

5 For the meaning of 'statutory period' see PARA 893 note 1 ante.

6 For these purposes, the 'previous limit' is taken to be the amount which, taking account of any previous operation of the Rent Act 1977 s 54 (as amended) (or of its predecessor, the Housing Finance Act 1972 s 46 (repealed)), was recoverable by way of rent for the last period of the previous tenancy of the dwelling house, or which would have been so recoverable if all notices of increase authorised by the Rent Act 1977, the Rent Act 1968 (repealed) and the Housing Finance Act 1972 s 37(3) (repealed) had been served: Rent Act 1977 s 54(3). As to the rent so recoverable see PARAS 891, 895 ante.

7 Ibid s 54(2).

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### **900. Protection following conversion to regulated tenancy.**

The following provisions apply to an agreement with a tenant having security of tenure<sup>1</sup> which is entered into on or after 28 November 1980<sup>2</sup> if the tenancy<sup>3</sup> has become or, as the case may be, the previous tenancy became a regulated tenancy<sup>4</sup> by conversion<sup>5</sup>.

Any such agreement which purports to increase the rent payable under a protected tenancy<sup>6</sup> is void if entered into at a time when no rent is registered<sup>7</sup> for the dwelling house<sup>8</sup>.

If any such agreement constitutes a grant of a regulated tenancy and is made at a time when no rent is so registered<sup>9</sup>, any excess of the rent payable under the tenancy so granted for any contractual<sup>10</sup> or statutory period<sup>11</sup> of the tenancy over the rent limit applicable to the previous tenancy is irrecoverable from the tenant<sup>12</sup>.

The above provisions<sup>13</sup> do not apply:

1768 (1) to any agreement where the tenant is neither the person who, at the time of the conversion, was the tenant nor a person who might succeed the tenant at that time as a statutory tenant<sup>14</sup>; and

1769 (2) to the agreement submitted to the rent officer in connection with the cancellation, where a rent is registered for the dwelling house and the registration is subsequently cancelled, nor to any agreement made so as to take effect after the cancellation<sup>15</sup>.

1 For the meaning of 'rent agreement with a tenant having security of tenure' see PARA 898 ante.

2 I.e. the date of commencement of the Housing Act 1980 s 68(2): see s 153(4); the Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706. These provisions were, however, previously enacted in the Rent Act 1977 s 52 (as originally enacted), which applied to agreements taking effect on or after 29 August 1977, and before that in the Housing Finance Act 1972 s 44 (repealed), in respect of agreements taking effect after 1 January 1973. See also the Rent Act 1977 s 155(3), Sch 24 para 18 (cited in PARA 899 note 3 ante).

3 For the meaning of 'tenancy' see PARA 818 note 1 ante.

4 For the meaning of 'regulated tenancy' see PARA 854 ante.

5 Rent Act 1977 s 52(1) (s 52 substituted by the Housing Act 1980 s 68(2)). For these purposes, a tenancy is a regulated tenancy by conversion if it has become a regulated tenancy by virtue of: (1) the Housing Act 1969 s 43 (repealed), the Housing Finance Act 1972 Pt III (ss 27-34) (repealed) or Pt IV (ss 35-48) (repealed), or the Rent Act 1977 Pt VIII (ss 108-118) (largely repealed) (conversion of controlled tenancies into regulated tenancies; or (2) the Rent Act 1968 s 7(1), Sch 2 para 5 (repealed), or the Rent Act 1977 s 18(3) (repealed) (conversion on death of first successor); or (3) the Housing Act 1980 s 64 (conversion of all remaining controlled tenancies: see PARA 848 ante); Rent Act 1977 s 52(4)(a)-(c) (as so substituted). For the meaning of 'controlled tenancy' see PARA 849 ante.

6 For the meaning of 'protected tenancy' see PARA 818 ante.

7 Ie under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq post.

8 Ibid s 52(2) (as substituted: see note 5 supra).

9 See note 7 supra.

10 For the meaning of 'contractual period' see PARA 892 note 2 ante.

11 For the meaning of 'statutory period' see PARA 893 note 1 ante.

12 Rent Act 1977 s 52(3) (as substituted: see note 5 supra). Section s 52(3) (as so substituted) ceases to apply if a rent is subsequently registered: s 52(3) (as so substituted).

13 Ie ibid s 52 (as substituted).

14 Ibid s 52(5) (as substituted: see note 5 supra).

15 Ibid s 52(6) (as substituted: see note 5 supra). For the meaning of 'rent officer' see PARA 911 note 6 post.

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## **(iv) Notices of Increase**

### **901. Service of notice of increase.**

A notice of increase<sup>1</sup> must be in the prescribed form<sup>2</sup>. Notwithstanding that such a notice relates to statutory periods<sup>3</sup>, it may be served during a contractual period<sup>4</sup>. Where a notice of increase is served during a contractual period and the protected tenancy<sup>5</sup> could, by a notice to quit served by the landlord<sup>6</sup> at the same time, be brought to an end before the date specified in the notice of increase, the notice of increase operates to convert the protected tenancy into a statutory tenancy<sup>7</sup> as from that date<sup>8</sup>.

There are no express provisions as to the mode of service of notices of increase in respect of regulated tenancies<sup>9</sup>; nor is there any penalty for false or misleading notices.

1 For these purposes, any reference to a notice of increase is a reference to a notice of increase under the Rent Act 1977 s 45(2) (as amended) (increase of rent for statutory period up to registered rent: see PARA 894 ante) or s 46(2) (increase of rent for statutory period, before registration, on account of rates: see PARA 895 ante); s 49(1) (amended by the Housing Act 1980 s 152(1), Sch 25 para 38). The Rent Act 1977 s 45(2) (as amended) does not require that the notice of increase must specify a date upon which the rent falls due to be paid (*Avenue v Properties (St John's Wood) Ltd v Aisinzon* [1977] QB 628, [1976] 2 All ER 177, CA); nor is there any such requirement in the Rent Act 1977 s 46(2).

2 Ibid s 49(2). For these purposes, 'prescribed' means prescribed by regulations under s 60 (see PARA 815 ante) and references to a prescribed form include references to a form substantially to the same effect as the

prescribed form: s 61(1). For the form of notice of increase appropriate in the cases referred to in note 1 supra see PARAS 894 note 8, 895 note 8 respectively ante. The notice must be correct in substance although some technical defects will not invalidate it: *Clydebank Investments Co Ltd v Marshall* 1927 SC 860, Ct of Sess; *Fredco Estates Ltd v Bryant* [1961] 1 All ER 34, [1961] 1 WLR 76, CA, distinguishing *Penfold v Newman* [1922] 1 KB 645, DC and *Bourne v Litton* [1924] 2 KB 10, CA. As to the amendment of notices see PARA 902 post.

If an increase of rent for which a notice of increase is necessary has been paid for a long time, the court may infer that a valid notice of increase has been validly served unless the facts are sufficiently clear to prevent the inference being drawn; and, where the current rent is an odd amount, the court may infer that a valid notice of increase has at some time been served: *Brock v Wollams* [1949] 2 KB 388, [1949] 1 All ER 715, CA. See also *Summers v Donohue* [1945] KB 376, [1945] 1 All ER 599, CA; *Solomon v Orwell* [1954] 1 All ER 874, [1954] 1 WLR 629, CA; *Brownlow v Whelan* (1958) 171 Estates Gazette 133, CA. This inference has been drawn on slight evidence: *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496, [1951] 2 All ER 271, CA. Where the landlord sued for rent at the higher rate on the basis of a valid notice of increase, he could not thereafter deny that a statutory tenancy had arisen: *Baxter v Eckersley* [1950] 1 KB 480, [1950] 1 All ER 139, CA. Cf, however, *Thomas Pocklington's Gift Trustees v Hill* (1989) 21 HLR 391, [1989] 2 EGLR 97, CA.

3 For the meaning of 'statutory period' see PARA 893 note 1 ante.

4 Rent Act 1977 s 49(3). For the meaning of 'contractual period' see PARA 892 note 2 ante.

5 For the meaning of 'protected tenancy' see PARA 818 ante.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 For the meaning of 'statutory tenancy' see PARA 831 ante.

8 Rent Act 1977 s 49(4). Although stated in this way, it is thought that no statutory tenancy will arise if the tenant is not resident at the date specified in the notice of increase. Where the notice of increase gave notice of two increases because the provisions relating to phasing (ie the Rent Act 1977 s 55, Sch 8 (repealed): see PARA 848 the text and note 8 ante) still applied, s 49(4) might operate in relation to the second date specified: see *Thomas Pocklington's Gift Trustees v Hill* [1989] 2 EGLR 97, CA.

9 However, the provisions as to service by a tenant on a landlord's agent apply: see the Rent Act 1977 s 151 (as amended); and PARA 817 ante.

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## **902. Amendment of notice of increase.**

If the county court is satisfied that any error or omission in a notice of increase<sup>1</sup> is due to a bona fide mistake on the part of the landlord<sup>2</sup>, the court may by order amend the notice by correcting any errors or supplying any omission therein which, if not corrected or supplied, would render the notice invalid and, if the court so directs, the notice as so amended has effect and is deemed to have had effect as a valid notice<sup>3</sup>.

Any such amendment may be made on such terms and conditions with respect to arrears of rent or otherwise as appear to the court to be just and reasonable<sup>4</sup>.

No increase of rent which becomes payable by reason of any such amendment is recoverable in respect of any statutory period<sup>5</sup> which ended more than six months before the date of the order making the amendment<sup>6</sup>.

1 For the meaning of 'notice of increase' see PARA 901 note 1 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante.

3 Rent Act 1977 s 49(5). If the tenant treats the notice as valid or otherwise acts upon it, he may be estopped from challenging its validity: *Re Swanson's Agreement, Hill v Swanson* [1946] 2 All ER 628; *Wallis v Semark* [1951] 2 TLR 222, CA; *Edwards v Edwards* [1952] EGD 328, CA; but see *Aristocrat Property Investments Ltd v Harounoff* (1982) 43 P & CR 284, CA. See also the saving provision on the registration of a rent in the Rent Act 1977 s 72(6) (as substituted): see PARA 923 post.

4 Ibid s 49(6). The court is likely to make an order where the conditions of s 49 (as amended) are complied with and the tenant is aware of the true position and has not been deprived of essential knowledge: see *Jackson v Croucher* [1956] 1 QB 394, [1956] 1 All ER 170, CA; *London Hospital Board of Governors v Jacobs* [1956] 2 All ER 603, [1956] 1 WLR 662, CA. Both these cases were decided on corresponding provisions in the Housing Repairs and Rents Act 1954 s 25(4) (repealed). The object of the power of amendment is not confined to correcting clerical errors; it is to do substantial justice: *Higgins v Warren* [1927] IR 558.

5 For the meaning of 'statutory period' see PARA 893 note 1 ante.

6 Rent Act 1977 s 49(7).

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## **(v) Recovery of Overpayments**

### **903. Right to recover overpayments.**

Where a tenant<sup>1</sup> has paid on account of rent any amount which is irrecoverable by the landlord<sup>2</sup>, the tenant who paid it<sup>3</sup> is entitled to recover that amount from the landlord who received it<sup>4</sup> or his personal representatives<sup>5</sup>. Any such amount may, without prejudice to any other method of recovery, be deducted by the tenant from any rent payable by him to the landlord<sup>6</sup>. No such amount is, however, recoverable at any time after the expiry of two years from the date of overpayment<sup>7</sup> or, in the case of an amount which is irrecoverable because of failure to comply with the provisions for the protection of tenants<sup>8</sup>, one year<sup>9</sup>.

1 For the meaning of 'tenant' see PARA 816 note 3 ante.

2 I.e. irrecoverable by virtue of the Rent Act 1977 Pt III (ss 44-61) (as amended), for regulated tenancies. Virtually identical provisions apply for rent made irrecoverable by Pt VI (ss 86-97) (as amended) for housing association tenancies (see s 94(1)-(3)), the only difference being in s 94(3) (see note 7 infra). As to the restrictions on rent for housing association tenancies see PARA 905 et seq post; and as to the phasing out of the special regime for such tenancies see PARA 1013 post. For the meaning of 'landlord' see PARA 816 note 2 ante.

It is for the tenant to establish that the rent which he has paid was in excess of the rent which the landlord could legitimately recover, and to do this he may tender evidence from which the court can infer what was the rent legitimately chargeable; if the tenant establishes a prima facie case as to the recoverable rent, the onus shifts to the landlord to disprove it: *Keane v Clarke* [1951] 2 KB 732, [1951] 2 All ER 187, CA (letting in 1944 prima facie evidence of standard rent of premises subject to 1939 control, in the absence of evidence of letting on or before 1 September 1939). A sum may be recovered which has been paid under an invalid notice of increase: *Smith v Lloyd* (1923) 92 LJB 877, DC. Even though the county court has retrospectively amended an invalid notice of increase (see PARA 902 ante), the tenant may recover from the landlord any increase of rent paid in respect of a rental period ending more than six months before the court order: *Williams v Britannic Merthyr Steam Coal Co Ltd* [1924] 2 KB 334. Where the standard rent had been determined by apportionment in the county court, the Court of Appeal could not on an appeal against an order for recovery of overpayments go behind the apportionment: *Field v Gover* [1944] KB 200, sub nom *Gover v Field* [1944] 1 All ER 151, 417n, CA. See also *Kimm v Cohen* (1923) 40 TLR 123, DC, where the tenant was entitled to recover rent paid before the date of the apportionment. The tenant may exercise this right notwithstanding any agreement to the contrary and, generally, he may not be estopped from exercising it: see *Baxter v Eckersley* [1950] 1 KB 480, [1950] 1 All ER 139, CA. However, he may not be able to exercise his right if the landlord has obtained judgment against the tenant for the arrears of rent: *Adams v Garratt* [1923] EGD 246, DC; *Edwards v Rimmer* [1925] EGD 362, DC (the point was left open in *Griffiths v Davies* [1943] KB 618, [1943] 2 All ER 209, CA). The

tenant may be able to have any such judgment set aside. The right to recover may be exercised by a tenant who is no longer in possession and has ceased to have any interest in the premises: *Terry v Molloy* (1939) 73 ILT 77; *Johnson v Tabrum* [1940] EGD 212.

3 The right to recover overpayments is exercisable by the tenant's personal representatives: *Dean v Wiesengrund* [1955] 2 QB 120, [1955] 2 All ER 432, CA.

4 The right to recover overpayments may be exercised against the trustee in bankruptcy of the landlord who received the overpayment: *Bradley-Hole v Cusen* [1953] 1 QB 300, sub nom *Hole v Cusen* [1953] 1 All ER 87, CA. It has been held in Ireland that a tenant was not entitled to deduct from rent due to his present landlord sums alleged to have been overpaid to the landlord's predecessor (*Murray v Webb* (1925) 59 ILT 41), but this point was left open in *Bradley-Hole v Cusen* supra at 302 and at 88. See further *Reeves v Pope* [1914] 2 KB 284, CA.

5 Rent Act 1977 s 57(1). For corresponding provisions relating to housing association tenancies see s 94(1). As to the treatment of erroneous entries in a rent book see s 57(4), (5) (as amended), s 58; and PARAS 904, 983 post.

6 Ibid s 57(2). As to the corresponding provisions relating to housing association tenancies see s 94(2); and PARA 906 post. It seems that, if a non-payment of rent is to be treated as a deduction for these purposes, the money must be consciously withheld: *Catling v Sowden* [1924] EGD 369, DC; *Littman v Goldman* [1955] EGD 149.

7 Rent Act 1977 s 57(3)(b) (substituted by the Housing Act 1980 s 68(3)). As to the corresponding provisions relating to housing association tenancies see the Rent Act 1977 s 94(3) (under which the two-year limit applies in all cases); and PARA 906 post. In computing the period of the time limit the day of overpayment is, it seems, excluded: *Truss v Oliver* (1924) 40 TLR 588, DC. In the case of recovery of overpayments by legal proceedings, the proceedings must be commenced within the period of the time limit, and it is immaterial that judgment is not delivered until the period has elapsed: *Lewis v McKay* [1924] 2 KB 136, DC; *Diment v Roberts* [1925] 1 KB 9, CA. Where there is an irregularity in the commencement of proceedings and the landlord subsequently waives it, the period is computed from the commencement of the proceedings and not from the date of waiver: *Pringle v Hales* [1925] 1 KB 573, CA. The point that a tenant's claim to recover overpayments is made outside the time limit may be raised on appeal even though it has not been raised below; it is the duty of the court to take the point if the landlord does not raise it: *Phillips v Copping* [1935] 1 KB 15 at 20-21, CA. The time limit applies to recovery by deduction as well as recovery by legal proceedings: *Bayley v Walker* [1925] 1 KB 447, DC. See also *Goklee v Burgener* (1925) 69 Sol Jo 311 (mode of setting off overpayments against rent).

8 In the case of an amount which is irrecoverable by virtue of the Rent Act 1977 s 54 (as amended): see PARA 899 ante.

9 Ibid s 57(3)(a) (substituted by the Housing Act 1980 s 68(3)). See also note 7 supra.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(3) RENT UNDER REGULATED TENANCIES/(v) Recovery of Overpayments/904. Entries in rent books.

#### **904. Entries in rent books.**

Any person who makes an entry in any rent book or similar document showing or purporting to show any tenant<sup>1</sup> as being in arrears in respect of any sum on account of rent which is irrecoverable by statute<sup>2</sup> is liable on summary conviction to a fine not exceeding level 3 on the standard scale unless he proves that at the time of the making of the entry the landlord<sup>3</sup> had a bona fide claim that the sum was recoverable<sup>4</sup>.

If, where any such entry has been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant to do so, refuses or neglects to cause the entry to be deleted within seven days, the landlord is liable on summary conviction to a fine not exceeding level 3 on the standard scale unless he proves that, at the time of the neglect or refusal to cause the entry to be deleted, he had a bona fide claim that the sum was recoverable<sup>5</sup>.



Similar provision is made with regard to certain housing association tenancies<sup>6</sup>.

1 For the meaning of 'tenant' see PARA 816 note 3 ante.

2 I.e. by virtue of the Rent Act 1977 Pt III (ss 44-61) (as amended).

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 Rent Act 1977 s 57(4) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

5 Ibid s 57(5) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). See also note 4 supra.

6 See the Rent Act s 94(4), (5) (amended by the Criminal Justice Act 1982 ss 38, 46). For the meaning of 'housing association tenancy' for these purposes see PARA 905 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(3) RENT UNDER REGULATED TENANCIES/(vi) Certain Housing Association Tenancies/905. Meaning of 'housing association tenancy'.

## **(vi) Certain Housing Association Tenancies**

### **905. Meaning of 'housing association tenancy'.**

For the purposes of the provisions about rent limits set out in the following paragraphs<sup>1</sup>, 'housing association tenancy' means a tenancy, other than a co-ownership tenancy<sup>2</sup>, where:

- 1770 (1) the interest of the landlord under the tenancy belongs to a housing association<sup>3</sup> or housing trust<sup>4</sup> or to the Housing Corporation<sup>5</sup> (or to the Secretary of State<sup>6</sup> where that interest belongs to him as the result of the exercise by him of functions under Part III of the Housing Associations Act 1985<sup>7</sup>); and
- 1771 (2) the tenancy would be a protected tenancy<sup>8</sup> but for its express statutory exclusion<sup>9</sup> and is not a business<sup>10</sup> tenancy<sup>11</sup>.

An old-style assured tenancy could not be a housing association tenancy<sup>12</sup>; and a tenancy which is entered into on or after 15 January 1989<sup>13</sup> cannot be a housing association tenancy except in certain transitional cases<sup>14</sup>.

1 I.e. for the purposes of the Rent Act 1977 Pt VI (ss 86-97) (as amended): see the text and notes 2-14 infra; and PARA 906 et seq post.

2 For these purposes, a tenancy is a co-ownership tenancy if (1) it was granted by a housing association which is a co-operative housing association within the meaning of the Housing Associations Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 11); and (2) the tenant or his personal representative will, under the terms of the tenancy agreement or the agreement under which he became a member of the association, be entitled, on his ceasing to be a member and subject to any conditions stated in either agreement, to a sum calculated by reference directly or indirectly to the value of the dwelling house: Rent Act 1977 s 86(3A) (added by the Housing Act 1980 s 77, Sch 10 para 1(1), (4); amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (5)).

3 For these purposes, 'housing association' has the same meaning as in the Housing Associations Act 1985 (see PARA 863 note 5 ante): Rent Act 1977 s 86(3) (amended by the Housing (Consequential Provisions) Act

1985 Sch 2 para 35(1), (5)). In the Rent Act 1977 Pt VI (ss 86-97) (as amended) (see PARA 906 et seq post), 'housing association' has the meaning assigned to it by s 86 (as so amended): s 97(1).

4 For these purposes, 'housing trust' has the same meaning as in ibid s 15 (as amended) (see PARA 887 ante): s 86(4) (substituted by the Housing Act 1980 Sch 10 para 1(5)). In the Rent Act 1977 Pt VI (ss 86-97) (as amended), 'housing trust' has the meaning assigned to it by s 86 (as so amended): s 97(1).

5 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18. 'Housing association tenancy' also included a tenancy where the landlord's interest belonged to the former Housing for Wales.

6 As to the Secretary of State see PARA 27 note 3 ante; as to the exercise of functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) by the 'relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 5; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Ie under ibid Pt III (as amended): see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

8 For the meaning of 'protected tenancy' see PARA 818 ante.

9 Ie by the Rent Act 1977 s 13 (as substituted) s 15 (as amended) or s 16 (as amended): see PARAS 883, 885-888 ante.

10 Ie a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) applies: see PARAS 706-708 ante.

11 Rent Act 1977 s 86(1), (2) (amended by the Housing Act 1980 Sch 10 para 1(2); the Housing Act 1988 s 140(1), Sch 17 Pt II para 100; the Government of Wales Act 1998 ss 141, 152, Sch 18 Pt VI; and by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 1). In the Rent Act 1977 Pt VI (ss 86-97) (as amended), 'tenancy' means a housing association tenancy; and 'housing association tenancy' has the meaning assigned to it by s 86 (as so amended): s 97(1).

12 See the Housing Act 1980 s 56 (repealed with savings by the Housing Act 1988 s 140(2), Sch 18); and PARA 890 ante.

13 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

14 See PARAS 1013, 1015 post.

## UPDATE

### 905 Meaning of 'housing association tenancy'

TEXT AND NOTE 5--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(3) RENT UNDER REGULATED TENANCIES/(vi) Certain Housing Association Tenancies/906. Rent limit for housing association tenancy.

### 906. Rent limit for housing association tenancy.

Where no rent for a dwelling house subject to a housing association tenancy<sup>1</sup> is registered<sup>2</sup>, the rent limit is determined as follows:

- 1772 (1) if the lease or agreement creating the tenancy was made before 1 January 1973, the rent limit is the rent recoverable under the tenancy, as varied by any agreement<sup>3</sup> made before that date, but not as varied by any later agreement<sup>4</sup>;
- 1773 (2) if head (1) above does not apply, and not more than two years before the tenancy began the dwelling house was subject to another tenancy<sup>5</sup>, whether before 1973 or later, the rent limit is the rent recoverable under that other tenancy, or, if there was more than one, the last of them, for the last rental period<sup>6</sup> thereof;
- 1774 (3) if neither head (1) nor head (2) above applies, the rent limit is the rent payable under the terms of the lease or agreement creating the tenancy, and not the rent so payable under those terms as varied by any subsequent agreement<sup>8</sup>.

Where for any period there is a difference between the amount, if any, of the rates<sup>9</sup> borne by the landlord or a superior landlord in respect of the dwelling house and the amount, if any, so borne in the rental period on which the rent limit is based, the rent limit is increased or decreased by the amount of the difference<sup>10</sup>.

Where a rent for the dwelling house is registered, then, subject to the provisions relating to phasing where these still apply<sup>11</sup>, the rent limit is the rent so registered<sup>12</sup>; but, where any rates in respect of the dwelling house are borne by the landlord or a superior landlord, the amount of those rates<sup>13</sup> must be added to the limit so imposed<sup>14</sup>. Where the rent payable under a housing association tenancy would exceed the rent limit<sup>15</sup>, the amount of the excess is irrecoverable from the tenant<sup>16</sup>.

A county court has jurisdiction<sup>17</sup> to determine any question as to the rent limit or as to any matter which is or may become material for determining any such question<sup>18</sup>. Where a tenant has paid on account of rent any amount which is irrecoverable by the landlord<sup>19</sup>, the tenant who paid it is entitled to recover that amount from the landlord who received it or his personal representatives<sup>20</sup>.

1 For the meaning of 'housing association tenancy' see for these purposes para 905 ante.

2 For these purposes, references to registration are references to registration pursuant to the Rent Act 1977 s 87 (as amended) (see PARAS 914-915 post): s 97(2).

3 For these purposes, references to the variation by agreement of the rent recoverable include references to a variation under *ibid* s 93 (as amended) (ie a notice of increase by the landlord accepted by the tenant: see PARA 907 post): s 93(5).

4 *Ibid* s 88(4)(a).

5 For these purposes, the reference to another tenancy includes, in addition to a housing association tenancy, a regulated tenancy which subsisted at any time after 1 April 1975 and under which, immediately before it came to an end, the landlord's interest belonged to a housing association: *ibid* s 88(5). For the meaning of 'regulated tenancy' see PARA 854 ante; and for the meaning of 'housing association' see PARA 905 note 3 ante.

6 For the meaning of 'rental period' see PARA 853 note 3 ante.

7 Rent Act 1977 s 88(4)(b) (amended by the Housing Act 1980 s 152(1), Sch 25 para 40). A tenancy commencing, whether before, on or after 29 August 1977, while there is in operation a condition imposed under any of the following enactments: (1) the Housing (Financial Provisions) Act 1924 s 2 (repealed); (2) the Housing Act 1985 s 438, Sch 16 para 2 or any corresponding earlier enactment; (3) the Housing Act 1949 s 23 (repealed); and (4) the Housing Act 1985 s 33 or any corresponding earlier enactment, which imposes a rent limit in respect of the dwelling house, must be disregarded for the purposes of the Rent Act 1977 s 88(4)(b) (as so amended) in determining the rent limit under any subsequent tenancy of the dwelling house: s 88(7) (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (6)).

Where the rent payable under a tenancy is subject to the rent limit specified in the Rent Act 1977 s 88(4)(b) (as so amended), the landlord, on being so requested in writing by the tenant, must supply him with a written statement of the rent which was payable for the last rental period of the other tenancy referred to in s 88(4) (as amended): s 95(1). If, without reasonable excuse, a landlord who has received such a request fails to supply the

written statement within 21 days of receiving the request, or supplies a statement which is false in any material particular, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale: s 95(2) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante. Where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or secretary or other similar officer of the body or any person who was purporting to act in such a capacity, he as well as the body is guilty of that offence and is liable to be proceeded against and punished accordingly: s 95(3). As to the standard scale see PARA 52 note 6 ante; for the meaning of 'landlord' see PARA 816 note 2 ante; and for the meaning of 'tenant' see PARA 816 note 3 ante.

8 Ibid s 88(4)(c).

9 For the meaning of 'rates' see PARA 862 note 5 ante. Presumably the rates are ascertained in accordance with ibid s 27 (repealed), Sch 5 (see PARA 896 ante): cf s 88(3) (see note 13 infra). As to the abolition of domestic rates see PARA 521 ante.

10 Ibid s 88(6). In ascertaining for the purposes of Pt VI (ss 86-97) (as amended) whether there is any difference with respect to rent or rates between one rental period and another, whether of the same tenancy or not, or the amount of any such difference, any necessary adjustments must be made to take account of periods of different lengths: s 96(4). For the purposes of such an adjustment, a period of one month is treated as equivalent to one-twelfth of a year and a period of one week is treated as equivalent to one-fifty-second of a year: s 96(5).

11 See ibid s 89 (repealed with savings by the Housing Act 1988 s 140, Sch 17 para 24, Sch 18).

12 Rent Act 1977 s 88(2) (amended by the Housing Act 1980 Sch 25 para 40; the Housing Act 1988 Sch 17 para 24, Sch 18).

13 The rates must be ascertained in accordance with the Rent Act 1977 Sch 5 (see PARA 896 ante): s 88(3).

14 Ibid s 88(3). References in Pt VI (ss 86-97) (as amended) to the amount of the registered rent include any amount added in this way: s 88(3).

15 Ie as determined in accordance with the above provisions.

16 Rent Act 1977 ss 88(1), 97(1).

17 This jurisdiction is exercisable either in the course of any proceedings relating to a dwelling house or on an application made for that purpose by the landlord or by the tenant: ibid s 96(3).

18 Ibid s 96(3). As to applications to the county court generally see PARA 980 et seq post.

19 Ie which is irrecoverable by virtue of ibid Pt VI (ss 86-97) (as amended). As to the treatment of erroneous entries in a rent book see s 94(4), (5) (as amended); and PARA 904 ante. The court has no power to correct erroneous entries: cf s 58; and PARA 983 post.

20 Ibid s 94(1). Without prejudice to any other method of recovery, any amount which a tenant is so entitled to recover may be deducted by the tenant from any rent payable by him to the landlord (s 94(2)); but no such amount is recoverable at any time after the expiry of two years from the date of payment (s 94(3)). See also PARA 903 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(3) RENT UNDER REGULATED TENANCIES/(vi) Certain Housing Association Tenancies/907. Increase of rent under housing association tenancy without notice to quit.

### **907. Increase of rent under housing association tenancy without notice to quit.**

Where a housing association tenancy<sup>1</sup> is a weekly or other periodical tenancy, the rent payable to the landlord<sup>2</sup> may, without the tenancy being terminated, be increased with effect from the beginning of any rental period<sup>3</sup> by a written notice of increase<sup>4</sup>, specifying the date on which

the increase is to take effect and given by the landlord to the tenant<sup>5</sup> not later than four weeks before that date<sup>6</sup>.

Where such a notice of increase is given and, before the date specified in it, the tenant gives a valid notice to quit, the notice of increase does not take effect unless the tenant, with the landlord's written agreement, withdraws his notice to quit before that date<sup>7</sup>.

1 For the meaning of 'housing association tenancy' for these purposes see PARA 905 ante.

2 For these purposes, 'the landlord' means the housing association or, as the case may be, the housing trust or the Housing Corporation or the Secretary of State: Rent Act 1977 s 93(1) (amended by the Housing Act 1988 s 140(1), Sch 17 para 100; the Government of Wales Act 1998 s 152, Sch 18, Pt VI; and by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 1). For the meaning of 'housing trust' see PARA 905 note 4 ante. As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq; as to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'rental period' see PARA 853 note 3 ante.

4 As to notices of increase see PARA 901 ante.

5 For the meaning of 'tenant' see PARA 816 note 3 ante.

6 Rent Act 1977 s 93(1) (as amended (see note 2 supra); further amended by the Housing Act 1980 s 77, Sch 10 para 5(1), (2) which applies to notices of increase given on or after 28 November 1980 (Sch 10 para 5(5)).

The Rent Act 1977 s 93 (as amended) applies to a tenancy notwithstanding that the letting took place before the coming into force of that Act: s 93(4). This provision was in fact previously contained in the Housing Finance Act 1972 s 87 (repealed). Nothing in the Rent Act 1977 s 93 (as amended) authorises any rent to be increased above the rent limit: s 93(5). In the absence of a contractual rent review provision, the contract of tenancy will normally impose a limit on the rent payable to the landlord. Accordingly, without s 93 (as amended) it would be necessary, in order to increase the rent payable up to the rent limit, for the landlord to serve a notice to quit and then to offer a new contract of tenancy to the tenant; thus s 93 (as amended) allows the rent to be increased without terminating the tenancy. Where the landlord is a housing association, a housing trust, the Housing Corporation or the Secretary of State, so that the rent restriction provisions of Pt VI (ss 86-97) (as amended) apply, the tenant can never be a statutory tenant but must always remain a contractual tenant: see s 13 (as substituted), ss 15, 16 (as amended) and PARA 883 et seq ante. Substantially similar provisions apply to local authority tenancies: see the Housing Act 1985 s 25 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 256. See further *Greater London Council v Connolly* [1970] 2 QB 100, [1970] 1 All ER 870, CA.

7 Rent Act 1977 s 93(2) (substituted by the Housing Act 1980 Sch 10 para 5(3)). As to the termination of a periodical tenancy by notice to quit see PARA 213 ante.

## UPDATE

### **907 Increase of rent under housing association tenancy without notice to quit**

TEXT AND NOTES 1-6--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(3) RENT UNDER REGULATED TENANCIES/(vii) Restrictions on Distress/908. Restrictions on levy of distress for rent.

## **(vii) Restrictions on Distress**

## **908. Restrictions on levy of distress for rent.**

No distress for the rent of any dwelling house let<sup>1</sup> on a protected tenancy<sup>2</sup> or subject to a statutory tenancy<sup>3</sup> may be levied except with the leave of the county court<sup>4</sup>. With respect to any application for such leave, the court has the same or similar powers with respect to adjournment, stay, suspension, postponement and otherwise as are conferred by statute<sup>5</sup> in relation to proceedings for possession of such a dwelling house<sup>6</sup>.

1 For the meaning of 'let' see PARA 820 ante.

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For the meaning of 'statutory tenancy' see PARA 831 ante.

4 Rent Act 1977 s 147(1). Nothing in s 147(1) applies, however, to distress levied under the County Courts Act 1984 s 102 (as amended) (see CIVIL PROCEDURE vol 12 (2009) PARA 1353): Rent Act 1977 s 147(2) (amended by the County Courts Act 1984 s 148(1), Sch 2 para 67). Cf the Housing Act 1988 s 19; and PARA 1090 post.

5 le by the Rent Act 1977 s 100 (as amended): see PARA 972 post.

6 Ibid s 147(1). See also note 4 supra. As to the jurisdiction of the court see PARA 982 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(i) Administration; in general/A. REGISTRATION AREAS AND RENT ASSESSMENT COMMITTEES/909. Registration areas.

## **(4) REGISTRATION OF RENT**

### **(i) Administration; in general**

#### ***A. REGISTRATION AREAS AND RENT ASSESSMENT COMMITTEES***

## **909. Registration areas.**

Except so far as different provision is made by an order under the Local Government Act 1992<sup>1</sup>, the registration areas in England for the purposes of the statutory provisions relating to registration of rents under regulated tenancies<sup>2</sup> are counties and county boroughs, London boroughs and the City of London<sup>3</sup>. The City of London is deemed to include the Inner Temple and the Middle Temple<sup>4</sup>.

Wales is a registration area<sup>5</sup>, as are the Isles of Scilly<sup>6</sup>; and the Council of the Isles of Scilly is the local authority for the latter registration area<sup>7</sup>.

If the Secretary of State<sup>8</sup> is of the opinion:

- 1775 (1) that there is at any time insufficient work in two or more registration areas to justify the existence of a separate service of rent officers<sup>9</sup> for each area; or
- 1776 (2) that it would at any time be beneficial for the efficient administration of the service provided by rent officers in two or more registration areas,

he may, after consultation<sup>10</sup> with the local authorities concerned, make a scheme<sup>11</sup> designating as an amalgamated registration area the areas of those authorities and making provision accordingly for that amalgamated area<sup>12</sup>. A scheme so made for an amalgamated registration area may contain such incidental, transitional and supplementary provisions as appear to the Secretary of State to be necessary or expedient<sup>13</sup>; and such a scheme:

- 1777 (a) must confer on the proper officer of one of the constituent authorities all or any of the functions which fall<sup>14</sup> to be exercisable by the proper officer of the local authority for the registration area;
- 1778 (b) may provide that any rent officer previously appointed for the area of any one of the constituent authorities shall be treated for such purposes as may be specified in the scheme as a rent officer appointed for the amalgamated registration area; and
- 1779 (c) must make such provision as appears to the Secretary of State to be appropriate for the payment by one or more of the constituent authorities of the remuneration, allowances and other expenditure which is to be paid<sup>15</sup> by the local authority for the area<sup>16</sup>.

The appointment and remuneration of rent officers is, however, no longer a function of local authorities<sup>17</sup>.

1   Ie by an order under the Local Government Act 1992 s 17 (as amended) (implementation of boundary etc changes recommended by the Electoral Commission): ELECTIONS AND REFERENDUMS. As to the exercise of that power see eg the Local Government Changes (Rent Act Registration Areas) Order 1995, SI 1995/3264; the Local Government Changes (Rent Act Registration Areas) Order 1996, SI 1996/2547; the Local Government Changes (Rent Act Registration Areas) Order 1998, SI 1998/54.

2   Ie for the purposes of the Rent Act 1977 Pt IV (ss 62-75) (as amended): see the text and notes 3-16 infra; and PARA 911 et seq post.

3   Rent Act 1977 s 62(1) (amended by the Local Government Act 1985 s 16, Sch 8 para 13(1), (2); the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 3(2); and by the Local Government Changes (Rent Act) Regulations 1995, SI 1995/2451, reg 3; the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 10(a), (b)). As to the London boroughs and the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq.

4   Rent Act 1977 s 62(2)(a) (amended by the Local Government Act 1985 Sch 8 para 13(1), (2)).

5   Rent Act 1977 s 62(1A) (added by the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 10(c)).

6   Rent Act 1977 s 62(2)(b).

7   Ibid s 62(2)(b). As to the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36; and as to the application of the Rent Act 1977 to those Isles see s 153 (as amended); and PARA 815 ante.

8   As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions under the Rent Act 1977 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

9   As to the appointment and functions of rent officers see PARAS 911-913 post.

10   As to what constitutes consultation see *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496; *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13, CA; *Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 All ER 280, [1972] 1 WLR 190; *R v Secretary of State for Social Services, ex p Association of Metropolitan Authorities* [1986] 1 All ER 164, [1986] 1 WLR 1.

11   Ie under the Rent Act 1977 s 63 (as amended): see PARA 911 post.

12   Ibid s 64A(1) (s 64A added by the Housing Act 1988 s 120, Sch 14 Pt II). Any reference in the Rent Act 1977 ss 64B-75 (as amended) to a registration area includes a reference to an amalgamated registration area

and, in relation to such an area, 'the constituent authorities' means the local authorities whose areas make up the amalgamated area: s 64A(2) (as so added).

13 Ibid s 64A(4) (as added: see note 12 supra).

14 Ie in accordance with ibid s 63 (as amended).

15 See note 11 supra.

16 Rent Act 1977 s 64A(3) (as added: see note 12 supra).

17 See PARA 911 the text and notes 10-17 post.

## UPDATE

### 909 Registration areas

NOTE 1--Local Government Act 1992 s 17 repealed: Local Democracy, Economic Development and Construction Act 2009 Sch 7.

TEXT AND NOTE 3--1977 Act s 62(1) further amended: Local Government and Public Involvement in Health Act 2007 Sch 1 para 13.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(i) Administration; in general/A. REGISTRATION AREAS AND RENT ASSESSMENT COMMITTEES/910. Rent assessment committees.

### 910. Rent assessment committees.

Rent assessment committees must be constituted in accordance with the following provisions<sup>1</sup>.

The Secretary of State<sup>2</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>3</sup> must draw up and from time to time revise panels of persons to act as chairmen and other members of rent assessment committees for such areas, comprising together every registration area<sup>4</sup>, as he or the Assembly or minister may from time to time determine<sup>5</sup>. Each panel must consist of a number of persons appointed by the Lord Chancellor<sup>6</sup> and a number of persons appointed by the Secretary of State or the Assembly or minister<sup>7</sup>; and the Secretary of State or the Assembly or minister must nominate one of the persons appointed by the Lord Chancellor to act as president of the panel and one or more such persons to act as vice-president or vice-presidents<sup>8</sup>.

The number of rent assessment committees to act for an area and the constitution of those committees must be determined<sup>9</sup> by the president of the panel formed for that area or, in the case of his absence or incapacity, by the vice-president or, as the case may be, one of the vice-presidents<sup>10</sup>. Each rent assessment committee must consist<sup>11</sup> of a chairman and one or two other members, and the chairman must be either the president or vice-president or, as the case may be, one of the vice-presidents, of the panel or one of the other members appointed by the Lord Chancellor<sup>12</sup>. The president of the panel may, if he thinks fit, direct that, when dealing with such cases or dealing with a case in such circumstances as may be specified in the direction, the chairman sitting alone may, with the consent of the parties, exercise the functions of a rent assessment committee<sup>13</sup>; and, when dealing with an application for deregistration of a rent<sup>14</sup>, a rent assessment committee carrying out the functions of a rent tribunal must consist of the chairman of the committee sitting alone<sup>15</sup>. There must be paid to



members of panels such remuneration and allowances as the Secretary of State or the Assembly or minister may determine<sup>16</sup>.

The president of the panel may appoint, with the approval of the Secretary of State or the Assembly or minister as to numbers, such clerks and other officers and servants of rent assessment committees as he thinks fit<sup>17</sup>.

1 Rent Act 1977 s 65. Rent assessment committees, residential property tribunals and leasehold valuation tribunals have now been brought together under one umbrella service, known as the Residential Property Tribunal Service. As to residential property tribunals see HOUSING vol 22 (2006 Reissue) PARAS 187-188; and as to leasehold valuation tribunals see PARA 58 et seq ante.

2 As to the Secretary of State see PARA 27 note 3 ante.

3 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

4 For the meaning of 'registration area' see PARA 909 ante.

5 Rent Act 1977 s 65, Sch 10 para 1.

6 No appointment of a person to any panel by the Lord Chancellor may be such as to extend beyond the day on which the person attains the age of 70 years; but this is subject to the Judicial Pensions and Retirement Act 1993 s 26(4)-(6) (as amended) (power to authorise continuance in office up to the age of 75 years: see COURTS vol 10 (Reissue) PARA 535): Rent Act 1977 Sch 10 para 2A (added by the Judicial Pensions and Retirement Act 1993 s 26, Sch 6 para 56).

7 Rent Act 1977 Sch 10 para 2 (amended by the Housing Act 1980 s 152, Sch 25 para 56, Sch 26).

8 Rent Act 1977 Sch 10 para 3. The Secretary of State or the Assembly may provide for the payment of pensions, allowances or gratuities to or in respect of any person nominated to act as president or vice-president of a panel: Sch 10 para 7A (added by the Housing Act 1980 s 148; amended by the Housing Act 1996 ss 222, 227, Sch 18 para 22(1)(a), Sch 19 Pt XIII).

9 Ie subject to the Rent Act 1977 Sch 10 (as amended): see the text and notes 1-8 supra, 10-17 infra.

10 Ibid Sch 10 para 4.

11 Ie subject to ibid Sch 10 para 6 and Sch 10 para 6A (as added): see the text and notes 13-15 infra.

12 Ibid Sch 10 para 5 (amended by the Housing Act 1980 s 71(2)).

13 Rent Act 1977 Sch 10 para 6.

14 Ie under ibid s 81A (as added and amended): see PARA 1001 post.

15 Ibid Sch 10 para 6A (added by the Housing Act 1980 s 71(2)). Rent assessment committees are under the direct supervision of the Council on Tribunals: see the Tribunals and Inquiries Act 1992 s 1(1), Sch 1 para 37. See further ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 57.

16 Rent Act 1977 Sch 10 para 7 (Sch 10 paras 7, 8 amended by the Housing Act 1996 ss 222, 227, Sch 18 para 22(1)(a), Sch 19 Pt XIII). In the case of panels in England, such remuneration and allowances must be paid out of moneys provided by Parliament: see the Rent Act 1977 Sch 10 para 9(a).

17 Ibid Sch 10 para 8 (as amended: see note 16 supra). The salaries and allowances of such clerks and other officers and servants so appointed in England, and such other expenses of a panel as the Secretary of State may determine, must be paid out of moneys provided by Parliament: see Sch 10 para 9(b), (c) (amended by the Housing Act 1996 s 222, Sch 18 para 22(2)).

Administration; in general/B. APPOINTMENT OF RENT OFFICERS/911. Appointment of rent officers; in general.

## **B. APPOINTMENT OF RENT OFFICERS**

### **911. Appointment of rent officers; in general.**

The Rent Act 1977 contains provisions requiring the Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup>, after consultation<sup>3</sup> with the local authority<sup>4</sup>, to make for every registration area<sup>5</sup> a scheme providing for the appointment by the proper officer of the local authority of such number of rent officers<sup>6</sup> for the area as might be determined by or in accordance with the scheme<sup>7</sup>. Default powers are also conferred on the Secretary of State or the Assembly or minister if a local authority<sup>8</sup> or its proper officer has failed to carry out any function or functions conferred on it or on him by such a scheme<sup>9</sup>.

All schemes made under these provisions in respect of England which were in existence immediately before 1 October 1999 ceased, however, to have effect from that date<sup>10</sup> and no new schemes are to be created<sup>11</sup>. Rent officers in England are now appointed by the Secretary of State<sup>12</sup>. Anyone who was a rent officer immediately before that date and who was appointed in pursuance of a scheme so made continues to be a rent officer<sup>13</sup> and other transitional provisions apply<sup>14</sup>. Similarly, all such schemes made in respect of Wales which were in existence immediately before 1 June 2003 ceased to have effect from that date<sup>15</sup> and no new schemes are to be created<sup>16</sup>. Rent officers and administrative staff employed in the provision of the rent officer service are now employees of the National Assembly for Wales<sup>17</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'consultation' see PARA 909 note 10 ante.

4 As to the appropriate local authorities see PARA 909 ante. In the case of a registration area in respect of which there is more than one local authority, the Rent Act 1977 s 63 (as amended) (see the text and notes 1-3 supra, 5-9 infra) applies as if: (1) the first reference to 'the local authority' in s 63(1) (as amended) were a reference to each of those local authorities which is (a) the county council for a county in England; or (b) the council for a district in England which is not in a county having a county council; and (2) the second reference to 'the local authority' in s 63(1) (as amended), the references to 'the local authority' in s 63(2) (as amended) and s 63(2A)(c) (as added), the reference to 'a local authority' in s 63(2A)(g) (as added) and the reference to 'the local authority for whose area the scheme is made' in s 63(3) (as amended) (see note 7 infra) were references to such one of those authorities as has been designated by the scheme: s 63(9) (added by the Local Government Act 1985 s 16, Sch 8 para 13; substituted by the Local Government Changes (Rent Act) Regulations 1995, SI 1995/2451, reg 4). See further note 7 infra.

5 For the meaning of 'registration area' see PARA 909 ante.

6 In the Rent Act 1977 Pt IV (ss 62-75) (as amended) 'the rent officer' means (1) in relation to any area not specified in an order made under s 64B (as added) (see PARA 912 post), any rent officer appointed for the area who is authorised to act in accordance with a scheme under s 63 (as amended); (2) in relation to any area or areas so specified, any rent officer appointed by the Secretary of State or, in relation to Wales, any rent officer appointed by the National Assembly for Wales or the relevant Welsh minister: s 63(4) (substituted by the Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 7(a); amended by the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 11).

7 Rent Act 1977 s 63(1) (amended by the Housing Act 1988 ss 120, 140(2), Sch 14 Pt I para 1, Sch 18). Such a scheme might be varied or revoked by a subsequent scheme so made: see the Rent Act 1977 s 63(5). For the provisions which such a scheme was to contain see s 63(2) (amended by the Housing Act 1988 Sch 14 Pt I para 2, Sch 18); and for the provisions which it might contain see the Rent Act 1977 s 63(2A) (added by the Housing Act 1988 Sch 14 Pt I para 3).

For the purposes of any local Act scheme within the meaning of the Superannuation Act 1972 s 8, rent officers appointed in pursuance of a scheme under the Rent Act 1977 s 63 (as amended) are deemed to be officers in

the employment of the local authority for whose area the scheme is made; and they are deemed to be in that employment under a contract of service for the purposes of the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended), the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended) and the Social Security Administration Act 1992: Rent Act 1977 s 63(3) (amended by the Housing Act 1988 Sch 14 Pt I para 3, Sch 18; the Pension Schemes Act 1993 s 190, Sch 8 para 10); Social Security (Consequential Provisions) Act 1992 s 2(4).

The Secretary of State or the Assembly or minister must, in respect of each financial year, make to any local authority incurring expenditure which is of a specified kind, a grant equal to that expenditure: Rent Act 1977 s 63(6). The expenditure so specified is any expenditure (a) attributable to s 63 (as amended) or an order under the Housing Act 1996 s 122 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 157); or (b) incurred in respect of pensions, allowances or gratuities payable to or in respect of rent officers appointed in pursuance of a scheme under the Rent Act 1977 s 63 (as amended) by virtue of regulations under the Superannuation Act 1972 s 7 or s 24 (as amended); or (c) incurred in respect of increases of pensions payable to or in respect of rent officers so appointed by virtue of the Pensions (Increase) Act 1971: Rent Act 1977 s 63(7) (amended by the Housing Act 1988 s 121(3), Sch 14 Pt I para 5, Sch 18; the Housing Act 1996 s 123, Sch 13 para 1). Any expenditure incurred by the Secretary of State by virtue of the Rent Act 1977 s 63(6) must be paid out of money provided by Parliament: s 63(8).

8 As to the local authorities concerned see PARA 909 ante.

9 See the Rent Act 1977 s 64(1)-(4).

10 Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 2(1), (3).

11 Ibid art 2(2).

12 See PARA 912 post.

13 Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 8(1).

14 See ibid art 8(2)-(5).

15 Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, arts 1(3), 2(1).

16 Ibid art 2(2).

17 See ibid art 3; and PARA 912 post.

## UPDATE

### 911 Appointment of rent officers; in general

NOTE 6--Definition of 'the rent officer' amended: SI 2008/3134.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(i) Administration; in general/B. APPOINTMENT OF RENT OFFICERS/912. New basis for administration of rent officer service.

### 912. New basis for administration of rent officer service.

If, with respect to registration areas<sup>1</sup> generally or any particular registration area or areas, it appears to the Secretary of State<sup>2</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>3</sup> that it is no longer appropriate for the appointment, remuneration and administration of rent officers<sup>4</sup> to be a function of local authorities, he or the Assembly or minister may by order:

- 1780 (1) provide that no scheme<sup>5</sup> is to be made for the area or areas specified in the order; and
- 1781 (2) make, with respect to the area or areas so specified, such provision as appears to him or to the Assembly or minister to be appropriate with respect to the appointment, remuneration and administration of rent officers and the payment of pensions, allowances or gratuities to or in respect of them<sup>6</sup>.

An order so made must make provision for any expenditure attributable to the provisions of the order to be met by the Secretary of State or the Assembly or minister in such manner as may be specified in the order, whether by way of grant, reimbursement or otherwise; and any expenditure incurred by the Secretary of State by virtue of this provision must be paid out of money provided by Parliament<sup>7</sup>.

These powers have been exercised in relation to England by the Secretary of State<sup>8</sup> and in relation to Wales by the Assembly<sup>9</sup>.

1 For the meaning of 'registration area' see PARA 909 ante.

2 As to the Secretary of State see PARA 27 note 3 ante.

3 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

4 For the meaning of 'rent officer' see PARA 911 note 6 ante.

5 I.e. under the Rent Act 1977 s 63 (as amended): see PARA 911 ante.

6 Ibid s 64B(1) (s 64B added by the Housing Act 1988 s 120, Sch 14 Pt II). An order so made (1) may contain such incidental, transitional and supplementary provisions as appear to the Secretary of State or the Assembly to be appropriate, including provisions amending the Rent Act 1977 Pt IV (ss 62-75) (as amended); and (2) must be made by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 64B(3) (as so added).

7 Ibid s 64B(2) (as added: see note 6 supra).

8 See PARA 911 the text and notes 10-14 ante, PARA 913 post.

9 See PARA 911 the text and notes 15-17 ante, PARA 913 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(i) Administration; in general/B. APPOINTMENT OF RENT OFFICERS/913. Current arrangements for the administration of the rent officer service.

### **913. Current arrangements for the administration of the rent officer service.**

Subject to transitional provisions<sup>1</sup>, the Secretary of State<sup>2</sup> must appoint such number of rent officers<sup>3</sup> for all the registration areas in England ('the specified areas') as he considers necessary<sup>4</sup>. He may appoint rent officers for fixed periods and may suspend or dismiss them<sup>5</sup>. He must remunerate rent officers and must determine the amounts of their remuneration having regard to any representations from such persons as he accepts as being representative of rent officers<sup>6</sup>.

The Secretary of State must:

- 1782 (1) provide office accommodation and clerical and other assistance for rent officers;
- 1783 (2) allocate work as between rent officers; and
- 1784 (3) supervise the conduct of rent officers<sup>7</sup>;

but rent officers must discharge such of the Secretary of State's functions under heads (1) to (3) above as he may direct either generally or as respects particular rent officers<sup>8</sup>. The Secretary of State may direct a rent officer to carry out the functions of a rent officer within such registration area as the Secretary of State may specify<sup>9</sup>.

A local authority may, by arrangement with the Secretary of State (which may include terms as to payment) and in connection with his statutory functions<sup>10</sup>:

- 1785 (a) provide goods or materials, or administrative, professional or technical services to the Secretary of State;
- 1786 (b) allow the Secretary of State to use any vehicle, plant or apparatus belonging to the local authority and, without prejudice to head (a) above, place at his disposal any person employed in connection with the vehicle or other property in question; or
- 1787 (c) carry out works of maintenance, including minor renewals, minor improvements and minor extensions, in connection with land or buildings for the maintenance of which the Secretary of State is responsible<sup>11</sup>;

but nothing in heads (a) and (b) above authorises a local authority to construct any buildings or works<sup>12</sup>.

Any expenditure which is of a specified kind<sup>13</sup> must be met by the Secretary of State by grant, reimbursement or otherwise<sup>14</sup>.

In relation to Wales, on 1 June 2003 the contracts of employment of rent officers and the administrative staff employed in the rent officer service were transferred to the National Assembly for Wales<sup>15</sup>, as were the property (not including interests in land or buildings) held and the rights and liabilities to which the relevant bodies<sup>16</sup> were entitled or subject, in connection with the rent officer service<sup>17</sup>. As from that date, the Assembly or the relevant minister must:

- 1788 (i) appoint and remunerate rent officers;
- 1789 (ii) determine the amounts of rent officers' remuneration having regard to any representations from such persons as it accepts as being a representative of rent officers; and
- 1790 (iii) pay, or as appropriate secure the payment of, such pensions, allowances and gratuities to or in respect of rent officers in accordance with their status as civil servants<sup>18</sup> appointed by the Assembly or minister<sup>19</sup>.

The Assembly or minister must:

- 1791 (A) provide office accommodation and clerical and other assistance for rent officers;
- 1792 (B) allocate work as between rent officers; and
- 1793 (C) supervise the conduct of rent officers<sup>20</sup>;

and rent officers are to discharge such rent officer duties as the Assembly or minister may direct<sup>21</sup>.

Any expenditure which is of a specified kind<sup>22</sup> is to be met by the Assembly or minister by way of grant, reimbursement or otherwise<sup>23</sup>.

1 See the Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 8; and PARA 911 the text and notes 13-14 ante.

2 As to the Secretary of State see PARA 27 note 3 ante.

3 For the meaning of 'rent officer' see PARA 911 note 6 ante.

4 Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, arts 2(1), 3(1).

5 Ibid art 3(2).

6 Ibid art 4(1). Pensions, allowances and gratuities must be paid to or in respect of rent officers in accordance with the Superannuation Act 1972 s 1 (as amended) or a scheme made under s 1, or regulations made under s 7 or s 24 (as amended): Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 4(2).

7 Ibid art 5(1).

8 Ibid art 5(2).

9 Ibid art 5(3).

10 Ie his functions under the Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403.

11 Ibid art 5(4).

12 Ibid art 5(5).

13 Ie expenditure mentioned in ibid art 6(2): art 6(1). That expenditure is any expenditure (1) attributable to the Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403; or (2) incurred in respect of pensions, allowances or gratuities payable to or in respect of rent officers (appointed in pursuance of a scheme made under the Rent Act 1977 s 63 (as amended) (see PARA 911 ante) or under the 1999 Order) by virtue of the Superannuation Act 1972 s 1 (as amended) or regulations made under s 7 or s 24 (as amended); or (3) incurred in respect of increases of pensions payable to or in respect of rent officers (so appointed) by virtue of the Pensions (Increase) Act 1971: Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 6(2).

14 Ibid art 6(1).

15 See the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, arts 1(3), 3, 4, 8.

16 'Relevant body' ('corff perthnasol') means the body which immediately before the transfer date (ie 1 June 2003) employed the relevant employee: ibid art 1(3).

17 See ibid art 5. As to the new arrangements for the devolved government in Wales which will come into force in 2007 see PARA 27 note 4 ante; and as to the power to transfer to the Welsh ministers, the First Minister, the Counsel General or the Assembly Commission any specified property, rights or liabilities, or property, rights or liabilities of any specified description, to which the Assembly constituted by the Government of Wales Act 1998 is entitled or subject or to which that Assembly was entitled or subject immediately before the end of the initial period see PARA 773 note 3 ante.

18 Ie and in accordance with the Superannuation Act 1972 s 1 (as amended) or a scheme made thereunder: Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 6(c).

19 Ibid art 6.

20 Ibid 7(1).

21 Ibid art 7(2).

22 Ie any expenditure incurred by the relevant bodies which is of a kind mentioned in ibid art 9(2): art 9(1). Such expenditure is any reasonable expenditure attributable to the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, and (1) incurred in respect of pensions, allowances or gratuities payable to or in respect of rent officers by virtue of the Superannuation Act 1972 s 1 (as amended) or regulations made under

s 7 or s 24 (as amended); or (2) incurred in respect of increases of pensions payable to or in respect of rent officers (so appointed) by virtue of the Pensions (Increase) Act 1971; or (3) incurred in respect of any land or buildings or any interest in any land or buildings which was, immediately before the coming into force of the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, (ie 1 June 2003: see art 1(1)), used for the purposes of the rent officer service where the relevant body has not been able to put that property to an alternative use or otherwise dispose of the same following the coming into force of that Order: art 9(2).

23 Ibid art 9(1). All sums of expenditure mentioned in art 9(1) are to be apportioned with reference to the transfer date (ie 1 June 2003): art 9(3).

## UPDATE

### 913 Current arrangements for the administration of the rent officer service

TEXT AND NOTES 1-12--As to the transfer of functions of the Secretary of State under SI 1999/2403, except functions under art 6, to the Commissioners for Her Majesty's Revenue and Customs, and the transfer of all rights and liabilities to which the Secretary of State is entitled or subject in connection with the functions transferred, see the Transfer of Functions (Administration of Rent Officer Service in England) Order 2008, SI 2008/3134. SI 1999/2403 art 1A added: SI 2008/3134.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(i) Administration; in general/C. REGISTER OF RENTS/914. Register of rents.

## C. REGISTER OF RENTS

### 914. Register of rents.

For each registration area<sup>1</sup>, a register for the statutory purposes<sup>2</sup> must be prepared and kept up to date by the rent officer<sup>3</sup>. The rent officer must make the register available for inspection in such place or places and in such manner as the Secretary of State<sup>4</sup> or in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>5</sup>, may direct, if the area is specified in an order<sup>6</sup> made for the administration of the rent officer service on a new basis<sup>7</sup>. If the area is not so specified, then the register must be made available for inspection in the place or places and manner provided by the scheme<sup>8</sup> made for the area<sup>9</sup>; but at the date at which this title states the law there are no such schemes in existence and no such schemes may be made<sup>10</sup>.

The register must contain, in addition to the rent payable under a regulated tenancy<sup>11</sup> of a dwelling house, the prescribed particulars<sup>12</sup> with regard to the tenancy and a specification of the dwelling house<sup>13</sup>. There must be a part of the register in which rents may be registered for dwelling houses which are let, or are, or are to be, available for letting under a housing association tenancy<sup>14</sup>.

A copy of an entry in the register certified under the hand of the rent officer or any person duly authorised by him is receivable in evidence in any court and in any proceedings<sup>15</sup>; and a person requiring such a certified copy is entitled to obtain it on payment of the prescribed fee<sup>16</sup>.

1 For the meaning of 'registration area' see PARA 909 ante.

2 Ie for the purposes of the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante; the text and notes 3-16 infra; and PARA 915 et seq post. As to registration of rents for dwelling houses subject to statutory tenancies within the meaning of the Rent (Agriculture) Act 1976 see PARAS 1162-1163 post.

3 Rent Act 1977 s 66(1) (s 66(1), (1A) substituted by the Administration of the Rent Officer Service (England) Order 1999, SI 1999/2403, art 7(b)). In relation to Wales, references in the Rent Act 1977 s 66 (as amended) to the rent officer are to the rent officer or rent officers designated for these purposes by the National Assembly for Wales: s 66(5) (added by the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 12(b)). For the meaning of 'rent officer' generally see PARA 911 note 6 ante.

4 As to the Secretary of State see PARA 27 note 3 ante.

5 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

6 Is an order made under the Rent Act 1977 s 64B (as added): see PARAS 912-913 ante.

7 Ibid s 66(1A)(b) (as substituted (see note 3 supra); amended by the Administration of the Rent Officer Service (Wales) Order 2003, SI 2003/973, art 12(a)).

8 Is under the Rent Act 1977 s 63 (as amended): see PARA 911 ante.

9 Ibid s 66(1A)(a) (as substituted: see note 3 supra).

10 See PARA 911 the text and notes 10-17 ante.

11 For the meaning of 'regulated tenancy' see PARA 854 ante.

12 For these purposes, 'prescribed' means prescribed by regulations under the Rent Act 1977 s 74 (as amended) (see PARA 815 ante); and references to a prescribed form include references to a form substantially to the same effect as the prescribed form: s 75(1). The prescribed particulars are: (1) address of premises; (2) names and addresses of landlord and tenant; (3) if granted for a term, date of commencement of the tenancy and length of term; (4) the rental period; (5) allocation between landlord and tenant of liabilities for repairs; (6) details of services provided by the landlord or a superior landlord; (7) details of furniture provided by the landlord or a superior landlord; (8) in the case of a statutory tenancy which has arisen by virtue of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post), details of the initial repairs; (9) liability for payment of council tax for the accommodation let to the tenant; and (10) any other terms of the tenancy taken into consideration in determining the fair rent: Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 5, Sch 2 (amended by SI 1993/655). A billing authority must, if so requested in writing by a rent officer, inform him whether or not a particular dwelling is or was at any time an exempt dwelling for council tax purposes: see the Housing Act 1988 s 41B (as added) cited in PARA 1092 note 5 post.

Where the rent is not registered as variable in accordance with the Rent Act 1977 s 71(4) (see PARA 922 post), the amount, if any, attributable to services and the amount of the service element must be noted in the register: see Sch 8 para 2(1) (repealed with savings). See also s 72A (as added); and PARA 922 post. The rent officer should note in the register the fact and result of a reference to a rent assessment committee: see s 67(7) (as amended), Sch 11 paras 6(2), 9(3).

13 Ibid s 66(2). It is important to know precisely what premises are the subject of the registration; there is no provision for apportionment and accordingly a registered rent would not appear to be applicable to a letting of part of the premises: see *Gluchowska v Tottenham Borough Council* [1954] 1 QB 438, [1954] 1 All ER 408, DC (decided under the predecessor of the rent registration provision for restricted contracts in the Rent Act 1977 Pt V (ss 77-85) (as amended): see PARA 996 et seq post). As to the circumstances in which a registered rent will no longer apply see *Rakhit v Carty* [1990] 2 QB 315, [1990] 2 All ER 202, CA; and PARA 892 note 6 ante.

14 Rent Act 1977 s 87(1). For the meaning of 'housing association tenancy' see PARA 905 ante. In relation to that part of the register the following, and no other, provisions of the Rent Act 1977, ie s 67 (as amended) (see PARA 915 post), s 67A (as added) (see PARA 915 note 10 post), s 70 (as amended) (see PARA 921 post), s 70A (as added) (see PARA 915 note 10 post), s 71 (as amended) except s 71(3) (as amended) (see PARA 922 post), s 72 (as substituted) (see PARA 923 post) and s 67(7), Sch 11 (as amended) (see PARA 917 post) apply in relation to housing association tenancies, and in their application to such tenancies have effect as if for any reference in those provisions to a regulated tenancy there were substituted a reference to a housing association tenancy: s 87(2) (amended by the Housing Act 1980 ss 61(3)(a), (8), 152(3), Sch 26; the Housing Act 1988 s 140, Sch 18; the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 6). A rent registered in any part of the register for a dwelling house which becomes, or ceases to be, one subject to a housing association tenancy is as effective as if it were registered in any other part of the register: Rent Act 1977 s 87(6).

A rent registered under the Rent Act 1968 Pt IV (ss 39-51) (repealed) on a local authority application before 2 December 1974 is effective for the purposes of a housing association tenancy: see the Rent Act 1977 s 155(3), Sch 24 para 10. See also Sch 24 para 31.

15 Ibid s 66(3).



16 Ibid s 66(4). The prescribed fee is £1: Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 6 (amended by SI 1984/1391).

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## **(ii) Applications for Registration**

### **915. Application for registration of rent.**

An application for the registration of a rent for a dwelling house may be made to the rent officer<sup>1</sup> by the landlord<sup>2</sup> or the tenant<sup>3</sup>, or jointly by the landlord and the tenant, under a regulated tenancy<sup>4</sup> of the dwelling house<sup>5</sup>. Any such application must be in the prescribed form<sup>6</sup> and must:

- 1794 (1) specify the rent which it is sought to register<sup>7</sup>;
- 1795 (2) where the rent includes any sum payable by the tenant to the landlord for services and the application is made by the landlord, specify that sum and be accompanied by details of the expenditure incurred by the landlord in providing those services; and
- 1796 (3) contain such other particulars as may be prescribed<sup>8</sup>.

Where a rent for a dwelling house has been registered<sup>9</sup>, no application by the tenant alone or by the landlord alone for the registration of a different rent for that dwelling house may<sup>10</sup> be entertained before the expiry of two years from the relevant date<sup>11</sup>, except on the ground that, since that date, there has been such a change in:

- 1797 (a) the condition of the dwelling house, including the making of any improvement<sup>12</sup> therein;
- 1798 (b) the terms of the tenancy;
- 1799 (c) the quantity, quality or condition of any furniture provided for use under the tenancy, deterioration by fair wear and tear excluded; or
- 1800 (d) any other circumstances taken into consideration when the rent was registered or confirmed<sup>13</sup>,

as to make the registered rent no longer a fair rent<sup>14</sup>.

An application which is made by the landlord alone and is so made within the last three months of the two-year period may, however, be entertained<sup>15</sup> notwithstanding that that period has not expired<sup>16</sup>.

Where a certificate of fair rent had been issued in respect of a dwelling house pursuant to an application made before 15 January 1989<sup>17</sup>, an application for the registration of a rent for the dwelling house in accordance with that certificate might be made within two years<sup>18</sup> of the date of the certificate by the landlord under such a regulated tenancy of the dwelling house as was specified in the certificate<sup>19</sup>.

1 For the meaning of 'rent officer' see PARA 911 note 6 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante. It appears that all joint tenants must join in the application: *Turley v Panton* (1975) 29 P & CR 397, DC; cf *Lloyd v Sadler* [1978] QB 774, [1978] 2 All ER 529, CA. If, however, not all joint tenants sign the application, it is a question of fact whether the application is made with the authority of all of them: see *R v London Rent Assessment Panel, ex p Braq Investments Ltd* [1969] 2 All ER 1012, [1969] 1 WLR 970, DC (application validly made by a tenants' association because it was possible to infer that, when the application was made in respect of a particular dwelling house, it was made on behalf of and with the authority of the particular tenant). See also *R v Rent Officer for the London Borough of Camden, ex p Felix* (1988) 21 HLR 34, [1988] 2 EGLR 132. A tenant under a protected tenancy may apply for the registration of a rent even though he is not a resident and would not later become a statutory tenant: *Feather Supplies Ltd v Ingham* [1971] 2 QB 348, [1971] 3 All ER 556, CA.

4 For the meaning of 'regulated tenancy' see PARA 854 ante.

5 Rent Act 1977 s 67(1). As to the application of s 67 (as amended) to a housing association tenancy see PARA 914 note 14 ante. Prior to 15 January 1989 there was also a right for a local authority to apply for a rent to be registered in respect of a dwelling house within the authority's area: see s 68 (repealed).

6 The prescribed forms are: (1) where a statutory tenancy arises at the end of a long tenancy under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post), the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(2)(a)(i), Sch 1, Form 6 (Sch 1, Forms 5-7 substituted by SI 1984/1319 and amended by SI 1993/655); (2) where the dwelling house is subject to a statutory tenancy as defined in the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 post), the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(2)(a)(ii), Sch 1, Form 7 (as so substituted and amended); and (3) reg 3(2)(a)(iii), Sch 1, Form 5 (as so substituted by SI 1984/1319 and amended). For the meaning of 'prescribed' see PARA 914 note 12 ante; and for the corresponding forms in Welsh see the Rent Act 1977 (Forms etc) (Welsh Forms and Particulars) Regulations 1993, SI 1993/1511, reg 2, Schedule, Forms 6, 7, 5 respectively. Forms substantially to the like effect may be used: see reg 3.

7 Failure to specify a rent which the applicant seeks to have registered makes the application, and any purported registration pursuant to that application, a nullity; the defect cannot be waived: *Chapman v Earl* [1968] 2 All ER 1214, [1968] 1 WLR 1315, DC (applicant had written 'rent officer to determine fair rent'; application held to be defective). The proposed rent need not, however, be set out as a settled figure; it is sufficient if words are used from which the rent can be calculated with certainty: *R v London Rent Assessment Panel, ex p Braq Investments Ltd* [1969] 2 All ER 1012, [1969] 1 WLR 970, DC (applicant had written that the rent was to be an annual sum per square foot; application held to be valid). An application to re-register the existing rent is invalid: *R v Chief Rent Officer for Royal Borough of Kensington and Chelsea, ex p Moberley* (1986) 18 HLR 189, [1986] 1 EGLR 168, CA.

8 Rent Act 1977 s 67(2) (substituted by the Housing Act 1980 s 59(2)). See also *Druid Development Co (Bingley) Ltd v Kay* (1982) 44 P & CR 76, CA (the prescribed particulars are directory not mandatory; technical defect did not invalidate tenant's application); *R (on the application of Hartley) v Rent Officer of the Royal Borough of Kensington and Chelsea* [2001] EWHC 291 (Admin), [2001] All ER (D) 186 (Mar).

9 Ie under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante, PARA 916 et seq post.

10 Ie subject to ibid s 67(4) (as amended) (see the text and notes 15-16 infra) and ss 67A, 70A (as added): s 67(3) (as amended: see note 14 infra). Under s 67A (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 3), an application might be made before 1 April 1994 by the landlord or the tenant, or jointly by them both, for the registration under the Rent Act 1977 s 70A (as added) of an increased rent where (1) the landlord or a superior landlord was liable under the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended) to pay council tax in respect of the dwelling house; (2) under the terms of the tenancy, or an agreement collateral to the tenancy, the tenant was liable to make payments to the landlord in respect of council tax; (3) the case fell within the Rent Act 1977 s 67A(2) or (3) (as so added) (time limits etc); and (4) no previous application has been so made in relation to the dwelling house: see s 67A(1), (4) (as so added). Where an application was so made: (a) the rent officer was to determine the amount by which, having regard to the provisions of s 70(3A) (as added) (see PARA 921 post), the existing registered rent might reasonably be increased to take account of the tenant's liability to make payments to the landlord in respect of council tax; and (b) the amount to be registered as the rent of the dwelling house was to be the existing registered rent plus the amount referred to in head (a) supra: see s 70A(1) (s 70A added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, Sch 2 para 4). As to the joint determination of an application under the Rent Act 1977 s 67 (as amended) and s 67A (as added) see s 70A(2) (as so added).

11 For these purposes, 'relevant date', in relation to a rent which has been registered under ibid Pt IV (ss 62-75) (as amended), means the date from which the registration took effect or, in the case of a registered rent which has been confirmed, the date from which the confirmation or, where there have been two or more successive confirmations, the last of them, took effect; but any registration or confirmation by virtue of s 70A

(as added) (see note 10 supra) is to be disregarded: s 67(5) (substituted by the Housing Act 1980 s 61(5); amended by the Housing Act 1988 s 140(2), Sch 18; the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, Sch 2 para 2(b)). A case where the rent officer did not register a rent on an application under the Rent Act 1977 s 68 (repealed) was not to be treated as a confirmation of a rent already registered: see s 68(5) (repealed).

12 For these purposes, 'improvement' includes structural alteration, extension or addition and the provision of additional fixtures or fittings, but does not include anything done by way of decoration or repair: *ibid* s 75(1). If the work which is done is the provision of something new for the benefit of the occupier, it is an improvement; if it is only the replacement, even by a modern equivalent, of something already there which has become dilapidated or worn out, it is a repair and not an improvement: *Morcom v Campbell-Johnson* [1956] 1 QB 106 at 115, [1955] 3 All ER 264 at 266, CA, approved in *Mackie v Gallagher* 1967 SC 59. See also *Strood Estates Co Ltd v Gregory* [1936] 2 KB 605, [1936] 2 All ER 355, CA (affd [1938] AC 118, [1937] 3 All ER 656, HL) (old-fashioned privy replaced by a modern water closet held to be an improvement); *Wates v Rowland* [1952] 2 QB 12, [1952] 1 All ER 470, CA (wooden floor replaced by a tiled floor held to be a repair). As to the different attitudes to the installation of a gas boiler see *London Housing and Commercial Properties Ltd v Cowan* [1977] QB 148, [1976] 2 All ER 385, DC.

Repairs may, however, effect a change a 'change in conditions' within the scope of the Rent Act 1977 s 67(3) (a); the mere fact that repairs are not within the meaning of 'improvement' does not take them out of s 67(3): see *R (on the application of Haysport Properties Ltd) v West Sussex Rent Officer* [2001] EWCA Civ 237, [2001] 21 EG 168, [2001] All ER (D) 238 (Jan). As to expenditure incurred by the landlord before 1 April 2006 in taking a step mentioned in a fire precaution notice see the Rent Act 1977 s 140, Sch 20 para 1 (repealed).

13 If the dwelling house forms part of a hereditament in respect of which the landlord or a superior landlord is, or was on the relevant date, liable under the Local Government Finance Act 1992 Pt I (as amended) to pay council tax, then, in determining for the purposes of the Rent Act 1977 s 67(3) (as amended) whether since the relevant date there has been such a change falling within s 67(3)(d) as to make the registered rent no longer a fair rent, any change in the amount of council tax payable in respect of the hereditament is to be disregarded unless it is attributable to: (1) the fact that the hereditament has become, or has ceased to be, an exempt dwelling; (2) an alteration, in accordance with regulations under the Local Government Finance Act 1992 s 24 (as amended) (alteration of lists: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 273), of the valuation band shown in a valuation list as applicable to the hereditament; or (3) the compilation of a new valuation list in consequence of an order of the Secretary of State or the National Assembly for Wales under s 5(4)(b) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 244): Rent Act 1977 s 67(3A) (s 67(3A), (3B) added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 5). For these purposes, 'hereditament' means a dwelling within the meaning of the Local Government Finance Act 1992 Pt I (as amended) and, subject thereto, expressions used in Pt I (as amended) and in the Rent Act 1977 s 67(3A) (as so added) have the same meaning in s 67(3A) (as so added) as in the Local Government Finance Act 1992 Pt I (as amended): Rent Act 1977 s 67(3B) (as so added). For transitional provisions see the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 1(2)(a).

14 Rent Act 1977 s 67(3) (amended by the Housing Act 1980 s 60(1), (2); the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, Sch 2 para 2(a)). See *Rakhit v Carty* [1990] 2 QB 315, [1990] 2 All ER 202, CA. This prohibition does not apply to a deemed registration under the Rent Act 1974 (repealed): see the Rent Act 1977 s 155(3), Sch 24 para 8(2); and PARA 892 note 1 ante. Nor does it apply to certain applications made by virtue of the Rent (Agriculture) Act 1976: see s 13(7) (as amended); and PARA 1162 note 11 post. 'Fair rent' is not defined but the method of determining it is laid down in the Rent Act 1977 s 70 (as amended): see PARA 921 post. The rent officer may well be required to consider whether in fact the applicant can rely upon s 67(3) (as so amended) to apply within the two year period; it appears that, if the rent officer decides that he has jurisdiction and increases the rent and the matter is referred to a rent assessment committee, that committee should not investigate the rent officer's decision on s 67(3) (as so amended): *London Housing and Commercial Properties Ltd v Cowan* [1977] QB 148, [1976] 2 All ER 385, DC; and see PARA 916 post. On such a valid application, the rent should be determined in the normal way: *London Housing and Commercial Properties Ltd v Cowan* supra, distinguishing *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Hierowski* [1953] 2 QB 147, [1953] 2 All ER 4, DC. See also *Kovats v Trinity House Corp'n* (1981) 262 Estates Gazette 445.

15 In notwithstanding anything in the Rent Act 1977 s 67(3) (as amended: see note 14 supra).

16 *Ibid* s 67(4) (amended by the Housing Act 1980 s 60(1), (2)). This provision will prevent prejudice to the landlord through delay in the rent being registered. For the effective date of a registration pursuant to such an application see the Rent Act 1977 s 72(3) (as substituted); and PARA 923 post. A joint application by both landlord and tenant may be made at any time where a tenancy which by virtue of s 12 (as amended) (resident landlord: see PARA 875 ante) was precluded from being a protected tenancy ceases to be so precluded and becomes a protected tenancy, and, before it does so, a rent was registered for the dwelling concerned under the provisions relating to restricted contracts (see PARA 996 et seq post) and the amount which is so registered is deemed to be registered under Pt IV (ss 62-75) (as amended) as the rent for the dwelling house which is let on that tenancy; the registration is deemed to take effect on the date the tenancy becomes a protected

tenancy and the two year limitation does not apply: see s 12(4), Sch 2 para 6(1), (2); and PARA 878 ante. The provisions in Sch 24 para 8(1), (2) transitional from the Rent Act 1974 appear to have already been obsolete by the date of the coming into force of the Rent Act 1977.

17     le the date when the Housing Act 1988 s 140, Sch 18 (which repealed the Rent Act 1977 s 69, Sch 12) came into force: see s 141(3). Before that date, where a person intended to provide a dwelling house by the erection or conversion of any premises or to make any improvements in a dwelling house, or where he intended to let on a regulated tenancy a dwelling house which was not for the time being subject to such a tenancy and where no rent was registered, he might apply to the rent officer for a certificate of fair rent, specifying a rent which in the opinion of the rent officer would be a fair rent under a regulated tenancy of the dwelling house on the terms specified in the application and subject to certain statutory assumptions: see the Rent Act 1977 s 69(1), (2) (repealed).

18     The period was three years where, on the determination or confirmation of a rent by the rent officer, the rent determined by him was registered, or his confirmation was noted on the register, before 28 November 1980: Rent Act 1977 s 69(4) (as originally enacted); Housing Act 1980 s 152(1), Sch 25 para 40.

19     See the Rent Act 1977 s 69(4) (repealed). As to the procedure on such an application see Sch 11 paras 10-12 (repealed with savings by the Housing Act 1988 Sch 17 para 22, Sch 18).

## **UPDATE**

### **915 Application for registration of rent**

NOTE 6--SI 1980/1697 further amended: SI 2008/2831. See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### **916. Determination of jurisdiction.**

Before he proceeds to determine and register a fair rent, the rent officer<sup>1</sup> has a duty to inquire and decide whether he has jurisdiction to do so; and he is normally entitled to decide a preliminary issue on which his jurisdiction depends<sup>2</sup>. The county court, however, normally provides an alternative forum for determining whether the application is within the jurisdiction of the rent officer<sup>3</sup>. The rent officer has a discretion<sup>4</sup> whether to decide the preliminary issue himself or whether to adjourn the application for the registration of a rent in order that an application may be made to the county court to determine the preliminary issue. In exercising his discretion, the rent officer should look at all the circumstances, including the wishes of the parties<sup>5</sup>. Where the nature of the preliminary issue requires disclosure, evidence and cross-examination, the rent officer should normally adjourn the application for the registration of a rent<sup>6</sup>; but, where the parties decline an invitation to apply to the county court, it is correct for the rent officer to proceed to determine the issue of his jurisdiction<sup>7</sup>.

A rent assessment committee has only a limited jurisdiction to hear and determine matters referred to it by a rent officer. The rent officer cannot refer to it any question of jurisdiction but only his determination of the fair rent<sup>8</sup>. The rent assessment committee may be concerned to see that a matter has been properly referred to it, namely that there has been an objection by one of the parties and that the matter has been referred to it consequent upon that objection<sup>9</sup>. A decision by the rent officer or the rent assessment committee as to jurisdiction is not conclusive, and may be put in issue in further proceedings<sup>10</sup>.

1 For the meaning of 'rent officer' see PARA 911 note 6 ante.

2 *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC, applied in *R v Kensington and Chelsea Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC; *R v Rent Officer for Camden, ex p Ebiri* [1981] 1 All ER 950, [1981] 1 WLR 881, DC. The rent officer does not have jurisdiction and the county court has exclusive jurisdiction to determine any question arising under the Rent Act 1977 s 25 as to the proper apportionment or aggregation of rateable value in order to determine the appropriate rateable value for the subject premises: see s 25(2); and PARA 859 ante. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante. If the rent officer has doubts as to whether the dwelling house is over or under the rateable value limits, or if the landlord objects, or if there is a challenge to the rent officer's jurisdiction, there is a 'question arising' within s 25(2) which must be determined by a county court: *R v Westminster (City) London Borough Council Rent Officer, ex p Rendall* [1973] QB 959, [1973] 3 All ER 119, CA. The relevant date for the grant of jurisdiction is the date of the application; and the jurisdiction continues to exist even if the tenancy comes to an end: *R v Lambeth Rent Officer, ex p Fox* (1977) 35 P & CR 65, DC, applying *R v West London Rent Tribunal, ex p Napper* [1967] 1 QB 169, [1965] 3 All ER 734, DC.

3 See the Rent Act 1977 s 141 (as amended); and PARA 981 post. Section 141 (as amended) does not, however, cover all the issues on which the jurisdiction of a rent officer may arise: see *London Housing and Commercial Properties Ltd v Cowan* [1977] QB 148, [1976] 2 All ER 385, DC. The issue of jurisdiction may also be raised in High Court proceedings for an appropriate declaration; and for an exceptional case where the High Court granted a mandatory order against the rent officer and declared the applicant to be a protected tenant see *R v Rent Officer for London Borough of Camden, ex p Plant* (1980) 7 HLR 15, [1981] 1 EGLR 73, DC.

4 This is subject to the exclusive jurisdiction of the county court under the Rent Act 1977 s 25(2): see note 2 supra.

5 See *R v Croydon and South West London Rent Tribunal, ex p Ryzewska* [1977] QB 876, [1977] 1 All ER 312, DC (a decision concerning a rent tribunal).

6 *R v Brent London Borough Rent Officer, ex p Ganatra* [1976] QB 576, [1976] 1 All ER 849, DC; *R v Kensington and Chelsea Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC.

7 See note 5 supra.

8 *R v Brent London Borough Rent Officer, ex p Ganatra* [1976] QB 576, [1976] 1 All ER 849, DC.

9 See the Rent Act 1977 s 67(7), Sch 11 paras 6, 9 (as amended); and PARAS 917-918 post; *R v Bristol Rent Assessment Committee, ex p Dunsworth* (1987) 19 HLR 351, [1987] 1 EGLR 102. The circumstances in which a rent assessment committee would be justified in ignoring the existence of the Rent Act 1977 s 141 (as amended) and in embarking into a question of jurisdiction or into any other matter not referred to it by the rent officer must be very rare: see *R v Brent London Borough Rent Officer, ex p Ganatra* [1976] QB 576 at 584, [1976] 1 All ER 849 at 855, DC, per Park J.

10 *R v Judge Pugh, ex p Graham* [1951] 2 KB 623, [1951] 2 All ER 307, DC; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC; *R v Brent London Borough Rent Officer, ex p Ganatra* [1976] QB 576 at 583, [1976] 1 All ER 849 at 854, DC. An aggrieved landlord may therefore prefer to claim for the contractual rent, possession or a declaration, as the case may be, in the county court, rather than go by way of appeal or for judicial review in the High Court.

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### 917. Procedure on application to rent officer.

On receiving any application for the registration of a rent<sup>1</sup>, the rent officer<sup>2</sup> may, by notice in writing served on the landlord<sup>3</sup> or the tenant<sup>4</sup>, whether or not the applicant or one of the applicants, require him to give to the rent officer, within such period of not less than seven days from the service of the notice as may be specified in the notice, such information as he

may reasonably require<sup>5</sup> regarding the particulars contained in the application as may be specified in the notice<sup>6</sup>.

Where the application is made jointly by the landlord and the tenant and it appears to the rent officer, after making such inquiry, if any, as he thinks fit and considering any information supplied to him<sup>7</sup>, that the rent specified in the application is a fair rent<sup>8</sup>, he may register that rent without further proceedings<sup>9</sup>. Where the rent officer so registers a rent, he must notify the landlord and tenant accordingly<sup>10</sup>.

In the case of any other application<sup>11</sup>, the rent officer must serve on the landlord and on the tenant a notice<sup>12</sup> inviting the person on whom the notice is served to state in writing, within a period of not less than seven days after the service of the notice<sup>13</sup>, whether he wishes the rent officer to consider, in consultation with the landlord and the tenant, what rent ought to be registered for the dwelling house<sup>14</sup>. If, after service of such a notice by the rent officer, no request in writing is made within the period specified in the notice for the rent to be so considered, the rent officer, after considering what rent ought to be registered or, as the case may be, whether a different rent ought to be registered, may:

- 1801 (1) determine a fair rent and register it as the rent for the dwelling house; or
- 1802 (2) confirm the rent for the time being registered and note the confirmation in the register; or
- 1803 (3) serve a notice on the landlord and on the tenant informing them that the rent officer proposes, at a time<sup>15</sup> and place specified in the notice, to consider in consultation<sup>16</sup> with the landlord and the tenant, or such of them as may appear at that time and place, what rent ought to be registered for the dwelling house or, as the case may be, whether a different rent ought to be so registered<sup>17</sup>.

Where, however, in response to a notice of invitation served by the rent officer<sup>18</sup>, the landlord or the tenant states in writing that he wishes the rent to be considered<sup>19</sup>, the rent officer must serve a notice under head (3) above<sup>20</sup>.

After considering<sup>21</sup> what rent ought to be registered or, as the case may be, whether a different rent ought to be registered, the rent officer must, as the case may require, determine a fair rent and register it as the rent for the dwelling house, or confirm the rent for the time being registered and note the confirmation in the register<sup>22</sup>.

Where a rent has been registered or confirmed by the rent officer<sup>23</sup>, he must notify the landlord and the tenant accordingly by a notice stating that, if within 28 days of the service of the notice or such longer period as he or a rent assessment committee<sup>24</sup> may allow, an objection in writing is received by the rent officer from the landlord or the tenant, the matter will be referred to a rent assessment committee<sup>25</sup>. If such an objection is received, then:

- 1804 (a) if it is received within the specified period<sup>26</sup> or a rent assessment committee so directs, the rent officer must refer the matter to a rent assessment committee;
- 1805 (b) if it is received after the expiry of that period, the rent officer may either refer the matter to a rent assessment committee or seek the directions of a rent assessment committee whether so to refer it<sup>27</sup>;

and the rent officer must indicate in the register whether the matter has been referred to a rent assessment committee<sup>28</sup>.

1 le under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante, PARA 918 et seq post. As the registration of a rent involves a matter of public interest, the rent officer appears to be able to withhold his consent to the withdrawal of an application: *R v Lambeth Rent Officer, ex p Fox* (1977) 35 P & CR 65 at 68,

DC, applying dicta in *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA. The relevant date for the grant of jurisdiction to a rent officer is the date of the application, and the jurisdiction continues even if the tenancy comes to an end: *R v Lambeth Rent Officer, ex p Fox* supra, applying *R v West London Rent Tribunal, ex p Napper* [1967] 1 QB 169, [1965] 3 All ER 734, DC.

2 For the meaning of 'rent officer' see PARA 911 note 6 ante.

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 For the meaning of 'tenant' see PARA 816 note 3 ante.

5 It appears that the information must be possible, relevant and necessary: see *Watney Mann Ltd v Langley* [1966] 1 QB 457, [1963] 3 All ER 967 (decided on a similar provision in the Local Government Act 1948 s 58 (repealed)).

6 Rent Act 1977 Sch 11 para 1. As to the application see PARA 915 ante; and as to the application of Sch 11 (as amended) to housing association tenancies see PARA 914 note 14 ante.

7 Ie in pursuance of *ibid* Sch 11 para 1.

8 For these purposes, references to a fair rent in relation to an application under *ibid* s 67A (as added) (see PARA 915 note 10 ante) are references to the amount to be registered under s 70A(1)(b) (as added) (see PARA 915 note 10 ante): Sch 11 para 9A (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 7).

The Rent Act 1977 Sch 11 (as amended) has effect subject to the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2 (see PARA 921 post); and accordingly the rent officer, in considering what rent ought to be registered, must consider whether art 2 applies: Rent Act 1977 Sch 11 para 9B(a) (added by the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 3, Schedule).

9 Rent Act 1977 Sch 11 para 2(1) (Sch 11 paras 2-3A substituted by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, reg 2, Sch 1 para 1).

10 Rent Act 1977 Sch 11 para 2(2) (as substituted: see note 9 supra).

11 Ie an application not falling within *ibid* Sch 11 para 2 (as substituted).

12 A notice so served on the person who did not make the application must be accompanied by: (1) a copy of the application; and (2) where, in pursuance of *ibid* s 67(2)(b) (as substituted) (see PARA 915 ante), the application was accompanied by details of the landlord's expenditure in connection with the provision of services, by a copy of those details: Sch 11 para 3(2) (as substituted: see note 9 supra). For forms of notice see (a) in a case falling under head (2) supra, the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(3) (amended by SI 1993/655), Sch 1, Form 13; (b) in the case of an application made under the Rent Act 1977 s 67A (as added), the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(3A), Sch 1, Forms 12A (added by SI 1993/655); and (c) in any other case, the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, Sch 1, Form 12. For the corresponding forms in Welsh see the Rent Act 1977 (Forms etc) (Welsh Forms and Particulars) Regulations 1993, SI 1993/1511, reg 2, Schedule, Forms 13, 12 respectively. A form substantially to the like effect may be used: see reg 3.

13 It appears that a quashing order will be made if a party is given less than seven days' notice and is deprived of the opportunity of being heard: *R v Devon and Cornwall Rent Tribunal, ex p West* (1975) 29 P & CR 316, DC (a decision concerning a rent tribunal hearing). Where there is no notification, a quashing order will be made to quash the registration: *Regis Property Co Ltd v Camden Rent Officer* [1967] EGD 752. As to the rent officer's power to reopen a matter at the request of one party who, through lack of notice, has not attended see *R v Kensington and Chelsea Rent Tribunal, ex p McFarlane* [1974] 3 All ER 390, [1974] 1 WLR 1486, CA; *R v Rent Officer for the London Borough of Camden, ex p Felix* (1988) 21 HLR 34, [1988] 2 EGLR 132.

14 Rent Act 1977 Sch 11 para 3(1) (as substituted: see note 9 supra).

15 The time must not be earlier than seven days after the service of the notice or 14 days in a case falling within *ibid* Sch 11 para 3(2)(b) (as substituted): Sch 11 para 4(2) (amended by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, Sch 1 para 3).

16 An important function of the consultation is to enable the rent officer to approach the determination of the rent with the knowledge that he has heard what the parties want to say about it; he should not have made a firm decision beforehand on which comparables he will rely, and is not obliged to disclose any comparables to the parties: *R v Brighton Rent Officers, ex p Elliott* (1975) 29 P & CR 456 at 460, DC per Lord Widgery CJ. At the consultation the landlord and the tenant may each be represented by a person authorised by him in that behalf, whether or not that person is of counsel or a solicitor: Rent Act 1977 Sch 11 para 4(3). The rent officer may,

where he considers it appropriate, arrange for consultations in respect of one dwelling house to be held together with consultations in respect of one or more other dwelling houses: Sch 11 para 4(4) (added by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, Sch 1 para 4).

17 Rent Act 1977 Sch 11 paras 3A, 4(2) (as respectively substituted and amended: see notes 9, 15 supra).

18 Ie a notice served under ibid Sch 11 para 3(1) (as substituted: see note 9 supra).

19 Ie as mentioned in ibid Sch 11 para 3(1) (as substituted: see note 9 supra).

20 Ibid Sch 11 para 4(1) (substituted by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, Sch 1 para 2).

21 Ie in accordance with the Rent Act 1977 Sch 11 para 4 (as amended)

22 Ibid Sch 11 para 5.

23 Ie under ibid Sch 11 para 3A (as substituted) or Sch 11 para 5.

24 As to rent assessment committees see PARA 910 ante.

25 Rent Act 1977 Sch 11 para 5A (substituted by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, Sch 1 para 5).

26 Ie the period of 28 days specified in the Rent Act 1977 Sch 11 para 5A (as substituted: see note 25 supra).

27 Ibid Sch 11 para 6(1) (amended by the Regulated Tenancies (Procedure) Regulations 1980, SI 1980/1696, Sch 1 para 6). As to reference to a rent assessment committee see PARA 918 post.

28 Rent Act 1977 Sch 11 para 6(2).

## **UPDATE**

### **917 Procedure on application to rent officer**

NOTE 12--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(ii) Applications for Registration/918. Reference to a rent assessment committee.

### **918. Reference to a rent assessment committee.**

The rent assessment committee<sup>1</sup> to which a matter is referred<sup>2</sup> may by notice in the prescribed form<sup>3</sup> served on the landlord or the tenant<sup>4</sup> require him to give to the committee, within such period of not less than 14 days from the service of the notice as may be specified in the notice, such further information<sup>5</sup> as it may reasonably require<sup>6</sup>. If any person fails without reasonable cause to comply with any such notice served on him, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>7</sup>. The rent assessment committee must serve on the landlord and on the tenant<sup>8</sup> a notice specifying a period<sup>9</sup> during which either written representations or a request to make oral representations may be made by the landlord or the tenant to the committee<sup>10</sup>. Where, within that specified period or such further period as the committee may allow, the landlord or the tenant requests to make oral representations, the committee must give him an opportunity to be heard<sup>11</sup>.



As the determination of a fair rent involves a matter of public interest, there is no unilateral, unqualified right to withdraw an objection to a rent officer's determination on which the reference to the rent assessment committee is based; but, if the rent assessment committee is satisfied that it is proper to do so, it may permit an objection to be withdrawn on the agreement of both landlord and tenant<sup>12</sup>.

If it appears to the committee<sup>13</sup> that the rent registered or confirmed by the rent officer is a fair rent, it must confirm that rent<sup>14</sup> but, if not, it must determine a fair rent for the dwelling house<sup>15</sup> and, in each case, must notify the landlord, the tenant and the rent officer of the decision and of the date on which it was made<sup>16</sup>. On receiving the notification, the rent officer must, as the case may be, either indicate in the register that the rent has been confirmed or register the rent determined by the committee as the rent for the dwelling house<sup>17</sup>.

1 As to rent assessment committees see PARA 910 ante.

2 Ie under the Rent Act 1977 s 67(7), Sch 11 para 6 (as amended): see PARA 917 ante.

3 For the prescribed form of notice see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(4), Sch 1, Form 14. A form substantially to the like effect may be used: reg 2(2).

4 The Rent Act 1977 Sch 11 para 7(1)(a) refers to 'the landlord or the tenant' whereas Sch 11 para 7(1)(b) (as amended) refers to 'the landlord and the tenant'. For the meaning of 'landlord' see PARA 816 note 2 ante; and for the meaning of 'tenant' see PARA 816 note 3 ante.

5 Ie in addition to any given to the rent officer under *ibid* Sch 11 para 1: see PARA 917 ante.

6 *Ibid* Sch 11 para 7(1)(a). As to what it is reasonable to require see PARA 917 note 5 ante. As to the application of Sch 11 (as amended) to housing association tenancies see PARA 914 note 14 ante.

7 *Ibid* Sch 11 para 7(2) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or secretary or other similar officer of the body or any person who was purporting to act in any such capacity, he as well as the body is guilty of that offence and is liable to be proceeded against and punished accordingly: Rent Act 1977 Sch 11 para 7(3). Proceedings may be instituted by the local authority: see s 150(2) (as amended); and PARA 816 ante.

8 See note 4 *supra*.

9 Ie a period of not less than seven days from the service of the notice. As to the position if no notice or inadequate notice is given see the cases cited in PARA 917 note 13 ante.

10 Rent Act 1977 Sch 11 para 7(1)(b) (amended by the Rent Assessment Committees (England and Wales) (Amendment) Regulations 1981, SI 1981/1783, reg 3).

11 Rent Act 1977 Sch 11 para 8. He may be heard either in person or by a person authorised by him in that behalf, whether or not of counsel or a solicitor: Sch 11 para 8. As to the general procedure before the committee and inspection of the premises by the committee see PARA 919 post; and as to the application of the rules of natural justice see PARA 920 post.

12 *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA; *R v Bristol Rent Assessment Committee, ex p Dunworth* (1987) 19 HLR 351, [1987] 1 EGLR 102. See also *R v Lambeth Rent Officer, ex p Fox* (1977) 35 P & CR 65, DC; and PARA 917 note 1 ante.

13 Ie after making such inquiry, if any, as it thinks fit and considering any information supplied or representations made to it pursuant to the Rent Act 1977 Sch 7 para 7 (as amended) or Sch 7 para 8: Sch 11 para 9(1).

14 *Ibid* Sch 11 para 9(1)(a).

15 *Ibid* Sch 11 para 9(1)(b). As to the determination of a fair rent see s 70 (as amended); and PARA 921 post. The Rent Act 1977 Sch 11 (as amended) has effect subject to the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2 (see PARA 921 post); and accordingly where a matter is referred to the rent assessment committee, the committee must consider whether art 2 applies and, where it does apply, the committee may not, subject to art 2(5), confirm or determine a rent for the dwelling house that exceeds the maximum fair rent

calculated in accordance with art 2: Rent Act 1977 Sch 11 para 9B(b) (added by the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 3, Schedule). There is authority for the view that the committee should determine a fair rent as at the effective date of the registration: *Nicoll v First National Developments Ltd* (1972) 226 Estates Gazette 301, DC. As to the effective date of the registration see PARA 923 post. See also *Northumberland and Durham Property Trust Ltd v London Rent Assessment Committee* (1998) 31 HLR 109, [1998] 3 EGLR 85.

16 Rent Act 1977 Sch 11 para 9(2) (amended by the Housing Act 1980 s 61(7)).

17 Rent Act 1977 Sch 11 para 9(3).

## UPDATE

### 918 Reference to a rent assessment committee

NOTE 3--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(ii) Applications for Registration/919. Procedure before a rent assessment committee.

### 919. Procedure before a rent assessment committee.

A hearing<sup>1</sup> by a rent assessment committee<sup>2</sup> must be in public unless, for special reasons, the committee otherwise decides<sup>3</sup>, and must be on such date and at such time as the committee appoints<sup>4</sup>, not less than ten days' notice<sup>5</sup> of which must be given to the landlord and the tenant<sup>6</sup> by the committee<sup>7</sup>. At the hearing the parties<sup>8</sup> must be heard in such order as the committee determines<sup>9</sup>; and a party may call witnesses, give evidence and cross-examine witnesses called by the other party<sup>10</sup>.

Where the reference<sup>11</sup> is to be subject to a hearing, the committee must take all reasonable steps to ensure that there is supplied to each of the parties before the date of the hearing:

- 1806 (1) a copy of, or sufficient extracts from or particulars of, any document relevant to the reference which has been received from the rent officer or from a party, other than a document which is in the possession of such party, or of which he has previously been supplied with a copy by the rent officer; and
- 1807 (2) a copy of any document which embodies the results of any inquiries made by or for the committee for the purposes of that reference, or which contains relevant information<sup>12</sup> in relation to fair rents previously determined for other dwelling houses, which has been prepared for the committee for the purposes of that reference<sup>13</sup>;

and, where at any hearing a document relevant to the reference is not in the possession of a party present at that hearing, and that party has not been supplied with a copy of, or sufficient extracts from or particulars of, that document by the rent officer or by the committee<sup>14</sup>, then, unless that party consents to the continuation of the hearing, or the committee considers that that party has a sufficient opportunity of dealing with that document without an adjournment of the hearing, the committee must adjourn the hearing for a period which it considers will afford that party a sufficient opportunity of dealing with that document<sup>15</sup>.

Where the reference is not to be subject to a hearing, the committee must supply to each of the parties a copy of, or sufficient extracts from or particulars of, any such document as is mentioned in head (1) above<sup>16</sup> and a copy of any such document as is mentioned in head (2) above, and the committee must not reach its decision until it is satisfied that each party has been given a sufficient opportunity of commenting upon any document of which a copy, or from which extracts or of which particulars, has or have been so supplied, and upon the other's case<sup>17</sup>.

Subject to any necessary consent being obtained, the committee may of its own motion, and must at the request of one of the parties, inspect the dwelling house which is the subject of the reference<sup>18</sup>. Such an inspection may be made before, during or after the close of the hearing<sup>19</sup>, or at such stage in relation to the consideration of the written representations as the committee decides, and it must give to the parties and their representatives an opportunity to attend<sup>20</sup>.

The committee's decision on a reference must be recorded in a document signed by the chairman<sup>21</sup>, which must contain no reference to the decision being by a majority, if that is the case, or to any opinion of a minority<sup>22</sup>. A copy of the document and of any certificate under the chairman's hand<sup>23</sup> correcting any clerical or accidental error or omission in it<sup>24</sup> must be sent by the committee to the parties and to the rent officer<sup>25</sup>. Where the committee is requested, on or before the giving or notification of the decision, to state the reasons for the decision, those reasons must be recorded in a document<sup>26</sup> to which the above provisions<sup>27</sup> apply<sup>28</sup>.

1 For these purposes, 'hearing' means the meeting or meetings of a rent assessment committee to hear oral representations made in relation to a reference: Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2(2). For the meaning of 'reference' see note 11 infra.

2 For these purposes, 'committee' means a rent assessment committee constituted under the Rent Act 1977 s 65, Sch 10 (as amended) (see PARA 910 ante) to which a reference is made, but does not include a rent assessment committee carrying out the functions conferred on it by: (1) the Housing Act 1980 s 72 (functions of rent tribunals: see PARA 988 post) or s 142 (as amended) (leasehold valuation tribunals: see PARA 1530 post); or (2) by the Landlord and Tenant Act 1985 s 31A (as added and repealed) (jurisdiction of leasehold valuation tribunal); or (3) by the Landlord and Tenant Act 1987 s 13 (as substituted) (determination of questions by leasehold valuation tribunal: see PARA 1776 post) or s 24A (as added and repealed) (jurisdiction of leasehold valuation tribunal) or s 31 (as amended) (determination of terms by leasehold valuation tribunal: see PARA 1789 post) or (4) by the Leasehold Reform, Housing and Urban Development Act 1993 s 75 (as amended) (see PARA 1504 post), s 88 (as amended) (see PARA 1531 post) or s 91 (as amended) (jurisdiction of leasehold valuation tribunals: see PARA 1743 post): Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2(2) (definition substituted by SI 1997/1854).

Rent assessment committees, residential property tribunals and leasehold valuation tribunals have now been brought together under one umbrella service, known as the Residential Property Tribunal Service. As to residential property tribunals see HOUSING vol 22 (2006 Reissue) PARAS 187-188.

3 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 3(1). Nothing in the regulations prevents a member of the Council on Tribunals in that capacity from attending any hearing: reg 3(1). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 55 et seq.

4 Ibid reg 3(2). The committee at its discretion may of its own motion, or at the request of the parties, or one of them, at any time and from time to time postpone or adjourn a hearing; but it may not do so at the request of one party only unless, having regard to the grounds on which and the time at which such request is made and to the convenience of the parties, it deems it reasonable to do so: reg 8. Such notice of any postponed or adjourned hearing as is reasonable in the circumstances must be given to the parties by the committee: reg 8. As to the giving of notice see note 7 infra. See also *R v Rent Assessment Committee for London, ex p Ellis-Rees* (1982) 262 Estates Gazette 1298 (tenants' request for adjournment in order to enable them to be represented by counsel of their choice was refused; not an improper exercise of the committee's discretion); *Malekout v London Rent Assessment Committee* [2006] EWHC 884 (Admin), [2006] All ER (D) 309 (Mar) (domiciliary hearing offered to claimant as a solution to his alleged inability to attend the hearing and the site inspection on the same day because of ill health, but he rejected that offer because he did not want the hearing to take place; accordingly, the committee was entitled to refuse to grant a further adjournment).

5 The notice may be given not less than seven days before the date of the hearing if that date has been referred to in the notice given under the Rent Act 1977 Sch 11 para 7(1)(b) (as amended) (see PARA 918 ante) or

under Sch 12 para 9(1) (repealed) or the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(2) (as added and amended) (see PARAS 1088, 1256 post) as the date when the hearing would be held if a request to make oral representations were to be made: reg 3(4) (added by SI 1981/1783; amended by SI 1988/2200).

6 Where the reference was an application for a certificate of fair rent under the Rent Act 1977 Sch 12 para 7 (repealed), the notice was to be given to the applicant and, in a case to which Sch 12 para 11 (repealed) applied, to the tenant; and, where the reference was an application supported by certificate of fair rent referred pursuant to Sch 11 para 11 (repealed with savings), the notice was to be given to the applicant: Rent Assessment Committee (England and Wales) Regulations 1971, SI 1971/1065, reg 3(3)(a), (b) (substituted by SI 1980/1699). As to the former right to apply for a certificate of fair rent see PARA 915 the text and notes 17-19 ante.

7 Rent Assessment Committee (England and Wales) Regulations 1971, SI 1971/1065, reg 3(3) (substituted by SI 1980/1699; amended by SI 1981/1783). Where any notice or other written matter is required under the provisions of the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065 (as amended) to be given or supplied by the committee, including any such matter to be supplied to a party for the purposes of a reference to which reg 6 applies, it is sufficient compliance with those regulations if such notice or matter is sent by post in a prepaid letter and addressed to the party for whom it is intended at his usual or last known address, or, if that party has appointed an agent to act on his behalf in relation to the reference, to that agent at the address of the agent supplied to the committee: reg 11. See *Dundon v Kenna* (1981) 261 Estates Gazette 367. For the meaning of 'reference' see note 11 infra.

8 For these purposes, 'party' means, where a reference is subject to a hearing, any person who is entitled under the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 3(3) (as substituted and amended) to notice of the hearing, and, in a case where a reference is not to be subject to a hearing, any person entitled to make written representations to the committee: reg 2(2). For the purpose of any provision relating to procedure at a hearing, any reference to a party is to be construed as including a reference to a person authorised by a party to make oral representations on his behalf: see reg 2(3) (amended by SI 1988/2200).

9 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 4(a). If a party does not appear at a hearing, the committee, on being satisfied that the statutory requirements regarding the giving of notice of hearings have been duly complied with, may proceed to deal with the reference upon the representations of any party present and upon the documents and information which it may properly consider: reg 9. See *Dundon v Kenna* (1981) 261 Estates Gazette 367.

10 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 4(b). Subject to the provisions of the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065 (as amended), the procedure is such as the committee may determine: reg 4(a).

11 For these purposes, 'reference' means a matter or application, as the case may be, which is referred by a rent officer to a rent assessment committee under the Rent Act 1977 Sch 11 (as amended) or was so referred under Sch 12 (repealed) or which is referred or made under the Housing Act 1988 s 6 (see PARAS 1069-1070 post), s 13 (as amended) (see PARA 1091 post), s 14A (as added) (certain interim increases before 1 April 1994) or s 22 (as amended) (see PARAS 1096-1098 post), or which is referred under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 6(2) (see PARA 1253 post) or Sch 10 para 10(2) (see PARA 1255 post): Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2(2) (definition amended by SI 1988/2200; SI 1990/427; SI 1993/653); Interpretation Act 1978 s 17(2)(a).

12 I.e. including information in relation to the terms, including rent, of assured tenancies or assured agricultural occupancies of other dwelling houses where such tenancies or occupancies have been the subject of a reference to the committee. For the meaning of 'assured tenancy' see PARA 1018 post; and for the meaning of 'assured agricultural occupancy' see PARA 1183 post.

13 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 5(1) (amended by SI 1988/2200).

14 I.e. in accordance with the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 5(1) (as amended).

15 Ibid reg 5(2).

16 I.e. other than a document excepted from ibid reg 5(1)(a).

17 Ibid reg 6.

18 Ibid reg 7(1). Notice of the inspection must be given as though it were a notice of hearing, save that the requirements for notice may be dispensed with or relaxed in so far as the committee is satisfied that the parties have received sufficient notice: reg 7(3).

19 Where an inspection is made after the close of a hearing, the committee must, if it considers it expedient to do so on account of any matter arising from the inspection, reopen the hearing; and, if the hearing is to be reopened ibid reg 3(3) (as substituted and amended) applies as it applies to the original hearing save in so far as its requirements may be dispensed with or relaxed with the consent of the parties: reg 7(4). The practice varies from one committee to another as to whether it inspects before or after any hearing.

20 Ibid reg 7(2). See also *R v Bristol Rent Assessment Committee, ex p Dunworth* (1987) 19 HLR 351, [1987] 1 EGLR 102.

21 In the event of the chairman's absence or incapacity, the document may be signed by another member of the committee: Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 10(1).

22 Ibid reg 10(1) (amended by SI 1981/1783). The committee's determination may be a majority decision: *Picea Holdings Ltd v London Rent Assessment Panel* [1971] 2 QB 216, [1971] 2 All ER 805, DC.

23 Or, in the event of his absence or incapacity, under the hand of either of the other members of the committee.

24 The power to issue such a certificate is conferred by the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 10(2).

25 Ibid reg 10(3).

26 Ibid reg 10A(1) (added by SI 1981/1783). As to reasons see further PARA 920 post.

27 Ie the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 10 (as amended).

28 Ibid reg 10A(2) (added by SI 1981/1783).

## UPDATE

### 919 Procedure before a rent assessment committee

TEXT AND NOTE 3--SI 1974/1065 reg 3(1) amended: SI 2008/2683.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(ii) Applications for Registration/920. Judicial review and appeals.

### 920. Judicial review and appeals.

Judicial review will lie against a rent officer or a rent assessment committee in appropriate cases<sup>1</sup>; and the rules of natural justice apply to hearings before a rent assessment committee<sup>2</sup>. The committee is, however, entitled to take into account matters within its own knowledge, as distinct from specific evidential material, without putting those matters to the parties for comment, and in such a case there will be no breach of the rules of natural justice<sup>3</sup>.

If any party to proceedings before such a committee is dissatisfied in point of law with its decision, he may appeal from it to the High Court<sup>4</sup> or require the committee to state a case for the opinion of the High Court<sup>5</sup>. It is the duty of a rent assessment committee to furnish a statement, either written or oral, of the reasons for its decision if requested, on or before the giving or notification of the decision, to do so<sup>6</sup>.

1 For examples of orders sought against rent officers see *Regis Property Co Ltd v Camden Rent Officer* [1967] EGD 752 (see PARA 917 note 13 ante); *R v Westminster (City) London Borough Council Rent Officer, ex p Rendall* [1973] QB 959, [1973] 3 All ER 119, CA (see PARA 916 note 2 ante); *R v Brighton Rent Officers, ex p Elliott* (1975) 29 P & CR 456, DC (see PARA 917 note 16 ante); *R v Brent London Borough Rent Officer, ex p Ganatra* [1976] QB 576, [1976] 1 All ER 849, DC (see PARA 916 notes 6, 8-10 ante); *R v Kensington and Chelsea (Royal) London Borough Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC (see PARA 916 note 2 ante); *R v Lambeth Rent Officer, ex p Fox* (1977) 35 P & CR 65, DC (see PARA 917 note 1 ante); *R v Rent Officer for Camden, ex p Ebiri* [1981] 1 All ER 950 [1981] 1 WLR 881, DC; *R v Rent Officer for London Borough of Camden, ex p Plant* (1980) 7 HLR 15, [1981] 1 EGLR 73, DC (see PARA 916 note 3 ante); *R v Rent Officer of the Nottinghamshire Registration Area, ex p Allen* (1985) 52 P & CR 41, 17 HLR 481 (see PARA 821 note 14 ante); *R v Chief Rent Officer for Royal Borough of Kensington and Chelsea, ex p Moberley* (1986) 18 HLR 189, [1986] 1 EGLR 168, CA (see PARA 915 note 7 ante).

The court to which matters of jurisdiction should be referred when the rent officer finds them too difficult or is ordered to take them to court is the county court; the Divisional Court may be stricter in the application of the rules affecting judicial review if the court gets too much work which is really appropriate to county courts: see *R v Kensington and Chelsea (Royal) London Borough Rent Officer, ex p Noel* supra at 10 and at 363 per Lord Widgery CJ. The procedure on an application for judicial review is now governed by CPR Pt 54; as to the caution to be exercised in applying pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33. The fact that the county court has no power to order deletion of entries in the rent register should not encourage applications to the High Court; the solution is prompt challenge to the rent officer's findings before the entries are made; registration can then be delayed until the question can be determined in the county court: *R v Rent Officer of the Nottinghamshire Registration Area, ex p Allen* supra. Otherwise, the practice is to allow the entry to remain on the register with the rent officer's indorsement against it that there is no jurisdiction to act on it: see *R v Rent Officer of the Nottinghamshire Registration Area, ex p Allen* supra. For examples of orders sought against rent assessment committees see the cases cited in PARA 921 post. See also PARA 993 post; and as to judicial review see JUDICIAL REVIEW.

2 *Brickfield Properties Ltd v London Rent Assessment Panel* [1967] EGD 780; *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577, sub nom *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304, CA; *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA. The test for bias in a member of a rent assessment committee is, irrespective of actual bias, whether there could be any reasonable suspicion of bias on his part: *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* supra.

3 *Ellis & Sons Fourth Amalgamated Properties Ltd v Southern Rent Assessment Panel* (1984) 14 HLR 48, 270 Estates Gazette 39.

4 Tribunals and Inquiries Act 1992 s 11(1) (as amended), Sch 1 para 37. As to the procedure see CPR Sch 1 RSC Ord 94 r 8; and as to statutory appeals see generally CIVIL PROCEDURE vol 12 (2009) PARA 1684. An appeal under the Tribunals and Inquiries Act 1992 is an alternative to a challenge of a decision of a rent assessment committee by way of judicial review. As to the advantages of the latter see *Ellis & Sons Fourth Amalgamated Properties Ltd v Southern Rent Assessment Panel* (1984) 270 Estates Gazette 39 at 40 per Mann J; cf *R v Rent Officer for the London Borough of Camden, ex p Felix* (1988) 21 HLR 34, [1988] 2 EGLR 132; *R v London Rent Assessment Panel, ex p Chelmsford Building Co Ltd* [1986] 1 EGLR 175.

5 Tribunals and Inquiries Act 1992 s 11(1) (as amended), Sch 1 para 37. As to the procedure see CPR Sch 1 RSC Ord 94 r 9; and as to appeals by way of case stated see generally CIVIL PROCEDURE vol 12 (2009) PARA 1691.

6 See the Tribunals and Inquiries Act 1992 s 10 (as amended), Sch 1 para 37; and JUDICIAL REVIEW vol 61 (2010) PARA 646. See also PARA 919 the text to notes 26-28 ante. Proper adequate reasons must be given; these must be intelligible and deal with the substantial points that have been raised, although they are not necessarily deficient merely because every process of reasoning is not set out or merely because they fail to deal with every point raised before the committee at the hearing: see *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, [1963] 1 All ER 612; *Mountview Court Properties Ltd v Devlin* (1970) 21 P & CR 689, DC; *Guppys Properties Ltd v Knott (No 3)* (1981) 1 HLR 30, 258 Estates Gazette 1083. See also *Metropolitan Properties Co (FGC) Ltd v Good* (1981) 260 Estates Gazette 67; *Midanbury Properties (Southampton) Ltd v Houghton, T Clark & Son Ltd v Heathfield* (1981) 259 Estates Gazette 565; *Waddington v Surrey and Sussex Rent Assessment Committee* (1982) 264 Estates Gazette 717; *R v London Rent Assessment Panel, ex p Cliftyville Properties Ltd* [1983] 1 EGLR 100, (1982) 266 Estates Gazette 44; *R v London Rent Assessment Committee, ex p St George's Court Ltd* (1982) 265 Estates Gazette 984; *Wareing v White* (1985) 17 HLR 433, [1985] 1 EGLR 125, CA; *R v London Rent Assessment Panel, ex p Chelmsford Building Co Ltd* [1986] 1 EGLR 175. It has been held to be sufficient if the committee states that, in the exercise of its skill and judgment, it prefers one method of valuation to another; it does not have to say why it has this preference: *Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172, DC; *Guppys Properties Ltd v Knott*, *Guppys Properties Ltd v Strutt* (1977) 245 Estates Gazette 1023, DC; *Wareing v White* supra; *R v London Rent Assessment Panel, ex p Chelmsford Building Co Ltd* supra. The committee should, however, make clear its decision; it is less than helpful for it merely to say that it was reached after full consideration of all the factors involved: see *Albyn Properties Ltd v Knox* 1977 SC

108, Ct of Sess. Failure to comply with the duty to give reasons under the Tribunals and Inquiries Act 1992 s 10 (as amended) entitles a party to apply for an order enforcing that duty: see *Ex p Dorrington Investment Trust* (1966) 197 Estates Gazette 259, DC (a case concerning a rent tribunal). On an appeal the committee can be required to give reasons by remission of the case to it: *Guppys Properties Ltd v Knott* (1979) 253 Estates Gazette 907.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(ii) Applications for Registration/921. Determination of fair rent.

## **921. Determination of fair rent.**

In determining what rent is, or would be<sup>1</sup>, a fair rent under a regulated tenancy<sup>2</sup> of a dwelling house, regard must be had<sup>3</sup> to all the circumstances<sup>4</sup>, other than personal circumstances<sup>5</sup>, and in particular to:

- 1808 (1) the age, character<sup>6</sup>, locality<sup>7</sup> and state of repair<sup>8</sup> of the dwelling house<sup>9</sup>;
- 1809 (2) if any furniture is provided for use under the tenancy, the quantity, quality and condition of the furniture<sup>10</sup>; and
- 1810 (3) any premium<sup>11</sup>, or sum in the nature of a premium, which has been or may be lawfully required or received on the grant, renewal, continuance or assignment of the tenancy<sup>12</sup>.

In any case where the landlord<sup>13</sup> or a superior landlord is liable<sup>14</sup> to pay council tax in respect of a hereditament<sup>15</sup> ('the relevant hereditament') of which the dwelling house forms part, regard must also be had to the amount of council tax which, as at the date on which the application to the rent officer was made, was set by the billing authority<sup>16</sup> for the financial year in which that application was made and for the category of dwellings<sup>17</sup> within which the relevant hereditament fell on that date<sup>18</sup>.

The rent officer and the rent assessment committee may consider registered rents for comparable properties, the capital value of the dwelling house with vacant possession and all other facts which are relevant according to the general principles of valuation<sup>19</sup>. In determining a fair rent, it must be assumed that the number of persons seeking to become tenants of similar dwelling houses in the locality<sup>20</sup> on the terms of the regulated tenancy<sup>21</sup> is not substantially greater than the number of such dwelling houses in the locality which are available for letting on such terms<sup>22</sup>.

There must be disregarded in the determination:

- 1811 (a) any disrepair or other defect attributable to a failure by the tenant<sup>23</sup> or any predecessor in title of his<sup>24</sup> under the regulated tenancy to comply with its terms<sup>25</sup>;
- 1812 (b) any improvement<sup>26</sup> carried out otherwise than in pursuance of the terms of the tenancy by the tenant or any predecessor in title of his<sup>27</sup> under the regulated tenancy<sup>28</sup>; and
- 1813 (c) if any furniture is provided for use under the regulated tenancy, any improvement to the furniture by the tenant or any predecessor in title of his<sup>29</sup> under the regulated tenancy or, as the case may be, any deterioration in the condition of the furniture due to any ill-treatment by the tenant, any person residing or lodging with him, or any subtenant of his<sup>30</sup>.

Any discount or other reduction affecting the amount of council tax payable must also be<sup>31</sup> disregarded<sup>32</sup>.

1 These words presumably refer to a future regulated tenancy when the application was for a certificate of fair rent under the Rent Act 1977 s 69 (repealed). As to the former right to apply for a certificate of fair rent see PARA 915 the text and notes 17-19 ante.

2 For the meaning of 'regulated tenancy' see PARA 854 ante. The provisions of *ibid* s 70 (as amended) also apply to housing association tenancies and references in s 70 (as amended) to regulated tenancies have effect also as references to housing association tenancies: see s 87(2) (as amended); and PARA 914 note 14 ante. For the meaning of 'housing association tenancy' see PARA 905 ante. As to the application of s 70 (as amended) to previously controlled tenancies converted to regulated tenancies by statute see s 18A (as added), Sch 17 para 6; and PARA 853 ante.

3 These provisions apply to both rent officers and rent assessment committees. For the meaning of 'rent officer' see PARA 911 note 6 ante; and as to rent assessment committees see PARA 910 ante.

4 Where the dwelling house is the subject of a housing association tenancy, the fact that the tenant has no legal security of tenure is not a relevant consideration: *Palmer v Peabody Trust* [1975] QB 604, [1974] 3 All ER 355, DC. If scarcity of housing is to be disregarded under the Rent Act 1977 s 70(2) (see the text and notes 20-21 infra), so too is security of tenure: *Palmer v Peabody Trust* supra. The terms of the tenancy are clearly relevant: see the Rent Act 1977 ss 66(2)(a), 67(3)(b); and PARAS 914-915 ante. The quantity and quality of the services provided by the landlord for the tenant are also relevant: see ss 47(1)(a), 71(1), (4)(a) (as amended); and PARA 897 ante, PARA 922 post. It is the estimated value to the tenant and not the actual cost to the landlord which should be taken into account: *Metropolitan Properties Co Ltd v Noble* [1968] 2 All ER 313, [1968] 1 WLR 838, DC (value to the tenant less than the cost to the landlord of inefficient central heating and a rental of a porter's flat). It appears that there should be an allowance for depreciation in respect of machinery and equipment necessary for the provision of the services, not being fixtures or fittings in the demised premises: *Regis Property Co Ltd v Dudley* [1958] 1 QB 346, [1958] 1 All ER 510, CA; *affd* [1959] AC 370, [1958] 3 All ER 491, HL. The landlord may be allowed a profit on the provision of services: *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 1 All ER 354, [1968] 1 WLR 815, DC (revsd on another ground sub nom *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577, sub nom *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304, CA). For a useful illustration of how a rent assessment committee approaches this problem see *De Caewe v Northern and London Investment Trust Ltd* (the 'St Stephens Close case') (1967) 202 Estates Gazette 473. See also *Metropolitan Properties Co (FGC) Ltd v Good* (1981) 260 Estates Gazette 67; *R v London Rent Assessment Panel, ex p Cliftyville Properties Ltd* [1983] 1 EGLR 100, (1983) 266 Estates Gazette 44. A rent assessment committee may calculate installation costs of machinery from its own experience: *Property Holding and Investment Trust Ltd v Lewis* (1969) 20 P & CR 808, DC. The committee is not obliged in every case to take into account inflation during the period the rent will be registered, but it may be reflected in the treatment of previous registered rents as comparables: *Metropolitan Properties Co (FGC) Ltd v Lannon* supra; *Guppy's (Bridport) Ltd v Carpenter* (1973) 228 Estates Gazette 1919, DC; *Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172, DC; *Palmer v Peabody Trust* supra. The general level of wages may be a relevant circumstance: *Guppy's (Birdport) Ltd v Carpenter* supra. The effect of phasing under the Rent Act 1977 s 55 (repealed with savings) was to be disregarded in determining a fair rent: *Midanbury Properties (Southampton) Ltd v Houghton, T Clark & Son Ltd v Heathfield* (1981) 259 Estates Gazette 565.

5 Rent Act 1977 s 70(1). The tenant's right to possession as a statutory tenant is a personal circumstance and, therefore, the relevant capital value of the premises is their value with vacant possession: *Mason v Skilling* [1974] 3 All ER 977, [1974] 1 WLR 1437, HL. The receipt of grant aid by a landlord is also a personal circumstance which must be disregarded: *Royal British Legion Housing Association Ltd v East Midlands Rent Assessment Panel* (1989) 21 HLR 482, [1989] 1 EGLR 131.

6 The correct approach is to have regard to the actual use of the house at the time of consideration: *Stephens v Rowland* (1974) 231 Estates Gazette 1415, DC.

7 In *Palmer v Peabody Trust* [1975] QB 604, [1974] 3 All ER 355, DC, the court declined to lay down criteria for 'the locality', and held that the committee could have regard to comparables in whatever area it regarded helpful. The test for scarcity under the Rent Act 1977 s 70(2) is to be applied over 'a really large area': *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389, [1975] 1 WLR 349, DC.

8 See note 24 infra. The fact that a closing order had been made under the Housing Act 1985 did not mean that a nil or nominal rent should be registered but was a relevant circumstance: *Williams v Khan* (1981) 258 Estates Gazette 554, CA (a decision concerning the Rent Act 1977 s 72 (as originally enacted)). Closing orders have now been replaced by prohibition orders under the Housing Act 2004 s 33: see PARA 944 post; and HOUSING vol 22 (2006 Reissue) PARA 399.



9 Rent Act 1977 s 70(1)(a) (amended by the Housing and Planning Act 1986 s 24(3), Sch 12 Pt I).

10 Rent Act 1977 s 70(1)(b). In determining a fair rent for furnished premises a rent assessment committee need not first determine a fair rent for the premises unfurnished and then secondly add a sum in respect of furniture; it may determine one rent taking all the circumstances into account: *Campbell v Gardner* (1976) 238 Estates Gazette 115, DC. Furniture may be provided for use under the tenancy notwithstanding that at the tenant's request the furniture is not physically on the premises: *R v London Rent Assessment Panel, ex p Mota* (1987) 20 HLR 159, [1988] 1 EGLR 89.

11 For these purposes, 'premium' has the same meaning as in the Rent Act 1977 Pt IX (ss 119-128) (as amended) (see PARA 926 post); and 'sum in the nature of a premium' means (1) any such loan as is mentioned in s 119 (as amended) (see PARA 931 post) or s 120 (as amended) (see PARA 928 post); (2) any such excess over the reasonable price of furniture as is mentioned in s 123 (see PARA 927 post); and (3) any such advance payment of rent as is mentioned in s 126 (as amended) (see PARA 935 post): s 70(4A) (added by the Housing and Planning Act 1986 s 17(3)).

12 Rent Act 1977 s 70(1)(c) (added by Housing and Planning Act 1986 s 17(2)). The Rent Act 1977 s 70(1)(c) (as so added) applies to any decision made by a rent officer or rent assessment committee after 7 January 1987 notwithstanding that the application was made prior to that date. In the case of a decision of the rent assessment committee this provision applies notwithstanding that the rent officer's decision was made before 7 January 1987: see the Housing and Planning Act 1986 s 17(4).

13 For the meaning of 'landlord' see PARA 816 note 2 ante.

14 Ie under the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended): see RATING AND COUNCIL TAX.

15 For these purposes, 'hereditament' means a dwelling within the meaning of *ibid* Pt I (ss 1-69) (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 232): Rent Act 1977 s 70(3B)(a) (s 70(3A), (3B) added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 6).

16 For these purposes, 'billing authority' has the same meaning as in the Local Government Finance Act 1992 Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 229): Rent Act 1977 s 70(3B)(b) (as added: see note 15 supra).

17 For these purposes, 'category of dwellings' has the same meaning as in the Local Government Finance Act 1992 s 30(1), (2) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 260): Rent Act 1977 s 70(3B)(c) (as added: see note 15 supra).

18 *Ibid* s 70(3A) (as added: see note 15 supra). For transitional provisions see the Local Government Finance (Housing) (Consequential Amendments) Order 1993 art 1(2)(a).

19 *Mason v Skilling* [1974] 3 All ER 977, [1974] 1 WLR 1437, HL. A fair rent must be fair to the landlord as well as fair to the tenant, and it may be regarded as fair to the landlord that he should have a fair return on his capital: *Mason v Skilling* supra. Any appreciation in the capital value of the landlord's investment in the property should not, however, be taken into account in determining a fair rent: *Midanbury Properties (Southampton) Ltd v Houghton, T Clark & Son Ltd v Heathfield* (1981) 259 Estates Gazette 565. For illustrations of and discussion of various valuation methods see *R v Brighton and Area Rent Tribunal, ex p Marine Parade Estates (1936) Ltd* [1950] 2 KB 410, [1950] 1 All ER 946, DC (rent based on capital value not conclusive; a rent tribunal case); *Crofton Investment Trust Ltd v Greater London Rent Assessment Committee* [1967] 2 QB 955, [1967] 2 All ER 1103, DC (use of contractor's method of valuation of modern site cost plus cost of construction); *Anglo-Italian Properties Ltd v London Rent Assessment Panel* [1969] 2 All ER 1128, [1969] 1 WLR 730, DC (rent to be 10% of cost of purchasing premises plus cost of conversion: an acceptable but novel approach); *Tormes Property Co Ltd v Landau* [1971] 1 QB 261, [1970] 3 All ER 653, DC (committee's preference for use of comparables not wrong); see also *Learmonth Property Investment Co Ltd v Aitken* [1971] RVR 689. The committee should act on the evidence before it; it may act on its own knowledge and experience and is entitled to take a broad overall picture; it may reject unchallenged expert evidence before it and determine a rent in the light of its own knowledge and experience: *Cubes Ltd v Heaps* (1970) 215 Estates Gazette 579, DC. See also *Crofton Investment Trust Ltd v Greater London Rent Assessment Committee* supra; *R v London Rent Assessment Panel Committee, ex p Metropolitan Properties Co (FGC) Ltd* [1969] 1 QB 577, sub nom *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] 3 All ER 304, CA; *Mason v Skilling* supra; *Guppys (Bridport) Ltd v Sandoe* (1975) 30 P & CR 69, DC. As to the use of comparables see *Meredith v Stevens* (1974) 237 Estates Gazette 573, DC; *Palmer v Peabody Trust* [1975] QB 604, [1974] 3 All ER 355, DC; *Re Leeds Federated Housing Association Ltd* (1981) 260 Estates Gazette 813; *Kovats v Trinity House Corp* (1981) 262 Estates Gazette 445; *London Rent Assessment Committee v St George's Court Ltd* (1984) 48 P & CR 230, 16 HLR 15, CA; *BTE Ltd v Merseyside and Cheshire Rent Assessment Committee and Jones* (1991) 24 HLR 514, [1992] 1 EGLR 116 (use of assured tenancies as comparables); *Curtis v London Rent Assessment Committee* [1999] QB 92, [1997] 4 All ER 842, CA (best evidence of fair rent is close market rent comparables; where such comparables are available enabling

the identification of a market rent as a starting point, there is normally no need to refer to registered fair rent comparables at all); *Northumberland and Durham Property Trust Ltd v Chairman of London Rent Assessment Committee and Bullock* (1998) 30 HLR 1091, sub nom *Northumberland and Durham Property Trust Ltd v Chairman of London Rent Assessment Committee (No 2)* [1998] 2 EGLR 99; *Spath Holme Ltd v Chairman of the North Western Rent Assessment Committee* [2001] EWHC Admin 541, [2003] HLR 133, [2001] All ER (D) 138 (Jul) (hypothetical market is an open market in regulated tenancies, and a landlord, in such a market, will face voids and letting costs to a similar extent as for assured tenancies).

20 A 'locality' is a really large or substantial area: *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389, [1975] 1 WLR 349, DC. The identification of the area is a matter for the rent assessment committee and, while having regard to the parties' submissions, it should determine the area for itself: *Northumberland and Durham Property Trust Ltd v Chairman of London Rent Assessment Committee and Bullock* (1998) 30 HLR 1091, sub nom *Northumberland and Durham Property Trust Ltd v London Rent Assessment Committee (No 2)* [1998] 2 EGLR 99. Although the concept of locality is elusive, it will generally be a much larger area for the purposes of the Rent Act 1977 s 70(2) than that appropriate and relevant to the assessment of market rent under s 70(1); it must be sufficiently large to give effect to the statutory purpose: *Queensway Housing Association Ltd v Chiltern, Thames and Eastern Rent Assessment Committee* (1998) 31 HLR 945, [1998] All ER (D) 543.

21 le other than those relating to rent.

22 Rent Act 1977 s 70(2). This provision is designed to eliminate any element in the fair rent based on an increase in rents due to a housing shortage: *Metropolitan Property Holdings Ltd v Finegold* [1975] 1 All ER 389, [1975] 1 WLR 349, DC. The committee need not quantify any element of scarcity value which it has deducted: *Metropolitan Property Holdings Ltd v Laufer* (1974) 29 P & CR 172, DC. Certain methods of valuation do not leave any room for a deduction for scarcity: *Anglo-Italian Properties Ltd v London Rent Assessment Panel* [1969] 2 All ER 1128, [1969] 1 WLR 730, DC (cited in note 19 supra). See also *Batt v London City and Westcliff Properties Ltd* (1967) 111 Sol Jo 684; *Western Heritable Investment Co Ltd v Husband* [1983] 2 AC 849, [1983] 3 All ER 65, HL; *Queensway Housing Association Ltd v Chiltern, Thames and Eastern Rent Assessment Committee* (1998) 31 HLR 945, [1998] All ER (D) 543; *Yeoman's Row Management Ltd v London Rent Assessment Committee* [2002] EWHC 835 (Admin), [2002] All ER (D) 148 (Apr). Local housing authority lists are not totally irrelevant in determining scarcity since a high demand for public sector housing may have an indirect effect on the private market, but they should be used with caution: *Forebury Estates Ltd v Chairwoman of the Chiltern Thames and Eastern Rent Assessment Panel* (2000) 33 HLR 718, (2000) Times, 11 July.

23 In relation to a controlled tenancy converted into a regulated tenancy by statute, this reference to the tenant includes references to the tenant under the tenancy before the conversion: see PARA 853 ante at head (3) in the text.

24 See *East Coast Amusement Co Ltd v British Transport Board* [1965] AC 58, [1963] 2 All ER 775, HL (decided under the Landlord and Tenant Act 1954); *Henry Smith's Charity Trustees v Hemmings* (1982) 45 P & CR 377, 6 HLR 47, CA.

25 Rent Act 1977 s 70(3)(a). There is authority for saying that the state of repair in s 70(1) (as amended) should be judged at the effective date of registration of the rent: *Nicoll v First National Developments Ltd* (1972) 226 Estates Gazette 301, DC. The terms of the tenancy must be regarded even though the landlord may be in breach of a repairing covenant: see *R v Hampstead and St Pancras Furnished Houses Rent Tribunal, ex p Ascot Lodge Ltd* [1947] KB 973, [1947] 2 All ER 12, DC. The landlord's failure to enforce the tenant's repairing covenants should not be taken into account against the landlord: *Metropolitan Properties Co Ltd v Wooldridge* (1969) 20 P & CR 64, DC. There must be evidence of breach of covenant or negligence by the tenant: *McGee v London Rent Assessment Panel Committee* (1969) 113 Sol Jo 384, DC. Conversely any enhancement in the condition of the premises by the tenant which is not an improvement within the Rent Act 1977 s 70(3)(b) must be regarded: see *Mackie v Gallagher* 1967 SC 59, Ct of Sess. In the application of the Rent Act 1977 s 70 (as amended) in relation to a housing association tenancy converted into a regulated tenancy by statute or a statutory tenancy imposed by virtue of s 92(4), Sch 14 para 1 (see PARA 886 ante), the reference in s 70(3)(a), (b) to a failure to comply with any terms of a regulated tenancy or to carrying out an improvement includes a reference to a failure occurring or an improvement carried out before the tenancy became a regulated tenancy or, as the case may be, before the statutory tenancy was imposed: Sch 14 para 7.

26 For these purposes, 'improvement' includes the replacement of any fixture and fitting: *ibid* s 70(4). See also s 75(1); and PARA 915 note 12 ante. This overrules the actual decision in *Mackie v Gallagher* 1967 SC 59, Ct of Sess.

27 See also the cases cited in note 24 supra.

28 Rent Act 1977 s 70(3)(b). See also Sch 14 para 7; cited in note 25 supra.

29 See also note 23 supra.

30 Rent Act 1977 s 70(3)(e).

31 ie in a case falling within *ibid* s 70(3A) (as added): see the text and notes 13-18 *supra*.

32 *Ibid* s 70(3A) (as added: see note 15 *supra*).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(4) REGISTRATION OF RENT/(iii) Registration; Effect and Cancellation/922. Amount to be registered as rent.

### **(iii) Registration; Effect and Cancellation**

#### **922. Amount to be registered as rent.**

Where an application for the registration of a new rent in respect of a dwelling house is made after 1 February 1999<sup>1</sup> and, on the date of that application, there is an existing registered rent<sup>2</sup> in respect of that dwelling house, then, subject to the prescribed exceptions<sup>3</sup>, the amount to be registered as the rent of the dwelling house<sup>4</sup> must not exceed the maximum fair rent calculated in accordance with the prescribed formula<sup>5</sup>. In applying this restriction, however, no account is to be taken of any variable sum to be included in the registered rent in accordance with the provisions as to services, maintenance and repair<sup>6</sup> set out below<sup>7</sup>; and the restriction does not apply in respect of a dwelling house if because of a change in the condition of the dwelling house or the common parts<sup>8</sup> as a result of repairs or improvements<sup>9</sup> carried out by the landlord or a superior landlord, the rent that is determined in response to an application for registration of a new rent<sup>10</sup> exceeds by at least 15% the previous rent registered or confirmed<sup>11</sup>.

The amount to be registered as the rent of a dwelling house must include any sums payable by the tenant<sup>12</sup> to the landlord<sup>13</sup> in respect of council tax or for use of furniture or for services, whether or not those sums are separate from the sums payable for the occupation of the dwelling house or are payable under separate agreements<sup>14</sup>. In order to assist authorities to give effect to the housing benefit scheme<sup>15</sup> where a rent is registered, there must be noted on the register the amount, if any, of the registered rent which, in the opinion of the rent officer<sup>16</sup> or rent assessment committee<sup>17</sup>, is fairly attributable to the provision of services, except any amount which is negligible in the opinion of the officer or, as the case may be, the committee<sup>18</sup>.

Where any rates<sup>19</sup> in respect of a dwelling house<sup>20</sup> are borne by the landlord or a superior landlord, the amount to be registered as the rent of the dwelling house is the same as if the rates were not so borne; but the fact they are so borne must be noted on the register<sup>21</sup>. In such a case the amount of the rates for any rental period<sup>22</sup> must be added to the rent limit<sup>23</sup>; and, if the rental period is a statutory period<sup>24</sup>, the rates are recoverable without service of a notice of increase in addition to the sums otherwise recoverable from the tenant<sup>25</sup>.

Where, under a regulated tenancy<sup>26</sup>, the sums payable by the tenant to the landlord include any sums varying according to the cost from time to time of any services provided by the landlord or a superior landlord, or any works of maintenance or repair carried out by the landlord or a superior landlord, the amount to be registered as rent may, if the rent officer or, as the case may be, the rent assessment committee is satisfied that the terms as to the variation are reasonable, be entered as an amount variable in accordance with those terms<sup>27</sup>.

1 ie the date when the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, came into force: see art 1(1). As to the statutory power under which that Order was made see PARA 248 *ante*. The 1999 Order is not ultra vires that power: see *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, [2001] 1 All ER 195, HL.

- 2    Ie an existing registered rent under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante; the text and notes 12-27 infra; and PARAS 923-924 post.
- 3    Ie subject to the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2(5), (7): see the text and notes 5-11 infra.
- 4    Ie under the Rent Act 1977 Pt IV (as amended).
- 5    Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2(1), (6), (8)(a). For the prescribed formula see art 2(2)-(4), (8)(c).
- 6    Ie in accordance with the Rent Act 1977 s 71(4): see the text and notes 26-27 infra.
- 7    Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2(5).
- 8    For these purposes, 'common parts', in relation to a building, includes the structure and exterior of the building and common facilities provided for the occupiers of the dwelling houses in the building: *ibid* art 2(8)(b).
- 9    Ie including the replacement of any fixture or fitting: *ibid* art 2(7).
- 10   See note 4 supra.
- 11   Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2(7). As to the approach to be taken by a rent assessment committee when considering art 2(7) see *Howard de Walden Estates Ltd v London Rent Assessment Committee* [2003] All ER (D) 73 (Jun).
- 12   For the meaning of 'tenant' see PARA 816 note 3 ante.
- 13   For the meaning of 'landlord' see PARA 816 note 2 ante.
- 14   Rent Act 1977 s 71(1) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 7; for transitional provisions see art 1(2)(a)). The Rent Act 1977 s 71(1) (as amended), s 71(2), (4) applies also to housing association tenancies: see s 87(2) (as amended); and PARA 914 note 14 ante. For the meaning of 'housing association tenancy' see PARA 905 ante.
- 15   Ie under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 140 et seq.
- 16   For the meaning of 'rent officer' see PARA 911 note 6 ante.
- 17   As to rent assessment committees see PARA 910 ante.
- 18   Rent Act 1977 s 72A (added by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 47).
- 19   For the meaning of 'rates' for these purposes see PARA 895 note 2 ante. As to the abolition of domestic rates see PARA 521 ante.
- 20   This includes such proportion of any rates in respect of a hereditament of which the dwelling house forms part as may be agreed in writing between the landlord and the tenant or determined by the county court: Rent Act 1977 s 75(2). As to the situation where a rent registered under the Rent Act 1968 Pt VI (ss 68-84) (repealed) is deemed to be registered under the Rent Act 1977 Pt IV (ss 62-75) (as amended) see *Dominal Securities Ltd v McLeod* (1978) 37 P & CR 411, CA; and PARA 892 note 1 ante.
- 21   Rent Act 1977 s 71(2). Section 71(2) applies also to housing association tenancies: see note 14 supra.
- 22   For the meaning of 'rental period' see PARA 853 note 3 ante. The amount of rates is ascertained in accordance with *ibid* s 27 (repealed), Sch 5 (see PARA 896 ante): s 71(3).
- 23   *Ibid* s 71(3)(a) (amended by the Housing Act 1980 s 152(3), Sch 26; the Rent (Relief from Phasing) Order 1987, SI 1987/264, art 2(3), Sch 1 para 4). The rent limit is that imposed by the Rent Act 1977 s 44(1) (as amended) (see PARA 892 ante). Section 71(3) (as amended) does not apply to housing association tenancies: cf note 14 supra.
- 24   Ie as defined in *ibid* s 61(1): see PARA 893 note 1 ante.
- 25   *Ibid* s 71(3)(b). See PARA 894 the text and notes 13-14 ante.

26 For the meaning of 'regulated tenancy' see PARA 854 ante.

27 Rent Act 1977 s 71(4). Section 71(4) applies also to housing association tenancies: see note 14 supra. See *Re Heathview Tenants' Co-operative Ltd* (1980) 258 Estates Gazette 644 (terms as to variation held to be reasonable); and see further *Hyams v Titan Properties Ltd* (1972) 24 P & CR 359 (decided under the Landlord and Tenant Act 1954); *Firstcross Ltd v Teasdale* (1982) 47 P & CR 228, 8 HLR 112; *Wigglesworth v Property Holding and Investment Trust plc* (1984) 270 Estates Gazette 555.

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### 923. Effect of registration of rent.

The registration of a rent for a dwelling house<sup>1</sup> determined by a rent officer<sup>2</sup> takes effect from the date when it is registered<sup>3</sup>; and the registration of a rent determined by a rent assessment committee takes effect from the date when the committee makes its decision<sup>4</sup>.

If the rent for the time being registered is confirmed by the rent officer, the confirmation takes effect from the date when it is noted in the register<sup>5</sup>; and, if it is confirmed by the rent assessment committee, the confirmation takes effect from the date when the committee makes its decision<sup>6</sup>. If, however, the landlord applies<sup>7</sup> within the last three months of the two-year period from the relevant date<sup>8</sup> and the resulting registration of a rent for the dwelling house, or confirmation of the rent for the time being registered, would otherwise take effect before the expiry of that period, it takes effect on the expiry of that period<sup>9</sup>.

The date from which the registration or confirmation of a rent takes effect must be entered in the register<sup>10</sup>; and as from the date on which the registration of a rent takes effect any previous registration of a rent for the dwelling house ceases to have effect<sup>11</sup>.

Where a valid notice of increase<sup>12</sup> has been served on a tenant<sup>13</sup> and, in consequence of the registration of a rent, part but not the whole of the increase specified in the notice becomes irrecoverable from the tenant, the registration does not invalidate the notice, but the notice has effect, as from the date from which the registration takes effect, as if it specified such part only of the increase as has not become irrecoverable<sup>14</sup>.

A registered rent operates in relation to the property rather than in relation to the particular tenant<sup>15</sup>.

1 The Rent Act 1977 s 72 (substituted by the Housing Act 1980 s 61(1)) also applies to housing association tenancies: see the Rent Act 1977 s 87(2) (as amended); and PARA 914 note 14 ante. There is, however, a special provision for housing association tenancies for a registration before 1 January 1973; in these circumstances the registration takes effect from that date: s 155(3), Sch 24 para 11. For the meaning of 'housing association tenancy' see PARA 905 ante.

2 For the meaning of 'rent officer' see PARA 911 note 6 ante.

3 Rent Act 1977 s 72(1)(a) (as substituted: see note 1 supra).

4 Ibid s 72(1)(b) (as substituted: see note 1 supra). As to rent assessment committees see PARA 910 ante.

5 Ibid s 72(2)(a) (as substituted: see note 1 supra).

6 Ibid s 72(2)(b) (as substituted: see note 1 supra).

7 Ie by virtue of ibid s 67(4) (as amended): see PARA 915 ante.

8 For the meaning of 'the relevant date' see PARA 915 note 11 ante.

9 Rent Act 1977 s 72(3) (as substituted: see note 1 supra).

10 Ibid s 72(4) (as substituted: see note 1 supra).

11 Ibid s 72(5) (as substituted: see note 1 supra).

12 I.e. a notice of increase under ibid Pt III (ss 44-61) (as amended): see PARA 891 et seq ante. As to notices of increase generally see PARA 901 ante.

13 For the meaning of 'tenant' see PARA 816 note 3 ante.

14 Rent Act 1977 s 72(6) (as substituted: see note 1 supra).

15 *Feather Supplies Ltd v Ingham* [1971] 2 QB 348, [1971] 3 All ER 556, CA; *Hanson v Church Comrs for England* [1978] QB 823, [1977] 3 All ER 404, CA.

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## **924. Cancellation of registration of rent.**

An application for the cancellation of the registration<sup>1</sup> of a rent for a dwelling house may be made either:

1814 (1) where a rent agreement<sup>2</sup> as respects the dwelling house takes effect, or is to take effect, after the expiration of the period of two years<sup>3</sup> beginning with the relevant date<sup>4</sup>, and the period for which the tenancy has effect cannot end, or be brought to an end<sup>5</sup> by the landlord<sup>6</sup>, earlier than 12 months after the date of the application<sup>7</sup>, and the application is made jointly by the landlord and the tenant<sup>8</sup> under the rent agreement<sup>9</sup>; or

1815 (2) where not less than two years have elapsed since the relevant date<sup>10</sup>, and the dwelling house is not for the time being subject to a regulated tenancy<sup>11</sup>, and the application is made by the person who would be the landlord if the dwelling house were let on such a tenancy<sup>12</sup>.

The rent agreement may be one providing that the agreement is not to take effect unless the application for the cancellation of registration is granted<sup>13</sup>.

The application must be in the prescribed form<sup>14</sup> and must contain the prescribed particulars<sup>15</sup>, and, in the case of an application under head (1) above, must be accompanied by a copy of the rent agreement<sup>16</sup>.

If the application is made under head (1) above and the rent officer is satisfied<sup>17</sup> that the rent<sup>18</sup> payable under the rent agreement does not exceed a fair rent<sup>19</sup> for the dwelling house, he must cancel the registration, and he must also cancel the registration if the application is made under head (2) above<sup>20</sup>.

A cancellation made in pursuance of an application under head (1) above does not take effect until the date when the agreement takes effect; and, if the cancellation is registered before that date, the date on which it is to take effect must be noted on the register<sup>21</sup>.

The rent officer must notify the applicants of his decision to grant or refuse an application for cancellation<sup>22</sup>. Any cancellation is without prejudice to a further registration of a rent at any time after cancellation<sup>23</sup>.

1     Ie a registration under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 905 et seq ante. Section 73 (as amended) does not apply to a housing association tenancy: see s 87(2) (as amended); and PARA 914 note 14 ante. For the meaning of 'housing association tenancy' see PARA 905 ante.

2     For these purposes, 'rent agreement' means an agreement increasing the rent payable under a protected tenancy which is a regulated tenancy, or, where a regulated tenancy is terminated and a new regulated tenancy is granted at a rent exceeding the rent under the previous tenancy, the grant of the new tenancy: *ibid* s 73(9). This is not the same as 'a rent agreement with a tenant having security of tenure': see PARA 898 ante. For the meaning of 'protected tenancy' see PARA 818 ante; and for the meaning of 'regulated tenancy' see PARA 854 ante.

3     Where, on the determination or confirmation of a rent by the rent officer, the rent determined by him was registered, or his confirmation was noted in the register, before 28 November 1980 the period was three years: *ibid* s 73(1)(a) (as originally enacted); Housing Act 1980 s 152(1), Sch 25 para 40.

4     Rent Act 1977 s 73(1)(a) (amended by the Housing Act 1980 Sch 25 para 40). For the meaning of 'the relevant date' see PARA 915 note 11 ante.

5     Ie except for non-payment of rent or a breach of the terms of the tenancy.

6     For the meaning of 'landlord' see PARA 816 note 2 ante.

7     Rent Act 1977 s 73(1)(b).

8     For the meaning of 'tenant' see PARA 816 note 3 ante.

9     Rent Act 1977 s 73(1)(c).

10    *Ibid* s 73(1A)(a) (s 73(1A) added by the Housing Act 1980 s 62(1), (2)). As to the period see also note 3 *supra*.

11    Rent Act 1977 s 73(1A)(b) (as added: see note 10 *supra*). For the meaning of 'regulated tenancy' see PARA 854 ante.

12    *Ibid* s 73(1A)(c) (as added: see note 10 *supra*).

13    *Ibid* s 73(2).

14    For the prescribed forms of application see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(2)(c), Sch 1, Form 10 (substituted by SI 1984/1391) (joint application by landlord and tenant), the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, Sch 1, Form 11 (other cases). A form substantially to the like effect may be used: reg 2(2). For the corresponding forms in Welsh see the Rent Act 1977 (Forms etc) (Welsh Forms and Particulars) Regulations 1993, SI 1993/1511, reg 2, Schedule, Forms 10, 11 respectively. A form substantially to the like effect may be used: reg 3.

15    Rent Act 1977 s 73(3)(a) (s 73(3) substituted by the Housing Act 1980 s 62(1), (3)). The prescribed particulars are those specified in the appropriate form referred to in note 14 *supra*: Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 4.

16    Rent Act 1977 s 73(3)(b) (as substituted: see note 15 *supra*).

17    If, after making such inquiry, if any, as he thinks fit and considering any information supplied to him, the rent officer is not so satisfied, he must serve a notice on the landlord and on the tenant informing them that he proposes, at a specified time (not less than seven days after the service of the notice) and place, to consider in consultation with them, or such of them as appear, whether the registration of the rent for the dwelling house should be cancelled: Rent Regulation (Cancellation of Registration of Rent) Regulations 1980, SI 1980/1698, regs 3, 4(1). At any such consultation the landlord and the tenant may each be represented by a person authorised by him in that behalf, whether or not of counsel or a solicitor: reg 4(2). The rent officer may not reach his decision until after such consideration: reg 4(3). Where he considers it appropriate, he may arrange for consultation in respect of more than one such application to be held together with consultations in respect of one or more other applications: reg 4(4). As to the service of notices see note 22 *infra*.

18 Where the rent is variable, this means the highest rent: Rent Act 1977 s 73(4).

19 As to the determination of a fair rent see *ibid* s 70 (as amended), s 70A (as added); and PARA 921 ante. Where the application is made under s 73(1) (as amended) and under the terms of the rent agreement the sums payable by the tenant to the landlord include any sums varying according to the cost from time to time of any services provided by the landlord or a superior landlord, or of any works of maintenance or repair carried out by the landlord or a superior landlord, the rent officer must not cancel the registration unless he is satisfied that those terms are reasonable: s 73(5) (amended by the Housing Act 1980 s 62(5)). Cf the Rent Act 1977 s 71(4); and PARA 922 ante.

20 *Ibid* s 73(4) (amended by the Housing Act 1980 s 62(4)).

21 Rent Act 1977 s 73(6) (amended by the Housing Act 1980 s 62(6)).

22 Rent Act 1977 s 73(8). In the case of a joint application under s 73(1) (as amended: see note 4 *supra*), any notices required to be served under the Rent Regulation (Cancellation of Registration of Rent) Regulations 1980, SI 1980/1698, reg 4 (see note 17 *supra*) and any notifications to be given under the Rent Act 1977 s 73(8) must be sent by post in a prepaid letter or delivered (1) to the landlord and to the tenant at their respective addresses given in the application; or (2) where the application is made on behalf of the landlord or of the tenant by an agent acting on his behalf, to that agent at the address of the agent given in the application: Rent Regulation (Cancellation of Registration of Rent) Regulations 1980, SI 1980/1698, regs 2, 5(1). In the case of an application under the Rent Act 1977 s 73(1A) (as added: see notes 10-12 *supra*) any notification to be given under s 73(8) must be sent by post in a prepaid letter or delivered to the applicant at the address given in the application or, where the application is made by an agent acting on behalf of the applicant, to that agent at the address of the agent given in the application: Rent Regulation (Cancellation of Registration of Rent) Regulations 1980, SI 1980/1698, reg 5(2).

23 Rent Act 1977 s 73(7).

## **UPDATE**

### **924 Cancellation of registration of rent**

NOTE 14--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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## **(5) PREMIUMS, LOANS AND PROHIBITED REQUIREMENTS**

### **(i) Nature and Scope of the Restrictions**

#### **925. In general.**

Rent regulation would be of little value to tenants if they could be required to pay capital sums, however disguised, for their tenancies in addition to the rent; and it would no more accord with the policy of the Rent Acts if outgoing tenants could profit from rent restriction by charging a premium to an incoming tenant<sup>1</sup>. The following conduct is, therefore, prohibited:

- 1816 (1) the requiring of a premium or loan as a condition of the grant, renewal, continuance or assignment of a protected tenancy<sup>2</sup>;
- 1817 (2) the receiving of a premium in connection with any such transaction<sup>3</sup>;
- 1818 (3) the offering of furniture for sale at an excessive price in connection with any such transaction<sup>4</sup>;



- 1819 (4) the requiring of a premium as a condition of the grant, renewal, continuance or assignment of rights under a restricted contract where the rent is registered<sup>5</sup>;
- 1820 (5) the requirement of payment of rent too far in advance<sup>6</sup>;
- 1821 (6) the requiring or receiving from anybody but the landlord of any sum by a statutory tenant for giving up possession<sup>7</sup>; and
- 1822 (7) the requiring of any pecuniary consideration for entering into an agreement for the transfer of a statutory tenancy<sup>8</sup>.

It is an offence to do any of these prohibited acts, and money received in contravention of these provisions is recoverable by the payer<sup>9</sup>.

Certain long tenancies are, however, excluded from the operation of these provisions<sup>10</sup>.

1 As to the 'black market' produced by rent restriction and the policy of the Rent Acts to obviate this see *Farrell v Alexander* [1977] AC 59 at 87, [1976] 2 All ER 721 at 738, HL, per Lord Simon of Glaisdale. See also PARA 931 note 1 post.

2 See the Rent Act 1977 ss 119(1), 120(1); and PARAS 931-932 post. Cf the Housing Act 1988 s 15 (as amended) whereby it is lawful to charge a premium to an assured tenant but there is then no statutory restriction on the tenant's freedom to assign: see PARA 1063 post.

3 See the Rent Act 1977 ss 119(2), 120(2); and PARAS 931-932 post.

4 See *ibid* s 124(1) (as amended); and PARA 933 post.

5 See *ibid* s 122 (as amended); and PARA 998 post.

6 See *ibid* s 126 (as amended); and PARA 935 post.

7 See *ibid* s 3(5), Sch 1 para 12 (as amended); and PARA 940 post.

8 See *ibid* Sch 1 para 14 (as amended); and PARA 941 post.

9 See PARA 931 et seq post.

10 See the Rent Act 1977 s 127 (as amended); and PARAS 929-930 post.

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## **926. Meaning of 'premium'.**

'Premium' includes:

- 1823 (1) any fine or other like sum<sup>1</sup>;
- 1824 (2) any other pecuniary consideration in addition to rent<sup>2</sup>; and
- 1825 (3) any sum paid by way of a deposit<sup>3</sup>, other than one which does not exceed one-sixth of the annual rent and is reasonable in relation to the potential liability in respect of which it is paid<sup>4</sup>.

'Premium' has been judicially defined as a cash payment made to the landlord and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained<sup>5</sup>. It is now settled, however, that a payment made to a third person to the order of the landlord is a premium for these purposes<sup>6</sup>. 'Pecuniary consideration' includes any consideration sounding or expressed in terms of money by which there is a benefit to the landlord or a detriment to the tenant; but the particular means adopted of passing the consideration is not significant<sup>7</sup>. It would seem that a requirement by a landlord that a tenant should contribute to repairs for which the tenant is not responsible or that he should buy the goodwill of a business would constitute a premium<sup>8</sup>. It is sometimes difficult to distinguish between a payment of a premium and a payment of rent in advance. Each case must be decided on its own facts and the substance of the transaction must be regarded, not the name given to the payment<sup>9</sup>.

1 Rent Act 1977 s 128(1)(a) (definition substituted by the Housing Act 1980 s 79). For the meaning of 'fine' of the Law of Property Act 1925 s 205(1)(xxiii), cited in PARA 485 note 5 ante. See also the text and notes 5-6 infra.

2 Rent Act 1977 s 128(1)(b) (as substituted: see note 1 supra). See also the text to note 7 infra.

3 As to the position regarding deposits before this head was added to the definition of 'premium' by the Housing Act 1980 s 79 see *R v Ewing* (1977) 65 Cr App Rep 4, CA.

4 Rent Act 1977 s 128(1)(c) (as substituted: see note 1 supra).

5 *King v Earl Cadogan* [1915] 3 KB 485 at 492, CA, per Warrington LJ.

6 *Elmdene Estates Ltd v White* [1960] AC 528, [1960] 1 All ER 306, HL (landlord's requirement that the tenant should sell a house to a third person for £500 less than its market value held to amount to a premium and the tenant recovered £500 from the landlord); not following *R v Birmingham (West) Rent Tribunal, ex p Edgbaston Investment Trusts Ltd* [1951] 2 KB 54, [1951] 1 All ER 198, DC (tenant required to contract to pay a builder part of the cost of conversion which the landlord was not contractually bound to pay; as the payment was not made to the landlord, it was held not to be a premium). See also *Berry v Humm & Co* [1915] 1 KB 627 at 631.

7 See the cases cited in note 6 supra.

8 See however, *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Philippe* [1950] 2 All ER 211, DC; and *R v Barnet (and Area) Rent Tribunal, ex p Millman* [1950] 2 KB 506, [1950] 2 All ER 216, DC, where it was held that such transactions, if they did not constitute premiums, were not payments in respect of the lease for the purposes of the Rent Acts.

9 See *Rush v Matthews* [1926] 1 KB 492, CA (premium payable weekly under an agreement separate from, but contemporaneous with, the lease held to form part of the rent); *Regor Estates Ltd v Wright* [1951] 1 KB 689, [1951] 1 All ER 219, CA (premium payable by instalments, the landlord's consent to assignment or underletting being conditional on the payment of all remaining instalments and the covenant to pay the premium being personal to the tenant so that it did not run with the land; premium held to be a true premium and instalments of it held not to be rent); *Lower v Porter* [1956] 1 QB 325, [1956] 1 All ER 150, CA (payment expressed to be for the goodwill of a business carried on in the premises, although no business was in fact carried on there); *O'Connor v Hume* [1954] 2 All ER 301, [1954] 1 WLR 824, CA; *Samrose Properties Ltd v Gibbard* [1958] 1 All ER 502, [1958] 1 WLR 235, CA (premium was commuted rent); *Grace Rymer Investments Ltd v Waite* [1958] Ch 314, [1958] 1 All ER 138 (sum paid as advance rent held to be a premium; affd [1958] Ch 831, [1958] 2 All ER 777, CA, but without its being decided whether the payment was a premium for the purposes of the Rent Acts). The transaction must be looked at as a whole and extrinsic evidence is admissible to explain it, at least so long as it does not contradict the terms of the instrument of letting: *Regor Estates Ltd v Wright* supra at 698 and at 223-224; *O'Connor v Hume* supra at 303, 305-306 and at 826, 829-830; *Woods v Wise* [1955] 2 QB 29 at 39-41, [1955] 1 All ER 767 at 772-773, CA. As to the principle that it is the substance of the transaction which is relevant see *Elmdene Estates Ltd v White* [1960] AC 528 at 538, [1960] 1 All ER 306 at 309, HL, per Viscount Simonds.

PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(5) PREMIUMS, LOANS AND PROHIBITED REQUIREMENTS/(i) Nature and Scope of the Restrictions/927. Excessive price for furniture etc.

### **927. Excessive price for furniture etc.**

Where the purchase of any furniture<sup>1</sup> is required as a condition of the grant, renewal, continuance or assignment of a protected tenancy<sup>2</sup> or of rights under a restricted contract<sup>3</sup> which relates to premises<sup>4</sup> for which a rent is registered, then, if the price exceeds the reasonable price of the furniture, the excess is to be treated<sup>5</sup> as if it were a premium required to be paid as a condition of the grant, renewal, continuance or assignment of the protected tenancy or, as the case may be, the rights under the restricted contract<sup>6</sup>.

Where a statutory tenant<sup>7</sup> of a dwelling house requires that furniture or other articles be purchased as a condition of his giving up possession of the dwelling house, the price demanded must, at the request of the person on whom the demand is made, be stated in writing and, if the price exceeds the reasonable price of the articles, the excess is to be treated<sup>8</sup> as a sum asked to be paid as a condition of giving up possession<sup>9</sup>. The reasonable price is the price that it would be reasonable to expect a willing incoming tenant to pay to a willing outgoing tenant. It is not necessarily the market value, but the desire of the incoming tenant to obtain the tenancy cannot be taken into account<sup>10</sup>.

1 For the purposes of the Rent Act 1977 Pt IX (ss 119-128) (as amended) (see PARA 926 ante; the text and notes 2-10 infra; and PARA 928 et seq post), 'furniture' includes fittings and other articles: s 128(1). For the meaning of 'article' see *Daly v Cannon* [1954] 1 All ER 315, [1954] 1 WLR 261, DC (decided under the Public Health Act 1936 s 154(1) (repealed)).

2 For the meaning of 'protected tenancy' see PARA 818 ante.

3 For the meaning of 'restricted contract' see PARA 986 post.

4 I.e. premises falling within the Rent Act 1977 s 122(1): see PARA 998 post.

5 I.e. for the purpose of ibid Pt IX (as amended).

6 Ibid s 123. As to the offences of offering furniture at an excessive price and of failing to provide a priced inventory see PARA 933 post.

7 For the meaning of 'statutory tenant' see PARA 831 ante.

8 I.e. for the purpose of the Rent Act 1977 s 3(5), Sch 1 para 12(1): see PARA 940 post.

9 Ibid Sch 1 para 12(2).

10 *Eales v Dale* [1954] 1 QB 539, [1954] 1 All ER 717, CA; *Nock v Munk* (1982) 263 Estates Gazette 1085.

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### **928. Loans.**

The statutory provisions which prohibit the requiring of a premium as a condition of the grant, renewal, continuance or assignment of a tenancy<sup>1</sup> and the provision relating to the punishment of persons contravening the prohibitions<sup>2</sup>, apply to requiring the making of any loan, whether

secured or unsecured, as they apply to requiring the payment of a premium in addition to rent<sup>3</sup>. Nothing in those provisions, however, invalidates any agreement for the making of a loan, or any security issued in pursuance of such an agreement, but any sum lent in circumstances involving a contravention of the prohibition is, notwithstanding anything in the agreement for the loan, repayable to the lender on demand<sup>4</sup>.

1    le the Rent Act 1977 ss 119(1), 120(1): see PARAS 931-932 post.

2    le ibid ss 119(3), (4), 120(6), (7) (as amended): see PARAS 931-932 post.

3    See ibid ss 119(1), 120(1).

4    Ibid s 125(2).

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## **929. Exclusion of certain long tenancies.**

Where a tenancy<sup>1</sup> is both a long tenancy<sup>2</sup> and a protected tenancy<sup>3</sup> and the following conditions are satisfied, the provisions as to the prohibition of premiums and similar transactions<sup>4</sup> do not apply and are deemed never to have applied to the tenancy<sup>5</sup>. If the premium is received or required to be paid, or the loan is required to be made, after 15 January 1989<sup>6</sup>, the conditions which must be satisfied are that:

1826 (1) the landlord<sup>7</sup> has no power to determine the tenancy<sup>8</sup> at any time within 20 years beginning on the date on which it was granted<sup>9</sup>; and

1827 (2) the terms of the tenancy do not inhibit both the assignment and the underletting of the whole of the premises comprised in the tenancy<sup>10</sup>.

If, however, the premium was received or required to be paid, or the loan was required to be made, on or before that date, the conditions which must be satisfied are that:

1828 (a) the tenancy is not, and cannot become, terminable within 20 years of the date when it was granted by notice given to the tenant<sup>11</sup>;

1829 (b) unless the tenancy was granted before 25 July 1969 or was granted under statutory provisions as to extension of long leaseholds<sup>12</sup>, the sums payable by the tenant otherwise than in respect of rates<sup>13</sup>, service, repairs, maintenance or insurance are not, under the terms of the tenancy, varied or liable to be varied within 20 years of the date when it was granted, except in certain circumstances<sup>14</sup>, nor thereafter, more than once in any 21 years<sup>15</sup>; and

1830 (c) the terms of the tenancy do not inhibit both the assignment and the underletting of the whole of the premises comprised in the tenancy<sup>16</sup>.

If any of these conditions is not satisfied, certain other provisions<sup>17</sup> as to the permissible amount of premium apply<sup>18</sup>.

In the case of premiums or loans paid before 15 January 1989 in respect of tenancies granted after 15 July 1980 which satisfy the following conditions more frequent rent reviews are permitted<sup>19</sup>. The conditions are:

- 1831 (i) that at the time when it was granted the tenancy was at a low rent<sup>20</sup>; and
- 1832 (ii) that its terms ensure that any variation of the sums payable by the tenant otherwise than in respect of rates, services, repairs or maintenance cannot lead to those sums exceeding an annual rate of two-thirds of the rateable value<sup>21</sup> of the dwelling house at the date when the variation is made<sup>22</sup>.

1 For the meaning of 'tenancy' see PARA 818 note 1 ante.

2 Ie within the meaning of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1202 post. An unprotected tenancy granted before 1 April 1990 in consideration of a low rent and a premium may become a protected tenancy by reason of the operation of a rent review clause. This is because, in order to determine whether the rent is 'low', the rent for the time being (which may vary) has to be compared with the rateable value on 'the appropriate day' (which is fixed): see PARAS 861, 862 note 11 ante.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 Ie the provisions of the Rent Act 1977 Pt IX (ss 119-128) (as amended), the Rent Act 1968 Pt VII (ss 85-92) (repealed) and the enactments replaced thereby.

5 Rent Act 1977 s 127(1)(a). Nothing in s 127 (as amended) affected the recovery, in pursuance of any judgment given or order or agreement made before 20 May 1969, of any amount which it was not lawful to receive under the law in force at the time it was received: s 127(4).

6 Ie the date when the Housing Act 1988 s 115(1) came into force: see s 141(3).

7 For the meaning of 'landlord' see PARA 816 note 2 ante.

8 For these purposes, the reference to a power of the landlord to determine a tenancy does not include a reference to a power of re-entry or forfeiture for breach of any term or condition of the tenancy: Rent Act 1977 s 127(3) (s 127(2), (3) substituted by the Housing Act 1988 s 115(1), (2)).

9 Rent Act 1977 s 127(2)(a) (as substituted: see note 8 supra). 'Grant' includes continuance and renewal: s 127(5).

10 Ibid s 127(2)(b) (as substituted: see note 8 supra). For the purposes of this condition there is to be disregarded any term of the tenancy which inhibits assignment and underletting only during a period which is or falls within the final seven years of the term for which the tenancy was granted: s 127(2) (as so substituted). The terms of a tenancy inhibit an assignment or underletting if they (1) preclude it; or (2) permit it subject to a consent but exclude the Law of Property Act 1925 s 144 (no payment in nature of fine: see PARA 485 ante); or (3) permit it subject to a consent but require in connection with a request for consent the making of an offer to surrender the tenancy: Rent Act 1977 s 127(5) (amended by the Housing Act 1980 s 78(1), (3); the Housing Act 1988 s 115(1), (3)).

11 Rent Act 1977 s 127(2)(a) (as originally enacted). For the meaning of 'tenant' see PARA 816 note 3 ante.

12 Ie was granted in pursuance of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq post.

13 For the meaning of 'rates' see PARA 862 note 5 ante. As to the abolition of domestic rates see PARA 521 ante.

14 Where the condition would be satisfied with respect to a subtenancy but for a term providing for one variation, within 20 years of the date when the subtenancy was granted, of the sums payable by the subtenant, the condition is deemed to be satisfied notwithstanding that term if it is satisfied with respect to a superior tenancy of the premises comprised in the subtenancy (or of those and other premises): Rent Act 1977 s 127(3) (as originally enacted).

15 Ibid s 127(2)(b) (as originally enacted).

16 Ibid s 127(2)(c) (as substituted by the Housing Act 1980 s 78(1), (2)).

17    Ie the Rent Act 1977 s 127(1)(b), Sch 18 Pt II (paras 6-11): see PARAS 938-939 post.

18    Ibid s 127(1)(b). As to a scheme to enable long leaseholders who do not satisfy the conditions in s 127(2) (as originally enacted) to sell at a full premium by granting subleases at fixed rents see 122 Sol Jo 271 (*Flats with Escalating Rents*).

19    See the Rent Act 1977 s 127(3C), (3D)(a) (added by the Housing Act 1980 s 78(4) with effect from 20 October 1980; repealed without affecting premiums or loans paid before 15 January 1989: see the Housing Act 1988 s 115(1)). In such cases the Rent Act 1977 s 127 (as amended) has effect as if, in relation to that tenancy, for the words '20 years' and '21 years' in s 127(2)(b), (3) (as originally enacted: see notes 15, 14 respectively supra) there were substituted, respectively, the words 'six years' and 'seven years': s 127(3C) (as so added and repealed).

20    Ibid s 127(3D)(b) (as added and repealed: see note 19 supra).

21    For these purposes, the rateable value of a dwelling house is to be ascertained in accordance with ibid s 25 (see PARA 859 ante) (disregarding s 25(4)), by reference to the valuation shown in the valuation list at the time the variation is made: s 127(3D) (as added and repealed: see note 19 supra). This avoids the problem alluded to in note 2 supra.

22    Ibid s 127(3D)(c) (as added and repealed: see note 19 supra).

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### **930. Exclusion of certain tenancies granted at a premium before 16 July 1980.**

If the following conditions are satisfied in respect of a tenancy<sup>1</sup>, the provisions relating to the prohibition of premiums and similar transactions<sup>2</sup> do not apply and are deemed never to have applied to it<sup>3</sup>. The conditions are that:

- 1833 (1) the tenancy was granted before 16 July 1980<sup>4</sup>;
- 1834 (2) a premium<sup>5</sup> was lawfully required and paid on the grant<sup>6</sup> of the tenancy<sup>7</sup>;
- 1835 (3) the tenancy was, at the time when it was granted, a tenancy at a low rent<sup>8</sup>;  
and
- 1836 (4) the terms of the tenancy do not inhibit<sup>9</sup> both the assignment and the underletting of the whole of the premises comprised in the tenancy<sup>10</sup>.

The object of this provision is to remedy a widespread injustice caused by conveyancers having overlooked the fact that a tenancy which reserved a low rent at the date of the grant could nevertheless become a protected tenancy<sup>11</sup> at a later date by virtue of either the operation of a provision enabling the ground rent to be reviewed or, in the case of a short tenancy, by virtue of a rise in the service charge<sup>12</sup>.

1    For the meaning of 'tenancy' see PARA 818 note 1 ante.

2    Ie the provisions of the Rent Act 1977 Pt IX (ss 119-128) (as amended) (see PARA 926 et seq ante, PARA 931 et seq post), the Rent Act 1968 Pt VII (ss 85-92) (repealed) and the enactments repealed thereby.

3    Rent Act 1977 s 127(3A) (s 127(3A), (3B) added by the Housing Act 1980 s 78(4)).

4    Rent Act 1977 s 127(3B)(a) (as added: see note 3 supra). The date so specified is the date when this provision was first published by way of amendment to the Housing Bill.

- 5 For the meaning of 'premium' see PARA 926 ante.
- 6 For the meaning of 'grant' see PARA 929 note 9 ante.
- 7 Rent Act 1977 s 127(3B)(b) (as added: see note 3 supra). See further PARA 936 post.
- 8 Ibid s 127(3B)(c) (as added: see note 3 supra). See further PARA 929 note 2 ante. See also PARAS 861, 862 note 11 ante.
- 9 For the meaning of 'inhibit' see PARA 929 note 10 ante.
- 10 Rent Act 1977 s 127(3B)(d) (as added: see note 3 supra).
- 11 For the meaning of 'protected tenancy' see PARA 818 ante.
- 12 See PARAS 861, 862 note 11 ante. Although service charges do not count as rent in a long tenancy (see the Rent Act 1977 ss 5(4), 146 (as amended); and PARA 862 ante), they do in other cases (see PARA 862 ante).

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## **(ii) Prohibitions, Penalties and Recovery**

### **931. Premiums on grant, renewal or continuance of protected tenancy.**

Any person<sup>1</sup> who either:

- 1837 (1) as a condition of the grant, renewal or continuance<sup>2</sup> of a protected tenancy<sup>3</sup>, requires<sup>4</sup>, in addition to the rent, the payment<sup>5</sup> of any premium<sup>6</sup> or the making of any loan, whether secured or unsecured<sup>7</sup>; or
- 1838 (2) in connection with the grant, renewal or continuance of a protected tenancy, receives any premium in addition to the rent<sup>8</sup>,

is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>9</sup>. The court by which a person is convicted of such an offence relating to requiring or receiving any premium may order the amount of the premium to be repaid to the person by whom it was paid<sup>10</sup>.

A landlord will not be criminally liable in respect of a premium demanded by an agent acting outside the scope of his express or implied authority<sup>11</sup>, but will be liable to repay any premium (as opposed to a bribe destined for the agent's own pocket) taken by his agent acting in the course of his employment<sup>12</sup>. A tenancy is not void for illegality merely because an unlawful premium is taken<sup>13</sup> and specific performance may be ordered of a contract to grant or assign a lease at an unlawful premium without the payment of the premium by the purchaser<sup>14</sup>. The prohibition applies whether or not the house in question was already subject to a protected tenancy at the time when the premium was required<sup>15</sup>.

1 The words 'any person' are wide enough to include not only landlords and potential landlords but also outgoing tenants, agents and middlemen: *Farrell v Alexander* [1977] AC 59, [1976] 2 All ER 721, HL (outgoing tenant received an excessive price for furniture in consideration for surrendering the tenancy and procuring the grant of a new lease to the incoming tenant). This decision overrules *Zimmerman v Grossman* [1972] 1 QB 167, [1971] 1 All ER 363, CA and, in effect, *Remington v Larchin* [1921] 3 KB 404, CA (decided under the Increase

of Rent and Mortgage Interest (Restrictions) Act 1920 s 8 (repealed)). See also *Robinson v Saleh* (1988) 20 HLR 424, sub nom *Saleh v Robinson* [1988] 2 EGLR 126, CA.

2 For the meaning of 'grant, renewal or continuance' see *Regor Estates Ltd v Wright* [1951] 1 KB 689 at 703-704, [1951] 1 All ER 219 at 227, CA, per Denning LJ. An agreement not to give a notice to quit or not to enforce a forfeiture would be an agreement for the continuance of a tenancy.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 A landlord does not infringe this provision by receiving a premium which he has not been proved to have required as a precondition of granting the tenancy: *Woods v Wise* [1955] 2 QB 29, [1955] 1 All ER 767, CA. The Rent Act 1965 s 37 (repealed: see now the Rent Act 1977 s 119(2)), therefore, introduced the further offence of receiving a premium in connection with the grant etc: see *Farrell v Alexander* [1977] AC 59 at 80, [1976] 2 All ER 721 at 731-732, HL, per Viscount Dilhorne.

5 Payment need not be in cash; the release of the landlord from a debt or a sale of property to a third person at an undervalue counts as payment: *Elmdene Estates Ltd v White* [1960] AC 528, [1960] 1 All ER 306, HL.

6 For the meaning of 'premium' see PARA 926 ante.

7 Rent Act 1977 s 119(1). As to loans see PARA 928 ante.

8 *Ibid* s 119(2).

9 *Ibid* s 119(3) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

10 *Ibid* s 119(4). Nothing in Pt IX (ss 119-128) (as amended) (1) renders any amount recoverable more than once (s 128(2)); or (2) applies to the assignment, before the end of the year 1990, of certain tenancies of dwellings forming part of the Crown Estate which became regulated tenancies by virtue of the Housing Act 1980 s 73 (as amended) (see PARA 883 ante) (see s 73(5), Sch 8 para 4(2), (3)).

11 *Barker v Levinson* [1951] 1 KB 342, [1950] 2 All ER 825, DC.

12 *Navarro v Moregrand Ltd* [1951] 2 TLR 674, CA, distinguishing *Barker v Levinson* [1951] 1 KB 342, [1950] 2 All ER 825, DC, and drawing attention to the fact that certain passages in [1950] 2 All ER 825 have been corrected in [1951] 1 KB 342.

13 *Grace Rymer Investments Ltd v Waite* [1958] Ch 831, [1958] 2 All ER 777, CA; cf *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, [1960] 1 All ER 177, PC (tenant paying an unlawful premium held not to be equally culpable as a landlord receiving it).

14 *Ailion v Spiekermann* [1976] Ch 158, [1976] 1 All ER 497. This remedy is discretionary, however, and may be refused in the light of the conduct of the parties: cf *Rees v Marquis of Bute* [1916] 2 Ch 64 (innocent vendor). See further SPECIFIC PERFORMANCE.

15 *Minns v Moore* [1950] 1 KB 241, [1949] 2 All ER 800, CA. Cf *Lower v Porter* [1956] 1 QB 325, [1956] 1 All ER 150, CA.

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### 932. Premiums on assignment.

Subject to certain exceptions<sup>1</sup>, any person<sup>2</sup> who either:



- 1839 (1) as a condition of the assignment of a protected tenancy<sup>3</sup>, requires<sup>4</sup> the payment of any premium<sup>5</sup> or the making of any loan, whether secured or unsecured<sup>6</sup>; or
- 1840 (2) in connection with the assignment of a protected tenancy receives any premium<sup>7</sup>,

is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>8</sup>. The court by which a person is convicted of such an offence relating to requiring or receiving any premium may order the amount of the premium, or so much of it as cannot lawfully be required or received<sup>9</sup>, to be repaid to the person by whom it was paid<sup>10</sup>.

Notwithstanding these provisions, however, an assignor of a protected tenancy of a dwelling house may, if he would otherwise be entitled to do so<sup>11</sup>, require the payment by the assignee or receive from him a payment:

- 1841 (a) of so much of any outgoings discharged by the assignor as is referable to any period after the assignment takes effect<sup>12</sup>;
- 1842 (b) of a sum not exceeding the amount of any expenditure reasonably incurred by the assignor in carrying out any structural alteration of the dwelling house or in providing or improving fixtures therein, being fixtures which as against the landlord he is not entitled to remove<sup>13</sup>;
- 1843 (c) where the assignor became a tenant of the dwelling house by virtue of an assignment of the protected tenancy, of a sum not exceeding any reasonable amount paid by him to his assignor in respect of expenditure incurred by that assignor, or by any previous assignor of the tenancy, in carrying out any such alteration or in providing or improving any such fixture as is mentioned in head (b) above<sup>14</sup>; or
- 1844 (d) where part of the dwelling house is used as a shop or office, or for business, trade or professional purposes, of a reasonable amount in respect of any goodwill of the business, trade or profession, being goodwill transferred to the assignee in connection with the assignment or accruing to him in consequence thereof<sup>15</sup>.

Without prejudice to a person's right to require or receive lawful payments<sup>16</sup>, the assignor is not guilty of an offence by reason only that:

- 1845 (i) any payment of outgoings required or received by him on an assignment was a payment of outgoings referable to a period before the assignment took effect<sup>17</sup>; or
- 1846 (ii) any expenditure which he incurred in carrying out structural alterations of the dwelling house, or in providing or improving fixtures therein, being expenditure in respect of which he required the payment of any sum on the assignment of a tenancy of the dwelling house, was not reasonably incurred<sup>18</sup>; or
- 1847 (iii) any sum paid by him<sup>19</sup> to a previous assignor in respect of structural alterations or fixtures was not a reasonable amount<sup>20</sup>; or
- 1848 (iv) any amount which he required to be paid or which he received on any assignment in respect of goodwill was not a reasonable amount<sup>21</sup>.

1 le subject to the Rent Act 1977 s 121: see PARAS 936-939 post.

2 For the meaning of 'any person' see PARA 931 note 1 ante.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 See PARA 931 note 4 ante.

- 5 For the meaning of 'premium' see PARA 926 ante.
- 6 Rent Act 1977 s 120(1). As to loans see PARA 928 ante.
- 7 Ibid s 120(2).
- 8 Ibid s 120(6) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.
- 9 Ie under ibid s 120(7), including any amount which, by virtue of s 120(4) (see the text and notes 16-21 infra), does not give rise to any offence.
- 10 Ibid s 120(7). Amounts are recoverable only once: see PARA 931 note 10 ante.
- 11 Ie apart from ibid s 120 (as amended).
- 12 Ibid s 120(3)(a).
- 13 Ibid s 120(3)(b). The expenditure need not have been incurred while the assignor is the tenant under the tenancy which is assigned: *Steele v McMahon* (1990) 22 HLR 479, [1990] 2 EGLR 114, CA. See also *Adair v Murrell* (1981) 263 Estates Gazette 66; *Nock v Munk* (1982) 263 Estates Gazette 1085.
- 14 Rent Act 1977 s 120(3)(c).
- 15 Ibid s 120(3)(d).
- 16 Ie without prejudice to ibid s 120(3).
- 17 Ibid s 120(4)(a).
- 18 Ibid s 120(4)(b).
- 19 Ie by virtue of ibid s 120(3)(c): see the text and note 14 supra.
- 20 Ibid s 120(4)(c).
- 21 Ibid s 120(4)(d).

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### **933. Excessive price for furniture etc.**

Any person who, in connection with the proposed grant, renewal, continuance or assignment of a protected tenancy<sup>1</sup> on terms which require the purchase of furniture<sup>2</sup>:

- 1849 (1) offers the furniture at a price which he knows or ought to know is unreasonably high, or otherwise seeks to obtain such a price for the furniture<sup>3</sup>; or
- 1850 (2) fails to furnish, to any person seeking to obtain or retain accommodation whom he provides with particulars of the tenancy, a written inventory of the furniture specifying the price sought for each item<sup>4</sup>,

is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>5</sup>.

Where a local authority<sup>6</sup> has reasonable grounds for suspecting that an offence under head (1) above has been committed with respect to a protected tenancy or proposed protected tenancy of a dwelling house, it may give notice to the person entitled to possession of it or his agent that on such date as may be specified in the notice, which must be not earlier than 24 hours after the giving of the notice or, if the dwelling house is unoccupied, the expiry of such period after the giving of the notice as may be reasonable in the circumstances, facilities will be required for entry to the dwelling house and inspection of the furniture there<sup>7</sup>. Where such a notice is given, any person authorised by the local authority may avail himself of any facilities for such entry and inspection provided on the specified date<sup>8</sup>.

If it is shown to the satisfaction of a justice of the peace on sworn information in writing that a person required to give facilities has failed to give them, the justice may by warrant under his hand empower the local authority, by any person authorised by it, to enter the dwelling house in question, if need be by force, and inspect the furniture therein<sup>9</sup>. Any person who wilfully obstructs a person acting in pursuance of a warrant so issued is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>10</sup>.

A person empowered by or under these provisions to enter a dwelling house may take with him such other persons as may be necessary; and, if the dwelling house is unoccupied, he must leave it as effectively secured against trespassers as he found it<sup>11</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 For the meaning of 'furniture' see PARA 927 note 1 ante.

3 Rent Act 1977 s 124(1)(a).

4 Ibid s 124(1)(b).

5 Ibid s 124(1) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

6 For these purposes, 'local authority' means the council of a district (or, in a county in England in which there are no districts having a district council, the council of the county) or the council of a London borough or the Common Council of the City of London or, in Wales, the council of a county or county borough: ibid s 124(8) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 3(4); and by the Local Government Changes (Rent Act) Regulations 1995, SI 1995/2451, reg 6). As to the London boroughs and the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq.

7 Rent Act 1977 s 124(2). The notice may be given by post: s 124(3).

8 Ibid s 124(4). The person authorised must, if so required, produce some duly authenticated document showing that he is authorised by the local authority: s 124(4).

9 Ibid s 124(5).

10 Ibid s 124(7) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

11 Ibid s 124(6).

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### **934. Recovery of unlawful premiums and loans.**

Where under any agreement<sup>1</sup> any premium is paid<sup>2</sup> and the whole or any part of it could not lawfully be required or received<sup>3</sup>, the amount of the premium or, as the case may be, so much of it as could not lawfully be required or received, is recoverable by the person by whom it was paid<sup>4</sup>. An unlawful loan is repayable to the lender on demand<sup>5</sup>. The county court has jurisdiction irrespective of the amount claimed<sup>6</sup>. The limitation period for the recovery of an unlawful premium is six years from the date when the cause of action accrued<sup>7</sup>.

Where a rent tribunal on an application made to it<sup>8</sup> before 2 June 1950 certified<sup>9</sup> that a premium had been paid before 2 June 1949 in respect of the grant, continuance or renewal of the tenancy, the tenant was entitled to deduct the rental equivalent<sup>10</sup> of the premium from the rent fixed by the tribunal up to the relevant date<sup>11</sup>. In the rare case where the term current at the date of such an application still subsists, the tenant can still recover the premium by instalments by deduction from the recoverable rent<sup>12</sup>.

1    Ie whether made before or after 29 August 1977.

2    Ie after 29 August 1977. For the meaning of 'premium' see PARA 926 ante.

3    Ie under the Rent Act 1977 ss 119-123 (as amended): see PARAS 925-931 ante, 998 post.

4    Ibid s 125(1). The power to recover premiums paid before 29 August 1977 under the Rent Act 1968 s 90(1) (repealed) is preserved by the Rent Act 1977 s 155(3), Sch 24 para 1(1). Amounts are recoverable only once: see PARA 931 note 10 ante. A premium paid to an agent who has ostensible authority to receive it is recoverable from the principal: *Robinson v Saleh* (1988) 20 HLR 424, sub nom *Saleh v Robinson* [1988] 2 EGLR 126, CA.

5    See the Rent Act 1977 s 125(2): and PARA 928 ante.

6    See the County Courts Act 1984 ss 15, 16 (as amended); and COURTS vol 10 (Reissue) PARAS 712-713.

7    See the Limitation Act 1980 s 9(1) (repairing the Limitation Act 1939 s 2(1)(d)); *Temple v Lewis* [1954] 1 QB 22, [1953] 2 All ER 1130, CA.

8    Ie under the Landlord and Tenant (Rent Control) Act 1949 s 1 (repealed).

9    Ie under ibid Sch 1 Pt I (paras 1-4) (repealed).

10   For these purposes, 'rental equivalent' meant the amount of the premium or so much of it as had not been repaid or recovered divided by the number of rent periods between the commencement (or continuance or renewal) of the term and the relevant date: ibid Sch 1 para 8 (repealed). Where the term exceeded seven years, the relevant date was that of the expiry of the term: Sch 1 para 6(2) (repealed).

11   Ibid Sch 1 para 2 (repealed).

12   These provisions are saved by the Rent Act 1968 s 117(3), Sch 16 para 20 (repealed) and the Rent Act 1977 Sch 24 para 32.

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### **935. Rent in advance.**

Where a protected tenancy<sup>1</sup> which is a regulated tenancy<sup>2</sup> is granted, continued or renewed, any requirement (a 'prohibited requirement') that rent is to be payable before the beginning of the rental period<sup>3</sup> in respect of which it is payable, or earlier than six months before the end of that period, if that period is more than six months, is void, whether the requirement is imposed

as a condition of the grant, renewal or continuance of the tenancy or under the terms of it<sup>4</sup>. Any person who purports to impose any prohibited requirement is liable on summary conviction to a fine not exceeding level 3 on the standard scale; and the court by which he is convicted may order any amount of rent paid in compliance with such a requirement to be repaid to the person by whom it was paid<sup>5</sup>.

Rent for any rental period to which a prohibited requirement relates is irrecoverable from the tenant<sup>6</sup>; and, where a tenant has paid any such amount on account of rent, he is entitled to recover it from the landlord<sup>7</sup> who received it or his personal representatives<sup>8</sup>. Without prejudice to any other method of recovery, any amount which a tenant is entitled so to recover may be deducted by the tenant from any rent payable by him to the landlord<sup>9</sup>; but no such amount is recoverable at any time after the expiry of two years from the date of payment<sup>10</sup>.

Any person who in any rent book or similar document makes an entry showing or purporting to show any tenant as being in arrears in respect of any sum on account of rent which is irrecoverable by virtue of the above provisions is liable on summary conviction to a fine not exceeding level 3 on the standard scale unless he proves that, at the time of the making of the entry, the landlord had a bona fide claim that the sum was recoverable<sup>11</sup>.

If, where any such entry has been made by or on behalf of the landlord, the landlord, on being requested by or on behalf of the tenant to do so, refuses or neglects to cause the entry to be deleted within seven days, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale unless he proves that at the time of the refusal or neglect he had a bona fide claim that the sum was recoverable<sup>12</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 For the meaning of 'regulated tenancy' see PARA 854 ante.

3 For the meaning of 'rental period' see PARA 853 note 3 ante.

4 Rent Act 1977 s 126(1), (2).

5 Ibid s 126(4) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

6 Ibid s 126(3). For the meaning of 'tenant' see PARA 816 note 3 ante.

7 For the meaning of 'landlord' see PARA 816 note 2 ante.

8 Rent Act 1977 s 126(5). Amounts are recoverable only once: see PARA 931 note 10 ante.

9 Ibid s 126(6).

10 Ibid s 126(7).

11 Ibid s 126(8) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1).

12 Ibid s 126(9) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1).

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### **(iii) Proportional Premiums permitted on an Assignment**

### 936. In general.

In three cases<sup>1</sup> where a lawful premium has been paid for the grant of a tenancy the prohibitions on requiring or receiving premiums<sup>2</sup> are modified so as to allow the tenant to take from an assignee a proportion of the premium originally paid. The requiring of a premium originally will have been lawful only if at that date the tenancy was not a protected tenancy<sup>3</sup>, as, for example, because it was at a low rent<sup>4</sup> or the rateable value was too high<sup>5</sup> or the term was too long<sup>6</sup>.

Prior to 8 December 1965<sup>7</sup> it was not unlawful to receive a premium, only to require one as a condition of the grant etc of a tenancy<sup>8</sup>. Moreover, from 6 July 1957<sup>9</sup> to 8 December 1965 the prohibition on requiring premiums applied only to controlled tenancies save that, from 6 July 1957 to 6 July 1960, it also applied to tenancies excluded from control by reason only of the provisions which decontrolled:

- 1851 (1) houses of which the rateable value exceeded certain limits<sup>10</sup>; or
- 1852 (2) tenancies granted after 5 July 1957<sup>11</sup>,

or by reason of those provisions and that<sup>12</sup> excluding from control tenancies at low rents<sup>13</sup>.

1 See PARAS 937-939 post.

2 See PARA 931 et seq ante.

3 For the meaning of 'protected tenancy' see PARA 818 ante.

4 See PARAS 861-862 ante. A tenancy may cease to be a tenancy at a low rent by virtue of the operation of a rent review clause or a service charge clause: see PARA 862 ante.

5 The rateable value limits were raised by the Counter-Inflation Act 1973 s 14 (repealed): see PARA 855 ante, PARA 938 post.

6 Until 1967 all long tenancies (ie terms certain exceeding 21 years) were excluded from the protection of the Rent Acts: Rent Act 1957 s 21 (repealed). Such tenancies were first brought within the ambit of protection by the Leasehold Reform Act 1967 s 39(1) and so remain, provided that they are not at a low rent.

7 Ie the commencement date of the Rent Act 1965.

8 See PARA 931 note 4 ante.

9 Ie the commencement date of the Rent Act 1957.

10 Ie ibid s 11(1) (repealed).

11 Ie ibid s 11(2) (repealed).

12 Ie the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(7) (repealed).

13 Rent Act 1957 s 13(1) (repealed).

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**937. Lawful premium paid on grant etc of tenancy.**

Where:

- 1853 (1) a premium<sup>1</sup> was lawfully<sup>2</sup> required and paid, or lawfully received, in respect of the grant, renewal or continuance<sup>3</sup> of a protected tenancy<sup>4</sup> of a dwelling house which is a regulated tenancy<sup>5</sup>; and
- 1854 (2) since that grant, renewal or continuance the landlord<sup>6</sup> has not granted a tenancy<sup>7</sup> of the dwelling house under which, as against the landlord, a person became entitled to possession, other than the person who was so entitled to possession of the dwelling house immediately before that tenancy began; and
- 1855 (3) a rent for the dwelling house is registered<sup>8</sup> and the rent so registered is higher than the rent payable under the tenancy,

nothing in the statutory prohibition of premiums<sup>9</sup> prevents any person from requiring or receiving, on an assignment of that protected tenancy or any subsequent protected tenancy of the same dwelling house, a premium which does not exceed the permitted amount<sup>10</sup>. That amount is ascertained by applying the statutory formula<sup>11</sup>.

For these purposes, the reference to a premium does not include a premium which consisted only of any such outgoings, sum or amount as an assignor is otherwise<sup>12</sup> permitted to require or receive<sup>13</sup>.

1 For the meaning of 'premium' see PARA 926 ante. See also text and notes 12-13 infra.

2 As to when a premium is lawful see PARA 936 ante.

3 For the meaning of 'grant, renewal or continuance' see PARA 931 note 2 ante.

4 For the meaning of 'protected tenancy' see PARA 818 ante.

5 For the meaning of 'regulated tenancy' see PARA 854 ante.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 For the meaning of 'tenancy' see PARA 818 note 1 ante.

8 I.e. under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante. Where any rates in respect of the dwelling house are borne by the landlord or a superior landlord, the amount of the registered rent is taken, for these purposes, to be increased by the amount of the rates so borne in respect of the rental period comprising the date from which the registration took effect: s 120(5), Sch 18 para 4. For the meaning of 'rates' for these purposes see PARA 895 note 2 ante; and for the meaning of 'rental period' see PARA 853 note 3 ante. As to the abolition of domestic rates see PARA 521 ante.

9 I.e. *ibid* s 120 (as amended): see PARA 932 ante.

10 *Ibid* Sch 18 paras 1, 2. Schedule 18 Pt I (paras 1-5) has effect notwithstanding anything in s 120(1), (2) (see PARA 932 ante): s 120(5).

11 The statutory formula is  $P \times A \div G$ , where P is the original premium, A is the length of the period beginning on the date on which the assignment in question takes effect and ending on the relevant date and G is the length of the period beginning on the date of the grant, renewal or continuance in respect of which the premium was paid and ending on the relevant date: *ibid* Sch 18 para 2. For these purposes, any reference to the relevant date is to be construed in accordance with the following provisions: (1) where the tenancy was granted, renewed or continued for a term of years certain exceeding seven years and that term has not expired when the assignment takes effect, the relevant date is the date of the expiry of that term; and (2) in any other case, the relevant date is the date of the expiry of seven years from the commencement of the term or, as the case may be, the renewal or continuance in respect of which the premium was paid: Sch 18 para 5(1)-(3). A term of years is treated as certain notwithstanding that it is liable to determination by re-entry or on the happening of any event other than the giving of notice by the landlord to determine the term; and a term determinable by the landlord giving notice to determine it is treated as a term certain expiring on the earliest

date on which such a notice given after the date of the assignment would be capable of taking effect: Sch 18 para 5(4).

If, although the registered rent is higher than the rent payable under the tenancy, the lump sum equivalent of the difference is less than the premium, the statutory formula in Sch 18 para 2 has effect as if P were the lump sum equivalent; and, for these purposes, the lump sum equivalent of the difference between the two rents is taken to be that difference multiplied by the number of complete rental periods falling within the period beginning with the grant, renewal or continuance in respect of which the premium was paid and ending with the relevant date: Sch 18 para 3(1), (2).

12     Ie under *ibid* s 120(3): see PARA 932 ante.

13     *Ibid* Sch 18 para 1(2). In the case of a premium which included any such outgoings, sum or other amount, so much only of the premium as does not consist of those outgoings, sum or amount is to be treated as the premium for these purposes: Sch 18 para 1(2). If it were not for this provision, an assignor could make a double charge.

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### **938. Dwelling houses of high rateable value.**

Where a premium<sup>1</sup> was lawfully<sup>2</sup> required and paid on the grant, renewal or continuance<sup>3</sup> or on the assignment<sup>4</sup> of a regulated tenancy<sup>5</sup> which was granted before 8 March 1973 and which would not have been a regulated tenancy but for the increase<sup>6</sup> in the rateable value limits for the purpose of the definition of a protected tenancy<sup>7</sup>, nothing in the statutory prohibition of premiums<sup>8</sup> prevents any person from requiring or receiving, on an assignment of the tenancy, the specified fraction of the premium<sup>9</sup>. However, this entitlement is without prejudice to that person's right to require or receive a greater sum in a case where he may lawfully<sup>10</sup> do so<sup>11</sup>. The specified fraction is X divided by Y, where X is the residue of the term<sup>12</sup> at the date of the assignment and Y is:

- 1856   (1)   where the premium was paid on the grant<sup>13</sup> of the tenancy, the term for which the tenancy was granted<sup>14</sup>; or
- 1857   (2)   where the premium was paid on the assignment of the tenancy, the residue of the term at the date of that assignment<sup>15</sup>.

Where the tenancy was granted on the surrender of a previous tenancy and a premium had been lawfully required and paid on the grant or an assignment of the previous tenancy, the surrender value<sup>16</sup> of the previous tenancy is treated for these purposes as a premium or, as the case may be, as part of the premium paid on the grant of the tenancy<sup>17</sup>.

1     For the meaning of 'premium' see PARA 926 ante.

2     Tenancies to which these provisions apply were not protected tenancies at the date when they were granted and it was therefore lawful to charge a premium.

3     For the meaning of 'grant, renewal or continuance' see PARA 931 note 2 ante.

4     The word 'assignment' does not appear in the Rent Act 1977 s 121, but is to be found in Sch 18 para 6(1): see the text and notes 5-11 *infra*.

5     For the meaning of 'regulated tenancy' see PARA 854 ante.



6    le but for the Counter-Inflation Act 1973 s 14(1) (repealed): see PARA 855 ante.

7    For the meaning of 'protected tenancy' see PARA 818 ante.

8    le the Rent Act 1977 s 120 (as amended): see PARA 932 ante.

9    Ibid s 121, Sch 18 para 6(1). If there was more than one premium, Sch 18 para 6(1) applies to the last of them: Sch 18 para 6(2). Schedule 18 Pt II (paras 6-11) applies to a tenancy which becomes a regulated tenancy by virtue of the Housing Act 1980 s 73 (as amended) (Crown Estate tenancies: see PARA 883 ante), unless it falls within s 73(5), Sch 8 para 4(2) (see PARA 931 ante): Sch 8 para 4(1).

10   le under the Rent Act 1977 Sch 18 Pt I (paras 1-5): see PARA 937 ante.

11   Ibid Sch 18 para 6(1).

12   In determining for these purposes the amount which may or could have been required and received on the assignment of a tenancy terminable, before the end of the term for which it was granted, by notice to the tenant, that term is to be taken to be a term expiring at the earliest date on which such a notice given after the date of the assignment would have been capable of taking effect: *ibid* Sch 18 para 10. For the meaning of 'tenancy' see PARA 818 note 1 ante; and for the meaning of 'tenant' see PARA 816 note 3 ante.

13   For these purposes, 'grant' includes continuance and renewal: *ibid* Sch 18 para 11.

14   Ibid Sch 18 para 7(1).

15   Ibid Sch 18 para 7(2).

16   For these purposes, the surrender value of the previous tenancy is to be taken to be the amount which, had the previous tenancy been assigned instead of being surrendered and had these provisions applied to it, would have been the amount that could lawfully have been required and received on the assignment: *ibid* Sch 18 para 9.

17   Ibid Sch 18 para 8.

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### **939. Certain long tenancies.**

Where a tenancy is both a long tenancy<sup>1</sup> and a protected tenancy<sup>2</sup>, the prohibitions on taking premiums<sup>3</sup> do not apply to it provided certain conditions are satisfied<sup>4</sup>. If any of those conditions are not satisfied, a person may require or receive on an assignment the same specified fraction of a previously paid premium as applies in the case of tenancies brought into the ambit of the Rent Acts by the 1973 increase in the rateable value limits<sup>5</sup>. If the tenancy was granted before 29 July 1977<sup>6</sup>, these provisions are deemed always to have applied to it<sup>7</sup>.

1    le within the meaning of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1202 post.

2    For the meaning of 'protected tenancy' see PARA 818 ante.

3    le the Rent Act 1977 Pt IX (ss 119-128) (as amended): see PARA 931 et seq ante.

4    Ibid s 127(1)(a). As to the conditions see s 127(2) (as amended); and PARA 929 ante.

5    Ibid s 127(1)(b), which applies Sch 18 Pt II (paras 6-11) (see PARA 938 ante), where the specified fraction is set out.

6 le the date on which the Rent Act 1977 was passed.

7 Ibid s 127(1)(b).

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## **(iv) Offences Special to Statutory Tenancies**

### **940. Payment for giving up possession.**

A statutory tenant<sup>1</sup> of a dwelling house who, as a condition of giving up possession of the dwelling house, asks for or receives the payment of any sum, or the giving of any other consideration, by any person other than the landlord<sup>2</sup> is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>3</sup>.

Where a statutory tenant of a dwelling house requires that furniture or other articles be purchased as a condition of his giving up possession of a dwelling house, the price demanded must, at the request of the person on whom the demand is made, be stated in writing, and, if the price exceeds the reasonable price<sup>4</sup> of the articles, the excess is to be treated as a sum asked to be paid as a condition of giving up possession<sup>5</sup>.

The court by which a person is convicted of such an offence may order the payment:

1858 (1) to the person who made any such payment or gave any such consideration as a condition of obtaining possession, of the amount of that payment or the value of that consideration; or

1859 (2) to the person who paid any such price for furniture or other articles, of the amount by which the price paid exceeds the reasonable price<sup>6</sup>.

An agreement to exchange flats is invalidated by these provisions since it involves the receipt by the outgoing tenant of consideration other than the money<sup>7</sup>; and it has been said that the charging of rent by a statutory tenant upon a purported subletting of the whole dwelling may be likewise prohibited<sup>8</sup>. An agreement in contravention of these provisions is void for illegality<sup>9</sup> and therefore unenforceable<sup>10</sup>. There are no provisions enabling the payer to recover such a prohibited payment in a civil claim<sup>11</sup>.

1 For the meaning of 'statutory tenant' see PARA 831 ante.

2 For the meaning of 'landlord' see PARA 816 note 2 ante. A prospective purchaser of the reversion who has not yet completed is not 'the landlord' and can, therefore, avoid an agreement to pay a statutory tenant to quit: *Sheridan v Dickson* [1970] 3 All ER 1049, [1970] 1 WLR 1328, CA.

3 Rent Act 1977 s 3(5), Sch 1 para 12(1), (3) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale' see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.

4 As to what is a reasonable price see PARA 927 ante.

5 Rent Act 1977 Sch 1 para 12(2).

6 Ibid Sch 1 para 12(4).

7 *Cripps v Brittal Ltd* [1951] EGD 308, CA.

8 *Wheeler v Smith* [1926] EGD 194, DC.

9 *Keeves v Dean, Nunn v Pellegrini* [1924] 1 KB 685 at 693, 695, CA.

10 *Sheridan v Dickson* [1970] 3 All ER 1049, [1970] 1 WLR 1328, CA.

11 This is in contrast to the cases of an unlawful premium paid on the grant, continuance or renewal of a protected tenancy (see PARA 934 ante) and of an unlawful payment to enter into an agreement to transfer a statutory tenancy (see PARA 941 post).

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#### **941. Payment for transfer of statutory tenancy.**

A statutory tenancy<sup>1</sup> may not be assigned but may be transferred by written agreement between the outgoing tenant and the incoming tenant to which the landlord is a party<sup>2</sup>. Any person who requires<sup>3</sup> the payment of any pecuniary consideration for entering into such an agreement is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>4</sup>; and the court by which he is convicted may order the amount of the payment to be repaid by the person to whom it was paid<sup>5</sup>. The amount of any such payment is also recoverable by the person by whom it was paid either by proceedings for its recovery or, if it was made to the landlord<sup>6</sup> by a person liable to pay rent to the landlord, by deduction from any rent so payable<sup>7</sup>.

Notwithstanding anything in these provisions, the outgoing tenant<sup>8</sup> may, if he would otherwise be entitled to do so, require the payment by the incoming tenant<sup>9</sup>:

1860 (1) of so much of any outgoings discharged by the outgoing tenant as is referable to any period after the transfer date<sup>10</sup>;

1861 (2) of a sum not exceeding the amount of any expenditure reasonably incurred by the outgoing tenant in carrying out any structural alteration of the dwelling<sup>11</sup> or in providing or improving fixtures therein, being fixtures which, as against the landlord, the outgoing tenant is not entitled to remove;

1862 (3) where the outgoing tenant became a tenant of the dwelling by virtue of an assignment of the previous protected tenancy<sup>12</sup>, of a sum not exceeding any reasonable amount paid by him to his assignor in respect of expenditure incurred by the assignor, or by any previous assignor of the tenancy, in carrying out any such alteration or in providing or improving any such fixtures as are mentioned in head (2) above; or

1863 (4) where part of the dwelling is used as a shop or office, or for business, trade or professional purposes, of a reasonable amount in respect of any goodwill of the business, trade or profession, being goodwill transferred to the incoming tenant in connection with his becoming a statutory tenant of the dwelling or accruing to him in consequence thereof<sup>13</sup>.

1 For the meaning of 'statutory tenancy' see PARA 831 ante.

- 2 See the Rent Act 1977 s 3(5), Sch 1 para 13; and PARA 841 ante.
- 3 There is no prohibition on receiving such a payment. Cf *ibid* ss 119(2), 120(2), Sch 1 para 12(1); and PARAS 931 note 4, 940 ante.
- 4 *Ibid* Sch 1 para 14(1) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.
- 5 *Ibid* Sch 1 para 14(2).
- 6 For the meaning of 'landlord' see PARA 816 note 2 ante.
- 7 Rent Act 1977 Sch 1 para 14(3).
- 8 For these purposes, 'outgoing tenant' has the same meaning as in *ibid* Sch 1 para 13 (see PARA 841 ante): Sch 1 para 14(5).
- 9 For these purposes, 'incoming tenant' has the same meaning as in *ibid* Sch 1 para 13 (see PARA 841 ante): Sch 1 para 14(5).
- 10 For these purposes, 'the transfer date' has the same meaning as in *ibid* Sch 1 para 13 (see PARA 841 ante): Sch 1 para 14(5).
- 11 For these purposes, 'the dwelling' has the same meaning of as in *ibid* Sch 1 para 13 (see PARA 841 note 3 ante): Sch 1 para 14(5).
- 12 For the meaning of 'protected tenancy' see PARA 818 ante.
- 13 Rent Act 1977 Sch 1 para 14(4). As to sums chargeable on the assignment of a protected tenancy see PARA 932 ante.

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## **(6) SECURITY OF TENURE; RECOVERY OF POSSESSION**

### **(i) Restrictions on Right to Possession**

#### **942. General principles.**

In general a court may not make an order for possession of a dwelling house which is for the time being let on a protected tenancy<sup>1</sup> or subject to a statutory tenancy<sup>2</sup> unless the court considers it reasonable<sup>3</sup> to make such an order and either:

- 1864 (1) the court is satisfied that suitable alternative accommodation<sup>4</sup> is available for the tenant<sup>5</sup> or will be available for him when the order in question takes effect<sup>6</sup>; or
- 1865 (2) one of the discretionary grounds<sup>7</sup> is established<sup>8</sup>.

If, however, the landlord<sup>9</sup> would otherwise<sup>10</sup> be entitled to recover possession of a dwelling house which is for the time being let on or subject to a regulated tenancy, the court must make an order for possession if one of the mandatory grounds<sup>11</sup> is established<sup>12</sup>.

A landlord may not evict a protected or statutory tenant without recourse to the court<sup>13</sup>. The court may not make a consent order for possession unless it is satisfied either by evidence or

by admission by or on behalf of the tenant that he is not entitled to that protection<sup>14</sup>. These restrictions on the right to possession apply notwithstanding any agreement to give up possession<sup>15</sup> but do not prevent an actual surrender<sup>16</sup>. The court has power to suspend or rescind an order for possession or to grant a stay of execution<sup>17</sup>. The restrictions are, however, removed in certain circumstances under housing legislation<sup>18</sup>. A licensee of a statutory tenant enjoys a measure of security in that the court may not order possession against him unless the tenant is joined as a party and an order made against him, so long at least as there is any possibility that the statutory tenancy subsists<sup>19</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 For the meaning of 'statutory tenancy' see PARA 831 ante.

3 As to the test of reasonableness see PARA 945 post.

4 As to what constitutes suitable alternative accommodation for these purposes see PARA 947 post.

5 For the meaning of 'tenant' see PARA 816 note 3 ante.

6 Rent Act 1977 s 98(1)(a).

7 Ie if the circumstances are as specified in any of ibid s 98(1), Sch 15 Pt I, Cases 1-10 (as amended): see PARA 949 et seq post.

8 Ibid s 98(1)(b).

9 For the meaning of 'landlord' see PARA 816 note 2 ante.

10 Ie apart from the Rent Act 1977 s 98(1): see the text and notes 1-8 supra.

11 Ie if the circumstances are as specified in any of ibid s 98(2), Sch 15 Pt II, Cases 11-20 (as amended): see PARA 961 et seq post.

12 Ibid s 98(2). The restrictions imposed by s 98 (as amended) upon the making of an order for possession do not apply where a mortgagor claims possession against a tenant whose tenancy was granted by the mortgagee in breach of the terms of the mortgage deed (*Britannia Building Society v Earl* [1990] 2 All ER 469, [1990] 1 WLR 422, CA) or where the court rescinds the tenancy agreement (*Killick v Roberts* [1991] 4 All ER 289, [1991] 1 WLR 1146, CA). The restrictions do, however, apply against a purchaser of land notwithstanding that the tenant had signed a contract of sale with the purchaser entitling the purchaser to vacant possession: *Appleton v Aspin* [1988] 1 All ER 904, [1988] 1 WLR 410, CA. The restrictions are modified in the case of certain agricultural workers: see PARA 943 post. As to the restrictions on the right to possession of dwelling houses let on assured tenancies see PARA 1100 et seq post.

13 See the Protection from Eviction Act 1977 s 1 (as amended), s 2; para 653 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609.

14 *R v Bloomsbury and Marylebone County Court, ex p Blackburne* (1985) 14 HLR 56, [1985] 2 EGLR 157, CA; *Wandsworth London Borough Council v Fadayomi* [1987] 3 All ER 474, [1987] 1 WLR 1473, CA (considering the Housing Act 1985 s 84 (as originally enacted): see PARA 1354 post); *R v Newcastle upon Tyne County Court, ex p Thompson* (1988) 20 HLR 430, [1988] 2 EGLR 119; *Syed Hussain bin Abdul Rahman bin Shaikh Alkaff v AM Abdullah Sahib & Co* [1985] 1 WLR 1392, PC (a decision under the similar legislation then in force in Singapore). See also *Middleton v Baldock* [1950] 1 KB 657, [1950] 1 All ER 708, CA.

15 *Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301; *Barton v Fincham* [1921] 2 KB 291, CA. A notice to quit given by the tenant may be a ground for an order for possession: see PARA 953 post. The tenant can enforce an agreement with the landlord to pay him a sum of money upon his giving up possession (*Rajbenback v Mamon* [1955] 1 QB 283, [1955] 1 All ER 12); but such an agreement between a statutory tenant and any other person is illegal (see PARA 940 ante).

16 *Foster v Robinson* [1951] 1 KB 149, [1950] 2 All ER 342, CA.

17 See the Rent Act 1977 s 100 (as amended); and PARA 972 post.

18 See PARA 944 post.

19 *Brown v Draper* [1944] KB 309, [1944] 1 All ER 246, CA; *Robson v Headland* (1948) 64 TLR 596 at 598, CA. See further PARA 833 ante.

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### **943. Agricultural workers.**

In the case of any protected<sup>1</sup> or statutory<sup>2</sup> tenancy which, if it were a tenancy at a low rent<sup>3</sup> and if (where relevant) any earlier tenancy<sup>4</sup> granted to the tenant<sup>5</sup> or to a member of his family had been a tenancy at a low rent, would be a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976<sup>6</sup>, the grounds upon which an order for possession may be made are modified<sup>7</sup>. The court may not<sup>8</sup> make an order for possession of a dwelling house which is for the time being let on or subject to such a tenancy unless the court considers it reasonable to make such an order<sup>9</sup> and either one of the specified discretionary grounds is established<sup>10</sup> or the special conditions relating to alternative accommodation<sup>11</sup> are satisfied<sup>12</sup>. If, however, the landlord<sup>13</sup> would otherwise<sup>14</sup> be entitled to recover possession of a dwelling house which is for the time being so let or subject, the court must make an order for possession on any of the mandatory grounds except those relating to the dwelling house being required<sup>15</sup> for an agricultural worker<sup>16</sup>.

1 For the meaning of 'protected tenancy' see PARA 818 ante.

2 For the meaning of 'statutory tenancy' see PARA 831 ante.

3 For the meaning of 'tenancy at a low rent' and as to the exemption of such tenancies from protection see PARAS 861-862 ante.

4 For the meaning of 'tenancy' see PARA 818 note 1 ante.

5 For the meaning of 'tenant' see PARA 816 note 3 ante.

6 See PARAS 1144-1149 post.

7 Rent Act 1977 s 99(1), (2). As to the restrictions on possession under the Rent (Agriculture) Act 1976 see PARA 1166 et seq post.

8 Ie notwithstanding anything in the Rent Act 1977 s 98 (as amended): see PARA 942 ante.

9 As to the test of reasonableness see PARA 945 post.

10 Ie if the circumstances are as specified in any of the Rent Act 1977 s 98(1), Sch 15 Pt I, Cases 1-10 (as amended) except Sch 15 Pt I, Case 8: see PARA 949 et seq post.

11 Ie if the circumstances are as specified in either of ibid s 99(2), Sch 16, Cases I or II (as amended): see PARA 948 post.

12 Ibid s 99(2).

13 For the meaning of 'landlord' see PARA 816 note 2 ante.

14 Ie apart from the Rent Act 1977 s 99(2).

15 Ie if the circumstances are as specified in any of ibid s 98(2), Sch 15 Pt II, Cases 11-20 (as amended) except Cases 16-18: see PARA 961 et seq post.

16 Ibid s 99(3).

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#### **944. Exceptions under the housing legislation.**

The restrictions on the right to possession of a dwelling house subject to a protected or statutory tenancy<sup>1</sup> are removed in the following circumstances:

- 1866 (1) at any time when the dwelling house is overcrowded<sup>2</sup> in such circumstances as to render the occupier guilty of an offence<sup>3</sup>;
- 1867 (2) where possession is sought of a house in respect of which a demolition order or prohibition order has been made<sup>4</sup>;
- 1868 (3) where the house is required to enable a local authority to exercise its powers under any enactment relating to housing<sup>5</sup>;
- 1869 (4) if the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>6</sup> certifies that possession of a house acquired and held by certain authorities for planning purposes is immediately required for those purposes<sup>7</sup>.

1 As to these restrictions see PARA 942 ante.

2 In the meaning of the Housing Act 1985 Pt X (ss 324-344) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 444 et seq.

3 Rent Act 1977 s 101 (substituted by the Housing (Consequential Provisions) Act 1985 ss 4, 5(1), Sch 2 para 35(1), (8), Sch 3 para 3 in a case where the tenant, or statutory tenant, occupies the dwelling house under or by virtue of a tenancy granted on or after 1 April 1986). The Rent Act 1977 s 101 as originally enacted removed protection from overcrowded premises used as a separate dwelling by 'members of the working classes': see *Guinness Trust (London Fund) Founded 1890 Registered 1920 v Green* [1955] 2 All ER 871, [1955] 1 WLR 872, CA. The relevant date for determining whether a house is overcrowded is the date of the hearing: *Zbytniewski v Broughton* [1956] 2 QB 673, [1956] 3 All ER 348, CA; *Henry Smith's Charity Trustees v Bartosiak-Jentys* (1990) 24 HLR 627, [1991] 2 EGLR 276, CA. It seems that overcrowding also deprives an occupier under a restricted contract of the security of tenure afforded him by the deferment of the operation of a notice to quit: see the Rent Act 1977 s 101 (as substituted), s 103 (as amended), s 104; and PARAS 1002-1004 post. As to overcrowding offences and the landlord's rights and duties see HOUSING vol 22 (2006 Reissue) PARAS 451-453.

4 See the Housing Act 1985 s 270(3) (as amended); the Housing Act 2004 s 33; and HOUSING vol 22 (2006 Reissue) PARAS 399, 419. Where there was a closing order, the landlord was entitled to possession even if the condition of the premises was a result of his breach of contractual or statutory duty: *Buswell v Goodwin* [1971] 1 All ER 418, [1971] 1 WLR 92, CA. There was no rule requiring a rent officer to register a nil rent because of the coming into force of a closing order: *Williams v Khan* (1981) 258 Estates Gazette 554, CA. The court had no power to vary or determine a statutory tenancy once a closing order had been made: *Johnson v Felton* (1994) 27 HLR 265, [1994] EGCS 135, CA. Prior to 1 April 1990, protection was also removed where the owner of a house had given an undertaking that it was not to be used for human habitation: see the Housing Act 1985 s 265 (as originally enacted). Closing orders are now replaced by prohibition orders under the Housing Act 2004: see further HOUSING vol 22 (2006 Reissue) PARA 387 et seq.

5 See the Housing Act 1985 s 612 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 587.

6 As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 See the Local Government, Planning and Land Act 1980 ss 144(1), (3), Sch 28 para 10 (as amended); the New Towns Act 1981 s 22 (as amended); the Town and Country Planning Act 1990 s 242; and TOWN AND COUNTRY PLANNING vols 46(2), (3) (Reissue) PARAS 963, 1372, 1472. See also the Leasehold Reform, Housing and Urban

Development Act 1993 s 169, Sch 20 para 8 (possession of house acquired and held by the Urban Regeneration Agency). As to that Agency, which is part of English Partnerships, see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1306 et seq; TRADE AND INDUSTRY vol 97 (2010) PARA 945. Lettings by development corporations and local authorities are in any event not protected: see PARA 884 ante.

## UPDATE

### 944 Exceptions under the housing legislation

NOTE 7--Urban Regeneration Agency abolished: Housing and Regeneration Act 2008 s 49; SI 2008/2358.

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### 945. Reasonableness.

In determining whether it is reasonable to make an order for possession the judge is entitled to take into account all the circumstances, as they exist at the date of hearing<sup>1</sup>, in a broad commonsense way<sup>2</sup>. He ought normally, however, to proceed on the assumption that domestic law strikes a fair balance and is compatible with the tenant's Convention rights under the Human Rights Act 1998<sup>3</sup>. Any facts which amount to hardship on landlord or tenant<sup>4</sup> are relevant and so is the conduct of the parties generally<sup>5</sup>. The question is not whether it is reasonable for the landlord to seek possession but whether it is reasonable for the court to grant it<sup>6</sup>. The interests of the public are also relevant<sup>7</sup>. The difficulty of establishing reasonableness will usually be less when alternative accommodation is available than when it is not<sup>8</sup>. The Court of Appeal will overrule the county court on questions of reasonableness only on very strong grounds<sup>9</sup>.

The court must consider the question of reasonableness before ordering possession, and so a default judgment entered without consideration of that issue was formerly held to be a nullity<sup>10</sup>. The rules relating to default judgments<sup>11</sup> do not now apply to possession claims<sup>12</sup>. Nor is summary judgment available in possession proceedings against a tenant whose occupancy is protected under the Rent Act 1977<sup>13</sup>.

1 *Neville v Hardy* [1921] 1 Ch 404; *Harcourt v Lowe* (1919) 35 TLR 255; *Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301 at 304; *Smith v McGoldrick* [1977] 1 EGLR 53, (1976) 242 Estates Gazette 1047, CA.

2 *Cumming v Danson* [1942] 2 All ER 653, CA; *Rhodes v Cornford* [1947] 2 All ER 601, CA; *Warren v Austen* [1947] 2 All ER 185, CA. See also *Shrimpton v Rabbits* (1924) 131 LT 478.

3 See *Kay v Lambeth London Borough Council*, *Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 2 WLR 570, [2006] 2 FCR 20 per Lord Bingham of Cornhill, with whom the majority concurred on this point. Cf *Stonebridge Housing Action Trust v Gabbidon* [2003] 05 LS Gaz R 30, Times, 13 December, [2002] All ER (D) 326 (Nov) (where it was held that the court ought to consider the tenant's Convention rights in every case). As to the relevant Convention rights see particularly the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 8 (right to respect for private and family life); and PARA 46 ante.

4 *Williamson v Pallant* [1924] 2 KB 173, DC (loss of goodwill); *Cresswell v Hodgson* [1951] 2 KB 92, [1951] 1 All ER 710, CA (financial means of both parties); *Warren v Austen* [1947] 2 All ER 185, CA (chance of taking in paying guests; loss of garden); *Cumming v Danson* [1942] 2 All ER 653, CA (landlord's desire to have relations and others living with him). Where a landlord was claiming possession of a house as a residence for his married daughter (see PARA 956 post), the county court judge was held entitled to take into account the fact that



sufficient accommodation would be available for the married daughter and her family in another house which was the landlord's own residence, if a tenant occupying part of the last-mentioned house left or was evicted: *Hardie v Frediani* [1958] 1 All ER 529, [1958] 1 WLR 318, CA.

5 *Upjohn v Macfarlane* [1922] 2 Ch 256 (assurance by landlord's agent); *Peach v Lowe* [1947] 1 All ER 441, CA (disrepair); *Yelland v Taylor* [1957] 1 All ER 627, [1957] 1 WLR 459, CA (landlord's perjury on another issue); *Dellenty v Pellow* [1951] 2 KB 858, [1951] 2 All ER 716, CA (persistent delay in paying rent); *Bell London and Provincial Properties Ltd v Reuben* [1947] KB 157, [1946] 2 All ER 547, CA (intention to continue breach of covenant); *Tideway Investment and Property Holdings Ltd v Wellwood* [1952] Ch 791, [1952] 2 All ER 514, CA (similar case); *Regional Properties Co Ltd v Frankenschwerth and Chapman* [1951] 1 KB 631, [1951] 1 All ER 178, CA (assignment just before end of lease); *Lee-Steere v Jennings* (1986) 20 HLR 1, CA (bad record for nonpayment of rent); *Yoland Ltd v Reddington* (1982) 5 HLR 41, [1982] 2 EGLR 80, CA (tenant would no longer be surrounded with subtenants of his own choosing); *Televantos v McCulloch* (1990) 23 HLR 412, [1991] 1 EGLR 123, CA (tenant had a counterclaim and set-off for damages for breach of the landlord's repairing covenant which exceeded landlord's claim for rent).

6 *Shreeve v Hallam* [1950] WN 140, CA; *Brown v Davies* [1958] 1 QB 117, [1957] 3 All ER 401, CA.

7 *Cresswell v Hodgson* [1951] 2 KB 92 at 97, [1951] 1 All ER 710 at 714, CA.

8 *Cumming v Danson* [1942] 2 All ER 653 at 657, CA; but see *Briddon v George* [1946] 1 All ER 609 at 614, CA; *Yoland Ltd v Reddington* (1982) 5 HLR 41, [1982] 2 EGLR 80, CA; *Battlespring Ltd v Gates* (1983) 11 HLR 6, [1983] 2 EGLR 103, CA. If the tenant has succeeded to a statutory tenancy on the death of a previous tenant (see PARA 843 ante), it is relevant to consider that there may be a new right to succeed to the tenant (already a successor as respects the existing dwelling) in respect of the alternative accommodation: *Strutt v Panter* [1953] 1 QB 397 at 400, [1953] 1 All ER 445 at 446, CA.

9 *Rhodes v Cornford* [1947] 2 All ER 601 at 603; *Darnell v Millward* [1951] 1 All ER 88 at 90, CA; *Cresswell v Hodgson* [1951] 2 KB 92, [1951] 1 All ER 710, CA; *Yelland v Taylor* [1957] 1 All ER 627, [1957] 1 WLR 459, CA. The appellate court will assume that the judge in the county court has taken all relevant matters into account: *Tendler v Sproule* [1947] 1 All ER 193, CA. See also *Abrahams v Wilson* [1971] 2 QB 88, [1971] 2 All ER 1114, CA; *Lee-Steere v Jennings* (1986) 20 HLR 1, CA; but see *Minchburn Ltd v Fernandez* (1986) 19 HLR 29, [1986] 2 EGLR 103, CA; *Wint v Monk* (1981) 259 Estates Gazette 45, CA (issue of reasonableness had not been fully explored at the trial); *Woking Borough Council v Bistram* (1993) 27 HLR 1, CA (county court judge had failed to take tenant's obligation not to cause a nuisance to other tenants on the estate into account). Appeals on questions of fact are precluded in some cases by the County Courts Act 1984 s 77(6) (as amended): see PARA 984 post.

10 *Peachey Property Corp Ltd v Robinson* [1967] 2 QB 543, [1966] 2 All ER 981, CA. See also *Peachey Property Corp Ltd v Morley* [1967] 3 All ER 30, [1967] 1 WLR 1134.

11 le CPR Pt 12: see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq.

12 See CPR 55.7(4); and PARA 663 ante.

13 See CPR 24.3(2)(a)(ii); and CIVIL PROCEDURE vol 11 (2009) PARA 524.

## UPDATE

### 945 Reasonableness

NOTE 4--The judge must decide as a question of fact whether it is reasonable to make an order by evaluating the effect on both parties if an order is made and if it is not: *Whitehouse v Lee* [2009] EWCA Civ 375, [2009] 31 EG 74.

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### 946. Transitional provisions.

There are provisions for giving security to tenants whose unprotected tenancies came to an end before the date of commencement of the Rent Act 1965<sup>1</sup>, the Counter-Inflation Act 1973<sup>2</sup> and the Rent Act 1974<sup>3</sup> but who retained possession beyond those dates and whose tenancies would have been protected tenancies if they had ended after the relevant commencement date. In each case the court was required not to make any order for possession which would not have been made if the tenancy had been protected when it ended, and was given power to rescind or vary any order already made<sup>4</sup>. Such a tenant is deemed to have retained possession as a statutory tenant under a regulated tenancy on the same terms as to rent and otherwise of the previous contractual tenancy as a person who became a statutory tenant on the termination of a protected tenancy<sup>5</sup>. The court has power to vary all or any of the terms of such a statutory tenancy in any way appearing to it to be just and equitable<sup>6</sup>.

1    le 8 December 1965. The Rent Act 1965 created regulated tenancies: see PARA 854 ante.

2    le 23 March 1973. The Counter-Inflation Act 1973 increased the rateable value limits for protected tenancies: see PARA 855 ante.

3    le 14 August 1974. The Rent Act 1974 made furnished tenancies protected: see PARA 870 ante.

4    See the Rent Act 1965 s 20(1); the Counter-Inflation Act 1973 s 14(4), Sch 5 para 7; the Rent Act 1974 s 16(1), Sch 3 para 3 (all repealed). As to the exercise of the discretion to rescind an order see *John Sainesbury & Co (a firm) v Roberts* [1975] 2 All ER 801, [1975] 1 WLR 1104, CA. The power to rescind an order extended to a consent order: *Mouat-Balthasar v Murphy* [1967] 1 QB 344, [1966] 3 All ER 477, CA.

5    See the Rent Act 1977 s 155(3), Sch 24 paras 3(2), 5, 7.

6    See *ibid* Sch 24 paras 3(2), 5(6), 7(4).

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## **(ii) Suitable Alternative Accommodation**

### **947. Conditions to be satisfied; in general.**

If it considers it reasonable<sup>1</sup> to do so, the court has power to make an order for possession if it is satisfied that suitable alternative accommodation is available<sup>2</sup> for the tenant, or will be available for him when the order takes effect<sup>3</sup>.

A certificate of the local housing authority<sup>4</sup> for the district<sup>5</sup> in which the dwelling house in question is situated, certifying that the authority will provide suitable alternative accommodation for the tenant by a date specified in the certificate is conclusive evidence that such accommodation will be available for him on that date<sup>6</sup>. Where no such certificate is produced to the court, the alternative accommodation is deemed to be suitable if, and only if<sup>7</sup> it consists of either:

- 1870 (1) premises which are to be let as a separate dwelling<sup>8</sup> such that they will then be let on a protected tenancy<sup>9</sup>, other than one under which the landlord might recover possession on a mandatory ground<sup>10</sup>; or

1871 (2) premises to be let as a separate dwelling on terms which will in the opinion of the court afford to the tenant security of tenure reasonably equivalent to that afforded in the case of a protected tenancy of a kind mentioned in head (1) above<sup>11</sup>,

and, in the opinion of the court, the accommodation fulfils the relevant conditions<sup>12</sup>.

The relevant conditions are that the accommodation is reasonably suitable to the needs of the tenant and his family<sup>13</sup> as regards proximity to their places of work<sup>14</sup> and either:

- 1872 (a) similar as regards rental and extent to the accommodation afforded by dwelling houses provided in the neighbourhood by any local housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and his family<sup>15</sup>; or
- 1873 (b) reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character<sup>16</sup>,

and that, if any furniture was provided for use under the protected or statutory tenancy in question, furniture is provided for use in the accommodation which is either similar to that so provided or is reasonably suitable to the needs of the tenant and his family<sup>17</sup>.

The alternative accommodation need not make provision for lodgers<sup>18</sup>, unless, it seems, the lodgers in question can be treated as members of the tenant's family<sup>19</sup>; but the extent to which it will accommodate the tenant's furniture<sup>20</sup> or include a garden for the use of the tenant's children<sup>21</sup> or (probably) a garage<sup>22</sup> is relevant, and all these circumstances may affect the question whether it is reasonable to make the order<sup>23</sup>. Where a tenant is protected for combined dwelling and professional purposes, the alternative accommodation must be suitable for his professional as well as his residential needs<sup>24</sup>. Accommodation is not deemed to be suitable for the needs of a tenant and his family if the result of their occupation of it would be to make it an overcrowded dwelling house for the purposes of housing legislation<sup>25</sup>, or if it would compel the tenant to live with a spouse from whom he or she is judicially separated<sup>26</sup>, or if it would be too large<sup>27</sup>, or the rent would be too high<sup>28</sup>, or if it lacks proper facilities<sup>29</sup>.

Accommodation may be suitable even though it consists of a part of the accommodation comprised in the original tenancy<sup>30</sup>. The court may properly take into account not only the physical character of the accommodation offered but also environmental matters either in relation to suitability to the needs of the tenant as regards its character or in relation to the reasonableness of making an order for possession<sup>31</sup>. In considering the needs of the tenant as regards character it is permissible for the court to look at the environment to which the tenants have become accustomed in their present accommodation and to see how far the new environment differs from that<sup>32</sup>; but 'character' is confined to the character of the property and does not extend to the society of the tenant's friends or to the tenant's cultural interests<sup>33</sup>.

It seems that, where the recoverable rent of the new accommodation is beyond what the tenant can afford, but the landlord offers the accommodation at less than the recoverable rent, the order may include an undertaking restricting his right to increase the rent<sup>34</sup>.

1 As to the test of reasonableness see PARA 945 ante.

2 It is not sufficient that it was available and that the tenant refused it: *Kimpson v Markham* [1921] 2 KB 157, DC.

3 Rent Act 1977 s 98(1)(a). Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 9; and PARA 1118 post. The accommodation need not be provided by the landlord: *Bazalgette v Hampson* (1920) 89 LJKB 476. An order may not, however, be made to enable works to be done that will only give suitable alternative accommodation once completed: *Akram v Adam* [2002] EWCA Civ 1679, [2003] HLR 381, [2002] All ER (D) 68 (Nov). Alternative accommodation belonging to the tenant which is let by him and possession of which cannot be obtained without

unreasonable expense or difficulty does not satisfy the test under the Rent Act 1977 s 98(1)(a): see *Amrit Holdings Co Ltd v Shahbakhti* [2005] EWCA Civ 339, [2005] HLR 474, [2005] All ER (D) 37 (Mar).

4 For these purposes, 'local housing authority' has the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Rent Act 1977 s 98(4), Sch 15 Pt IV para 8 (substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (12)).

5 For these purposes, 'district', in relation to a local housing authority, has the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Rent Act 1977 Sch 15 Pt IV para 8 (as substituted: see note 4 supra).

6 Ibid Sch 15 Pt IV para 3 (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 35(1), (12)). Any document purporting to be such a certificate and to be signed by the proper officer of the local housing authority must be received in evidence and is deemed to be such a certificate without further proof, unless the contrary is shown: Rent Act 1977 Sch 15 Pt IV para 7 (as so amended).

7 *Standingford v Probert* [1950] 1 KB 377 at 385, [1949] 2 All ER 861 at 866, CA; *Sheenan v Cutler* [1946] KB 339 at 343, 344, CA; but see *Barnard v Towers* [1953] 2 All ER 877 at 877, 878, [1953] 1 WLR 1203, CA, per Somervell LJ. The onus is on the landlord to show that the premises are suitable: *Neville v Hardy* [1921] 1 Ch 404; *Andrew v Baker* (1946) 175 LT 95, CA.

8 In this connection this normally means premises all under one roof and not separated by another distinct dwelling house (*Sheehan v Cutler* [1946] KB 339, CA; *Selwyn v Hamill* [1948] 1 All ER 70, CA); but see *Marks v Maxwell* (1954) 163 Estates Gazette 406, CA (rooms in different houses but connected). As to the position where the family consists of two subfamilies see *Standingford v Probert* [1950] 1 KB 377 at 384, [1949] 2 All ER 861 at 865, CA, per Cohen LJ and at 386 and 866 per Evershed MR; *Kettering Ironmongers Ltd v Afford* (1950) 155 Estates Gazette 180, CA. Alternative accommodation is not suitable if it involves sharing of living accommodation with another occupant (*Barnard v Towers* [1953] 2 All ER 877, [1953] 1 WLR 1203, CA); see also *Sharpe v Nicholls* [1945] KB 382, [1945] 2 All ER 55, CA; *Cookson v Walsh* (1954) 163 Estates Gazette 486, CA (shared use of kitchen); cf *Saul v Brooks* (1946) 148 Estates Gazette 409, CA (sharing of bathroom and lavatory). In another context a dwelling house may comprise rooms in more than one building: see PARA 821 ante. It seems that a house of which the tenant is the freeholder, even if outside the rateable value limits of the Rent Acts, can be suitable alternative accommodation: *Barnard v Towers* supra.

9 For the meaning of 'protected tenancy' see PARA 818 ante.

10 Rent Act 1977 Sch 15 Pt IV para 4(1)(a) (Sch 15 Pt IV para 4(1) amended by the Housing Act 1980 s 152(1), Sch 25 para 58; renumbered by the Housing and Planning Act 1986 s 13(2)). As to the mandatory grounds for possession see PARA 961 et seq post.

11 Rent Act 1977 Sch 15 Pt IV para 4(1)(b) (as amended and renumbered: see note 10 supra). The security of tenure of a council house is not reasonably equivalent to that afforded in the case of a protected tenancy: *Sills v Watkins* [1956] 1 QB 250, [1955] 3 All ER 319, CA. Similarly, premises which have been decontrolled by reconstruction are not suitable unless a lease for a substantial period is offered: *Scrace v Windust* [1955] 2 All ER 104, [1955] 1 WLR 475, CA.

12 Rent Act 1977 Sch 15 Pt IV para 4(1) (as renumbered: see note 10 supra).

13 It seems that 'family' for these purposes has in general the same meaning as in ibid s 2(1)(b), Sch 1 Pt I (paras 1-11) (as amended) (see PARA 846 ante): *Brock v Wollams* [1949] 2 KB 388 at 392-393, [1949] 1 All ER 715 at 716, CA. Only persons who are permanently living with the tenant, in the sense that they have made their home with him and have no present intention of making any change, are members of the tenant's family for these purposes: *Standingford v Probert* [1950] 1 KB 377 at 383, [1949] 2 All ER 861 at 865, CA; *Scrace v Windust* [1955] 2 All ER 104 at 107, [1955] 1 WLR 475, CA. Quaere whether the needs of the tenant's fiancée have to be taken into account: see *Gladyric Ltd v Collinson* (1983) 11 HLR 12, [1983] 2 EGLR 98, CA (where the question was raised but left undecided). The needs of a friend living with the tenant but not a member of his family for these purposes are not relevant: see *Kavanagh v Lyroudias* [1985] 1 All ER 560, (1983) 10 HLR 20, CA. The fact that a tenant receives temporary visits from relations, even though it is not relevant to the suitability of alternative accommodation, may be relevant to the reasonableness of making an order for possession: *Smith v Combes* (1950) 155 Estates Gazette 334, CA.

14 'Place of work' may be a place for voluntary work: *Dakyns v Pace* [1948] 1 KB 22. It need not be a building or office, but may be an area: *Yewbright Properties Ltd v Stone* (1980) 40 P & CR 402, CA.

15 Rent Act 1977 Sch 15 Pt IV para 5(1)(a) (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 35(1), (12)). A certificate of a local housing authority stating (1) the extent of the accommodation afforded by dwelling houses provided by it to meet the needs of tenants with families of such number as may be specified therein; and (2) the amount of rent charged for dwelling houses affording accommodation of that

extent, is conclusive evidence of those facts: Rent Act 1977 Sch 15 Pt IV para 5(2) (as so amended). The certificate should state the number of rooms in such accommodation and it is desirable, but not essential, that it should also state their approximate size: see *MacDonnell v Daly* [1969] 3 All ER 851 at 854, [1969] 1 WLR 1482 at 1487, CA, per Edmund Davies LJ; *Jones v Cook* [1990] 2 EGLR 108 at 111, CA, per Woolf LJ. The certificate is not conclusive as to suitability or as to whether the alternative accommodation is similar as regards rental and extent: *Turner v Keiller* 1950 SC 43, Ct of Sess; *Hinesman v Read* (1946) 148 Estates Gazette 409, CA (existing accommodation at increased rent); *Jones v Cook* supra. As to the admissibility of certificates see note 6 supra. Environmental considerations which affect the character of a property are of as much relevance for these purposes as they are to the Rent Act 1977 Sch 15 Pt IV para 5(1)(b) (see the text and note 16 infra) where they are specifically mentioned: *Dawncar Investments Ltd v Plews* (1993) 25 HLR 639, [1994] 1 EGLR 141, CA.

16 Rent Act 1977 Sch 15 Pt IV para 5(1)(b). 'Needs' means 'needs for housing'; it is not necessary that the character of the alternative accommodation should be similar to that of the existing premises: *Hill v Rochard* [1983] 2 All ER 21, [1983] 1 WLR 478, CA.

17 Rent Act 1977 Sch 15 Pt IV para 5(1).

18 *Thompson v Rolls* [1926] 2 KB 426, DC; *M'Lauchlin v Gillan* 1931 SLT (Sh Ct) 35; *Luttrell v Addicott* [1946] 2 All ER 625, CA; *Stewart v Mackay* 1947 SC 287, Ct of Sess.

19 *Stewart v Mackay* (1947) SC 287, Ct of Sess; *McKillop v Cameron* 1948 SLT (Sh Ct) 49.

20 *McIntyre v Hardcastle* [1948] 2 KB 82 at 90, [1948] 1 All ER 696 at 699, CA; *Burgh of Paisley v Bamford* 1950 SLT 200 at 209, Ct of Sess; *Mykolyshyn v Noah* [1971] 1 All ER 48, [1970] 1 WLR 1217, CA (where premises without room for the tenant's unnecessary furniture were held to be suitable). See also *Gladyric Ltd v Collinson* (1983) 11 HLR 12, [1983] 2 EGLR 98, CA.

21 *De Markozoff v Craig* (1949) 93 Sol Jo 693, CA.

22 See *MacDonnell v Daly* [1969] 3 All ER 851 at 854, [1969] 1 WLR 1482 at 1487, CA, per Edmund Davies LJ (where *Briddon v George* [1946] 1 All ER 609, CA was disapproved and *Adler v Seshold* (1952) 159 Estates Gazette 522, CA, to the same effect as *Briddon v George* supra was not cited).

23 *Warren v Austen* [1947] 2 All ER 185, CA; cf *Singh v Malayan Theatres Ltd* [1953] AC 632, PC. As to the requirement that the court should consider it reasonable to make an order see PARA 942 ante; and as to the test of reasonableness see PARA 945 ante.

24 *MacDonnell v Daly* [1969] 3 All ER 851, [1969] 1 WLR 1482, CA (artist's studio); *Re De Markozoff v Craig* (1949) 93 Sol Jo 693, CA (suitability for entertaining business guests relevant). See also *Williamson v Pallant* [1924] 2 KB 173, DC (financial hardship relevant).

25 Rent Act 1977 Sch 15 Pt IV para 6 (amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 35(1), (12)). See also *Kerr v M'Callion* 1950 SLT (Sh Ct) 44. For the meaning of 'overcrowded' see HOUSING vol 22 (2006 Reissue) PARA 444 et seq.

26 *Crutchley v White* (1920) 89 LJBK 815, DC.

27 *Macey v Dolphin* (1950) 156 Estates Gazette 422, CA.

28 *Sealand Manor Co-operators (Welsh Land Settlement) Ltd v Bray* [1941] LJNCCR 197.

29 See *Duncan v Page* 1949 SLT (Sh Ct) 39 (sharing of bedroom); *Esposito v Ware* (1950) 155 Estates Gazette 383, CA (no bathroom or lavatory facilities); *Linotype and Machinery Ltd v Vaughan* (1957) 107 L Jo 562 (no bath; tenant an invalid); *Gratton v Spence* [1948] EGD 275; *Melville v Munro* 1933 SLT (Sh Ct) 31 (restricted access).

30 *Thompson v Rolls* [1926] 2 KB 426; *Parmee v Mitchell* [1950] 2 KB 199, [1950] 1 All ER 872, CA; *Mykolyshyn v Noah* [1971] 1 All ER 48, [1970] 1 WLR 1217, CA. The proper form of order in such a case is for possession of the whole house subject to the grant of a tenancy: *Thompson v Rolls* supra; *Parmee v Mitchell* supra. See also *Potter v Brown* (1950) 156 Estates Gazette 463; *Saul v Brooks* (1946) 148 Estates Gazette 409; *Thomas v Evans* [1927] EGD 83, DC; *Tanton v Harland* (1947) 150 Estates Gazette 98, CA; *Braunton v Lake* (1953) 103 L Jo 624; *Clements v Harris* (1954) 164 Estates Gazette 33. For cases where accommodation comprised in the original tenancy was held unsuitable see *Goulden v Whitby* [1942] LJNCCR 90; *Duncan v Page* 1949 SLT (Sh Ct) 39; *Gratton v Spence* [1948] EGD 275; *Sealand Manor Co-operators (Welsh Land Settlement) Ltd v Bray* [1941] LJNCCR 197; *MacDonnell v Daly* [1969] 3 All ER 851, [1969] 1 WLR 1482, CA. If planning permission is necessary for alterations involved in providing the alternative accommodation, and if such permission has not been obtained, proceedings may, it seems, be adjourned for the obtaining of permission

(*Allen v Jacobs* (1950) unreported, but see 100 L Jo 16), or an order may be made conditional upon the obtaining of permission (*Schaffer v Griffith* (1955) 105 L Jo 188).

31 *Redspring v Francis* [1973] 1 All ER 640, [1973] 1 WLR 134, CA (new flat in busy road with fried fish shop next door, and hospital, cinema and public house nearby).

32 *Hill v Rochard* [1983] 2 All ER 21, [1983] 1 WLR 478, CA (modern house in a housing estate on the outskirts of a village held to constitute suitable alternative accommodation for tenants of a large period country house in an isolated position).

33 *Siddiqui v Rashid* [1980] 3 All ER 184, [1980] 1 WLR 1018, CA.

34 *Strutt v Panter* [1953] 1 QB 397 at 400, [1953] 1 All ER 445 at 446, CA (a case involving controlled premises but there seems no reason why the same principle should not apply to a regulated tenancy). As to recoverable rent see PARA 891 et seq ante.

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#### **948. Special grounds applying to certain agricultural workers.**

In the case of certain dwelling houses let to agricultural workers<sup>1</sup>, the court may make an order for possession if it considers it reasonable to do so<sup>2</sup> and either of the following discretionary grounds for possession is established<sup>3</sup>.

Where alternative accommodation is not provided or arranged by the housing authority, the court may make an order for possession if it is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order for possession takes effect<sup>4</sup>. Accommodation is deemed suitable for these purposes if it consists of:

- 1874 (1) premises which are to be let as a separate dwelling such that they will then be let on a protected tenancy<sup>5</sup>; or
- 1875 (2) premises which are to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded<sup>6</sup> in the case of a protected tenancy,

and, in the opinion of the court, the accommodation fulfils the specified conditions<sup>7</sup>.

The specified conditions are that the accommodation must be reasonably suitable to the needs of the tenant and his family<sup>8</sup> as regards proximity to place of work and either:

- 1876 (a) similar as regards rental and extent to the accommodation afforded by dwelling houses provided in the neighbourhood by the local housing authority<sup>9</sup> for persons whose needs as regards extent are similar to those of the tenant and his family<sup>10</sup>; or
- 1877 (b) reasonably suitable to the means of the tenant, and to the needs of the tenant and his family as regards extent and character<sup>11</sup>;

but for these purposes no account may be taken of accommodation as respects which an offer has been made or notice has been given as mentioned in heads (i) or (ii) below<sup>12</sup>. If any furniture was provided by the landlord for use under the tenancy, furniture must be provided

for use in the alternative accommodation which is either similar, or is reasonably suitable to the needs of the tenant and his family<sup>13</sup>.

Alternatively, the court may make an order for possession if:

- 1878 (i) the local housing authority has made an offer in writing to the tenant of alternative accommodation which appears to it to be suitable, specifying the date when the accommodation will be available and the date, not being less than 14 days from the date of the offer, by which the offer must be accepted; or
- 1879 (ii) the local housing authority has given notice in writing to the tenant that it has received from a person specified in the notice an offer in writing to rehouse the tenant in alternative accommodation which appears to it to be suitable, and the notice specifies both the date when the accommodation will be available and the date, not being less than 14 days from the date when the notice was given to the tenant, by which the offer must be accepted<sup>14</sup>,

and the landlord shows that the tenant:

- 1880 (A) accepted the offer by the housing authority or other person within the time duly specified in the offer; or
- 1881 (B) did not so accept the offer, and the tenant does not satisfy the court that he acted reasonably in failing to accept the offer<sup>15</sup>.

The accommodation offered must, in the opinion of the court, be reasonably suitable to the needs of the tenant and his family as regards proximity to place of work<sup>16</sup> and to the means of the tenant and to the needs of the tenant and his family as regards extent<sup>17</sup>.

1 le dwelling houses let on or subject to tenancies to which the Rent Act 1977 s 99 applies: see PARA 943 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 Rent Act 1977 s 99(2).

4 Ibid s 99(2), Sch 16, Case I para 1.

5 For the meaning of 'protected tenancy' see PARA 818 ante.

6 le by the Rent Act 1977 Pt VII (ss 98-107) (as amended): see PARA 942 et seq ante, PARA 949 et seq post. Cf para 947 note 11 ante.

7 Ibid Sch 16, Case I para 2.

8 Accommodation is not deemed to be suitable to the needs of the tenant and his family if the result of their occupation of the accommodation would be that it would be an overcrowded dwelling house for the purposes of the Housing Act 1985 Pt X (ss 324-344) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 444 et seq): Rent Act 1977 Sch 16, Case I para 4 (Sch 16, Case I paras 3-5 amended, and Sch 16, Case I para 7 substituted, by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (13)). For the meaning of 'family' see PARA 947 note 13 ante.

9 For these purposes, 'the local housing authority' has the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Rent Act 1977 Sch 16, Case I para 7 (as substituted: see note 8 supra).

10 For these purposes, a certificate of the local housing authority stating (1) the extent of the accommodation afforded by dwelling houses provided by the authority to meet the needs of tenants with families of such number as may be specified in the certificate; and (2) the amount of the rent charged by the local housing authority for dwelling houses affording accommodation of that extent, is conclusive evidence of the facts so stated: ibid Sch 16, Case I para 3(2) (as amended: see note 8 supra). Any document purporting to be a certificate of the local housing authority issued for these purposes and to be signed by the proper officer of

the authority is receivable in evidence and is deemed to be such a certificate without further proof unless the contrary is shown: Sch 16, Case I para 5 (as so amended).

11 Rent Act 1977 Sch 16, Case I para 3(1) (as amended: see note 8 supra). Cf para 947 note 16 ante.

12 Ibid Sch 16, Case I para 6.

13 Ibid Sch 16, Case I para 3(3).

14 Ibid Sch 16, Case II para 1 (Sch 16, Case II paras 1, 4 amended by the Housing (Consequential Provisions) Act 1985 Sch 2 para 35(1), (13)). If the accommodation offered is available for a limited period only, the local housing authority's offer or notice must contain an assurance that other accommodation the availability of which is not so limited, which appears to the authority to be suitable, and which fulfils the conditions in the Rent Act 1977 Sch 16, Case II para 3 (see the text and notes 16-17 infra) will be offered to the tenant as soon as practicable: Sch 16, Case II para 4 (as so amended).

15 Ibid Sch 16, Case II para 2.

16 Ibid Sch 16, Case II para 3(1), (2). Cf para 947 note 14 ante.

17 Ibid Sch 16, Case II para 3(1), (3).

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### **(iii) Discretionary Grounds for Possession**

#### **949. Case 1: non-payment of rent or breach of obligation.**

The court may make an order for possession<sup>1</sup> without proof of alternative accommodation, if it considers it reasonable<sup>2</sup> to do so, where any rent lawfully due from the tenant<sup>3</sup> has not been paid<sup>4</sup>. The material date is the date when proceedings are commenced, and a tender of the arrears before that date will defeat the claim<sup>5</sup>. A tender of the arrears or payment into court after the proceedings have been commenced does not prevent the court from making an order, as, for example, where there has been a long history of default<sup>6</sup>. The normal order, where there are still arrears at the date of the hearing, is an order for possession suspended so long as the current rent is paid and a further sum paid off the arrears<sup>7</sup>. Rent is lawfully due when the day for payment arrives, even if the landlord has habitually accepted late payment, unless the circumstances give rise to an estoppel or show that the terms have been varied<sup>8</sup>. An order cannot be made on the ground of default by the tenant's predecessor in title<sup>9</sup>. The landlord's failure to supply a proper rent book does not prevent the rent being lawfully due<sup>10</sup>, although failure to furnish the tenant with an address for the landlord to enable notices to be served on the landlord will do so<sup>11</sup>.

An order for possession may also be so made where any obligation of the tenancy<sup>12</sup> has been broken or not performed<sup>13</sup>. The landlord may not rely on this ground if he has waived the breach, but acceptance of rent with knowledge of the breach does not necessarily bar the landlord's claim<sup>14</sup>. If, however, the landlord has to rely on a forfeiture to put an end to the contractual tenancy, acceptance of rent, where the breach is not a continuing one, is dangerous and in any event the tenant or a subtenant may be able to obtain relief<sup>15</sup>.

If he is to escape the consequences of a breach of covenant to repair and decorate, the onus is on the tenant to show that the dilapidation of the premises is within an exception in the tenancy agreement as to fair wear and tear<sup>16</sup>. It seems that the court is not confined to



considering the state of facts at the hearing, but has jurisdiction to make an order for possession if there has been a breach before then<sup>17</sup>.

Cohabitation by an unmarried couple is not a breach of a term that the premises should not be used for immoral purposes<sup>18</sup>. A tenant is not in breach of a term not to permit a nuisance unless he has authorised the nuisance or abstained from taking reasonable steps to prevent the nuisance where it is within his power to prevent it<sup>19</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 1. Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 10; and PARA 1119 post. For the purposes of the statutory provisions for the protection of persons serving in the reserve and auxiliary forces of the Crown which render the leave of the court necessary for the enforcement of a judgment or order for the recovery of possession of land in default of payment of rent (see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(3)-(5), 3, 4(1); and ARMED FORCES vol 2(2) (Reissue) PARA 82 et seq), a judgment or order for the recovery of possession of a dwelling house let on or subject to a protected or statutory tenancy is deemed to be a judgment or order for the recovery of the dwelling house in default of payment of rent if the court in giving or making the judgment or order was exercising the power conferred by the Rent Act 1977 Sch 15 Pt I, Case 1, on the sole ground that rent lawfully due from the tenant had not been paid and was not exercising any other power conferred by that Schedule: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 4(2) (amended by the Rent Act 1977 s 155(2), Sch 23 para 2). There will be no arrears of rent where the tenant has an equitable set-off for damages for breach of the landlord's repairing covenants which exceeds the amount of the rent due: *Televantos v McCulloch* (1990) 23 HLR 412, [1991] 1 EGLR 123, CA.

5 *Bird v Hildage* [1948] 1 KB 91, [1947] 2 All ER 7, CA.

6 *Dellenty v Pellow* [1951] 2 KB 858, [1951] 2 All ER 716, CA; *Lee-Steere v Jennings* (1986) 20 HLR 1, CA.

7 *Dellenty v Pellow* [1951] 2 KB 858, [1951] 2 All ER 716, CA; *Grimshaw v Dunbar* [1953] 1 QB 408, [1953] 1 All ER 350, CA; *Mills v Allen* [1953] 2 QB 341, [1953] 2 All ER 534, CA.

8 *Bird v Hildage* [1948] 1 KB 91, [1947] 2 All ER 7, CA.

9 *Tickner v Clifton* [1929] 1 KB 207.

10 *Shaw v Groom* [1970] 2 QB 504, [1970] 1 All ER 702, CA.

11 See the Landlord and Tenant Act 1987 ss 46-48 (as amended); and PARAS 53, 257 ante.

12 Is any obligation of the protected or statutory tenancy which arises under the Rent Act 1977 or (1) in the case of a protected tenancy, any other obligation of the tenancy, in so far as is consistent with the provisions of Pt VII (ss 98-107) (as amended); or (2) in the case of a statutory tenancy, any other obligation of the previous protected tenancy which is applicable to the statutory tenancy. For the meaning of 'protected tenancy' see PARA 818 ante; and for the meaning of 'statutory tenancy' see PARA 831 ante. Obligations personal to the tenant and unconnected with his user of the premises are not to be considered: *RMR Housing Society Ltd v Coombs* [1951] 1 KB 486, [1951] 1 All ER 16, CA. Implied obligations are sufficient but there is no implied obligation to pay the rent peaceably: *Liffen v France* (1952) 102 L Jo 583, CA. An obligation to yield up possession at the end of the tenancy is inconsistent with the protection afforded by what is now the Rent Act 1977: *Artizans, Labourers and General Dwellings Co Ltd v Whitaker* [1919] 2 KB 301 (decided under the Increase of Rent and Mortgage Interest (War Restrictions) Acts 1915 and 1919 (repealed)). Where a lease creating a protected tenancy for the purposes of the Rent Act 1977 provides for re-entry in the event of the tenant's bankruptcy, and the tenant is made bankrupt after becoming a statutory tenant, that bankruptcy constitutes the breach or non-performance of an obligation of the previous protected tenancy applicable to the statutory tenancy and therefore provides grounds for possession: *Cadogan Estates Ltd v McMahon* [2001] 1 AC 378, [2000] 4 All ER 897, HL.

13 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 1. Cf the Housing Act 1988 Sch 2 Pt II, Ground 12; and PARA 1121 post. A failure by a serviceman or servicewoman performing a period of relevant service to perform duties connected with his employment is not treated as a breach of obligation: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(1) (as amended); and PARA 1081 post. Where a statutory tenancy arises on the termination of a long tenancy under the Landlord and Tenant Act 1954 s 6 (as amended) (see PARA

1215 post), no order may be made during the period of the statutory tenancy for the recovery of possession of the dwelling house from the tenant on any of the grounds specified in the Rent Act 1977 Sch 15 Pt I, Cases 1-3 by reason only of any act or default which occurred before the date of termination of the former tenancy: Landlord and Tenant Act 1954 s 10(2) (amended by the Rent Act 1977 s 68, s 117(2), Sch 15; the Rent Act 1977 s 155(2), Sch 23 para 14).

14 *Oak Property Co Ltd v Chapman* [1947] KB 886, [1947] 2 All ER 1, CA; *Trustees of Henry Smith's Charity v Willson* [1983] QB 316, [1983] 1 All ER 73, CA.

15 See PARAS 622, 627 ante. Where the contractual tenancy has already been determined, there is no need to serve a notice to remedy the breach and there is no question of relief: *Brewer v Jacobs* [1923] 1 KB 528, DC. Where the breach is of an obligation not to assign or sublet, possession can be obtained against the original tenant and the assignee: *Chapman v Hughes* (1923) 39 TLR 260; *Ward v Larkins* (1923) 130 LT 184. See further PARA 954 post.

16 *Brown v Davies* [1958] 1 QB 117, [1957] 3 All ER 401, CA (admitted breach of covenant to cultivate a garden).

17 *Brown v Davies* [1958] 1 QB 117 at 122-123, 128, 132, [1957] 3 All ER 401 at 403, 407, 409, CA.

18 *Heglibiston Establishment v Heyman* (1977) 121 Sol Jo 851, CA. There is no implied covenant against immoral user: *Burfort Financial Investments Ltd v Chotard* [1976] 2 EGLR 53, (1976) 239 Estates Gazette 891.

19 *Commercial General Administration Ltd v Thomsett* (1979) 250 Estates Gazette 547, CA, applying dicta of Atkin LJ in *Berton v Alliance Economic Investment Co* [1922] 1 KB 742 at 759, CA. See also PARA 500 ante.

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### **950. Case 2: nuisance or annoyance or conviction for illegal or immoral user.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where the tenant<sup>3</sup> or any person residing or lodging with him or any subtenant of his has been guilty of conduct which is a nuisance<sup>4</sup> or annoyance<sup>5</sup> to adjoining occupiers<sup>6</sup>. Such an order may be made notwithstanding that the nuisance has been abated by the trial date<sup>7</sup>.

An order for possession may also be so made where the tenant or any person residing or lodging with him or any subtenant of his has been convicted of using the dwelling house or allowing it to be used for immoral or illegal purposes<sup>8</sup>. The premises must have been used for the purpose of committing the crime and not merely have been the scene of it. User of the premises need not, however, be an essential ingredient in the offence or be referred to in the charge<sup>9</sup> nor need there be continuous or repeated user<sup>10</sup>; but the court must look at the circumstances very carefully before an isolated finding on a single occasion is held to constitute proof of user<sup>11</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 It has been held that 'nuisance' means a common law nuisance (see NUISANCE vol 78 (2010) PARA 109 et seq) and does not include a statutory nuisance: see *Timmis v Pearson* [1934] LJNCCR 115.

5 'Annoyance' would cover anything that would disturb the reasonable peace of mind of an ordinary sensible person even though it might not amount to physical detriment to comfort: *Tod-Heatly v Benham* (1888) 40 ChD 80 at 98, CA. It may include annoyance due to prostitution (*Frederick Platts Co Ltd v Grigor* [1950] 1 All ER 941n, CA; *Yates v Morris* [1951] 1 KB 77, [1950] 2 All ER 577, CA); but normally the fact that a man is living on the premises with his cohabitant would not be enough (*Hodson v Jones* [1951] WN 127 at 128, CA). It also includes creation of noise or dust to a degree less than that required to constitute a nuisance: *Chapman v Hughes* (1923) 39 TLR 260 at 261; and see *Cobstone Investments Ltd v Maxim* [1985] QB 140, [1984] 2 All ER 635, CA (use of abusive or obscene language). As to use of the premises for the illegal sale and consumption of drugs see *Bristol City Council v Mousah* (1997) 30 HLR 32, CA.

6 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 2. As to the restriction of the application of Sch 15 Pt I, Case 2 where a statutory tenancy arises on the termination of a long tenancy see PARA 949 note 13 ante. Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 14 (as substituted): see PARA 1123 post. 'Adjoining' in this context means 'neighbouring' rather than 'contiguous': *Cobstone Investments Ltd v Maxim* [1985] QB 140, [1984] 2 All ER 635, CA. Annoyance of the landlord as such is not within this ground unless the landlord is an adjoining occupier: *Liffen v France* (1952) 102 L Jo 583, CA; and see *Whitbread v Ward* (1952) 159 Estates Gazette 494. See also *Taylor v Smith* (1946) 90 Sol Jo 294; cf *Knapp v Swanson* (1945) 89 Sol Jo 20. A tenant's subtenant is not, it seems, an adjoining occupier, and in proceedings by the landlord against the tenant a subtenant's evidence has been held inadmissible: *Chester v Empson* [1949] CLY 3397. The evidence of a subtenant has, however, been admitted in corroboration of that of an adjoining occupier: *Cox v Goldsmith* (1949) 154 Estates Gazette 4.

7 *Florent v Horez* (1983) 48 P & CR 166, 12 HLR 1, CA.

8 Rent Act 1977 Sch 15 Pt I, Case 2.

9 *S Schneiders & Sons Ltd v Abrahams* [1925] 1 KB 301, CA; *Abrahams v Wilson* [1971] 2 QB 88, [1971] 2 All ER 1114, CA.

10 *Hodson v Jones* [1951] WN 127, CA. An isolated offence in the course of a lawful user is not sufficient: *Waller & Son Ltd v Thomas* [1921] 1 KB 541.

11 *Abrahams v Wilson* [1971] 2 QB 88, [1971] 2 All ER 1114, CA.

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### 951. Case 3: neglect of dwelling house.

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where:

1882 (1) the condition of the dwelling house has, in the court's opinion, deteriorated owing to acts of waste by, or the neglect or default of, the tenant<sup>3</sup> or any person residing or lodging with him or any subtenant of his<sup>4</sup>; and

1883 (2) in the case of any act of waste by, or the neglect or default of, a person lodging with the tenant or a subtenant of his, the court is satisfied that the tenant has not, before the making of the order in question, taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant, as the case may be<sup>5</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 3. Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 13: see PARA 1122 post. As to the restriction of the application of the Rent Act 1977 Sch 15 Pt I, Case 3 where a statutory tenancy arises on the termination of a long tenancy see PARA 949 note 13 ante. Where the court is satisfied that one of the grounds in Sch 15 Pt I, Case 3 is established but considers that it is not reasonable to make the order, the defendant may be ordered to pay the costs: *Ottway v Jones* [1955] 2 All ER 585, [1955] 1 WLR 706, CA. Allowing a garden to grow uncontrolled can constitute conduct falling within the Rent Act 1977 Sch 15 Pt I, Case 3: see *Holloway v Povey* (1984) 49 P & CR 196, [1984] 2 EGLR 115, CA.

5 Rent Act 1977 Sch 15 Pt I, Case 3.

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### **952. Case 4: ill-treatment of furniture.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where:

- 1884 (1) the condition of any furniture<sup>3</sup> provided for use under the tenancy has, in the court's opinion, deteriorated owing to ill-treatment by the tenant<sup>4</sup> or any person residing or lodging with him or any subtenant of his; and
- 1885 (2) in the case of any ill-treatment by a person lodging with the tenant or a subtenant of his, the court is satisfied that the tenant has not, before the making of the order in question, taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant, as the case may be<sup>5</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'furniture' see PARA 872 ante.

4 For the meaning of 'tenant' see PARA 816 note 3 ante.

5 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 4. Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 15: see PARA 1125 post.

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### **953. Case 5: notice to quit by the tenant.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where the tenant<sup>3</sup> has given notice to quit and, in consequence of that notice, the landlord<sup>4</sup> has contracted to sell or let<sup>5</sup> the dwelling house or has

taken any other steps as the result of which he would, in the court's opinion, be seriously prejudiced if he could not obtain possession<sup>6</sup>.

It is not sufficient that the tenant should have agreed to give up possession unless his agreement can be construed as a notice to quit<sup>7</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 For the meaning of 'let' see PARA 820 ante.

6 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 5. A notice to quit by the tenant is not sufficient in the absence of evidence that the landlord has contracted to sell or let or has taken other steps: *Barton v Fincham* [1921] 2 KB 291, CA.

7 *De Vries v Sparks* (1927) 137 LT 441, DC; *Gilbert v Jordan* [1920] WN 309. Merely going out of possession is not sufficient: *Standingford v Bruce* [1926] 1 KB 466. As to termination of a joint tenancy by notice to quit see eg *Harrow London Borough Council v Johnstone* [1997] 1 All ER 929, [1997] 1 WLR 459, HL. The landlord may obtain possession against a subtenant under the Rent Act 1977 Sch 15 Pt I, Case 5 notwithstanding the statutory provisions for the protection of subtenants (see PARA 975 post), if the tenant has given notice to quit (*Lord Hylton v Heal* [1921] 2 KB 438, DC), but the order must be reasonable as against the subtenant (*Enniskillen UDC v Bartley and Lynch* [1947] NI 177, NI CA; *Leith Properties Ltd v Byrne* [1983] QB 433 at 443; sub nom *Leith Properties Ltd v Springer* [1982] 3 All ER 731 at 737, CA). See further PARA 975 post.

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#### **954. Case 6: assignment or subletting of whole premises.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where the tenant<sup>3</sup> has, without the landlord's<sup>4</sup> consent, at any time after:

- 1886 (1) 22 March 1973 in the case of a tenancy which became a regulated tenancy<sup>5</sup> by virtue of the Counter-Inflation Act 1973<sup>6</sup>;
- 1887 (2) 14 August 1974 in the case of a regulated furnished tenancy<sup>7</sup>; or
- 1888 (3) 8 December 1965 in the case of any other tenancy<sup>8</sup>,

assigned or sublet the whole of the dwelling house or sublet part of the dwelling house, the remainder being already sublet<sup>9</sup>.

This Case is not confined to instances where the assignment or subletting is in breach of covenant<sup>10</sup>. It applies where there has been an assignment of a contractual tenancy<sup>11</sup>, for a statutory tenant has nothing to assign<sup>12</sup>. The consent may be express or implied and it may be given after the assignment but before proceedings<sup>13</sup>; but it is not implied simply from the fact that there is no prohibition in the lease<sup>14</sup>. An order may be made notwithstanding that the subletting of the whole had ceased before the issue of proceedings<sup>15</sup>.

- 1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.
- 2 As to the test of reasonableness see PARA 945 ante.
- 3 For the meaning of 'tenant' see PARA 816 note 3 ante.
- 4 For the meaning of 'landlord' see PARA 816 note 2 ante.
- 5 For the meaning of 'regulated tenancy' see PARA 854 ante.
- 6 In the Counter-Inflation Act 1973 s 14 (repealed): see PARA 855 ante.
- 7 For the meaning of 'regulated furnished tenancy' see PARA 849 note 12 ante.
- 8 In the case, however, of a tenancy which became a regulated tenancy by virtue of the Housing Act 1980 s 73 (as amended) (Crown Estate: see PARA 883 ante), the operative date is 28 November 1980: Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 6 para (bb) (added by the Housing Act 1980 s 73(5), Sch 8 para 2).
- 9 Rent Act 1977 Sch 15 Pt I, Case 6 (amended by the Housing Act 1980 s 152(3), Sch 26). The order is effective against an assignee or subtenant, but lawful subtenants are protected in the sense that it is necessary to show that it is reasonable to make the order against them: *Leith Properties Ltd v Byrne* [1983] QB 433, sub nom *Leith Properties Ltd v Springer* [1983] 3 All ER 731, CA. See PARA 975 post. See also *Chogley v Bains* [1955] 3 All ER 148 at 153, [1955] 1 WLR 877, PC. For a discussion of whether it is possible for a statutory tenant to sublet the whole of the dwelling house see *Trustees of Henry Smith's Charity v Willson* [1983] QB 316, [1983] 1 All ER 73, CA.
- 10 *Leith Properties Ltd v Byrne* [1983] QB 433, sub nom *Leith Properties Ltd v Springer* [1983] 3 All ER 731, CA. If there is a breach of covenant, this would be a ground for possession under the Rent Act 1977 Sch 15 Pt I, Case 1: see PARA 949 ante.
- 11 *Regional Property Co Ltd v Frankenschwerth and Chapman* [1951] 1 KB 631, [1951] 1 All ER 178, CA.
- 12 *Skinner v Geary* [1931] 2 KB 546, CA. See PARA 832 ante.
- 13 *Hyde v Pimley* [1952] 2 QB 506, [1952] 2 All ER 102, CA; *Dalrymple's Trustees v Brown* 1945 SC 190, Ct of Sess; *Pazgate Ltd v McGrath* [1984] 2 EGLR 130, (1984) 272 Estates Gazette 1069 (no consent implied).
- 14 *Regional Properties Co Ltd v Frankenschwerth and Chapman* [1951] 1 KB 631, [1951] 1 All ER 179, CA. It may, however, be difficult to show that it is reasonable to make the order unless the assignment took place near the end of the lease.
- 15 *Finkle v Strzelczyk* [1961] 3 All ER 409, [1961] 1 WLR 1201, CA.

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### **955. Case 8: letting in consequence of employment.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation if the court considers it reasonable<sup>2</sup> to do so and the landlord<sup>3</sup> can prove that:

- 1889 (1) the tenant<sup>4</sup> was in the employment of the landlord or a former landlord and the dwelling house was let<sup>5</sup> to him in consequence of that employment<sup>6</sup>;
- 1890 (2) he has ceased to be in that employment; and

1891 (3) the dwelling house is reasonably required<sup>7</sup> by the landlord for occupation as a residence for some person<sup>8</sup> engaged<sup>9</sup> in his<sup>10</sup> whole-time employment or in the whole-time employment of some tenant from him or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into<sup>11</sup>.

The court may order the landlord to pay compensation if it later appears that he has obtained possession under this Case by misrepresentation<sup>12</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 For these purposes, 'tenant' means the original tenant: *Bolsover Colliery Co Ltd v Abbott* [1946] KB 8, CA.

5 For the meaning of 'let' see PARA 820 ante.

6 The question is what was in the mind of the landlord; knowledge on the part of the tenant is irrelevant: *Braithwaite & Co Ltd v Elliot* [1947] KB 177, [1946] 2 All ER 537, CA (overruling *Frederick Braby & Co Ltd v Bedwell* [1926] 1 KB 456, DC, and disapproving a dictum of Lush J in *Queen's Club Garden Estates Ltd v Bignell* [1924] 1 KB 117 at 132); *Royal Crown Derby Porcelain Co Ltd v Russell* [1949] 2 KB 417, [1949] 1 All ER 749, CA; *Harvard v Shears* (1967) 111 Sol Jo 683, CA. It need not be shown that the nature of the employment made the letting necessary or that the employment has not changed in character: *Munro v Daw* [1948] 1 KB 125, [1947] 3 All ER 360, CA; *Duncan v Hay* [1956] 3 All ER 555, [1956] 1 WLR 1329, CA. The crucial date is the termination of the contractual tenancy: *Read v Gordon* [1941] 1 KB 495, [1941] 1 All ER 222, CA, disapproving an observation of Bray J in *Lever Bros Ltd v Caton* (1921) 37 TLR 664 at 665, DC. If the employment ceased before that day and a new tenancy was granted, the ground will not apply (*Murton v Aldis* (1929) 141 LT 168), but a new tenancy will not readily be inferred from the fact of remaining for a time in possession after the employment has ceased (*Benninga (Mitcham) Ltd v Bijstra* [1946] KB 58, [1945] 2 All ER 433, CA; *Thompsons (Funeral Furnishers) Ltd v Phillips* [1945] 2 All ER 49, CA; *Lever Bros Ltd v Caton* (1921) 37 TLR 664 at 665, DC, per Lush J).

7 The material date for this purpose is the date of hearing: *Benninga (Mitcham) Ltd v Bijstra* [1946] KB 58, [1945] 2 All ER 433, CA.

8 A landlord is not bound to nominate a particular whole-time employee if he has a list of whole-time employees whom he desires to occupy a house: *Oban Transport and Trading Co Ltd v Devine* 1953 SLT (Sh Ct) 40.

9 'Engaged' means, subject to the provision for conditional contracts, actually in employment and not engaged to work at a future date: *Benninga (Mitcham) Ltd v Bijstra* [1946] KB 58, [1945] 2 All ER 433, CA. Absence owing to illness does not, however, prevent the employee from being engaged: *RF Fuggle Ltd v Gadsden* [1948] 2 KB 236, [1948] 2 All ER 160, CA.

10 It has been held in Scotland to be insufficient that the landlord should be the joint employer of the person for whose occupation the dwelling house is required: *Grinyard v Duncan* (1949) 99 L Jo 133; sed quaere.

11 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 8. Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 16 (as amended): see PARA 1126 post. In certain cases the Rent Act 1977 Sch 15 Pt I, Case 8 does not apply on an application for possession of premises made during a serviceman's or servicewoman's period of residence protection: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(2) (as amended); and PARA 1081 post. As to the provisions which apply in such cases see s 20(3) (as amended); and PARA 1081 post.

12 See PARA 959 post.

PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(6) SECURITY OF TENURE; RECOVERY OF POSSESSION/(iii) Discretionary Grounds for Possession/956. Case 9: premises required for landlord or certain relatives.

### **956. Case 9: premises required for landlord or certain relatives.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable<sup>2</sup> to do so, where the dwelling house is reasonably required<sup>3</sup> by the landlord<sup>4</sup> for occupation as a residence for himself<sup>5</sup>, or for any son or daughter of his over 18 years of age<sup>6</sup>, or for his father or mother or, if the dwelling house is let<sup>7</sup> on or subject to a regulated tenancy<sup>8</sup>, the father or mother of his spouse or civil partner<sup>9</sup>. A landlord may seek possession although the need for accommodation is not presently established provided that need is in the ascertainable and not too distant future<sup>10</sup>; and the relevant date for considering whether the dwelling house is reasonably required by the landlord is the date of the hearing<sup>11</sup>.

This power is, however, subject to two limitations:

- 1892 (1) the landlord must not have become landlord by purchasing the dwelling house or any interest therein after 7 November 1956 in the case of a tenancy which was then a controlled tenancy<sup>12</sup>, 8 March 1973 in the case of a tenancy which became a regulated tenancy by virtue of the Counter-Inflation Act 1973<sup>13</sup>, 24 May 1974 in the case of a regulated furnished tenancy<sup>14</sup>, or 28 March 1965 in the case of any other tenancy<sup>15</sup>; and
- 1893 (2) the court may not make an order if satisfied by the tenant that having regard to all the circumstances, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order than by refusing to grant it<sup>16</sup>.

The court may order the landlord to pay compensation if it later appears that he has obtained possession under this Case by misrepresentation<sup>17</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante. An order should not be made merely on the admission of the tenant: *Smith v McGoldrick* [1977] 1 EGLR 53, (1976) 242 Estates Gazette 1047, CA. Cf para 942 the text and note 14 ante.

3 A landlord who wants possession in order to live in the house only until he can sell it may not rely on this ground: *Rowe v Truelove* [1977] 1 EGLR 46, (1976) 241 Estates Gazette 533, CA.

4 For the meaning of 'landlord' see PARA 816 note 2 ante. 'Landlord' includes beneficial joint owners having the legal estate but they must require the premises for occupation by both of them: *Baker v Lewis* [1947] KB 186, [1946] 2 All ER 592, CA; *McIntyre v Hardcastle* [1948] 2 KB 82, [1948] 1 All ER 696, CA; cf *Wetherall & Co Ltd v Stone* [1950] 2 All ER 1209, CA. A landlord who was a trustee for himself and his daughter as tenants in equity in equal shares and obliged to transfer the house into their joint names succeeded under this ground where he claimed that the house was reasonably required for the daughter, notwithstanding that, if the transfer had been executed, the landlord would not have been entitled to possession by reason of *McIntyre v Hardcastle* supra: *Bostock v Tacher de la Pagerie* (1987) 14 HLR 358, [1987] 1 EGLR 104, CA. Beneficiaries under a trust, not having the legal estate, cannot take advantage of this provision: *Parker v Rosenberg* [1947] KB 371, [1947] 1 All ER 87, CA. A tenant for life can, however, do so, as can executors beneficially interested if they all require to occupy the premises (*Sharpe v Nicholls* [1945] KB 382, [1945] 2 All ER 55, CA); and personal representatives with no beneficial interest in the house may also do so (*Patel v Patel* [1982] 1 All ER 68, [1981] 1 WLR 1342, CA).

5 This provision is satisfied if the landlord requires the premises for his family even if for business reasons he is compelled to live away from the premises (*Smith v Penny* [1947] KB 230, [1946] 2 All ER 672, CA) but not if he requires them for a stranger who will not live as one household with him (*Richter v Wilson* [1963] 2 QB 426,



[1963] 2 All ER 335, CA; *Lowdell v Nash* [1958] EGD 77, CA). The landlord need not in all cases intend to occupy the whole of the premises: *Kelley v Goodwin* [1947] 1 All ER 810, CA.

6 A husband and wife who are joint landlords may claim possession on the ground that the dwelling house is required as a residence for a child who is the natural son of the wife but neither the natural nor the adopted son of the husband: *Potsos v Theodotou* (1991) 23 HLR 356, [1991] 2 EGLR 93, CA.

7 For the meaning of 'let' see PARA 820 ante.

8 For the meaning of 'regulated tenancy' see PARA 854 ante.

9 Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 9 (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 14). This provision cannot be extended to other relatives: *Stovin v Fairbrass* (1919) 88 LJB 1004, CA. The provision is relevant only when the landlord is not offering suitable alternative accommodation: *Briddon v George* [1946] 1 All ER 609, CA.

10 *Kidder v Birch* (1982) 46 P & CR 362, 5 HLR 28, CA.

11 *Alexander v Mohamadzadeh* (1985) 51 P & CR 41, 18 HLR 90, CA.

12 For the meaning of 'controlled tenancy' see PARA 849 ante. The Rent Act 1977 Sch 15 Pt I, Case 9 (now as amended) has effect in relation to any tenancy which was a controlled tenancy on 7 November 1956 notwithstanding that it ceased to be a controlled tenancy before 28 November 1980: Housing Act 1980 s 152(1), Sch 25 para 57.

13 Ie by virtue of the Counter-Inflation Act 1973 s 14 (repealed): see PARA 855 ante.

14 For the meaning of 'regulated furnished tenancy' see PARA 849 note 12 ante.

15 Rent Act 1977 Sch 15 Pt I, Case 9 (amended for this purposes by the Housing Act 1980 Sch 25 para 57). As to the relevant date for this purpose and for the meaning of 'purchase' see PARA 957 post.

16 Rent Act 1977 s 98(3), Sch 15 Pt III para 1. As to the question of greater hardship see PARA 958 post.

17 See PARA 959 post.

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### **957. Meaning of 'landlord by purchase' for the purposes of Case 9.**

For the purpose of the limitation by reference to the date of purchase where premises are required as a residence for the landlord or certain relatives of his<sup>1</sup>, the relevant date is the date of purchase, not the date when the landlord became landlord. 'Purchase', for these purposes, means the date of a binding contract to purchase rather than the date of completion<sup>2</sup>, and is used in its ordinary meaning and not in the technical conveyancing sense<sup>3</sup>. Thus a person taking a grant of a lease without paying any premium subject to the tenancy does not become landlord by purchase<sup>4</sup>, nor does a person who acquires a house under a will even though compensating payments may be made to fellow residuary legatees<sup>5</sup>. A landlord who buys the freehold and subsequently obtains possession from the tenant does not become landlord by purchase of the subtenant<sup>6</sup>. The court will have regard to the substance and reality of the transaction or transactions by which the property was acquired<sup>7</sup>. The object of the limitation is to disqualify those who purchase the premises over the head of the tenant and it does not apply where after purchasing the premises a new tenancy is granted<sup>8</sup>.

1 le the limitation set out in the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 9 (as amended): see PARA 956 ante.

2 *Emberson v Robinson* [1953] 2 All ER 755, [1953] 1 WLR 1129, CA. This is especially the case where the reversion is conveyed to trustees for a purchaser who is a minor before the relevant date and later vested in him: *Pratt v Simpson* (1962) 185 Estates Gazette 297, CA.

3 *Baker v Lewis* [1947] KB 186, [1946] 2 All ER 592, CA; *Thomas v Fryer* [1970] 2 All ER 1, [1970] 1 WLR 845, CA.

4 *Powell v Cleland* [1948] 1 KB 262, [1947] 2 All ER 672, CA. A person who derives title from a landlord who has become landlord by purchase is, however, in no better position than the original landlord: *Lucas v Lineham* [1950] 1 KB 548, [1950] 1 All ER 586, CA; *Littlechild v Holt* [1950] 1 KB 1, [1949] 1 All ER 933, CA.

5 *Thomas v Fryer* [1970] 2 All ER 1, [1970] 1 WLR 845, CA.

6 *Cairns v Piper* [1954] 2 QB 210, [1954] 2 All ER 611, CA; and see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA (gratuitous surrender of mesne tenancy).

7 *Evans v Engelson* [1980] 1 EGLR 62, (1979) 253 Estates Gazette 577, CA (acquisition by the plaintiff's wholly-owned company held to amount to a purchase by the plaintiff). 'Plaintiffs' are now generally known as 'claimants': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

8 *Epps v Rothnie* [1945] KB 562, [1946] 1 All ER 146, CA; *Fowle v Bell* [1947] KB 242, [1946] 2 All ER 668, CA; *Newton v Biggs* [1953] 2 QB 211, [1953] 1 All ER 99, CA (tenancy granted by purchaser to vendor under terms of agreement for sale). The limitation does, however, apply where the new tenancy is granted by way of alternative accommodation: *Wright v Walford* [1955] 1 QB 363, [1955] 1 All ER 207, CA. A tenant who purchases the freehold does not become landlord by purchase of his subtenant: *Turney v Hammond* (1952) 102 L Jo 721. An employee who is enabled by a gift from his former employer's estate to purchase a property occupied by a statutory tenant is a landlord by purchase (*Amaddio v Dalton* (1991) 23 HLR 332, CA); but the donee of a flat who covenants with the donor that the donee will keep up the mortgage instalments on the flats is not a landlord by purchase (*Mansukhani v Sharkey* (1992) 24 HLR 600, [1992] 2 EGLR 105, CA).

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## 958. Meaning of 'greater hardship' for the purposes of Case 9.

The question of greater hardship<sup>1</sup> is pre-eminently one for the judge, whose decision will be upset only if there was no evidence upon which he could properly have based his conclusion<sup>2</sup>. The burden of proof is on the tenant<sup>3</sup>. The whole of the circumstances are to be considered<sup>4</sup>, the existence of alternative accommodation on both sides being an important but not decisive factor<sup>5</sup>, but having to move does not of itself constitute hardship<sup>6</sup>. Changes in circumstances after the date of hearing may form the basis of a fresh application to the court<sup>7</sup>.

1 le for the purposes of the Rent Act 1977 s 98(3), Sch 15, Pt III para 1: see PARA 956 ante at head (2) in the text.

2 *Sims v Wilson* [1946] 2 All ER 261, CA; *Kelley v Goodwin* [1947] 1 All ER 810, CA; *Coplands v King* [1947] 2 All ER 393, CA; *Hodges v Blee* (1987) 20 HLR 32, [1987] 2 EGLR 119, CA; *Ghelani v Bowie* [1988] 2 EGLR 130, CA; but cf *Manaton v Edwards* (1985) 18 HLR 116, [1985] 2 EGLR 159, CA; *Baker v MacIver* (1990) 22 HLR 328, [1990] 2 EGLR 104, CA. It seems that the Court of Appeal is bound to consider changes of circumstances between the date of hearing and appeal, if the judge refused an order (*King v Taylor* [1955] 1 QB 150, [1954] 3 All ER 373, CA); but, if an order was made, its only function is to see whether that order was rightly made (*Goldthorpe v Bain* [1952] 2 QB 455, [1952] 2 All ER 23, CA).

3 *Sims v Wilson* [1946] 2 All ER 261, CA; *Manaton v Edwards* (1985) 18 HLR 116, [1985] 2 EGLR 169, CA.

4 Eg financial circumstances (*Kelley v Goodwin* [1947] 1 All ER 810, CA); the position of relatives and dependants of the parties with due regard to their proximity to landlord or tenant (*Harte v Frampton* [1948] 1 KB 73, [1947] 2 All ER 604, CA; *Rhodes v Cornford* [1947] 2 All ER 601, CA); the position of other tenants of the same landlord to whom eviction might cause lesser hardship than the one against whom the order is sought (*Hardie v Frediani* [1958] 1 All ER 529, [1958] 1 WLR 318, CA); the mental health of the landlord (*Thomas v Fryer* [1970] 2 All ER 1, [1970] 1 WLR 845, CA); the availability of alternative accommodation and the nature of that accommodation (*Baker v MacIver* (1990) 22 HLR 328, [1990] 2 EGLR 104, CA). The hardship must be judged with regard to the order which is made, eg the time given to the tenant: *Wheeler v Evans* [1948] 1 KB 459, [1947] 2 All ER 740, CA; *Bumstead v Wood* (1946) 175 LT 149, CA; *Kidder v Birch* (1982) 46 P & CR 362, 5 HLR 28, CA. The consideration of hardship largely overlaps with the consideration whether it is reasonable to make the order: *Rhodes v Cornford* supra.

5 *Sims v Wilson* [1946] 2 All ER 261 at 265, CA; and see *Neville v Hardy* [1921] 1 Ch 404. The other accommodation enjoyed by the tenant need not be rent controlled: *Sims v Wilson* supra at 265.

6 *Segal v Morgan* (1966) 200 Estates Gazette 407, CA.

7 *Burman v Woods* [1948] 1 KB 111, CA. As to applications to the court see generally para 980 et seq post.

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### **959. Compensation where possession under Cases 8 or 9 obtained by misrepresentation.**

Where a landlord<sup>1</sup> obtains an order for possession on the ground that the dwelling house is reasonably required for an employee<sup>2</sup>, or for himself or his family<sup>3</sup>, and it is subsequently made to appear to the court that the order was obtained by misrepresentation or concealment of material facts, the court may order the landlord to pay to the former tenant such sum as appears sufficient as compensation for damage or loss sustained by that tenant as a result of the order<sup>4</sup>. The quantum of compensation is to be assessed in accordance with normal tortious principles<sup>5</sup>.

1 For the meaning of 'landlord' see PARA 816 note 2 ante.

2 Ie under the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 8: see PARA 955 ante.

3 Ie under ibid Sch 15 Pt I, Case 9 (as amended): see PARA 956 ante.

4 Ibid s 102; cf the Housing Act 1988 s 12; and PARA 1105 post. An order for compensation may be made if the order for possession was obtained by misrepresentation on the part of the landlord, even though the tenant, in the belief that the landlord's representations were true, consented to the order for possession being made: *Thorne v Smith* [1947] KB 307, [1947] 1 All ER 39, CA (landlord represented that he required the premises for his own occupation, but immediately after obtaining possession sold the premises with vacant possession).

5 See *Clements v Simmonds* [2002] EWHC 1652 (QB), [2002] All ER (D) 98 (Apr).

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**960. Case 10: overcharging on subletting.**

An order for possession<sup>1</sup> may be made without proof of alternative accommodation, if the court considers it reasonable to do so<sup>2</sup>, where the court is satisfied that the rent charged by the tenant<sup>3</sup>:

1894 (1) for any sublet<sup>4</sup> part of the dwelling house let<sup>5</sup> on a protected tenancy<sup>6</sup> or subject to a statutory tenancy<sup>7</sup> is or was in excess of the maximum rent for the time being recoverable<sup>8</sup> for that part<sup>9</sup>; or

1895 (2) for any sublet<sup>10</sup> part of the dwelling house subject to a restricted contract<sup>11</sup> is or was in excess of the maximum<sup>12</sup>, if any, which it is lawful for the lessor<sup>13</sup> to require or receive<sup>14</sup>.

1 As to the general principles governing the making of an order for possession of a dwelling house let on a protected tenancy or subject to a statutory tenancy see PARA 942 ante.

2 As to the test of reasonableness see PARA 945 ante.

3 For the meaning of 'tenant' see PARA 816 note 2 ante.

4 This Case does not apply where there is a sub-licensee: *Kenyon v Walker* [1946] 2 All ER 595, CA (no subletting where tenant and alleged subtenant shared kitchen).

5 For the meaning of 'let' see PARA 820 ante.

6 For the meaning of 'protected tenancy' see PARA 818 ante.

7 For the meaning of 'statutory tenancy' see PARA 831 ante.

8 Ie under the Rent Act 1977 Pt III (ss 44-61) (as amended) (regulated tenancies): see PARA 891 et seq ante.

9 Ibid s 98(1)(b), Sch 15 Pt I, Case 10(a) (amended by the Housing Act 1980 s 152(3), Sch 26).

10 See note 4 supra.

11 For the meaning of 'restricted contract' see PARA 986 post.

12 Ie under the Rent Act 1977 Pt V (ss 77-85) (as amended): see PARA 989 et seq post.

13 Ie within the meaning of ibid Pt V (as amended): see PARA 987 note 8 post.

14 Ibid Sch 15 Pt I, Case 10(b). See eg *Boulton v Sutherland* [1938] 1 All ER 488, CA, and also as reported in (1938) 54 TLR 388, where the reports conflict on whether an order was made for possession of the whole premises or the part sublet only.

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**(iv) Mandatory Grounds for Possession****A. IN GENERAL****961. Meaning of 'the relevant date'.**

The expression 'the relevant date' occurs often in the mandatory grounds<sup>1</sup> for possession. In the case of a regulated furnished tenancy<sup>2</sup> created<sup>3</sup> before 14 August 1974<sup>4</sup>, 'the relevant date' means 13 February 1975<sup>5</sup>; in the case of a tenancy created before 22 March 1973<sup>6</sup> which became a regulated tenancy<sup>7</sup> by virtue of the Counter-Inflation Act 1973<sup>8</sup>, it means 22 September 1973<sup>9</sup>; in the case of any other tenancy created before 8 December 1965<sup>10</sup>, it means 7 June 1966<sup>11</sup>; and in any other case it means the date of commencement of the regulated tenancy in question<sup>12</sup>.

1    Ie the Rent Act 1977 s 98(2), Sch 15 Pt II, Cases 11-20 (as amended): see PARA 963 et seq post.

2    For the meaning of 'regulated furnished tenancy' see PARA 849 note 12 ante.

3    All the references in this paragraph to the date of creation of a tenancy are references to the date of creation of the contractual tenancy: see the Rent Act 1977 s 98(3), Sch 15 Pt III para 2(a)-(d).

4    Ie the date of commencement of the Rent Act 1974 (repealed).

5    Rent Act 1977 Sch 15 Pt III para 2(c). The various dates given as 'the relevant date' are all six months later than the commencement dates of the Acts referred to in note 4 supra and notes 6, 10 infra, the policy in each case being to give the landlords of existing tenants (but not, it seems, of new tenants) six months in which to assimilate the new legislation and serve any appropriate notices.

6    Ie the date of commencement of the Counter-Inflation Act 1973 (repealed).

7    For the meaning of 'regulated tenancy' see PARA 854 ante.

8    Ie by virtue of the Counter-Inflation Act 1973 s 14 (repealed): see PARA 855 ante.

9    Rent Act 1977 Sch 15 Pt III para 2(b). See note 5 supra.

10   Ie the date of commencement of the Rent Act 1965 (repealed).

11   Rent Act 1977 Sch 15 Pt III para 2(a). See note 5 supra.

12   Ibid Sch 15 Pt III para 2(d). However, in the case of a tenancy which becomes a regulated tenancy by virtue of the Housing Act 1980 s 73 (as amended) (Crown Estate: see PARA 883 ante), the relevant date for the purposes of the Rent Act 1977 Sch 15 Pt II (Cases 11-20) (as amended) is (notwithstanding Sch 15 Pt III para 2) 8 February 1981: Housing Act 1980 s 73(5), Sch 8 para 3.

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## **962. Conditions applicable in certain cases.**

Certain conditions<sup>1</sup> are applied, in so far as relevant, to those mandatory grounds for possession<sup>2</sup> which relate to residences for owner-occupiers<sup>3</sup>, residences for persons retiring from employment<sup>4</sup> and houses let<sup>5</sup> by members of the armed forces<sup>6</sup>. Those conditions are that:

1896 (1) the dwelling house is required as a residence for the owner<sup>7</sup> or any member of his family who resided with the owner when he last occupied the dwelling house as a residence<sup>8</sup>;

1897 (2) the owner has retired from regular employment and requires the dwelling house as a residence<sup>9</sup>;

- 1898 (3) the owner has died and the dwelling house is required as a residence for a member of his family who was residing with him at the time of his death<sup>10</sup>;
- 1899 (4) the owner has died and the dwelling house is required by a successor in title<sup>11</sup> as his residence or for the purpose of disposing of it with vacant possession<sup>12</sup>;
- 1900 (5) the dwelling house is subject to a mortgage<sup>13</sup>, made by deed and granted before the tenancy, and the mortgagee is entitled to exercise a power of sale<sup>14</sup> and requires the dwelling house for the purpose of disposing of it with vacant possession in exercise of that power<sup>15</sup>; and
- 1901 (6) the dwelling house is not reasonably suitable to the needs of the owner, having regard to his place of work, and he requires it for the purpose of disposing of it with vacant possession and of using the proceeds of that disposal in acquiring, as his residence, a dwelling house which is more suitable to those needs<sup>16</sup>.

1    le the conditions set out in the Rent Act 1977 s 98(5), Sch 15 Pt V (added by the Housing Act 1980 s 66(3), Sch 7): see heads (1)-(6) in the text. Subject to the Housing Act 1980 s 66(6) (see notes 10, 12 *infra*), the Rent Act 1977 Sch 15 Pt II, Cases 11, 12 (as amended by the Housing Act 1980 s 66) apply to all tenancies whenever granted, and notices given under the Rent Act 1977 Sch 15 Pt II, Case 11 or Case 12 (as so amended) before 28 November 1980 are not invalidated: Housing Act 1980 s 66(5).

2    As to the circumstances in which the mandatory grounds for possession apply see PARA 942 *ante*.

3    le the Rent Act 1977 Sch 15 Pt II, Case 11 (as amended): see PARA 963 *post*.

4    le *ibid* Sch 15 Pt II, Case 12 (as amended): see PARA 964 *post*.

5    For the meaning of 'let' see PARA 820 *ante*.

6    le the Rent Act 1977 Sch 15 Pt II, Case 20 (as added): see PARA 971 *post*.

7    For these purposes, 'owner' means, in relation to *ibid* Sch 15 Pt II, Case 11 (as amended), the owner-occupier: Sch 15 Pt V para 1 (as added: see note 1 *supra*).

8    *Ibid* Sch 15 Pt V para 2(a) (as added: see note 1 *supra*). This condition applies only to Sch 15 Pt II, Case 11 (as amended): see PARA 963 *post*. Where there are joint owners, it is sufficient if only one requires the house as a residence: *Tilling v Whiteman* [1980] AC 1, [1979] 1 All ER 737, HL. A landlord need only prove a genuine desire and intention to use the house as his residence and not that his intention is reasonable: *Kennealy v Dunne* [1977] QB 837, [1977] 2 All ER 16, CA.

9    Rent Act 1977 Sch 15 Pt V para 2(b) (as added: see note 1 *supra*). This condition applies only to Sch 15 Pt II, Case 12 (as amended): see PARA 964 *post*.

10    *Ibid* Sch 15 Pt V para 2(c) (as added: see note 1 *supra*). This condition does not apply to Sch 15 Pt II, Case 11 (as amended) if the tenancy was granted, and the owner died, before 28 November 1980: Housing Act 1980 s 66(6).

11    For these purposes, 'successor in title' means any person deriving title from the owner, other than a purchaser for value or a person deriving title from a purchaser for value: Rent Act 1977 Sch 15 Pt V para 1 (as added: see note 1 *supra*).

12    *Ibid* Sch 15 Pt V para 2(d) (as added: see note 1 *supra*). This condition does not apply to Sch 15 Pt II, Cases 11 or 12 (as amended) if the tenancy was granted, and the owner died, before 28 November 1980: Housing Act 1980 s 66(6).

13    For these purposes, 'mortgage' includes a charge; and 'mortgagee' is to be construed accordingly: Rent Act 1977 Sch 15 Pt V para 1 (as added: see note 1 *supra*).

14    le a power of sale conferred on the mortgagee by the terms of the mortgage or by the Law of Property Act 1925 s 101 (as amended): see MORTGAGE vol 77 (2010) PARA 443 *et seq*.

15    Rent Act 1977 Sch 15 Pt V para 2(e) (as added: see note 1 *supra*).

16    *Ibid* Sch 15 Pt V para 2(f) (as added: see note 1 *supra*). This condition does not apply to Sch 15 Pt II, Case 12 (as amended): see PARA 964 *post*. There must be a connection between the acquisition of a dwelling house by the landlord as a residence, which could include the building of such a house, and the use of the proceeds of

sale of the existing house for that purpose, which latter must be within a reasonable time of the former:  
*Bissessar v Ghosn* (1986) 18 HLR 486, CA.

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## **B. CASES IN WHICH ORDERS FOR POSSESSION MUST BE MADE**

### **963. Case 11: house required as residence for owner-occupier.**

Where a person ('the owner-occupier') who let<sup>1</sup> the dwelling house on a regulated tenancy<sup>2</sup> had, at any time before the letting, occupied it as his residence<sup>3</sup> and:

- 1902 (1) not later than the relevant date<sup>4</sup> the landlord<sup>5</sup> gave notice in writing to the tenant<sup>6</sup> that possession might be recovered under this Case<sup>7</sup>; and
- 1903 (2) the house has not since the prescribed date<sup>8</sup> been let by the owner-occupier on a protected tenancy<sup>9</sup> with respect to which the condition mentioned in head (1) above was not satisfied<sup>10</sup>; and
- 1904 (3) the court is of the opinion that one of certain conditions<sup>11</sup> is satisfied<sup>12</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>13</sup>, the landlord would be entitled to recover possession<sup>14</sup>.

If, however, the court is of the opinion that it would be just and equitable to make an order for possession notwithstanding that the condition in head (1) or head (2) above has not been complied with, the court may dispense with the requirements of either or both of those conditions, as the case may require<sup>15</sup>. In deciding whether to dispense with a requirement the court should look at all the circumstances of the case, including the circumstances affecting the landlord or his successors in title, the circumstances of the tenant and the circumstances in which the failure to give written notice arose<sup>16</sup>.

1 For the meaning of 'let' see PARA 820 ante.

2 For the meaning of 'regulated tenancy' see PARA 854 ante.

3 Rent Act 1977 s 98(2), Sch 15 Pt II, Case 11 (amended by the Rent (Amendment) Act 1985 s 1(1), (2)). The amendment, which applies to tenancies granted and notices given before as well as after 23 May 1985 (s 1(4)) and to actions pending at that date (*Hewitt v Lewis* [1986] 1 All ER 927, [1986] 1 WLR 444, CA) reverses the decision in *Pocock v Steel* [1985] 1 All ER 434, [1985] 1 WLR 229, CA, that the occupation and the letting must have taken place at substantially the same point in time. The quality of residence required of an owner-occupier before letting the premises is not the same as that required of a tenant for the purposes of the Rent Act 1977 s 2(1)(a) (see PARA 831 ante); occupation which is intermittent and temporary may suffice (*Naish v Curzon* (1984) 51 P & CR 229, [1985] 1 EGLR 117, CA; *Mistry v Isidore* (1990) 22 HLR 281, [1990] 2 EGLR 97, CA).

4 For the meaning of 'the relevant date' see PARA 961 ante.

5 For the meaning of 'landlord' see PARA 816 note 2 ante.

6 For the meaning of 'tenant' see PARA 816 note 3 ante.

7 Rent Act 1977 Sch 15 Pt II, Case 11(a). The giving of a notice before 14 August 1974 under the Rent Act 1968 s 79 (repealed) is to be treated, in the case of a regulated furnished tenancy (see PARA 849 note 12 ante), as compliance with the Rent Act 1977 Sch 15 Pt II, Case 11(a): Sch 15 Pt II, Case 11.

8 In the case of a tenancy which became regulated by virtue of the Counter-Inflation Act 1973 s 14 (repealed) (see PARA 855 ante), 22 March 1973; in the case of a regulated furnished tenancy, 14 August 1974; and in the case of any other tenancy, 8 December 1965: Rent Act 1977 Sch 15 Pt II, Case 11(b)(i)-(iii).

9 For the meaning of 'protected tenancy' see PARA 818 ante.

10 Rent Act 1977 Sch 15 Pt II, Case 11(b). Where the dwelling house has been let by the owner-occupier on a protected tenancy ('the earlier tenancy') granted on or after 16 November 1984 but not later than the end of the period of two months beginning with 23 May 1985 and either (1) the earlier tenancy was granted for a term certain, whether or not to be followed by a further term or to continue thereafter from year to year or some other period, and was during that term a protected shorthold tenancy as defined in the Housing Act 1980 s 52 (repealed with savings: see PARA 1009 post); or (2) the conditions mentioned in the Rent Act 1977 Sch 15 Pt II, Case 20(a)-(c) (as added) (see PARA 971 post) were satisfied with respect to the dwelling house and the earlier tenancy, then, for these purposes, the condition as to service of notice in Sch 15 Pt II, Case 11(a) is to be treated as satisfied with respect to the earlier tenancy: Sch 15 Pt II, Case 11 (amended by the Rent (Amendment) Act 1985 s 1(1), (4)).

11 In the conditions set out in the Rent Act 1977 s 98(5), Sch 15 Pt V para 2(a), (c)-(f) (as added): see PARA 962 ante at heads (1), (3)-(6) in the text.

12 Ibid Sch 15 Pt II, Case 11(c) (substituted by the Housing Act 1980 s 66(1)).

13 In apart from the Rent Act 1977 s 98(1): see PARA 942 ante.

14 Ibid s 98(2). Cf the Housing Act 1988 s 7(2), Sch 2 Pt I, Ground 1 (as amended); and PARA 1109 post.

15 Rent Act 1977 Sch 15 Pt II, Case 11.

16 Where there was never any intention of creating a tenancy falling within ibid Sch 15 Pt II, Case 11 (as amended), it will not be just and equitable to dispense with written notice: see *Bradshaw v Baldwin-Wiseman* (1985) 49 P & CR 382, 17 HLR 260, CA, considering *Fernandes v Parvardin* (1982) 5 HLR 33, CA. See also *Jones v White* [1993] NPC 139, CA.

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#### **964. Case 12: residence acquired for retirement.**

Where the landlord<sup>1</sup> ('the owner') intends to occupy the dwelling house as his residence at such time as he might retire from regular employment and has let<sup>2</sup> it on a regulated tenancy<sup>3</sup> before he has so retired, and:

1905 (1) not later than the relevant date<sup>4</sup> the landlord has given notice in writing to the tenant<sup>5</sup> that possession might be recovered under this Case<sup>6</sup>;

1906 (2) the dwelling house has not, since 14 August 1974, been let by the owner on a protected tenancy<sup>7</sup> with respect to which the condition mentioned in head (1) above was not satisfied<sup>8</sup>; and

1907 (3) the court is of the opinion that one of certain conditions<sup>9</sup> is satisfied<sup>10</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>11</sup>, the landlord would be entitled to recover possession<sup>12</sup>.



If, however, the court is of the opinion that it would be just and equitable to make an order for possession notwithstanding that the condition in head (1) or head (2) above has not been complied with, it may dispense with the requirements of either or both of those conditions, as the case may require<sup>13</sup>.

- 1 For the meaning of 'landlord' see PARA 816 note 2 ante.
- 2 For the meaning of 'let' see PARA 820 ante.
- 3 For the meaning of 'regulated tenancy' see PARA 854 ante.
- 4 For the meaning of 'the relevant date' see PARA 961 ante.
- 5 For the meaning of 'tenant' see PARA 816 note 3 ante.
- 6 Rent Act 1977 s 98(2), Sch 15 Pt II, Case 12(a) (amended by the Housing Act 1980 s 66(4)).
- 7 For the meaning of 'protected tenancy' see PARA 818 ante.
- 8 Rent Act 1977 Sch 15 Pt II, Case 12(b).
- 9 Ie the conditions set out in ibid s 98(5), Sch 15 Pt V para 2(b)-(e) (as added): see PARA 962 ante at heads (2)-(5) in the text.
- 10 Ibid Sch 15 Pt II, Case 12(c) (substituted by the Housing Act 1980 s 66(2)).
- 11 Ie apart from the Rent Act 1977 s 98(1): see PARA 942 ante.
- 12 Ibid s 98(2).
- 13 Ibid Sch 15 Pt II, Case 12.

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#### **965. Cases 13 and 14: out of season letting and houses previously let to students.**

Where a dwelling house was let<sup>1</sup>:

- 1908 (1) under a tenancy for a term of years certain<sup>2</sup> not exceeding eight months and:
  - 10 (a) not later than the relevant date<sup>3</sup> the landlord had given notice in writing to the tenant<sup>4</sup> that possession might be recovered under Case 13<sup>5</sup>; and
  - 11 (b) the dwelling house was, at some time within a period of 12 months ending on the relevant date, occupied under a right to occupy it for a holiday<sup>6</sup>; or
- 1909 (2) under a tenancy for a term of years certain<sup>7</sup> not exceeding 12 months and:
  - 12 (a) not later than the relevant date the landlord had given notice in writing to the tenant that possession might be recovered under Case 14<sup>8</sup>; and

13. (b) at some time within the period of 12 months ending on the relevant date the dwelling house was subject to a tenancy<sup>9</sup> granted to a student by a specified educational institution<sup>10</sup>,  
13

the court was to make an order for possession if, apart from the Rent Act 1977<sup>11</sup>, the landlord would have been entitled to recover possession<sup>12</sup>.

These Cases are, however, now obsolete for practical purposes as it has not been possible to create a protected tenancy since 15 January 1989 except in certain transitional cases<sup>13</sup>.

1 For the meaning of 'let' see PARA 820 ante.

2 For these purposes, a tenancy is treated as being for a term of years certain notwithstanding that it is liable to determination by re-entry or on the happening of any event other than the giving of notice by the landlord to determine the term: Rent Act 1977 s 98(2), Sch 15 Pt II, Case 13. For the meaning of 'landlord' see PARA 816 note 2 ante.

3 For the meaning of 'the relevant date' see PARA 961 ante.

4 For the meaning of 'tenant' see PARA 816 note 3 ante.

5 Rent Act 1977 Sch 15 Pt II, Case 13(a).

6 Ibid Sch 15 Pt II, Case 13(b).

7 For these purposes, a tenancy is treated as being for a term of years certain notwithstanding that it is liable to determination by re-entry or on the happening of any event other than the giving of notice by the landlord to determine the term: Rent Act 1977 Sch 15 Pt II, Case 14. For the meaning of 'landlord' see PARA 816 note 2 ante.

8 Ibid Sch 15 Pt II, Case 14(a).

9 I.e. such a tenancy as is referred to in *ibid* s 8(1): see PARA 874 ante.

10 Ibid Sch 15 Pt II, Case 14(b). As to the educational institutions so specified see PARA 874 note 3 ante.

11 I.e. apart from *ibid* s 98(1): see PARA 942 ante.

12 Ibid s 98(2). Cf the Housing Act 1988 s 7(2), Sch 2 Pt I, Grounds 3, 4; and PARAS 1111- 1112 post.

13 See PARA 1011 post.

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#### **966. Case 15: residence required for minister of religion.**

Where a dwelling house is held for the purpose of being available for occupation by a minister of religion<sup>1</sup> as a residence from which to perform the duties of his office and:

- 1910 (1) not later than the relevant date<sup>2</sup> the tenant<sup>3</sup> was given notice in writing that possession might be recovered under this Case<sup>4</sup>; and

1911 (2) the court is satisfied that the dwelling house is required for occupation by a minister of religion as such a residence<sup>5</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>6</sup>, the landlord would be entitled to recover possession<sup>7</sup>.

1 This ground for possession is not restricted to ministers of the Church of England; indeed it has been said that the court does not prefer one religion to another or one sect to another: *Re Watson, Hobbs v Smith* [1973] 3 All ER 678, [1973] 1 WLR 1472, following *Thornton v Howe* (1862) 31 Beav 14 (charity cases). It seems that this ground would not apply where the ministers of a sect are not distinguished from the members: *Walsh v Lord Advocate* [1956] 3 All ER 129, [1956] 1 WLR 1002, HL (Jehovah's Witnesses). As to the exemption of parsonage houses from the operation of the Rent Acts see PARA 882 ante.

2 For the meaning of 'the relevant date' see PARA 961 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 Rent Act 1977 s 98(2), Sch 15 Pt II, Case 15(a).

5 Ibid Sch 15 Pt II, Case 15(b).

6 ie apart from ibid s 98(1): see PARA 942 ante.

7 Ibid s 98(2). Cf the Housing Act 1988 s 7(2), Sch 2 Pt I, Ground 5; and PARA 1113 post.

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### **967. Case 16: house required for agricultural worker.**

Where the dwelling house was at any time occupied by a person under the terms of his employment<sup>1</sup> as a person employed<sup>2</sup> in agriculture<sup>3</sup> and:

1912 (1) the tenant<sup>4</sup> neither is nor at any time was so employed by the landlord<sup>5</sup> and is not the widow of a person who was so employed; and

1913 (2) not later than the relevant date<sup>6</sup>, the tenant was given notice in writing that possession might be recovered under this Case; and

1914 (3) the court is satisfied that the dwelling house is required for occupation by a person employed, or to be employed, by the landlord in agriculture<sup>7</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>8</sup>, the landlord would be entitled to recover possession<sup>9</sup>.

1 For these purposes, 'employment' has the same meaning as in the Agricultural Wages Act 1948 (ie employment under a contract of service or apprenticeship: see s 17(1)): Rent Act 1977 s 98(2), Sch 15 Pt II, Case 16.

2 For these purposes, 'employed' has the same meaning as in the Agricultural Wages Act 1948 (ie employed under a contract of service or apprenticeship: see s 17(1)): Rent Act 1977 Sch 15 Pt II, Case 16. The like meaning applies for the purposes of Sch 15 Pt II, Cases 17, 18 (see PARAS 968-969 post): Sch 15 Pt II, Case 17, Sch 15 Pt II, Case 18.

3 For these purposes, 'agriculture' has the same meaning as in the Agricultural Wages Act 1948 (ie it includes dairy-farming, the production of any consumable produce which is grown for sale or for consumption or other use for the purposes of a trade or business or of any other undertaking (whether carried on for profit or not), and the use of land as grazing, meadow or pasture land or orchard or osier land or woodland or for market gardens or nursery grounds: see s 17(1)): Rent Act 1977 Sch 15 Pt II, Case 16. The like meaning applies for the purposes of Sch 15 Pt II, Cases 17, 18: Sch 15 Pt II, Case 17, Sch 15 Pt II, Case 18.

4 For the meaning of 'tenant' see PARA 816 note 3 ante.

5 For the meaning of 'landlord' see PARA 816 note 2 ante.

6 For the meaning of 'the relevant date' see PARA 961 ante.

7 Rent Act 1977 Sch 15 Pt II, Case 16.

8 Ie apart from ibid s 98(1): see PARA 942 ante.

9 Ibid s 98(2).

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**968. Case 17: house required for agricultural worker after carrying out of proposed amalgamation.**

Where proposals for amalgamation approved for the purposes of a scheme under the Agriculture Act 1967<sup>1</sup> have been carried out and, at the time when the proposals were submitted, the dwelling house was occupied by a person responsible, whether as owner, tenant<sup>2</sup>, or servant or agent of another, for the control of the farming of any part of the land comprised in the amalgamation and:

1915 (1) after the carrying out of the proposals, the dwelling house was let<sup>3</sup> on a regulated tenancy<sup>4</sup> otherwise than to, or to the widow of, either a person ceasing to be so responsible as part of the amalgamation or a person who is, or at any time was, employed<sup>5</sup> by the landlord<sup>6</sup> in agriculture<sup>7</sup>; and

1916 (2) not later than the relevant date<sup>8</sup> the tenant was given notice in writing that possession might be recovered under this Case; and

1917 (3) the court is satisfied that the dwelling house is required for occupation by a person employed, or to be employed, by the landlord in agriculture; and

1918 (4) the proceedings for possession are commenced by the landlord at any time during the period of five years beginning with the date on which the proposals for the amalgamation were approved or, if occupation of the dwelling house after the amalgamation continued in, or was first taken by, a person ceasing to be responsible as mentioned in head (1) above or his widow, during a period expiring three years after the date on which the dwelling house next became unoccupied<sup>9</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>10</sup>, the landlord would be entitled to recover possession<sup>11</sup>.

1 le under the Agriculture Act 1967 s 26 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1338 et seq. For these purposes, 'amalgamation' has the same meaning as in Pt II (ss 26-40) (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1338): Rent Act 1977 s 98(2), Sch 15 Pt II, Case 17.

2 For the meaning of 'tenant' see PARA 816 note 3 ante.

3 For the meaning of 'let' see PARA 820 ante.

4 For the meaning of 'regulated tenancy' see PARA 854 ante.

5 For the meaning of 'employed' see PARA 967 note 2 ante.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 For the meaning of 'agriculture' see PARA 967 note 3 ante.

8 For the meaning of 'the relevant date' see PARA 961 ante.

9 Rent Act 1977 Sch 15 Pt II, Case 17.

10 le apart from ibid s 98(1): see PARA 942 ante.

11 Ibid s 98(2).

## UPDATE

**968-969 Case 17: house required for agricultural worker after carrying out of proposed amalgamation, Case 18: house previously occupied by agricultural worker once more required for that purpose.**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(6) SECURITY OF TENURE; RECOVERY OF POSSESSION/(iv) Mandatory Grounds for Possession/B. CASES IN WHICH ORDERS FOR POSSESSION MUST BE MADE/969. Case 18: house previously occupied by agricultural worker once more required for that purpose.

**969. Case 18: house previously occupied by agricultural worker once more required for that purpose.**

Where:

1919 (1) the last occupier of the dwelling house before the relevant date<sup>1</sup> was a person, or the widow of a person, who was at some time during his occupation responsible, whether as owner, tenant<sup>2</sup>, or servant or agent of another, for the control of the farming of land which formed, together with the dwelling house, an agricultural unit<sup>3</sup>; and

1920 (2) the tenant is neither a person, or the widow of a person, who is or has at any time been so responsible, nor a person, or the widow of a person, who is or at any time was employed<sup>4</sup> by the landlord<sup>5</sup> in agriculture<sup>6</sup>; and

1921 (3) the creation of the tenancy was not preceded by the carrying out in connection with any of that land of an amalgamation<sup>7</sup>; and

- 1922 (4) not later than the relevant date the tenant was given notice in writing that possession might be recovered under this Case; and
- 1923 (5) the court is satisfied that the dwelling house is required for occupation either by a person responsible or to be responsible, whether as owner, tenant, or servant or agent of another, for the control of the farming of any part of that land or by a person employed or to be employed by the landlord in agriculture; and
- 1924 (6) in a case where the relevant date was before 9 August 1972, the proceedings for possession are commenced by the landlord before the expiry of five years from the date on which the last occupier<sup>8</sup> went out of occupation<sup>9</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>10</sup>, the landlord would be entitled to possession<sup>11</sup>.

1 For the meaning of 'the relevant date' see PARA 961 ante.

2 For the meaning of 'tenant' see PARA 816 note 3 ante.

3 Ie within the meaning of the Agriculture Act 1947 (ie land which is occupied as a unit for agricultural purposes, including (1) any dwelling house or other building occupied by the same person for the purpose of farming the land; and (2) any other land falling within the definition in that Act of the expression 'agricultural land' which is in the occupation of the same person, being land as to which the Minister is satisfied that having regard to the character and situation thereof and other relevant circumstances it ought in the interests of full and efficient production to be farmed in conjunction with the agricultural unit, and directs accordingly): see s 109(2); and see further AGRICULTURAL LAND vol 1 (2008) PARA 324.

4 For the meaning of 'employed' see PARA 967 note 2 ante.

5 For the meaning of 'landlord' see PARA 816 note 2 ante.

6 For the meaning of 'agriculture' see PARA 967 note 3 ante.

7 Ie approved for the purposes of a scheme under the Agriculture Act 1967 s 26 (as amended): see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1338 et seq. For these purposes, 'amalgamation' has the same meaning as in Pt II (ss 26-40) (as amended) (see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1338: Rent Act 1977 s 98(2), Sch 15 Pt II, Case 18.

8 Ie the occupier referred to in ibid Sch 15 Pt II, Case 18(a): see head (1) in the text.

9 Ibid Sch 15 Pt II, Case 18.

10 Ie apart from ibid s 98(1): see PARA 942 ante.

11 Ibid s 98(2).

## UPDATE

**968-969 Case 17: house required for agricultural worker after carrying out of proposed amalgamation... Case 18: house previously occupied by agricultural worker once more required for that purpose.**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

RECOVERY OF POSSESSION/(iv) Mandatory Grounds for Possession/B. CASES IN WHICH ORDERS FOR POSSESSION MUST BE MADE/970. Case 19: protected shorthold tenancies.

### **970. Case 19: protected shorthold tenancies.**

The court must make an order for possession of a dwelling house in certain circumstances where the house was let under a protected shorthold tenancy<sup>1</sup>.

<sup>1</sup> See the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 19 (as added); and PARA 1010 post. For the meaning of 'protected shorthold tenancy' see PARA 1009 post.

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### **971. Case 20: lettings by service personnel.**

Where the dwelling house was let<sup>1</sup> by a person ('the owner') at any time after 28 November 1980<sup>2</sup> and:

- 1925 (1) both at the time when the owner acquired the dwelling house and at the relevant date<sup>3</sup> he was a member of the regular armed forces of the Crown<sup>4</sup>;
- 1926 (2) not later than the relevant date the owner gave notice in writing to the tenant<sup>5</sup> that possession might be recovered under this Case<sup>6</sup>;
- 1927 (3) the dwelling house has not since 28 November 1980 been let by the owner on a protected tenancy<sup>7</sup> with respect to which the condition mentioned in head (1) above was not satisfied<sup>8</sup>; and
- 1928 (4) the court is of the opinion that either the dwelling house is required as a residence for the owner or that one of certain conditions<sup>9</sup> is satisfied<sup>10</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>11</sup>, the landlord would be entitled to recover possession<sup>12</sup>.

If, however, the court is of the opinion that it would be just and equitable to make an order for possession notwithstanding that the condition in head (2) or head (3) above has not been complied with, it may dispense with the requirements of either or both of those conditions, as the case may require<sup>13</sup>.

<sup>1</sup> For the meaning of 'let' see PARA 820 ante.

<sup>2</sup> Ie the date of commencement of the Housing Act 1980 s 67: see s 153(4); the Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706.

<sup>3</sup> For the meaning of 'the relevant date' see PARA 961 ante.

<sup>4</sup> Rent Act 1977 s 98(2), Sch 15 Pt II, Case 20(a), (b) (added by the Housing Act 1980 s 67). For these purposes, 'regular armed forces of the Crown' has the same meaning as in the House of Commons Disqualification Act 1975 s 1 (as amended) (see PARLIAMENT vol 78 (2010) PARA 906): Rent Act 1977 Sch 15 Pt II, Case 20 (as so added).

<sup>5</sup> For the meaning of 'tenant' see PARA 816 note 3 ante.

- 6 Rent Act 1977 Sch 15 Pt II, Case 20(c) (as added: see note 4 supra).
- 7 For the meaning of 'protected tenancy' see PARA 818 ante.
- 8 Rent Act 1977 Sch 15 Pt II, Case 20(d) (as added: see note 4 supra).
- 9 le the conditions set out in *ibid* s 98(5), Sch 15 Pt V para 2(c)-(f) (as added): see PARA 962 ante at heads (3)-(6) in the text.
- 10 *Ibid* Sch 15 Pt II, Case 20(e) (as added: see note 4 supra).
- 11 le apart from *ibid* s 98(1): see PARA 942 ante.
- 12 *Ibid* s 98(2).
- 13 *Ibid* Sch 15 Pt II, Case 20 (as added: see note 4 supra).

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## **(v) Special Powers in Possession Proceedings**

### **972. Extended powers of the court.**

The proper forum in which to apply for an order for possession of a dwelling house is generally the county court<sup>1</sup>. The court may not, save in certain specified cases, postpone the giving up of possession to a date later than 14 days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and in any event the court may not postpone possession to a date later than six weeks after the making of the order<sup>2</sup>.

Where, however, proceedings are brought for possession of a dwelling house which is let<sup>3</sup> on a protected tenancy<sup>4</sup> or subject to a statutory tenancy<sup>5</sup> on a ground other than any of the mandatory grounds<sup>6</sup> for possession, the court has much wider powers and may adjourn the proceedings for such period or periods as it thinks fit<sup>7</sup>.

On the making of an order for possession of such a dwelling house or at any time before the execution of such an order<sup>8</sup>, the court may stay or suspend execution<sup>9</sup> of the order or postpone the date of possession for such period or periods as it thinks fit<sup>10</sup>. Unless the court considers that to do so would cause exceptional hardship to the tenant<sup>11</sup> or would otherwise be unreasonable, the court must, on any such adjournment, stay, suspension or postponement, impose conditions with regard to payment by the tenant of arrears of rent, if any, and rent or payments in respect of occupation after termination of the tenancy (*mesne profits*) and may impose such other conditions as it thinks fit<sup>12</sup>. If any such conditions are complied with, the court may discharge or rescind the order for possession<sup>13</sup>.

In any case where:

- 1929 (1) proceedings are brought for possession of a dwelling house which is let on a protected tenancy or subject to a statutory tenancy;
- 1930 (2) the tenant's spouse or former spouse, having statutory rights of occupation<sup>14</sup>, is then in occupation of the dwelling house; and
- 1931 (3) the tenancy is terminated as a result of those proceedings,



the spouse or former spouse, so long as he or she remains in occupation, has the same rights in relation to, or in connection with, any such adjournment, stay, suspension or postponement of possession proceedings as he or she would have if those rights of occupation were not affected by the termination of the tenancy<sup>15</sup>.

1 See PARA 981 post.

2 See the Housing Act 1980 s 89(1), (2); and PARA 665 ante.

3 For the meaning of 'let' see PARA 820 ante.

4 For the meaning of 'protected tenancy' see PARA 818 ante.

5 For the meaning of 'statutory tenancy' see PARA 831 ante.

6 Ie the grounds specified in the Rent Act 1977 s 98(2), Sch 15 Pt II (Cases 11-20) (as amended): see PARAS 963-971 ante.

7 Ibid s 100(1), (5).

8 This power extends to a case where the order for possession was a consent order: *Rossiter v Langley* [1925] 1 KB 741, DC; *Mouat-Balthasar v Murphy* [1967] 1 QB 344, [1966] 3 All ER 477, CA. As to consent orders see PARA 942 the text and note 14 ante.

9 As to the duration and renewal of warrants for possession see CIVIL PROCEDURE vol 12 (2009) PARA 1292. A warrant for possession against a statutory tenant must be executed by the court bailiff; the landlord may not resort to self-help: *Haniff v Robinson* [1993] QB 419, [1993] 1 All ER 185, CA. As to delivery of possession see CIVIL PROCEDURE vol 12 (2009) PARA 1309.

10 Rent Act 1977 s 100(2). These powers cannot be exercised after execution of the order: *Scott-James v Chehab* [1988] 2 EGLR 61, CA. If a judgment or order is set aside, any enforcement of the judgment or order ceases to have effect unless the court otherwise orders: CPR 70.6; *Governors of Peabody Donation Fund v Hay* (1986) 19 HLR 145, CA.

11 For the meaning of 'tenant' see PARA 816 note 3 ante.

12 Rent Act 1977 s 100(3) (substituted by the Housing Act 1980 s 75(1), (2)). The court ought not to make a suspension order if it will result in the arrears being paid over an almost indefinite period: *Taj v Ali* (2000) 33 HLR 253, [2000] 3 EGLR 35, CA (where an appeal was allowed against a suspension order which would have resulted in the arrears being paid off over a period of more than 55 years).

13 Rent Act 1977 s 100(4).

14 Ie under what is now the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see PARA 836 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

15 Rent Act 1977 s 100(4A), (4B) (added by the Housing Act 1980 s 75(3)); Interpretation Act 1978 s 17(2) (a). This provision (which does not appear to apply to civil partners or former civil partners) is designed to enable the deserted spouse to apply for and enjoy the benefit of the Rent Act 1977 s 100 (as amended) even if the original date fixed for possession is past, thus obviating the injustice which arose in *Penn v Dunn* [1970] 2 QB 686, [1970] 2 All ER 858, CA (see PARA 836 note 3 ante). Cf the Housing Act 1988 s 9(5) (as amended); and PARA 1117 post.

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### 973. Modification of order or postponement of date for possession.

The court has, it seems, no power by virtue of the provisions as to the making of orders for possession<sup>1</sup> to discharge an absolute order for possession of which the character has not been modified by any subsequent order<sup>2</sup>. It may, however, in effect convert an absolute order into a conditional order by making a subsequent order postponing the date of possession on conditions and may discharge the original order for possession if the conditions are fulfilled<sup>3</sup>. For these purposes, the order imposing the conditions and the order providing for the discharge of the original absolute order may be combined in one order; and it is not necessary for the tenant to obtain first an order imposing conditions and subsequently a further order discharging the original absolute order<sup>4</sup>. Wide use is made of these powers, particularly in postponing the date of possession<sup>5</sup>, or, where the ground is non-payment of rent, in suspending an order on condition that the current rent and something off the arrears is paid<sup>6</sup>. If the tenant dies after a possession order is made, the rights of a successor to the statutory tenancy depend on whether the order was absolute (whether or not suspended for a period) or conditional<sup>7</sup>.

1 As to these provisions see PARA 972 ante.

2 *American Economic Laundry Ltd v Little* [1951] 1 KB 400 at 406, [1950] 2 All ER 1186 at 1189, CA, per Somervell LJ; *Haymills Houses Ltd v Blake* [1955] 1 All ER 592 at 598, [1955] 1 WLR 237 at 246, CA; *Payne v Cooper* [1958] 1 QB 174 at 183, 184, [1957] 3 All ER 335 at 340, CA, per Lord Evershed MR.

3 *Payne v Cooper* [1958] 1 QB 174, [1957] 3 All ER 335, CA, applying dicta of Evershed MR in *Mills v Allen* [1953] 2 QB 341 at 354-355, [1953] 2 All ER 534 at 542, CA, and *Haymills Houses Ltd v Blake* [1955] 1 All ER 592 at 598, [1955] 1 WLR 237 at 246, CA.

4 *Payne v Cooper* [1958] 1 QB 174, [1957] 3 All ER 335, CA, applying dicta of Romer LJ in *Sherrin v Brand* [1956] 1 QB 403 at 428, 429, [1956] 1 All ER 194 at 206, 207, CA.

5 This may be done even against the will of the tenant: *King's College, Cambridge v Kershman* (1948) 64 TLR 547, CA.

6 Thus in a nuisance case the order may be suspended indefinitely so long as no nuisance occurs: *Yates v Morris* [1951] 1 KB 77, [1950] 2 All ER 577, CA. For the form in a rent case see *Mills v Allen* [1953] 2 QB 341 at 357, [1953] 2 All ER 534 at 544, CA; cf *Tideway Investment and Property Holdings Ltd v Wellwood* [1952] Ch 791 at 813, [1952] 2 All ER 514 at 523, CA. For the form of a conditional order for possession see *Sherrin v Brand* [1956] 1 QB 403, [1956] 1 All ER 194, CA. As to the variation of a conditional order see *Haymills Houses Ltd v Blake* [1955] 1 All ER 592, [1955] 1 WLR 237, CA. An application for suspension of an unconditional order should not be a retrial of the whole case: *Goldthorpe v Bain* [1952] 2 QB 455, [1952] 2 All ER 23, CA.

7 *American Economic Laundry Ltd v Little* [1951] 1 KB 400, [1950] 2 All ER 1186, CA; *Mills v Allen* [1953] 2 QB 341 at 351-356, [1953] 2 All ER 534 at 540-543, CA; *Sherrin v Brand* [1956] 1 QB 403, [1956] 1 All ER 94, CA. The successor's right is subject to the terms of the order: *Sherrin v Brand* supra.

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## **(vi) Security of Subtenants**

### **974. Position of subtenants generally.**

Whether a subtenant is entitled to protection against his immediate landlord depends simply on whether his tenancy is a protected or statutory tenancy according to the general criteria<sup>1</sup>. It does not matter for that purpose whether the head tenancy is protected<sup>2</sup> or whether the

subtenancy is unlawful<sup>3</sup>. At common law a subtenancy comes to an end automatically on the determination of the tenancy out of which it was created<sup>4</sup> (except in the cases of surrender<sup>5</sup> and merger), but the security of tenure of certain subtenants of residential premises in that event is preserved by statute<sup>6</sup>. Where the mesne tenancy is determined by forfeiture, the subtenant may obtain relief against forfeiture and with it a protected tenancy<sup>7</sup>.

1 See PARA 818 et seq ante. Except where the context otherwise requires, 'tenant' and 'tenancy' include 'subtenant' and 'subtenancy': Rent Act 1977 s 152(1).

2 *Knight v Olive* [1954] 1 QB 514 at 519, [1954] 1 All ER 701 at 703, CA.

3 *Fenn v Simmons* [1931] EGD 231, DC.

4 See eg *Legge v Matthews* [1960] 2 QB 37 at 44, [1960] 1 All ER 595 at 596, CA.

5 See *Parker v Jones* [1910] 2 KB 32; the Law of Property Act 1925 s 139; *Bromley Park Garden Estates Ltd v George* (1991) 23 HLR 441, [1991] 2 EGLR 95, CA; and PARA 638 ante.

6 See the Rent Act 1977 s 137 (as amended); and PARAS 976-978 post.

7 See eg *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630, CA.

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### **975. Effect of order for possession against mesne tenant.**

An order for possession on any of the discretionary grounds<sup>1</sup> against a protected or statutory tenant<sup>2</sup> does not affect the right of any subtenant to whom the dwelling house or any part of it has been lawfully sublet<sup>3</sup> before the commencement of proceedings for recovery of possession to retain possession<sup>4</sup>; nor does the order operate to give a right to possession against any such subtenant<sup>5</sup>. The effect of this provision is that, where there is a subtenant lawfully and de facto in possession of a dwelling house, the landlord cannot avail himself against the subtenant of any order or judgment for possession which he may have recovered against the tenant, but must either commence separate proceedings against the subtenant, in which the subtenant may urge whatever matters he may think fit, including matters personal between himself and the landlord affecting the reasonableness of the landlord's demand<sup>6</sup>, or join the subtenant as a defendant in proceedings against the tenant, in which case the court must address itself separately to the position of the subtenant and consider whether it would be reasonable to make an order for possession against him<sup>7</sup>. The landlord need not prove a ground for possession against the subtenant provided that one exists against the tenant<sup>8</sup>.

If, however, a landlord has obtained a writ of possession against his tenant and the sheriff's officer, in executing the writ, turns out a lawful subtenant who is protected by the Rent Acts, neither the landlord nor the sheriff's officer is in general liable in damages to the subtenant, as the sheriff's officer is not the agent of the landlord so as to render the landlord liable for the act of the officer and the officer is protected so long as he is acting in accordance with the writ<sup>9</sup>.

1 Ie by virtue of the Rent Act 1977 ss 98(1), 99(2), Sch 15 Pt I, Cases 1-10 (as amended) (see PARA 949 et seq ante) or Sch 16, Cases I or II (as amended) (see PARA 948 ante).

2 For the meaning of 'protected tenant' see PARA 818 ante; and for the meaning of 'statutory tenant' see PARA 831 ante. Ibid s 137 (as amended) also applies where the head tenant is a protected occupier or statutory tenant as defined in the Rent (Agriculture) Act 1976 (see PARAS 1144-1149 post) (Rent Act 1977 s 137(1)(b)); and, where a protected occupier of a dwelling house or part of a dwelling house has a relevant licence as defined in the Rent (Agriculture) Act 1976 (see PARA 1141 post), 'tenancy' and cognate expressions are to be construed accordingly (Rent Act 1977 s 137(7)).

3 As to lawful subletting see PARA 978 post.

4 le by virtue of the Rent Act 1977.

5 Ibid s 137(1) (amended by the Housing Act 1988 s 140, Sch 17 para 25, Sch 18). The general rule, to which this provision is an exception, is that the sheriff or bailiff acting pursuant to a writ or warrant of possession is bound to turn out those he finds upon the land whether they are bound by the judgment or not: *R v Wandsworth County Court, ex p London Borough of Wandsworth* [1975] 3 All ER 390, [1975] 1 WLR 1314, DC. However, in the case of a lawful subtenant the officer must 'stay his hand': *Lewis v Gunter-Jones* [1949] LJR 769 at 770, CA, per Denning LJ.

6 *Lord Hylton v Heal* [1921] 2 KB 438 at 449, DC.

7 *Enniskillen UDC v Bartley and Lynch* [1947] NI 177, NI CA; *Leith Properties Ltd v Byrne* [1983] QB 433, sub nom *Leith Properties Ltd v Springer* [1982] 3 All ER 731, CA; and see *Image v Taylor and Mills* (1952) 102 L Jo 613 (notice to quit served on tenant; proceedings for possession brought against tenant and subtenant; no necessity that order for possession be obtained against tenant before taking of proceedings against subtenant; notice to quit served on tenant automatically determined subtenant's contractual tenancy). It is doubtful whether a subtenant whose tenancy has not been directly determined becomes a statutory or contractual tenant of the head landlord: *Chapman v Hughes* (1923) 129 LT 223; *Stanley v Compton* [1951] 1 All ER 859 at 863, CA.

8 *Lord Hylton v Heel* [1921] 2 KB 438; *Leith Properties Ltd v Byrne* [1983] QB 433, sub nom *Leith Properties Ltd v Springer* [1982] 3 All ER 731, CA.

9 *Williams v Williams and Nathan* [1937] 2 All ER 559, CA; *Barclays Bank Ltd v Roberts* [1954] 3 All ER 107, [1954] 1 WLR 1212, CA. In *Barclays Bank Ltd v Roberts* supra advice given by the landlord's solicitor to the sheriff's officers as to the validity of the subtenant's claim to be protected was held not to have made the sheriff's officers the agents of the landlord; and the question was left open whether, in a case where the sheriff or his officers received notice of facts sufficient to show that the subtenant was protected, he or they might be liable in damages to the subtenant for evicting him: *Barclays Bank Ltd v Roberts* supra at 111-112 and at 1217 per Evershed MR. As to writs and warrants of possession generally see CIVIL PROCEDURE VOL 12 (2009) PARA 1265 et seq.

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## **976. Status of subtenant after end of mesne tenancy.**

Where a statutorily protected tenancy<sup>1</sup> of a dwelling house is determined, either as a result of an order for possession or for any other reason<sup>2</sup>, any subtenant to whom the dwelling house or any part of it has been lawfully sublet<sup>3</sup> is deemed to become the tenant of the landlord<sup>4</sup> on the same terms as<sup>5</sup> if the tenant's statutorily protected tenancy had continued<sup>6</sup>. For a subtenant to be entitled to the benefit of this provision three conditions must be satisfied:

1932 (1) the mesne tenancy must, subject to certain exceptions<sup>7</sup>, have been a statutorily protected tenancy<sup>8</sup>;

1933 (2) the subtenancy must have been protected<sup>9</sup>;

1934 (3) the subtenancy must have been lawful<sup>10</sup>.

Once the head landlord has proved his title and an intention to regain possession, the onus is on the defendant to establish his subtenancy<sup>11</sup>.

Where, however, a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993<sup>12</sup>, none of the statutory provisions relating to security of tenure for tenants apply to the lease; and after the term date of the lease no person is entitled, by virtue of any sublease directly or indirectly derived out of the lease, to retain possession under Part VII<sup>13</sup> of the Rent Act 1977<sup>14</sup>.

1 For these purposes, 'statutorily protected tenancy' means (1) a protected or statutory tenancy (see PARAS 818, 831 ante); (2) a protected occupancy or statutory tenancy as defined in the Rent (Agriculture) Act 1976 (see PARA 1144 et seq post); or (3) if the subtenancy is a protected or statutory tenancy to which the Rent Act 1977 s 99 (see PARA 943 ante) applies, (a) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 which is a tenancy in relation to which that Act applies (see PARA 806 ante); or (b) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 ante): Rent Act 1977 s 137(4) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 60; the Agricultural Tenancies Act 1995 s 40, Schedule para 28(3)).

2 Eg surrender of possession to the landlord (*Standingford v Bruce* [1926] 1 KB 466); or death of a statutory tenant (*Lewis v Reeves* [1952] 1 KB 19, [1951] 2 All ER 855, CA); or notice to quit (see the cases cited in PARA 978 note 3 post).

3 As to lawful subletting see PARA 978 post.

4 For the meaning of 'landlord' see PARA 816 note 2 ante.

5 The Rent Act 1968 s 18(2) (as originally enacted and now repealed), read 'as he would have held from the tenant if ...'. These words were omitted when a new section was substituted by the Rent (Agriculture) Act 1976 s 40(2), Sch 8 para 20. The omission would not appear to have changed the law.

6 Rent Act 1977 s 137(2). Section 137(2) and s 137(1) (as amended) (see PARA 975 ante) overlap to some degree: see the remarks of Scrutton LJ in *Roe v Russell* [1928] 2 KB 117 at 128, CA. See also *Chogley v Bains* [1955] 3 All ER 148 at 153, [1955] 1 WLR 877 at 884, PC. Where, however, a tenancy has been extended under the Leasehold Reform Act 1967 s 14 (as amended), after the extended term date no person is entitled by virtue of any subtenancy directly or indirectly derived out of the tenancy to retain possession under the Rent Act 1977 Pt VII (ss 98-107) (as amended) (see PARA 942 et seq ante) or any enactment applying or extending Pt VII (as amended): see the Leasehold Reform Act 1967 s 16(1) (as amended); and PARA 1483 post. See also ss 17(3), 18(5), Sch 2 para 3(2) (as amended); and PARA 1494 post.

7 See PARA 977 post.

8 *Wright v Arnold* [1947] KB 280, [1946] 2 All ER 616, CA; *Cow v Casey* [1949] 1 KB 474, [1949] 1 All ER 197, CA (head tenancy excluded by rateable value); *Knightsbridge Estates Ltd v Deeley* [1950] 2 KB 228, [1950] 1 All ER 577, CA (head tenancy at low rent). The effect of these cases is, however, largely abrogated by the statutory exceptions described in PARA 977 post: see *Earl Cadogan v Henthorne* [1956] 3 All ER 851, [1957] 1 WLR 1. See also *Grosvenor Estates Belgravia v Cochran* (1991) 24 HLR 98, [1991] 2 EGLR 83, CA.

9 *Stanley v Compton* [1951] 1 All ER 859, CA; *Solomon v Orwell* [1954] 1 All ER 874, [1954] 1 WLR 629, CA.

10 See PARA 978 post.

11 *Portland Managements Ltd v Harte* [1977] QB 306, [1976] 1 All ER 225, CA.

12 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 post.

13 Ie under the Rent Act 1977 Pt VII (as amended) or any enactment applying or extending Pt VII (as amended).

14 See the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post. See also s 61, Sch 14 para 3(1), (2)(a), (3)(a); and PARA 1727 post.

PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(6) SECURITY OF TENURE; RECOVERY OF POSSESSION/(vi) Security of Subtenants/977. Exceptions to rule that mesne tenancy must have been protected.

### **977. Exceptions to rule that mesne tenancy must have been protected.**

There are two exceptions to the rule<sup>1</sup> that for a subtenant to retain his security against the head landlord the mesne tenancy must have been protected:

- 1935 (1) a long tenancy<sup>2</sup> of a dwelling house which is also a tenancy at a low rent<sup>3</sup> but which, had it not been a tenancy at a low rent, would have been a protected tenancy<sup>4</sup> or an assured tenancy<sup>5</sup> is treated as a statutorily protected tenancy<sup>6</sup>;
- 1936 (2) where the dwelling house is itself subject to a protected or statutory tenancy<sup>7</sup> and forms part of premises which have been let as a whole on a superior tenancy but do not constitute a dwelling house let on a statutorily protected tenancy<sup>8</sup>, then, from the coming to an end of the superior tenancy, the subtenant has the same protection<sup>9</sup> as if, in lieu of the superior tenancy, there had been separate tenancies of the dwelling house and the remainder of the premises, for the like purposes as under the superior tenancy, and at rents equal to the just proportion of the rent under the superior tenancy<sup>10</sup>.

The latter provision applies in certain circumstances<sup>11</sup> where the premises let on the superior tenancy are an agricultural holding<sup>12</sup> or land comprised in a farm business tenancy<sup>13</sup> and has been held to apply to premises comprised in a business tenancy<sup>14</sup> the residential part of which is sublet<sup>15</sup>.

This notional division of the premises comprised in the mesne tenancy will prevent the subtenant being deprived of security by the fact that those premises have a high rateable value<sup>16</sup> or are not let as a separate dwelling<sup>17</sup>. A subtenant may rely on the combined effect of the above two exceptions<sup>18</sup>.

1 See PARA 976 ante.

2 For the meaning of 'long tenancy' see PARA 849 note 7 ante.

3 For the meaning of 'tenancy at a low rent' see PARA 861 ante.

4 For the meaning of 'protected tenancy' see PARA 818 ante.

5 I.e. within the meaning of the Housing Act 1988: see PARA 1018 post.

6 Rent Act 1977 s 137(5) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 53(1)). The subtenant is not, however, given security where the subtenancy was created, whether immediately or derivatively, out of such a long tenancy after a notice to terminate the long tenancy had been given under the Landlord and Tenant Act 1954 s 4(1) (see PARA 1212 post) or, as the case may be, served under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 4(1) (see PARA 1249 post), or at a time when the long tenancy was being continued by the Landlord and Tenant Act 1954 s 3(1) (see PARA 1209 post) or, as the case may be, the Local Government and Housing Act 1989 Sch 10 para 3 (see PARA 1248 post), unless the subtenancy was created with the consent in writing of the person who at the time the subtenancy was created was the landlord within the meaning of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) or the Local Government and Housing Act 1989 Sch 10 (as amended): Rent Act 1977 s 137(6) (amended by the Local Government and Housing Act 1989 Sch 11 para 53(2)).

7 For the meaning of 'statutory tenancy' see PARA 831 ante.

8 For the meaning of 'statutorily protected tenancy' see PARA 976 note 1 ante.

9 I.e. under the Rent Act 1977 s 137(2): see PARA 976 ante.

10 Ibid s 137(3); and see the text and notes 11-13 *infra*. On its true construction, the Rent Act 1977 s 137(3) (as amended: see notes 12-13 *infra*) affords a subtenant protection under the Act as against the tenant of business premises, part of which have been lawfully sublet for residential use, and he continues to enjoy the same protection against the head landlord when the superior tenancy comes to an end: see *Wellcome Trust Ltd v Hamad*, *Ebied v Hopkins*, *Church Comrs for England v Baines* [1998] QB 638, [1998] 1 All ER 657, CA.

11 Ie if the subtenancy is a protected or statutory tenancy to which the Rent Act 1977 s 99 applies (ie a tenancy to a qualifying agricultural worker not at a low rent): see PARA 943 *ante*.

12 In the circumstances described in note 11 *supra*, 'premises' for the purposes of head (2) in the text includes an agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy to which that Act applies (see PARA 806 *ante*; and AGRICULTURAL LAND vol 1 (2008) PARA 323): Rent Act 1977 s 137(3) (amended by the Agricultural Holdings Act 1986 s 100, Sch 14 para 60).

13 Rent Act 1977 s 137(3) (as amended (see note 12 *supra*); further amended by the Agricultural Tenancies Act 1995 s 40, Schedule para 28(2)). In the circumstances described in note 11 *supra*, 'premises' for the purposes of head (2) in the text includes land comprised in a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 *ante*; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Rent Act 1977 s 137(3) (as so amended).

14 Ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 *et seq* *ante*.

15 See *Wellcome Trust Ltd v Hamad* [1998] QB 638, [1998] 1 All ER 657, CA, considering *Maunsell v Olins* [1975] AC 373, [1975] 1 All ER 16, HL, and disapproving *Pittalis v Grant* [1989] QB 605, [1989] 2 All ER 622, CA. Cf *Bromley Park Garden Estates Ltd v George* (1991) 23 HLR 441, [1991] 2 EGLR 95, CA. As to what is a dwelling house for the purposes of the Rent Act 1977 see PARA 821 *ante*.

16 As to the exclusion of premises from protection by reason of high rateable value see PARAS 855-859 *ante*; as to the abolition of domestic rates see PARA 521 *ante*; and as to the certification of a rateable value in certain cases see PARA 523 *ante*.

17 See PARA 823 *ante*.

18 *Earl Cadogan v Henthorne* [1956] 3 All ER 851, [1957] 1 WLR 1, approved in *Legge v Matthews* [1960] 2 QB 37, [1960] 1 All ER 595, CA.

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## 978. Lawful subtenancy.

A subletting is lawful if it is not contrary to the terms of the mesne tenancy<sup>1</sup>. It is unlawful if it involves a breach of covenant, even if there is no right of forfeiture<sup>2</sup>. The question of lawfulness is to be determined as at the date of determination of the mesne tenancy<sup>3</sup> unless the mesne tenant is still a statutory tenant, in which case the material date is that of the commencement of possession proceedings<sup>4</sup>. If before the material date the head landlord has waived the breach, the subtenant is protected against him<sup>5</sup>. A waiver only operates so as to render the subletting lawful from the date of the waiver<sup>6</sup>. For these purposes, whether acceptance of rent amounts to a waiver is a question of fact<sup>7</sup>; there has to be such a degree of acquiescence that a consent to a subletting can be inferred<sup>8</sup>. However, a landlord who has actual or deemed knowledge of a change of personnel in the house is put on inquiry as to the true state of affairs and, if he then accepts rent for a substantial period, will be held to have waived the breach of covenant, even though he did not know the precise nature of the breach<sup>9</sup>. For these purposes, the knowledge of the landlord's employees or agents whose duty it is to report such matters will be treated as the knowledge of the landlord<sup>9</sup>. If the subtenant claiming protection is an assignee of the sub-term, the assignment must also have been lawful<sup>10</sup>.

1 *Ward v Larkins* (1923) 130 LT 184; *Leith Properties Ltd v Byrne* [1983] QB 433, sub nom *Leith Properties Ltd v Springer* [1982] 3 All ER 731, CA. It seems that a subletting which was illegal under the general law would not be 'lawful'. As to covenants against subletting see PARA 484 ante. Although subletting the whole premises without consent may be a ground for possession (see PARA 954 ante), that does not make the subletting unlawful: *Gidden v Mills* [1925] 2 KB 713, DC; and see *Hyde v Pimley* [1952] 2 QB 506 at 514, 515, [1952] 2 All ER 102 at 106, CA. A statutory tenant, including a successor to the statutory tenancy, may sublet part of the premises (*Lewis v Reeves* [1952] 1 KB 19, [1951] 2 All ER 855, CA), but it is questionable whether a purported subletting of the whole premises confers any interest on the subtenant (*Oak Property Co Ltd v Chapman* [1947] KB 886, [1947] 2 All ER 1, CA; *Trustees of Henry Smith's Charity v Willson* [1983] QB 316, [1983] 1 All ER 73, CA); and see *RC Glaze Properties Ltd v Alabdinboni* (1992) 25 HLR 150, [1992] EGCS 141, CA; *Moreland Properties (UK) Ltd v Dhokia* [2003] EWCA Civ 1639, [2003] All ER (D) 348 (Oct), [2004] 1 P & CR D34 (statutory tenant who had abandoned possession for a number of years could not grant an effective sub-tenancy of the whole of the demised premises).

2 *Maley v Fearn* [1946] 2 All ER 583, CA, explaining and criticising dicta in *Norman v Simpson* as reported in (1945) 62 TLR 113, CA.

3 *Norman v Simpson* [1946] 1 KB 158, [1946] 1 All ER 74, CA; *Watson v Saunders-Roe Ltd* [1947] KB 437, CA (both cases where the head tenancy was determined by notice to quit and the tenant gave up possession); *Muspratt v Johnston* [1963] 2 QB 383, [1963] 2 All ER 339, CA (where the statutory head tenancy came to an end by decontrol under the Rent Act 1957 (repealed)).

4 *Oak Property Co Ltd v Chapman* [1947] KB 886, [1947] 2 All ER 1, CA.

5 See eg *Watson v Saunders-Roe Ltd* [1947] KB 437, CA.

6 *Muspratt v Johnston* [1963] 2 QB 383, [1963] 2 All ER 339, CA.

7 *Oak Property Co Ltd v Chapman* [1947] KB 886, [1947] 2 All ER 1, CA; *Carter v Green* [1950] 2 KB 76, [1950] 1 All ER 627, CA. A demand for rent sent to a statutory tenant will not effect a waiver: *Trustees of Henry Smith's Charity v Willson* [1983] QB 316, [1983] 1 All ER 73, CA. In contrast, acceptance of rent with knowledge of the breach operates as a waiver of a right to forfeit the lease as a matter of law: *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048, CA. See also PARA 616 ante.

8 See *Muspratt v Johnston* [1963] 2 QB 383 at 393, [1963] 2 All ER 339 at 341, CA, per Lord Denning MR.

9 *Metropolitan Properties Co Ltd v Cordery* (1979) 39 P & CR 10, CA. Cf *Chrisdell Ltd v Johnson* (1987) 283 Estates Gazette 1553, CA (failure to take proceedings where purported 'house-keeper' was in fact subtenant arose from landlord's fear that those proceedings might be unsuccessful; did not amount to waiver).

10 *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250, [1953] 2 All ER 1475, CA.

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### 979. Furnished subtenancies.

As a subtenant who is deemed by statute to become the direct tenant of the head landlord does so on the terms of his subtenancy<sup>1</sup>, it follows that the head landlord will be obliged to provide services or furniture if the intervening tenant had been so obliged by the terms of the subtenancy. If, however, certain conditions are fulfilled, the terms on which the subtenant is deemed<sup>2</sup> to become to tenant of the landlord<sup>3</sup> are not to include<sup>4</sup> any terms as to the provision by the landlord of furniture or services<sup>5</sup>. The conditions are that:

1937 (1) the statutorily protected tenancy<sup>6</sup> which is determined<sup>7</sup> was neither a protected nor a statutory furnished tenancy<sup>8</sup>; and



- 1938 (2) immediately before the determination of that statutorily protected tenancy, the subtenant<sup>9</sup> was the tenant under a protected or a statutory furnished tenancy; and
- 1939 (3) the landlord, within the period of six weeks beginning with the day on which the statutorily protected tenancy was determined, serves notice on the subtenant that these provisions are to apply to his tenancy or statutory tenancy<sup>10</sup>.

If the former mesne tenant leaves his furniture in the premises, it seems that the rent should be apportioned<sup>11</sup>.

1 See the Rent Act 1977 s 137(2); and PARA 976 ante.

2 Ie by virtue of *ibid* s 137(2): see PARA 976 ante.

3 For the meaning of 'landlord' see PARA 816 note 2 ante.

4 Ie in a case to which the Rent Act 1977 s 137(2) applies.

5 *Ibid* s 138(1).

6 For these purposes, 'statutorily protected tenancy' has the same meaning as it has for the purposes of *ibid* s 137(2) (see PARA 976 note 1 ante): s 138(3) (amended by the Housing Act 1980 s 152, Sch 25 para 51).

7 Ie as mentioned in the Rent Act 1977 s 137(2).

8 For the meaning of 'protected furnished tenancy' and 'statutory furnished tenancy' see PARA 849 note 12 ante. The question whether or not a tenancy is a furnished tenancy is now of very little significance as regards protection under the Rent Act 1977: see PARA 870 ante. As the definition involves a test of substantiality, a landlord will be unable to invoke s 138 (as amended) if there is some furniture but not enough.

9 Ie the subtenant referred to in *ibid* s 137(2).

10 *Ibid* s 138(2).

11 See *Salmon v Matthews* (1841) 8 M & W 827; *Charles Hoare & Co v Hove Bungalows Ltd* (1912) 56 Sol Jo 686, CA (apportionment between mortgagor and mortgagee).

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## **(7) APPLICATIONS TO THE COURT**

### **980. Ordinary jurisdiction of the county court.**

Apart from the Rent Act 1977<sup>1</sup> the county court has jurisdiction to hear and determine any claim founded on contract or tort<sup>2</sup>. In any proceedings in a county court the court may, with certain exceptions<sup>3</sup>, make any order which could be made by the High Court if the proceedings were in the High Court<sup>4</sup>. Any order made by a county court may be absolute or conditional, interim or final<sup>5</sup>. A county court has jurisdiction to hear and determine any claim for the recovery of land<sup>6</sup>, or in which the title to any hereditament comes in question<sup>7</sup>.

1 As to the jurisdiction conferred on the county court by the Rent Act 1977 see PARA 981 post.

2 See the County Courts Act 1984 s 15(1) (as amended); and COURTS vol 10 (Reissue) PARA 712. As to the exceptions to this rule see s 15(2) (as amended); and COURTS vol 10 (Reissue) PARA 712. As to the transfer of proceedings between the High Court and a county court see the County Courts Act 1984 ss 40-42 (as amended); and CIVIL PROCEDURE vol 11 (2009) PARA 69; and as to the power to reduce the costs which would otherwise have been awarded to a person who started proceedings in the High Court when they should have been started in the county court see the Senior Courts Act 1981 s 51(9)-(12) (as substituted; the Supreme Court Act 1981 prospectively renamed as the Senior Courts Act 1981 by the Constitutional Reform Act 2005 s 59(5), Sch 11 Pt 1 para 1); and CIVIL PROCEDURE vol 12 (2009) PARA 1748.

3 See the County Courts Act 1984 s 38(3)-(7) (as substituted and amended); the County Court Remedies Regulations 1991, SI 1991/1222 (as amended); and COURTS vol 10 (Reissue) PARA 711; CIVIL PROCEDURE vol 11 (2009) PARA 58. The County Court Remedies Regulations 1991, SI 1991/1222 (as amended) do not affect or modify the special Rent Act jurisdiction of the county court: see reg 3(1), (4)(a). As to the special Rent Act jurisdiction see PARA 981 post.

4 County Courts Act 1984 s 38(1), (3) (substituted by the Courts and Legal Services Act 1990 s 3); High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 3.

5 See the County Courts Act 1984 s 38(2) (as substituted: see note 4 supra); and COURTS vol 10 (Reissue) PARA 711.

6 See *ibid* s 21(1) (as amended); and COURTS vol 10 (Reissue) PARA 715.

7 See *ibid* s 21(2) (as amended); and COURTS vol 10 (Reissue) PARA 715.

## UPDATE

### 980 Ordinary jurisdiction of the county court

NOTE 2--2005 Act Sch 11 para 1 in force on 1 October 2009: SI 2009/1604.

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### 981. Special Rent Act jurisdiction of the county court.

A county court has jurisdiction, either in the course of any proceedings relating to a dwelling or on an application<sup>1</sup> made for the purpose by the landlord<sup>2</sup> or the tenant<sup>3</sup>, to determine any of the following questions:

- 1940 (1) as to whether a tenancy is a protected tenancy<sup>4</sup> or whether any person is a statutory tenant<sup>5</sup> of a dwelling house<sup>6</sup>;
- 1941 (2) as to the rent limit<sup>7</sup>;
- 1942 (3) as to the application to a contract of the provisions<sup>8</sup> relating to restricted contracts<sup>9</sup>;
- 1943 (4) as to whether a protected, statutory or regulated tenancy<sup>10</sup> is a protected, statutory or regulated furnished tenancy<sup>11</sup>;

or as to any matter which is or may become material for determining any such question<sup>12</sup>.

The county court shares with the High Court the power to vary the terms of statutory tenancies arising under the transitional provisions of the enactments<sup>13</sup> which gave protection to furnished tenants<sup>14</sup>, certain housing association tenants<sup>15</sup> and tenants of houses with a higher rateable value<sup>16</sup>.

- 1 As to the procedure on an application to a county court see generally CIVIL PROCEDURE.
- 2 For the meaning of 'landlord' see PARA 816 note 2 ante.
- 3 For the meaning of 'tenant' see PARA 816 note 3 ante.
- 4 For the meaning of 'protected tenancy' see PARA 818 ante.
- 5 For the meaning of 'statutory tenant' see PARA 831 ante.
- 6 Rent Act 1977 s 141(1)(a) (amended by the Housing Act 1980 s 152(3), Sch 26).
- 7 Rent Act 1977 s 141(1)(b). As to the rent limit see PARA 891 et seq ante. Under this provision the county court has jurisdiction to ascertain whether there is a registered rent and, if so, to apply it in accordance with the provisions of Pt III (ss 44-61) (as amended) (see PARA 891 et seq ante); but the court has no power to fix the registered rent or to alter it in any way: *Tingey v Sutton* [1984] 3 All ER 561, [1984] 1 WLR 1154, CA.
- 8 I.e. the provisions of the Rent Act 1977 Pt V (ss 77-85) (as amended) (see PARA 989 et seq post) and of ss 103-106 (as amended) (see PARA 1002 et seq post).
- 9 Ibid s 141(1)(d).
- 10 For the meaning of 'regulated tenancy' see PARA 854 ante.
- 11 Rent Act 1977 s 141(1)(e). For the meaning of 'protected, statutory or regulated furnished tenancy' see PARA 849 note 12 ante. See also PARA 870 ante, PARA 985 post.
- 12 Ibid s 141(1). The special Rent Act jurisdiction is unaffected by the restrictions on interim relief imposed by the County Court Remedies Regulations 1991, SI 1991/1222 (as amended): see reg 3(1), (4)(a); and PARA 980 ante.
- 13 I.e. the Rent Act 1974 (repealed), the Housing Act 1974 s 18 (repealed) and the Counter-Inflation Act 1974 s 14 (repealed). See PARA 946 ante.
- 14 See the Rent Act 1977 s 155(3), Sch 24 para 7(4).
- 15 See ibid s 92(4), Sch 14 para 1(8).
- 16 See ibid Sch 24 para 5(6).

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## **982. Exclusive jurisdiction of the county court.**

In addition to its ordinary and special Rent Act jurisdiction<sup>1</sup> the county court is given specific and exclusive jurisdiction in the following matters:

- 1944 (1) to decide between competing claims of members of the tenant's family to succeed to a statutory tenancy<sup>2</sup>;
- 1945 (2) to apportion rates<sup>3</sup> and rateable value<sup>4</sup>;
- 1946 (3) to deal with applications for leave to distrain for rent of a dwelling house let as a protected tenancy or subject to a statutory tenancy<sup>5</sup>;
- 1947 (4) to modify rights relating to shared accommodation<sup>6</sup>;
- 1948 (5) to determine any adjustment in the recoverable rent with respect to services or furniture<sup>7</sup>;

- 1949 (6) to empower a landlord to carry out works to provide standard amenities<sup>8</sup>;
- 1950 (7) to reduce the period at the end of which a notice to quit extended by a rent tribunal is to take effect<sup>9</sup>;
- 1951 (8) to stay or suspend the execution of a possession order<sup>10</sup>.

The apportionment by a county court of a rateable value is final and no appeal lies from it<sup>11</sup>.

Furthermore, the county court has an exclusive jurisdiction to make orders for possession of premises within its current jurisdiction<sup>12</sup> in which any person lawfully residing there at the end of the contractual period is still living, in the following circumstances:

- 1952 (a) where the premises were let as a dwelling under a tenancy which was not a statutorily protected tenancy nor an excluded tenancy<sup>13</sup>; or
- 1953 (b) where a person was granted exclusive possession of a dwelling as a licensee under the terms of his employment<sup>14</sup>; or
- 1954 (c) where the owner's right to possession arises on the death of the statutory tenant<sup>15</sup>.

1 See PARAS 980-981 ante.

2 See the Rent Act 1977 s 2(1)(a), Sch 1 para 3 (as amended); and PARA 843 ante.

3 See *ibid* ss 61(2), 75(2); and PARA 895 ante. As to the abolition of domestic rates see PARA 521 ante.

4 See *ibid* s 25(2); and PARA 859 ante. As to the certification of a rateable value in certain cases see PARA 523 ante.

5 See *ibid* s 147(1); and PARA 908 ante.

6 See *ibid* s 22(6); and PARA 826 ante.

7 See *ibid* s 47(2); and PARA 897 ante.

8 See *ibid* s 116(2) (as amended); and PARA 839 ante.

9 See *ibid* s 106(4); and PARA 1007 post.

10 See *ibid* s 100(2), (5); and PARA 972 ante; s 106A(1), (2) (as added) and PARA 1008 post.

11 See *ibid* s 25(2); and PARA 859 ante. Cf *Field v Gover* [1944] KB 200 at 207, sub nom *Gover v Field* [1944] 1 All ER 151 at 154, CA.

12 See PARA 980 ante. The jurisdiction to order possession in cases where it is unlawful for the owner to enforce his right to recover possession otherwise than by proceedings is made exclusive to the county court in the case of such premises by the definition of 'the court' in the Protection from Eviction Act 1977 s 9(1): see PARA 653 note 2 ante.

13 *Ibid* s 3(1) (amended by the Housing Act 1988 s 30). For the meaning of 'excluded tenancy' see PARA 215 ante; and for the meaning of 'statutorily protected tenancy' see PARA 653 note 5 ante. Most of the tenancies to which this provision will apply are restricted contracts and other tenancies granted by exempt bodies: see PARA 884 et seq ante, PARA 985 et seq post.

14 See the Protection from Eviction Act 1977 s 8(2) (cited in PARA 215 note 2 ante), which deems a service licensee to have been a tenant for the purposes of Pt I (ss 1-4) (as amended).

15 *Ibid* s 3(3). For the meaning of 'the owner' see PARA 653 note 10 ante. See also s 3(2A)-(2C) (as added); and PARA 653 ante.

PARAS 1386-2000)/16. TENANCIES UNDER THE RENT ACT 1977/(7) APPLICATIONS TO THE COURT/983. Court's powers in relation to rent book.

### **983. Court's powers in relation to rent book.**

Where, in any proceedings, the recoverable rent<sup>1</sup> of any dwelling house subject to a regulated tenancy<sup>2</sup> is determined by a court, the court may on the application of the tenant<sup>3</sup>, whether in those or any subsequent proceedings, call for the production of the rent book<sup>4</sup> or any similar document relating to the dwelling house and may direct the district judge or clerk of the court to correct any entries in the rent book which show or purport to show that the tenant is in arrears in respect of any sum which the court has determined to be irrecoverable<sup>5</sup>.

1 For the meaning of 'recoverable rent' see PARA 895 note 6 ante.

2 For the meaning of 'regulated tenancy' see PARA 854 ante.

3 For the meaning of 'tenant' see PARA 816 note 3 ante.

4 As to the landlord's duty to provide a rent book see PARA 253 ante.

5 Rent Act 1977 s 58; Courts and Legal Services Act 1990 s 74(1), (3).

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### **984. Appeals from county courts.**

The decision of the county court as to the apportionment of a rateable value is final and no appeal lies from it<sup>1</sup>. If any party to other proceedings in a county court is dissatisfied with the determination of the judge, he may, subject to certain statutory restrictions<sup>2</sup>, appeal from it to a senior court<sup>3</sup>. No appeal lies, however, on a question of fact in proceedings in which either the claimant or defendant is claiming the possession of any premises if, by virtue of the statutory provisions which restrict the making or giving of orders for the recovery of possession of dwelling houses<sup>4</sup>, the court can only grant possession if it is reasonable to do so<sup>5</sup>.

The Access to Justice Act 1999 (Destination of Appeals) Order 2000<sup>6</sup> now provides that in most cases an appeal from a county court lies to the High Court<sup>7</sup>. The procedure on appeals is governed by Part 52 of the Civil Procedure Rules<sup>8</sup> and is discussed elsewhere in this work<sup>9</sup>.

1 See PARA 982 ante.

2 I.e. subject to the provisions of the County Courts Act 1984 s 77 (as amended) and to any order made under the Access to Justice Act 1999 s 56(1); and in such manner and subject to such conditions as may be provided by Civil Procedure Rules: County Courts Act 1984 s 77(1) (amended by the Civil Procedure Act 1997 s 10, Sch 2 para 2(7); and by the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, art 8).

3 The County Courts Act 1984 s 77(1) (as amended: see note 2 supra) provides that there is a right of appeal to the Court of Appeal (see CIVIL PROCEDURE vol 12 (2009) PARA 1679); but see the text and notes 6-9 infra.

4 I.e. the Landlord and Tenant Act 1954 s 13(4) (see PARA 1228 post); the Rent (Agriculture) Act 1976 s 6, Sch 4, Cases III-IX (see PARA 1172 et seq post); the Rent Act 1977 s 98 (as amended) as it applies to Sch 15 Pt I, Cases 1-6 (as amended) (see PARAS 949-954 ante), Sch 15 Pt I, Case 8 (see PARA 955 ante), Sch 15 Pt I, Case 9 (as amended) (see PARA 956 ante) or s 98 (as amended) as extended or applied by any other enactment; s 99

as it applies to Sch 15 Pt I, Cases 1-6, 9 (as amended); the Housing Act 1985 s 84(2)(a) (see PARA 1354 post); the Housing Act 1988 s 7 (as amended) (see PARAS 1100-1101, 1108 post) as it applies to the grounds in Sch 2 Pt II (Grounds 9-16) (as amended) (see PARA 1118 et seq post); the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13(4) (see PARA 1264 post); or any other enactment.

5 County Courts Act 1984 s 77(6) (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 57(3); the Housing Act 1988 s 140(1), Sch 17 para 35(2); the Local Government and Housing Act 1989 s 194(1), Sch 11 para 60).

If an order for possession is made and enforced but is later set aside on appeal, the court has a discretion whether to order restitution of possession or the payment of compensation by the landlord: *Pollock v Kumar* (1976) 120 Sol Jo 589, CA, applying *Tanner v Tanner* [1975] 3 All ER 776, [1975] 1 WLR 1346, CA. If the premises have been relet, the latter alternative is likely to be preferred: cf *Rhodes Trust v Khan* [1980] 1 EGLR 64, (1979) 253 Estates Gazette 689, CA (appeal against an order setting aside an order for possession allowed on the ground that the premises had been sold to a third person).

6 See the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, (as amended): see CIVIL PROCEDURE vol 12 (2009) PARA 1679.

7 See *ibid* arts 3, 4 (as amended); and CIVIL PROCEDURE vol 12 (2009) PARA 1679.

8 See CPR Pt 52; *Practice Direction--Appeals* PD 52; and CIVIL PROCEDURE vol 12 (2009) PARA 1679.

9 See CIVIL PROCEDURE vol 12 (2009) PARA 1657 et seq.

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## **17. RESTRICTED CONTRACTS AND PROTECTED SHORTHOLDS**

### **(1) RESTRICTED CONTRACTS**

#### **(i) Introduction**

##### **985. Origin of restricted contracts.**

Before 14 August 1974 the general provisions of the Rent Restrictions Acts did not apply to a dwelling house bona fide let at a rent which included to a sufficient degree payments in respect of board, attendance or the use of furniture<sup>1</sup>. Furnished tenancies were subject to a separate system of control through rent tribunals introduced by the Furnished Houses (Rent Control) Act 1946 and eventually consolidated in Part VI of the Rent Act 1968<sup>2</sup>. Such tenancies were thereafter known as 'Part VI contracts'<sup>3</sup>.

The Rent Act 1974 enabled tenancies of fully furnished premises to be protected<sup>4</sup>, thus greatly reducing the number of Part VI contracts, but it also introduced a new category of lettings incapable of being protected, namely lettings by resident landlords<sup>5</sup>, and applied the provisions of Part VI of the Rent Act 1968 to them<sup>6</sup>. The existing law was then consolidated in the Rent Act 1977, which renamed Part VI contracts 'restricted contracts'<sup>7</sup>.

No new restricted contracts can be created on or after 15 January 1989<sup>8</sup> save in certain transitional cases<sup>9</sup> but existing restricting contracts are unaffected<sup>10</sup>. There is no equivalent system of protection under the Housing Act 1988<sup>11</sup>.

1 See PARAS 869-870 ante.

- 2 See the Rent Act 1968 Pt VI (ss 68-84) (repealed).
- 3 Ibid s 70(6) (repealed).
- 4 See the Rent Act 1974 s 1 (repealed); and PARA 870 ante.
- 5 See ibid s 2(3), Sch 2 Pt I (repealed). As to resident landlords see PARAS 875-879 ante.
- 6 See ibid s 2(4), Sch 2 para 4 (repealed).
- 7 Rent Act 1977 s 19(1) (repealed with savings by the Housing Act 1988 s 140(2), Sch 18 para 1).
- 8 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).
- 9 See ibid s 36(1); and PARA 1014 post.
- 10 See PARA 1014 post.
- 11 See PARAS 1019, 1035 post.

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#### **986. Meaning of 'restricted contract'.**

Subject to certain exclusions<sup>1</sup>, a restricted contract is a contract entered into before 15 January 1989<sup>2</sup> and either:

- 1955 (1) a contract whereby one person grants to another person, in consideration of a rent which includes payment for the use of furniture<sup>3</sup> or services<sup>4</sup>, the right to occupy a dwelling<sup>5</sup> as a residence<sup>6</sup>, whether or not, in the case of a contract relating to a dwelling consisting of only part of a house, the lessee<sup>7</sup> is entitled, in addition to exclusive occupation of that part, to the use in common with any other person of other rooms or accommodation in the house<sup>8</sup>; or
- 1956 (2) a contract under which:
  - 14
  14. (a) a tenant<sup>9</sup> has the exclusive occupation of any accommodation;
  15. (b) the terms on which he holds the accommodation include the use of other accommodation in common with his landlord<sup>10</sup> or in common with his landlord and other persons; and
  16. (c) by reason only of the circumstances mentioned in head (b) above, or by reason of those circumstances and the fact that the landlord resides in another part of the building<sup>11</sup>, the accommodation referred to in head (a) above is not a dwelling house let<sup>12</sup> on a protected tenancy<sup>13</sup>,
  - 15
  - 1957 notwithstanding that the rent does not include payment for the use of furniture or for services<sup>14</sup>.

Additionally, if and so long as a tenancy entered into before 15 January 1989 is precluded from being a protected tenancy by reason only of the resident landlord exemption<sup>15</sup>, it is treated as a restricted contract notwithstanding that the rent may not include payment for the use of furniture or for services<sup>16</sup>.

As a contract is not a restricted contract if it creates a regulated tenancy<sup>17</sup> and furnished tenancies are no longer precluded from being protected<sup>18</sup>, head (1) above will generally only apply to licences<sup>19</sup> and to tenancies which are excluded from being protected tenancies because board or substantial attendance is provided<sup>20</sup>. For a contract to be a restricted contract exclusive occupation of at least one room is necessary<sup>21</sup> and there must, in a case falling within head (1) above, be a contractual right to the services or the use of the furniture<sup>22</sup>.

1 See PARA 987 post.

2 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). No new restricted contracts can be created after that date except in certain transitional cases: see PARA 1014 post.

3 For the meaning of 'furniture' see PARA 872 ante. See also *R v Blackpool Rent Tribunal, ex p Ashton* [1948] 2 KB 277, [1948] 1 All ER 900, DC (electric clock and curtains de minimis; gas cooker and water heater not furniture).

4 For these purposes, 'services' includes attendance, the provision of heating or lighting, the supply of hot water and any other privilege or facility connected with the occupancy of a dwelling, other than a privilege or facility requisite for the purposes of access, cold water supply or sanitary accommodation: Rent Act 1977 s 19(8) (s 19 repealed with savings by the Housing Act 1988 s 140(2), Sch 18 para 1). An identical definition appears in the Rent Act 1977 s 85(1) in respect of Pt V (ss 77-85) (as amended): see PARA 989 et seq post. Cf the services considered in *R v Paddington North and St Marylebone Rent Tribunal, ex p Perry* [1956] 1 QB 229 at 231, [1955] 3 All ER 391 at 393, DC (decided under the Housing Repairs and Rents Act 1954 s 40 (repealed), which did not contain this definition).

5 For these purposes, 'dwelling' means a house or part of a house: Rent Act 1977 s 19(8) (repealed with savings: see note 4 supra). Identical definitions appear in ss 85(1), 107(1) in respect of Pt V (as amended) (see PARA 989 et seq post) and Pt VII (ss 98-107) (as amended) (see PARA 942 et seq ante, PARA 1002 et seq post). A hotel can be a house and a hotel room a dwelling for these purposes: *Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA. The same is true of a furnished room in a hostel: *R v South Middlesex Rent Tribunal, ex p Beswick* (1976) 32 P & CR 67, DC. A caravan is a house for these purposes provided the occupier is to live in it in a particular field (*R v Guildford Area Rent Tribunal, ex p Grubey* [1951] EGD 286, DC), but a houseboat is not (*R v Wolverhampton and District Rent Tribunal* as reported in (1949) 113 JP Jo 376). As to the separate statutory protection for occupiers of mobile homes see PARA 1267 et seq post.

6 Rent Act 1977 s 19(1), (2) (repealed with savings: see note 4 supra). Occupation of a hotel room for a temporary visit is not occupation as a residence (*R v Bethnal Green and Paddington Rent Tribunals, ex p Rowton Houses Ltd* (1947) 91 Sol Jo 255, DC), but long-term occupation is (*Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA). It is not necessary that the contract should expressly permit occupation as a residence; it is enough if the lessee is within his rights so to occupy the premises: *R v York, Harrogate, Ripon and Northallerton Areas Rent Tribunal, ex p Ingle* [1954] 1 QB 456, [1954] 1 All ER 440, DC, applied in *Luganda v Service Hotels Ltd* supra. No right to occupy a dwelling for a holiday is to be treated as a right to occupy it as a residence for these purposes: Rent Act 1977 s 19(7) (as so repealed).

7 For these purposes, 'lessee' means the person to whom is granted, under a restricted contract, the right to occupy the dwelling in question as a residence and any person directly or indirectly deriving title from the grantee: *ibid* s 19(8) (repealed with savings: see note 4 supra). Identical definitions appear in ss 85(1), 107(1) in respect of Pt V (as amended) and Pt VII (as amended).

8 *Ibid* s 19(6) (repealed with savings: see note 4 supra).

9 For the meaning of 'tenant' see PARA 816 note 3 ante.

10 For the meaning of 'landlord' see PARA 816 note 2 ante. To come within the Rent Act 1977 s 21 (repealed with savings by the Housing Act 1988 Sch 18 para 1) (see head (2) in the text), the terms must include clear words reserving the right to the landlord to live on the premises sharing accommodation with the tenant; but it is sufficient for the landlord to reserve to himself that express right and he need not actually exercise it nor have a clear intention of doing so, so long as the possibility is genuinely within his contemplation at the time of the tenancy agreement: *Gray v Brown* (1992) 25 HLR 144, [1993] 1 EGLR 119, CA.

11 I.e. by reason of the operation of the Rent Act 1977 s 12 (as amended): see PARA 875 ante.

12 For the meaning of 'let' see PARA 820 ante.

13 For the meaning of 'protected tenancy' see PARA 818 ante.



14 Rent Act 1977 s 21 (repealed with savings: see note 10 supra). See also *Baldock v Murray* (1980) 257 Estates Gazette 281, CA.

15 See note 11 supra.

16 Rent Act 1977 s 20 (repealed with savings by the Housing Act 1988 Sch 18 para 1). As to the application of the Rent Act 1977 s 20 (as so repealed) to a tenancy granted before 14 August 1974 see PARA 879 note 6 ante.

17 Ibid s 19(5)(a) (repealed with savings: see note 4 supra). For the meaning of 'regulated tenancy' see PARA 854 ante.

18 See PARA 986 ante.

19 See eg *R v Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal, ex p Parikh* [1957] 1 All ER 352, [1957] 1 WLR 410, DC (lodger); *Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA (student living in hotel room); *R v South Middlesex Rent Tribunal, ex p Beswick* (1976) 32 P & CR 67, DC (hostel room); *Marchant v Charters* [1977] 3 All ER 918, [1977] 1 WLR 1181, CA (lodger).

20 See PARAS 869-873 ante.

21 *R v Battersea, Wandsworth, Mitcham and Wimbledon Rent Tribunal, ex p Parikh* [1957] 1 All ER 352, [1957] 1 WLR 410, DC.

22 *R v Hampstead and St Pancras Furnished Houses Rent Tribunal, ex p Ascot Lodge Ltd* [1947] KB 973, [1947] 2 All ER 12, DC; *R v Croydon and District Rent Tribunal, ex p Langford Property Co Ltd* [1948] 1 KB 60, DC; *R v Paddington and St Marylebone Rent Tribunal, ex p Bedrock Investments Ltd* [1947] KB 984, [1947] 2 All ER 15 (affd on other grounds [1948] 2 KB 413, [1948] 2 All ER 528, CA).

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### **987. Contracts excluded from being restricted.**

A contract entered into before 15 January 1989<sup>1</sup> is not a restricted contract<sup>2</sup> in the following circumstances:

- 1958 (1) if the rateable value<sup>3</sup> in relation to the dwelling<sup>4</sup> on the appropriate day<sup>5</sup> exceeded the specified limits for its Class<sup>6</sup>; or
- 1959 (2) if the contract creates a regulated tenancy<sup>7</sup>; or
- 1960 (3) if under the contract the interest of the lessor<sup>8</sup> belongs to a local authority or one of certain other bodies<sup>9</sup>; or
- 1961 (4) if under the contract the interest of the lessor belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department<sup>10</sup>; or
- 1962 (5) if the contract is for the letting of any premises at a rent which includes payment in respect of board<sup>11</sup> if the value of the board to the lessee<sup>12</sup> forms a substantial<sup>13</sup> proportion of the whole rent<sup>14</sup>; or
- 1963 (6) if it creates a qualifying shared ownership lease<sup>15</sup>; or
- 1964 (7) if it is a protected occupancy<sup>16</sup>; or
- 1965 (8) if it creates a tenancy<sup>17</sup> to which the special regime for housing association tenancies<sup>18</sup> applies<sup>19</sup>; or
- 1966 (9) if it creates an old-style<sup>20</sup> assured tenancy<sup>21</sup>; or
- 1967 (10) if immediately before the revocation of the relevant Defence Regulation<sup>22</sup>, the accommodation was let in accordance with terms registered for the purposes of the relevant provision of that regulation, so long as that letting continues<sup>23</sup>; or

- 1968 (11) where the dwelling belongs to a benefice of the Church of England for the occupation of the incumbent<sup>24</sup>; or
- 1969 (12) where the contract only confers a right to occupy a dwelling for a holiday<sup>25</sup>.

The Secretary of State<sup>26</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>27</sup> may by order provide that, as from such date as may be specified in the order, the restricted contract provisions<sup>28</sup> are not to apply to a dwelling the rateable value of which on such day as may be specified in the order exceeds such amount as may be so specified<sup>29</sup>.

1 le the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). No new restricted contracts can be created after that date except in certain transitional cases: see PARA 1014 post.

2 For the meaning of 'restricted contract' see PARA 986 ante.

3 For the meaning of 'rateable value' see PARA 859 ante. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

4 For the meaning of 'dwelling' see PARA 986 note 5 ante.

5 For the meaning of 'the appropriate day' see PARA 859 ante.

6 Rent Act 1977 s 19(3) (s 19 repealed with savings by the Housing Act 1988 s 140(2), Sch 18 para 1). Where alternative rateable values are mentioned, the higher applies if the dwelling is in Greater London and the lower applies if it is elsewhere: Rent Act 1977 s 19(4) (as so repealed with savings). The specified rateable values and Classes are: (1) Class D, if the appropriate day in relation to the dwelling house fell on or after 1 April 1973 and the dwelling on the appropriate day had a rateable value exceeding £1,500 or £750; (2) Class E, if the appropriate day in relation to the dwelling fell before 1 April 1973 and the dwelling had a rateable value (a) on the appropriate day exceeding £400 or £200; and (b) on 1 April 1973 exceeding £1,500 or £750: s 19(4) (as so repealed). As to the significance of 1 April 1973 see PARA 855 ante. As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

7 Ibid s 19(5)(a) (repealed with savings: see note 6 supra). See further PARA 986 ante; and *Baldock v Murray* (1980) 257 Estates Gazette 281, CA. For the meaning of 'regulated tenancy' see PARA 854 ante.

8 For these purposes, 'lessor' means the person who, under a restricted contract, grants to another the right to occupy the dwelling in question as a residence and any person directly or indirectly deriving title from the grantor: Rent Act 1977 s 19(8) (repealed with savings: see note 6 supra). Identical definitions appear in ss 85(1), 107(1) in respect of Pt V (ss 77-85) (as amended) (see PARA 989 et seq post) and Pt VII (ss 98-107) (as amended) (see PARA 942 et seq ante, PARA 1002 et seq post).

9 Ibid s 19(5)(aa) (added by the Housing Act 1980 s 152(1), Sch 25 para 36; repealed with savings (see note 6 supra)). The local authorities and bodies concerned are those mentioned in the Rent Act 1977 s 14 (as amended) (see PARA 884 ante): s 19(5)(aa) (as so added and repealed).

10 Ibid s 19(5)(b) (amended by the Housing Act 1980 s 73(2); repealed with savings (see note 6 supra)). An interest belonging to Her Majesty in right of the Crown does not, however, prevent a contract from being a restricted contract if the interest is under the management of the Crown Estate Commissioners: s 19(5) (as so amended and repealed). Cf s 13 (as substituted) (affecting protected tenancies); and PARA 883 ante. As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

11 For the meaning of 'board' see PARA 871 ante.

12 For the meaning of 'lessee' see PARA 986 note 7 ante.

13 For the meaning of 'substantial portion' see PARA 873 ante.

14 Rent Act 1977 s 19(5)(c) (repealed with savings: see note 6 supra).

15 Ibid s 19(5)(cc) (added by the Housing and Planning Act 1986 s 18, Sch 4 para 1(3); repealed with savings (see note 6 supra)). For the meaning of 'qualifying shared ownership lease' see the Rent Act 1977 s 5A (as added; applied by s 19(5)(cc) (as so added and repealed)); and PARA 863 ante; and as to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

- 16 Ibid s 19(5)(d) (repealed with savings: see note 6 supra). For the meaning of 'protected occupancy' see PARAS 1144-1145 post.
- 17 Ie a tenancy to which ibid Pt VI (ss 86-97) (as amended) applies: see PARAS 885-888 ante.
- 18 As to the phasing out of that regime see PARA 1013 post.
- 19 Rent Act 1977 s 19(5)(e) (repealed with savings: see note 6 supra).
- 20 Ie an assured tenancy within the meaning of the Housing Act 1980 s 56 (repealed with savings): see PARA 890 ante.
- 21 Rent Act 1977 s 19(5)(f) (added by the Housing and Planning Act 1986 s 13(1); repealed with savings (see note 6 supra)).
- 22 Ie the Defence (General) Regulations 1939, SR & O 1939/927, reg 68CB, revoked with effect from 7 December 1954 by the Defence Regulations (No 10) Order 1954, SI 1954/1558.
- 23 Rent Act 1977 s 19(6) (repealed with savings: see note 6 supra); s 155(3), Sch 24 para 17.
- 24 This is for the same reasons that prevent tenancies of parsonage houses being protected tenancies: see eg *Bishop of Gloucester v Cunningham* [1943] KB 101, [1943] 1 All ER 61, CA; and PARA 882 ante.
- 25 Rent Act 1977 s 19(7) (repealed with savings: see note 6 supra).
- 26 As to the Secretary of State see PARA 27 note 3 ante.
- 27 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.
- 28 Ie the Rent Act 1977 s 19 (repealed with savings: see note 6 supra): see the text and notes 1-25 supra; and PARA 986 ante.
- 29 Rent Act 1977 s 144(1). Such an order may be made so as to relate to the whole of England or Wales or to a specified area, and so as to apply generally or only to, or except to, specified classes of dwellings: s 144(2) (a). The order may contain such transitional provisions as appear to the Secretary of State or the Assembly or minister to be desirable: s 144(2)(b). The power to make such an order is exercisable by statutory instrument and no such order made by the Secretary of State is to have effect unless approved by a resolution of each House of Parliament: s 144(3). At the date at which this title states the law, no such order had been made. As to the making of orders generally see PARA 815 ante.

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## **(ii) Control of Rent**

### **A. POWERS OF RENT TRIBUNALS**

#### **988. Rent tribunals.**

Rent tribunals as constituted for the purposes of the Rent Act 1977<sup>1</sup> have been abolished<sup>2</sup>; and the functions conferred by that Act on rent tribunals are now carried out by rent assessment committees<sup>3</sup>. When constituted to carry out these functions, a rent assessment committee is, however, known as a 'rent tribunal'<sup>4</sup>.

<sup>1</sup> See the Rent Act 1977 s 76, Sch 13 (repealed).

2 Housing Act 1980 s 72(1).

3 Ibid s 72(2). As to rent assessment committees generally see PARA 910 ante; and as to the functions of such committees in relation to restricted contracts see PARA 989 et seq post.

4 Ibid s 72(3).

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### 989. Reference of contract to rent tribunal.

Either the lessor<sup>1</sup> or the lessee<sup>2</sup> under a restricted contract<sup>3</sup> may refer the contract to the rent tribunal<sup>4</sup>; but no other person, unless authorised to act as an agent for one of the above, can validly make such a reference<sup>5</sup>. Where there are joint tenants, the reference must be made by or on behalf of all of them<sup>6</sup>. It is essential that there is a subsisting contract at the date of the reference<sup>7</sup>, although not at the date of the hearing<sup>8</sup>.

It is not intended that these provisions should be used to create a general rent-fixing tribunal throughout a district<sup>9</sup>.

1 For the meaning of 'lessor' see PARA 987 note 8 ante.

2 For the meaning of 'lessee' see PARA 986 note 7 ante. It follows from this definition and that of 'lessor' (see note 1 supra) that a reference may be made by a licensee and by an assignee (revsg *R v Tottenham and District Rent Tribunal, ex p Northfield (Highgate) Ltd* [1957] 1 QB 103, [1956] 2 All ER 863, DC). A person allowed to stay on paying rent 'without prejudice to the landlord's right of action' after the expiry of a notice to quit can validly make a reference to a rent tribunal: *R v South-West London Rent Tribunal, ex p Gravesande* (1966) 200 Estates Gazette 1092, DC.

3 For the meaning of 'restricted contract' see PARA 986 ante.

4 Rent Act 1977 s 77(1) (amended by the Housing Act 1980 s 152(3), Sch 26; the Housing Act 1988 s 140, Sch 17 para 23, Sch 18). 'Rent tribunal' is to be construed in accordance with the Housing Act 1980 s 72 (see PARA 988 ante); Rent Act 1977 s 85(1) (amended by the Housing Act 1980 s 152(1), Sch 25 para 45(b)). It thus means a rent assessment committee. For the procedure on such a reference see PARA 994 post.

Before 1 April 1994 the lessor or the lessee might also refer the contract to the rent tribunal for consideration of an increased rent where (1) the lessor or any person having any title superior to that of the lessor was liable to pay council tax in respect of a hereditament which included the dwelling to which the restricted contract related; (2) under the terms of the restricted contract, or an agreement collateral to the contract, the lessee was liable to make payments to the lessor in respect of council tax; (3) either (a) a rent had been entered in the register under the Rent Act 1977 s 79 (as amended) (see PARA 996 post) before 1 April 1993, the period of two years beginning on the date on which the rent was last considered by the tribunal had not yet expired and since that date there had been no change in circumstances of the kind mentioned in s 80(2)(a)-(d) (see PARA 1000 post), other than circumstances relating to council tax, as to make the registered rent no longer a reasonable rent; or (b) a reference had been made under s 77 (as amended) or s 80 (as amended) before 1 April 1993 but had not been disposed of before that date; and (4) no previous such reference in relation to the dwelling had been made to the rent tribunal: see s 80A(1)-(4) (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 5). As to the rent tribunal's powers on such a reference see the Rent Act 1977 s 80A(5), (6) (as so added).

5 *R v Twickenham Rent Tribunal, ex p Dunn* [1953] 2 QB 425, [1953] 2 All ER 734, DC (deserted wife of a tenant held not to have implied authority to refer a contract on his behalf); *R v Kensington and Chelsea Rent Tribunal, ex p Barrett* (1977) 245 Estates Gazette 397, DC.

6 *Turley v Panton* (1975) 29 P & CR 397, DC.

7 *R v East London Rent Tribunal, ex p Schryer* [1970] 1 QB 686, [1969] 3 All ER 447, DC.

8 *R v West London Rent Tribunal, ex p Napper* [1967] 1 QB 169, [1965] 3 All ER 734, DC.

9 *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666 at 680, [1949] 1 All ER 720 at 726, DC, per Lord Goddard; explained and approved in *R v Barnet and Camden Rent Tribunal, ex p Frey Investments Ltd* [1972] 2 QB 342 at 353, [1971] 3 All ER 759 at 767, DC, per O'Connor J, and [1972] 2 QB 342 at 363, [1972] 1 All ER 1185 at 1193-1194, CA, per Salmon LJ.

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### 990. Tribunal's power to require information.

Where a restricted contract<sup>1</sup> is referred to a rent tribunal<sup>2</sup>, the tribunal may by notice in writing served on the lessor<sup>3</sup> require him to give to it within the period specified in the notice, not being less than seven days from the date of service of the notice, such information as it may reasonably require regarding such of the prescribed particulars relating to the contract as are specified in the notice<sup>4</sup>. The prescribed particulars comprise:

- 1970 (1) the name of the lessee;
- 1971 (2) a specification of the dwelling to which the contract relates;
- 1972 (3) accommodation occupied or used by the lessee:
- 16
- 17. (a) exclusively;
- 18. (b) in common with the lessor;
- 19. (c) in common with persons other than the lessor;
- 17
- 1973 (4) furniture provided by the lessor for the use of the lessee;
- 1974 (5) services provided by the lessor for the use of the lessee;
- 1975 (6) the rateable value<sup>5</sup> of the accommodation occupied by the lessee, where this has been separately assessed, or, where it has not, the rateable value of the dwelling of which the accommodation forms part;
- 1976 (7) responsibility for payment of the rates and the council tax for the accommodation occupied by the lessee;
- 1977 (8) payments contracted to be made by the lessee to the lessor and, if separate payments are made in respect of occupation, furniture and services, the separate payments in respect of each;
- 1978 (9) whether board is supplied and, if so, the nature and amount of the board;
- 1979 (10) the date the occupation of the accommodation began<sup>6</sup>.

If the lessor fails without reasonable cause to comply with the provisions of the notice within the specified period, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>7</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 ie under the Rent Act 1977 s 77(1) (as amended): see PARA 989 ante. For the meaning of 'rent tribunal' see PARA 988 ante.

3 For the meaning of 'lessor' see PARA 987 note 8 ante.

4 Rent Act 1977 s 77(2).

5 As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

6 Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 7, Sch 3 (amended by SI 1993/655).

7 Rent Act 1977 s 77(3) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings for such an offence may not be instituted otherwise than by the local authority: s 77(4). For the meaning of 'local authority' for these purposes see PARA 816 note 11 ante.

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### **991. Consideration of the reference.**

Where a restricted contract<sup>1</sup> is referred to a rent tribunal<sup>2</sup>, the tribunal must consider the reference unless it is withdrawn by the party or authority who made it before the tribunal has entered upon consideration of it<sup>3</sup>, even though the lessee has left and surrendered his tenancy before the hearing<sup>4</sup>. Withdrawal of a reference need not be in any particular form<sup>5</sup>, and becomes effective within a reasonable time of its reaching the office of the tribunal during office hours. The tribunal enters upon consideration of a reference when all of its members have started to read the papers<sup>6</sup>. The tribunal must make such inquiry as it thinks fit and must give to each party to the contract<sup>7</sup> and, if the general management of the dwelling<sup>8</sup> is vested in and exercisable by a housing authority<sup>9</sup>, to that authority, an opportunity of being heard or, at his or its option, of submitting representations in writing<sup>10</sup>. The tribunal must correctly identify both parties to the contract<sup>11</sup>. If one party takes a point which will take the other by surprise, the other should be given a fair opportunity to deal with it<sup>12</sup>.

In any case where the lessor<sup>13</sup>, or any person having any title superior to that of the lessor, is liable<sup>14</sup> to pay council tax in respect of a hereditament<sup>15</sup> ('the relevant hereditament') of which the dwelling forms part, the tribunal must have regard to the amount of council tax which, as at the date on which the reference to the tribunal was made, was set by the billing authority<sup>16</sup> for the financial year in which that reference was made and for the category of dwelling<sup>17</sup> within which the relevant hereditament fell on that date. Any discount or other reduction affecting the amount of council tax payable must, however, be disregarded<sup>18</sup>.

After taking the above steps, the tribunal must:

- 1980 (1) approve the rent<sup>19</sup> payable under the contract<sup>20</sup>; or
- 1981 (2) reduce or increase it to such sum as the tribunal may, in all the circumstances, think reasonable<sup>21</sup>; or
- 1982 (3) if it thinks fit in all the circumstances, dismiss the reference<sup>22</sup>.

The effect of a reduction or increase by the tribunal is to alter the existing contract so that the new rent becomes payable without any notice of increase or notice to quit being served<sup>23</sup>. The effect of a dismissal of the reference instead of the approval of the rent is that it avoids a rent being registered<sup>24</sup>. An approval, reduction or increase may be limited to rent payable in respect of a particular period<sup>25</sup>. On a reference of a restricted contract relating to a dwelling for which a rent is already registered under the provisions relating to regulated tenancies<sup>26</sup>, the tribunal

may not reduce the rent below the amount which would be recoverable under a regulated tenancy<sup>27</sup>.

The tribunal must notify the parties of its decision<sup>28</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 For the meaning of 'rent tribunal' see PARA 988 ante.

3 Rent Act 1977 s 78(1). The tribunal has jurisdiction only so long as the application subsists: *R v Hampstead and St Pancras Rent Tribunal, ex p Goodman* [1951] 1 KB 541 at 545, [1951] 1 All ER 170 at 172, DC (decided under the Landlord and Tenant (Rent Control) Act 1949 s 1 (repealed) that a reference may be withdrawn at any time before the hearing or, it seems, the decision). The terms of the Rent Act 1977 s 78(1) and the cases cited in notes 4, 6 infra make it clear that there can be no withdrawal once the tribunal members have started to read the papers.

4 *R v West London Rent Tribunal, ex p Napper* [1967] 1 QB 169, [1965] 3 All ER 734, DC.

5 *R v Fulham Rent Tribunal, ex p Roberts* [1953] CLY 3123.

6 *R v Tottenham Districts Rent Tribunal, ex p Fryer Bros (Properties) Ltd* [1971] 2 QB 681, [1971] 3 All ER 563, CA.

7 For these purposes, references to a party to a contract include references to any person directly or indirectly deriving title from him: Rent Act 1977 s 85(2). A superior landlord has no standing, even if the subletting is unlawful: *Hampstead and St Pancras Rent Tribunal v Perseus Property Co Ltd* (1954) 163 Estates Gazette 630, CA.

8 For the meaning of 'dwelling' see PARA 986 note 5 ante.

9 For these purposes, 'housing authority' means a local housing authority within the meaning of the Housing Act 1985 (see PARA 1311 note 4 post): Rent Act 1977 s 78(5) (amended by the Housing Act 1980 s 152(2), Sch 25 para 42; the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 35(1), (4)).

10 Rent Act 1977 s 78(2). See generally *R v Paddington North and St Marylebone Rent Tribunal, ex p Perry* [1956] 1 QB 229 at 235-236, [1955] 3 All ER 391 at 395, DC, per Lord Goddard CJ.

11 *R v Paddington and St Marylebone Rent Tribunal, ex p Haines* [1962] 1 QB 388, [1961] 3 All ER 1047, DC.

12 See *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666 at 683, [1949] 1 All ER 720 at 727, DC, per Lord Goddard CJ.

13 For the meaning of 'lessor' see PARA 987 note 8 ante.

14 Ie under the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended). See further RATING AND COUNCIL TAX.

15 For these purposes, 'hereditament' means a dwelling within the meaning of *ibid* Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 232): Rent Act 1977 s 78(2B)(a) (s 78(2A), (2B) added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 8; for transitional provisions see art 1(2)(b)).

16 For these purposes, 'billing authority' has the same meaning as in the Local Government Finance Act 1992 Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 229): Rent Act 1977 s 78(2B)(b) (as added: see note 15 supra).

17 For these purposes, 'category of dwellings' has the same meaning as in the Local Government Finance Act 1992 s 30(1), (2) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 260): Rent Act 1977 s 78(2B)(c) (as added: see note 15 supra).

18 *Ibid* s 78(2A) (as added: see note 15 supra).

19 Where separate sums are payable by the lessee of any dwelling to the lessor for any two or more of the following: (1) occupation of the dwelling; (2) use of furniture; and (3) services, any reference for these purposes to 'rent' in relation to that dwelling is a reference to the aggregate of those sums; and, where those sums are payable under separate contracts, those contracts are deemed to be one contract: Rent Act 1977 s 85(3). For the meaning of 'services' see PARA 986 note 4 ante.

20 Ibid s 78(2)(i).

21 Ibid s 78(2)(ii). The tribunal must take into account any services and amenities which the lessor has not contracted to supply but is in fact supplying, if there is every reason to suppose that they will be continued: *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720, DC. The receipt of war damage compensation by the lessor is irrelevant: *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Hierowski* [1953] 2 QB 147, [1953] 2 All ER 4, DC. No criteria are laid down for the ascertainment of a 'reasonable rent' other than the requirement to have regard to liability for council tax; cf the criteria provided by the Rent Act 1977 s 70 (as amended) for the determination by rent officers of a fair rent for regulated tenancies: see PARA 921 ante. In particular, it is not clear whether or to what extent the tribunal should discount scarcity value. Nor does the Rent Acts (Maximum Fair Rent) Order 1999, SI 1999/6, art 2 apply to restrict the rent, since art 2 applies only where there is an existing registered rent under the Rent Act 1977 Pt IV (ss 62-75) (as amended) (registration of rent under regulated tenancies: see PARA 891 et seq ante): see art 2(6); and PARA 922 ante.

22 Rent Act 1977 s 78(2)(iii) (amended by the Housing Act 1980 s 152(3), Sch 26).

23 *Villa d'Este Restaurant Ltd v Burton* [1957] 2 QB 214, [1957] 1 All ER 862, CA.

24 As to the effect of registration see PARA 996 et seq post. It is suggested that dismissal may be appropriate where the rent is too low but the landlord does not want to increase it or where the current rent is reasonable but the circumstances make it unfair to fix the premises with that rent bearing in mind the restrictions on reapplying within two years (see PARA 1000 post). If the reference is dismissed, other than for want of jurisdiction, a notice to quit served after the reference was made in respect of a restricted contract made before 28 November 1980 will be deferred automatically for six months from the date of the decision unless the tribunal directs otherwise, but a notice served before the reference will be deferred only for seven days unless the tribunal directs a longer period: see the Rent Act 1977 s 103 (as amended), s 104; and PARAS 1003-1004 post.

25 Ibid s 78(4).

26 Ie under ibid Pt IV (as amended): see PARA 891 et seq ante.

27 Ibid s 78(3). For the meaning of 'regulated tenancy' see PARA 854 ante.

28 Ibid s 78(2) (amended by the Housing Act 1980 s 152(3), Sch 26).

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## 992. Jurisdiction of the rent tribunal.

The rent tribunal, before it determines the main question, has a duty to inquire and decide whether it has jurisdiction to do so, and is entitled to decide a collateral question on which its jurisdiction depends<sup>1</sup>. The county court, however, provides an alternative forum for determining whether a particular contract is within the tribunal's jurisdiction<sup>2</sup>. The tribunal has a discretion whether to decide the preliminary question itself or whether to adjourn the reference in order that an application may be made to the county court. In exercising this discretion the tribunal should look at all the circumstances including the wishes of the parties<sup>3</sup>. Where the nature of the preliminary question requires disclosure, evidence and cross-examination, the tribunal should normally adjourn the reference<sup>4</sup>; but, where the parties decline an invitation to apply to the county court, it is correct for the tribunal to proceed to determine the issue of jurisdiction itself<sup>5</sup>. The tribunal's decision as to its jurisdiction is not conclusive and may be put in issue in further proceedings<sup>6</sup>. It has no power to decide questions of breach of contract or to award compensation to tenants for breach of contract by way of reduction of rent<sup>7</sup>.



Where a restricted contract<sup>8</sup> is referred to a rent tribunal under Part V<sup>9</sup> or Part VII<sup>10</sup> of the Rent Act 1977 and the contract relates to a dwelling<sup>11</sup> consisting of or comprising part only of a hereditament, and no apportionment of the rateable value of the hereditament has been made<sup>12</sup>, then, unless the lessor<sup>13</sup> in the course of the proceedings requires that such an apportionment be made and, within two weeks of making the requirement, brings proceedings in the county court for the making of the apportionment, the rent tribunal has jurisdiction to deal with the reference if it appears to it that, had the apportionment been made, it would have had jurisdiction<sup>14</sup>.

1 *R v City of London etc Rent Tribunal, ex p Honig* [1951] 1 KB 641, [1951] 1 All ER 195, DC; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC; *R v Croydon and South West London Rent Tribunal, ex p Ryzewska* [1977] QB 876, [1977] 1 All ER 312, DC.

2 *Ie* under the Rent Act 1977 s 141(1)(d): see PARA 981 ante.

3 *R v Croydon and South West London Rent Tribunal, ex p Ryzewska* [1977] QB 876, [1977] 1 All ER 312, DC.

4 *R v Kensington and Chelsea (Royal) London Borough Rent Officer, ex p Noel* [1978] QB 1, [1977] 1 All ER 356, DC, applying dicta of Devlin J in *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC. Where there is a genuine dispute as to the terms of a contract and proceedings are pending in a county court, the tribunal should also adjourn: *R v Fulham Rent Tribunal, ex p Littna and Smith* [1947] WN 214.

5 *R v Croydon and South-West London Rent Tribunal, ex p Ryzewska* [1977] QB 876, [1977] 1 All ER 312, DC.

6 *R v Judge Pugh, ex p Graham* [1951] 2 KB 623, [1951] 2 All ER 307, DC. An aggrieved landlord may therefore prefer to sue for the contractual rent, possession or a declaration as the case may be in the county court rather than going by way of appeal or for judicial review to the High Court. See PARA 993 post.

7 *R v Hampstead and St Pancras Furnished Houses Rent Tribunal, ex p Ascot Lodge Ltd* [1947] KB 973, [1947] 2 All ER 12, DC.

8 For the meaning of 'restricted contract' see PARA 986 ante.

9 *Ie* the Rent Act 1977 Pt V (ss 77-85) (as amended): see PARA 989 et seq ante.

10 *Ie* *ibid* Pt VII (ss 98-107) (as amended): see PARA 942 et seq ante, PARA 1002 et seq post.

11 For the meaning of 'dwelling' see PARA 986 note 5 ante.

12 *Ie* under the Rent Act 1977 s 25: see PARA 859 ante. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

13 For the meaning of 'lessor' see PARA 987 note 8 ante.

14 Rent Act 1977 s 82.

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### 993. Appeals and judicial review.

If any party to proceedings before a rent tribunal<sup>1</sup> is dissatisfied in point of law with a decision of the tribunal, he may appeal from it to the High Court<sup>2</sup> or require the tribunal to state a case for the opinion of the High Court<sup>3</sup>. Judicial review will also lie in appropriate cases<sup>4</sup>. Thus the High Court will intervene if the tribunal has not given the lessor an opportunity to be heard<sup>5</sup>, or

if it can be proved that the tribunal wrongly decided facts which went to its jurisdiction<sup>6</sup>, or if it exceeded its jurisdiction by reducing the rent below a rent registered under Part IV of the Rent Act 1977<sup>7</sup> or by proceeding after the application had been withdrawn in time<sup>8</sup>, or if it has disregarded the principles of natural justice<sup>9</sup>, or if there was no subsisting contract at the date of the reference<sup>10</sup> or if the reference was not made by the lessor, lessee or other authorised person<sup>11</sup>.

1     le a rent assessment committee constituted in accordance with the Rent Act 1977 s 65, Sch 10 (as amended) (see PARA 910 ante) and performing the functions of a rent tribunal by virtue of the Housing Act 1980 s 72 (see PARA 988 ante).

2     Tribunals and Inquiries Act 1992 s 11(1), Sch 1 para 37; and see PARA 920 note 4 ante.

3     Ibid s 11(1), Sch 1 para 37; and see PARA 920 note 5 ante.

4     See JUDICIAL REVIEW vol 61 (2010) PARA 646. See also PARA 920 note 6 ante.

5     *R v Kingston-upon-Hull Rent Tribunal, ex p Black* [1949] 1 All ER 260, DC.

6     *R v City of London etc Rent Tribunal, ex p Honig* [1951] 1 KB 641, [1951] 1 All ER 195, DC; *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC; and see *R v Paddington and St Marylebone Furnished Houses Rent Tribunal, ex p Kendal Hotels Ltd* [1947] 1 All ER 448, DC.

7     le a rent registered under the Rent Act 1977 Pt IV (ss 62-75) (as amended) (registration of rents under regulated tenancies: see PARA 891 et seq ante): see s 78(3); and PARA 991 ante.

8     *R v Hampstead and St Pancras Rent Tribunal, ex p Goodman* [1951] 1 KB 541, [1951] 1 All ER 170, DC.

9     See *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666 at 682-683, [1949] 1 All ER 720 at 727, DC; cf *R v Brighton and Area Rent Tribunal, ex p Marine Parade Estates (1936) Ltd* [1950] 2 KB 410 at 417, [1950] 1 All ER 946 at 948, DC, per Lord Goddard CJ. See further JUDICIAL REVIEW vol 61 (2010) PARA 629 et seq.

10    See PARA 989 the text and note 7 ante.

11    See PARA 989 the text and notes 5-6 ante.

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## **B. PROCEDURE ON REFERENCE TO RENT TRIBUNAL**

### **994. Making of the reference; preliminary proceedings.**

Reference to a rent tribunal<sup>1</sup> must be by written notice<sup>2</sup>, which may be delivered at an office of the rent assessment panel<sup>3</sup>, in which case it is deemed to have reached the tribunal on the day when it was so delivered, or may be posted to the panel, in which case it is deemed to have reached the tribunal on the day when it would be delivered in the ordinary course of post<sup>4</sup>. The tribunal must give notice in writing to each party to the restricted contract<sup>5</sup> informing him that he may, within such time as the tribunal may allow, not being less than seven days from the date of the notice<sup>6</sup>, give notice to the tribunal that he desires to be heard by it, or may send to it written representations<sup>7</sup>. If any such party informs the tribunal that he desires to be heard, the tribunal must give to each party not less than seven clear days' written notice of the time

and place of the hearing<sup>8</sup>. Notices by the tribunal may be sent by prepaid post to a party at his usual or last known address<sup>9</sup>.

1 For the meaning of 'rent tribunal' see PARA 988 ante.

2 The notice must specify the address of the house or part of a house to which the restricted contract relates, the names of the lessor and lessee and the address of the lessor: Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 3.

3 As to rent assessment panels see PARA 910 ante.

4 Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 3.

5 As to references to parties to the contract see PARA 991 note 7 ante.

6 The tribunal may extend the time: Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 4 proviso.

7 Ibid reg 4 (amended by SI 1981/1493). The tribunal may, however, refuse to entertain the reference if it was made too soon after a previous reference (see PARA 1000 post) but this did not apply if it was an interim reference before 1 April 1994 under the Rent Act 1977 s 80A (as added) in respect of liability for council tax.

8 Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 5(1) (amended by SI 1981/1493). If the house to which the reference relates is one whose general management is vested in a local authority as housing authority (see PARA 991 text and note 9 ante), that authority must be given an opportunity of being heard or, if it so desires, of submitting written representations: Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 5(2).

9 Ibid reg 9. If a party does not receive the notice and therefore misses the hearing, he may apply for it to be reopened: see PARA 995 post.

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### **995. Procedure at the hearing.**

At a hearing before a rent tribunal<sup>1</sup> a party to a restricted contract<sup>2</sup> may appear in person, by counsel, by solicitor or by any other representative or may be accompanied by any person whom he may wish to assist him at the hearing<sup>3</sup>. The procedure is such as the tribunal may determine<sup>4</sup>. The tribunal may, if it thinks fit, and must, if either party so requests, allow the hearing to be in public unless for some special reason it considers it undesirable<sup>5</sup>. The tribunal may adjourn or postpone the hearing from time to time as it thinks fit<sup>6</sup>. Decision is by a majority; it must be in writing, signed by the chairman and sent as soon as may be to the parties to the contract<sup>7</sup>. The tribunal must furnish a statement, either written or oral, of the reasons for its decision if, on or before the giving or notification of the decision, it is requested to state the reasons<sup>8</sup>.

The tribunal is not bound to act on evidence or on any particular principles; it may act on its own views, knowledge and opinions<sup>9</sup>. Provided that the parties are given the opportunity of being heard or making representations, it is doubtful how far the rules of natural justice must be observed<sup>10</sup>. The tribunal may act on unstamped documents<sup>11</sup>. If a party fails to attend the hearing, the tribunal may reopen the case on his application, but it should do so only if his application is made promptly and if it is satisfied that there was a good argument on the merits

that the absent party has a real and reasonable excuse for being absent and that other parties would not be prejudiced<sup>12</sup>.

1 For the meaning of 'rent tribunal' see PARA 988 ante.

2 For the meaning of 'restricted contract' see PARA 986 ante. As to references to parties to the contract see PARA 991 note 7 ante.

3 Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 6. As to the extended right of third persons to represent service personnel see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 22(2); and PARA 1083 post.

4 Rent Assessment Committees (England and Wales) (Rent Tribunal) Regulations 1980, SI 1980/1700, reg 7(1).

5 Ibid reg 7(1). Nevertheless a member of the Council on Tribunals in that capacity may attend any hearing: reg 7(1). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 55 et seq.

6 Ibid reg 7(2). As to the circumstances in which a tribunal should adjourn in order to allow an application to be made to a county court see PARA 992 ante.

7 Ibid reg 8(1). The chairman has power to correct, by certificate under his hand, any clerical or accidental error or omission in the decision: reg 8(2).

8 Tribunals and Inquiries Act 1992 s 10(1), Sch 1 para 37. Any such statement of reasons is to be taken to form part of the decision and so to be incorporated in the record: s 10(6).

9 *R v Brighton and Area Rent Tribunal, ex p Marine Parade Estates (1936) Ltd* [1950] 2 KB 410, [1950] 1 All ER 946, DC; *R v Paddington North and St Marylebone Rent Tribunal, ex p Perry* [1956] 1 QB 229, [1955] 3 All ER 391, DC.

10 See the text and note 9 supra; cf *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666, [1949] 1 All ER 720, DC.

11 *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Zerek* [1951] 2 KB 1, [1951] 1 All ER 482, DC.

12 *R v Kensington and Chelsea Rent Tribunal, ex p Macfarlane* [1974] 3 All ER 390, [1974] 1 WLR 1486, DC.

## UPDATE

### 995 Procedure at the hearing

TEXT AND NOTES 4, 5--SI 1980/1700 reg 7(1) amended: SI 2008/2683.

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## C. REGISTRATION OF RENT AND ITS EFFECT

### 996. Maintenance and inspection of the register.

The president of every rent assessment panel<sup>1</sup> must prepare and keep up to date a register<sup>2</sup> and must make it available for inspection in such place or places and in such manner as the Secretary of State<sup>3</sup> or, in relation to Wales, the National Assembly for Wales or the relevant

Welsh minister<sup>4</sup> may direct<sup>5</sup>. The register must be so prepared and kept up to date as to contain, with regard to any contract relating to a dwelling<sup>6</sup> situated in the area of the rent assessment panel and under which a rent<sup>7</sup> is payable which has been approved, reduced or increased under the relevant statutory provisions<sup>8</sup>, entries of:

- 1983 (1) the prescribed particulars<sup>9</sup> with regard to the contract;
- 1984 (2) a specification of the dwelling to which the contract relates; and
- 1985 (3) the rent as approved, reduced or increased by the rent tribunal<sup>10</sup>, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period<sup>11</sup>.

Where any rates<sup>12</sup> in respect of a dwelling are borne by the lessor<sup>13</sup> or any person having any title superior to that of the lessor, the amount to be so entered in the register as the rent payable is the same as if the rates were not so borne, but the fact that they are so borne must be noted in the register<sup>14</sup>; and the amount to be so entered in the register as the rent payable for a dwelling includes any sums payable by the lessee<sup>15</sup> to the lessor in respect of the council tax, whether or not those sums are separate from the sums payable for the occupation of the dwelling or are payable under separate agreements<sup>16</sup>.

A copy of an entry in the register certified under the hand of an officer duly authorised in that behalf by the president of the rent assessment panel concerned is receivable in evidence in any court and in any proceedings<sup>17</sup> and a person requiring such a certified copy is entitled to obtain it on payment of the prescribed fee<sup>18</sup>.

1 As to rent assessment panels see PARA 910 ante.

2 For these purposes, 'register' means the register kept by the president of the rent assessment panel concerned under the Rent Act 1977 s 79 (as amended) (see the text and notes 3-18 infra): s 85(1) (amended by the Housing Act 1980 s 152(1), Sch 25 para 45(a)). The register was formerly kept by the local authority: see the Rent Act 1977 s 79(1) (as originally enacted). Before the end of February 1981 each local authority had to send to the president of the appropriate panel the register previously kept by the authority: see s 79(6A) (added by the Housing Act 1980 Sch 25 para 44).

3 As to the Secretary of State see PARA 27 note 3 ante.

4 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

5 Rent Act 1977 s 79(1) (amended by the Housing Act 1980 Sch 25 para 43(a)). The Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697 (as amended) (see note 9 infra) contain no directions as to the place where the register is to be kept.

6 For the meaning of 'dwelling' see PARA 986 note 5 ante.

7 For the meaning of 'rent' see PARA 991 note 19 ante.

8 I.e. under the Rent Act 1977 s 78 (as amended): see PARA 991 ante.

9 The prescribed particulars comprise: (1) the names and addresses of parties to the restricted contract referred to the rent tribunal; (2) the accommodation (a) of which the lessee is entitled to exclusive occupation; (b) of which the lessee is entitled to the use in common with the lessor and persons other than the lessor; (3) details of any furniture provided by the lessor for the use of the lessee; (4) details of any services provided by the lessor; (5) whether board is supplied, and, if so, the nature and amount of the board; (6) liability for payment of council tax for the accommodation occupied by the lessee; (7) any other terms of the contract taken into consideration in determining the rent: Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 8, Sch 4 (amended by SI 1993/655).

10 For the meaning of 'rent tribunal' see PARA 988 ante.

11 Rent Act 1977 s 79(2) (amended by the Housing Act 1980 Sch 25 para 43(b)).

12 For these purposes, the reference to rates in respect of a dwelling includes a reference to such proportion of any rates in respect of a hereditament of which the dwelling forms part as may be agreed in writing between the lessor and the lessee or determined by a county court: Rent Act 1977 s 85(4). For the meaning of 'rates' generally see PARA 862 note 5 ante; and as to the abolition of domestic rates see PARA 521 ante.

13 For the meaning of 'lessor' see PARA 987 note 8 ante.

14 Rent Act 1977 s 79(3).

15 For the meaning of 'lessee' see PARA 986 note 7 ante.

16 Rent Act 1977 s 79(3A) (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 9; for transitional provisions see art 1(2)(b)).

17 Rent Act 1977 s 79(5) (amended by the Housing Act 1980 Sch 25 para 43(d)).

18 Rent Act 1977 s 79(6). The prescribed fee is £1: Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 9 (amended by SI 1984/1391).

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## **997. Excess rent.**

Where the rent<sup>1</sup> payable for any dwelling<sup>2</sup> is entered on the register<sup>3</sup>, it is not lawful to require or receive on account of rent for that dwelling under a restricted contract<sup>4</sup>, either in respect of any period subsequent to the date of the entry<sup>5</sup>, or, where a particular period is specified in the register, in respect of that period<sup>6</sup>, payment of any amount in excess of the rent so registered<sup>7</sup>. Where the rates are borne by the lessor or a superior landlord<sup>8</sup>, the registered rent is treated for this purpose as increased for any rental period<sup>9</sup> by the amount of the rates<sup>10</sup> for that period<sup>11</sup>. Where any payment has been made or received in contravention of these provisions, the amount of the excess is recoverable by the person by whom it was paid<sup>12</sup>.

The limitation as to rent does not apply only to the lessor who was a party to the reference; it attaches to the premises<sup>13</sup>. There is no provision for apportionment, and the registered rent is not applicable to a letting of a part of the premises<sup>14</sup>; but it would seem that the registered rent would apply to a letting of the same premises on different terms or with different internal equipment, furniture or services until the matter was referred to the tribunal for reconsideration<sup>15</sup>.

1 For the meaning of 'rent' see PARA 991 note 19 ante.

2 For the meaning of 'dwelling' see PARA 986 note 5 ante.

3 I.e. under the Rent Act 1977 s 79 (as amended): see PARA 996 ante. For the meaning of 'register' see PARA 996 note 2 ante.

4 For the meaning of 'restricted contract' see PARA 986 ante.

5 Rent Act 1977 s 81(1)(a).

6 Ibid s 81(1)(b).

7 Ibid s 81(1). To do so is an offence: see PARA 999 post. It seems that a lessor who grants or agrees to grant a lease at a rent exceeding the registered rent does not thereby require the excess rent; nor is such a lease or agreement void: see *Mauray v Durley Chine (Investments) Ltd* [1953] 2 QB 433, [1953] 2 All ER 458, CA (where

a tenant gave notice to exercise an option at the yearly rent of £525 (reduced to £425 for the purpose of the Furnished Houses (Rent Control) Act 1946 (repealed)), and it was held that the words contained in the notice did not call for a lease in terms different from those of the lease specified by the option agreement, but were merely declaratory of the legal effect of quashing a lease in the terms offered by that agreement, and, therefore, the plaintiff's notice was a good and valid notice).

8     le where the Rent Act 1977 s 79(3) applies: see PARA 996 ante.

9     For the meaning of 'rental period' see PARA 853 note 3 ante.

10    For the meaning of this reference to rates see PARA 996 note 12 ante; and for the meaning of 'rates' generally see PARA 862 note 5 ante. As to the abolition of domestic rates see PARA 521 ante.

11    Rent Act 1977 s 81(2). The amount of the rates for a rental period is ascertained in accordance with s 27 (repealed), Sch 5 (see PARA 896 ante): s 81(2). As to apportionment when the premises are not separately assessed see s 85(4); and PARA 996 note 12 ante.

12    Ibid s 81(3). See *Henry v Taylor* [1954] 1 QB 506, [1954] 1 All ER 721, CA.

13    *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Gormly* [1952] 1 KB 179, [1951] 2 All ER 1030, DC; *De Jean v Fletcher* [1959] 1 All ER 602, [1959] 1 WLR 341, CA.

14    *Gluchowska v Tottenham Borough Council* [1954] 1 QB 438, [1954] 1 All ER 408, DC.

15    See *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Marks* [1951] 2 KB 694, [1951] 2 All ER 465, DC. The landlord must, however, enter into a contract comprising the altered terms before applying to the tribunal: *R v East London Rent Tribunal, ex p Schryer* [1970] 1 QB 686, [1969] 3 All ER 447, DC.

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## **998. Premiums under restricted contracts.**

If a rent is registered for any premises<sup>1</sup> under the statutory provisions relating to restricted contracts<sup>2</sup>, and in a case where the approval, reduction or increase of the rent by the rent tribunal<sup>3</sup> is limited to rent payable in respect of a particular period, that period has not expired, then any person who, as a condition of the grant, renewal, continuance or assignment of rights under a restricted contract<sup>4</sup>, requires the payment of any premium<sup>5</sup> is guilty of an offence<sup>6</sup> and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>7</sup>. The court by which a person is convicted of such an offence may order the amount of the premium, or so much of it as cannot lawfully be required<sup>8</sup>, to be repaid to the person by whom it was paid<sup>9</sup>.

Nothing in the above provisions, however, prevents a person from requiring that there shall be paid:

1986 (1) so much of any outgoings discharged by a grantor or assignor as is referable to any period after the grant or assignment takes effect<sup>10</sup>; or

1987 (2) a reasonable amount in respect of goodwill of a business, trade or profession, where the goodwill is transferred to a grantee or assignee in connection with the grant or assignment or accrues to him in consequence thereof<sup>11</sup>.

The requirement that furniture be purchased at an excessive price as a condition of the grant of rights under a restricted contract falling under these provisions<sup>12</sup> is also treated as the requirement of a premium<sup>13</sup>.

- 1 le in the register kept in pursuance of the Rent Act 1977 s 79 (as amended): see PARA 996 ante.
- 2 le under *ibid* Pt V (ss 77-85) (as amended): see PARA 985 et seq ante, PARA 999 et seq post.
- 3 For the meaning of 'rent tribunal' see PARA 988 ante.
- 4 For the meaning of 'grant, renewal or continuance' see PARA 931 note 2 ante; and for the meaning of 'restricted contract' see PARA 986 ante.
- 5 For the meaning of 'premium' see PARA 926 ante. For the meaning of 'require as a condition' see *Woods v Wise* [1955] 2 QB 29, [1955] 1 All ER 767, CA.
- 6 Rent Act 1977 s 122(1), (2).
- 7 *Ibid* s 122(4) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may be instituted by a local authority: see s 150(2) (as amended); and PARA 816 ante.
- 8 le under *ibid* s 122 (as amended): see the text and notes 1-7 supra, 9-11 infra.
- 9 *Ibid* s 122(5). Amounts are recoverable only once: see PARA 931 note 10 ante.
- 10 *Ibid* s 122(3)(a).
- 11 *Ibid* s 122(3)(b).
- 12 le under *ibid* s 122(1).
- 13 See *ibid* s 123; and PARA 927 ante.

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### **999. Offences.**

Any person who requires or receives any payment of rent<sup>1</sup> in contravention of the statutory limitation<sup>2</sup> is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 3 on the standard scale, or to both<sup>3</sup>. Without prejudice to any other method of recovery, the court by which a person is found guilty of such an offence may order the amount paid in excess<sup>4</sup> to be repaid to the person by whom the payment was made<sup>5</sup>.

It is also an offence for any person to require a premium for the grant, renewal, continuance or assignment of rights under a restricted contract<sup>6</sup>. Failure to provide a proper rent book and the demanding or receiving of rent when such a rent book has not been provided is an offence<sup>7</sup>, as is a failure by a lessor to give information required of him by a rent tribunal<sup>8</sup>.

- 1 For the meaning of 'rent' see PARA 991 note 19 ante.
- 2 le in contravention of the Rent Act 1977 s 81 (as amended): see the text and notes 3-5 infra; and PARA 997 ante.
- 3 *Ibid* s 81(4) (amended by the Criminal Justice Act 1982 ss 38, 46); Rent Act 1977 s 150(1). As to the standard scale see PARA 52 note 6 ante. Proceedings may not be instituted otherwise than by the local authority: s 81(5). It is also an offence for the tenant to pay the rent at more than the reduced figure, as he is thereby aiding and abetting an offence, and, if he offered it, he would be guilty of inciting the landlord to



commit an offence: *R v Paddington and St Marylebone Rent Tribunal, ex p Bell London and Provincial Properties Ltd* [1949] 1 KB 666 at 681, [1949] 1 All ER 720 at 726, DC, per Lord Goddard CJ. For the meaning of 'local authority' for these purposes see PARA 816 note 11 ante.

4 See *Henry v Taylor* [1954] 1 QB 506, [1954] 1 All ER 721, CA.

5 Rent Act 1977 s 81(4).

6 See *ibid* s 122(2); and PARA 998 ante.

7 See the Landlord and Tenant Act 1985 ss 4-7 (as amended); and PARAS 253-255 ante.

8 See the Rent Act 1977 s 77(3) (as amended); and PARA 990 ante.

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### **1000. Reconsideration of reference.**

Where the rent<sup>1</sup> payable for any dwelling<sup>2</sup> under a restricted contract<sup>3</sup> has been entered in the register<sup>4</sup>, the lessor<sup>5</sup> or the lessee<sup>6</sup> may refer the case to the rent tribunal<sup>7</sup> for reconsideration of the rent so entered<sup>8</sup>. A rent tribunal is not, however, required to entertain<sup>9</sup> a reference made otherwise than by the lessor and the lessee jointly for the registration of a different rent for the dwelling concerned before the expiry of a period of two years beginning on the date on which the rent was last considered by the tribunal except on the ground that, since that date, there has been such a change in:

- 1988 (1) the condition of the dwelling;
- 1989 (2) the furniture or services<sup>10</sup> provided;
- 1990 (3) the terms of the contract; or
- 1991 (4) any other circumstances taken into consideration when the rent was last considered,

as to make the registered rent no longer a reasonable rent<sup>11</sup>.

If the dwelling forms part of a hereditament<sup>12</sup> in respect of which the lessor, or any person having any title superior to that of the lessor, is liable<sup>13</sup> to pay council tax or was so liable on the date on which the rent was last considered by the tribunal, then, in the determining for these purposes whether since that date there has been such a change falling within head (4) above as to make the registered rent no longer a reasonable rent, any change in the amount of council tax payable in respect of the hereditament must be disregarded unless it is attributable to:

- 1992 (a) the fact that the hereditament has become, or has ceased to be, an exempt dwelling<sup>14</sup>;
- 1993 (b) an alteration in accordance with regulations<sup>15</sup> of the valuation band<sup>16</sup> shown in a valuation list<sup>17</sup> as applicable to the hereditament; or
- 1994 (c) the compilation of a new valuation list in consequence of an order<sup>18</sup> of the Secretary of State<sup>19</sup> or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister<sup>20</sup>.

- 1 For the meaning of 'rent' see PARA 991 note 19 ante.
- 2 For the meaning of 'dwelling' see PARA 986 note 5 ante.
- 3 For the meaning of 'restricted contract' see PARA 986 ante.
- 4 Ie under the Rent Act 1977 s 79 (as amended): see PARA 996 ante.
- 5 For the meaning of 'lessor' see PARA 987 note 8 ante.
- 6 For the meaning of 'lessee' see PARA 986 note 7 ante.
- 7 For the meaning of 'rent tribunal' see PARA 988 ante.
- 8 Rent Act 1977 s 80(1) (amended by the Housing Act 1988 s 140(2), Sch 18).
- 9 A reference is entertained once a notice of inspection and hearing has been posted: *R v Kensington and Chelsea London Borough Council Rent Tribunal, ex p Macfarlane* [1974] 3 All ER 390, [1974] 1 WLR 1486, DC. As to when the tribunal enters upon consideration of a reference see PARA 991 ante.
- 10 For the meaning of 'services' see PARA 986 note 4 ante.
- 11 Rent Act 1977 s 80(2) (amended by the Housing Act 1980 s 70(1)). It has been held that, upon a reconsideration on grounds of changed circumstances, the tribunal may not review the whole case de novo so as to correct a decision which it thinks wrong but may only give effect to the changed circumstances, although it is not limited to those relied on by the applicant: *R v Fulham, Hammersmith and Kensington Rent Tribunal, ex p Hierowski* [1953] 2 QB 147, [1953] 2 All ER 4, DC (decided under the Furnished Houses (Rent Control) Act 1946 s 2(3) (repealed)). That Act had no two-year rule and only allowed reconsideration on grounds of change of circumstances. However, that decision was distinguished in *London Housing and Commercial Properties Ltd v Cowan* [1977] QB 148, [1976] 2 All ER 385, DC, on grounds which would appear to apply to the Rent Act 1977 s 80(2) (as so amended). It was there held that a rent assessment committee reconsidering a rent in the three-year period under the Rent Act 1968 s 44(3) (repealed) (now a two-year period under the Rent Act 1977 s 67(3) (as amended): see PARA 915 ante), should consider the case afresh.
- 12 For these purposes, 'hereditament' means a dwelling within the meaning of the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 232): Rent Act 1977 s 80(4) (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 10; for transitional provisions see art 1(2)(b)).
- 13 Ie under the Local Government Finance Act 1992 Pt I (as amended). See further RATING AND COUNCIL TAX.
- 14 For these purposes, 'exempt dwelling' has the same meaning as in *ibid* Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 234): Rent Act 1977 s 80(4) (as added: see note 12 supra). As to the billing authority's duty to give the rent assessment committee, when carrying out the functions of a rent tribunal, information as to whether or not a particular dwelling is or was at any time an exempt dwelling see the Housing Act 1988 s 41B (as added and amended); and PARA 1092 note 5 post.
- 15 Ie regulations made under the Local Government Finance Act 1992 s 24 (as amended): see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 273.
- 16 For these purposes, 'valuation band' has the same meaning as in *ibid* Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 244): Rent Act 1977 s 80(4) (as added: see note 12 supra).
- 17 For these purposes, 'valuation list' has the same meaning as in the Local Government Finance Act 1992 Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 268 et seq): Rent Act 1977 s 80(4) (as added: see note 12 supra).
- 18 Ie an order under the Local Government Finance Act 1992 s 5(4)(b): see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 244.
- 19 As to the Secretary of State see PARA 27 note 3 ante.
- 20 Rent Act 1977 s 80(3) (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993 Sch 1 para 10). See also note 12 supra. As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

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### **1001. Cancellation of registration.**

Where the rent<sup>1</sup> payable for any dwelling<sup>2</sup> is entered in the register<sup>3</sup>, the rent tribunal<sup>4</sup>, on an application being made under this provision, must cancel the entry if the dwelling is not for the time being subject to a restricted contract<sup>5</sup> and the application is made by the person who would be the lessor<sup>6</sup> if the dwelling were so subject<sup>7</sup>. An application must be in the prescribed form<sup>8</sup> and must contain the prescribed particulars<sup>9</sup>.

The rent tribunal must notify the applicant of its decision to grant, or to refuse, any such application<sup>10</sup>. Cancellation of the registration is without prejudice to a further registration of a rent at any time thereafter<sup>11</sup>.

1 For the meaning of 'rent' see PARA 991 note 19 ante.

2 For the meaning of 'dwelling' see PARA 986 note 5 ante.

3 I.e. under the Rent Act 1977 s 79 (as amended): see PARA 996 ante.

4 For the meaning of 'rent tribunal' see PARA 988 ante.

5 For the meaning of 'restricted contract' see PARA 986 ante.

6 For the meaning of 'lessor' see PARA 987 note 8 ante.

7 Rent Act 1977 s 81A(1) (s 81A added by the Housing Act 1980 s 71(1); the Rent Act 1977 s 81A(1) amended by the Housing Act 1988 ss 36(4), 140(2), Sch 18). When dealing with such an application the rent tribunal must consist of the chairman of the rent assessment committee sitting alone: see the Rent Act 1977 s 65, Sch 10 para 6A (as added); and PARA 910 ante.

8 For the prescribed form of application see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(5), Sch 1, Form 15 (amended by SI 1988/2195).

9 Rent Act 1977 s 81A(2) (as added: see note 7 supra). The prescribed particulars are the particulars specified in the prescribed form: see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 4.

10 Rent Act 1977 s 81A(4) (as added: see note 7 supra).

11 Ibid s 81A(3) (as added: see note 7 supra).

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### **(iii) Security of Tenure; Recovery of Possession**

#### ***A. RESTRICTED CONTRACTS ENTERED INTO BEFORE 28 NOVEMBER 1980***

### **1002. Nature of protection.**

Security of tenure is given to persons occupying premises under a restricted contract<sup>1</sup> entered into before 28 November 1980<sup>2</sup> by deferring the operation of a notice to quit<sup>3</sup> in certain circumstances<sup>4</sup>. This does not prevent a tenancy being determined by effluxion of time, forfeiture or some other method. Nor do these provisions prevent the immediate landlord of an occupier of a dwelling house<sup>5</sup> which is overcrowded<sup>6</sup> in such circumstances as to render the occupier guilty of an offence<sup>7</sup> from obtaining possession<sup>8</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 I.e. the commencement date of the Housing Act 1980 s 69: see s 153(4); the Housing Act 1980 (Commencement No 5) Order 1980, SI 1980/1706. The Rent Act 1977 ss 103-106 (as amended) (see the text and notes 3-8 infra; and PARAS 1003-1007 post) apply only to restricted contracts entered into before that date: s 102A (added by the Housing Act 1980 s 69(3)). As to the position in relation to contracts entered into on and after that date see the Rent Act 1977 s 106A (added by the Housing Act 1980 s 69(2)); and PARA 1008 post.

3 These provisions have been held to apply in the case of a residential licensee who would, strictly speaking, not need to be given a notice to quit to determine his right of occupation: *Luganda v Service Hotels Ltd* [1969] 2 Ch 209, [1969] 2 All ER 692, CA. Cf *Crane v Morris* [1965] 3 All ER 77, [1965] 1 WLR 1104, CA.

4 See the Rent Act 1977 s 103 (as amended), s 104; and PARAS 1003-1004 post. The statutory provisions that the notice is or is not to have effect are usually understood to mean that the contractual tenancy is thereby prolonged (*Alexander v Springate* [1951] 1 KB 803, [1951] 1 All ER 351); but in *Francis Jackson Developments Ltd v Hall* [1951] 2 KB 488, [1951] 2 All ER 74, CA, it was said (apropos of a subtenancy) that the contractual tenancy was not extended but that the subtenant obtained a statutory security of tenure as against the tenant. The nature of such security is obscure and the decision has been cogently criticised: see eg 68 LQR 22.

5 The Rent Act 1977 s 101 (as originally enacted) applies to a dwelling house which consists of premises used as a separate dwelling by members of the working classes or of a type suitable for such use: Rent Act 1977 s 101(2) (as originally enacted; substituted in relation to tenancies granted on or after 1 April 1986 by the Housing (Consequential Provisions) Act 1985 ss 4, 5(1), Sch 2 para 35(1), (8), Sch 3 para 3). See further PARA 944 note 3 ante. 'Dwelling' means a house or part of a house: Rent Act 1977 s 107(1); cf para 986 note 5 ante.

6 I.e. overcrowded, in relation to tenancies granted before 1 April 1986, within the meaning of the Housing Act 1957 (repealed).

7 As to offences of overcrowding under the Housing Act 1985 Pt X (ss 324-344) (as amended) see HOUSING vol 22 (2006 Reissue) PARAS 451-453.

8 Rent Act 1977 s 101(1) (as originally enacted). Section 101 (substituted, in relation to tenancies granted on or after 1 April 1986, by the Housing (Consequential Provisions) Act 1985 ss 4, 5(1), Sch 2 para 35(1), (8), Sch 3 para 3) also applies to protected tenancies: see PARA 944 ante. The equivalent provision in the Rent Act 1968 s 17 (repealed) did not affect Part VI contracts (see PARA 985 ante). The operation of the provision has therefore been widened in the course of the consolidation of the law in the Rent Act 1977.

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### **1003. Notice to quit after reference.**

If, after a restricted contract<sup>1</sup> entered into before 28 November 1980<sup>2</sup> has been referred<sup>3</sup> to a rent tribunal<sup>4</sup> by the lessee<sup>5</sup>, a notice to quit the dwelling<sup>6</sup> to which the contract relates is served by the lessor<sup>7</sup> on the lessee at any time before the tribunal's decision is given or within six months thereafter, then, subject to two exceptions<sup>8</sup>, the notice does not take effect before

the expiry of that period<sup>9</sup>. In such a case the rent tribunal may, however, if it thinks fit, direct that a shorter period be substituted for that period of six months<sup>10</sup>.

If the reference to the rent tribunal is withdrawn, the period during which the notice to quit is not to take effect ends on the expiry of seven days from the withdrawal of the reference<sup>11</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 See PARA 1002 note 2 ante.

3 I.e. under the Rent Act 1977 s 77 (as amended) (see PARAS 989-990 ante) or s 80 (as amended) (see PARA 1000 ante).

4 For the meaning of 'rent tribunal' see PARA 988 ante.

5 For the meaning of 'lessee' see PARA 986 note 7 ante. Prior to 15 January 1989 a contract might also be referred by the local authority: see the Housing Act 1988 s 140(2), Sch 18; the Housing Act 1988 (Commencement No 2) Order 1988, SI 1988/2152, art 3, Sch 2 para 5).

6 For the meaning of 'dwelling' see PARA 986 note 5 ante.

7 For the meaning of 'lessor' see PARA 987 note 8 ante.

8 I.e. subject to the Rent Act 1977 ss 105, 106: see PARAS 1005-1007 post.

9 Ibid s 103(1) (amended by the Housing Act 1988 Sch 18). If the notice is served within the six-month period and is expressed to expire during that period, the effect of the Rent Act 1977 s 103(1) (as so amended) is that it will expire at the end of that period: see *Alexander v Springate* [1951] 1 KB 803, [1951] 1 All ER 351.

10 Rent Act 1977 s 103(2)(a). In exercising this power the tribunal has a complete discretion and may balance the respective hardships: see *R v West London Rent Tribunal, ex p Saliterman* (1969) 20 P & CR 776, DC (where the landlord's establishment was found to be well run, the tenant was found to have behaved intolerably and to be able to afford somewhere else, and the security was reduced to seven days).

11 Rent Act 1977 s 103(2)(b).

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#### **1004. Extension of security.**

Where:

1995 (1) a notice to quit a dwelling<sup>1</sup> the subject of a restricted contract<sup>2</sup> entered into before 28 November 1980<sup>3</sup> has been served; and

1996 (2) the restricted contract has been referred<sup>4</sup> to a rent tribunal<sup>5</sup> whether before or after the service of the notice to quit and the reference has not been withdrawn; and

1997 (3) the period at the end of which the notice takes effect<sup>6</sup> has not expired,

the lessee<sup>7</sup> may apply to the tribunal for the extension of that period<sup>8</sup>. No such application may, however, be made with respect to a notice to quit if a direction has been given<sup>9</sup> reducing the period at the end of which the notice is to take effect<sup>10</sup>.

Where an application is so made, the notice to quit to which the application relates does not have effect before the determination of the application unless the application is withdrawn<sup>11</sup>. The rent tribunal, after making such inquiry as it thinks fit and giving to each party<sup>12</sup> an opportunity of being heard or, at his option, of submitting written representations, may direct that the notice to quit shall not have effect until the end of such period, not exceeding six months from the date on which the notice to quit would otherwise have had effect, as may be specified in the direction<sup>13</sup>. If the rent tribunal refuses to give such a direction, the notice to quit does not have effect before the expiration of seven days from the determination of the application and no subsequent application may be made in relation to the same notice to quit<sup>14</sup>. On coming to a determination on such an application, the rent tribunal must notify the parties of its determination<sup>15</sup>.

1 For the meaning of 'dwelling' see PARA 986 note 5 ante.

2 For the meaning of 'restricted contract' see PARA 986 ante.

3 See PARA 1002 note 2 ante.

4 I.e. under the Rent Act 1977 s 77 (as amended) (see PARAS 989-990 ante) or s 80 (as amended) (see PARA 1000 ante).

5 For the meaning of 'rent tribunal' see PARA 988 ante.

6 I.e. whether by virtue of the contract, of the Rent Act 1977 s 103 (as amended) (see PARA 1003 ante) or of s 104 (see the text and notes 8-15 infra).

7 For the meaning of 'lessee' see PARA 986 note 7 ante.

8 Rent Act 1977 s 104(1). Such an application does not have to be made within the period of six months from the decision prescribed by s 103(1) (as amended) (see PARA 1003 ante) so long as it is made before the expiry of the notice to quit: *Preston and Area Rent Tribunal v Pickavance* [1953] AC 562, [1953] 2 All ER 438, CA.

9 I.e. under the Rent Act 1977 s 106(2): see PARA 1006 post.

10 Ibid s 106(3).

11 Ibid s 104(2).

12 It is submitted that this reference to a party means a party to the contract. References in *ibid* Pt VII (ss 98-107) (as amended) to a party to a contract include references to any person directly or indirectly deriving title from such a party: s 107(2).

13 Ibid s 104(3). Where the notice is expressed to expire before the hearing, the tribunal may allow up to six months from the hearing; and, where it is expressed to expire after the hearing, the tribunal may extend it for up to six months after its expiry date: *R v Paddington South Rent Tribunal, ex p Millard* [1955] 1 All ER 691, [1955] 1 WLR 348, DC.

14 Rent Act 1977 s 104(4). Subject to this limitation, it seems that the lessee can obtain successive extensions of his tenancy by means of applications under s 104.

15 Ibid s 104(5). If the tribunal takes all relevant circumstances into account and excludes irrelevant or improper considerations, its decisions will not be interfered with: *Campbell v Daramola* (1974) 235 Estates Gazette 687, CA.

CONTRACTS ENTERED INTO BEFORE 28 NOVEMBER 1980/1005. Notice to quit served by owner-occupier.

### **1005. Notice to quit served by owner-occupier.**

Where a person who has occupied a dwelling<sup>1</sup> as a residence ('the owner-occupier') has, by virtue of a restricted contract<sup>2</sup> entered into before 28 November 1980<sup>3</sup>, granted the right to occupy the dwelling to another person, and has previously<sup>4</sup> given that other person notice in writing that he is the owner-occupier<sup>5</sup> and, if the dwelling is part of a house, the owner-occupier does not occupy any other part of the house as his residence<sup>6</sup>, the provisions deferring the operation of a notice to quit<sup>7</sup> do not apply where a notice to quit the dwelling is served if, at the time the notice is to take effect, the dwelling is required as a residence for the owner-occupier or any member of his family<sup>8</sup> who resided with him when he last occupied the dwelling as a residence<sup>9</sup>.

1 For the meaning of 'dwelling' see PARA 986 note 5 ante.

2 For the meaning of 'restricted contract' see PARA 986 ante.

3 See PARA 1002 note 2 ante.

4 I.e. at or before the time when the right was granted or, if it was granted before 8 December 1965, not later than 7 June 1966.

5 Rent Act 1977 s 105(a).

6 Ibid s 105(b).

7 I.e. ibid s 103 (as amended) (see PARA 1003 ante) and s 104 (see PARA 1004 ante).

8 For the meaning of 'member of his family' in the context of succession to a protected or statutory tenancy see PARA 846 ante.

9 Rent Act 1977 s 105. Cf the mandatory ground for possession when an owner-occupier lets his dwelling house on a protected tenancy: see s 98(2), Sch 15 Pt II, Case 11 (as amended); and PARA 963 ante.

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### **1006. Reduction of period of notice by the rent tribunal on account of the lessee's default.**

Where a restricted contract<sup>1</sup> entered into before 28 November 1980<sup>2</sup> has been referred to a rent tribunal<sup>3</sup> and the period at the end of which a notice to quit will take effect has been determined<sup>4</sup> or extended<sup>5</sup>, the lessor<sup>6</sup> may apply for a direction that the period be reduced to end at a specified date<sup>7</sup>. If it appears to the rent tribunal, on such an application, that:

- 1998 (1) the lessee<sup>8</sup> has not complied with the terms of the contract<sup>9</sup>; or
- 1999 (2) he or any person residing or lodging with him has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers or has been convicted of using the dwelling<sup>10</sup>, or allowing it to be used, for an immoral or illegal purpose<sup>11</sup>; or

- 2000 (3) that its condition has deteriorated owing to any act or neglect of the lessee or any person residing or lodging with him<sup>12</sup>; or
- 2001 (4) that the condition of any furniture provided for the use of the lessee under the contract has deteriorated owing to any ill-treatment by him or any person residing or lodging with him<sup>13</sup>,

the rent tribunal may direct that the period at the end of which the notice to quit will take effect shall be reduced so as to end at a date specified in the direction<sup>14</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 See PARA 1002 note 2 ante.

3 For the meaning of 'rent tribunal' see PARA 988 ante.

4 Ie by virtue of the Rent Act 1977 s 103 (as amended): see PARA 1003 ante.

5 Ie under ibid s 104: see PARA 1004 ante.

6 For the meaning of 'lessor' see PARA 987 note 8 ante.

7 Rent Act 1977 s 106(1), (2).

8 For the meaning of 'lessee' see PARA 986 note 7 ante.

9 Rent Act 1977 s 106(2)(a). Cf s 98(1), Sch 15 Pt I, Case 1 (where similar behaviour by a protected or statutory tenant is a discretionary ground for making a possession order against him): see PARA 949 ante.

10 For the meaning of 'dwelling' see PARA 986 note 5 ante.

11 Rent Act 1977 s 106(2)(b). Cf Sch 15 Pt I, Case 2 (where similar behaviour by a protected or statutory tenant is a discretionary ground for making a possession order against him): see PARA 950 ante.

12 Ibid s 106(2)(c). Cf Sch 15 Pt I, Case 3 (where similar behaviour by a protected or statutory tenant is a discretionary ground for making a possession order against him): see PARA 951 ante.

13 Ibid s 106(2)(d). Cf Sch 15 Pt I, Case 4 (where similar behaviour by a protected or statutory tenant is a discretionary ground for making a possession order against him): see PARA 952 ante.

14 Ibid s 106(2). If a direction has been so given, no application may be made under s 104 with respect to a notice to quit: see s 106(3) (cited in PARA 1004 ante).

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### **1007. Reduction of period of notice by the court on account of the lessee's default.**

In any case where a notice to quit a dwelling<sup>1</sup> which is the subject of a restricted contract<sup>2</sup> entered into before 28 November 1980<sup>3</sup> has been served and the period at the end of which it takes effect is for the time being extended<sup>4</sup>, and at some time during that period the lessor<sup>5</sup> institutes proceedings in the county court for the recovery of possession of the dwelling<sup>6</sup>, then, if the court is satisfied that the lessee is in default in any specified manner<sup>7</sup>, the court may



direct that the period at the end of which the notice to quit is to take effect shall be reduced so as to end at a date specified in the direction<sup>8</sup>.

1 For the meaning of 'dwelling' see PARA 986 note 5 ante.

2 For the meaning of 'restricted contract' see PARA 986 ante.

3 See PARA 1002 note 2 ante.

4 I.e. by virtue of the Rent Act 1977 s 103 (as amended) or s 104: see PARAS 1003-1004 ante.

5 For the meaning of 'lessor' see PARA 987 note 8 ante.

6 The usual rule is that the notice to quit must be allowed to expire before a claim for possession is brought upon it, otherwise the claim will be premature and bound to fail. This provision creates a statutory exception to that rule.

7 I.e. if the court is satisfied that any of the Rent Act 1977 s 106(2)(a)-(d) applies: see PARA 1006 ante at heads (1)-(4) in the text.

8 Ibid s 106(4). It is not certain whether the claim can succeed unless the period is reduced so as to expire before the claim is brought.

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## ***B. RESTRICTED CONTRACTS ENTERED INTO AFTER 27 NOVEMBER 1980***

### **1008. Court's discretion in possession proceedings.**

In the case of restricted contracts<sup>1</sup> entered into on or after 28 November 1980<sup>2</sup> the operation of a notice to quit cannot be deferred either automatically or by direction of a rent tribunal<sup>3</sup>. Instead, in the case of any dwelling house<sup>4</sup> which is the subject of such a restricted contract, the court may, on the making of an order for possession of such a dwelling house or at any time before the execution of such an order, stay or suspend execution of the order or postpone the date of possession for such period or periods as it thinks fit<sup>5</sup>.

Where a court makes an order for possession of such a dwelling house, the giving up of possession may not, however, be postponed<sup>6</sup> to a date later than three months after the making of the order<sup>7</sup>. On any such stay, suspension or postponement the court, unless it considers that to do so would cause exceptional hardship to the lessee<sup>8</sup> or would otherwise be unreasonable, must impose conditions with regard to payment by the lessee of arrears of rent, if any, and rent or payments in respect of occupation after termination of the tenancy (mesne profits) and may impose such other conditions as it thinks fit<sup>9</sup>.

In any case where:

- 2002 (1) proceedings are brought for possession of such a dwelling house;
- 2003 (2) the lessee's spouse or former spouse having rights of occupation under the Family Law Act 1996<sup>10</sup> is then in occupation of the dwelling house; and
- 2004 (3) the restricted contract is terminated as a result of those proceedings,

the spouse or former spouse, so long as he or she remains in occupation, has the same rights in relation to, or in connection with, any stay, suspension or postponement of possession as he or she would have if those rights of occupation were not affected by the termination of the restricted contract<sup>11</sup>.

It is unlawful for the land owner to enforce his right to recover possession otherwise than by proceedings in the court against a licensee holding under a restricted contract entered into on or after 28 November 1980, or against a tenant holding under such a contract whenever it was granted<sup>12</sup>.

1 For the meaning of 'restricted contract' see PARA 986 ante.

2 See PARA 1002 note 2 ante.

3 See the Rent Act 1977 s 102A (as added); and PARA 1002 ante.

4 There is no statutory definition of 'dwelling house' for these purposes but see PARA 821 ante. Cf para 986 note 5 ante (meaning of 'dwelling' for the purposes of the other statutory provisions relating to restricted contracts).

5 Rent Act 1977 s 106A(1), (2) (s 106A added by the Housing Act 1980 s 69(2)). As to the court's inherent jurisdiction to give time see PARAS 665, 972 ante.

6 Ie whether by the order or any variation, suspension or stay of execution.

7 Rent Act 1977 s 106A(3) (as added: see note 5 supra). The court has no discretion to postpone possession beyond the period of three months: *Bryant v Best* [1987] 2 EGLR 113, (1987) 283 Estates Gazette 843, CA.

8 For the meaning of 'lessee' see PARA 986 note 7 ante.

9 Rent Act 1977 s 106A(4) (as added: see note 5 supra).

10 As to persons having such rights of occupation see PARA 836 ante. See also PARA 989 note 5 ante.

11 Rent Act 1977 s 106A(5), (6) (as added: see note 5 supra); Interpretation Act 1978 s 17(2)(a). This protection does not appear to apply to civil partners or former civil partners.

12 See the Protection from Eviction Act 1977 s 3 (as amended); and PARA 653 ante.

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## **(2) PROTECTED SHORTHOLD TENANCIES**

### **1009. In general.**

Protected shorthold tenancies were introduced by the Housing Act 1980<sup>1</sup> and phased out under the provisions of the Housing Act 1988<sup>2</sup>. Such a tenancy had the normal incidents of a protected tenancy in that the rent was subject to registration<sup>3</sup>, the restrictions on premiums<sup>4</sup> applied and after the determination of the contractual term the tenant became and remains a statutory tenant if and so long as he occupies the house as his residence<sup>5</sup>. A protected shorthold tenancy differs from an ordinary protected tenancy, however, in that:

- 2005 (1) the tenant had a statutory right to determine the contractual term on notice<sup>6</sup>;

- 2006 (2) neither the protected shorthold tenancy nor any subsequent contractual tenancy granted to the original tenant or his statutory successors was or is capable of being assigned except in pursuance of certain court orders<sup>7</sup>;
- 2007 (3) subtenants enjoy no security of tenure<sup>8</sup>; and
- 2008 (4) there is available to the landlord at any time after the determination of the shorthold term a special mandatory ground for possession<sup>9</sup>.

1 le the Housing Act 1980 ss 51-55 (as amended): see the text and notes 2-9 infra.

2 See the Housing Act 1988 ss 34, 140(2), Sch 18 para 2 (as amended); and PARA 1012 post. As to the grant of an assured shorthold tenancy to a tenant who was previously a protected shorthold tenant see PARA 1054 post.

A protected shorthold tenancy was a protected tenancy granted on or after 28 November 1980 and before 15 January 1989 which was granted for a term certain of not less than one year nor more than five years and which satisfied the following conditions: (1) the tenancy could not be brought to an end by the landlord before the expiry of the term, except in pursuance of a provision for re-entry or forfeiture for non-payment of rent or breach of any other obligation of the tenancy; and (2) before the grant the landlord gave the tenant a valid notice stating that the tenancy was to be a protected shorthold tenancy: Housing Act 1980 s 52(1) (repealed with savings by the Housing Act 1988 s 140(2), Sch 18 para 2). A tenancy of a dwelling house was not a protected shorthold tenancy if it was granted to a person who, immediately before it was granted, was a protected or statutory tenant of that dwelling house: s 52(2) (as so repealed). See *Dibbs v Campbell* (1988) 20 HLR 374, [1988] 2 EGLR 122, CA (previous tenancy validly surrendered despite tenant's failure to vacate premises; new protected shorthold tenancy therefore properly created).

If a protected tenancy was granted on or after 28 November 1980 for a term certain of not less than one and not more than five years to be followed, at the option of the tenant, by a further term, or for such a term certain and thereafter from year to year or some other period, and satisfied the conditions set out in heads (1)-(2) supra, the tenancy was a protected shorthold tenancy until the end of the term certain: Housing Act 1980 s 52(5) (as so repealed).

3 See PARA 909 et seq ante. Registration of rent is, however, no longer required in order to qualify as a protected shorthold tenancy: see the Protected Shorthold Tenancies (Rent Registration) Order 1987, SI 1987/265, arts 2, 3.

4 As to these restrictions see PARA 925 et seq ante.

5 See PARAS 831-833 ante; and see *Ridehalgh v Horsefield and Isherwood* (1992) 24 HLR 453, CA.

6 See the Housing Act 1980 ss 51, 53(1), (2). Cf the Landlord and Tenant Act 1954 s 38(1) (as amended), s 38A (as added); and PARA 709 ante.

7 See the Housing Act 1980 ss 51, 54(2) (as amended).

8 See *ibid* ss 51, 54(1), (3).

9 See PARA 1010 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/17. RESTRICTED CONTRACTS AND PROTECTED SHORTHOLDS/(2) PROTECTED SHORTHOLD TENANCIES/1010. Case 19: special mandatory ground for possession.

### **1010. Case 19: special mandatory ground for possession.**

Where a dwelling house was let<sup>1</sup> under a protected shorthold tenancy<sup>2</sup> or is treated<sup>3</sup> as having been so let, and:

- 2009 (1) either there has been no grant of a further tenancy<sup>4</sup> of the dwelling house since the end of the protected shorthold tenancy or, if there was such a grant, it

was to a person who immediately before the grant was in possession of the dwelling house as a protected or statutory tenant<sup>5</sup>; and  
 2010 (2) the proceedings for possession were commenced after appropriate notice by the landlord<sup>6</sup> to the tenant and not later than three months after the expiry of the notice<sup>7</sup>,

the court must make an order for possession if, apart from the Rent Act 1977<sup>8</sup>, the landlord would be entitled to recover possession<sup>9</sup>.

A notice is appropriate for this Case if:

- 2011 (a) it is in writing and states that proceedings for possession under this Case may be brought after its expiry<sup>10</sup>;
- 2012 (b) it expires not earlier than three months after it is served nor, if, when it is served, the tenancy is a periodic tenancy, before that periodic tenancy could be brought to an end by a notice to quit<sup>11</sup> served by the landlord on the same day<sup>12</sup>;
- 2013 (c) it is served in the period of three months immediately preceding the date on which the protected shorthold tenancy<sup>13</sup> comes to an end or, if that date has passed, in the period of three months immediately preceding any anniversary of that date<sup>14</sup>; and
- 2014 (d) it is served, in a case where a previous notice has previously been served by the landlord on the tenant in respect of the dwelling house, not earlier than three months after the expiry of the previous notice<sup>15</sup>.

If, in proceedings for possession under this Case, the court is of the opinion that, notwithstanding that either of the conditions<sup>16</sup> in the definition of a protected shorthold tenancy is not satisfied, it is just and equitable<sup>17</sup> to make an order for possession, it may treat the tenancy under which the dwelling house was let as a protected shorthold tenancy<sup>18</sup>.

1 For the meaning of 'let' see PARA 820 ante.

2 For the meaning of 'protected shorthold tenancy' see PARA 1009 note 2 ante.

3 I.e. under the Housing Act 1980 s 55(2): see the text and notes 16-18 infra.

4 For the meaning of 'tenancy' see PARA 818 note 1 ante.

5 Rent Act 1977 s 98(2), Sch 15 Pt II, Case 19(a) (Sch 15 Pt II Case 19 added by the Housing Act 1980 s 55(1)). For the meaning of 'protected tenant' see PARA 818 ante; and for the meaning of 'statutory tenant' see PARA 831 ante. This condition means that the Rent Act 1977 Sch 15 Pt II, Case 19 (as so added) is available only against the original shorthold tenant or his statutory successors, but the grant of subsequent contractual tenancies which are not protected shorthold tenancies to such persons will not preclude the landlord recovering possession on this ground. See *Gent v De la Mare* (1987) 20 HLR 199, [1988] 1 EGLR 104, CA.

6 For the meaning of 'landlord' see PARA 816 note 2 ante.

7 Rent Act 1977 Sch 15 Pt II, Case 19(b) (as added: see note 5 supra). This time limit is not a procedural requirement; it is one of two necessary conditions without which Sch 15 Pt II, Case 19 (as added) is not established and without which the court has no jurisdiction to make a possession order: *Ridehalgh v Horsefield and Isherwood* (1992) 24 HLR 453, CA. If proceedings are not commenced within the time limit, it may be a considerable time, up to nine months, before the landlord can serve another appropriate notice.

8 I.e. apart from the Rent Act 1977 s 98(1): see PARA 942 ante.

9 Ibid s 98(2). Cf the Housing Act 1988 s 21 (as amended); and PARAS 1106-1107 post (additional mandatory grounds for possession in the case of assured shorthold tenancies).

10 Rent Act 1977 Sch 15 Pt II, Case 19(i) (as added: see note 5 supra).

11 Where the tenancy is periodic, it is submitted that a common law notice to quit satisfying the requirements of the Protection from Eviction Act 1977 s 5 (as amended) (see PARA 214 ante) must be served in addition to the 'appropriate notice', as the Rent Act 1977 s 98(2) applies only if the landlord would be entitled to recover possession at common law and Sch 15 Pt II, Case 19 (as added: see note 5 supra) does not expressly dispense with the need for a notice to quit.

12 Ibid Sch 15 Pt II, Case 19(ii) (as added: see note 5 supra). See *Henry Smith's Charity Trustees v Kyriakou* (1989) 22 HLR 66, [1989] 2 EGLR 110, CA.

13 Ie the original contractual term.

14 Rent Act 1977 Sch 15 Pt II, Case 19(iii) (as added: see note 5 supra). There is no maximum length of notice but, as there is only a three-month season in each year for service, a landlord who anticipates requiring possession in the next year must work out his timetable carefully: see note 7 supra. Although it is possible to make the notice expire on the anniversary day, this is highly inadvisable because it requires service to be effected only on the day exactly three months earlier than the expiry date of the notice.

15 Ibid Sch 15 Pt II, Case 19(iv) (as added: see note 5 supra). This restricts the landlord to one valid notice per year.

16 Ie the conditions set out in the Housing Act 1980 s 52(1)(b) (repealed with savings) or s 52(1)(c) (repealed): see PARA 1009 ante.

17 Cf the Rent Act 1977 Sch 15 Pt II, Cases 11, 12 (as amended) (see PARAS 963-964 ante), which also enable the court to dispense with certain requirements if it is just and equitable to make an order for possession. The court is thus enabled to overlook eg technical defects in the notice required by the Housing Act 1980 s 52(1)(b) (repealed with savings).

18 Ibid ss 51, 55(2).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1011. Introduction.

## **18. ASSURED AND ASSURED SHORTHOLD TENANCIES**

### **(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS**

#### **1011. Introduction.**

With certain exceptions<sup>1</sup> and save for certain transitional cases<sup>2</sup>, tenancies of dwelling houses entered into on or after 15 January 1989<sup>3</sup> are either assured tenancies or assured shorthold tenancies<sup>4</sup> under the Housing Act 1988 and cannot be protected tenancies<sup>5</sup> or become statutory tenancies<sup>6</sup> under the Rent Act 1977<sup>7</sup>. Similarly a licence or tenancy entered into on or after that date cannot ordinarily be a relevant licence<sup>8</sup> or relevant tenancy<sup>9</sup> for the purposes of the Rent (Agriculture) Act 1976<sup>10</sup>.

Further, an assured tenancy created on or after 28 February 1997 is presumed to be an assured shorthold tenancy unless it falls within one of the statutory exceptions to this rule<sup>11</sup>.

1 See PARA 1023 et seq post.

2 See PARA 1012 et seq post.

3 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

4 For the meaning of 'assured tenancy' for these purposes see PARA 1018 post.

- 5 As to protected tenancies see PARA 818 et seq ante.
- 6 As to statutory tenancies see PARA 831 et seq ante.
- 7 See the Housing Act 1988 s 34(1) (as amended); and PARA 1012 post.
- 8 For the meaning of 'relevant licence' see PARA 1141 post.
- 9 For the meaning of 'relevant tenancy' see PARA 1141 post.
- 10 See the Housing Act 1988 s 34(4); and PARA 1135 post.
- 11 See ibid s 19A, Sch 2A (as added); and PARA 1044 et seq post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1012. New protected tenancies restricted to special cases.

### **1012. New protected tenancies restricted to special cases.**

A tenancy<sup>1</sup> which is entered into on or after 15 January 1989<sup>2</sup> cannot be a protected tenancy<sup>3</sup>, unless:

- 2015 (1) it is entered into in pursuance of a contract made before that date; or
- 2016 (2) it is granted to a person, alone or jointly with others, who, immediately before the tenancy was granted, was a protected or statutory tenant<sup>4</sup> and was so granted by the person who at that time was the landlord<sup>5</sup>, or one of the joint landlords, under the protected or statutory tenancy<sup>6</sup>; or
- 2017 (3) it is granted to a person, alone or jointly with others, in the following circumstances:
  - 18
  - 20. (a) prior to the grant of the tenancy, an order for possession of a dwelling house was made against him, alone or jointly with others, on the court being satisfied that suitable alternative accommodation was available to him<sup>7</sup>; and
  - 21. (b) the tenancy is of the premises which constitute the suitable alternative accommodation as to which the court was so satisfied; and
  - 22. (c) in the proceedings for possession the court considered that, in the circumstances, the grant of an assured tenancy would not afford the required security and accordingly directed that the tenancy would be a protected tenancy; or
  - 19
  - 2018 (4) it is a tenancy under which the interest of the landlord was at the time the tenancy was granted held by a new town corporation<sup>8</sup> and before 31 March 1996<sup>9</sup> ceased to be so held by virtue of a disposal<sup>10</sup> by the Commission for the New Towns<sup>11</sup>.

1 For these purposes, except where the context otherwise requires, 'tenancy' includes subtenancy and an agreement for a tenancy or subtenancy: Housing Act 1988 s 45(1).

2 ie the date when ibid Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 For these purposes, 'protected tenancy' has the same meaning as in the Rent Act 1977 (see PARA 818 ante): Housing Act 1988 s 34(5). A protected tenancy cannot be an assured tenancy: see s 1(2), Sch 1 para 13(1); and PARA 1043 post. For the meaning of 'assured tenancy' see PARA 1018 post.

4 For these purposes, 'protected tenant' and 'statutory tenant' do not include: (1) a tenant under a protected shorthold tenancy; (2) a protected or statutory tenant of a dwelling house which was let under a protected shorthold tenancy which ended before 15 January 1989 and in respect of which at that date either there had been no grant of a further tenancy or any grant of a further tenancy had been to the person who, immediately before the grant, was in possession of the dwelling house as a protected or statutory tenant (*ibid* s 34(2)(a), (b)); and 'protected shorthold tenancy' includes a tenancy which, in proceedings for possession under the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 19 (as added) (see PARAS 970, 1010 ante) is treated as a protected shorthold tenancy (Housing Act 1988 s 34(2)). For the meaning of 'protected tenant' generally see PARA 818 ante; for the meaning of 'statutory tenant' generally see PARA 831 ante; and for the meaning of 'protected shorthold tenancy' generally see PARA 1009 ante. For these purposes, except where the context otherwise requires, 'dwelling house' may be a house or part of a house; and 'let' includes sublet: s 45(1). See also PARA 1018 post.

As to the grant of an assured shorthold tenancy or an assured tenancy to a person who was previously a protected shorthold tenant see s 34(3) (as amended); and PARA 1054 post.

5 For the meaning of 'landlord' see PARA 1020 note 3 post.

6 For these purposes, 'statutory tenancy' has the same meaning as in the Rent Act 1977 (see PARA 831 ante): Housing Act 1988 s 34(5). As to the application of head (2) in the text see *Arogol Co Ltd v Rajah* [2001] EWCA Civ 454, 82 P & CR D14, [2001] All ER (D) 254 (Mar) (it is the identities of the landlord and tenant that matter, not the identity or extent of the premises); *Secretarial Nominee Co Ltd v Thomas* [2005] EWCA Civ 1008, [2005] 3 EGLR 37, [2005] All ER (D) 484 (Jul) (protection does not apply when the original tenant protected by the Rent Act 1977 has ceased to be a joint tenant under a successor tenancy).

7 If the court was satisfied as mentioned in the Rent Act 1977 s 98(1)(a) (see PARAS 942, 947 ante) or s 99, Sch 16, Case I (as amended) (see PARAS 943, 948 ante) or in the Rent (Agriculture) Act 1976 s 6, Sch 4, Case I (as amended) (see PARA 1170 post). Where the court is satisfied that alternative accommodation is available and that the tenancy of that accommodation offers the required security, it is not obliged to direct that the tenancy of the alternative accommodation be a protected tenancy: see *Laimond Properties Ltd v Al-Shakarchi* (1998) 30 HLR 1099, [1998] NPC 19, CA.

8 If within the meaning of the Housing Act 1985 s 80 (as amended): see PARA 1300 note 9 post. As to development corporations for new towns see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

9 If the date which has effect by virtue of the Housing Act 1988 s 38(4)(a) or (b) (as amended): see PARA 1015 post.

10 If made pursuant to a direction under the New Towns Act 1981 s 37 (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1385.

11 Housing Act 1988 s 34(1) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 104). As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

The creation of a statutory tenancy following the expiry of a protected shorthold tenancy does not fall within the Housing Act 1988 s 34 (as amended); the subjection of a house to a statutory tenancy is not a matter with which s 34 (as amended) is concerned since it cannot be regarded as a 'tenancy ... entered into': *Ridehalgh v Horsefield and Isherwood* (1992) 24 HLR 453, CA.

## UPDATE

### 1012 New protected tenancies restricted to special cases

TEXT AND NOTE 11--Housing Act 1988 s 34(1) further amended: SI 2008/3002.

NOTE 11--See also *Truro Diocesan Board of Finance Ltd v Foley* [2008] EWCA Civ 1162, [2009] 1 All ER 814.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF

THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1013. Removal of special regimes for housing association tenancies.

### **1013. Removal of special regimes for housing association tenancies.**

A tenancy<sup>1</sup> which is entered into on or after 15 January 1989<sup>2</sup> cannot be a housing association tenancy<sup>3</sup> unless:

- 2019 (1) it is entered into in pursuance of a contract made before that date; or
- 2020 (2) it is granted to a person, alone or jointly with others, who, immediately before the tenancy was granted, was a tenant<sup>4</sup> under a housing association tenancy and is so granted by the person who at that time was the landlord<sup>5</sup> under that housing association tenancy; or
- 2021 (3) it is granted to a person, alone or jointly with others, in the following circumstances:
  - 20 (a) prior to the grant of the tenancy, an order for possession of a dwelling house<sup>6</sup> was made against him, alone or jointly with others, on the court being satisfied that suitable accommodation was available to him<sup>7</sup>; and
  - 24. (b) the tenancy is of the premises which constitute the suitable accommodation as to which the court was so satisfied; and
  - 25. (c) in the proceedings for possession the court directed that the tenancy would be a housing association tenancy; or
- 21
- 2022 (4) it is a tenancy under which the interest of the landlord was at the time the tenancy was granted held by a new town corporation<sup>8</sup> and before 31 March 1996<sup>9</sup> ceased to be so held by virtue of a disposal<sup>10</sup> by the Commission for the New Towns<sup>11</sup>.

Where, on or after 15 January 1989, a registered social landlord<sup>12</sup> grants a secure tenancy to a former owner occupier<sup>13</sup>, then, in determining whether that tenancy is a housing association tenancy, it must be assumed<sup>14</sup> that the tenancy was granted before that date<sup>15</sup>. If, on or after that date, the interest of the landlord under a protected or statutory tenancy<sup>16</sup> becomes held by a housing association<sup>17</sup>, a housing trust<sup>18</sup> or the Housing Corporation<sup>19</sup> or, as the result of the exercise by him of functions under Part III of the Housing Associations Act 1985<sup>20</sup>, the Secretary of State<sup>21</sup>, nothing in the above provisions prevents the tenancy from being a housing association tenancy or a secure tenancy<sup>22</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 For these purposes, 'housing association tenancy' has the same meaning as in the Rent Act 1977 Pt VI (ss 86-97) (as amended) (see PARA 905 ante): Housing Act 1988 s 35(1).

4 For the meaning of 'tenant' see PARA 1018 note 6 post.

5 For the meaning of 'landlord' see PARA 1020 note 3 post.

6 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 ie on the court being satisfied as mentioned in the Housing Act 1985 s 84(2)(b) or (c): see PARA 1354 post at heads (2)-(3) in the text.

8 ie within the meaning of ibid s 80 (as amended): see PARA 1300 note 9 post. As to development corporations for new towns see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.



9 le the date which has effect by virtue of the Housing Act 1988 s 38(4)(a) or (b) (as amended): see PARA 1015 post.

10 le made pursuant to a direction under the New Towns Act 1981 s 37 (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1385.

11 Housing Act 1988 s 35(2) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 105(1)). As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

12 le a registered social landlord within the meaning of the Housing Act 1985: see s 5(4), (5) (as substituted and amended); and HOUSING vol 22 (2006 Reissue) PARAS 11, 67.

13 le pursuant to an obligation under *ibid* s 554(2A) (as added and amended): see HOUSING vol 22 (2006 Reissue) PARA 732. For these purposes, except where the context otherwise requires, 'secure tenancy' has the meaning assigned by s 79 (see PARA 1300 post): Housing Act 1988 s 45(1). As to the restrictions on the creation of new secure tenancies see s 35(4) (as amended); and PARA 1301 post.

14 le for the purposes only of the Rent Act 1977 s 86(2)(b) (as amended): see PARA 905 ante.

15 Housing Act 1988 s 35(3) (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 18(2)).

16 For the meaning of 'protected tenancy' see PARA 818 ante; and for the meaning of 'statutory tenancy' see PARA 831 ante.

17 For these purposes, 'housing association' has the same meaning as in the Housing Act 1985 (see PARA 863 note 5 ante): Housing Act 1988 s 35(6).

18 For these purposes, 'housing trust' has the same meaning as in the Housing Act 1985 (see s 6; and HOUSING vol 22 (2006 Reissue) PARA 12): Housing Act 1988 s 35(6).

19 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

20 le under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

21 As to the Secretary of State see PARA 27 note 3 ante; as to the exercise of functions under *ibid* Pt III (as amended) by the 'relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 18 et seq; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

22 Housing Act 1988 s 35(5) (amended by the Government of Wales Act 1998 s 140, Sch 16 para 60; and by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 3(1), (2)). Accordingly, in such a case the Housing Act 1985 s 80 (as amended) (see PARA 1300 post) and any enactment which refers to it have effect without regard to the repeal of provisions of s 80 effected by the Housing Act 1988: s 35(5).

## UPDATE

### 1013 Removal of special regimes for housing association tenancies

TEXT AND NOTE 11--Housing Act 1988 s 35(2) further amended: SI 2008/3002.

TEXT AND NOTE 19--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1014. New restricted contracts limited to transitional cases.

### 1014. New restricted contracts limited to transitional cases.

A tenancy<sup>1</sup> or other contract entered into on or after 15 January 1989<sup>2</sup> cannot be a restricted contract<sup>3</sup> unless it is entered into in pursuance of a contract made before that date<sup>4</sup>. If the terms of a restricted contract are varied on or after that date, then, if the variation affects the amount of the rent<sup>5</sup> which, under the contract, is payable for the dwelling in question<sup>6</sup>, the contract is treated as a new contract entered into at the time of the variation<sup>7</sup>. If, however, the variation does not affect the amount of the rent which, under the contract, is so payable, nothing in these provisions affects the determination of the question whether the variation is such as to give rise to a new contract<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 I.e. for the purposes of the Rent Act 1977: see PARA 985 et seq ante.

4 Housing Act 1988 s 36(1). There is no equivalent to the restricted contract under the Housing Act 1988: see PARAS 1019, 1035 post.

5 For these purposes, 'rent' has the same meaning as in the Rent Act 1977 Pt V (ss 77-85) (as amended) (see PARA 991 note 19 ante): Housing Act 1988 s 36(5).

6 For these purposes, any reference to a variation affecting the amount of the rent which, under a contract, is payable for a dwelling does not include a reference to: (1) a reduction or increase effected under the Rent Act 1977 s 78 (as amended) (power of rent tribunal: see PARA 991 ante); or (2) a variation which is made by the parties and has the effect of making the rent expressed to be payable under the contract the same as the rent for the dwelling which is entered in the register under s 79 (as amended) (see PARA 996 ante): Housing Act 1988 s 36(3). In the Rent Act 1977 s 81A(1) (as added) (cancellation of registration of rent relating to a restricted contract: see PARA 1001 ante) s 81A(1)(a) (as added) (no cancellation until two years have elapsed since the date of the entry) ceases to have effect: Housing Act 1988 s 36(4).

7 Ibid s 36(2)(a). Section 36(1) has effect accordingly: s 36(2)(a).

8 Ibid s 36(2)(b).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1015. Transfer of existing tenancies from public to private sector.

### 1015. Transfer of existing tenancies from public to private sector.

The following provisions apply in relation to a tenancy<sup>1</sup> which was entered into before, or pursuant to a contract made before, 15 January 1989<sup>2</sup> if:

2023 (1) at that date or, if it is later, at the time the tenancy is entered into, the interest of the landlord<sup>3</sup> is held by a public body<sup>4</sup> and at some time after that date the interest of the landlord ceases to be so held<sup>5</sup>; or

2024 (2) at that date or, if it is later, at the time the tenancy is entered into, it is a housing association tenancy<sup>6</sup> and at some time after that date it ceases to be such a tenancy<sup>7</sup>.

Subject to the exceptions set out below<sup>8</sup>, on and after the time when the interest of the landlord ceases to be held by a public body<sup>9</sup> or the tenancy ceases to be a housing association tenancy<sup>10</sup>, the tenancy is:

- 2025 (a) not capable of being a protected tenancy<sup>11</sup>, a protected occupancy<sup>12</sup> or a housing association tenancy;
- 2026 (b) not capable of being a secure tenancy<sup>13</sup> unless, and only at a time when, the interest of the landlord under the tenancy is, or is again, held by a public body; and
- 2027 (c) not prohibited from being an assured tenancy<sup>14</sup> because it was entered into before, or pursuant to a contract made before, 15 January 1989<sup>15</sup> and the question whether at any time after that time it becomes or remains an assured tenancy must be determined accordingly<sup>16</sup>.

In relation to a tenancy under which, on 15 January 1989 or, if it is later, at the time when the tenancy is entered into, the interest of the landlord is held by a new town corporation<sup>17</sup> and which subsequently ceases to be so held by virtue of a disposal by the Commission for the New Towns<sup>18</sup>, the above provisions<sup>19</sup> have effect as if any reference<sup>20</sup> to 15 January 1989 were a reference to 14 November 1990<sup>21</sup> or such other date, whether earlier or later, as may be specified by an order made for these purposes<sup>22</sup> by the Secretary of State by statutory instrument within the period of two years beginning on 15 January 1989<sup>23</sup>. The date so specified is 31 March 1996<sup>24</sup>.

Where, however, by virtue of a disposal by the Commission for the New Towns<sup>25</sup> made before 31 March 1996, the interest of the landlord under a tenancy passes to a registered social landlord<sup>26</sup>, then, so long as the tenancy continues to be held by a specified body<sup>27</sup>, the tenancy continues<sup>28</sup> to be a secure tenancy and to be capable of being a housing association tenancy<sup>29</sup>. Similarly, where, by virtue of a disposal by the Secretary of State<sup>30</sup> made in the exercise by him of functions under Part III of the Housing Associations Act 1985<sup>31</sup>, the interest of the landlord under a secure tenancy passes to a registered social landlord<sup>32</sup> then, so long as the tenancy continues to be held by a specified body<sup>33</sup>, the tenancy continues<sup>34</sup> to be a secure tenancy and to be capable of being a housing association tenancy<sup>35</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 For the meaning of 'landlord' see PARA 1020 note 3 post.

4 For these purposes, the interest of a landlord under a tenancy is held by a public body at a time when it belongs to: (1) a local authority, a new town corporation, or an urban development corporation, all within the meaning of the Housing Act 1985 s 80 (as amended) (see PARA 1300 notes 8-11 post); or (2) a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq); or (3) Her Majesty in right of the Crown or a government department or is held in trust for Her Majesty for the purposes of a government department: Housing Act 1988 s 38(5) (amended by the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to new town development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq; and as to urban development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq.

5 Ibid s 38(1).

6 For these purposes, 'housing association tenancy' means a tenancy to which the Rent Act 1977 Pt VI (ss 86-97) (as amended) (see PARA 905 et seq ante) applies: Housing Act 1988 s 38(6)(a). As to the phasing out of the special regime for housing association tenancies see PARA 1013 ante.

7 Ibid s 38(2).

8 Ie subject to ibid s 38(4), (4A), (4B) (as respectively amended and added): see the text and notes 21-35 infra.

- 9     Ie on or after the time referred to in *ibid* s 38(1)(b).
- 10    Ie on or after the time referred to in *ibid* s 38(2)(b).
- 11    For these purposes, 'protected tenancy' has the same meaning as in the Rent Act 1977 (see *PARA* 818 ante): Housing Act 1988 s 38(6)(b).
- 12    For these purposes, 'protected occupancy' has the same meaning as in the Rent (Agriculture) Act 1976 (see *PARAS* 1144-1145 post): Housing Act 1988 s 38(6)(c).
- 13    For the meaning of 'secure tenancy' see *PARA* 1013 note 13 ante.
- 14    For the meaning of 'assured tenancy' see *PARA* 1018 post.
- 15    Ie the Housing Act 1988 s 1(2), Sch 1 para 1 (see *PARA* 1025 post) does not apply in relation to it.
- 16    Ibid s 38(3) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 106(1); and by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 3(1), (3)(a)).
- 17    Ie within the meaning of the Housing Act 1985 s 80 (as amended): see *PARA* 1300 note 9 post.
- 18    Ie made pursuant to a direction under the New Towns Act 1981 s 37 (as amended): see *TOWN AND COUNTRY PLANNING* vol 46(3) (Reissue) *PARA* 1385. As to the Commission for the New Towns (now part of English Partnerships) see *TOWN AND COUNTRY PLANNING* vol 46(3) (Reissue) *PARA* 1383 et seq.
- 19    Ie the Housing Act 1988 s 38(1), (3) (as amended): see the text and notes 1-5, 8-16 supra.
- 20    Ie in *ibid* s 38(1).
- 21    Ibid s 38(4)(a).
- 22    Ie made under *ibid* s 38(4)(b) for the purposes of s 38(4) (as amended).
- 23    Ibid s 38(4) (amended by the Local Government and Housing Act 1989 Sch 11 para 106(2)). In exercise of the power so conferred the Secretary of State made the Commission for the New Towns (Specified Date) (Tenancies) Order 1990, SI 1990/1980, which came into force on 23 October 1990: art 1. As to the Secretary of State see *PARA* 27 note 3 ante.
- 24    Ibid art 2. The Housing Act 1988 s 38(1), (3) (as amended) previously had effect as if any reference in s 38(1) were a reference to the date on which the period of two years from 15 November 1988 expired: see s 38(4)(a).
- 25    Ie a disposal falling within *ibid* s 38(4) (as amended).
- 26    Ie within the meaning of the Housing Act 1985: see s 5(4), (5) (as substituted and amended); and *HOUSING* vol 22 (2006 Reissue) *PARAS* 11, 67.
- 27    Ie a body which would have been specified in the Housing Act 1985 s 80(1) (as amended) (see *PARA* 1300 post) if the repeal of provisions of s 80 effected by the Housing Act 1988 had not been made.
- 28    Ie notwithstanding anything in *ibid* s 38(3) (as amended).
- 29    Ibid s 38(4A) (added by the Local Government and Housing Act 1989 Sch 11 para 106(3)).
- 30    As to the exercise of functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) by the 'relevant authority' see *HOUSING* vol 22 (2006 Reissue) *PARA* 18 et seq; and as to the transfer of functions so far as exercisable in relation to Wales see *PARA* 27 note 4 ante.
- 31    Ie under *ibid* Pt III (as amended): see *HOUSING* vol 22 (2006 Reissue) *PARA* 18 et seq.
- 32    See note 26 supra.
- 33    See note 27 supra.
- 34    See note 28 supra.

35 Housing Act 1988 s 38(4B) (added by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule, PARA 3(1), (3)(b)).

## **UPDATE**

### **1015 Transfer of existing tenancies from public to private sector**

TEXT AND NOTES--Housing Act 1988 s 38 further amended: SI 2008/3002.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(1) PHASING OUT OF THE RENT ACTS AND OTHER TRANSITIONAL PROVISIONS/1016. Succession to assured tenancies by statutory tenants.

### **1016. Succession to assured tenancies by statutory tenants.**

Where the person who is the original tenant<sup>1</sup> or the first successor<sup>2</sup> within the meaning of the Rent Act 1977 dies after 15 January 1989<sup>3</sup>, the provisions of that Act allowing a spouse or a member of the family of a deceased tenant to succeed to a statutory tenancy are modified by the Housing Act 1988<sup>4</sup>. Where the original tenant died on or before 15 January 1989, a surviving spouse or a member of the family of the deceased tenant who qualified succeeded to a statutory tenancy as the first successor; but, where the original tenant dies after that date, only a surviving spouse may succeed as a first successor and a qualifying family member will become an assured tenant by succession<sup>5</sup>. Where a first successor who was a statutory tenant died on or before 15 January 1989, a surviving spouse or qualifying family member succeeded to a statutory tenancy; but, where such a first successor dies after that date, a surviving spouse or surviving civil partner, or a qualifying family member, will succeed to an assured tenancy<sup>6</sup>.

In any case where, by virtue of any such modified provision<sup>7</sup>, a person ('the successor') becomes entitled to an assured tenancy of a dwelling house<sup>8</sup> by succession, that tenancy is a periodic tenancy arising<sup>9</sup> by statute<sup>10</sup> and is a tenancy:

- 2028 (1) taking effect in possession immediately after the death of the protected<sup>11</sup> or statutory tenant<sup>12</sup> or protected occupier<sup>13</sup> ('the predecessor') on whose death the successor became so entitled;
- 2029 (2) deemed to have been granted to the successor by the person who, immediately before the death of the predecessor, was the landlord<sup>14</sup> of the predecessor under his tenancy<sup>15</sup>;
- 2030 (3) under which the premises which are let<sup>16</sup> are the same dwelling house as, immediately before his death, the predecessor occupied under his tenancy;
- 2031 (4) under which the periods of the tenancy are the same as those for which rent was last payable by the predecessor under his tenancy;
- 2032 (5) under which the other terms are<sup>17</sup> the same as those on which, under his tenancy, the predecessor occupied the dwelling house immediately before his death; and
- 2033 (6) which is treated<sup>18</sup> as a statutory periodic tenancy<sup>19</sup>.

If, immediately before the death of the predecessor, the landlord might have recovered possession of the dwelling house on the mandatory ground for possession available where the tenancy was a protected shorthold tenancy<sup>20</sup>, the assured periodic tenancy to which the

successor becomes entitled is<sup>21</sup> an assured shorthold tenancy<sup>22</sup>; and, if immediately before his death the predecessor was a protected occupier or statutory tenant within the meaning of the Rent (Agriculture) Act 1976, the assured periodic tenancy to which the successor becomes entitled is an assured agricultural occupancy<sup>23</sup>.

Where, immediately before his death, the predecessor was a tenant under a fixed term tenancy<sup>24</sup>, the provisions for fixing the terms of the statutory periodic tenancy<sup>25</sup> to which the successor becomes entitled on the predecessor's death are modified<sup>26</sup>; and, if and so long as a dwelling house is subject to an assured tenancy to which the successor has become entitled by succession, the provisions relating to the recovery of possession<sup>27</sup> are also modified<sup>28</sup>.

1 For the meaning of 'the original tenant' see PARAS 843 (death on or before 15 January 1989), 844 (death after that date) respectively ante.

2 For the meaning of 'the first successor' see PARAS 843 (death on or before 15 January 1989), 844 (death after that date) respectively ante.

3 I.e. the Rent Act 1977 ss 2, 3, Sch 1 Pt 1 (paras 1-11) (as amended): see PARA 843 et seq ante.

4 Housing Act 1988 s 39(2), (3). For the meaning of 'statutory tenancy' see PARA 831 ante.

5 See the Housing Act 1988 s 39(2), Sch 4 Pt I (paras 1-9) and PARAS 844-845 ante. Rights to succession under the Rent (Agriculture) Act 1976 are similarly modified: see PARAS 1148-1149 post.

6 See the Housing Act 1988 s 39(3), Sch 4 Pt I paras 5-9; and PARAS 844-845 ante. For the meaning of 'assured tenancy' see PARA 1018 post.

7 I.e. any provision of the Rent Act 1977 Sch 1 Pt I (paras 1-11) as amended in accordance with the Housing Act 1988 s 39(2) or s 39(3) or any provision of the Rent (Agriculture) Act 1976 s 4 as amended in accordance with the Housing Act 1988 s 39(4) (see PARA 1149 post).

8 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

9 I.e. by virtue of the Housing Act 1988 s 39 (as amended)

10 Ibid s 39(5)(a). The tenancy to which the successor succeeds is a new periodic tenancy as an estate in land, not a continuation of the pre-existing statutory tenancy: *N & D (London) Ltd v Gadsdon* (1991) 24 HLR 64, [1992] 1 EGLR 112.

11 For the meaning of 'protected tenant' see PARA 818 ante.

12 For the meaning of 'statutory tenant' see PARA 831 ante.

13 I.e. within the meaning of the Rent (Agriculture) Act 1976: see PARAS 1143-1144 post.

14 For the meaning of 'landlord' see PARA 1020 note 3 post.

15 For these purposes, 'under his tenancy', in relation to the predecessor, means under his protected tenancy or protected occupancy or in his capacity as statutory tenant: Housing Act 1988 s 39(6).

16 For the meaning of 'let' see PARA 1012 note 4 ante.

17 I.e. subject to the Housing Act 1988 ss 13-15 (as amended): see PARA 1091 et seq post.

18 I.e. for the purposes of ibid s 13(2) (as amended): see PARA 1091 post.

19 Ibid s 39(6). For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 post.

20 I.e. under the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 19 (as added): see PARAS 970, 1010 ante.

21 I.e. whether or not, in the case of a tenancy to which this provision applies, it fulfils the conditions in the Housing Act 1988 s 20(1) (as substituted): see PARA 1051 post.

22 Ibid s 39(7) (amended by the Housing Act 1996 s 104, Sch 8 para 2(8)).

- 23 See the Housing Act 1988 s 39(8); and PARA 1149 post.
- 24 For the meaning of 'fixed term tenancy' see PARA 1051 note 2 post.
- 25 Ie the Housing Act 1988 s 6: see PARA 1069 post.
- 26 Ibid s 39(9). As to the specified modifications see PARA 1069 notes 3-4, 6-7 post.
- 27 Ie ibid s 7, Sch 2 (as amended): see PARA 1100 et seq post.
- 28 Ibid s 39(10). As to the specified modifications see PARAS 1100 note 8, 1108 post.

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### **1017. Conversion of 1980 Act assured tenancies; no such new tenancies to be created.**

A tenancy<sup>1</sup> under which a dwelling house<sup>2</sup> was, on 15 January 1989<sup>3</sup>, let as a separate dwelling<sup>4</sup> and which immediately before that date was an assured tenancy for the purposes of the Housing Act 1980<sup>5</sup>, became on that date an assured tenancy<sup>6</sup> for the purposes of the Housing Act 1988<sup>7</sup>.

In any case where, immediately before that date, the landlord<sup>8</sup> under a tenancy was a fully mutual housing association<sup>9</sup>, and the tenancy so became an assured tenancy, then, so long as that association remains the landlord under that tenancy and under any statutory periodic tenancy<sup>10</sup> which arises on the coming to an end of that tenancy, the tenancy is not excluded<sup>11</sup> from being an assured tenancy notwithstanding that the landlord is such an association<sup>12</sup>.

In any case where a tenant under a 1980 Act tenancy<sup>13</sup> made an application to the court<sup>14</sup> before 15 January 1989 for the grant of a new tenancy and the 1980 Act tenancy was continuing<sup>15</sup> on that date, the above provisions<sup>16</sup> do not apply to the 1980 Act tenancy<sup>17</sup>; but, if the court makes an order for the grant of a new tenancy<sup>18</sup>, that tenancy is<sup>19</sup> an assured tenancy<sup>20</sup>. In any case where a contract was entered into before 15 January 1989 for the grant of a 1980 Act tenancy but at that date the tenancy had not been granted, the contract has effect as a contract for the grant of an assured tenancy<sup>21</sup>.

A tenancy which is entered into on or after 15 January 1989 cannot be a 1980 Act tenancy<sup>22</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

4 For the meaning of 'let' see PARA 1012 note 4 ante; and as to shared accommodation see PARAS 1019-1021 post.

5 Ie the Housing Act 1980 ss 56-58 (as amended; repealed with savings by the Housing Act 1988 s 140(1), Sch 18) (tenancies granted by approved bodies): see PARA 890 ante.

6 Ie except as provided by the Housing Act 1988 Pt I Ch V (ss 34-39) (as amended): see PARAS 1012-1016 ante. For the meaning of 'assured tenancy' see PARA 1018 post.

7 Ibid s 1(3). In relation to an assured tenancy falling within s 1(3), Sch 1 Pt I (paras 1-13) (as amended) has effect, subject to s 1(5) (see the text and notes 8-12 *infra*), as if it consisted only of Sch 1 paras 11, 12 (as amended) (see PARAS 1039-1040 *post*); and the Housing Act 1980 ss 56-58, Sch 5 (as amended; repealed with savings by the Housing Act 1988 Sch 18) (see PARA 890 *ante*) do not apply after 15 January 1989: Housing Act 1988 s 1(4).

8 For the meaning of 'landlord' see PARA 1020 note 3 *post*.

9 For these purposes, except where the context otherwise requires, 'fully mutual housing association' has the same meaning as in the Housing Associations Act 1985 Pt I (ss 1-40) (as amended) (see s 1(2) (as amended)); and HOUSING vol 22 (2006 Reissue) PARA 11): Housing Act 1988 s 45(1).

10 For the meaning of 'statutory periodic tenancy' see PARA 1067 *post*.

11 *Ie* by the Housing Act 1988 Sch 1 para 12(1)(h): see PARA 1040 *post*.

12 Ibid s 1(5).

13 For these purposes, a '1980 Act tenancy' means an assured tenancy for the purposes of the Housing Act 1980 ss 56-58 (as amended; repealed with savings by the Housing Act 1988 Sch 18) (see PARA 890 *ante*): Housing Act 1988 s 37(1).

14 *Ie* under the Landlord and Tenant Act 1954 s 24 (as amended): see PARA 720 *ante*. For these purposes, any reference to a provision of the Landlord and Tenant Act 1954 is a reference only to that provision as applied by the Housing Act 1980 s 58 (as amended; repealed with savings by the Housing Act 1988 Sch 18) (see PARA 890 *ante*): Housing Act 1988 s 37(6).

15 *Ie* by virtue of the Landlord and Tenant Act 1954 s 24 (as amended) or of any provision of Pt IV (ss 51-70) (as amended). See also note 14 *supra*.

16 *Ie* the Housing Act 1988 s 1(3): see the text and notes 1-7 *supra*.

17 Ibid s 37(1), (2).

18 *Ie* under the Landlord and Tenant Act 1954 s 29 (as substituted): see PARA 720 *ante*. See also note 14 *supra*.

19 *Ie* for the purposes of the Housing Act 1988.

20 Ibid s 37(3). In relation to an assured tenancy falling within s 37(3) or granted pursuant to a contract falling within s 37(4) (see the text and note 21 *infra*), Sch 1 Pt I (paras 1-13) (as amended) has effect as if it consisted only of Sch 1 paras 11, 12 (as amended); and, if the landlord granting the tenancy is a fully mutual housing association, then, so long as that association remains the landlord under that tenancy, and under any statutory periodic tenancy which arises on the coming to an end of that tenancy, Sch 1 para 12 (as amended) has effect in relation to that tenancy with the omission of Sch 1 para 12(1)(h): s 37(5).

21 Ibid s 37(4). See also note 20 *supra*.

22 Ibid s 37(1).

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## **(2) MEANING OF 'ASSURED TENANCY'**

### **(i) In general**

#### **1018. Meaning of 'assured tenancy'.**



A tenancy<sup>1</sup> under which a dwelling house<sup>2</sup> is let<sup>3</sup> as a separate dwelling<sup>4</sup> is<sup>5</sup> an assured tenancy if and so long as:

2034 (1) the tenant<sup>6</sup> or, as the case may be, each of the joint tenants is an individual<sup>7</sup>; and

2035 (2) the tenant or, as the case may be, at least one of the joint tenants occupies the dwelling house as his only or principal home<sup>8</sup>; and

2036 (3) the tenancy is not one which cannot be<sup>9</sup> an assured tenancy<sup>10</sup>.

Lettings to service personnel which would not otherwise be assured tenancies may be treated as such in certain circumstances<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante. The letting of a houseboat will not be on an assured tenancy since the Housing Act 1988 only applies to land, not to personal property, and a boat is not real property: see *Chelsea Yacht and Boat Club Ltd v Pope* [2001] 2 All ER 409, [2000] 1 WLR 1941, CA. Cooking facilities are not an essential attribute of a 'dwelling house' or 'dwelling' for these purposes; but a hotel room let to a long-term resident who provides his own electrical equipment enabling him to warm up food and make simple meals may fall within the statutory protection since the legislative purpose is to protect people in the occupation of their homes: see *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, [2002] 1 All ER 46.

3 For the meaning of 'let' see PARA 1012 note 4 ante.

4 In determining whether a property is let as a separate dwelling, the primary consideration is the tenancy agreement itself, rather than the nature of the property or the use to which it has been put: *Andrews v Brewer* (1997) 30 HLR 203, sub nom *Brewer v Andrews* [1997] EGCS 19, CA. As to the sharing of premises see PARA 1019 et seq post.

5 Ie for the purposes of the Housing Act 1988: see PARA 1011 et seq ante, PARA 1019 et seq post.

6 For these purposes, unless the context otherwise requires, 'tenant' includes a subtenant and any person deriving title under the original tenant or subtenant: *ibid* s 45(1). Where two or more persons jointly constitute the tenant in relation to a tenancy, then, for these purposes, except where otherwise provided, any reference to the tenant is a reference to all the persons who jointly constitute the tenant: s 45(3).

7 The requirement that the tenant or each of the joint tenants be an individual prevents a letting to a company, whether alone or as one of joint tenants, from being an assured tenancy and marks a departure from the Rent Acts which contain no such restriction in relation to protected tenancies, although only an individual can become a statutory tenant (see PARA 832 ante). The requirement that a tenant be an individual is also found in the Housing Act 1985 s 81 in relation to secure tenants: see PARA 1300 post. An assured tenancy will, therefore, cease to be an assured tenancy if it is assigned to a company.

8 This requirement also marks a departure from the Rent Acts under which occupation is not a prerequisite of the existence of a protected tenancy, although a statutory tenancy continues if and so long as the statutory tenant occupies the dwelling house as his residence: see the Rent Act 1977 s 2(1)(a); and PARA 831 ante. For the meaning of 'occupies the dwelling house as his residence' in the context of the Rent Acts see PARAS 832-836 ante. That case law is likely to be helpful in determining what constitutes occupation as 'a home' but not as to whether the home is the tenant's 'only or principal' home since the test is stricter than the test of residence. The requirement of occupation as an only or principal home is also found in the Housing Act 1985 s 81 in relation to secure tenants: see PARA 1300 note 19 post. See also *Ujima Housing Association v Ansah* (1997) 30 HLR 831, [1997] NPC 144, CA (subtenant who sublet the whole premises and moved out leaving his furniture in the premises was held not to be in occupation).

9 Ie by virtue of the Housing Act 1988 s 1(2) (see PARA 1024 post) or s 1(6) (repealed).

10 *Ibid* s 1(1).

11 See PARA 1073 et seq post.

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## **(ii) Shared Accommodation**

### **1019. Sharing with the landlord.**

A tenant who does not have a tenancy of premises let as a separate dwelling because he shares essential living accommodation<sup>1</sup> with his landlord cannot be an assured tenant<sup>2</sup>.

Any reservation by a landlord of a right to re-enter and share accommodation with the tenant must be clear and specific if it is to operate to prevent the tenant from holding an assured tenancy<sup>3</sup>.

1 For the meaning of 'essential living accommodation' for the purposes of the Rent Act 1977 see PARA 824 ante. It is thought that the same principles apply for the purposes of the Housing Act 1988. Cf the meaning of 'living accommodation' for the purposes of s 3 (sharing with persons other than the landlord): see PARA 1020 note 7 post.

2 It is a requirement of an assured tenancy that the premises are let as a separate dwelling: see PARA 1018 ante. As to resident landlords see further PARA 1035 et seq post. The Housing Act 1988 contains no equivalent provision to that formerly contained in the Rent Act 1977 s 21 (repealed with savings) which conferred the limited protection of a 'restricted contract' on certain tenants who shared accommodation with their landlords. As to restricted contracts see PARA 985 et seq ante; and as to the phasing out of restricted contracts see PARA 1014 ante. As to the exceptions to the general requirement of 'separateness' see PARA 1038 post. See also *Gray v Brown* (1992) 25 HLR 144 [1993] 1 EGLR 119, CA (cited in PARA 826 note 4 ante).

3 See *Miller v Eyo* (1999) 31 HLR 306, [1998] NPC 95, CA (term of tenancy of bedsitting room that kitchen and bathroom were to be shared with any other tenant of the other bedroom but there was no agreement relating to the possibility of sharing with the landlords; held that the tenancy was an assured tenancy).

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### **1020. Tenant sharing with persons other than the landlord.**

Where a tenant<sup>1</sup> has the exclusive occupation<sup>2</sup> of any accommodation ('the separate accommodation') and:

2037 (1) the terms as between the tenant and his landlord<sup>3</sup> on which the tenant holds the separate accommodation include the use of other accommodation ('the shared accommodation') in common with another person or other persons not being or including the landlord; and

2038 (2) the separate accommodation would not otherwise be a dwelling house let<sup>4</sup> on an assured tenancy by reason only of the circumstances mentioned in head (1) above,

the separate accommodation is deemed to be a dwelling house let on an assured tenancy and the following provisions have effect<sup>5</sup>.

While the tenant is in possession of the separate accommodation, any term of the tenancy<sup>6</sup> terminating or modifying, or providing for the termination or modification of, his right to use any of the shared accommodation which is living accommodation<sup>7</sup> is of no effect<sup>8</sup>. Where, however, the terms of the tenancy are such that, at any time during the tenancy, the persons in common with whom the tenant is entitled to the use of the shared accommodation could be varied or their number increased, nothing in the above provision prevents those terms from having effect so far as they relate to any such variation or increase<sup>9</sup>.

While the tenant is in possession of the separate accommodation, no order may be made<sup>10</sup> for possession of any of the shared accommodation, whether on the application of the immediate landlord of the tenant or on the application of any person under whom that landlord derives title, unless a like order has been made, or is made at the same time, in respect of the separate accommodation<sup>11</sup>. The statutory provisions relating to fixing the terms of a statutory periodic tenancy<sup>12</sup> apply accordingly<sup>13</sup>. The court<sup>14</sup> may, however, on the application of the landlord, make such order as it thinks just either:

- 2039 (a) terminating the right of the tenant to use the whole or any part of the shared accommodation other than living accommodation; or
- 2040 (b) modifying his right to use the whole or any part of the shared accommodation, whether by varying the persons or increasing the number of persons entitled to the use of that accommodation or otherwise<sup>15</sup>;

but no order may be so made so as to effect any termination or modification of the rights of the tenant which could not<sup>16</sup> be effected by or under the terms of the tenancy<sup>17</sup>.

1 For the meaning of 'tenant' see PARA 1018 note 6 ante.

2 As to exclusive occupation generally see PARA 6 ante.

3 For these purposes, except where the context otherwise requires, 'landlord' includes any person from time to time deriving title under the original landlord and also includes, in relation to a dwelling house, any person other than a tenant who is or but for the existence of an assured tenancy would be entitled to possession of the dwelling house: Housing Act 1988 s 45(1). Where two or more persons jointly constitute the landlord in relation to a tenancy then, except where otherwise provided, any reference to the landlord is a reference to all the persons who jointly constitute the landlord: s 45(3). For the meaning of 'dwelling house' see PARA 1012 note 4 ante; and for the meaning of 'assured tenancy' see PARA 1018 ante.

4 For the meaning of 'let' see PARA 1012 note 4 ante.

5 Housing Act 1988 s 3(1). Where, for the purposes of determining the rateable value of the separate accommodation, it is necessary to make an apportionment under s 1(2)(b), Sch 1 Pt II (paras 14-16) (see PARA 1027 post), regard must, however, be had to the circumstances mentioned in s 3(1)(a) (see head (1) in the text): s 3(2). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

6 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

7 For these purposes, 'living accommodation' means accommodation of such a nature that the fact that it constitutes or is included in the shared accommodation is sufficient, apart from the Housing Act 1988 s 3, to prevent the tenancy from constituting an assured tenancy of a dwelling house: s 3(5).

8 Ibid s 3(3).

9 Ibid s 3(4).

10 Ie without prejudice to the enforcement of any order made under ibid s 10(3): see the text and notes 12-15 infra.

11 Ibid s 10(1), (2).

12 Ie ibid s 6: see PARAS 1069-1070 post.

- 13 See note 11 *supra*.
- 14 As to the jurisdiction of the court see PARA 1128 *post*.
- 15 Housing Act 1988 s 10(1), (3).
- 16 *Ie* apart from *ibid* s 3(3): see the text and notes 6-8 *supra*.
- 17 *Ibid* s 10(4). Corresponding provisions in the Rent Act 1977 have been judicially criticised for obscurity: see PARA 826 note 18 *ante*. The obscurity is not elucidated by the provisions of the Housing Act 1988.

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### **1021. Tenant sharing with a subtenant.**

Where the tenant<sup>1</sup> of a dwelling house<sup>2</sup> has sublet part but not the whole of the dwelling house, then no part of the dwelling house is, as against his landlord<sup>3</sup> or any superior landlord, to be treated as excluded from being a dwelling house let on an assured tenancy<sup>4</sup> by reason only that the terms on which any person claiming under the tenant holds any part of the dwelling house include the use of accommodation in common with other persons<sup>5</sup>. Nothing in this provision, however, affects the rights against, and liabilities to, each other of the tenant and any person claiming under him or of any two such persons<sup>6</sup>.

- 1 For the meaning of 'tenant' see PARA 1018 note 6 *ante*.
- 2 For the meaning of 'dwelling house' see PARA 1012 note 4 *ante*.
- 3 For the meaning of 'landlord' see PARA 1020 note 3 *ante*.
- 4 For the meaning of 'assured tenancy' see PARA 1018 *ante*.
- 5 Housing Act 1988 s 4(1).
- 6 *Ibid* s 4(2). The position between a tenant and subtenant is not affected by s 4, which gives statutory effect, in relation to assured tenancies, to the decision in *Baker v Turner* [1950] AC 401, [1950] 1 All ER 834, HL. Cf the Rent Act 1977 s 23; and PARA 827 *ante*.

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### **(iii) Letting of Dwelling House with Other Land**

#### **1022. Letting with other land.**

If, under a tenancy<sup>1</sup>, a dwelling house<sup>2</sup> is let<sup>3</sup> together with other land<sup>4</sup>, then:

- 2041 (1) if and so long as the main purpose of the letting is the provision of a home for the tenant<sup>5</sup>, or, where there are joint tenants, at least one of them, the other land is treated for the statutory purposes<sup>6</sup> as part of the dwelling house;
- 2042 (2) if and so long as the main purpose of the letting is not as mentioned in head (1) above, the tenancy is treated for those purposes as not being one under which a dwelling house is let as a separate dwelling<sup>7</sup>.

Nothing in the above provisions, however, affects any question whether a tenancy is otherwise precluded<sup>8</sup> from being an assured tenancy<sup>9</sup>. During the course of a tenancy the main purposes of the letting may change and accordingly the tenancy may sometimes be assured and sometimes not<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'let' see PARA 1012 note 4 ante.

4 'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land: Interpretation Act 1978 s 5, Sch 1.

5 For the meaning of 'tenant' see PARA 1018 note 6 ante.

6 I.e. for the purposes of the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq ante, PARA 1023 et seq post.

7 Ibid s 2(1).

8 I.e. by virtue of any provision of ibid s 1(2), Sch 1 (as amended): see PARA 1024 et seq post.

9 Ibid s 2(2). For the meaning of 'assured tenancy' see PARA 1018 ante.

10 The question whether the tenancy is assured or not will probably depend on the actual use at the date of the hearing: see *Bradshaw v Smith* [1980] 2 EGLR 89, (1980) 255 Estates Gazette 699, CA (decided under the Rent Act 1977 s 26: see PARA 867 ante).

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### **(3) EXCEPTIONS AND EXCLUSIONS**

#### **(i) Certain Lettings arranged by Local Housing Authorities**

##### **1023. Letting arranged in discharge of local housing authority's interim duties to house the homeless.**

Where, in pursuance of any of its housing functions under the provisions of the Housing Act 1996 imposing interim duties to house the homeless<sup>1</sup>, a local housing authority<sup>2</sup> makes arrangements with a private landlord to provide accommodation, a tenancy granted to the applicant in pursuance of the arrangements cannot be an assured tenancy<sup>3</sup> before the end of the period of 12 months beginning with:

2043 (1) the date on which the applicant was notified of the authority's decision on his case<sup>4</sup>; or

2044 (2) if there is a review of that decision<sup>5</sup> or an appeal to the court<sup>6</sup>, the date on which he is notified of the decision on review or the appeal is finally determined,

unless, before or during that period, the tenant is notified by the landlord<sup>7</sup> that the tenancy is to be regarded as an assured shorthold tenancy<sup>8</sup> or an assured tenancy other than an assured shorthold tenancy<sup>9</sup>.

1   le its functions under the Housing Act 1996 s 188 (as amended) (interim duty to accommodate in case of apparent priority need), s 190 (as amended) (duties to persons becoming homeless intentionally), s 200 (as amended) (duties to applicant whose case is considered for referral or referred to another local housing authority) or s 204(4) (as amended) (power to secure accommodation for applicant until appeal is determined): see HOUSING vol 22 (2006 Reissue) PARAS 286, 288, 293, 295.

2   For the meaning of 'local housing authority' for these purposes see *ibid* s 230 (applying the definition in the Housing Act 1985); and HOUSING vol 22 (2006 Reissue) PARA 9.

3   For the meaning of 'assured tenancy' see PARA 1018 ante.

4   le its decision under the Housing Act 1996 s 184(3) (inquiry into cases of homelessness or threatened homelessness) or s 198(5) (decision on referral to another local housing authority): see HOUSING vol 22 (2006 Reissue) PARAS 283, 292.

5   le under *ibid* s 202 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 294.

6   le under *ibid* s 204 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 295.

7   le or in the case of joint landlords, by at least one of them: *ibid* s 209 (substituted by the Homelessness Act 2002 s 18(1), Sch 1 paras 2, 19).

8   For the meaning of 'assured shorthold tenancy' see PARA 1051 post.

9   Housing Act 1996 s 209 (as substituted: see note 7 *supra*). See further HOUSING vol 22 (2006 Reissue) PARA 298. The exemption from protection is, therefore, temporary, and after the expiry of the specified period the tenancy, unless previously terminated, will become assured. As to the statutory presumption that any assured tenancy granted will be an assured shorthold tenancy see PARA 1044 et seq post.

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## **(ii) Tenancies which cannot be Assured Tenancies**

### **1024. In general.**

If and so long as a tenancy<sup>1</sup> falls within any of the statutory exclusions<sup>2</sup>, it cannot be an assured tenancy<sup>3</sup>.

1   For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2   le within any of the Housing Act 1988 s 1(2), Sch 1 Pt I (paras 1-13) (as amended): see PARA 1025 et seq post.

3   *Ibid* s 1(2). Section 1(2) is subject to s 1(3) (see PARA 1017 ante): s 1(2). For the meaning of 'assured tenancy' see PARA 1018 ante. As to the application of Sch 1 Pt I (paras 1-13) (as amended) for the purpose of

determining whether the qualifying condition is fulfilled as respects a long residential tenancy under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) see PARA 1244 note 7 post.

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### **1025. Tenancies entered into before commencement.**

A tenancy<sup>1</sup> which was entered into before, or pursuant to a contract made before, 15 January 1989<sup>2</sup> cannot<sup>3</sup> be an assured tenancy<sup>4</sup>. By contrast a tenancy entered into after that date cannot, save in exceptional circumstances, be a protected or statutory tenancy for the purposes of the Rent Act 1977<sup>5</sup>.

1 For these purposes, 'tenancy' means a tenancy under which a dwelling house is let as a separate dwelling: Housing Act 1988 s 1(2)(a). For the meaning of 'tenancy' generally see PARA 1012 note 1 ante; and for the meanings of 'dwelling house' and 'let' see PARA 1012 note 4 ante. As to shared accommodation see PARAS 1019-1021 ante.

2 Ie the date when *ibid* Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 Ie subject to *ibid* s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

4 Housing Act 1988 s 1(2), Sch 1 para 1.

5 See *ibid* s 34 (as amended); and PARA 1012 et seq ante.

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1026. Tenancies at high rents.

### **1026. Tenancies at high rents.**

A tenancy<sup>1</sup> which is entered into on or after 1 April 1990, otherwise than, where the dwelling house<sup>2</sup> had a rateable value<sup>3</sup> on 31 March 1990, in pursuance of a contract made before 1 April 1990, and under which the rent<sup>4</sup> payable for the time being is payable at a rate exceeding £25,000<sup>5</sup> a year, cannot<sup>6</sup> be an assured tenancy<sup>7</sup>.

There is no statutory restriction on the rent which the parties may agree; however a clause in a tenancy agreement which purported to be a rent review clause but which provided for the annual rent to rise from £4,680 to £25,000, which was substantially above the market value for the property, was held to be a device designed to enable the landlord to bring the assured tenancy to an end and obtain possession of the property and was, accordingly, unenforceable as an unlawful contracting out of the security of tenure provisions relating to assured tenancies<sup>8</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 As to the ascertainment of rateable value see PARA 1027 post; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value where no entry appeared on the valuation list at the date at which the domestic rating system was abolished see PARA 523 ante.

4 For these purposes, 'rent' does not include any sum payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates, council tax, services, management, repairs, maintenance or insurance, unless it could not have been regarded by the parties to the tenancy as a sum so payable: Housing Act 1988 s 1(2), Sch 1 para 2(2) (Sch 1 para 2 substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 29; amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 19). Cf the Rent Act 1977 s 4(5) (as added and amended), s 5(4) (as amended) and PARAS 860 note 5, 862 ante. Unless the rent is a pecuniary rent or, if in kind, has been quantified in money terms, the exclusion cannot operate: see *Hornsby v Maynard* [1925] 1 KB 514, DC; *Montague v Browning* [1954] 2 All ER 601, [1954] 1 WLR 1039, CA; *Barnes v Barratt* [1970] 2 QB 657, [1970] 2 All ER 483, CA (all decided under the Rent Act 1977: see PARA 862 ante).

'Rates' includes water rates and charges but does not include an owner's drainage rate, as defined by the Land Drainage Act 1976 s 63(2)(a) (repealed; see now the Land Drainage Act 1991 s 40; and WATER AND WATERWAYS vol 101 (2009) PARAS 627-628); Housing Act 1988 s 45(1). For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 See subject to *ibid* s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

6 The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace any amount referred to in the Housing Act 1988 Sch 1 para 2 (as substituted and amended) by such amount as is specified in the order; and such an order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Housing Act 1988 s 1(2A) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 27). At the date at which this title states the law, no such order had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions under the Housing Act 1988 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Housing Act 1988 Sch 1 para 2(1) (as substituted: see note 4 supra). For the meaning of 'assured tenancy' see PARA 1018 ante. Cf the Rent Act 1977 s 4(4) (as added) and PARA 860 ante.

8 See *Bankway Properties Ltd v Pensfold-Dunsford* [2001] EWCA Civ 528, [2001] 1 WLR 1369, [2001] All ER (D) 104 (Apr).

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**



See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### **1027. Tenancies where rateable value exceeds certain limits.**

A tenancy<sup>1</sup> which was entered into before 1 April 1990, or on or after that date in pursuance of a contract made before that date, and under which the dwelling house<sup>2</sup> had a rateable value<sup>3</sup> on 31 March 1990 which, if it is in Greater London<sup>4</sup>, exceeded £1,500 and, if it is elsewhere, exceeded £750, cannot<sup>5</sup> be an assured tenancy<sup>6</sup>.

The rateable value of a dwelling house at any time is to be ascertained<sup>7</sup> as follows<sup>8</sup>. If the dwelling house is a hereditament for which a rateable value is then shown in the valuation list<sup>9</sup>, it is that rateable value<sup>10</sup>. If, however, the dwelling house forms part only of such a hereditament or consists of or forms part of more than one such hereditament, its rateable value is taken to be such value as is found by a proper apportionment or aggregation of the rateable value or values so shown<sup>11</sup>.

Where, after the time at which the rateable value of a dwelling house is material for these purposes<sup>12</sup>, the valuation list is altered so as to vary the rateable value of the hereditament of which the dwelling house consists, in whole or in part, or forms part and the alteration has effect from that time or from an earlier time, the rateable value of the dwelling house at the material time must be ascertained as if the value shown in the valuation list at the material time had been the value shown in the list as altered<sup>13</sup>.

The above provisions<sup>14</sup> apply in relation to any other land<sup>15</sup> which is treated<sup>16</sup> as part of a dwelling house as they apply in relation to the dwelling house itself<sup>17</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value where no entry appeared on the valuation list at the date at which the domestic rating system was abolished see PARA 523 ante.

4 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

5 Ie subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

6 Ibid Sch 1 para 2A (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 29). For the meaning of 'assured tenancy' see PARA 1018 ante. As to rateable value limits for the purposes of the Rent Act 1977 see s 4(1), (2) (as amended); and PARAS 855-859 ante.

7 Ie for the purposes of the Housing Act 1988 Sch 1 Pt I (paras 1-13) (as amended): see PARAS 1025-1026 ante; the text and notes 1-6 supra; and PARA 1028 et seq post.

8 Ibid s 1(2)(b), Sch 1 para 14(1).

9 As to the valuation list see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 268 et seq; and see note 3 supra.

10 Housing Act 1988 Sch 1 para 14(1)(a).

11 Ibid Sch 1 para 14(1)(b). Any question arising under Sch 1 Pt II (paras 14-16) as to the proper apportionment or aggregation of any value or values must be determined by the county court; and the decision of that court is final: Sch 1 para 14(2). As to apportionment in the case of shared accommodation see PARA 1020 note 5 ante.

12 See note 7 supra.

13 Housing Act 1988 Sch 1 para 15. Cf *Guestheath Ltd v Mirza* (1990) 22 HLR 399, [1990] 2 EGLR 111 (cited in PARA 859 note 9 ante).

14 Ie the Housing Act 1988 Sch 1 paras 14, 15.

15 For the meaning of 'land' see PARA 1022 note 4 ante.

16 Ie under the Housing Act 1988 s 2: see PARA 1022 ante.

17 Ibid Sch 1 para 16.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### 1028. Tenancies at low rents.

The following tenancies<sup>1</sup> cannot<sup>2</sup> be assured tenancies<sup>3</sup>:

2045 (1) a tenancy under which for the time being no rent<sup>4</sup> is payable<sup>5</sup>;

2046 (2) a tenancy:

22

26. (a) which is entered into on or after 1 April 1990, otherwise than, where the dwelling house<sup>6</sup> had a rateable value<sup>7</sup> on 31 March 1990, in pursuance of a contract made before 1 April 1990; and

27. (b) under which the rent payable for the time being is payable at a rate of £1,000<sup>8</sup> or less a year, if the dwelling house is in Greater London<sup>9</sup>, and £250<sup>10</sup> or less a year, if it is elsewhere<sup>11</sup>;

23

2047 (3) a tenancy:

24

28. (a) which was entered into before 1 April 1990 or, where the dwelling house had a rateable value on 31 March 1990, on or after 1 April 1990 in pursuance of a contract made before that date; and

29. (b) under which the rent for the time being payable is less than two-thirds of the rateable value of the dwelling house on 31 March 1990<sup>12</sup>.

25

It seems that a tenancy may move in and out of protection depending upon the amount of rent payable 'for the time being'<sup>13</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 The subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

3 For the meaning of 'assured tenancy' see PARA 1018 ante.

4 The Housing Act 1988 s 1(2), Sch 1 para 2(2) (as substituted and amended) (meaning of 'rent': see PARA 1026 note 4 ante) applies for the purposes of Sch 1 paras 3-3B (as substituted) (see the text and notes 1-3 supra, 5-12 infra) as it applies for the purposes of Sch 1 para 2(1) (as substituted) (see PARA 1026 ante): Sch 1 para 3C (Sch 1 paras 3-3C substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 30).

5 Housing Act 1988 Sch 1 para 3 (as substituted: see note 4 supra).

6 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 As to ascertainment of rateable value see PARA 1027 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value where no entry appeared on the valuation list at the date at which the domestic rating system was abolished see PARA 523 ante.

8 The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace any amount referred to in the Housing Act 1988 s 1(2), Sch 1 para 3A (as substituted) by such amount as is specified in the order; and such an order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 1(2A) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 27). At the date at which this title states the law, no such order had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

9 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

10 See note 8 supra.

11 Housing Act 1988 Sch 1 para 3A (as substituted: see note 4 supra).

12 Ibid Sch 1 para 3B (as substituted: see note 4 supra). Cf the Rent Act 1977 s 5 (as amended); and PARA 861 ante.

13 Cf para 862 the text and notes 10-11 ante.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1029. Business tenancies.

### **1029. Business tenancies.**

A tenancy<sup>1</sup> to which Part II of the Landlord and Tenant Act 1954<sup>2</sup> applies cannot<sup>3</sup> be an assured tenancy<sup>4</sup>. A tenancy to which that Act formerly applied does not necessarily become an assured tenancy within the meaning of the Housing Act 1988 merely because the tenant ceases the business use and uses the premises solely for residential purposes<sup>5</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

3 Ie subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

4 Housing Act 1988 s 1(2), Sch 1 para 4. For the meaning of 'assured tenancy' see PARA 1018 ante. Cf the Rent Act 1977 s 24(3); and PARA 822 ante.

5 See *Wagle v Trustees of Henry Smith's Charity Kensington Estate* [1990] QB 42, [1989] 1 EGLR 124, CA (decided under the Rent Act 1977; tenant ceased business use without consent of landlord; tenancy did not thereby become a protected tenancy); *Webb and Barrett v London Borough of Barnet* (1988) 21 HLR 228, [1989] 1 EGLR 49, CA (similar decision with regard to the provisions of the Housing Act 1985 relating to secure tenancies: see PARA 1300 note 3 post).

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### **1030. Licensed premises.**

A tenancy<sup>1</sup> under which the dwelling house<sup>2</sup> consists of or comprises premises which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>3</sup> for consumption on the premises, cannot<sup>4</sup> be an assured tenancy<sup>5</sup>.

- 1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.
- 2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 3 Ie within the meaning of the Licensing Act 2003 s 14.
- 4 Ie subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.
- 5 Housing Act 1988 s 1(2), Sch 1 para 5 (amended by the Licensing Act 2003 s 198(1), Sch 6 para 108). Cf the Rent Act 1977 s 11 (as amended); and PARA 881 ante. With effect from 1 January 1991, such tenancies will usually fall within the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see the Landlord and Tenant (Licensed Premises) Act 1990 ss 1, 2(2), (3); and PARA 775 ante.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1031. Tenancies of agricultural land.

### 1031. Tenancies of agricultural land.

A tenancy<sup>1</sup> under which agricultural land<sup>2</sup> exceeding two acres<sup>3</sup> is let<sup>4</sup> together with the dwelling house<sup>5</sup> cannot<sup>6</sup> be an assured tenancy<sup>7</sup>.

- 1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.
- 2 For these purposes, 'agricultural land' has the meaning set out in the General Rate Act 1967 s 26(3)(a) (as amended) (see PARA 867 note 2 ante): Housing Act 1988 s 1(2), Sch 1 para 6(2). The General Rate Act 1967 s 26(3)(a) (as amended) continues to have effect after 31 March 1990 for these purposes as if the Local Government Finance Act 1988 s 117(1) (now as amended) (rates and precepts: abolition) had not been enacted: References to Rating (Housing) Regulations 1990, SI 1990/434, reg 3.
- 3 Ie 0.8 hectare approximately.
- 4 For the meaning of 'let' see PARA 1012 note 4 ante.
- 5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 6 Ie subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.
- 7 Housing Act 1988 Sch 1 para 6(1). For the meaning of 'assured tenancy' see PARA 1018 ante. Cf s 2 which excludes from protection a tenancy under which a dwelling house is let with other land if the main purpose of the letting is not the provision of a home for the tenant: see PARA 1022 ante. See also the Rent Act 1977 s 26; and PARA 867 ante.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1032. Tenancies of agricultural holdings etc.

### 1032. Tenancies of agricultural holdings etc.

A tenancy<sup>1</sup> under which the dwelling house<sup>2</sup> is comprised in an agricultural holding<sup>3</sup> and is occupied by the person responsible for the control, whether as tenant<sup>4</sup> or as servant or agent of the tenant, of the farming of the holding, cannot<sup>5</sup> be an assured tenancy<sup>6</sup>. Similarly, a tenancy under which the dwelling house is comprised in the holding held under a farm business tenancy<sup>7</sup>, and is occupied by the person responsible for the control, whether as tenant or as servant or agent of the tenant, of the management of the holding, cannot<sup>8</sup> be an assured tenancy<sup>9</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For these purposes, 'agricultural holding' means any agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy in relation to which that Act applies: Housing Act 1988 s 1(2), Sch 1 para 7(3) (Sch 1 para 7 substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 34). As to such agricultural holdings see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 Subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

6 Housing Act 1988 Sch 1 para 7(1) (as substituted: see note 3 supra). For the meaning of 'assured tenancy' see PARA 1018 ante. Cf the Rent Act 1977 s 10(1)(a) (as substituted); and PARA 868 ante. See also *Critchley v Clifford* [1962] 1 QB 131, [1961] 3 All ER 288, CA, cited in PARA 868 ante. Where a dwelling house was let as part of an agricultural holding, its assignment and use separately from the land did not mean that it was no longer comprised within an agricultural holding: *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA (decided under the Leasehold Reform Act 1967 s 1(3)(b)(i) (as amended; now as substituted): see PARA 1415 post).

7 For these purposes, 'farm business tenancy', and 'holding' in relation to such a tenancy, have the same meaning as in the Agricultural Tenancies Act 1995: Housing Act 1988 Sch 1 para 7(3) (as substituted: see note 3 supra). As to such tenancies and holdings see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302.

8 See note 5 supra.

9 Housing Act 1988 Sch 1 para 7(2) (as substituted: see note 3 supra). Cf the Rent Act 1977 s 10(1)(b) (as substituted); and PARA 868 ante.

### UPDATE

## **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### **1033. Lettings to students.**

A tenancy<sup>1</sup> which is granted to a person who is pursuing, or intends to pursue, a course of study provided by a specified<sup>2</sup> educational institution<sup>3</sup> and is so granted either by that institution or by another specified institution or body<sup>4</sup> of persons cannot<sup>5</sup> be an assured tenancy<sup>6</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For these purposes, 'specified' means specified, or of a class specified, for the purposes of the Housing Act 1988 s 1(2), Sch 1 para 8 by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister, by statutory instrument: Sch 1 para 8(2). A statutory instrument made by the Secretary of State in the exercise of the power so conferred is subject to annulment in pursuance of a resolution of either House of Parliament: Sch 1 para 8(3). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions in relation to Wales see PARA 27 note 4 ante. See the Assured and Protected Tenancies (Lettings to Students) Regulations 1998, SI 1998/1967 (as amended); and PARA 874 ante.

3 As to the institutions specified as educational institutions for these purposes and for the purposes of the Rent Act 1977 s 8 see PARA 874 note 3 ante.

4 As to the bodies of persons, whether unincorporated or bodies corporate, specified as bodies for these purposes and for the purposes of the Rent Act 1977 s 8 see PARA 874 note 5 ante. Additionally, the following bodies of persons, whether corporate or unincorporated, are specified as bodies for the purposes of the Housing Act 1988 Sch 1 para 8 only: (1) any housing association, as defined in the Housing Associations Act 1985 s 1 (as amended) (see PARA 863 note 5 ante), which is registered by the Housing Corporation in accordance with Pt I (ss 1-40) (as amended) and which is not listed in the Assured and Protected Tenancies (Lettings to Students) Regulations 1998/1967, Sch 1; and (2) a body listed in Sch 2 (as amended): reg 5. As to the bodies listed in Sch 1 see PARA 874 note 5 head (3) ante. The bodies listed in Sch 2 (as amended) are: AFSIL Ltd, Campus Accommodation Ltd, Derbyshire Student Residences Ltd, Friendship Housing, Hull Student Welfare Association, International Lutheran Student Centre, International Students Club (Church of England) Ltd, International Students' Club (Lee Abbey) Ltd, International Students Housing Society, Oxford Brookes Housing Association Ltd, Oxford Overseas Student Housing Association Ltd, St Brigid's House Ltd, St Thomas More Housing Society Ltd, SOAS Homes Ltd, The House of St Gregory and St Macrina Oxford Ltd, The London Mission (West London) Circuit Meeting of the Methodist Church, The London School of Economics Housing Association, The Royal London Hospital Special Trustees, The Universities of Brighton and Sussex Catholic Chaplaincy Association, The Victoria League for Commonwealth Friendship, University of Leicester Students' Union, Wandsworth Students Housing Association Ltd, Willowbrook Properties Ltd and York Housing Association Ltd: Sch 2 (amended by SI 1999/1803, SI 1999/2268 and SI 2000/2706). As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

5 le subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

<sup>6</sup> Housing Act 1988 Sch 1 para 8(1). Cf the Rent Act 1977 s 8; and PARA 874 ante. See also the Housing Act 1988 s 7(3) (as amended), Sch 2 Pt I, Ground 4; and PARA 1112 post. For the meaning of 'assured tenancy' see PARA 1018 ante.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### 1033 Lettings to students

NOTE 4--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839. SI 1998/1967 Sch 2 further amended: SI 2009/1825.

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### 1034. Holiday lettings.

A tenancy<sup>1</sup> the purpose of which is to confer on the tenant<sup>2</sup> the right to occupy the dwelling house<sup>3</sup> for a holiday cannot<sup>4</sup> be an assured tenancy<sup>5</sup>.

<sup>1</sup> For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

<sup>2</sup> For the meaning of 'tenant' see PARA 1018 note 6 ante.

<sup>3</sup> For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

<sup>4</sup> The subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

<sup>5</sup> Housing Act 1988 s 1(2), Sch 1 para 9. Cf the Rent Act 1977 s 9; and PARA 874 ante. See also the Housing Act 1988 s 7(3), Sch 2 Pt I, Ground 3; and PARA 1111 post. For the meaning of 'assured tenancy' see PARA 1018 ante.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.



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### **1035. Resident landlords.**

The Housing Act 1988 follows the Rent Acts<sup>1</sup> by excluding from its protection certain tenancies granted by resident landlords; but, whereas under the Rent Acts a tenancy which fell within the resident landlord exemption was a restricted contract<sup>2</sup>, a tenancy which falls within the resident landlord exemption under the Housing Act 1988 has no statutory protection.

A tenancy<sup>3</sup> in respect of which the following conditions are fulfilled cannot<sup>4</sup> be an assured tenancy<sup>5</sup>. The conditions are:

- 2048 (1) that the dwelling house<sup>6</sup> forms part only of a building<sup>7</sup> and, except in a case where the dwelling house also forms part of flat<sup>8</sup>, the building is not a purpose-built block of flats<sup>9</sup>; and
- 2049 (2) that, subject to certain exceptions<sup>10</sup>, the tenancy was granted by an individual<sup>11</sup> who at the time when the tenancy was granted occupied as his only or principal home<sup>12</sup> another dwelling house which also forms part of the flat<sup>13</sup> or also forms<sup>14</sup> part of the building<sup>15</sup>; and
- 2050 (3) that, subject to certain exceptions<sup>16</sup>, at all times since the tenancy was granted the interest of the landlord under the tenancy has belonged to an individual<sup>17</sup> who, at the time he owned that interest, occupied as his only or principal home another dwelling house which also formed part of the flat<sup>18</sup> or also formed<sup>19</sup> part of the building<sup>20</sup>; and
- 2051 (4) that the tenancy is not a new tenancy excluded<sup>21</sup> from the resident landlord exemption<sup>22</sup>.

1 The exclusion was introduced by the Rent Act 1974 (repealed) and was re-enacted in the Rent Act 1977 s 12, Sch 2 (as amended). The corresponding provisions in the Housing Act 1988 are in many respects very similar to those in the Rent Act 1977: see PARA 875 et seq ante.

2 See PARA 985 et seq ante.

3 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

4 The subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

5 Housing Act 1988 s 1(2), Sch 1 para 10(1). For the meaning of 'assured tenancy' see PARA 1018 ante.

6 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 What constitutes a 'building' for these purposes is a question of fact: see *Bardrick v Haycock* (1976) 31 P & CR 420 at 424, CA, per Scarman LJ; *Lewis-Graham v Conacher* (1991) 24 HLR 132, [1992] 1 EGLR 111, CA (both decided under the Rent Act 1977 and cited in PARA 875 note 4 ante).

8 For these purposes, 'flat' means a dwelling house which forms part only of a building and is separated horizontally from another dwelling house which forms part of the same building: Housing Act 1988 s 1(2)(c), Sch 1 para 22. As to 'separated horizontally' cf the Leasehold Reform Act 1967 s 2(1); and *Peck v Anicar Properties Ltd* [1971] 1 All ER 517, (1970) 21 P & CR 919, CA. See also PARA 1390 post.

9 For these purposes, a building is a purpose-built block of flats if as constructed it contained, and it contains, two or more flats: Housing Act 1988 Sch 1 para 22. See also *Barnes v Gorsuch* (1981) 43 P & CR 294, 2 HLR 134, CA.

10 Ie subject to the Housing Act 1988 Sch 1 Pt III (paras 17-22) (as amended): see the text and notes 8 supra, 15 infra; and PARAS 1036-1037 post.

11 If a tenancy was granted by two or more persons jointly, the reference to an individual is a reference to any one of those persons: *ibid* Sch 1 para 10(2).

12 As to occupation as his only or principal home see PARA 1018 note 8 ante.

13 Ie in the case mentioned in the Housing Act 1988 Sch 1 para 10(1)(a): see head (1) in the text.

14 Ie in any other case.

15 Housing Act 1988 Sch 1 para 10(1)(b). In any case where (1) immediately before a tenancy comes to an end, the condition in Sch 1 para 10(1)(c) (see head (3) in the text) is deemed to be fulfilled by virtue of Sch 1 para 18(1) (as amended) (see PARA 1037 post); and (2) on the coming to an end of that tenancy the trustees in whom the interest of the landlord is vested grant a new tenancy of the same or substantially the same dwelling house to a person, alone or jointly with others, who was the tenant or one of the tenants under the previous tenancy, the condition in Sch 1 para 10(1)(b) is deemed to be fulfilled with respect to the new tenancy: Sch 1 para 19. For the meaning of 'landlord' see PARA 1020 note 3 ante.

16 See note 10 supra.

17 For these purposes, if the interest of the landlord is for the time being held by two or more persons jointly, the reference to an individual is a reference to any one of those persons: Housing Act 1988 Sch 1 para 10(2).

18 See note 13 supra.

19 See note 14 supra.

20 Housing Act 1988 Sch 1 para 10(1)(c). As to determining whether this condition is at any time fulfilled see PARA 1037 post.

21 Ie by *ibid* Sch 1 para 10(3): see PARA 1038 post.

22 *Ibid* Sch 1 para 10(1)(d).

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### 1036. Resident landlords; periods of non-occupation by landlord to be disregarded.

In determining whether the condition as to residence by the landlord<sup>1</sup> is at any time fulfilled with respect to a tenancy<sup>2</sup>, there must be disregarded:

2052 (1) any period of not more than 28 days beginning with the date on which the interest of the landlord under the tenancy becomes vested at law and in equity in an individual who, during that period, does not occupy as his only or principal home<sup>3</sup> another dwelling house<sup>4</sup> which forms part of the building<sup>5</sup> or, as the case may be, flat<sup>6</sup> concerned<sup>7</sup>;

2053 (2) if, within a period falling within head (1) above the individual concerned notifies the tenant<sup>8</sup> in writing of his intention to occupy as his only or principal home another dwelling house in the building or, as the case may be, flat concerned, the period beginning with the date on which the interest of the landlord under the tenancy becomes vested in that individual as mentioned in head (1) above and ending:

26

30. (a) at the expiry of the period of six months beginning on that date; or

31. (b) on the date on which that interest ceases to be so vested; or

32. (c) on the date on which that interest becomes again vested in an individual who fulfils the residence requirement<sup>9</sup> or that requirement becomes deemed to be fulfilled<sup>10</sup>,

27

2054 whichever is the earlier<sup>11</sup>; and

2055 (3) any period of not more than two years beginning with the date on which the interest of the landlord under the tenancy becomes, and during which it remains, vested in trustees as such or vested<sup>12</sup> in the Probate Judge or the Public Trustee<sup>13</sup>.

Throughout any period which falls to be disregarded by virtue of these provisions<sup>14</sup> for the purpose of determining whether the condition as to residence by the landlord<sup>15</sup> is fulfilled with respect to a tenancy, no order may be made for possession of the dwelling house subject to that tenancy other than an order which might be made if that tenancy were or, as the case may be, had been an assured tenancy<sup>16</sup>.

1    le the condition in the Housing Act 1988 s 1(2), Sch 1 para 10(1)(c): see PARA 1035 ante at head (3) in the text. For the meaning of 'landlord' see PARA 1020 note 3 ante.

2    For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

3    As to occupation as his only or principal home see PARA 1018 note 8 ante.

4    For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5    See PARA 1035 note 7 ante.

6    For the meaning of 'flat' see PARA 1035 note 8 ante.

7    Housing Act 1988 Sch 1 para 17(1)(a). Where the interest of the landlord under a tenancy becomes vested at law and in equity in two or more persons jointly, of whom at least one was an individual, Sch 1 para 17(1)(a) has effect subject to the modification that for the words from 'an individual' to 'occupy' there is to be substituted 'the joint landlords if, during that period none of them occupies': Sch 1 para 17(2)(a).

8    For the meaning of 'tenant' see PARA 1018 note 6 ante.

9    le such an individual as is mentioned in the Housing Act 1988 Sch 1 para 10(1)(c): see PARA 1035 ante at head (3) in the text.

10   le by virtue of *ibid* Sch 1 para 18(1) (as amended) or Sch 1 para 20: see PARA 1037 post.

11 Ibid Sch 1 para 17(1)(b). Where the interest of the landlord under a tenancy becomes vested at law and in equity in two or more persons jointly, of whom at least one was an individual, Sch 1 para 17(1)(b) has effect subject to the modification that for the words 'the individual concerned' there is to be substituted 'any of the joint landlords who is an individual' and for the words 'that individual' there is to be substituted 'the joint landlords': Sch 1 para 17(2)(b).

12 Ie by virtue of the Administration of Estates Act 1925 s 9 (as substituted) (as substituted): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 34.

13 Housing Act 1988 Sch 1 para 17(1)(c) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 11).

14 Ie the Housing Act 1988 Sch 1 para 17 (as amended) or Sch 1 para 18(2) (see PARA 1037 post).

15 See note 1 supra.

16 Housing Act 1988 Sch 1 para 21. Schedule 1 para 21 probably does not prevent the tenancy from expiring or being determined by notice to quit during the period of disregard but only confers immunity from proceedings (other than proceedings on the grounds which would be available against an assured tenant during the period of disregard): see *Landau v Sloane* [1982] AC 490, [1981] 1 All ER 705, HL (decided under the Rent Act 1977). As to the orders for possession which may be made against an assured tenant see PARA 1100 et seq post.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### 1037. Deemed fulfilment of landlord's residence condition.

During any period when:

2056 (1) the interest of the landlord<sup>1</sup> under the tenancy<sup>2</sup> is vested in trustees as such; and

2057 (2) that interest is held on trust for any person who, or for two or more persons of whom at least one, occupies as his only or principal home<sup>3</sup> a dwelling house<sup>4</sup> which forms part of the building<sup>5</sup> or, as the case may be, the flat<sup>6</sup> in question,

the condition as to residence by the landlord<sup>7</sup> is deemed to be fulfilled and, accordingly, no part of that period is to be<sup>8</sup> disregarded<sup>9</sup>. If such a period comes to an end on the death of a person who was in occupation of a dwelling house as mentioned in head (2) above, then, in determining whether that residence condition is at any time thereafter fulfilled, there must be disregarded any period:

2058 (a) which begins on the date of the death;

- 2059 (b) during which the interest of the landlord remains vested in trustees as such; and
- 2060 (c) which ends at the expiry of the period of two years beginning on the date of the death or on any earlier date on which that residence condition becomes again so deemed<sup>10</sup> to be fulfilled<sup>11</sup>.

If the interest of the landlord under the tenancy becomes vested in the personal representatives of a deceased person acting in that capacity, the landlord's residence condition is also deemed to be fulfilled for any period, beginning with the date on which the interest becomes vested in the personal representatives and not exceeding two years, during which the interest of the landlord remains so vested<sup>12</sup>.

It is probable that as under the Rent Acts the periods of disregard and deemed fulfilment can be aggregated<sup>13</sup>.

- 1 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 2 I.e. the tenancy referred to in the Housing Act 1988 s 1(2), Sch 1 para 10: see PARA 1035 ante.
- 3 As to occupation as his only or principal home see PARA 1018 note 8 ante.
- 4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 5 I.e. the building referred to in the Housing Act 1988 Sch 1 para 10(1)(a): see PARA 1035 ante.
- 6 I.e. the flat referred to in ibid Sch 1 para 10(1)(a): see PARA 1035 ante. For the meaning of 'flat' see PARA 1035 note 8 ante.
- 7 I.e. the condition in ibid Sch 1 para 10(1)(c): see PARA 1035 ante at head (3) in the text.
- 8 I.e. by virtue of ibid Sch 1 para 17 (as amended): see PARA 1036 ante.
- 9 Ibid Sch 1 para 18(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4; for transitional provisions and savings see s 25(4), (5)). See also the Housing Act 1988 Sch 1 para 19 (cited in PARA 1035 note 15 ante).
- 10 I.e. by virtue of ibid Sch 1 para 18(1) (as amended).
- 11 Ibid Sch 1 para 18(2).
- 12 Ibid Sch 1 para 20(1), (2).
- 13 See *Williams v Mate* (1982) 46 P & CR 43, CA (decided under the Rent Act 1977 s 12(4), Sch 2 para 1(c) (as amended): see PARAS 876-877 ante).

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1038. New tenancies excluded from resident landlord exemption.

### **1038. New tenancies excluded from resident landlord exemption.**

A tenancy<sup>1</sup> ('the new tenancy') is excluded from the resident landlord exemption<sup>2</sup> if:

- 2061 (1) it is granted to a person, alone or jointly with others, who immediately before it was granted was a tenant<sup>3</sup> under an assured tenancy<sup>4</sup> ('the former tenancy') of the same dwelling house<sup>5</sup> or of another dwelling house which forms part of the building<sup>6</sup> in question; and
- 2062 (2) the landlord<sup>7</sup> under the new tenancy and under the former tenancy is the same person or, if either of those tenancies is or was granted by two or more persons jointly, the same person is the landlord or one of the landlords under each tenancy<sup>8</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 I.e. the Housing Act 1988 s 1(2), Sch 1 para 10(1): see PARA 1035 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For the meaning of 'assured tenancy' see PARA 1018 ante.

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 See PARA 1035 note 7 ante.

7 For the meaning of 'landlord' see PARA 1020 note 3 ante.

8 Housing Act 1988 Sch 1 para 10(3). Such a tenancy is, therefore, capable of being an assured tenancy.

### **UPDATE**

#### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1039. Crown tenancies.

### **1039. Crown tenancies.**

A tenancy<sup>1</sup> under which the interest of the landlord<sup>2</sup> belongs to Her Majesty in right of the Crown<sup>3</sup> or to a government department or is held in trust for Her Majesty for the purposes of a government department cannot<sup>4</sup> be an assured tenancy<sup>5</sup>. Subject to this provision, the

provisions of the Housing Act 1988 relating to assured tenancies<sup>6</sup> apply to premises in which there subsists, or at any material time subsisted, a Crown interest<sup>7</sup> as they apply in relation to premises in relation to which no such interest subsists or ever subsisted<sup>8</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 For these purposes, the reference to the case where the interest of the landlord belongs to Her Majesty in right of the Crown does not include the case where that interest is under the management of the Crown Estate Commissioners or it is held by the Secretary of State as the result of the exercise by him of functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended): Housing Act 1988 s 1(2), Sch 1 para 11(2) (amended by the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule, PARA 3(1), (4)). As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280; as to the Secretary of State see PARA 27 note 3 ante; as to the exercise of functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) by the 'relevant authority' see HOUSING vol 22 (2006 Reissue) PARA 18 et seq; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

4 In subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

5 Housing Act 1988 Sch 1 para 11(1). For the meaning of 'assured tenancy' see PARA 1018 ante.

6 In *ibid* Pt I Chs I-IV (ss 1-33) (as amended): see PARA 1011 et seq ante, PARA 1040 et seq post. Sections 27, 28 (as amended) (see PARAS 654-655 ante) do not, however, bind the Crown, and ss 29-33 (amendments to the Protection from Eviction Act 1977) bind the Crown only to the extent provided for in the Protection from Eviction Act 1977 s 10 (see PARA 653 ante): Housing Act 1988 s 44(2).

7 For these purposes, 'Crown interest' means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall, or to a government department, or which is held in trust for Her Majesty for the purposes of a government department: *ibid* s 44(3). Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, then, for the purposes of Pt I Chs I-IV (as amended), the Chancellor of the Duchy of Lancaster is deemed to be the owner of the interest: s 44(4).

8 *Ibid* s 44(1). Cf the Rent Act 1977 s 13 (as substituted); and PARA 883 ante. As to the extension of the immunity of Crown property to property held for the public purposes of the country by a servant or agent of the Crown see PARA 883 text and note 12 ante and the cases there cited; and as to the removal of Crown immunity from NHS Trusts and health service bodies see HEALTH SERVICES vol 54 (2008) PARAS 94, 111, 136, 155.

## UPDATE

### 1024-1043 Tenancies which cannot be Assured Tenancies

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1040. Local authority tenancies etc.

### 1040. Local authority tenancies etc.

A tenancy<sup>1</sup> under which the interest of the landlord<sup>2</sup> belongs to:

- 2063 (1) a local authority<sup>3</sup>;
- 2064 (2) the Commission for the New Towns<sup>4</sup>;
- 2065 (3) an urban development corporation<sup>5</sup>;
- 2066 (4) a development corporation for a new town<sup>6</sup>;
- 2067 (5) a waste disposal authority<sup>7</sup>;
- 2068 (6) a fully mutual housing association<sup>8</sup>; or
- 2069 (7) a housing action trust<sup>9</sup>,

cannot<sup>10</sup> be an assured tenancy<sup>11</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 The following are local authorities for these purposes: (1) the council of a county, county borough, district or London borough; (2) the Common Council of the City of London; (3) the Council of the Isles of Scilly; (4) the Broads Authority; (5) a National Park authority; (6) the former Inner London Education Authority; (7) the London Fire and Emergency Planning Authority; (8) a joint authority within the meaning of the Local Government Act 1985 (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq); and (9) a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139); Housing Act 1988 s 1(2), Sch 1 para 12(2) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 9(2); the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 62; the Environment Act 1995 s 78, Sch 10 para 28; the Police Act 1996 s 103, Sch 7 para 1(2)(zc); the Greater London Authority Act 1999 s 328 Sch 29 Pt I para 53; and the Police Reform Act 2002 ss 100(2), 107(2), Sch 8). As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq; as to districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq; as to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq; as to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734; as to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526; as to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217; and as to the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

The Housing Act 1988 applies to the Isles of Scilly subject to such exceptions, adaptations and modifications as the Secretary of State may by order direct: s 139(1). The power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 139(2). At the date at which this title states the law, no such order had been made.

4 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

5 Ie an urban development corporation established by an order under the Local Government, Planning and Land Act 1980 s 135 (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq.

6 Ie a development corporation within the meaning of the New Towns Act 1981: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

7 Ie an authority established under the Local Government Act 1985 s 10 (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 17; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 620 et seq.

8 For the meaning of 'fully mutual housing association' see PARA 1017 note 9 ante. In relation to an assured tenancy falling within the Housing Act 1988 s 37(3) or granted pursuant to a contract falling within s 37(4) (see PARA 1017 ante), where the landlord granting the tenancy is a fully mutual housing association, Sch 1 para 12 (as amended) has effect in relation to that tenancy with the omission of Sch 1 para 12(1)(h) (see head (8) in the text): see s 37(5); and PARA 1017 note 20 ante.

9 Ie a housing action trust established under ibid Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

10 Ie subject to ibid s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

11 Housing Act 1988 Sch 1 para 12(1) (amended by the Local Government (Wales) Act 1994 s 39, Sch 13 para 31; the Government of Wales Act 1998 s 152, Sch 18 Pt IV). Cf the Rent Act 1977 s 14 (as amended); and



PARA 884 ante. A tenancy under which the interest of the landlord belonged to a residuary body within the meaning of the Local Government Act 1985 (see LOCAL GOVERNMENT vol 69 (2009) PARA 17) or to the former Residuary Body for Wales (Corff Gweddillio! Cymru) (see LOCAL GOVERNMENT vol 69 (2009) PARA 18) was similarly excluded: see the Housing Act 1988 Sch 1 para 12(1) (as so amended). Subtenants of a non-exempt body are not deprived of protection merely because the superior landlord is exempt but at the termination of the intermediate tenancy, eg by surrender, the subtenancy cannot be an assured tenancy as against the exempt body. For the meaning of 'assured tenancy' see PARA 1018 ante.

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### **1040 Local authority tenancies etc**

NOTE 3--Housing Act 1988 Sch 1 para 12(2) further amended: Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 79.

TEXT AND NOTE 11--1988 Act Sch 1 para 12(1) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 44; SI 2008/3002.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1041. Accommodation for asylum-seekers.

### **1041. Accommodation for asylum-seekers.**

A tenancy<sup>1</sup> granted by a private landlord<sup>2</sup> under arrangements for the provision of support for asylum-seekers or dependants of asylum-seekers made under Part VI of the Immigration and Asylum Act 1999<sup>3</sup> cannot<sup>4</sup> be an assured tenancy<sup>5</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 'Private landlord' means a landlord who is not within the Housing Act 1985 s 80(1) (as amended) (see PARA 1300 post): Housing Act 1988 s 1(2), Sch 1 para 12A(2) (Sch 1 para 12A added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 88). For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 The arrangements made under the Immigration and Asylum Act 1999 Pt VI (ss 94-120) (as amended): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 246 et seq.

4 The subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

5 Housing Act 1988 Sch 1 para 12A(1) (as added: see note 2 supra). For the meaning of 'assured tenancy' see PARA 1018 ante.

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### **1041 Accommodation for asylum-seekers**

NOTE 3--Or arrangements made under the Immigration and Asylum Act 1999 s 4: Housing Act 1988 Sch 1 para 12A(1) (amended by the Immigration, Asylum and Nationality Act 2006 s 43(4)(f)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1042. Accommodation for displaced persons with temporary protection.

### **1042. Accommodation for displaced persons with temporary protection.**

A tenancy<sup>1</sup> granted by a private landlord<sup>2</sup> under arrangements for the provision of accommodation for persons with temporary protection<sup>3</sup> made under the Displaced Persons (Temporary Protection) Regulations 2005<sup>4</sup> cannot<sup>5</sup> be an assured tenancy<sup>6</sup>.

1 For the meaning of 'tenancy' for these purposes see PARA 1025 note 1 ante.

2 'Private landlord' means a landlord who is not within the Housing Act 1985 s 80(1) (as amended) (see PARA 1300 post): Housing Act 1988 s 1(2), Sch 1 para 12B(2) (Sch 1 para 12B added by the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379, Schedule para 6).

3 'Temporary protection' means limited leave to enter or remain granted pursuant to the Immigration Rules Pt 11A (as added): see the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379, reg 2(1) (h).

4 I.e. arrangements made under the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379: see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

5 I.e. subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

6 Housing Act 1988 Sch 1 para 12B(1) (as added: see note 2 supra). For the meaning of 'assured tenancy' see PARA 1018 ante.

### **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and

Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(3) EXCEPTIONS AND EXCLUSIONS/(ii) Tenancies which cannot be Assured Tenancies/1043. Transitional cases.

### **1043. Transitional cases.**

The following tenancies cannot<sup>1</sup> be assured tenancies<sup>2</sup>:

- 2070 (1) a protected tenancy within the meaning of the Rent Act 1977<sup>3</sup>;
- 2071 (2) a housing association tenancy<sup>4</sup>;
- 2072 (3) a secure tenancy<sup>5</sup>;
- 2073 (4) where a person is a protected occupier<sup>6</sup> of a dwelling house<sup>7</sup> within the meaning of the Rent (Agriculture) Act 1976, the relevant tenancy<sup>8</sup> by virtue of which he occupies the dwelling house<sup>9</sup>.

The alternative statutory protection afforded to such existing tenancies is, however, continued in respect of them<sup>10</sup>.

1 The subject to the Housing Act 1988 s 1(3) (conversion of Housing Act 1980 assured tenancies): see PARA 1017 ante.

2 Housing Act 1988 s 1(2), Sch 1 para 13. For the meaning of 'assured tenancy' see PARA 1018 ante.

3 As to protected tenancies see PARA 818 et seq ante; and as to the phasing out of such tenancies see PARA 1012 ante.

4 The within the meaning of the Rent Act 1977 Pt VI (ss 86-97) (as amended): see PARA 905 ante. As to the phasing out of the special regime for such tenancies see PARA 1013 ante.

5 For the meaning of 'secure tenancy' see PARA 1013 note 13 ante.

6 For the meaning of 'protected occupier' see PARAS 1144-1145 post.

7 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

8 For the meaning of 'relevant tenancy' see PARA 1141 post. As to the phasing out of such tenancies see PARA 1135 post.

9 Housing Act 1988 Sch 1 para 13.

10 See PARAS 818 et seq, 905 et seq ante, PARAS 1134 et seq, 1300 et seq post.

## **UPDATE**

### **1024-1043 Tenancies which cannot be Assured Tenancies**

See also Housing Act 1988 Sch 1 para 12ZA (added by the Housing and Regeneration Act 2008 s 297(2)) (family intervention tenancies). For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(i) Assured Shorthold Tenancies created on or after 28 February 1997/1044. Statutory presumption that assured tenancy is assured shorthold tenancy.

#### **(4) ASSURED SHORTHOLD TENANCIES**

##### **(i) Assured Shorthold Tenancies created on or after 28 February 1997**

##### **1044. Statutory presumption that assured tenancy is assured shorthold tenancy.**

An assured tenancy<sup>1</sup> which:

- 2074 (1) is entered into on or after 28 February 1997<sup>2</sup>, otherwise than pursuant to a contract made before that day; or
- 2075 (2) comes into being<sup>3</sup> on the coming to an end of an assured tenancy within head (1) above,

is an assured shorthold tenancy unless it falls within any of the statutory exceptions<sup>4</sup> to this rule<sup>5</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 Ie the day on which the Housing Act 1996 s 96 came into force: see the Housing Act 1996 (Commencement No 7 and Savings) Order 1997, SI 1997/225, art 2.

3 Ie by virtue of the Housing Act 1988 s 5 (as amended) (security of tenure): see PARAS 1067-1071 post.

4 Ie unless it falls within ibid s 19A, Sch 2A (as added): see PARA 1045 et seq post.

5 Ibid s 19A (added by the Housing Act 1996 s 96(1)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(i) Assured Shorthold Tenancies created on or after 28 February 1997/1045. Exclusion of statutory presumption by notice or by provisions of assured tenancy.

##### **1045. Exclusion of statutory presumption by notice or by provisions of assured tenancy.**

An assured tenancy<sup>1</sup> created on or after 28 February 1997<sup>2</sup> is not an assured shorthold tenancy<sup>3</sup> if it is an assured tenancy in respect of which a notice is served as mentioned below<sup>4</sup>, that is either:

- 2076 (1) the notice is one which:
- 28
- 33. (a) is served before the assured tenancy is entered into;

34. (b) is served by the person who is to be the landlord<sup>5</sup> under the assured tenancy on the person who is to be the tenant<sup>6</sup> under that tenancy; and
35. (c) states that the assured tenancy to which it relates is not to be an assured shorthold tenancy<sup>7</sup>; or
- 29
- 2077 (2) the notice is one which:
- 30
36. (a) is served after the assured tenancy has been entered into;
37. (b) is served by the landlord under the assured tenancy on the tenant under that tenancy; and
38. (c) states that the assured tenancy to which it relates is no longer an assured shorthold tenancy<sup>8</sup>.
- 31

Nor is an assured tenancy created on or after that date an assured shorthold tenancy if it contains a provision to the effect that the tenancy is not an assured shorthold tenancy<sup>9</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 As to the significance of that date see PARA 1044 ante.

3 The Housing Act 1988 s 19A (as added) is excluded: see PARA 1044 ante.

4 Ibid s 19A, Sch 2A paras 1(1), 2(1) (Sch 2A added by the Housing Act 1996 s 96(2), Sch 7).

5 For the meaning of 'landlord' see PARA 1020 note 3 ante.

6 For the meaning of 'tenant' see PARA 1018 note 6 ante.

7 Housing Act 1988 Sch 2A para 1(2) (as added: see note 3 supra). No form of notice is prescribed for these purposes.

8 Ibid Sch 2A para 2(2) (as added: see note 3 supra). No form of notice is prescribed for these purposes.

9 See the Housing Act 1998 Sch 2A para 3 (as added: see note 3 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(i) Assured Shorthold Tenancies created on or after 28 February 1997/1046. Tenancies replacing non-shortholds.

#### **1046. Tenancies replacing non-shortholds.**

An assured tenancy<sup>1</sup> created on or after 28 February 1997<sup>2</sup> which:

- 2078 (1) is granted to a person, alone or jointly with others, who, immediately before the tenancy was granted, was the tenant<sup>3</sup> or, in the case of joint tenants, one of the tenants, under an assured tenancy other than a shorthold tenancy ('the old tenancy');
- 2079 (2) is granted, alone or jointly with others, by a person who was at that time the landlord<sup>4</sup>, or one of the joint landlords, under the old tenancy; and
- 2080 (3) is not one in respect of which a notice is served as mentioned below<sup>5</sup>,

is not<sup>6</sup> an assured shorthold tenancy<sup>7</sup>.

The notice referred to in head (3) above is one which:

- 2081 (a) is in such form as may be prescribed<sup>8</sup>;
- 2082 (b) is served before the assured tenancy is entered into;
- 2083 (c) is served by the person who is to be the tenant under the assured tenancy on the person who is to be the landlord under that tenancy or, in the case of joint landlords, on at least one of the persons who are to be joint landlords; and
- 2084 (d) states that the assured tenancy to which it relates is to be a shorthold tenancy<sup>9</sup>.

Nor is an assured tenancy which comes into being<sup>10</sup> on or after that date on the coming to an end of an assured tenancy which is not a shorthold tenancy an assured shorthold tenancy<sup>11</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 As to the significance of that date see PARA 1044 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For the meaning of 'landlord' see PARA 1020 note 3 ante.

5 See heads (a)-(d) in the text.

6 The Housing Act 1988 s 19A (as added) is excluded: see PARA 1044 ante.

7 Ibid s 19A, Sch 2A para 7(1) (Sch 2A paras 7, 8 added by the Housing Act 1996 s 96(2), Sch 7).

8 'Prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister by statutory instrument; and regulations so made may make different provision with respect to different cases or descriptions of case, including different provision for different areas: Housing Act 1988 s 45(1), (5). As to the transfer of functions in relation to Wales see PARA 27 note 4. For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(h), Schedule Form 8.

9 Housing Act 1988 Sch 2A para 7(2) (as added: see note 7 supra).

10 The by virtue of ibid s 5 (as amended) (security of tenure): see PARAS 1067-1071 post.

11 Ibid Sch 2A para 8 (as added: see note 7 supra).

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#### **1047. Assured agricultural occupancies.**

An assured tenancy<sup>1</sup> created on or after 28 February 1997<sup>2</sup> in the case of which the agricultural worker condition<sup>3</sup> is for the time being fulfilled<sup>4</sup> with respect to the dwelling house<sup>5</sup> subject to the tenancy is not<sup>6</sup> an assured shorthold tenancy<sup>7</sup> provided that it does not fall within either head (1) or head (2) below<sup>8</sup>. Those heads are as follows:

- 2085 (1) a tenancy falls within this head if:

39. (a) before it is entered into, a notice in such form as may be prescribed<sup>9</sup> and stating that the tenancy is to be a shorthold tenancy is served by the person who is to be the landlord<sup>10</sup> under the tenancy on the person who is to be the tenant<sup>11</sup> under it; and
40. (b) it is not an excepted tenancy<sup>12</sup>;
- 33
- 2086 (2) an assured tenancy falls within this head if it comes into being<sup>13</sup> on the coming to an end of a tenancy falling within head (1) above<sup>14</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 As to the significance of that date see PARA 1044 ante.

3 As to the agricultural worker condition see PARA 1184 post.

4 Ie by virtue of any provision of the Housing Act 1988 s 24, Sch 3 (as amended): see PARA 1184 post.

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 Ie the Housing Act 1988 s 19A (as added) is excluded: see PARA 1044 ante.

7 Ibid s 19A, Sch 2A para 9(1)(a) (Sch 2A para 9 added by the Housing Act 1996 s 96(2), Sch 7).

8 See the Housing Act 1988 Sch 2A para 9(1)(b) (as added: see note 7 supra).

9 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(i), Schedule Form 9.

10 For the meaning of 'landlord' see PARA 1020 note 3 ante.

11 For the meaning of 'tenant' see PARA 1018 note 6 ante.

12 Housing Act 1988 Sch 2A para 9(2) (as added: see note 7 supra). For the purposes of Sch 2A para 8(2)(b) (as so added) (see head (b) in the text), an assured tenancy is an excepted tenancy if (1) the person to whom it is granted or, as the case may be, at least one of the persons to whom it is granted was, immediately before it is granted, a tenant or licensee under an assured agricultural occupancy; and (2) the person by whom it is granted or, as the case may be, at least one of the persons by whom it is granted was, immediately before it is granted, a landlord or licensor under the assured agricultural occupancy referred to in head (1) supra: Sch 2A para 9(3) (as so added). For the meaning of 'assured agricultural occupancy' see PARA 1183 post.

13 Ie by virtue of ibid s 5 (as amended) (security of tenure): see PARA 1067-1071 post.

14 Ibid Sch 2A para 9(4) (as added: see note 7 supra).

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#### **1048. Other cases where the statutory presumption is excluded.**

The following assured tenancies<sup>1</sup> created on or after 28 February 1997<sup>2</sup> are not assured shorthold tenancies<sup>3</sup>:

- 2087 (1) an assured tenancy arising by succession<sup>4</sup>, other than one where immediately before the death of the predecessor the landlord might have

- recovered possession<sup>5</sup> under the provisions of the Rent Act 1977 relating to protected shorthold tenancies<sup>6</sup>;
- 2088 (2) an assured tenancy which became an assured tenancy on ceasing to be a secure tenancy<sup>7</sup>;
- 2089 (3) an assured tenancy which ceases to be a demoted<sup>8</sup> assured shorthold tenancy<sup>9</sup>;
- 2090 (4) an assured tenancy arising by virtue of the provisions of the Local Government and Housing Act 1989<sup>10</sup> giving security of tenure on the ending of long residential tenancies<sup>11</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 As to the significance of that date see PARA 1044 ante.

3 I.e. the Housing Act 1988 s 19A (as added) is excluded: see PARA 1044 ante.

4 I.e. arising by virtue of ibid s 39 (as amended): see PARA 1016 ante.

5 I.e. other than an assured tenancy to which ibid s 39(7) (as amended) applies: see PARA 1016 ante.

6 Ibid s 19A, Sch 2A para 4 (Sch 2A added by the Housing Act 1996 s 96(2), Sch 7).

7 Housing Act 1988 Sch 2A para 5 (as added: see note 6 supra). As to secure tenancies see PARA 1300 et seq post.

8 I.e. which ceases to be an assured shorthold tenancy by virtue of ibid s 20B(2) or (4) (as added): see PARA 1050 post.

9 Ibid Sch 2A para 5A (added by the Anti-social Behaviour Act 2003 s 15(3)).

10 I.e. arising by virtue of the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1244 et seq post.

11 Housing Act 1988 Sch 2A para 6 (as added: see note 6 supra).

## UPDATE

### 1048 Other cases where the statutory presumption is excluded

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 1049. Landlord's duty to provide statement as to terms of tenancy.

A tenant<sup>1</sup> under an assured shorthold tenancy to which the statutory presumption<sup>2</sup> applies may<sup>3</sup>, by notice in writing, require the landlord<sup>4</sup> under that tenancy to provide him with a written statement of any term of the tenancy which:

- 2091 (1) falls within heads (a) to (d) below; and



2092 (2) is not evidenced in writing<sup>5</sup>.

The terms so referred to are the following terms of a tenancy:

- 2093 (a) the date on which the tenancy began or, if it is a statutory periodic tenancy<sup>6</sup> or a tenancy to which the specified statutory provision<sup>7</sup> applies, the date on which the tenancy came into being;
- 2094 (b) the rent payable under the tenancy and the dates on which that rent is payable;
- 2095 (c) any term providing for a review of the rent payable under the tenancy; and
- 2096 (d) in the case of a fixed term tenancy, the length of the fixed term<sup>8</sup>.

No notice may, however, be so given in relation to a term of the tenancy if:

- 2097 (i) the landlord under the tenancy has provided a statement of that term in response to an earlier such notice given by the tenant under the tenancy; and
- 2098 (ii) the term has not been varied since the provision of the statement referred to in head (i) above<sup>9</sup>.

A landlord who fails, without reasonable excuse, to comply with such a notice within the period of 28 days beginning with the date on which he received the notice is liable on summary conviction to a fine not exceeding level 4 on the standard scale<sup>10</sup>.

A statement provided for these purposes is not, however, to be regarded as conclusive evidence of what was agreed by the parties to the tenancy in question<sup>11</sup>.

1 In the Housing Act 1988 s 20A(1), (3) (as added) (see the text and notes 2-5, 9 infra), references to the tenant under the tenancy are, in the case of joint tenants, to be taken to be references to any of the tenants: s 20A(7)(a) (s 20A added by the Housing Act 1996 s 97). For the meaning of 'tenant' generally see PARA 1018 note 6 ante.

2 *Ibid* s 19A (as added): see PARA 1044 ante.

3 *Ibid* subject to *ibid* s 20A(3) (as added): see heads (i)-(ii) in the text.

4 In *ibid* s 20A(1), (3) (as added) (see the text and notes 1-4 supra, 5, 9 infra), references to the landlord under the tenancy are, in the case of joint landlords, to be taken to be references to any of the landlords: s 20A(7)(b) (as added: see note 1 supra). For the meaning of 'landlord' generally see PARA 1020 note 3 ante.

5 *Ibid* s 20A(1) (as added: see note 1 supra). Where (1) a term of a statutory periodic tenancy is one which has effect by virtue of s 5(3)(e) (see PARA 1068 post at head (5) in the text); or (2) a term of a tenancy to which s 39(7) (as amended) applies is one which has effect by virtue of s 39(6)(e) (see PARA 1016 ante), s 20A(1) (as so added) has effect in relation to it as if s 20A(1)(b) (see head (2) in the text) related to the term of the tenancy from which it derives: s 20A(6) (as so added).

6 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 post.

7 *Ibid* if it is a tenancy to which the Housing Act 1988 s 39(7) (as amended) applies: see PARA 1016 ante.

8 *Ibid* s 20A(2) (as added: see note 1 supra).

9 *Ibid* s 20A(3) (as added: see note 1 supra).

10 *Ibid* s 20A(4) (as added: see note 1 supra).

11 *Ibid* s 20A(5) (as added: see note 1 supra).

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### **1050. Demoted assured shorthold tenancies.**

An assured tenancy<sup>1</sup> is a demoted assured shorthold tenancy<sup>2</sup> if the tenancy is created by virtue of a demotion order<sup>3</sup> and the landlord<sup>4</sup> is a registered social landlord<sup>5</sup>.

At the end of the period of one year starting with the day when the demotion order takes effect a demoted assured shorthold tenancy ceases to be an assured shorthold tenancy unless, before the end of that period, the landlord gives notice of proceedings for possession of the dwelling house<sup>6</sup>. In that case the tenancy continues to be a demoted assured shorthold tenancy until the end of that period or, if later, until one of the following occurs:

- 2099 (1) the notice of proceedings for possession is withdrawn;
- 2100 (2) the proceedings are determined in favour of the tenant<sup>7</sup>;
- 2101 (3) the period of six months beginning with the date on which the notice is given ends and no proceedings for possession have been brought<sup>8</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 I.e. an assured shorthold tenancy to which the Housing Act 1988 s 20B (as added) applies: see the text and notes 3-8 infra.

3 I.e. an order of the court under the Housing Act 1985 s 82A (as added) (see PARA 1351 post) or the Housing Act 1988 s 6A (as added) (see PARA 1066 post).

Each of the following has effect in respect of a demoted tenancy at the time it is created by virtue of an order under s 6A (as added) as it has effect in relation to the assured tenancy at the time it is terminated by virtue of the order: (1) the parties to the tenancy; (2) the period of the tenancy; (3) the amount of the rent; (4) the dates on which the rent is payable; but head (2) supra does not apply if the assured tenancy was for a fixed term and in such a case the demoted tenancy is a weekly periodic tenancy: s 6A(8), (9) (added by the Anti-social Behaviour Act 2003 s 14(4)). If the landlord of the demoted tenancy serves on the tenant a statement of any other express terms of the assured tenancy which are to apply to the demoted tenancy such terms are also terms of the demoted tenancy: Housing Act 1988 s 6A(10) (as so added). For these purposes, a demoted tenancy is a tenancy to which s 20B (as added) applies (see the text and notes 4-8 infra): s 6A(11) (as so added).

4 For the meaning of 'landlord' see PARA 1020 note 3 ante.

5 Housing Act 1988 s 20B(1) (s 20B added by the Anti-social Behaviour Act 2003 s 15(1)). For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1996 Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq): Housing Act 1988 s 20B(5) (as so added).

6 Ibid s 20B(2), (3) (as added: see note 5 supra). For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 For the meaning of 'tenant' see PARA 1018 note 6 ante.

8 Housing Act 1988 s 20B(4) (as added: see note 5 supra). See also s 19A, Sch 2A para 5A (as added); and PARA 1048 ante.

## **UPDATE**

### **1050 Demoted assured shorthold tenancies**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(ii) Assured Shorthold Tenancies created before 28 February 1997**

### **1051. Meaning of 'assured shorthold tenancy'.**

An assured tenancy<sup>1</sup> created before 28 February 1997<sup>2</sup> is an assured shorthold tenancy if:

2102 (1) it is a fixed term tenancy<sup>3</sup> granted for a term certain of not less than six months<sup>4</sup>; and

2103 (2) there was no power for the landlord<sup>5</sup> to determine the tenancy<sup>6</sup> at any time earlier than six months from the beginning of the tenancy<sup>7</sup>; and

2104 (3) a notice in respect of it was served:

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41. (a) in such form as might be prescribed<sup>8</sup>;

42. (b) before the assured tenancy was entered into;

43. (c) by the person who was to be the landlord<sup>9</sup> under the assured tenancy on the person who was to be the tenant<sup>10</sup>;

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2105 and the notice stated that the assured tenancy to which it related was to be a shorthold tenancy<sup>11</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante. Tenancies which cannot be assured tenancies (see PARA 1024 et seq ante) cannot be assured shorthold tenancies.

2 Ie an assured tenancy which is not one to which the Housing Act 1988 s 19A (as added) applies: see PARA 1044 ante. As to the significance of the date in the text see PARA 1044 ante.

3 For these purposes, 'fixed term tenancy' means any tenancy other than a periodic tenancy: *ibid* s 45(1). A tenancy is not a periodic tenancy for these purposes where the automatic continuance is not for the same period as the initial term: see *Goodman v Evelyn* [2001] EWCA Civ 104, [2001] All ER (D) 146 (Jan). For the meaning of 'tenancy' see PARA 1012 note 1 ante.

4 The tenancy commenced on the date of grant, not at any earlier date from which the tenancy is expressed to run: see *Keen v Holland* [1984] 1 All ER 75, [1984] 1 WLR 251, CA (decided under the Agricultural Holdings Act 1948 s 2(1) (repealed)). See also *Bedding v McCarthy* (1993) 27 HLR 103, [1994] 2 EGLR 40, CA (tenancy agreements deal with years, months and weeks and sometimes days, but not with hours).

5 For the meaning of 'landlord' see PARA 1020 note 3 ante.

6 Any reference in the Housing Act 1988 Pt I (ss 1-45) (as amended), however expressed, to a power for a landlord to determine a tenancy does not include a reference to a power of re-entry or forfeiture for breach of any term or condition of the tenancy: s 45(4).

7 Subject to *ibid* s 7(5), Sch 2 Pt IV para 11 (see PARA 1108 note 6 post), any reference in Pt I (ss 1-45) (as amended) to the beginning of a tenancy is a reference to the day on which the tenancy is entered into or, if it is later, the day on which, under the terms of any lease, agreement or other document, the tenant is entitled to possession under the tenancy: s 45(2).

8 For the meaning of 'prescribed' see PARA 1046 note 8 ante. For the form of notice which was prescribed for these purposes see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988, SI 1988/2203, regs 2, 3(7), Schedule, Form 7 (as amended; revoked by SI 1997/194). The prescribed form required for its completion the specification of a date of termination and therefore predicated the insertion of the correct date for the tenancy in respect of which it was served; a notice with an incorrect date was invalid: *Panayi & Pyrkos v Roberts* (1993) 25 HLR 421, [1993] 2 EGLR 51, CA; and see *Clickex Ltd v McCann* (1999) 32 HLR 324, [1999] 2 EGLR 63, CA (not only was the notice technically defective, but the commencement and termination dates on the claimant's and defendant's copies of the tenancy agreement had been in complete conflict with each other, so that it was impossible to determine by reference to the documents alone which was correct). See also *Manel v Memon* [2000] 2 EGLR 40, [2000] All ER (D) 481, CA (omission from a notice of four bullet points in the prescribed form, particularly an exhortation to the prospective tenant to obtain advice and a statement that the notice did not commit the prospective tenant to the tenancy, rendered that notice ineffective). A notice not in the prescribed form by virtue only of a clerical error might, however, still be treated as valid: *Andrews v Brewer* (1997) 30 HLR 203, sub nom *Brewer v Andrews* [1997] EGCS 19, CA; and see *York v Casey* (1998) 31 HLR 209, [1998] 2 EGLR 25, CA (distinguished in *Clickex Ltd v McCann* supra). The question for the court is whether, despite errors or omissions, the notice accomplished the statutory purpose of informing the proposed tenant of the unique nature of an assured shorthold tenancy: *Ravenseft Properties Ltd v Hall* [2001] EWCA Civ 2034, [2002] HLR 624, [2001] All ER (D) 318 (Dec). The notice ought properly to include the landlord's name and address, but a failure to give such information where the notice gave the name and address of the landlord's agent did not have the effect of invalidating the notice, since, without such information, the notice would still be substantially to the same effect as the proper form: *Osborn & Co Ltd v Dior, Marito Holdings SA v Borhane* [2003] EWCA Civ 281, [2003] HLR 649, [2003] All ER (D) 185 (Jan).

9 In the case of joint landlords, the reference to the person who was to be the landlord is a reference to at least one of the persons who were to be joint landlords: see the Housing Act 1988 s 20(6)(a).

10 For the meaning of 'tenant' see PARA 1018 note 6 ante. Where there are joint tenants, all must have been served with the notice: see *ibid* s 45(3) (cited in PARA 1018 note 6 ante).

11 *Ibid* s 20(1), (2) (s 20(1) substituted by the Housing Act 1996 s 104, Sch 8 para 2(1), (3)). The requirement for service of notice in the prescribed form could not be dispensed with: cf the Housing Act 1980 s 55(2) (protected shorthold tenancies); and PARA 1010 ante. A tenant might authorise an agent to receive the notice: *Yenula Properties Ltd v Naidu* [2002] EWCA Civ 719, [2003] HLR 229, [2002] All ER (D) 366 (May).

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## **1052. Shorthold tenancy could not be granted to tenant who was previously an assured tenant.**

Where immediately before<sup>1</sup> a tenancy<sup>2</sup> ('the new tenancy') was granted, the person to whom it was granted or, as the case might be, at least one of the persons to whom it was granted was a tenant<sup>3</sup> under an assured tenancy<sup>4</sup> which was not an assured shorthold tenancy<sup>5</sup> and the new tenancy was granted by the person who, immediately before the beginning of the tenancy<sup>6</sup>, was the landlord<sup>7</sup> under that assured tenancy, the new tenancy could not<sup>8</sup> be an assured shorthold tenancy<sup>9</sup>.

The above provision does not apply where the new tenancy is created on or after 28 February 1997<sup>10</sup>.

1 The expression 'immediately before' is not defined but the gap between the existence of a previous assured tenancy and the creation of a new tenancy need not be long: see *Dibbs v Campbell* (1988) 20 HLR 374, [1988] 2 EGLR 122, CA.

2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

- 3 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 4 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 5 For the meaning of 'assured shorthold tenancy' see PARA 1051 ante.
- 6 For the meaning of references to the beginning of the tenancy see PARA 1051 note 7 ante.
- 7 For the meaning of 'landlord' see PARA 1020 note 3 ante. It seems that, where there were joint landlords under either the new or the previous tenancy, the new tenancy would be an assured shorthold tenancy unless there was an exact identity between the persons who comprised 'the landlord' under each tenancy: see the Housing Act 1988 s 45(3) (cited in PARA 1020 note 3 ante).
- 8 Ie notwithstanding anything in *ibid* s 20(1) (as substituted): see PARA 1051 ante.
- 9 *Ibid* s 20(3). It seems that existing security of tenure could not, in those circumstances, be reduced even if the new tenancy was of different premises.
- 10 See *ibid* s 20(5A) (added by the Housing Act 1996 s 104, Sch 8 para 2(1), (4) (which provides that the Housing Act 1988 s 20(3) does not apply where the new tenancy is one to which s 19A (as added) applies: see PARA 1044 ante).

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### **1053. Grant to tenant who was previously a protected or statutory tenant.**

A tenancy entered into on or after 15 January 1989 cannot generally be a protected or statutory tenancy under the Rent Act 1977<sup>1</sup>. Transitional provisions preserve the pre-existing statutory protection in a number of cases where a new tenancy is granted on or after 15 January 1989 to a tenant who was previously a protected or statutory tenant<sup>2</sup>; but this protection does not apply to protected shorthold tenants<sup>3</sup>. A new tenancy granted on or after that date, whether of the same or different premises, to a person who was previously a protected or statutory tenant cannot, therefore, be an assured shorthold tenancy<sup>4</sup>; but a new tenancy granted to a person who was previously a protected shorthold tenant may be<sup>5</sup>.

- 1 See PARA 1011 ante.
- 2 See the Housing Act 1988 s 34 (as amended); and PARA 1012 ante.
- 3 See *ibid* s 34(2); and PARA 1012 ante.
- 4 See *ibid* s 34(1) (as amended); and PARA 1012 ante.
- 5 See *ibid* s 34(3) (as amended); and PARA 1054 post.

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**1054. Grant to tenant who was previously a protected shorthold tenant.**

In any case where:

- 2106 (1) a tenancy<sup>1</sup> entered into on or after 15 January 1980<sup>2</sup> is<sup>3</sup> an assured tenancy<sup>4</sup>; but
- 2107 (2) the tenancy would<sup>5</sup>, if not granted to a person who was previously a protected shorthold tenant, be<sup>6</sup> a protected tenancy<sup>7</sup>; and
- 2108 (3) the landlord<sup>8</sup> and the tenant<sup>9</sup> under the tenancy are the same as at the coming to an end of the protected or statutory tenancy<sup>10</sup> which would otherwise qualify for protection<sup>11</sup>,

the tenancy is an assured shorthold tenancy<sup>12</sup>, whether or not, in the case of a tenancy created before 28 February 1997<sup>13</sup>, it fulfils the statutory conditions<sup>14</sup>, unless, before the tenancy is entered into, the landlord serves notice on the tenant that it is not to be a shorthold tenancy<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3).

3 Ie by virtue of *ibid* s 34(1), (2) (as amended): see PARA 1012 ante.

4 For the meaning of 'assured tenancy' see PARA 1018 ante.

5 Ie apart from the Housing Act 1988 s 34(2).

6 Ie by virtue of *ibid* s 34(1)(b): see PARA 1012 ante.

7 For these purposes, 'protected tenancy' has the same meaning as in the Rent Act 1977 (see PARA 818 ante): Housing Act 1988 s 34(5). As to protected shorthold tenancies see PARA 1009 et seq ante.

8 For the meaning of 'landlord' see PARA 1020 note 3 ante. There must be a precise identity between the person or persons who were ultimately the landlord and the tenant under the previous tenancy and those who are the landlord and tenant under the new tenancy: see *ibid* s 45(3) (cited in PARA 1020 note 3 ante).

9 For the meaning of 'tenant' see PARA 1018 note 6 ante. See also note 8 supra.

10 For these purposes, 'statutory tenancy' has the same meaning as in the Rent Act 1977 (see PARA 831 ante): Housing Act 1988 s 34(5).

11 Ie which would, apart from *ibid* s 34(2), fall within s 34(1)(b).

12 For the meaning of 'assured shorthold tenancy' see PARA 1051 ante.

13 Ie in the case of a tenancy to which the Housing Act 1988 s 20(1) (as substituted) applies: see PARA 1051 ante. As to the significance of the date in the text see PARA 1044 ante.

14 Ie the conditions in *ibid* s 20(1) (as substituted): see PARA 1051 ante.

15 *Ibid* s 34(3) (amended by the Housing Act 1996 s 104, Sch 8 para 2(7)). No form of notice has been prescribed for these purposes.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(ii) Assured Shorthold Tenancies created before 28 February 1997/1055. Grant to tenant who was previously an assured shorthold tenant.

### **1055. Grant to tenant who was previously an assured shorthold tenant.**

If, on the coming to an end of an assured shorthold tenancy<sup>1</sup>, including a tenancy<sup>2</sup> which was an assured shorthold but ceased to be assured before it came to an end, a new tenancy of the same or substantially the same premises came into being under which the landlord<sup>3</sup> and the tenant<sup>4</sup> were the same as at the coming to an end of the earlier tenancy, then, if and so long as the new tenancy is an assured tenancy<sup>5</sup>, it is an assured shorthold tenancy whether or not it fulfils the statutory<sup>6</sup> conditions<sup>7</sup>. This provision does not, however, apply if, before the new tenancy was entered into or, in the case of a statutory periodic tenancy<sup>8</sup>, took effect in possession, the landlord<sup>9</sup> served notice on the tenant that the new tenancy was not to be an assured shorthold tenancy<sup>10</sup>. Nor does it apply where the new tenancy is created on or after 28 February 1997<sup>11</sup>.

1 For the meaning of 'assured shorthold tenancy' see PARA 1051 ante.

2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

3 For the meaning of 'landlord' see PARA 1020 note 3 ante. If there were joint landlords under the old tenancy, the same persons must be the joint landlords under the new tenancy for the provision to apply: see the Housing Act 1988 s 45(3) (cited in PARA 1020 note 3 ante). Cf s 20(6)(b) (cited in note 9 infra).

4 For the meaning of 'tenant' see PARA 1018 note 6 ante. If there were joint tenants under the old tenancy, the same persons must be the joint tenants under the new tenancy for the provision to apply: see *ibid* s 45(3) (cited in PARA 1018 note 6 ante). Cf s 20(3)(a) (cited in PARA 1052 ante).

5 For the meaning of 'assured tenancy' see PARA 1018 ante.

6 I.e. the conditions in the Housing Act 1988 s 20(1)(a)-(c) (as substituted): see PARA 1051 ante at heads (1)-(3) in the text.

7 *Ibid* s 20(4).

8 For the meaning of 'statutory periodic tenancy' see PARA 1067 post.

9 For these purposes, in the case of joint landlords, the reference to the landlord is a reference to at least one of the joint landlords: Housing Act 1988 s 20(6)(b).

10 *Ibid* s 20(5). In the case of joint tenants, notice must have been served on each of them: see s 45(3) (cited in PARA 1018 note 6 ante). No form of notice has been prescribed for these purposes.

11 See *ibid* s 20(5A) (added by the Housing Act 1996 s 104, Sch 8 para 2(1), (4) (which provides that the Housing Act 1988 s 20(4) does not apply where the new tenancy is one to which s 19A (as added) applies: see PARA 1044 ante).

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### **(iii) Tenancy Deposit Schemes**

#### **1056. Arrangements for securing availability of tenancy deposit schemes.**

As from a day which, except for the purposes of making an order or regulations, is to be appointed<sup>1</sup>, the appropriate national authority<sup>2</sup> must make arrangements for securing that one or more tenancy deposit schemes are available for the purpose of safeguarding tenancy

deposits<sup>3</sup> paid in connection with shorthold tenancies<sup>4</sup>. For these purposes a 'tenancy deposit scheme' is a scheme which:

- 2109 (1) is made for the purpose of safeguarding tenancy deposits paid in connection with shorthold tenancies and facilitating the resolution of disputes arising in connection with such deposits; and
- 2110 (2) complies with the statutory requirements<sup>5</sup>.

Such arrangements must be arrangements made with any body or person under which the body or person ('the scheme administrator') undertakes to establish and maintain a tenancy deposit scheme of a description specified in the arrangements<sup>6</sup>. They must require the scheme administrator to give the appropriate national authority, in such manner and at such times as it may specify, such information and facilities for obtaining information as it may specify<sup>7</sup>.

The appropriate national authority may:

- 2111 (a) give financial assistance to the scheme administrator<sup>8</sup>;
- 2112 (b) make payments to the scheme administrator, otherwise than as financial assistance, in pursuance of such arrangements<sup>9</sup>;
- 2113 (c) in such manner and on such terms as it thinks fit, guarantee the discharge of any financial obligation incurred by the scheme administrator in connection with such arrangements<sup>10</sup>;
- 2114 (d) make regulations conferring or imposing on scheme administrators, or on scheme administrators of any description specified in the regulations, such powers or duties in connection with such arrangements as are so specified<sup>11</sup>.

1 le under the Housing Act 2004 s 270(4), (5)(c). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

2 For these purposes, 'the appropriate national authority' means (1) in relation to England, the Secretary of State; and (2) in relation to Wales, the National Assembly for Wales or the relevant Welsh minister: Housing Act 2004 s 261(1); and see PARA 27 notes 3-4 ante.

3 'Tenancy deposit', in relation to a shorthold tenancy, means any money intended to be held, by the landlord or otherwise, as security for (1) the performance of any obligations of the tenant; or (2) the discharge of any liability of his, arising under or in connection with the tenancy; 'money' means money in the form of cash or otherwise; and 'shorthold tenancy' means an assured shorthold tenancy within the meaning of the Housing Act 1988 Pt I Ch II (ss 19A-23) (as amended) (see PARA 1044 et seq ante, PARA 1063 et seq post): Housing Act 2004 s 212(8). For these purposes, references to a landlord or landlords in relation to any shorthold tenancy or tenancies include references to a person or persons acting on his or their behalf in relation to the tenancy or tenancies: s 212(9)(a).

4 Ibid s 212(1).

5 Ibid s 212(2). The statutory requirements referred to in the text are the requirements of Sch 10: see PARA 1057 et seq post.

6 Ibid s 212(3).

7 Ibid s 212(6).

8 Ibid s 212(4)(a).

9 Ibid s 212(4)(b).

10 Ibid s 212(5).



11 Ibid s 212(7).

## **UPDATE**

### **1056-1062 Tenancy Deposit Schemes**

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### **1056 Arrangements for securing availability of tenancy deposit schemes**

NOTE 3--A final payment under a contract for the sale and lease back of a property by a tenant to a landlord does not constitute a deposit for the purposes of the 2004 Act: *UK Housing Alliance (North West) Ltd v Francis* [2010] EWCA Civ 117, [2010] 18 EG 100.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1057. Schemes to be custodial schemes or insurance schemes.

### **1057. Schemes to be custodial schemes or insurance schemes.**

A tenancy deposit scheme<sup>1</sup> must be either a custodial scheme or an insurance scheme<sup>2</sup>.

A 'custodial scheme' is a scheme under which:

- 2115 (1) tenancy deposits<sup>3</sup> in connection with shorthold tenancies<sup>4</sup> are paid to the landlords<sup>5</sup> under the tenancies;
- 2116 (2) amounts representing the deposits are then paid by the landlords into a designated account held by the scheme administrator<sup>6</sup>; and
- 2117 (3) those amounts are kept by the scheme administrator in that account until such time as, in accordance with the scheme, they fall to be paid, wholly or in part, to the landlords or tenants under the tenancies<sup>7</sup>.

An 'insurance scheme' is a scheme under which:

- 2118 (a) tenancy deposits in connection with shorthold tenancies are paid to the landlords under the tenancies;
  - 2119 (b) such deposits are retained by the landlords on the basis that, at the end of the tenancies:
- 36
- 44. (i) such amounts in respect of the deposits as are agreed between the tenants and the landlords will be repaid to the tenants; and
  - 45. (ii) such amounts as the tenants request to be repaid to them and which are not so repaid will, in accordance with directions given by the scheme administrator, be paid into a designated account held by the scheme administrator;
- 37
- 2120 (c) amounts paid into that account are kept by the scheme administrator in the account until such time as, in accordance with the scheme, they fall to be paid, wholly or in part, to the landlords or tenants under the tenancies;

- 2121 (d) landlords undertake to reimburse the scheme administrator, in accordance with directions given by him, in respect of any amounts in respect of the deposits paid to the tenants by the scheme administrator, other than amounts paid to the tenants as mentioned in head (c) above; and
- 2122 (e) insurance is maintained by the scheme administrator in respect of failures by landlords to comply with such directions<sup>8</sup>.

Every custodial scheme or insurance scheme must provide:

- 2123 (A) for the scheme administrator to respond as soon as is practicable to any request made by the tenant under a shorthold tenancy to receive confirmation that a deposit paid in connection with the tenancy is being held in accordance with the scheme<sup>9</sup>;
- 2124 (B) for facilities to be available for enabling disputes relating to tenancy deposits subject to the scheme to be resolved without recourse to litigation, but it must not make the use of such facilities compulsory in the event of such a dispute<sup>10</sup>.

Additionally, the scheme must comply with the specific statutory requirements for custodial or insurance schemes<sup>11</sup>, as the case may be<sup>12</sup>. The appropriate national authority<sup>13</sup> may by order make such amendments of the statutory requirements<sup>14</sup> as it considers appropriate<sup>15</sup>.

At the date at which this title states the law, the provisions set out above were in force only for the purposes of making orders or regulations; for other purposes, they are to come into force as from a day to be appointed<sup>16</sup>.

1 For the meaning of 'tenancy deposit scheme' see PARA 1056 ante.

2 Housing Act 2004 s 212(2), Sch 10 para 1(1).

3 For the meaning of 'tenancy deposit' see PARA 1056 note 3 ante.

4 For the meaning of 'shorthold tenancy' for these purposes see PARA 1056 note 3 ante.

5 For the meaning of references to a landlord or landlords for these purposes see PARA 1056 note 2 ante.

6 For the meaning of 'scheme administrator' see PARA 1056 ante.

7 Housing Act 2004 s 212(8), Sch 10 para 1(2). In Sch 10, references to tenants under shorthold tenancies include references to persons who, in accordance with arrangements made with such tenants, have paid tenancy deposits on behalf of the tenants: Sch 10 para 12.

8 Ibid s 212(8), Sch 10 para 1(3).

9 Ibid Sch 10 para 9(1), (2).

10 Ibid Sch 10 para 10(1), (2).

11 A custodial scheme must conform with ibid Sch 10 paras 9-10 (see the text and notes 9-10 supra) and with Sch 10 paras 3-4 (see PARA 1058 post) and an insurance scheme must conform with Sch 10 paras 9-10 and with Sch 10 paras 5-8 (see PARA 1059 post): Sch 10 para 2(1), (2).

12 See note 11 supra.

13 For the meaning of 'the appropriate national authority' see PARA 1056 note 1 ante.

14 Ie amendments of the Housing Act 2004 Sch 10.

15 Ibid Sch 10 para 11. At the date at which this title states the law, no such order had been made.

16 See *ibid* s 270(4), (5)(c), (d). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### 1057 Schemes to be custodial schemes or insurance schemes

TEXT AND NOTES--These provisions may confer power on a person acting as an adjudicator in relation to such a dispute to decline to proceed, or continue to proceed, with the case: 2004 Act Sch 10 para 10(3) (added by the Housing (Tenancy Deposit Schemes) Order 2007, SI 2007/796. As to the service of documents, see the 2004 Act Sch 10 para 10A-10C (added by SI 2007/796).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1058. Custodial schemes.

### 1058. Custodial schemes.

The following provisions apply to a custodial scheme<sup>1</sup>. The scheme must provide for any landlord<sup>2</sup> who receives a tenancy deposit<sup>3</sup> in connection with a shorthold tenancy<sup>4</sup> to pay an amount equal to the deposit into a designated account held by the scheme administrator<sup>5</sup>. The designated account must not contain anything other than amounts paid into it as so mentioned and any interest accruing on such amounts<sup>6</sup>. The scheme administrator may<sup>7</sup> retain any interest accruing on such amounts<sup>8</sup>. The relevant arrangements<sup>9</sup> may, however, provide for any amount paid in accordance with the provisions relating to the termination of tenancies set out below<sup>10</sup> to be paid with interest:

- 2125 (1) in respect of the period during which the relevant amount<sup>11</sup> has remained in the designated account; and
- 2126 (2) at such rate as the appropriate national authority<sup>12</sup> may specify by order<sup>13</sup>.

With the exception of any interest retained as described above<sup>14</sup>, nothing contained in the designated account may be used to fund the administration of the scheme<sup>15</sup>.

A custodial scheme must make provision:

- 2127 (a) for enabling the tenant<sup>16</sup> and the landlord under a shorthold tenancy in connection with which a tenancy deposit is held in accordance with the scheme<sup>17</sup> to apply, at any time after the tenancy has ended, for the whole or part of the relevant amount<sup>18</sup> to be paid to him; and

2128 (b) for such an application to be dealt with by the scheme administrator in accordance with the following provisions<sup>19</sup>.

Where the tenant and the landlord notify the scheme administrator that they have agreed that the relevant amount should be paid wholly to one of them, or partly to the one and partly to the other, then if, having received such a notification, the scheme administrator is satisfied that the tenant and the landlord have so agreed, the scheme administrator must arrange for the relevant amount to be paid, in accordance with the agreement, within the period of ten days beginning with the date on which the notification is received by the scheme administrator<sup>20</sup>.

Where the tenant or the landlord notifies the scheme administrator that a court has decided that the relevant amount is payable either wholly to one of them or partly to the one and partly to the other, and that decision has become final<sup>21</sup>, then if, having received such a notification, the scheme administrator is satisfied as to those matters, the scheme administrator must arrange for the relevant amount to be paid, in accordance with the decision, within the period of ten days beginning with the date on which the notification is received by the scheme administrator<sup>22</sup>.

At the date at which this title states the law, the provisions set out above were in force only for the purposes of making orders or regulations; for other purposes, they are to come into force as from a day to be appointed<sup>23</sup>.

1 Housing Act 2004 s 212(2), Sch 10 para 3(1). For the meaning of 'custodial scheme' see PARA 1056 ante.

2 For the meaning of references to the landlord for these purposes see PARA 1056 note 3 ante.

3 For the meaning of 'tenancy deposit' see PARA 1056 note 3 ante.

4 For the meaning of 'shorthold tenancy' for these purposes see PARA 1056 note 3 ante.

5 Housing Act 2004 Sch 10 para 3(2). For the meaning of 'the scheme administrator' see PARA 1056 ante.

6 Ibid Sch 10 para 3(3).

7 I.e. subject to ibid Sch 10 para 3(5): see the text and notes 9-13 infra.

8 Ibid Sch 10 para 3(4).

9 I.e. the relevant arrangements under ibid s 212(1): see PARA 1056 ante.

10 I.e. in accordance with ibid Sch 10 para 4: see the text and notes 16-22 infra.

11 For these purposes 'the relevant amount', in relation to a tenancy deposit, means the amount paid into the designated account in respect of the deposit: ibid Sch 10 para 3(7).

12 For the meaning of 'the appropriate national authority' see PARA 1056 note 2 ante.

13 Housing Act 2004 Sch 10 para 3(5).

14 I.e. retained in accordance with ibid Sch 10 para 3(4): see the text and notes 7-8 supra.

15 Ibid Sch 10 para 3(6).

16 For the meaning of references to tenants under shorthold tenancies for these purposes see PARA 1057 note 7 ante.

17 For these purposes, references to a tenancy deposit being held in accordance with a scheme include, in the case of a custodial scheme, references to an amount representing the deposit being held in accordance with the scheme: Housing Act 2004 s 212(9)(b).

18 For these purposes, 'the relevant amount' has the meaning given by ibid Sch 10 para 3(7) (see note 11 supra): Sch 10 para 4(8).

19 Ibid Sch 10 para 4(1).

20 Ibid Sch 10 para 4(2), (3).

21 For the purposes of ibid Sch 10 a decision becomes final (1) if not appealed against, at the end of the period for bringing an appeal; or (2) if appealed against, at the time when the appeal (or any further appeal) is disposed of: Sch 10 para 4(6). An appeal is disposed of (a) if it is determined and the period for bringing any further appeal has ended; or (b) if it is abandoned or otherwise ceases to have effect: Sch 10 para 4(7).

22 Ibid Sch 10 para 4(4), (5).

23 See ibid s 270(4), (5)(c), (d). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### 1058 Custodial schemes

TEXT AND NOTES--As to the procedures that apply after a tenancy is terminated but the parties are not able to agree to whom a deposit held in a custodial scheme should be paid, either because one of the parties has no current address for, or other means of contacting the other party, or because one party has failed to respond to the communications of the other within the period specified, see the 2004 Act Sch 10 paras 4A-4C (added by the Housing (Tenancy Deposit Schemes) Order 2007, SI 2007/796).

NOTE 22--Now, this also applies where the tenant or landlord notifies the scheme administrator that a person acting as an adjudicator under the provision made under paragraph 10 has made a binding decision that the relevant amount is payable either wholly to one of them or partly to one and partly to the other: 2004 Act Sch 10 para 4(4A) (added by SI 2007/796).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1059. Insurance schemes.

### 1059. Insurance schemes.

The following provisions apply to an insurance scheme<sup>1</sup>. The scheme must provide that any landlord<sup>2</sup> by whom a tenancy deposit<sup>3</sup> is retained under the scheme must give the scheme administrator<sup>4</sup> an undertaking that, if the scheme administrator directs the landlord to pay him any amount in respect of the deposit in accordance with the statutory requirements<sup>5</sup>, the landlord will comply with such a direction<sup>6</sup>. The scheme must require the scheme administrator to effect, and maintain in force, adequate insurance in respect of failures by landlords by whom

tenancy deposits are retained under the scheme to comply with such directions as are mentioned above<sup>7</sup>; and if the scheme provides for landlords participating in the scheme to be members of the scheme, the scheme may provide for a landlord's membership to be terminated by the scheme administrator in the event of any such failure on the part of the landlord<sup>8</sup>. The scheme may provide for landlords participating in the scheme to pay to the scheme administrator fees in respect of the administration of the scheme and contributions in respect of the cost of such insurance against failures by landlords<sup>9</sup>.

An insurance scheme must make provision<sup>10</sup> in relation to the respective obligations of the landlord and the scheme administrator where a tenancy deposit has been retained by the landlord under the scheme and the tenancy has ended<sup>11</sup>. Where the tenant<sup>12</sup> notifies the scheme administrator that:

- 2129 (1) the tenant has requested the landlord to repay to him the whole or any part of the deposit; and
- 2130 (2) the amount in question ('the outstanding amount') has not been repaid to him within the period of ten days beginning with the date on which the request was made,

the following provisions apply<sup>13</sup>. On receiving a notification in accordance with heads (1) and (2) above, the scheme administrator must direct the landlord to pay an amount equal to the outstanding amount into a designated account held by the scheme administrator and to do so within the period of ten days beginning with the date on which the direction is received by the landlord<sup>14</sup>. The landlord must comply with any so direction given<sup>15</sup>. Where the tenant or the landlord notifies the scheme administrator:

- 2131 (a) that a court has decided that the outstanding amount is payable either wholly to one of them or partly to the one and partly to the other and the decision has become final<sup>16</sup>; or
- 2132 (b) that the tenant and landlord have agreed that such an amount is to be paid either wholly to one of them or partly to the one and partly to the other,

then if the scheme administrator is satisfied as to the matters mentioned in head (a) or head (b) above, as the case may be, he must pay to the tenant any amount due to him in accordance with the decision or agreement<sup>17</sup> and must either:

- 2133 (i) where any amount held by the scheme administrator<sup>18</sup> is more than any amount due to the tenant in accordance with the decision or agreement, pay the balance to the landlord<sup>19</sup>; or
- 2134 (ii) where any amount so held by the scheme administrator is less than any amount so due to the tenant, direct the landlord to pay him the difference within the period of ten days beginning with the date on which the direction is received by the landlord<sup>20</sup>;

and the landlord must comply with any direction so given<sup>21</sup>. The scheme administrator must pay any amounts required to be paid to the tenant or the landlord as mentioned above<sup>22</sup> within ten days beginning with the date on which the notification is received by the scheme administrator<sup>23</sup>.

The designated account held by the scheme administrator must not contain anything other than amounts paid into it as mentioned above<sup>24</sup> and any interest accruing on such amounts<sup>25</sup>. The scheme administrator may<sup>26</sup> retain any interest accruing on such amounts<sup>27</sup>. The relevant arrangements<sup>28</sup> may, however, provide for any amount paid to the tenant or the landlord in accordance with the above provisions<sup>29</sup> to be paid with interest in respect of the period during

which the relevant amount<sup>30</sup> has remained in the designated account and at such rate as the appropriate national authority<sup>31</sup> may<sup>32</sup> specify<sup>33</sup>. With the exception of any interest retained as mentioned above<sup>34</sup>, nothing contained in the designated account may be used to fund the administration of the scheme<sup>35</sup>.

The scheme must make provision for preventing double recovery<sup>36</sup> by a tenant in respect of the whole or part of the deposit, and may in that connection make provision for excluding or modifying any requirement imposed by the scheme in accordance with the above requirements<sup>37</sup> and for requiring the repayment of amounts paid to the tenant by the scheme administrator<sup>38</sup>.

At the date at which this title states the law, the provisions set out above were in force only for the purposes of making orders or regulations; for other purposes, they are to come into force as from a day to be appointed<sup>39</sup>.

- 1     Housing Act 2004 s 212(2), Sch 10 para 5(1). For the meaning of 'insurance scheme' see PARA 1056 ante.
- 2     For the meaning of references to the landlord for these purposes see PARA 1056 note 2 ante.
- 3     For the meaning of 'tenancy deposit' see PARA 1056 note 2 ante.
- 4     For the meaning of 'the scheme administrator' see PARA 1056 ante.
- 5     Ie in accordance with the Housing Act 2004 Sch 10 para 6(3) or Sch 10 para 6(7): see the text and notes 14, 20 infra.
- 6     Ibid Sch 10 para 5(2).
- 7     Ibid Sch 10 para 5(3).
- 8     Ibid Sch 10 para 5(4).
- 9     Ibid Sch 10 para 5(5).
- 10    Ie in accordance with ibid Sch 10 paras 6-8: see the text and notes 11-38 infra.
- 11    Ibid Sch 10 para 6(1).
- 12    For the meaning of references to tenants under shorthold tenancies for these purposes see PARA 1057 note 7 ante.
- 13    Ibid Sch 10 para 6(2).
- 14    Ibid Sch 10 para 6(3).
- 15    Ibid Sch 10 para 6(9).
- 16    As to when a decision becomes final see ibid Sch 10 para 4(6), (7); and PARA 1058 note 21 ante.
- 17    Ibid Sch 10 para 6(4), (5)(a). To the extent possible, he must pay that amount out of any amount held by him by virtue of Sch 10 para 6(3): Sch 10 para 6(5)(a).
- 18    Ie by virtue of ibid Sch 10 para 6(3).
- 19    Ibid Sch 10 para 6(5)(b), (6).
- 20    Ibid Sch 10 para 6(5)(b), (7).
- 21    See note 15 supra.
- 22    Ie as mentioned in the Housing Act 2004 Sch 10 para 6(5)(a) or Sch 10 para 6(6): see the text and notes 16-17, 19 supra.
- 23    Ibid Sch 10 para 6(8).

- 24    Ie as mentioned in *ibid* Sch 10 para 6(3): see the text and note 14 *supra*.
- 25    *Ibid* Sch 10 para 7(1).
- 26    Ie subject to *ibid* Sch 10 para 7(3): see the text and notes 28-33 *infra*.
- 27    *Ibid* Sch 10 para 7(2).
- 28    Ie the relevant arrangements under *ibid* s 212(1): see *PARA 1056 ante*.
- 29    Ie in accordance with *ibid* Sch 10 para 6(5)(a) or Sch 10 para 6(6): see the text and notes 16-17, 19 *supra*.
- 30    For these purposes 'the relevant amount', in relation to a tenancy deposit, means the amount, in respect of the deposit, paid into the designated account by virtue of a direction given in accordance with *ibid* Sch 10 para 6(3): Sch 10 para 7(5).
- 31    For the meaning of 'the appropriate national authority' see *PARA 1056 note 1 ante*.
- 32    Ie for the purposes of the Housing Act 2004 Sch 10 para 3(5)(b): see *PARA 1058 ante*.
- 33    *Ibid* Sch 10 para 7(3).
- 34    Ie as mentioned in *ibid* Sch 10 para 7(2); see the text and notes 26-27 *supra*.
- 35    *Ibid* Sch 10 para 7(4).
- 36    For these purposes, 'double recovery', in relation to an amount of a tenancy deposit, means recovering that amount both from the scheme administrator and from the landlord: *ibid* Sch 10 para 8(2).
- 37    Ie in accordance with *ibid* Sch 10 para 6 or Sch 10 para 7: see the text and notes 10-35 *supra*.
- 38    *Ibid* Sch 10 para 8(1).
- 39    See *ibid* s 270(4), (5)(c), (d). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### 1059 Insurance schemes

TEXT AND NOTES--The scheme must make provision as to the requirements that fall to be complied with by the landlord or by the scheme administrator where (1) a landlord wishes to retain a tenancy deposit under the scheme; or (2) a landlord retaining a tenancy deposit under the scheme, in relation to a tenancy that has not terminated, gives notice to the scheme administrator that he no longer wishes to retain the deposit under that scheme: 2004 Act Sch 10 para 5(1A) (added by the Housing (Tenancy Deposit Schemes) Order 2007, SI 2007/796). Further provision is made as to the requirements where deposit is to cease to be retained under an insurance scheme: 2004 Act Sch 10 paras 5(6), (7), 5A (added by SI 2007/796).



NOTE 13--When a tenant gives such notice, he must also indicate whether he consents to any dispute as to the amount to be repaid to him being resolved through the use of the dispute resolution service: 2004 Act Sch 10 para 6(2A) (added by SI 2007/796).

NOTE 14--As to the notice to be sent to a landlord when such a direction is given, see the 2004 Act Sch 10 para 6A (added by SI 2007/796).

TEXT AND NOTE 17--Now head (c) that a person acting as an adjudicator under the provision made under the 2004 Act Sch 10 para 10 (see PARA 1057) has made a binding decision that the outstanding amount is payable either wholly to one of them or partly to one and partly to the other: 2004 Act Sch 10 para 6(4)(c) (added by SI 2007/796). For 'head (b)' now read 'head (c)': 2004 Act Sch 10 para 6(5) (amended by SI 2007/796).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1060. Requirements relating to tenancy deposits.

#### **1060. Requirements relating to tenancy deposits.**

As from a day which, except for the purposes of making orders or regulations, is to be appointed<sup>1</sup>, the following provisions apply despite any agreement to the contrary<sup>2</sup>.

Any tenancy deposit<sup>3</sup> paid to a person in connection with a shorthold tenancy<sup>4</sup> must, as from the time when it is received, be dealt with in accordance with an authorised<sup>5</sup> scheme<sup>6</sup>; and no person may require the payment of a tenancy deposit in connection with a shorthold tenancy which is not to be subject to that requirement<sup>7</sup>.

Where a landlord<sup>8</sup> receives a tenancy deposit in connection with a shorthold tenancy, the initial requirements of an authorised scheme<sup>9</sup> must be complied with by the landlord in relation to the deposit within the period of 14 days beginning with the date on which it is received<sup>10</sup>.

A landlord who has received such a tenancy deposit must give the tenant and any relevant person<sup>11</sup> such information relating to:

- 2135 (1) the authorised scheme applying to the deposit;
- 2136 (2) compliance by the landlord with the initial requirements of the scheme in relation to the deposit; and
- 2137 (3) the operation of specified provisions of the Housing Act 2004<sup>12</sup> in relation to the deposit,

as may be prescribed<sup>13</sup>. The information so required must be given to the tenant and any relevant person in the prescribed form or in a form substantially to the same effect and within the period of 14 days beginning with the date on which the deposit is received by the landlord<sup>14</sup>.

No person may, in connection with a shorthold tenancy, require a deposit<sup>15</sup> which consists of property<sup>16</sup> other than money<sup>17</sup>.

<sup>1</sup> le under the Housing Act 2004 s 270(4), (5)(c). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June

2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

2 Housing Act 2004 s 213(9).

3 For the meaning of 'tenancy deposit' see PARA 1056 note 3 ante.

4 For the meaning of 'shorthold tenancy' for these purposes see PARA 1056 note 3 ante.

5 For these purposes, 'authorised', in relation to a tenancy deposit scheme, means that the scheme is in force in accordance with arrangements under the Housing Act 2004 s 212(1) (see PARA 1056 ante): s 212(8).

6 Ibid s 213(1).

7 Ibid s 213(2).

8 For the meaning of references to a landlord for these purposes see PARA 1056 note 3 ante.

9 For these purposes, 'the initial requirements' of an authorised scheme are such requirements imposed by the scheme as fall to be complied with by a landlord on receiving such a tenancy deposit: Housing Act 2004 s 213(4).

10 Ibid s 213(3).

11 For these purposes, 'relevant person' means any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant: ibid s 213(10).

12 Ie the operation of ibid Pt 6 Ch 4 (ss 212-215): see PARA 1056 et seq ante, PARAS 1061-1062 post.

13 Ibid s 213(5). 'Prescribed' means prescribed by an order made by the appropriate national authority: s 213(10). For the meaning of 'the appropriate national authority' see PARA 1056 note 2 ante.

14 Ibid s 213(6).

15 For these purposes, 'deposit' means a transfer of property intended to be held (by the landlord or otherwise) as security for (1) the performance of any obligations of the tenant; or (2) the discharge of any liability of his, arising under or in connection with the tenancy: ibid s 213(8).

16 For these purposes, 'property' means movable property: ibid s 213(10).

17 Ibid s 213(7).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### 1060 Requirements relating to tenancy deposits

NOTE 13--See Housing (Tenancy Deposits) (Prescribed Information) Order 2007, SI 2007/797.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1061. Proceedings relating to tenancy deposits.

### 1061. Proceedings relating to tenancy deposits.

As from a day which, except for the purposes of making orders or regulations, is to be appointed<sup>1</sup>, the following provisions apply. Where a tenancy deposit<sup>2</sup> has been paid in connection with a shorthold tenancy<sup>3</sup>, the tenant or any relevant person<sup>4</sup> may make an application to a county court on the grounds:

- 2138 (1) that the initial requirements of an authorised scheme<sup>5</sup> have not been complied with, or the statutory requirement to give information to the tenant or other relevant person<sup>6</sup> has not been complied with, in relation to the deposit; or
- 2139 (2) that he has been notified by the landlord<sup>7</sup> that a particular authorised scheme<sup>8</sup> applies to the deposit but has been unable to obtain confirmation from the scheme administrator<sup>9</sup> that the deposit is being held in accordance with the scheme<sup>10</sup>.

If on such an application the court is satisfied that the initial requirements or the statutory requirement mentioned in head (1) above have or has not been complied with in relation to the deposit, or is not satisfied that the deposit is being held in accordance with an authorised scheme, as the case may be, then the court must, as it thinks fit, either:

- 2140 (a) order the person who appears to the court to be holding the deposit to repay it to the applicant; or
- 2141 (b) order that person to pay the deposit into the designated account held by the scheme administrator under an authorised custodial scheme<sup>11</sup>,

within the period of 14 days beginning with the date of the making of the order<sup>12</sup>. The court must also order the landlord to pay to the applicant a sum of money equal to three times the amount of the deposit within the period of 14 days beginning with the date of the making of the order<sup>13</sup>.

Where any deposit<sup>14</sup> given in connection with a shorthold tenancy could not be lawfully required<sup>15</sup>, the property in question is recoverable from the person holding it by the person by whom it was given as a deposit<sup>16</sup>.

1    Ie under the Housing Act 2004 s 270(4), (5)(c). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

2    For the meaning of 'tenancy deposit' see PARA 1056 note 3 ante.

3    For the meaning of 'shorthold tenancy' for these purposes see PARA 1056 note 3 ante.

4    Ie any relevant person as defined by the Housing Act 2004 s 213(10): see PARA 1060 note 11 ante.

5    For the meaning of 'the initial requirements' of an authorised scheme see *ibid* s 213(4); and PARA 1060 note 9 ante.

6    Ie *ibid* s 213(6)(a): see PARA 1060 ante.

7    For the meaning of references to the landlord for these purposes para 1056 note 3 ante.

8    For the meaning of 'authorised' see PARA 1060 note 5 ante.

- 9 For the meaning of 'the scheme administrator' see PARA 1056 ante.
- 10 Housing Act 2004 s 214(1).
- 11 For the meaning of 'custodial scheme' see PARA 1056 ante.
- 12 Housing Act 2004 s 214(2), (3).
- 13 Ibid s 214(4).
- 14 For this purpose, 'deposit' has the meaning given by ibid s 213(8) (see PARA 1060 note 15 ante): s 214(6).
- 15 ie as a result of ibid s 213(7): see PARA 1060 ante.
- 16 Ibid s 214(5).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

### 1061 Proceedings relating to tenancy deposits

NOTES 12, 13--See *Draycott v Hannells Letting Ltd (t/a Hannells Letting Agents)* [2010] EWHC 217 (QB), [2010] All ER (D) 136 (Feb).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(4) ASSURED SHORTHOLD TENANCIES/(iii) Tenancy Deposit Schemes/1062. Sanctions for non-compliance with tenancy deposit requirements.

### 1062. Sanctions for non-compliance with tenancy deposit requirements.

As from a day to be appointed<sup>1</sup>, the following provisions apply. If a tenancy deposit<sup>2</sup> has been paid in connection with a shorthold tenancy<sup>3</sup>, no notice requiring possession of the dwelling house ('section 21 notice')<sup>4</sup> may be given in relation to the tenancy at a time when:

- 2142 (1) the deposit is not being held in accordance with an authorised scheme<sup>5</sup>; or
- 2143 (2) the initial requirements of such a scheme<sup>6</sup> have not been complied with in relation to the deposit<sup>7</sup>.

If the statutory requirement to give information to the tenant or other relevant person<sup>8</sup> is not complied with in relation to a deposit given in connection with a shorthold tenancy, no section 21 notice may be given in relation to the tenancy until such time as the required information has been given<sup>9</sup>.

If any deposit<sup>10</sup> given in connection with a shorthold tenancy could not be lawfully required<sup>11</sup>, no section 21 notice may be given in relation to the tenancy until such time as the property in question is returned to the person by whom it was given as a deposit<sup>12</sup>.

1 le under the Housing Act 2004 s 270(4), (5)(c). At the date at which this title states the law, no such day had been appointed. For the anticipated timetable see the Department for Communities and Local Government paper *Tenancy Deposit Protection: Secondary Legislation; Summary of Responses to Consultation* (23 June 2006) (product code 06HC0345/05), accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk). See also the Council of Mortgage Lenders press release dated 26 September 2006, accessible at the date at which this title states the law at [www.cml.org.uk](http://www.cml.org.uk).

2 For the meaning of 'tenancy deposit' see PARA 1056 note 3 ante.

3 For the meaning of 'shorthold tenancy' for these purposes see PARA 1056 note 3 ante.

4 For these purposes, a 'section 21 notice' means a notice under the Housing Act 1988 s 21(1)(b) or (4)(a) (recovery of possession on termination of shorthold tenancy: see PARA 1106 post): Housing Act 2004 s 215(5).

5 For the meaning of 'authorised' see PARA 1060 note 5 ante.

6 For the meaning of 'the initial requirements' of an authorised scheme see the Housing Act 2004 s 213(4); and PARA 1060 note 9 ante.

7 Ibid s 215(1).

8 le ibid s 213(6): see PARA 1060 ante.

9 See ibid s 215(2), which provides that no s 21 notice may be given until s 213(6)(a) has been complied with.

10 For this purpose, 'deposit' has the meaning given by ibid s 213(8) (see PARA 1060 note 15 ante): s 215(4).

11 le as a result of ibid s 213(7): see PARA 1060 ante.

12 Ibid s 215(3).

## UPDATE

### 1056-1062 Tenancy Deposit Schemes

These provisions now in force for all purposes: SI 2007/305 (Wales), SI 2007/1068 (England).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(5) IMPLIED TERMS OF ASSURED TENANCIES/1063. Limited prohibition on assignment etc without consent.

## (5) IMPLIED TERMS OF ASSURED TENANCIES

### 1063. Limited prohibition on assignment etc without consent.

It is an implied term of every assured tenancy<sup>1</sup> which is a periodic tenancy that, except with the consent of the landlord<sup>2</sup>, the tenant<sup>3</sup> shall not assign the tenancy<sup>4</sup>, in whole or in part, or sublet or part with possession of the whole or any part of the dwelling house<sup>5</sup> let<sup>6</sup> on the tenancy<sup>7</sup>. Where this term is so implied, the landlord is not precluded from withholding his consent unreasonably<sup>8</sup>.

In the case of an assured periodic tenancy which is not a statutory periodic tenancy<sup>9</sup> or an assured periodic tenancy arising under the Local Government and Housing Act 1989<sup>10</sup>, the above term is not implied if:

2144 (1) there is a provision, whether contained in the tenancy or not, under which the tenant is prohibited, whether absolutely or conditionally, from assigning or subletting or parting with possession or is permitted, whether absolutely or conditionally, to assign, sublet or part with possession; or

2145 (2) a premium<sup>11</sup> is required to be paid on the grant or renewal of the tenancy<sup>12</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 For the meaning of 'let' see PARA 1012 note 4 ante.

7 Housing Act 1988 s 15(1).

8 The Landlord and Tenant Act 1927 s 19 (as amended) (consents to assign not to be unreasonably withheld etc: see PARA 486 ante) does not apply to a term which is implied into an assured tenancy by the Housing Act 1988 s 15(1): s 15(2).

9 For the meaning of 'statutory periodic tenancy' see PARA 1067 post.

10 Ie under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 et seq post.

11 For these purposes, 'premium' includes (1) any fine or other like sum; (2) any other pecuniary consideration in addition to rent; and (3) any sum paid by way of deposit, other than one which does not exceed one-sixth of the annual rent payable under the tenancy immediately after the grant or renewal in question: Housing Act 1988 s 15(4).

12 Ibid s 15(3) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 102).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(5) IMPLIED TERMS OF ASSURED TENANCIES/1064. Access for repairs.

### **1064. Access for repairs.**

It is an implied term of every assured tenancy<sup>1</sup> that the tenant<sup>2</sup> shall afford to the landlord<sup>3</sup> access to the dwelling house<sup>4</sup> let<sup>5</sup> on the tenancy<sup>6</sup> and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute<sup>7</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 For the meaning of 'landlord' see PARA 1020 note 3 ante.

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 For the meaning of 'let' see PARA 1012 note 4 ante.

6 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

7 Housing Act 1988 s 16. Cf the Rent Act 1977 ss 3(2), 148; and PARAS 837, 828 respectively ante; the Landlord and Tenant Act 1985 s 11(6); and PARA 416 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(i) Introduction/1065. Security of tenure; in general.

## **(6) SECURITY OF TENURE**

### **(i) Introduction**

#### **1065. Security of tenure; in general.**

An assured tenancy<sup>1</sup> cannot be brought to an end by the landlord<sup>2</sup> except by obtaining an order of the court in accordance with the statutory provisions<sup>3</sup> or, in the case of a fixed term tenancy<sup>4</sup> which contains power for the landlord to determine the tenancy<sup>5</sup> in certain circumstances, by the exercise of that power; and, accordingly, the service by the landlord of a notice to quit is of no effect in relation to a periodic assured tenancy<sup>6</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 Ie in accordance with the Housing Act 1988 ss 5(2)-(7), 6-19 (as amended) or Pt I Ch II (ss 19A-23) (as amended); see PARA 1067 et seq post.

4 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

5 For the meaning of references to the landlord's power to determine the tenancy see the Housing Act 1988 s 45(4) (cited in PARA 1051 note 6 ante). A proviso for re-entry or forfeiture is not thereby rendered wholly nugatory; although forfeiture is not a means by which alone the landlord can recover possession while the tenancy remains assured, the presence of such a proviso would enable the court to make an order for possession on certain grounds during the currency of the contractual fixed term: see s 7(6); and PARA 1101 post. As to forfeiture generally see PARA 603 et seq ante.

6 Ibid s 5(1). As to the tenant's right to remain in possession under a statutory periodic tenancy see PARA 1067 et seq post; and as to grounds for possession see PARA 1108 et seq post. There is nothing to prevent a landlord from serving a notice to quit where the tenancy, though once assured, has ceased to be so, but it is doubtful whether the notice to quit could be effective if the tenancy becomes assured again before the expiry of the notice. Cf the Landlord and Tenant Act 1954 s 24(3)(b); and PARA 713 ante.

### **UPDATE**

#### **1065 Security of tenure; in general**

TEXT AND NOTE 6--Housing Act 1988 s 5(1) substituted, s 5(1A) added: Housing and Regeneration Act 2008 s 299, Sch 11 para 6(2). For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also Housing and Regeneration Act 2008 Sch 11 Pt 2 (paras 15-26) (replacement of certain terminated tenancies).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE)

PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(ii) Demotion of Assured Tenancy/1066. Demotion because of anti-social behaviour.

## **(ii) Demotion of Assured Tenancy**

### **1066. Demotion because of anti-social behaviour.**

The following provisions apply to an assured tenancy<sup>1</sup> if the landlord<sup>2</sup> is a registered social landlord<sup>3</sup>.

The landlord may apply to a county court for a demotion order<sup>4</sup>; and a demotion order has the following effect:

- 2146 (1) the assured tenancy is terminated with effect from the date specified in the order;
- 2147 (2) if the tenant remains in occupation of the dwelling house after that date a demoted tenancy<sup>5</sup> is created with effect from that date;
- 2148 (3) it is a term of the demoted tenancy that any arrears of rent payable at the termination of the assured tenancy become payable under the demoted tenancy;
- 2149 (4) it is also a term of the demoted tenancy that any rent paid in advance or overpaid at the termination of the assured tenancy is credited to the tenant's liability to pay rent under the demoted tenancy<sup>6</sup>.

The court must not entertain proceedings for a demotion order unless:

- 2150 (a) the landlord has served on the tenant a notice<sup>7</sup> which must:
  - 38
  - 46. (i) give particulars of the conduct in respect of which the order is sought;
  - 47. (ii) state that the proceedings will not begin before the date specified in the notice<sup>8</sup>;
  - 48. (iii) state that the proceedings will not begin after the end of the period of 12 months beginning with the date of service of the notice<sup>9</sup>; or
  - 39
- 2151 (b) the court thinks it is just and equitable to dispense with the requirement of the notice<sup>10</sup>.

The court will fix a date for the hearing when it issues the claim form<sup>11</sup>. The defendant must be served with the claim form and the particulars of claim not less than 21 days before the hearing date<sup>12</sup>. Where the defendant does not file a defence within the specified time<sup>13</sup> he may take part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs<sup>14</sup>. The landlord may not obtain a default judgment<sup>15</sup>.

At the hearing fixed in accordance with the rules set out above<sup>16</sup> or at any adjournment of that hearing the court may either decide the claim or give case management directions<sup>17</sup>. Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions so given will include the allocation of the claim to a track<sup>18</sup> or directions to enable it to be allocated<sup>19</sup>. A practice direction may make provision about proceedings relating to demoted tenancies<sup>20</sup>.

The court must not make a demotion order unless it is satisfied that the tenant or a person residing in or visiting the dwelling house<sup>21</sup> has engaged or has threatened to engage in conduct amounting to anti-social behaviour or use of the premises for unlawful purposes<sup>22</sup> and that it is reasonable to make the order<sup>23</sup>.



A demotion order may be claimed in the alternative to a possession order, in which case there are different procedural rules<sup>24</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 Housing Act 1988 s 6A(1) (s 6A added by the Anti-social Behaviour Act 2003 s 14(4)). For the meaning of 'registered social landlord' see HOUSING vol 22 (2006 Reissue) PARAS 11, 67.

4 Housing Act 1988 s 6A(2) (as added: see note 3 supra). Where a demotion claim is made other than in a possession claim, CPR 65.14-CPR 65.19 apply: CPR 65.13. The claim must be made in the county court for the district in which the property to which the claim relates is situated; and the claim form and form of defence sent with it must be in the forms set out in the relevant practice direction: CPR 65.14(1), (2). The particulars of claim must be filed and served with the claim form: CPR 65.15.

5 For these purposes, a demoted tenancy is a tenancy to which the Housing Act 1988 s 20B (as added) applies (see PARA 1050 ante): s 6A(11) (as added: see note 3 supra).

6 Ibid s 6A(3) (as added: see note 3 supra). As to other terms of the demoted tenancy see s 6A(8)-(10) (as so added); and PARA 1050 note 3 ante.

7 I.e a notice under ibid s 6A(6) (as added): see heads (i)-(iii) in the text.

8 The date specified for these purposes must not be before the end of the period of two weeks beginning with the date of service of the notice: ibid s 6A(7) (as added: see note 3 supra).

9 Ibid s 6A(6) (as added: see note 3 supra).

10 Ibid s 6A(5) (as added: see note 3 supra).

11 CPR 65.16(1). The hearing date will be not less than 28 days from the date of issue of the claim form: CPR 65.16(2). The standard period between the issue of the claim form and the hearing will be not more than eight weeks: CPR 65.16(3). The court may extend or shorten the time for compliance with any rule and may adjourn or bring forward a hearing: see CPR 3.1(2)(a), (b); and CIVIL PROCEDURE vol 11 (2009) PARAS 247, 249.

The court may use its powers under CPR 3.1(2)(a), (b) to shorten the time periods set out in CPR 65.16(2)-(4): *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 8.1. Particular consideration should be given to the exercise of this power if (1) the defendant, or a person for whom the defendant is responsible, has assaulted or threatened to assault (a) the claimant; (b) a member of the claimant's staff; or (c) another resident in the locality; (2) there are reasonable grounds for fearing such an assault; or (3) the defendant, or a person for whom the defendant is responsible, has caused serious damage or threatened to cause serious damage to the property or to the home or property of another resident in the locality: para 8.2. Where para 8.2 applies but the case cannot be determined at the first hearing fixed under CPR 65.16, the court will consider what steps are needed to finally determine the case as quickly as reasonably practicable: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 8.3.

12 CPR 65.16(4). The claimant must use the appropriate claim form and particulars of claim form set out in *Practice Direction--Forms* PD 4 Table 1; and the defence must be in form N11D as appropriate: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 6.2. The claimant's evidence should include details of the conduct alleged and any other matters relied upon: para 6.3. An acknowledgement of service is not required and CPR Pt 10 (see CIVIL PROCEDURE vol 11 (2009) PARA 184 et seq) does not apply: CPR 65.17(1). Where the claimant serves the claim form and particulars of claim, he must produce at the hearing a certificate of service of those documents and CPR 6.14(2)(a) (see CIVIL PROCEDURE vol 11 (2009) PARA 151) does not apply: CPR 65.18(5).

In a demotion claim the particulars of claim must (1) state whether the demotion claim is a claim under the Housing Act 1985 s 82A(2) (as added) (see PARA 1351 post) or under the Housing Act 1988 s 6A(2) (as added); (2) state whether the claimant is a local housing authority, a housing action trust or a registered social landlord; (3) identify the property to which the claim relates; (4) provide the following details about the tenancy to which the demotion claim relates: (a) the parties to the tenancy; (b) the period of the tenancy; (c) the amount of the rent; (d) the dates on which the rent is payable; and (e) any statement of express terms of the tenancy served on the tenant under the Housing Act 1985 s 82A(7) (as added) (see PARA 1351 post) or under the Housing Act 1988 s 6A(10) (as added) (see PARA 1050 note 3 ante), as applicable; and (5) state details of the conduct alleged: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 7.1.

13 I.e the time specified in CPR 15.4: see CIVIL PROCEDURE vol 11 (2009) PARA 201.

14 CPR 65.17(2).

15 See CPR 65.17(3), disapplying CPR Pt 12 (default judgment: see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq).

16 It is fixed in accordance with CPR 65.16(1): see the text and note 11 supra.

17 CPR 65.18(1). As to case management see generally CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq. Except where the claim is allocated to the fast track or the multi-track, or the court directs otherwise, any fact that needs to be proved by the evidence of witnesses at a hearing referred to in CPR 65.18(1) may be proved by evidence in writing: CPR 65.18(3). All witness statements must be filed and served at least two days before the hearing: CPR 65.18(4). As to the general rule about evidence, which is subject to any provision to the contrary, see CPR 32.2(1), (2); and CIVIL PROCEDURE vol 11 (2009) PARA 979.

Each party should wherever possible include all the evidence he wishes to present in his statement of case, verified by a statement of truth: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 9.1. If (1) the maker of a witness statement does not attend a hearing; and (2) the other party disputes material evidence contained in the statement, the court will normally adjourn the hearing so that oral evidence can be given: para 9.3.

18 When the court decides the track for the claim, the matters to which it must have regard include: (1) the matters set out in CPR 26.8 (see CIVIL PROCEDURE vol 11 (2009) PARA 270); and (2) the nature and extent of the conduct alleged: CPR 65.19.

19 CPR 65.18(2).

20 CPR 65.20; and see *Practice Direction--Anti-social Behaviour and Harassment* PD 65 cited in notes 11-12, 17 supra, notes 22, 24 infra.

21 For the meaning of 'dwelling house' see PARA para 1012 note 4 ante.

22 It is the conduct to which the Housing Act 1996 s 153A or s 153B (each as added) (injunctions against anti-social behaviour: see HOUSING vol 22 (2006 Reissue) PARA 268) applies: Housing Act 1988 s 6A(4)(a) (as added: see note 3 supra). The claimant's evidence should include details of the conduct to which the Housing Act 1996 s 153A or s 153B (each as added) applies and in respect of which the demotion claim is made: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 9.2.

23 Ibid s 6A(4) (as added: see note 3 supra).

24 See CPR 65.12. In such a case the claimant must use the procedure under CPR Pt 55 (see PARA 656 et seq ante) and CPR Pt 55 s 1 (CPR 55.2-CPR 55.10A) applies, except that the claim must be made in the county court for the district in which the property to which the claim relates is situated: CPR 65.12; and see *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 10.1. If the claim relates to residential property let on a tenancy and if the claim includes a demotion claim, the particulars of claim must (1) state whether the demotion claim is a claim under the Housing Act 1985 s 82A(2) (as added) (see PARA 1351 post) or under the Housing Act 1988 s 6A(2) (as added); (2) state whether the claimant is a local housing authority, a housing action trust or a registered social landlord; (3) provide details of any statement of express terms of the tenancy served on the tenant under the Housing Act 1985 s 82A(7) (as added: see PARA 1351 post) or under the Housing Act 1988 s 6A(10) (as added: see PARA 1050 note 3 ante), as applicable; and (4) state details of the conduct alleged: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 5.1.

## UPDATE

### 1066 Demotion because of anti-social behaviour

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 12--CPR 65.18(5) amended: SI 2008/2178.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(iii) Statutory Periodic Tenancy/1067. Statutory periodic tenancy.

### **(iii) Statutory Periodic Tenancy**

#### **1067. Statutory periodic tenancy.**

If an assured tenancy<sup>1</sup> which is a fixed term tenancy<sup>2</sup> comes to an end otherwise than by virtue of an order of the court or a surrender or other action on the part of the tenant<sup>3</sup>, the tenant is entitled<sup>4</sup> to remain in possession of the dwelling house<sup>5</sup> let<sup>6</sup> under that tenancy and his right to possession depends upon a periodic tenancy arising by virtue of the relevant<sup>7</sup> statutory provisions<sup>8</sup>. That statutory periodic tenancy does not, however, arise if, on the coming to an end of the fixed term tenancy, the tenant is entitled, by virtue of the grant of another tenancy<sup>9</sup>, to possession of the same or substantially the same dwelling house as was let to him under the fixed term tenancy<sup>10</sup>.

1 For the meaning of 'assured tenancy' see PARA 1018 ante.

2 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 Ie subject to the Housing Act 1988 s 7 (as amended) (see PARAS 1100-1101 post) and Pt I Ch II (ss 19A-23) (as amended) (see PARA 1051 et seq ante, PARAS 1096-1099, 1106-1107 post).

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 For the meaning of 'let' see PARA 1012 note 4 ante.

7 Ie by virtue of the Housing Act 1988 s 5 (as amended): see PARA 1065 ante; the text and notes 8-19 infra; and PARAS 1068-1071 post.

8 Ibid s 5(2). If, by virtue of any provision of Pt I (ss 1-45) (as amended) s 1(2), Sch 1 Pt I (paras 1-13) (as amended) (see PARA 1025 et seq ante) has effect in relation to a fixed term tenancy as if it consisted only of Sch 1 paras 11, 12 (see PARAS 1039-1040 ante), Sch 1 Pt I (paras 1-13) (as amended) has the like effect in relation to any periodic tenancy which arises by virtue of s 5 (as amended) on the coming to an end of the fixed term tenancy: s 5(6). For these purposes, except where the context otherwise requires, any reference to a statutory periodic tenancy is a reference to a periodic tenancy arising by virtue of s 5 (as amended): ss 5(7), 45(1). A tenancy which is an assured tenancy or an assured agricultural occupancy within the meaning of the Housing Act 1988 Pt I (ss 1-45) (as amended) and the terms of which inhibit an assignment as mentioned in the Rent Act 1977 s 127(5) (as amended) (see PARA 929 note 10 ante) would normally be excluded from the bankrupt's estate: see the Insolvency Act 1986 s 283(3A) (as added); para 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216. Such a tenancy may, however, vest in the trustee in bankruptcy on service of a notice under s 308A (as added): see PARA 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 393.

9 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

10 Housing Act 1988 s 5(4).

#### **UPDATE**

#### **1067 Statutory periodic tenancy**

TEXT AND NOTE 8--Housing Act 1988 s 5(2) amended: Housing and Regeneration Act 2008 s 299, Sch 11 para 6(3). For transitional provisions see Sch 11 para 14 (partly in

force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(iii) Statutory Periodic Tenancy/1068. Terms of the statutory periodic tenancy.

### **1068. Terms of the statutory periodic tenancy.**

The periodic tenancy arising by statute<sup>1</sup> is one:

- 2152 (1) taking effect in possession on the coming to an end of the fixed term tenancy<sup>2</sup>;
- 2153 (2) deemed to have been granted by the person who was the landlord<sup>3</sup> under the fixed term tenancy immediately before it came to an end to the person who was then the tenant<sup>4</sup> under that tenancy<sup>5</sup>;
- 2154 (3) under which the premises which are let<sup>6</sup> are the same dwelling house<sup>7</sup> as was let under the fixed term tenancy;
- 2155 (4) under which the periods of the tenancy are the same as those for which rent was last payable under the fixed term tenancy<sup>8</sup>; and
- 2156 (5) under which the terms are<sup>9</sup> the same as those of the fixed term tenancy immediately before it came to an end, except that any term which makes provision for determination by the landlord<sup>10</sup> or the tenant does not have effect while the tenancy remains an assured tenancy<sup>11</sup>.

1    Ie the periodic tenancy referred to in the Housing Act 1988 s 5(2): see PARA 1067 ante.

2    For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

3    For the meaning of 'landlord' see PARA 1020 note 3 ante.

4    For the meaning of 'tenant' see PARA 1018 note 6 ante.

5    For the meaning of 'tenancy' see PARA 1012 note 1 ante.

6    For the meaning of 'let' see PARA 1012 note 4 ante.

7    For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

8    See *Church Comrs for England v Meysa* [2006] EWCA Civ 821, (2006) Times, 4 July, [2006] All ER (D) 234 (Jun).

9    Ie subject to the Housing Act 1988 ss 5(4)-(7), 6-45 (as amended): see PARAS 1063-1064, 1067 ante, PARA 1069 et seq post.

10   For the meaning of references to the landlord's power to determine the tenancy see PARA 1051 note 6 ante.

11   Housing Act 1988 s 5(3). For the meaning of 'assured tenancy' see PARA 1018 ante. The terms of the tenancy may be varied under s 6: see PARAS 1069-1070 post.

## **UPDATE**

### **1068 Terms of the statutory periodic tenancy**

NOTE 8--*Meya*, cited, reported at [2007] HLR 38.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(iii) Statutory Periodic Tenancy/1069. Procedure for variation of implied terms.

### **1069. Procedure for variation of implied terms.**

The landlord<sup>1</sup> may serve on the tenant<sup>2</sup>, or the tenant may serve on the landlord, not later than the first anniversary of the day on which the former tenancy<sup>3</sup> came to an end<sup>4</sup>, a notice in the prescribed form<sup>5</sup> proposing terms of the statutory periodic tenancy<sup>6</sup> different from the implied terms<sup>7</sup>; and, if the landlord or the tenant considers it appropriate, proposing an adjustment of the rent to take account of the proposed terms<sup>8</sup>. Where a notice has been so served, within the period of three months beginning with the date on which the notice was served on him the landlord or the tenant, as the case may be, may by an application in the prescribed form<sup>9</sup> refer<sup>10</sup> the notice to a rent assessment committee<sup>11</sup>. If the notice is not so referred, then, with effect from such date not falling within that three-month period as may be specified in the notice, the terms proposed in the notice become terms of the tenancy<sup>12</sup> in substitution for any of the implied terms dealing with the same subject matter; and the amount of the rent must be varied in accordance with any adjustment so proposed<sup>13</sup>.

1 For the meaning of 'landlord' see PARA 1020 note 3 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 For these purposes, 'the former tenancy' means the fixed term tenancy on the coming to an end of which the statutory periodic tenancy arises: Housing Act 1988 s 6(1)(a). For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante; and for the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

Where, immediately before his death, the predecessor was a tenant under a fixed term tenancy, s 6 applies in relation to the assured periodic tenancy to which the successor becomes entitled on the predecessor's death subject to the modification that s 6(1)(a) is to be omitted: s 39(9)(b). For the meaning of 'the predecessor' and 'the successor' see PARA 1016 ante; and for the meaning of 'assured tenancy' see PARA 1018 ante.

4 Where, immediately before his death, the predecessor was a tenant under a fixed term tenancy, *ibid* s 6 applies in relation to the assured periodic tenancy to which the successor becomes entitled on the predecessor's death subject to the modification that for any reference to the coming to an end of the former tenancy there is to be substituted a reference to the date of the predecessor's death: s 39(9)(c).

5 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(a), Schedule, Form 1. For the meaning of 'prescribed' see PARA 1046 note 8 ante.

6 Where, immediately before his death, the predecessor was a tenant under a fixed term tenancy, the Housing Act 1988 s 6 applies in relation to the assured periodic tenancy to which the successor becomes entitled on the predecessor's death subject to the modification that for any reference to a statutory periodic tenancy there is to be substituted a reference to the assured periodic tenancy to which the successor becomes so entitled: s 39(9)(a).

7 For these purposes, 'the implied terms' means the terms of the tenancy which have effect by virtue of *ibid* s 5(3)(e) (see PARA 1068 ante at head (5) in the text), other than terms as to the amount of rent: s 6(1)(b). Where, immediately before his death, the predecessor was a tenant under a fixed term tenancy, s 6 applies in relation to the assured periodic tenancy to which the successor becomes entitled on the predecessor's death subject to the modification that the reference in s 6(1)(b) to s 5(3)(e) is to be construed as a reference to s 39(6)(e) (see PARA 1016 ante at head (5) in the text): s 39(9)(b).

8 Ibid s 6(2). Nothing in s 6(2), (3) applies, however, to a statutory periodic tenancy at a time when, by virtue of s 1(2), Sch 1 para 11 (see PARA 1039 ante) or Sch 1 para 12 (see PARA 1040 ante), it cannot be an assured tenancy: s 6(1). For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

9 For the prescribed form of application see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(b), Schedule, Form 2.

10 Ie under the Housing Act 1988 s 6(4): see PARA 1070 post.

11 Ibid s 6(3)(a). See also note 8 supra. As to the procedure on such a reference see PARA 1088 post; and as to determination of the reference see PARA 1070 post.

12 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

13 Housing Act 1988 s 6(3)(b). See also note 8 supra. There is no guidance as to whether the parties may agree enforceable variations of the implied terms without adopting this procedure.

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#### **1070. Determination of terms by rent assessment committee.**

Where a notice<sup>1</sup> is referred to a rent assessment committee<sup>2</sup>, the committee must consider the terms proposed in the notice and must determine whether those terms or some other terms, dealing with the same subject matter as the proposed terms, are such as, in the committee's opinion, might reasonably be expected to be found in an assured periodic tenancy<sup>3</sup> of the dwelling house<sup>4</sup> concerned, being a tenancy<sup>5</sup>:

- 2157 (1) which begins on the coming to an end of the former tenancy<sup>6</sup>; and
- 2158 (2) which is granted by a willing landlord<sup>7</sup> on terms which, except in so far as they relate to the subject matter of the proposed terms, are those of the statutory periodic tenancy<sup>8</sup> at the time of the committee's consideration<sup>9</sup>.

Whether or not such a notice proposes an adjustment of the amount of the rent under the statutory periodic tenancy, where a rent assessment committee so determines any terms, it must, if it considers it appropriate, specify an adjustment to take account of the terms so determined<sup>10</sup>. In so making a determination or so specifying an adjustment of an amount of rent there must be disregarded any effect on the terms or the amount of the rent attributable to the granting of a tenancy to a sitting tenant<sup>11</sup>.

Where such a notice is referred to a rent assessment committee, then, unless the landlord and the tenant otherwise agree, with effect from such date as the committee may direct:

- 2159 (a) the terms determined by the committee become terms of the statutory periodic tenancy in substitution for any of the implied terms<sup>12</sup> dealing with the same subject matter; and
- 2160 (b) the amount of the rent under the statutory periodic tenancy must be altered to accord with any adjustment specified by the committee;

but, for the purposes of head (b) above, the committee may not direct a date earlier than the date specified<sup>13</sup> in the notice referred to it<sup>14</sup>.

Nothing in the above provisions requires a rent assessment committee to continue with a determination<sup>15</sup> if the landlord and tenant give notice in writing that they no longer require such a determination or if the tenancy has come to an end<sup>16</sup>.

In any case where a rent assessment committee has before it at the same time the reference of a notice relating to a tenancy<sup>17</sup> ('the section 6 reference') and the reference of a notice proposing a new rent<sup>18</sup> relating to the same tenancy ('the section 13 reference'), and the date specified in the first notice<sup>19</sup> is not later than the first day of the new period specified in the second notice<sup>20</sup>, and the committee proposes to hear the two references together, the committee must make a determination in relation to the section 6 reference before making its determination in relation to the section 13 reference<sup>21</sup>.

1    Ie a notice under the Housing Act 1988 s 6(2): see PARA 1069 ante.

2    As to rent assessment committees generally see PARA 910 ante, PARAS 1087, 1089 post; and as to the procedure on such a reference see PARA 1088 post.

3    For the meaning of 'assured tenancy' see PARA 1018 ante.

4    For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5    For the meaning of 'tenancy' see PARA 1012 note 1 ante.

6    For the meaning of 'the former tenancy' see PARA 1069 note 3 ante.

7    For the meaning of 'landlord' see PARA 1020 note 3 ante.

8    For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante. See also PARA 1069 note 6 ante.

9    Housing Act 1988 s 6(4). Nothing in s 6(4)-(8) applies, however, to a statutory periodic tenancy at a time when, by virtue of s 1(2), Sch 1 Pt I para 11 (see PARA 1039 ante) or Sch 1 Pt I para 12 (see PARA 1040 ante), it cannot be an assured tenancy: s 6(1).

10   Ibid s 6(5). See also note 9 supra.

11   Ibid s 6(6). See also note 9 supra.

12   For the meaning of 'the implied terms' see PARA 1069 note 7 ante.

13   Ie in accordance with the Housing Act 1988 s 6(3)(b): see PARA 1069 ante.

14   Ibid s 6(7). See also note 9 supra.

15   Ie under ibid s 6(4): see the text and notes 1-9 supra.

16   Ibid s 6(8). See also note 9 supra.

17   Ie the reference of a notice under ibid s 6(2): see PARA 1069 ante.

18   Ie the reference of a notice under ibid s 13(2) (as amended): see PARA 1091 post.

19   Ie the notice under ibid s 6(2).

20   Ie the notice under ibid s 13(2) (as amended).

21   Ibid s 14(6). Accordingly, in such a case the reference in s 14(1)(c) (see PARA 1092 post at head (3) in the text) to the terms of the tenancy to which the notice relates is to be construed as a reference to those terms as varied by virtue of the determination made in relation to the section 6 reference: s 14(6).

PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(6) SECURITY OF TENURE/(iii) Statutory Periodic Tenancy/1071. Security of tenure cannot be avoided.

### **1071. Security of tenure cannot be avoided.**

If, on or before the date on which a tenancy<sup>1</sup> is entered into or is deemed to have been granted<sup>2</sup>, the person who is to be the tenant<sup>3</sup> under that tenancy enters into an obligation to do any act which will otherwise<sup>4</sup> cause the tenancy to come to an end at a time when it is an assured tenancy<sup>5</sup>, or executes, signs or gives any surrender, notice to quit or other document which otherwise has the effect of bringing the tenancy to an end at a time when it is an assured tenancy, the obligation is not enforceable or, as the case may be, the surrender, notice to quit or other document is of no effect<sup>6</sup>. Nothing in this provision, however, affects any right of pre-emption:

2161 (1) which is exercisable by the landlord<sup>7</sup> under a tenancy in circumstances where the tenant indicates his intention to dispose<sup>8</sup> of the whole of his interest under the tenancy; and

2162 (2) in pursuance of which the landlord would be required to pay, in respect of the acquisition<sup>9</sup> of that interest, an amount representing its market value<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 I.e. as mentioned in the Housing Act 1988 s 5(3)(b): see PARA 1068 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 I.e. apart from the Housing Act 1988 s 5(5): see the text and notes 5-6 infra.

5 For the meaning of 'assured tenancy' see PARA 1018 ante.

6 Housing Act 1988 s 5(5).

7 For the meaning of 'landlord' see PARA 1020 note 3 ante.

8 'Dispose' means dispose by assignment or surrender; and 'acquisition' has a corresponding meaning: Housing Act 1988 s 5(5A) (added by the Housing Act 2004 s 222(1), (2); for transitional provisions see ss 222(3), 270(3)(a)).

9 See note 8 supra.

10 Housing Act 1988 s 5(5A) (as added: see note 8 supra).

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## **(iv) Family Homes**

### **A. IN GENERAL**

#### **1072. Family homes.**

Where one spouse<sup>1</sup> or civil partner<sup>2</sup> ('A') is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or any enactment giving that spouse or partner the



right to remain in occupation, the spouse or civil partner not so entitled ('B') has the following rights ('home rights'):

- 2163 (1) if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it by A except with the leave of the court given by an order under the relevant statutory provisions<sup>3</sup>;
- 2164 (2) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house<sup>4</sup>.

B's occupation by virtue of these statutory provisions is to be treated, if B occupies the dwelling house as B's only or principal home, as occupation by A as A's only or principal home for the purposes of Part I<sup>5</sup> of the Housing Act 1988<sup>6</sup>. These provisions do not, however, apply to a dwelling house which:

- 2165 (a) in the case of spouses, has at no time been, and was at no time intended by them to be, a matrimonial home of theirs; and
- 2166 (b) in the case of civil partners, has at no time been, and was at no time intended by them to be, a civil partnership home of theirs<sup>7</sup>.

Cohabitants have more limited rights under the 1996 Act. If:

- 2167 (i) one cohabitant or former cohabitant is entitled to occupy a dwelling house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation;
- 2168 (ii) the other cohabitant or former cohabitant is not so entitled; and
- 2169 (iii) that dwelling house is the home in which they cohabit or a home in which they at any time cohabited or intended to cohabit,

the cohabitant or former cohabitant not so entitled may apply to the court for an order against the other cohabitant or former cohabitant ('the respondent') containing provision:

- 2170 (A) if the applicant is in occupation, giving him the right not to be evicted or excluded from the dwelling house or any part of it by the respondent for the period specified in the order and prohibiting the respondent from evicting or excluding the applicant during that period;
- 2171 (B) if the applicant is not in occupation, giving him the right to enter into and occupy the dwelling house for the period specified in the order and requiring the respondent to permit the exercise of that right<sup>8</sup>.

Other specified matters may be included in such an order<sup>9</sup>. An order so made may not be made after the death of either of the parties and ceases to have effect on the death of either of them<sup>10</sup>. It must be limited so as to have effect for a specified period not exceeding six months, but may be extended on one occasion for a further specified period not exceeding six months<sup>11</sup>. So long as the order remains in force, the applicant's occupation by virtue of these statutory provisions is to be treated, for the purposes of Part I of the Housing Act 1988, as occupation by the respondent as the respondent's residence<sup>12</sup>.

If one spouse or civil partner is entitled, either in his own right or jointly with the other spouse or civil partner, to occupy a dwelling house by virtue of a relevant tenancy<sup>13</sup>, the court may make an order transferring the tenancy from one of them to the other<sup>14</sup> on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter<sup>15</sup> or at any time when it has power to make a property adjustment order<sup>16</sup> with respect to the civil partnership<sup>17</sup>. Similarly, if one cohabitant is entitled, either in his own right

or jointly with the other cohabitant, to occupy a dwelling house by virtue of a relevant tenancy, then if the cohabitants cease to cohabit, the court may make an order transferring the tenancy from one of them to the other<sup>18</sup>. Such an order may not be made, however, unless the dwelling house is or was a matrimonial home, a civil partnership home, or a home in which the cohabitants cohabited, as the case may be<sup>19</sup>.

Rights of occupation in respect of family homes are discussed in detail elsewhere in this work<sup>20</sup>.

1 For the more limited rights available to cohabitants see the text and notes 8-12 *infra*.

2 *Ie* within the meaning of the Civil Partnership Act 2004.

3 See the Family Law Act 1996 s 30(1), (2)(a) (s 30 amended by the Civil Partnership Act 2004 s 82, Sch 9 para 1(1), (2)(b); for transitional provisions see Sch 9 Pt 3). The 'relevant statutory provisions' referred to in head (1) in the text are the provisions of the Family Law Act 1996 s 33 (as amended); see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 292-293.

4 See *ibid* s 30(1), (2)(b) (as amended: see note 3 *supra*).

5 *Ie* the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 *et seq ante*, PARA 1084 *et seq post*.

6 See the Family Law Act 1996 s 30(4)(b) (as amended: see note 3 *supra*).

7 See *ibid* s 30(7) (as amended: see note 3 *supra*).

8 See *ibid* s 36(1)-(4) (s 36(1) amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 34(1), (2)).

9 See the Family Law Act 1996 s 36(5).

10 *Ibid* s 36(9).

11 *Ibid* s 36(10).

12 See the Family Law Act 1996 s 36(13) (amended by the Civil Partnership Act 2004 Sch 9 para 7), applying the Family Law Act 1996 s 30(4)(b) (as amended: see note 3 *supra*).

13 For these purposes, 'relevant tenancy' means, *inter alia*, an assured tenancy or assured agricultural occupancy within the meaning of the Housing Act 1988 Pt I (as amended): Family Law Act 1996 s 53, Sch 7 para 1.

14 *Ie* an order under *ibid* Sch 7 Pt II (paras 6-9) (as amended): see note 17 *infra*.

15 *Ie* whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute.

16 *Ie* under the Civil Partnership Act 2004 Sch 5 Pt 2.

17 Family Law Act 1996 s 53, Sch 7 para 2(1), (2) (Sch 7 para 2(1) amended, and Sch 7 para 2(2) substituted, by the Civil Partnership Act 2004 s 82, Sch 9 Pt 1 para 16(1)-(4)).

If a spouse, civil partner or cohabitant is entitled to occupy the dwelling house by virtue of an assured tenancy or assured agricultural occupancy within the meaning of the Housing Act 1988 Pt I (as amended), the court may by order direct that, as from such date as may be specified in the order, there is, by virtue of the order and without further assurance, to be transferred to, and vested in, the other spouse, civil partner or cohabitant: (1) the estate or interest which the spouse, civil partner or cohabitant so entitled had in the dwelling house immediately before that date by virtue of the lease or agreement creating the tenancy and any assignment of that lease or agreement, with all rights, privileges and appurtenances attaching to that estate or interest but subject to all covenants, obligations, liabilities and incumbrances to which it is subject; and (2) where the spouse, civil partner or cohabitant so entitled is an assignee of such lease or agreement, the liability of that spouse, civil partner or cohabitant under any covenant of indemnity by the assignee express or implied in the assignment of the lease or agreement to that spouse, civil partner or cohabitant: Family Law Act 1996 Sch 7 para 7(1) (amended for these purposes by the Civil Partnership Act 2004 Sch 9, Pt 1 para 16(1), (8); and by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 10(b)(ii)). If an order is so made, any liability or obligation to which the spouse, civil partner or cohabitant so entitled is subject under any covenant having reference to the dwelling house in the lease or agreement, being a liability or

obligation falling due to be discharged or performed on or after the date so specified, is not to be enforceable against that spouse, civil partner or cohabitant: Family Law Act 1996 Sch 7 para 7(2) (as so amended). References in Schedule 7 Pt II (as amended) to a spouse, a civil partner or a cohabitant being entitled to occupy a dwelling house by virtue of a relevant tenancy apply whether that entitlement is in his own right or jointly with the other spouse, civil partner or cohabitant: Sch 7 para 6 (amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (7)).

If the spouse, civil partner or cohabitant so entitled is for the purposes of the Housing Act 1988 s 17 (as amended) (see PARA 1084 post) a successor in relation to the tenancy or occupancy: (a) his former spouse (or, in the case of judicial separation, his spouse); (b) his former civil partner (or, if a separation order is in force, his civil partner), or (c) his former cohabitant, is to be deemed to be a successor in relation to the tenancy or occupancy for the purposes of s 17 (as amended): Family Law Act 1996 Sch 7 para 7(4) (substituted by the Civil Partnership Act 2004 Sch 9, Pt 1, PARA 16(1), (9)). If the transfer under the Family Law Act 1996 Sch 7 para 7(1) (as amended) is of an assured agricultural occupancy, then, for the purposes of the Housing Act 1988 Pt I Ch III (ss 24-25) (as amended) (see PARA 1183 et seq post), the agricultural worker condition is fulfilled with respect to the dwelling house while the spouse, civil partner or cohabitant to whom the assured agricultural occupancy is transferred continues to be the occupier under that occupancy, and that condition is to be treated as so fulfilled by virtue of the same paragraph of the Housing Act 1988 Sch 3 (as amended) (see PARA 1184 post) as was applicable before the transfer: Family Law Act 1996 Sch 7 para 7(5) (amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (10)).

18 See the Family Law Act 1996 Sch 7 para 3(1), (2) (amended by the Domestic Violence, Crime and Victims Act 2004 s 58(1), Sch 10 para 42(1), (2)).

19 See the Family Law Act 1996 Sch 7 para 4 (amended by the Civil Partnership Act 2004, s 261(4), Sch 9 Pt 1 para 16(1), (5), Sch 30). For matters which the court must take into account see the Family Law Act 1996 Sch 7 para 5 (amended by the Civil Partnership Act 2004 Sch 9 Pt 1 para 16(1), (6)).

20 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

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## ***B. SERVICEMAN'S OR SERVICEWOMAN'S FAMILY RESIDENCE***

### **(A) CERTAIN RENTED PREMISES**

#### **1073. Protection of tenure of certain rented premises.**

If at any time during a serviceman's<sup>1</sup> period of residence protection<sup>2</sup> a tenancy qualifying for protection<sup>3</sup>, which is a fixed term tenancy<sup>4</sup>, ends<sup>5</sup> without being continued or renewed by agreement, whether on the same or different terms and conditions, and on the ending of that tenancy no statutory periodic tenancy<sup>6</sup> of the rented family residence<sup>7</sup> would otherwise arise by reason only of the specified circumstances<sup>8</sup>, the statutory provisions relating to assured tenancies<sup>9</sup> apply, during the remainder of the period of protection, in relation to the rented family residence as if those circumstances did not exist and had not existed immediately before the ending of that tenancy. Those statutory provisions apply, therefore, as if on the ending of that tenancy there arose a statutory periodic tenancy which is an assured tenancy during the remainder of that period<sup>10</sup>.

If at any time during a serviceman's period of residence protection:

2172 (1) a tenancy qualifying for protection which is a periodic tenancy would otherwise come to an end; and

2173 (2) by reason only of the specified circumstances<sup>11</sup>, that tenancy is not an assured tenancy; and

2174 (3) if that tenancy had been an assured tenancy, it would not have come to an end at that time,

the statutory provisions relating to assured tenancies<sup>12</sup> apply during the remainder of the period of protection as if those circumstances did not exist and, accordingly, as if the tenancy had become an assured tenancy immediately before it would otherwise have come to an end<sup>13</sup>.

The circumstances so specified are any one or more of the following, that is to say:

2175 (a) that the tenancy was entered into before, or pursuant to a contract made before, 15 January 1989;

2176 (b) that the rateable value of the premises which are the rented family residence, or of a property of which those premises form part, exceeded the relevant limit<sup>14</sup>;

2177 (c) that the circumstances excluding tenancies from being assured tenancies on the grounds that the tenancies were of dwelling houses with high rateable values<sup>15</sup> or were at a low rent<sup>16</sup> or were tenancies of agricultural land<sup>17</sup> applied with respect to the tenancy qualifying for protection; and

2178 (d) that the reversion immediately expectant on the tenancy qualifying for protection belongs to any of the specified<sup>18</sup> bodies<sup>19</sup>.

1 For the meaning of 'serviceman' see PARA 780 note 4 ante.

2 For these purposes, 'period of residence protection' means the period of relevant service, other than a short period of training, and four months from the date of the ending of it: see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 14(1). For the meaning of 'relevant service' see PARA 780 note 2 ante; and for the meaning of 'short period of training' see PARA 780 note 3 ante.

3 For the meaning of 'tenancy qualifying for protection' and 'tenancy' see PARA 1074 post.

4 For these purposes, 'fixed term tenancy' means any tenancy other than a periodic tenancy: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1) (amended by the Housing Act 1988 s 140(1), Sch 17 para 13(2)(b)).

5 For these purposes, references to the ending of a tenancy are references to the coming to an end of it however brought about, whether by effluxion of time, notice to quit or otherwise, and in particular, as respects a statutory tenancy, include references to the coming to an end of it as between the tenant and a landlord who is himself a tenant by reason of the ending of the tenancy of the landlord: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(2)(a). In relation to a statutory tenancy or to a provision of the Rent Act 1977 'landlord' and 'tenant' have the same meaning as in that Act (see PARA 816 notes 2-3 respectively ante) but, subject thereto, those expressions have the same meanings as in the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARAS 1020 note 3, 1018 note 6 respectively ante): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1) (amended by the Housing Act 1988 Sch 17 para 13(2)(c)). For the meaning of 'statutory tenancy' see PARA 1074 note 4 post.

6 For these purposes, 'statutory periodic tenancy' has the same meaning as in the Housing Act 1988 Pt I (as 1-45) (as amended) (see PARA 1067 note 8 ante): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1) (amended by the Housing Act 1988 Sch 17 para 13(2)(d)).

7 For the meaning of 'rented family residence' see PARA 1074 post.

8 Ie the circumstances specified in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(4) (as substituted and amended): see heads (a)-(d) in the text.

9 Ie the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended): see PARA 1011 et seq ante, PARA 1084 et seq post. Any reference for these purposes to Pt I Ch I (ss 1-19) (as amended) includes a reference to the general provisions of Pt I Ch VI (ss 40-45) (as amended): see PARA 1039 ante, PARA 1128 et seq post) so far as applicable to Pt I Ch I (ss 1-19) (as amended): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1A) (added by the Housing Act 1988 Sch 17 para 13(3)).

10 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(1) (s 16 substituted by the Housing Act 1988 Sch 17 para 2). For these purposes, 'assured tenancy' has the same meaning as in the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1018 ante; Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1) (definition added by the Housing Act 1988 Sch 17 para 13(2)(a)). As to the exclusion of protection see PARA 1075 post.

11 See note 8 supra.

12 See note 9 supra.

13 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(2) (as substituted: see note 10 supra).

14 Ie the relevant limit specified in the Housing Act 1988 s 1, Sch 1 para 2A (as substituted): see PARA 1027 ante. As to the abolition of domestic rates see PARA 521 ante; and as to certification of a rateable value in certain cases see PARA 523 ante.

15 Ie the circumstances mentioned in ibid Sch 1 para 2 (as substituted): see PARA 1026 ante.

16 Ie the circumstances mentioned in ibid Sch 1 paras 3, 3A, 3B (as substituted): see PARA 1028 ante.

17 Ie the circumstances mentioned in ibid Sch 1 para 6: see PARA 1031 ante.

18 Ie any of the bodies specified in ibid Sch 1 para 12 (as amended): see PARA 1040 ante.

19 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(4) (as substituted (see note 10 supra); amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 1).

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#### **1074. Meaning of 'tenancy qualifying for protection'; 'tenancy'; and 'rented family residence'.**

'Tenancy qualifying for protection' means<sup>1</sup> the tenancy of a rented family residence of the serviceman in right of which a dependant<sup>2</sup> or dependants of his is or are living in it or in part of it at the time in question<sup>3</sup>; and 'tenancy' includes a statutory tenancy<sup>4</sup> and, apart from a statutory tenancy, means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement, but does not include any relationship between a mortgagor and a mortgagee as such<sup>5</sup>.

'Rented family residence' means<sup>6</sup> premises in which, or in part of which, the serviceman was living immediately before the beginning of his period of service<sup>7</sup> with a dependant or dependants of his in right of a tenancy at a rent of those premises being a tenancy vested<sup>8</sup> in him or in that dependant or any of those dependants, and in which, or in part of which, at the time in question during the period of protection a dependant or dependants of his is or are living, whether with or without him, in right of such a tenancy of those premises being a tenancy vested in him or in that dependant or any of those dependants<sup>9</sup>.

1 Ie for the purposes of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt II (ss 14-25) (as amended): see PARA 1073 ante, PARA 1075 et seq post.

2 For these purposes, 'dependant', in relation to a serviceman, means (1) his spouse or civil partner; and (2) any other member of his family who was wholly or mainly maintained by him immediately before the beginning of the period of service in question: *ibid* s 23(1) (definition amended by the Civil Partnership Act 2004 s 257, Sch 26 para 21(a)). For the meaning of 'serviceman' see PARA 780 note 4 ante.

3 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 14(1)(b).

4 For these purposes, 'statutory tenancy' means a right to retain possession of premises after the ending of a tenancy of them, being a right arising on the ending of that tenancy from the operation of the Rent Act 1977, or of the Rent Act 1977 as extended by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt II (ss 14-25) (as amended), in relation to a person as being, or being the surviving spouse or surviving civil partner of or otherwise related to, the former owner of the tenancy, or a right to retain possession of premises arising by virtue of s 18(1) (as amended) (see PARA 1078 post): s 23(1) (definition amended by the Rent Act 1977 s 155(2), Sch 23 para 10(b); the Civil Partnership Act 2004 Sch 26 para 21(b)).

5 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(1).

6 See note 1 *supra*.

7 For the meaning of 'service' see PARA 780 note 2 ante.

8 For these purposes, references to a tenancy vested in any person include references to a tenancy vested in trustees, or held as part of the estate of a deceased person, where the first-mentioned person has a right or permission to occupy the premises arising by reason of a beneficial interest, whether direct or derivative, under the trusts or, as the case may be, in the estate of the deceased person or under trusts of which the deceased person was trustee: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 23(2)(b).

9 *Ibid* s 14(1)(a).

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### **1075. Exclusion of protection.**

The extended protection of tenure of certain rented premises<sup>1</sup> does not apply if a statutory tenancy<sup>2</sup> arises on the ending of the tenancy qualifying for protection<sup>3</sup>; nor does it have effect if and so long as the rented family residence<sup>4</sup> is:

2179 (1) a dwelling house which consists of or comprises premises which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>5</sup> on the premises; or

2180 (2) is bona fide let<sup>6</sup> at a rent which includes payments in respect of board<sup>7</sup>; or

2181 (3) is a dwelling house which is subject to a protected occupancy<sup>8</sup> or statutory tenancy<sup>9</sup> within the meaning of the Rent (Agriculture) Act 1976<sup>10</sup>.

1 *Ie* the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(1), (2) (as substituted): see PARA 1073 ante.

2 For the meaning of 'statutory tenancy' see PARA 1074 note 4 ante; and for the meaning of 'tenancy' see PARA 1074 ante.

3 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(3) (substituted by the Housing Act 1988 s 140(1), Sch 17 para 2).

4 For the meaning of 'rented family residence' see PARA 1074 ante.

- 5 le within the meaning of the Licensing Act 2003 s 14.
- 6 For the meaning of 'bona fide let' see PARA 869 note 3 ante.
- 7 For the meaning of 'board' see PARA 871 ante.
- 8 For the meaning of 'protected occupancy' for these purposes see PARAS 1144-1145 post.
- 9 For the meaning of 'statutory tenancy' for these purposes see PARAS 1146-1149 post.
- 10 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 14(2) (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent (Agriculture) Act 1976 s 40, Sch 8 para 1; and the Licensing Act 2003 s 198(1), Sch 6 paras 21, 22).

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## (B) ACCOMMODATION SHARED OTHERWISE THAN WITH LANDLORD

### **1076. In general.**

Where at any time during a serviceman's<sup>1</sup> period of residence protection<sup>2</sup> a tenancy qualifying for protection<sup>3</sup> which is a fixed term tenancy<sup>4</sup> ends<sup>5</sup> and immediately before the ending of the tenancy:

- 2182 (1) the tenant<sup>6</sup> under the terms of the tenancy has the exclusive occupation of some accommodation ('the separate accommodation') and has the use of other accommodation in common with another person or other persons, not being or including the landlord<sup>7</sup>; but
- 2183 (2) by reason only of the specified circumstances<sup>8</sup>, the statutory provisions whereby such accommodation is deemed to be a dwelling house let on an assured tenancy<sup>9</sup> did not have effect with respect to the separate accommodation,

those provisions apply, during the remainder of the period of protection, in relation to the separate accommodation as if the specified circumstances did not exist and had not existed immediately before the ending of the tenancy<sup>10</sup>. Those provisions apply, therefore, as if on the ending of the tenancy there arose a statutory periodic tenancy<sup>11</sup> which is an assured tenancy during the remainder of that period<sup>12</sup>.

Where, at any time during a serviceman's period of residence protection, a tenancy qualifying for protection which is a periodic tenancy would otherwise<sup>13</sup> come to an end and heads (1) and (2) above apply, the statutory provisions whereby separate accommodation is deemed to be a dwelling house let on an assured tenancy<sup>14</sup> apply, during the remainder of the period of protection, in relation to the separate accommodation as if the circumstances referred to in head (2) above did not exist and, accordingly, as if the tenancy had become an assured tenancy immediately before it would otherwise have come to an end<sup>15</sup>.

- 1 For the meaning of 'serviceman' see PARA 780 note 4 ante.
- 2 For the meaning of 'period of residence protection' see PARA 1073 note 2 ante.

3 For the meaning of 'tenancy qualifying for protection' see PARA 1074 ante; and for the meaning of 'tenancy' see PARA 1074 ante.

4 For the meaning of 'fixed term tenancy' see PARA 1073 note 4 ante.

5 In the circumstances mentioned in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(1)(a) (as substituted): see PARA 1073 ante. For the meaning of references to the ending of a tenancy see PARA 1073 note 5 ante.

6 For the meaning of 'tenant' see PARA 1073 note 5 ante.

7 For the meaning of 'landlord' see PARA 1073 note 5 ante.

8 In the circumstances specified in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 16(4) (as substituted and amended): see PARA 1073 ante at heads (a)-(d) in the text.

9 In the Housing Act 1988 s 3: see PARA 1020 ante.

10 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 17(1) (amended by the Housing Act 1988 s 140, Sch 17 para 4(1), (2)). As to the exclusion of protection see PARA 1077 post.

11 For the meaning of 'statutory periodic tenancy' see PARA 1073 note 6 ante.

12 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 17(1) (as amended: see note 10 supra). For the meaning of 'assured tenancy' see PARA 1073 note 10 ante.

13 In apart from the provisions of *ibid* s 16 (as substituted and amended) (see PARA 1073 ante) and s 17 (as amended).

14 See note 9 supra.

15 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 17(2) (substituted by the Housing Act 1988 Sch 17 para 4(1), (3)).

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### **1077. Exclusion of protection.**

The extended protection in respect of accommodation shared otherwise than with the landlord<sup>1</sup> does not apply if a statutory tenancy<sup>2</sup> arises on the ending of the tenancy qualifying for protection<sup>3</sup>; nor does it have effect if and so long as the rented family residence<sup>4</sup> is:

2184 (1) a dwelling house which consists of or comprises premises which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>5</sup> on the premises; or

2185 (2) bona fide let<sup>6</sup> at a rent which includes payments in respect of board<sup>7</sup>; or

2186 (3) a dwelling house which is subject to a protected occupancy<sup>8</sup> or statutory tenancy<sup>9</sup> within the meaning of the Rent (Agriculture) Act 1976<sup>10</sup>.

1 In the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 17(1), (2) (as substituted and amended): see PARA 1076 ante.

2 For the meaning of 'statutory tenancy' see PARA 1074 note 4 ante; and for the meaning of 'tenancy' see PARA 1074 ante.



- 3 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 17(3) (substituted by the Housing Act 1988 s 140(1), Sch 17 para 4(1), (3)).
- 4 For the meaning of 'rented family residence' see PARA 1074 ante.
- 5 le within the meaning of the Licensing Act 2003 s 14.
- 6 For the meaning of 'bona fide let' see PARA 869 note 3 ante.
- 7 For the meaning of 'board' see PARA 871 ante.
- 8 For the meaning of 'protected occupancy' for these purposes see PARAS 1144-1145 post.
- 9 For the meaning of 'statutory tenancy' for these purposes see PARAS 1146-1149 post.
- 10 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 14(2) (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent (Agriculture) Act 1976 s 40, Sch 8 para 1; and the Licensing Act 2003 s 198(1), Sch 6 paras 21, 22).

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## (C) LICENCES AND RENT-FREE LETTINGS

### **1078. Protection of employees occupying under licence or rent-free letting.**

Where a serviceman<sup>1</sup>:

- 2187 (1) begins a period of relevant service<sup>2</sup>, other than a short period of training<sup>3</sup>, and immediately before beginning it he was living, together with a dependant<sup>4</sup> or dependants of his, in any premises by virtue of a licence in that behalf granted to him by his employer in consequence of his employment<sup>5</sup>, or by virtue of a tenancy<sup>6</sup> so granted otherwise than at a rent (a 'rent-free tenancy'); or
- 2188 (2) is performing such a period of relevant service, other than a short period of training, and immediately before beginning it he was so living, and a dependant or dependants of his is or are living in the premises or in part of them, otherwise than in right of a tenancy at a rent,

then, during the serviceman's period of residence protection<sup>7</sup>, the statutory provisions relating to assured tenancies<sup>8</sup> apply in relation to those premises as if instead of the licence, or of the rent-free tenancy, there had been granted to the serviceman a tenancy at a rent for a term of years certain expiring at the beginning of the period of service and in other respects on the same terms and conditions, excluding any terms or conditions relating to the employment, as those on which the licence or the rent-free tenancy, as the case may be, was granted<sup>9</sup>. Those premises are deemed, during the period of protection, to be a dwelling house let on a statutory periodic tenancy<sup>10</sup> which is an assured tenancy<sup>11</sup>. As regards the assumption of the granting of a tenancy which is to be made for the above purposes in a case where the grant in question was of a licence, if the granting of such a tenancy would have been a subletting of the premises, it is not to be treated for any purposes as constituting a breach of any covenant or agreement prohibiting or restricting subletting<sup>12</sup>.

The subsistence of a Crown interest<sup>13</sup> in the premises does not affect the application of these provisions if the interest of the grantor of the licence, or the rent-free tenancy, as the case may be, is not a Crown interest<sup>14</sup>.

1 For the meaning of 'serviceman' see PARA 780 note 4 ante.

2 For the meaning of 'relevant service' see PARA 780 note 2 ante.

3 For the meaning of 'short period of training' see PARA 780 note 3 ante.

4 For the meaning of 'dependant' see PARA 1074 note 2 ante.

5 In relation to a policeman serviceman, the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18 (as amended) has effect with the substitution of a reference to a grant to him, either by the relevant police authority or by another person under arrangements made by that authority with that person, in consequence of the serviceman's membership of the relevant police force, for the reference to a grant to a serviceman by his employer in consequence of his employment: s 18(6). For these purposes, 'policeman serviceman' means a serviceman who, immediately before beginning the period of relevant service in question, was a member of a police force; and 'relevant police authority' means, in relation to a police force, the police authority responsible for the maintenance of that force: s 23(1) (definition amended by the Police Act 1964 s 64(3), Sch 10 Pt I).

6 For the meaning of 'tenancy' see PARA 1074 ante.

7 For the meaning of 'period of residence protection' see PARA 1073 note 2 ante.

8 In the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended): see PARA 1011 et seq ante, PARA 1084 et seq post. As to the construction of references to Pt I Ch I (ss 1-19) (as amended) see PARA 1073 note 9 ante.

9 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18(1) (amended by the Housing Act 1988 s 140(1), Sch 17 para 6(1)). As to the exclusion of protection see PARA 1079 post.

10 For the meaning of 'statutory periodic tenancy' see PARA 1073 note 6 ante.

11 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18(1) (as amended: see note 9 supra). For the meaning of 'assured tenancy' see PARA 1073 note 10 ante.

12 Ibid s 18(4).

13 For these purposes, 'Crown interest' means an interest belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duchy of Cornwall, or to a government department, or held on behalf of Her Majesty for the purposes of a government department: ibid s 23(1).

14 Ibid s 18(5).

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### **1079. Exclusion of protection.**

The extended protection in respect of employees occupying under licences or rent-free lettings<sup>1</sup> does not have effect:

2189 (1) where the licence or the rent-free tenancy, as the case may be, was granted in connection with the management of premises which, by virtue of a

- premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>2</sup> on the premises for consumption on them; or
- 2190 (2) where the licence or the rent-free tenancy, as the case may be, was granted pursuant to a contract which imposed on the grantor of it an obligation to provide board<sup>3</sup> for the serviceman<sup>4</sup> and the dependant<sup>5</sup> or dependants; or
- 2191 (3) where the premises are a dwelling house subject to a protected occupancy<sup>6</sup> or statutory tenancy<sup>7</sup> as defined in the Rent (Agriculture) Act 1976; or
- 2192 (4) where the premises are a dwelling house which is let on or subject to an assured agricultural occupancy<sup>8</sup> which is not an assured tenancy<sup>9</sup>.

1    le the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18(1) (as amended): see PARA 1078 ante.

2    le within the meaning of the Licensing Act 2003 s 14.

3    For the meaning of 'board' see PARA 871 ante.

4    For the meaning of 'serviceman' see PARA 780 note 4 ante.

5    For the meaning of 'dependant' see PARA 1074 note 2 ante.

6    For the meaning of 'protected occupancy' for these purposes see PARAS 1144-1145 post.

7    For the meaning of 'statutory tenancy' for these purposes see PARAS 1146-1149 post.

8    le an assured agricultural occupancy within the meaning of the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1183 post.

9    Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18(3) (amended by the Rent (Agriculture) Act 1976 s 40, Sch 8 para 2; the Housing Act 1988 Sch 17 para 6(4); the Licensing Act 2003 s 198(1), Sch 6 paras 21, 23).

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## (D) LIMITATION OF PROTECTION; MODIFICATION OF STATUTORY PROVISIONS

### **1080. Limitation on application of protection.**

Where, by virtue of the statutory provisions relating to the protection of servicemen's tenancies<sup>1</sup>, the operation of the relevant provisions of the Housing Act 1988<sup>2</sup> in relation to any premises is extended or modified, the extension or modification does not affect:

- 2193 (1) any tenancy<sup>3</sup> of those premises other than the statutory periodic tenancy<sup>4</sup> which is deemed to arise or, as the case may be, the tenancy which is for any period deemed to be an assured tenancy<sup>5</sup> by virtue of any of those provisions; or
- 2194 (2) any rent payable in respect of a period beginning before the time when that statutory periodic tenancy was deemed to arise or, as the case may be, before that tenancy became deemed to be an assured tenancy; or
- 2195 (3) anything done or omitted to be done before the time referred to in head (2) above<sup>6</sup>.

- 1 In the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 16-18 (as amended): see PARAS 1073-1079 ante.
- 2 In the Housing Act 1988 Pt I Ch I (ss 1-19): see PARA 1011 et seq ante, PARA 1084 et seq post. As to the construction of references to Pt I Ch I (ss 1-19) (as amended) see PARA 1073 note 9 ante.
- 3 For the meaning of 'tenancy' see PARA 1074 ante.
- 4 For the meaning of 'statutory periodic tenancy' see PARA 1073 note 6 ante.
- 5 For the meaning of 'assured tenancy' see PARA 1073 note 10 ante.
- 6 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 19 (substituted by the Housing Act 1988 s 140(1), Sch 17 para 7).

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### **1081. Modifications of certain statutory provisions relating to recovery of possession.**

Where the carrying out of duties connected with an employment which a serviceman<sup>1</sup> had before beginning a period of relevant service<sup>2</sup> or, in the case of a policeman serviceman<sup>3</sup>, the carrying out of his police duties, constitutes an obligation of a tenancy<sup>4</sup>, and his performing that service prevents his carrying out those duties, the fact that he does not carry them out is not to be treated for the purposes of the statutory provisions relating to recovery of possession where an obligation of a tenancy has been broken or not performed<sup>5</sup> as a breach or non-performance of the obligation<sup>6</sup>.

The statutory provisions relating to recovery of possession without proof of suitable alternative accommodation in circumstances connected with occupation by employees<sup>7</sup> do not apply for the purposes of the proceedings on an application for possession of premises made at any time during a serviceman's period of residence protection<sup>8</sup> if the premises are a rented family residence<sup>9</sup> of his<sup>10</sup>. Nor do they apply for those purposes if the statutory provisions relating to assured tenancies apply in relation to the premises<sup>11</sup> and a dependant<sup>12</sup> or dependants of the serviceman is or are living in the premises or in part of them in right of the statutory periodic tenancy<sup>13</sup> which is deemed<sup>14</sup> to arise or of the assured tenancy<sup>15</sup> which is deemed<sup>16</sup> to exist<sup>17</sup>.

Where the above restriction has effect as to an application for possession, the specified circumstances<sup>18</sup> in which the court has power to make or give an order or judgment for the recovery of possession without proof of suitable alternative accommodation nevertheless include either of the following sets of circumstances:

- 2196 (1) that the landlord<sup>19</sup> is a body who are statutory undertakers<sup>20</sup> or a local authority<sup>21</sup> or development corporation<sup>22</sup> having public utility functions<sup>23</sup>, and the premises are required by that body in the public interest for occupation as a residence for some person who is engaged in the body's whole-time employment in connection with its public utility functions or with whom, conditional on housing accommodation being provided, a contract for such employment has been entered into;

2197 (2) where a dependant or dependants of a policeman serviceman is or are living in the premises as mentioned above<sup>24</sup>, that the premises are required by the relevant police authority<sup>25</sup> for occupation as a residence by a member of the police force in question<sup>26</sup>.

Where, however, the court is satisfied that circumstances exist such as are specified in head (1) above, the matters relevant for the court in determining<sup>27</sup> whether it is reasonable to make or give such an order or judgment include<sup>28</sup> the question whether the body seeking the order or judgment has at its disposal any vacant accommodation which would be suitable alternative accommodation for the tenant<sup>29</sup> or will have such accommodation at its disposal at or before the time when it is proposed that the order or judgment should take effect<sup>30</sup>.

1 For the meaning of 'serviceman' see PARA 780 note 4 ante.

2 For the meaning of 'relevant service' see PARA 780 note 2 ante.

3 For the meaning of 'policeman serviceman' see PARA 1078 note 5 ante.

4 For the meaning of 'tenancy' see PARA 1074 ante.

5 I.e. the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1 (see PARA 949 ante) or the Housing Act 1988 s 7(4) (as amended), Sch 2 Pt II, Ground 12 (see PARA 1121 post).

6 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(1) (amended by the Rent Act 1977 ss 117(2), 155, Sch 15, Sch 23 para 8; the Housing Act 1988 s 140(1), Sch 17 para 9(1), (2)).

7 I.e. the Rent Act 1977 Sch 15 Pt I, Case 8 (see PARA 955 ante) or, as the case may be, the Housing Act 1988 Sch 2 Pt II, Ground 16 (as amended) (see PARA 1126 post).

8 For the meaning of 'period of residence protection' see PARA 1073 note 2 ante.

9 For the meaning of 'rented family residence' see PARA 1074 ante.

10 Reserve and Auxiliary Force (Protection of Civil Interests) Act 1951 s 20(2)(a) (amended by the Rent Act 1977 Sch 23 para 8; the Housing Act 1988 Sch 17 para 9(1), (3)).

11 I.e. if the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended) applies as mentioned in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 18(1) (as amended): see PARA 1078 ante.

12 For the meaning of 'dependant' see PARA 1074 note 2 ante.

13 For the meaning of 'statutory periodic tenancy' see PARA 1073 note 6 ante.

14 I.e. as referred to in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 19(a) (as substituted): see PARA 1080 ante.

15 For the meaning of 'assured tenancy' see PARA 1073 note 10 ante.

16 See note 14 supra.

17 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(2)(b) (substituted by the Housing Act 1988 Sch 17 para 9(1), (3)).

18 I.e. specified in the Rent Act 1977 Sch 15 Pt I, Cases 1-10 (as amended) (see PARAS 949-960 ante) or, as the case may be, the Housing Act 1988 Sch 2 Pt II, Grounds 10-16 (as amended) (see PARAS 1118-1126 post).

19 For the meaning of 'landlord' see PARA 1073 note 5 ante.

20 For these purposes, 'statutory undertakers' has the same meaning as in the Town and Country Planning Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1009): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(4); Planning (Consequential Provisions) Act 1990 s 2(4). The following bodies are also deemed to be statutory undertakers, and their undertakings statutory undertakings, for these purposes: (1) a gas transporter (see the Gas Act 1995 s 16(1), Sch 4 para 2(1)(vi)); (2) the Environment Agency, every water undertaker and every sewerage undertaker (see the Water Act 1989 s

190(1), Sch 25 para 1(1), (2)(v) (amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 3, Sch 2, PARA 4)); (3) the holder of a licence under the Electricity Act 1989 s 6 (as substituted and amended) (see s 112(1), Sch 16 para 1(1)(viii)); and (4) a licence holder under the Transport Act 2000 Pt I Ch I (ss 1-40) (as amended) (air traffic services) (see s 37, Sch 5 para 1(1), (2)(d)).

21 For these purposes, 'local authority' has the same meaning as in the Town and Country Planning Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 3 note 3): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(4); Planning (Consequential Provisions) Act 1990 s 2(4).

22 For the purposes, 'development corporation' has the same meaning as in the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq): Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(4); Interpretation Act 1978 s 17(2)(a).

23 For these purposes, 'public utility functions' means powers or duties conferred or imposed by or under any enactment, being powers or duties to carry on a statutory undertaking or being powers or duties of an internal drainage board: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(4) (amended by the Water Resources Act 1963 s 136(2), Sch 14 Pt I; the Water Act 1989 s 190(1), Sch 25 para 16).

24 le as mentioned in the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(2)(b) (as substituted).

25 For the meaning of 'relevant police authority' see PARA 1078 note 5 ante.

26 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(3) (amended by the Rent Act 1977 Sch 15, Sch 23 para 8; the Housing Act 1988 Sch 17 para 9(1), (4)(a)).

27 le under the Rent Act 1977 s 98(1) (see PARA 942 ante) or the Housing Act 1988 s 7(4) (as amended) (see PARA 1100 post).

28 le without prejudice to the generality of the Rent Act 1977 s 98(1) or, as the case may be, the Housing Act 1988 s 7(4) (as amended).

29 For the meaning of 'tenant' see PARA 1073 note 5 ante.

30 Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(3) proviso (amended by the Rent Act 1977 Sch 15; the Housing Act 1988 Sch 17 para 9(1), (4)(b)).

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## (E) SHORT PERIODS OF TRAINING

### **1082. Protection during short period of training.**

Where a serviceman<sup>1</sup> who has been living with a dependant<sup>2</sup> or dependants of his in any premises in right of a tenancy<sup>3</sup>, or of a licence in that behalf granted by his employer in consequence of his employment, performs a short period of training<sup>4</sup>, then, for so long during that period and within 14 days from the ending of it as the dependant or dependants and the serviceman or any of them is or are still living in the premises or any part of them, no person is entitled, except with the leave of the appropriate court, to proceed:

2198 (1) to execution on, or otherwise to the enforcement of, any judgment or order<sup>5</sup> given or made against any of them for the recovery of possession of any part of the premises<sup>6</sup> in which any of them is or are living; or

2199 (2) to exercise against any of them any right to take possession of, or to re-enter upon, any such part of them<sup>7</sup>.

If, on any application for such leave as is so required, the court is of opinion that, by reason of circumstances directly or indirectly attributable to the serviceman's performing or having performed the period of service in question, the judgment, order or right ought not to be immediately executed, enforced or exercised, the court may refuse leave or give leave subject to such restrictions and conditions as the court thinks proper<sup>8</sup>.

1 For the meaning of 'serviceman' see PARA 780 note 4 ante.

2 For these purposes, 'dependant', in relation to a serviceman, means his spouse or civil partner and any other member of his family wholly or mainly maintained by him: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 25(6) (amended by the Civil Partnership Act 2004 s 257, Sch 26 para 22).

3 For the meaning of 'tenancy' see PARA 1074 ante.

4 For the meaning of 'short period of training' see PARA 780 note 3 ante.

5 For these purposes, a person is deemed to be proceeding to execution on, or otherwise to the enforcement of, a judgment or order in the circumstances in which, by virtue of the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 3(9) (see ARMED FORCES vol 2(2) (Reissue) PARA 83), he would be deemed to be so proceeding for the purposes of s 2 (as amended), and, where a person has, in a case for which leave was not required under s 25 (as amended), taken out any judicial process with a view to, or in the course of, the enforcement of a judgment or order or proceeded to the exercise of a right to take possession of or to re-enter upon premises, he is deemed to be proceeding to the enforcement of the judgment or order or to the exercise of the right when any step is taken by him or on his behalf towards its completion: s 25(4).

6 For these purposes, references to a judgment or order for the recovery of possession of premises include references to any judgment or order the effect of which is to enable a person to obtain possession of the premises, and in particular includes, in relation to a mortgagee, a judgment or order for the delivery of possession of the premises: *ibid* s 25(3).

7 *Ibid* s 25(1).

8 *Ibid* s 25(2). The provisions of s 13 which relate to omission to obtain leave required under s 2 (as amended) (see ARMED FORCES vol 2(2) (Reissue) PARA 81) have effect in relation to omission to obtain leave required under s 25: s 25(5).

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## (F) PROCEEDINGS

### 1083. Representation in proceedings.

Where in the course of any proceedings<sup>1</sup> it appears to the court or tribunal that:

2200 (1) the proceedings relate to a tenancy<sup>2</sup> or licence vested<sup>3</sup> in a serviceman<sup>4</sup>;

2201 (2) a person other than the serviceman desires to take a step in the proceedings on behalf of the serviceman at a time when he is serving abroad<sup>5</sup>, or has purported to take a step in the proceedings on his behalf at a time when he was so serving; and

2202 (3) that person, in seeking or purporting to take that step, is or was acting in good faith in the interests of the serviceman and is or was a fit person to take that step on his behalf, but is or was not duly authorised to do so,

the court or tribunal may direct that that person is to be deemed to be, or to have been, duly authorised to take that step on behalf of the serviceman<sup>6</sup>. The above provisions apply in relation to the institution of proceedings before a court as they apply in relation to the taking of a step in such proceedings, and apply in relation to the making of a reference or application to a rent tribunal as they apply in relation to the taking of a step in proceedings consequential upon the making of such a reference or application<sup>7</sup>.

Where in the course of any proceedings a court or tribunal so gives a direction, the person to whom the direction relates has the like right of audience in those proceedings as the serviceman himself would have<sup>8</sup>.

In relation to any proceedings before a rent officer<sup>9</sup> or rent assessment committee<sup>10</sup> these provisions have effect as if the references to the court or tribunal included references to a rent officer or rent assessment committee<sup>11</sup>.

1    In any proceedings brought under the Protection from Eviction Act Pt I (ss 1-4) (as amended): see PARAS 215, 653 ante, PARAS 1194-1195 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609) or under the Rent Act 1977 Pt III (ss 44-61) (as amended) (see PARA 891 et seq ante), Pt IV (ss 62-75) (as amended) (see PARA 909 et seq ante) or Pt VII (ss 98-107) (as amended) (see PARAS 942 et seq, 1002 et seq ante) or under the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARA 1011 et seq ante, PARA 1084 et seq post), or of any proceedings consequential upon the making of a reference or application to a rent tribunal under the Rent Act 1977 Pt V (ss 77-85) (as amended) or to a rent assessment committee under the Housing Act 1988 Pt I (as amended), or under the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 Pt II (ss 14-25) (as amended).

2    For the meaning of 'tenancy' see PARA 1074 ante.

3    For the meaning of references to a tenancy vested in any person see PARA 1074 note 8 ante.

4    For the meaning of 'serviceman' see PARA 780 note 4 ante.

5    For these purposes, references to a time when a serviceman is serving abroad are references to a time when he is performing a period of relevant service and is outside the United Kingdom: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 22(7). For the meaning of 'relevant service' see PARA 780 note 2 ante; and for the meaning of 'United Kingdom' see PARA 25 note 18 ante.

6    Ibid s 22(1) (amended by the Rent Act 1968 s 117(2), Sch 15; the Protection from Eviction Act 1977 s 12, Sch 1 para 1; the Rent Act 1977 s 155(2), Sch 23 para 9; the Housing Act 1988 s 140(1), Sch 17 para 11).

7    Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 22(2). References in s 22(2) to proceedings brought or a reference or application made as therein mentioned include references to proceedings which purport to be so brought or to a reference or application which purports to be so made, as the case may be: s 22(2). As to rent tribunals see PARA 988 et seq ante.

8    Ibid s 22(3).

9    For the meaning of 'rent officer' see PARA 911 note 6 ante.

10   As to rent assessment committees see PARA 910 ante.

11   Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 22(3A) (added by the Rent Act 1968 Sch 15; amended by the Rent Act 1977 Sch 23 para 9).

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## **(7) SUCCESSION**



### 1084. Succession by spouse or civil partner to assured periodic tenancy.

In any case where:

- 2203 (1) the sole tenant<sup>1</sup> under an assured periodic tenancy<sup>2</sup> dies; and
- 2204 (2) immediately before the death, the tenant's spouse or civil partner<sup>3</sup> was occupying the dwelling house<sup>4</sup> as his or her only or principal home<sup>5</sup>; and
- 2205 (3) the tenant was not himself a successor,

then, on the death, the tenancy<sup>6</sup> vests in the spouse or civil partner and, accordingly, does not devolve under the tenant's will or intestacy<sup>7</sup>.

For these purposes, a tenant is a successor in relation to a tenancy if:

- 2206 (a) the tenancy became vested in him either by virtue of these provisions or under the will or intestacy of a previous tenant; or
- 2207 (b) at some time before the tenant's death the tenancy was a joint tenancy held by himself and one or more other persons and, prior to his death, he became the sole tenant by survivorship; or
- 2208 (c) he became entitled<sup>8</sup> to the tenancy by virtue of being a second successor to a protected or statutory tenancy under the Rent (Agriculture) Act 1976 or the Rent Act 1977<sup>9</sup>.

A tenant is also a successor in relation to a tenancy ('the new tenancy') which was granted to him, alone or jointly with others, if:

- 2209 (i) at some time before the grant of the new tenancy, he was a successor<sup>10</sup> in relation to an earlier tenancy of the same or substantially the same dwelling house as is let<sup>11</sup> under the new tenancy; and
- 2210 (ii) at all times since he became such a successor he has been a tenant, alone or jointly with others, of the dwelling house which is let under the new tenancy or of a dwelling house which is substantially the same as that dwelling house<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 1018 note 6 ante. If there were joint tenants, the tenancy would pass to the survivor or survivors by the right of survivorship.

2 For the meaning of 'assured tenancy' see PARA 1018 ante. A fixed term tenancy is not within this provision and would devolve under the tenant's will or according to the rules relating to intestacy.

3 For these purposes: (1) a person who was living with the tenant as his or her wife or husband is to be treated as the tenant's spouse; and (2) a person who was living with the tenant as if they were civil partners is to be treated as the tenant's civil partner: Housing Act 1988 s 17(4) (s 17(4) substituted, and s 17(1), (5) amended, by the Civil Partnership Act 2004 s 81, Sch 8 para 41). See also note 5 infra. For indicia that a person is living with another as his or her wife or husband see *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 (Ch), [2005] 2 P & CR 254, [2004] All ER (D) 347 (Dec) (a case involving two men, decided before the amendments made by the Civil Partnership Act 2004 Sch 8 para 41 came into force). Where the parties are married or in a civil partnership, there is no requirement that the spouse or civil partner should have been 'living with' the deceased tenant so long as the spouse or civil partner was occupying the dwelling house immediately before the death of the tenant. Cf the Rent Act 1977 s 2(1)(b), Sch 1 para 2 (as substituted and amended); and PARA 843 ante.

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 If, on the death of the tenant, there is, by virtue of the Housing Act 1988 s 17(4) (as substituted: see note 3 supra), more than one person who fulfils the condition in s 17(1)(b) (as amended), such one of them as may be decided by agreement or, in default of agreement, by the county court is to be treated for these purposes

(according to whether that one of them is of the opposite sex to, or of the same sex as, the tenant) as the tenant's spouse or the tenant's civil partner: s 17(5) (as amended: see note 3 supra). For the indicia that a person is living with another as his or her wife or husband see *Nutting v Southern Housing Group Ltd* [2004] EWHC 2982 (Ch), [2005] 2 P & CR 254, [2004] All ER (D) 347 (Dec).

6 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

7 Housing Act 1988 s 17(1) (as amended: see note 3 supra). The rule in *Moodie v Hosegood* [1952] AC 61, [1951] 2 All ER 582, HL (cited in PARA 847 note 6 ante) under the Rent Acts has no application in these circumstances. If the tenancy is a periodic tenancy which does not vest in a spouse or civil partner under these provisions but which passes under a will or intestacy, a mandatory ground for possession is available under the Housing Act 1988 s 7(3) (as amended), Sch 2 Pt I, Ground 7: see PARA 1115 post. As to transfer to a spouse or civil partner on divorce, dissolution of the partnership etc see PARA 1072 ante. If the spouse, civil partner or cohabitant entitled to occupy the dwelling house by virtue of an assured tenancy is for the purposes of the Housing Act 1988 s 17 (as amended) a successor in relation to the tenancy or occupancy: (1) his former spouse (or, in the case of judicial separation, his spouse); (2) his former civil partner (or, if a separation order is in force, his civil partner), or (3) his former cohabitant, is to be deemed to be a successor in relation to the tenancy or occupancy for the purposes of s 17 (as amended): see the Family Law Act 1996 Sch 7 para 7(4) (as substituted); and PARA 1072 note 17 ante.

8 le as mentioned in the Housing Act 1988 s 39(5): see PARA 1016 ante.

9 Ibid s 17(2).

10 le by virtue of ibid s 17(2).

11 For the meaning of 'let' see PARA 1012 note 4 ante.

12 Housing Act 1988 s 17(3).

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## **(8) REVERSIONS ON ASSURED TENANCIES**

### **1085. Where landlord is subtenant.**

If at any time:

- 2211 (1) a dwelling house<sup>1</sup> is for the time being lawfully<sup>2</sup> let<sup>3</sup> on an assured tenancy<sup>4</sup>;  
and
- 2212 (2) the landlord<sup>5</sup> under the assured tenancy is himself a tenant<sup>6</sup> under a  
superior tenancy<sup>7</sup>; and
- 2213 (3) the superior tenancy comes to an end,

the assured tenancy continues<sup>8</sup> in existence as a tenancy held of the person whose interest would, apart from the continuance of the assured tenancy, entitle him to actual possession of the dwelling house at that time<sup>9</sup>. This provision does not, however, apply to an assured tenancy if the interest which would<sup>10</sup> become that of the landlord is such that the tenancy could not<sup>11</sup> be an assured tenancy<sup>12</sup>.

Where, however, a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993<sup>13</sup>, none of the statutory provisions relating to security of tenure for tenants apply to the lease, and after the term date of the lease no person is entitled, by virtue of any sublease directly or indirectly derived out of the lease, to retain possession under Part I<sup>14</sup> of the Housing Act 1988<sup>15</sup>.

- 1 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 2 Cf the similar requirement in the Rent Act 1977 s 137 (as amended): see PARA 975 ante. As to lawful subletting for those purposes see PARA 978 ante.
- 3 For the meaning of 'let' see PARA 1012 note 4 ante.
- 4 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 5 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 6 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 7 For the meaning of 'tenancy' see PARA 1012 note 1 ante. There is no requirement that the superior tenancy is itself an assured tenancy.
- 8 le subject to the Housing Act 1988 s 18(2): see the text and notes 10-12 infra.
- 9 Ibid s 18(1).
- 10 le by virtue of ibid s 18(1).
- 11 le by virtue of ibid s 1(2), Sch 1 (as amended): see PARA 1025 et seq ante.
- 12 Ibid s 18(2).
- 13 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 post.
- 14 le under the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1018 et seq ante, PARA 1086 et seq post.
- 15 See the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post. See also s 61, Sch 14 para 3(1), (2)(c), (3)(c); and PARA 1727 post.

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### **1086. Reversionary tenancies.**

Where an assured tenancy<sup>1</sup> which is a periodic tenancy, including a statutory periodic tenancy<sup>2</sup>, continues<sup>3</sup> beyond the beginning of a reversionary tenancy<sup>4</sup> which was granted<sup>5</sup> so as to begin on or after:

- 2214 (1) the date on which the previous contractual assured tenancy<sup>6</sup> came to an end; or
- 2215 (2) a date on which the periodic tenancy could otherwise<sup>7</sup> have been brought to an end by the landlord<sup>8</sup> by notice to quit,

the reversionary tenancy has effect as if it had been granted subject to the periodic tenancy<sup>9</sup>.

- 1 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 2 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

3     le by virtue of any provision of the Housing Act 1988 Pt I (ss 1-35) (as amended): see PARA 1018 et seq ante, PARA 1069 et seq post.

4     For the meaning of 'tenancy' see PARA 1012 note 1 ante; and for the meaning of references to the beginning of the tenancy see PARA 1051 note 7 ante.

5     le whether before, on or after 15 January 1989 (ie the date when the Housing Act 1988 Pt I (as amended) came into force): see s 141(3).

6     The reference to the previous contractual assured tenancy applies only where the periodic tenancy referred to is a statutory periodic tenancy and is a reference to the fixed term tenancy which immediately preceded the statutory periodic tenancy: *ibid* s 18(4). For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

7     le apart from any provision of *ibid* Pt I (as amended).

8     For the meaning of 'landlord' see PARA 1020 note 3 ante; and for the meaning of references to the landlord's power to determine the tenancy see PARA 1051 note 6 ante.

9     Housing Act 1988 s 18(3).

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## **(9) RENT**

### **(i) Rent Assessment Committees etc**

#### **1087. Rent assessment committees; procedures and information powers.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> is empowered to make regulations regulating the procedure to be followed by rent assessment committees<sup>3</sup>. The rent assessment committee to which a matter is referred<sup>4</sup> may by notice in the prescribed form<sup>5</sup> served on the landlord<sup>6</sup> or the tenant<sup>7</sup> require him to give to the committee, within such period of not less than 14 days from the service of the notice as may be specified in the notice, such information as the committee may reasonably require<sup>8</sup> for the purposes of its functions<sup>9</sup>.

If any person fails without reasonable excuse to comply with a notice so served on him, he is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>10</sup>; and, where such an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager or secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against and punished accordingly<sup>11</sup>.

1     As to the Secretary of State see PARA 27 note 3 ante.

2     As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3     See the Rent Act 1977 s 74(1)(b) (as amended); and PARA 815 ante at head (2) in the text. At the date at which this title states the law, by virtue of the Rent Act 1977 s 155(3), Sch 24 para 1 (see PARA 814 ante), the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065 (as amended), have effect as if made under this provision. See further PARA 919 ante, PARA 1088 post.

4 lie under the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended) (see PARA 1011 et seq ante, PARA 1090 et seq post) or Pt I Ch II (ss 19A-23) (as amended) (see PARA 1051 et seq ante, PARAS 1096-1099, 1106-1107 post).

5 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(g), Schedule, Form 7. For the meaning of 'prescribed' see PARA 1046 note 8 ante.

6 For the meaning of 'landlord' see PARA 1020 note 3 ante.

7 For the meaning of 'tenant' see PARA 1018 note 6 ante.

8 For the meaning of 'as ... may reasonably require' see *Watney Mann v Langley* [1966] 1 QB 457, [1963] 3 All ER 967.

9 Housing Act 1988 s 41(2).

10 Ibid s 41(3). As to the standard scale see PARA 52 note 6 ante.

11 Ibid s 41(4).

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### **1088. Procedure on reference to rent assessment committee.**

Where a reference is made to a rent assessment committee<sup>1</sup>, the committee must serve on each party a notice specifying a period of not less than seven days from the service of the notice during which either representations in writing or a request to make oral representations may be made by that party to the committee<sup>2</sup>. A notice so served on the party who did not make the reference must be accompanied by a copy of the reference<sup>3</sup>.

Where a party makes a request to make oral representations within the specified period, or such further period as a committee may allow, the committee must give him an opportunity to be heard in person or by a person authorised by him, whether or not that person is of counsel or a solicitor<sup>4</sup>.

The committee must make such inquiry, if any, as it thinks fit and consider any information supplied or representation made to it in pursuance of this provision<sup>5</sup>.

1 lie under (1) the Housing Act 1988 s 6 (see PARAS 1069-1070 ante), s 13 (as amended) (see PARAS 1091, 1092 post), s 14A (as added) (see PARA 1093 note 19 post) or s 22 (as amended) (see PARAS 1096-1098 post); or (2) the Landlord and Tenant Act 1954 Sch 5 para 5 as applied by the Local Government and Housing Act 1989 Sch 10 para 19 (see PARA 1238 post); or (3) Sch 10 para 6(2) (see PARA 1253 post) or Sch 10 para 10(2) (see PARA 1255 post).

2 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(1), (2) (reg 2A added by SI 1988/2200; the Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(1) substituted by SI 1997/3007).

3 Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(3) (as added: see note 2 supra).

4 Ibid reg 2A(4) (as added: see note 2 supra).

5 Ibid reg 2A(5) (as added: see note 2 supra).

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### **1089. Information as to determination of rents.**

The president of every rent assessment panel<sup>1</sup> must keep and make publicly available, in such manner as is specified in an order<sup>2</sup> made by the Secretary of State or, in relation to Wales by the National Assembly for Wales or the relevant Welsh minister, such information as may be so specified<sup>3</sup> with respect to rents under assured tenancies<sup>4</sup> and assured agricultural occupancies<sup>5</sup> which have been the subject of references or applications to, or determinations by, rent assessment committees<sup>6</sup>. The president of each rent assessment panel must keep the specified information available for public inspection without charge during usual office hours at the office or principal office of that panel<sup>7</sup>.

A person requiring a copy of any specified information certified under the hand of an officer duly authorised by the president of the rent assessment panel concerned is entitled to obtain it on payment of a fee of £1 for the specified information relating to each determination or, where no determination is made, each application<sup>8</sup>. A copy of any information certified under the hand of an officer duly authorised by the president of the rent assessment panel concerned is receivable in evidence in any court and in any proceedings<sup>9</sup>.

1 As to rent assessment panels see PARA 910 ante.

2 An order so made may prescribe the fees to be charged for the supply of a copy, including a certified copy, of any of the information so kept; and may make different provision with respect to different cases or descriptions of case, including different provision for different areas: Housing Act 1988 s 42(3). The power to make such an order is exercisable by statutory instrument which is subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 42(4). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199 (amended by SI 1990/1474; SI 1993/657), which came into force on 15 January 1989 (art 1) and applies to cases where the rent assessment committee for an area has made a determination on an application under the Housing Act 1988 s 13(4) (see PARA 1091 post) or s 22(1) (as amended) (see PARA 1096 post) or is precluded from making a determination on an application under s 22(1) (as amended) by reason of s 22(3) (see PARA 1097 post) (Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199, art 2 (amended by SI 1990/1474)). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 The president of the rent assessment panel for the area concerned must, as respects the cases falling within the Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199, art 2 (as amended) (see note 2 supra) make available for public inspection under the Housing Act 1988 s 42 the following information: (1) address of premises; (2) description of premises; (3) names and addresses of landlord and tenant; (4) if granted for a term, date of commencement of the tenancy and length of term; (5) the rental period; (6) allocation between landlord and tenant of liabilities for repairs; (7) whether any council tax or rates is or are borne by the landlord or a superior landlord; (8) details of services provided by the landlord or a superior landlord; (9) details of furniture provided by the landlord or a superior landlord; (10) any other terms of the tenancy or notice relating to the tenancy taken into consideration in determining the rent; (11) the rent determined, the date it was determined and the amount, if any, of the rent which, in the opinion of the committee, is fairly attributable to the provision of services, except where that amount is in its opinion negligible or, in a case where the committee is precluded from making a determination by s 22(3), the rent currently payable under the assured shorthold tenancy, and whether the committee is so precluded by s 22(3) (a) or s 22(3)(b): Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199, art 3, Schedule (amended by SI 1990/1474; SI 1993/657). For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante.

4 For the meaning of 'assured tenancy' see PARA 1018 ante.

5 For the meaning of 'assured agricultural occupancy' see PARA 1183 post.

6 Housing Act 1988 s 42(1). See also s 41A (as added); and PARA 1092 note 5 post. As to rent assessment committees see PARAS 910, 1087-1088 ante.

7 Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199, art 4.

8 Ibid art 5.

9 Housing Act 1988 s 42(2).

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## **(ii) Restrictions on Distress**

### **1090. Restriction on levy of distress for rent.**

No distress for the rent of any dwelling house<sup>1</sup> let<sup>2</sup> on an assured tenancy<sup>3</sup> may be levied<sup>4</sup> except with leave of the county court<sup>5</sup>. The court has, with respect to any application for such leave, the same powers with respect to adjournment, stay, suspension, postponement and otherwise as are conferred<sup>6</sup> in relation to proceedings for possession of such a dwelling house<sup>7</sup>.

1 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

2 For the meaning of 'let' see PARA 1012 note 4 ante.

3 For the meaning of 'assured tenancy' see PARA 1018 ante.

4 Ie subject to the Housing Act 1988 s 19(2): see note 5 infra.

5 Ibid s 19(1). Nothing in s 19(1), however, applies to distress levied under the County Courts Act 1984 s 102 (as amended) (see CIVIL PROCEDURE vol 12 (2009) PARAS 1352-1353): Housing Act 1988 s 19(2). Cf the Rent Act 1977 s 147 (as amended); and PARA 908 ante.

6 Ie by the Housing Act 1988 s 9 (as amended): see PARA 1117 post.

7 Ibid s 19(1). See also note 5 supra. As to the jurisdiction of the court generally see PARA 1128 post.

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## **(iii) Increases of Rent under Assured Periodic Tenancies**

### **1091. Procedure for increasing rent.**

The following provisions apply to:

2216 (1) a statutory periodic tenancy<sup>1</sup> other than one which cannot<sup>2</sup> for the time being be an assured tenancy<sup>3</sup>; and

- 2217 (2) any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant<sup>4</sup>, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period<sup>5</sup>.

For the purpose of securing an increase in the rent under such a tenancy, the landlord<sup>6</sup> may serve on the tenant a notice in the prescribed form<sup>7</sup> proposing a new rent to take effect at the beginning of a new period of the tenancy specified in the notice<sup>8</sup>. The new period must be a period beginning not earlier than:

- 2218 (a) the minimum period<sup>9</sup> after the date of the service of the notice; and  
 2219 (b) except in the case of a statutory periodic tenancy:  
 40  
 49. (i) in the case of an assured agricultural occupancy<sup>10</sup>, the first anniversary of the date on which the first period of the tenancy began;  
 50. (ii) in any other case, on the date that falls 52 weeks after the date on which the first period of the tenancy began; and  
 41  
 2220 (c) if the rent under the tenancy has previously been increased by virtue of such a notice<sup>11</sup> or of a determination by a rent assessment committee<sup>12</sup>:  
 42  
 51. (i) in the case of an assured agricultural occupancy, the first anniversary of the date on which the increased rent took effect;  
 52. (ii) in any other case, the appropriate date<sup>13</sup>.  
 43

Where a notice is so served, a new rent specified in the notice takes effect as mentioned in it unless, before the beginning of the new period specified in the notice:

- 2221 (A) the tenant by an application in the prescribed form<sup>14</sup> refers the notice to a rent assessment committee<sup>15</sup>; or  
 2222 (B) the landlord and the tenant agree on a variation of the rent which is different from that proposed in the notice or agree that the rent should not be varied<sup>16</sup>.

Nothing in these provisions affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy, including a term relating to rent<sup>17</sup>.

1 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

2 le by virtue of the Housing Act 1988 s 1(2), Sch 1 para 11 (as amended) (see PARA 1039 ante) or Sch 1 para 12 (as amended) (see PARA 1040 ante).

3 For the meaning of 'assured tenancy' see PARA 1018 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 Housing Act 1988 s 13(1). There is no statutory definition of 'rent' for these purposes; cf s 14(4) (as amended); and PARA 1092 note 5 post; and see also Sch 1 para 2(2) (as substituted and amended); and PARA 1026 note 4 ante.

6 For the meaning of 'landlord' see PARA 1020 note 3 ante.

7 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(d)-(dc), Schedule, Forms 4B-4E (reg 3(d), (da), Forms 4B, 4C added in relation to England by SI 2003/260; the Assured Tenancies and Agricultural Occupancies (Forms) Regulations



1997, SI 1997/194, reg 3(db), (dc), Schedule Forms 4D, 4E added in relation to Wales by SI 2003/307). For the meaning of 'prescribed' see PARA 1046 note 8 ante. A form substantially the same as the prescribed form of notice was held to be valid in *Tadema Holdings Ltd v Ferguson* (1999) 32 HLR 866, [1999] NPC 144, CA.

8 Housing Act 1988 s 13(2) (s 13(2) amended, and s 13(3A), (3B) added, by the Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order 2003, SI 2003/259, arts 1, 2).

9 The minimum period for these purposes is: (1) in the case of a yearly tenancy, six months; (2) in the case of a tenancy where the period is less than a month, one month; and (3) in any other case, a period equal to the period of the tenancy: Housing Act 1988 s 13(3).

10 For the meaning of 'assured agricultural occupancy' see PARA 1183 post.

11 *Ie* under *ibid* s 13(2) (as amended).

12 *Ie* under *ibid* s 14 (as amended): see PARA 1092 post.

13 *Ibid* s 13(2)(a)-(c) (as amended: see note 8 supra). The appropriate date referred to in s 13(2)(c)(ii) (as so substituted) (see head (c)(ii) in the text) is: (1) in a case to which s 13(3B) (as added) applies, the date that falls 53 weeks after the date on which the increased rent took effect; (2) in any other case, the date that falls 52 weeks after the date on which the increased rent took effect: s 13(3A) (as added: see note 8 supra). Section 13(3B) (as so added) applies where: (a) the rent under the tenancy has been increased by virtue of a notice under s 13 (as amended) or a determination under s 14 (as amended) on at least one occasion after the coming into force of the Regulatory Reform (Assured Periodic Tenancies) (Rent Increases) Order 2003, SI 2003/259 (ie 11 February 2003: see art 1); and (2) the fifty-third week after the date on which the last such increase took effect begins more than six days before the anniversary of the date on which the first such increase took effect: Housing Act 1988 s 13(3B) (as so added).

14 For the prescribed form of application see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(e), Schedule, Form 5. The notes on that form have been subject to judicial criticism: see *R (on the application of Lester) v London Rent Assessment Committee* [2003] EWCA Civ 319 at [36], [2003] 1 WLR 1449, [2003] All ER (D) 163 (Mar) per Waller LJ (the notes should say in bold letters that delivery to the office of the rent assessment committee prior to the relevant date is mandatory, that there is no discretion to extend time, and that the effect of non-receipt by the rent assessment committee before the relevant date will be that the rent proposed by the landlord will be the rent from the relevant date).

15 As to reference to a rent assessment committee see PARA 1092 post; and as to rent assessment committees generally see PARAS 910, 1087-1089 ante.

16 Housing Act 1988 s 13(4). For these purposes, a tenant's application for review is referred on the date on which it is received by the relevant rent assessment committee: *R (on the application of Lester) v London Rent Assessment Committee* [2003] EWCA Civ 319, [2003] 1 WLR 1449, [2003] All ER (D) 163 (Mar).

17 *Ibid* s 13(5).

## UPDATE

### 1091 Procedure for increasing rent

NOTE 5--Exclusion from the need to comply with the procedure under the 1988 Act s 13(2) where the assured tenancy agreement contains its own rent review clause applies equally to a rent review clause that provides for a fixed increase in rent as it does to a rent review clause that provides for an unspecified increase in rent that is to be achieved in a specified way: *Contour Homes Ltd v Rowen* [2007] EWCA Civ 842, [2007] 1 WLR 2982. Given the contrast between the 1988 Act s 13(1)(a) and (b), a rent review clause in a contractual assured periodic tenancy does not oust the mechanism for increasing rent in s 13 once that tenancy has been superseded by a statutory periodic tenancy: *London District Properties (Management) Ltd v Goolamy* [2009] EWHC 1367 (Admin), [2010] 1 WLR 307, [2009] All ER (D) 164 (Jun).

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### **1092. Determination of rent by rent assessment committee; the statutory assumptions.**

Where a tenant<sup>1</sup> refers<sup>2</sup> to a rent assessment committee<sup>3</sup> a notice<sup>4</sup> relating to an increase in rent, the committee must determine the rent<sup>5</sup> at which the committee considers that the dwelling house might reasonably be expected to be let<sup>6</sup> in the open market by a willing landlord<sup>7</sup> under an assured tenancy<sup>8</sup>:

- 2223 (1) which is a periodic tenancy having the same periods as those of the tenancy<sup>9</sup> to which the notice relates;
- 2224 (2) which begins at the beginning of the new period specified in the notice;
- 2225 (3) the terms of which, other than those relating to the amount of the rent, are the same as those of the tenancy to which the notice relates<sup>10</sup>; and
- 2226 (4) in respect of which the same notices, if any, have been given under any of Grounds 1 to 5<sup>11</sup> as have been given, or have effect as if given, in relation to the tenancy to which the notice relates<sup>12</sup>.

Nothing in the above provisions:

- 2227 (a) requires a rent assessment committee to continue with its determination of a rent for a dwelling house if the landlord and tenant give notice in writing that they no longer require such a determination or if the tenancy has come to an end<sup>13</sup>;
- 2228 (b) affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy, including a term relating to rent<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 1018 note 6 ante.

2 Ie under the Housing Act 1988 s 13(4)(a): see PARA 1091 ante.

3 As to rent assessment committees generally see PARAS 910, 1087-1089 ante.

4 Ie under the Housing Act 1988 s 13(2) (as amended): see PARA 1091 ante.

5 For these purposes, 'rent' does not include any service charge within the meaning of the Landlord and Tenant Act 1985 s 18 (as amended) (see PARA 326 ante) but, subject thereto, includes any sums payable by the tenant to the landlord on account of the use of furniture, in respect of council tax, or for any of the matters referred to in s 18(1)(a), whether or not those sums are separate from the sums payable for the occupation of the dwelling house concerned or are payable under separate agreements: Housing Act 1988 s 14(4) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 17(1), (3); for transitional provisions see art 1(2)(c)). For the meaning of 'landlord' see PARA 1020 note 3 ante; and for the meaning of 'dwelling house' see PARA 1012 note 4 ante.

A billing authority within the meaning of the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended) must, if so requested in writing by a rent officer or rent assessment committee in connection with his or its functions under any enactment, inform the rent officer or rent assessment committee in writing whether or not a particular dwelling, within the meaning of Pt I (as amended), is, or was at any time specified in the request, an exempt dwelling for the purposes of Pt I (as amended): Housing Act 1988 s 41B (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, Sch 1 para 18; substituted by SI 1993/1120).

In order to assist authorities to give effect to the housing benefit scheme under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 140 et seq), where a rent is determined under the Housing Act 1988 s 14 (as amended) or under s 22 (as

amended) (see PARA 1097 post), the rent assessment committee must note in its determination the amount, if any, of the rent which, in its opinion, is fairly attributable to the provision of services, except where that amount is in its opinion negligible; and the amount so noted may be included in the information specified in an order under s 42 (see PARA 1089 ante): s 41A (added by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 103).

6 For the meaning of 'let' see PARA 1012 note 4 ante. The hypothesis requires an objective approach without reference to the subjective characteristics of the particular tenant: see *Ponsford v HMS Aerosols Ltd* [1979] AC 63, [1978] 2 All ER 837, HL.

7 For the meaning of 'willing landlord' see *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1977) 36 P & CR 185, [1978] 1 EGLR 93; affd as reported in (1977) 245 Estates Gazette 657 at 662, CA. In order for there to be a transaction a willing tenant must also be assumed: see *Dennis & Robinson Ltd v Kiossos Establishment* (1987) 54 P & CR 282, [1987] 1 EGLR 133, CA.

8 'Under an assured tenancy' for these purposes refers to an assured tenancy without reference to any limitations on the rent applicable to assured tenancies: *R v London Rent Assessment Panel, ex p Cadogan Estates Ltd* [1998] QB 398, 76 P & CR 410; and see *R (on the application of Morris) v London Rent Assessment Committee* [2002] EWCA Civ 276 at [18], [2002] 2 EGLR 13, [2002] All ER (D) 75 (Mar) per Mummery LJ (if the rent is determined by the rent assessment committee at a figure exceeding £25,000, the landlord is not prohibited by statute from recovering it; the result is that the tenancy will simply cease to qualify for protection as an assured tenancy). For the meaning of 'assured tenancy' see PARA 1018 ante.

9 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

10 In a case where the Housing Act 1988 s 14(6) applies (see PARA 1070 ante), the reference in s 14(1)(c) to the terms of the tenancy to which the notice relates is to be construed as a reference to those terms as varied by virtue of the determination made in relation to the reference under s 6 (see PARA 1070 ante): s 14(6).

11 *Ibid* s 7(1), Sch 2 Pt I Grounds 1-5 (as amended): see PARAS 1109-1113 post.

12 *Ibid* s 14(1). As to the matters to be disregarded by the committee see PARA 1093 post. Section 14 (as amended) applies in relation to (1) an assured shorthold tenancy as if in s 14(1) the reference to an assured tenancy were a reference to an assured shorthold tenancy (s 14(9) (added by the Housing Act 1996 s 104, Sch 8 para 291), (2)); and (2) an assured agricultural occupancy as if that reference were a reference were a reference to an assured agricultural occupancy (s 24(4)). For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante; and for the meaning of 'assured agricultural occupancy' see PARA 1183 post.

13 *Ibid* s 14(8).

14 *Ibid* s 13(5).

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### **1093. Determination by rent assessment committee; matters to be considered or disregarded.**

In making a determination of rent<sup>1</sup> there must be disregarded:

2229 (1) any effect on the rent<sup>2</sup> attributable to the granting of a tenancy<sup>3</sup> to a sitting tenant<sup>4</sup>;

2230 (2) any increase in the value of the dwelling house<sup>5</sup> attributable to a relevant improvement<sup>6</sup> carried out by a person who at the time it was carried out was the tenant<sup>7</sup>, if the improvement was carried out:

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53. (a) otherwise than in pursuance of an obligation<sup>8</sup> to his immediate landlord<sup>9</sup>; or

54. (b) pursuant to an obligation to his immediate landlord being an obligation which did not relate to the specific improvement concerned but arose by reference to consent given to the carrying out of that improvement; and

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2231 (3) any reduction in the value of the dwelling house attributable to a failure by the tenant to comply with any terms of the tenancy<sup>10</sup>.

Where any rates<sup>11</sup> in respect of the dwelling house concerned are borne by the landlord or a superior landlord, the rent assessment committee<sup>12</sup> must make its determination as if the rates were not so borne<sup>13</sup>. In making a determination in any case where the landlord or a superior landlord is liable<sup>14</sup> to pay council tax in respect of a hereditament<sup>15</sup> ('the relevant hereditament') of which the dwelling house forms part, the rent assessment committee must have regard to the amount of council tax which, as at the date on which the notice proposing an increase in rent<sup>16</sup> was served, was set by the billing authority<sup>17</sup> for the financial year in which that notice was served and for the category of dwellings<sup>18</sup> within which the relevant hereditament fell on that date; but any discount or other reduction affecting the amount of council tax payable must be disregarded<sup>19</sup>.

Nothing in these provisions:

- 2232 (i) requires a rent assessment committee to continue with its determination of a rent for a dwelling house if the landlord and tenant give notice in writing that they no longer require such a determination or if the tenancy has come to an end<sup>20</sup>;
- 2233 (ii) affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy, including a term relating to rent<sup>21</sup>.

1 le under the Housing Act 1988 s 14 (as amended): see PARA 1092 ante; the text and notes 2-20 infra; and PARA 1094 post.

2 For the meaning of 'rent' for these purposes see PARA 1092 note 5 ante.

3 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 For these purposes, in relation to a notice which is referred by the tenant as mentioned in the Housing Act 1988 s 14(1) (see PARA 1092 ante), an improvement is a relevant improvement if either it was carried out during the tenancy to which the notice relates or if the following conditions are satisfied, namely: (1) that it was carried out not more than 21 years before the date of service of the notice; and (2) that, at all times during the period beginning when the improvement was carried out and ending on the date of service of the notice, the dwelling house has been let under an assured tenancy; and (3) that, on the coming to an end of an assured tenancy at any time during that period, the tenant, or, in the case of joint tenants, at least one of them, did not quit: s 14(3). For the meaning of 'let' see PARA 1012 note 4 ante; and for the meaning of 'assured tenancy' see PARA 1018 ante.

7 Since 'tenancy' includes an agreement for a tenancy (see PARA 1012 note 1 ante), improvements carried out by a tenant holding under such an agreement would be disregarded.

8 Improvements are not carried out in pursuance of an obligation if the tenant may choose whether or not to carry them out at all but where, if he chooses to do them, he must carry them out in accordance with plans approved by the landlord: *Godbold v Martins the Newsagents Ltd* [1983] 2 EGLR 128, (1983) 268 Estates Gazette 1202.

9 For the meaning of 'landlord' see PARA 1020 note 3 ante.

10 Housing Act 1988 s 14(2); and see *Rowe v South Western Rent Assessment Panel* [2001] EWHC 865 (Admin), [2001] All ER (D) 326 (Oct). As to the application of s 14 (as amended) to assured shorthold tenancies see PARA 1092 note 12 ante; and as to its application to a determination of rent under (1) the Local Government

and Housing Act 1989 s 186(1), Sch 10 para 6 (as amended) see PARA 1253 note 13 post; (2) Sch 10 para 11 (as amended) see PARA 1259 note 4 post.

11 For the meaning of 'rates' see PARA 1026 note 4 ante. As to the abolition of domestic rates see PARA 521 ante.

12 As to rent assessment committees generally see PARAS 910, 1087-1089 ante.

13 Housing Act 1988 s 14(5).

14 Ie under the Local Government Finance Act 1992 Pt I (ss 1-69) (as amended): see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 227 et seq.

15 For these purposes, 'hereditament' means a dwelling within the meaning of ibid Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 232); Housing Act 1988 s 14(3B)(a) (s 14(3A), (3B) added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 17(1), (2); for transitional provisions see art 1(2)(c)).

16 Ie the notice under the Housing Act 1988 s 13(2) (as amended): see PARA 1091 ante.

17 For these purposes, 'billing authority' has the same meaning as in the Local Government Finance Act 1992 Pt I (as amended) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 229); Housing Act 1988 s 14(3B)(b) (as added: see note 15 supra).

18 For these purposes, 'category of dwellings' has the same meaning as in the Local Government Finance Act 1992 s 30(1), (2) (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 260); Housing Act 1988 s 14(3B)(c) (as added: see note 15 supra).

19 Ibid s 14(3A) (as added: see note 15 supra). If so requested, the billing authority must inform the rent assessment committee whether or not a particular dwelling is or was at any specified time an exempt dwelling for council tax purposes: see s 41B (as added and amended) (cited in PARA 1092 note 5 ante).

Under s 14A (added by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 8), where: (1) the landlord of a dwelling house let on an assured tenancy to which the Housing Act 1988 s 13 (as amended) applied or a superior landlord was liable to pay council tax in respect of a dwelling which included that dwelling house; (2) under the terms of the tenancy, or an agreement collateral to the tenancy, the tenant was liable to make payments to the landlord in respect of council tax; (3) the case fell within s 14A(2) or (3) (as so added); and (4) no previous notice had been served under s 14A (as so added) in relation to the dwelling house, the landlord might, before 1 April 1994, serve on the tenant a notice in the prescribed form proposing an increased rent to take account of the tenant's liability to make payments to the landlord in respect of council tax, such increased rent to take effect at the beginning of a new period of the tenancy specified in the notice: s 14A(1), (4) (as so added). The specified new period was not to begin earlier than one month after the date on which the notice was served: s 14A(1) (as so added). The case fell within s 14A(2) (as so added) if (a) the rent under the tenancy had previously been increased by virtue of a notice under s 13(2) (now as amended) or a determination under s 14 (now as amended); and (b) the first anniversary of the date on which the increased rent took effect had not yet occurred; and the case fell within s 14A(3) (as so added) if a notice had been served under s 13(2) (now as amended) before 1 April 1993 but no increased rent had taken effect before that date: s 14A(2), (3) (as so added). Where a notice was so served, the new rent specified in the notice took effect as mentioned in the notice unless, before the beginning of the new period specified in it, the tenant referred the notice to a rent assessment committee by an application in the prescribed form or the landlord and the tenant agreed on a variation of the rent which was different from that proposed in the notice, or agreed that the rent should not be varied: s 14A(5) (as so added). As to the interim determination of rent by a rent assessment committee where a tenant so referred a notice see s 14B(1)-(4) (as so added). Nothing in these provisions, however, affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy, including a term relating to rent: s 14A(6) (as so added).

20 Ibid s 14(8).

21 Ibid s 13(5).

Increases of Rent under Assured Periodic Tenancies/1094. Effect of determination by rent assessment committee.

#### **1094. Effect of determination by rent assessment committee.**

Where a notice proposing an increase in rent<sup>1</sup> has been referred to a rent assessment committee<sup>2</sup>, then, unless the landlord<sup>3</sup> and the tenant<sup>4</sup> otherwise agree<sup>5</sup>, the rent<sup>6</sup> determined by the committee is to be the rent under the tenancy<sup>7</sup> with effect from the beginning of the new period specified in the notice or, if it appears to the rent assessment committee that that would cause undue hardship to the tenant, with effect from such later date, not being later than the date the rent is determined, as the committee may direct<sup>8</sup>.

1    le a notice under the Housing Act 1988 s 13(2) (as amended): see PARA 1092 ante.

2    As to rent assessment committees generally see PARAS 910, 1087-1089 ante.

3    For the meaning of 'landlord' see PARA 1020 note 3 ante.

4    For the meaning of 'tenant' see PARA 1018 note 6 ante.

5    Nothing in the Housing Act 1988 ss 13, 14 (as amended) affects the right of the landlord and the tenant under an assured tenancy to vary by agreement any term of the tenancy, including a term relating to rent: s 13(5). For the meaning of 'assured tenancy' see PARA 1018 ante.

6    For the meaning of 'rent' for these purposes see PARA 1092 note 5 ante.

7    le subject, in a case where the Housing Act 1988 s 14(5) (see PARA 1093 ante) applies, to the addition of the appropriate amount in respect of rates. For the meaning of 'rates' see PARA 1026 note 4 ante; and as to the abolition of domestic rates see PARA 521 ante.

8    Ibid s 14(7). As to the application of s 14 (as amended) to assured shorthold tenancies see PARA 1092 note 12 ante.

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### **(iv) Rents under Assured Shorthold Tenancies**

#### **A. RENT INCREASES UNDER PERIODIC TENANCIES**

#### **1095. Rent increases under periodic assured shorthold tenancies.**

An assured shorthold tenancy created before 28 February 1997 must be for a fixed term<sup>1</sup> but an assured shorthold tenancy created on or after that date may be a periodic tenancy<sup>2</sup>. In that case, the tenant may refer a notice of a proposed rent increase<sup>3</sup> to a rent assessment committee<sup>4</sup> and the provisions relating to the determination of rent by such a committee<sup>5</sup> apply<sup>6</sup>.

1    See PARA 1051 ante.

2    See PARA 1044 ante.

3 le a notice under the Housing Act 1988 s 13(2) (as amended): see PARA 1091 ante.

4 See *ibid* s 13(4)(a); and PARA 1091 ante.

5 le *ibid* s 14 (as amended): see PARAS 1092-1094 ante.

6 See *ibid* s 14(9) (as added), cited in PARA 1092 note 12 ante.

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## ***B. REFERENCE OF EXCESSIVE RENTS TO RENT ASSESSMENT COMMITTEE***

### **1096. Reference of excessive rents to rent assessment committee.**

The tenant<sup>1</sup> under an assured shorthold tenancy<sup>2</sup> may<sup>3</sup> make an application in the prescribed form<sup>4</sup> to a rent assessment committee<sup>5</sup> for a determination of the rent<sup>6</sup> which, in the committee's opinion, the landlord<sup>7</sup> might reasonably be expected to obtain under the assured shorthold tenancy<sup>8</sup>.

No such application may, however, be made if:

- 2234 (1) the rent payable under the tenancy<sup>9</sup> is a rent previously determined upon such an application;
- 2235 (2) the tenancy was created on or after 1 February 1997<sup>10</sup> and more than six months have elapsed since the beginning of the tenancy<sup>11</sup> or, in the case of a replacement tenancy<sup>12</sup>, since the beginning of the original tenancy<sup>13</sup>; or
- 2236 (3) the tenancy is an assured shorthold tenancy which has come into being at the end of an earlier tenancy<sup>14</sup> and in respect of which notice need not<sup>15</sup> have been served<sup>16</sup>.

1 For the meaning of 'tenant' see PARA 1018 note 6 ante.

2 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante. Where an assured tenancy ceases to be an assured shorthold tenancy by virtue of falling within the Housing Act 1988 s 19A, Sch 2A para 2 (as added) (see PARA 1045 ante), and at the time when it so ceases to be an assured shorthold tenancy there is pending before a rent assessment committee an application in relation to it under s 22 (as amended) (see the text and notes 3-16 *infra*; and PARA 1097 post), the fact that it so ceases to be an assured shorthold tenancy must, in relation to that application, be disregarded for these purposes: s 22(5A) (s 22(5A), (6) added by the Housing Act 1996 ss 100(3), 104, Sch 8 para 2(1), (6)).

3 le subject to the Housing Act 1988 s 23 (see PARA 1099 post) and s 22(2) (as amended) (see heads (1)-(3) in the text).

4 For the prescribed form of application see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(f), Schedule, Form 6. For the meaning of 'prescribed' see PARA 1046 note 8 ante.

5 As to rent assessment committees generally see PARAS 910, 1087-1089 ante.

6 The Housing Act 1988 s 14(4) (as amended) (meaning of 'rent': see PARA 1092 note 5 ante) applies in relation to a determination of rent under s 22 (as amended) as it applies in relation to a determination under s 14 (as amended): s 22(5).

- 7 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 8 Housing Act 1988 s 22(1) (amended by the Housing Act 1996 ss 104, 227, Sch 8 para 2(5), Sch 19 Pt IV).
- 9 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 10 Ie the tenancy is one to which the Housing Act 1988 s 19A (as added) applies: see PARA 1044 ante.
- 11 For the meaning of references to the beginning of a tenancy see PARA 1051 note 7 ante.
- 12 In head (2) in the text, the references to the original tenancy and to a replacement tenancy are to be construed in accordance with the Housing Act 1988 s 21(6), (7) (as added) (see PARA 1106 post): s 22(6) (as added: see note 2 supra).
- 13 See note 12 supra.
- 14 Ie the tenancy falls within the Housing Act 1988 s 20(4): see PARA 1055 ante.
- 15 Ie as mentioned in ibid s 20(2): see PARA 1051 ante.
- 16 Ibid s 22(2) (amended by the Housing Act 1996 s 100(2), Sch 19 Pt IV).

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### **1097. Determination by rent assessment committee.**

Where an application for the determination of a rent is made<sup>1</sup> to a rent assessment committee<sup>2</sup> with respect to the rent<sup>3</sup> under an assured shorthold tenancy<sup>4</sup>, the committee may not make such a determination unless it considers:

- 2237 (1) that there is a sufficient number of similar dwelling houses<sup>5</sup> in the locality let<sup>6</sup> on assured tenancies<sup>7</sup>, whether shorthold or not; and
- 2238 (2) that the rent payable under the assured shorthold tenancy in question is significantly higher than the rent which the landlord<sup>8</sup> might reasonably be expected to be able to obtain under the tenancy<sup>9</sup>, having regard to the level of rents payable<sup>10</sup> in the locality<sup>11</sup>.

Nothing in the above provisions requires a rent assessment committee to continue with its determination of a rent for a dwelling house if the landlord and tenant<sup>12</sup> give notice in writing that they no longer require such a determination or if the tenancy has come to an end<sup>13</sup>.

- 1 Ie under the Housing Act 1988 s 22(1) (as amended): see PARA 1096 ante.
- 2 As to rent assessment committees generally see PARAS 910, 1087-1089 ante.
- 3 For the meaning of 'rent' for these purposes see PARA 1096 note 6 ante.
- 4 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.
- 5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 6 For the meaning of 'let' see PARA 1012 note 4 ante.
- 7 For the meaning of 'assured tenancy' see PARA 1018 ante.



- 8 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 9 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 10 Ie under the tenancies referred to in the Housing Act 1988 s 22(3)(a): see head (1) in the text.
- 11 Ibid s 22(3).
- 12 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 13 Housing Act 1988 s 14(8) (applied by s 22(5)).

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### **1098. Effect of determination by rent assessment committee.**

Where, on an application for the determination of a rent<sup>1</sup>, a rent assessment committee<sup>2</sup> makes a determination of a rent<sup>3</sup> for an assured shorthold tenancy<sup>4</sup>, the determination has effect from such date as the committee may direct, not being earlier than the date of the application<sup>5</sup>. If, at any time on or after the determination takes effect, the rent<sup>6</sup> which would otherwise be payable under the tenancy<sup>7</sup> exceeds the rent so determined, the excess is irrecoverable from the tenant<sup>8</sup>.

No notice may be served by the landlord seeking an increase in the rent<sup>9</sup> with respect to a tenancy of the dwelling house<sup>10</sup> in question until after the first anniversary of the date on which the determination takes effect<sup>11</sup>.

- 1 Ie under the Housing Act 1988 s 22 (as amended): see PARAS 1096-1097 ante.
- 2 As to rent assessment committees generally see PARAS 910, 1087-1089 ante.
- 3 For the meaning of 'rent' for these purposes see PARA 1096 note 6 ante.
- 4 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.
- 5 Housing Act 1988 s 22(4)(a).
- 6 Ibid s 14(5) (see PARA 1093 ante) applies in relation to a determination of rent under s 22 (as amended) as it applies in relation to a determination under s 14 (as amended); and, accordingly, where s 14(5) applies, any reference in s 22(4)(b) to rent is a reference to rent exclusive of the amount attributable to rates: s 22(5). For the meaning of 'rates' see PARA 1026 note 4 ante; and as to the abolition of domestic rates see PARA 521 ante.
- 7 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 8 Housing Act 1988 s 22(4)(b). For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 9 Ie under ibid s 13(2) (as amended): see PARA 1091 ante.
- 10 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 11 Housing Act 1988 s 22(4)(c).

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### **1099. Termination of rent assessment committee's functions.**

If the Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> by order made by statutory instrument so provides, the right to refer excessive rents to a rent assessment committee<sup>3</sup> does not apply in such cases or to tenancies<sup>4</sup> of dwelling houses<sup>5</sup> in such areas or in such other circumstances as may be specified in the order<sup>6</sup>. Such an order may contain such transitional, incidental and supplementary provisions as appear to the Secretary of State or the Assembly or minister to be desirable<sup>7</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 Ie the Housing Act 1988 s 22 (as amended): see PARAS 1096-1098 ante.

4 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 Housing Act 1988 s 23(1).

7 Ibid s 23(2). No such order may be made by the Secretary of State unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament: ibid s 23(3). At the date at which this title states the law, no such order had been made.

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## **(10) RECOVERY OF POSSESSION**

### **(i) In general**

#### **1100. In general.**

The court<sup>1</sup> may not make an order for possession of a dwelling house<sup>2</sup> let<sup>3</sup> on an assured tenancy<sup>4</sup> except on one or more of the statutory grounds<sup>5</sup>. If the court is satisfied that any of the mandatory grounds<sup>6</sup> is established, the court must<sup>7</sup> make an order for possession<sup>8</sup>; and, if the court is satisfied that any of the discretionary grounds<sup>9</sup> is established, the court may<sup>10</sup> make an order for possession if it considers it reasonable to do so<sup>11</sup>. The court may not, however, make an order for possession of a dwelling house let on an assured periodic tenancy arising under the Local Government and Housing Act 1989<sup>12</sup> on certain specified<sup>13</sup> grounds<sup>14</sup>.

Nothing in Part I of the Housing Act 1988<sup>15</sup> relates to proceedings for possession of a dwelling house let on an assured tenancy which are brought by a mortgagee<sup>16</sup> who has lent money on the security of the assured tenancy<sup>17</sup>.

- 1 As to the jurisdiction of the court see PARA 1128 post.
  - 2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
  - 3 For the meaning of 'let' see PARA 1012 note 4 ante.
  - 4 For the meaning of 'assured tenancy' see PARA 1018 ante.
  - 5 Housing Act 1988 s 7(1). Jurisdiction to make a possession order in the absence of one of the statutory grounds cannot be conferred on the court by the parties' consent: *Baygreen Properties Ltd v Gil* [2002] EWCA Civ 1340, [2003] HLR 119, [2002] All ER (D) 113 (Jul). See, however, *Nutt v Read* (1999) 32 HLR 761, (1999) Times, 3 December, CA (where parties were under a common misapprehension as to the rights which would arise from the agreement that they were making, and neither of them had been at fault in relation to that misapprehension, the court has power, in equity, to set aside the agreement and rescission ought not to be refused simply on the basis that it has given rise to an assured tenancy). As to the statutory grounds see the Housing Act 1988 s 7(1), Sch 2 (as amended); and PARA 1109 et seq post.
  - 6 Ie the grounds in ibid Sch 2 Pt I (Grounds 1-8) (as amended): see PARA 1109 et seq post.
  - 7 Ie subject to ibid s 7(5A) (as added) (see the text and notes 12-14 infra) and s 7(6) (see PARA 1101 post).
  - 8 Ibid s 7(3) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 101(1)). The Housing Act 1988 s 7(3)-(7) (as amended) (see the text and notes 9-17 infra; and PARA 1101 post) has effect in relation to proceedings for the recovery of possession of a dwelling house let on an assured tenancy, subject to s 8 (as amended) (see PARA 1103 post): s 7(2). Once possession has been ordered, the tenant cannot take advantage of the relief provided by the County Courts Act 1984 s 138 (as amended) (see PARA 628 ante): *Artesian Residential Investments Ltd v Beck* [2000] QB 541, [1999] 3 All ER 113, CA; and see *Procureur v Alexander* [2004] EWHC 607 (Ch), [2004] All ER (D) 406 (Feb).
- In relation to the assured tenancy to which the successor becomes entitled by succession as mentioned in s 39 (as amended) (see PARA 1016 ante), s 7 (as amended) has effect as if in s 7(3) (as amended) after the word 'established' there were inserted the words 'or that the circumstances are as specified in any of Cases 11, 12, 16, 17, 18 and 20 in Schedule 15 to the Rent Act 1977': Housing Act 1988 s 39(10), Sch 4 para 13(1). If, however, by virtue of s 39(8) (see PARA 1149 post), the assured tenancy to which the successor becomes entitled is an assured agricultural occupancy, Sch 4 para 13(1) does not apply and s 7 (as amended) has effect in relation to that tenancy as if in s 7(3) after the word 'established' there were inserted the words 'or that the circumstances are as specified in Case XI or Case XII of the Rent (Agriculture) Act 1976': Housing Act 1988 Sch 4 paras 13(2), 14. For these purposes, 'the successor' has the same meaning as in s 39 (as amended) (see PARA 1016 ante): s 39(10). For the meaning of 'assured agricultural occupancy' see PARA 1183 post.
- 9 Ie the grounds in ibid Sch 2 Pt II (Grounds 9-16) (as amended): see PARA 1118 et seq post.
  - 10 See note 7 supra.
  - 11 Housing Act 1988 s 7(4) (amended by the Local Government and Housing Act 1989 Sch 11 para 101(2)). See also note 8 supra. As to the circumstances in which a court may make a possession order in respect of the rented family residence of a serviceman and the matters which are to be taken into account see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 20(3) (as amended); and PARA 1081 ante. As to the test of reasonableness for the purposes of the Rent Act 1977 see PARA 945 ante.
  - 12 Ie under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1237 et seq post. As to the assured periodic tenancy so arising see PARA 1254 et seq post.
  - 13 Ie on any of the following grounds: (1) the Housing Act 1988 Sch 2 Pt I, Ground 1 (as amended) (see PARA 1109 post), Ground 2 (see PARA 1110 post), Ground 5 (see PARA 1113 post); (2) Sch 2 Pt II, Ground 16 (as amended) (see PARA 1126 post); (3) if the assured periodic tenancy arose on the termination of a former 1954 Act tenancy within the meaning of the Local Government and Housing Act 1989 Sch 10 (as amended) (see PARA 1248 note 8 post), the Housing Act 1988 Sch 2 Pt I, Ground 6 (as amended) (see PARA 1114 post).
  - 14 Ibid s 7(5A) (added by the Local Government and Housing Act 1989 Sch 11 para 101(3)).
  - 15 Ie the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq ante, PARA 1103 et seq post.
  - 16 Ie within the meaning of the Law of Property Act 1925.
  - 17 Housing Act 1988 s 7(1).

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### **1101. Fixed term tenancies.**

The court<sup>1</sup> may not make an order for possession of a dwelling house<sup>2</sup> to take effect at a time when it is let<sup>3</sup> on an assured fixed term tenancy<sup>4</sup> unless the ground for possession is one of certain specified<sup>5</sup> grounds and the terms of the tenancy<sup>6</sup> make provision<sup>7</sup> for it to be brought to an end on the ground in question<sup>8</sup>.

The court may<sup>9</sup>, however, make an order for possession of a dwelling house on grounds relating to a fixed term tenancy which has come to an end; and, where an order is made in such circumstances, any statutory periodic tenancy<sup>10</sup> which has arisen on the ending of the fixed term tenancy ends, without any notice and regardless of the period, on the day on which the order takes effect<sup>11</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'let' see PARA 1012 note 4 ante.

4 For the meaning of 'assured tenancy' see PARA 1018 ante; and for the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

5 I.e. the Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 2 (see PARA 1110 post) or Ground 8 (as amended) (see PARA 1116 post) or any of the grounds in Sch 2 Pt II (Grounds 9-16) (as amended) (see PARA 1118 et seq post) other than Ground 9 (see PARA 1118 post) or Ground 16 (as amended) (see PARA 1126 post).

6 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

7 I.e. whether that provision takes the form of a provision for re-entry, for forfeiture, for determination by notice or otherwise.

8 Housing Act 1988 s 7(6). A fixed term tenancy cannot be brought to an end by forfeiture since a power of forfeiture is not a power to determine the tenancy within the meaning of s 5(1) (see PARA 1065 ante): see s 45(4); and PARA 1051 note 6 ante. See also *Paterson v Aggio* (1987) 19 HLR 551, [1987] 2 EGLR 127, CA (decided under the Housing Act 1980 s 52 (repealed with savings) (see PARA 1009 ante)). If, however, the tenancy contains a proviso for re-entry or forfeiture, that would enable the court to make an order for possession where an appropriate ground was available even though there could not be a forfeiture.

9 I.e. subject to the Housing Act 1988 s 7(1)-(6) (as amended): see the text and notes 1-8 supra; and PARA 1100 ante.

10 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

11 Housing Act 1988 s 7(7).

### **UPDATE**

#### **1101 Fixed term tenancies**

TEXT AND NOTE 11--Housing Act 1988 s 7(7) amended: Housing and Regeneration Act 2008 s 299, Sch 11 para 7. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

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### **1102. Exceptions under the housing legislation.**

The restrictions on the right to possession of a dwelling house subject to an assured tenancy<sup>1</sup> are removed in the following circumstances:

- 2239 (1) where possession is sought of a house in respect of which a demolition order or prohibition order has been made<sup>2</sup>;
- 2240 (2) where the house is required to enable a local authority to exercise its powers under any enactment relating to housing<sup>3</sup>;
- 2241 (3) if the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>4</sup> certifies that possession of a house acquired or appropriated and held by certain authorities for planning purposes is immediately required for those purposes<sup>5</sup>.

1 As to these restrictions see PARAS 1100-1101 ante.

2 See the Housing Act 1985 ss 270(3) (as amended); the Housing Act 2004 s 33; and HOUSING vol 22 (2006 Reissue) PARAS 399, 419. For the similar exclusion of protection under the Rent Act 1977 see PARA 944 ante.

3 See the Housing Act 1985 s 612 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 587.

4 As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

5 See the Local Government, Planning and Land Act 1980 ss 144(1), (3), Sch 28 para 10 (as amended); the New Towns Act 1981 s 22 (as amended); the Town and Country Planning Act 1990 s 242; and TOWN AND COUNTRY PLANNING vols 46(2), (3) (Reissue) PARAS 963, 1372, 1472. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 169, Sch 20 para 8 (possession of house acquired and held by the Urban Regeneration Agency). As to that Agency, which is part of English Partnerships, see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1306 et seq; TRADE AND INDUSTRY vol 97 (2010) PARA 945. Lettings by development corporations and local authorities cannot in any event be assured tenancies: see PARA 1040 ante.

### **UPDATE**

### **1102 Exceptions under the housing legislation**

NOTE 5--Urban Regeneration Agency abolished: Housing and Regeneration Act 2008 s 49; SI 2008/2358.

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### **1103. Notice of proceedings for possession; in general.**

The court<sup>1</sup> may not entertain proceedings for possession of a dwelling house<sup>2</sup> let<sup>3</sup> on an assured tenancy<sup>4</sup> unless:

- 2242 (1) the landlord<sup>5</sup>, or in the case of joint landlords, at least one of them, has served on the tenant<sup>6</sup> a notice in the prescribed form<sup>7</sup> in accordance with the relevant statutory provisions<sup>8</sup> and the proceedings are begun within the statutory time limits<sup>9</sup>; or
- 2243 (2) the court considers it just and equitable to dispense with the requirement of such a notice<sup>10</sup>.

The court may not make an order for possession on any of the statutory grounds<sup>11</sup> unless that ground and the particulars of it are specified in the notice; but the grounds specified in such a notice may be altered or added to with the leave of the court<sup>12</sup>.

The notice must inform the tenant that:

- 2244 (a) the landlord intends to begin proceedings for possession of the dwelling house on one or more of the grounds specified in the notice; and
- 2245 (b) those proceedings will not begin earlier than a date specified in the notice<sup>13</sup>; and
- 2246 (c) those proceedings will not begin later than 12 months from the service of the notice<sup>14</sup>.

Where such a notice is served at a time when the dwelling house is let on a fixed term tenancy<sup>15</sup>, or is served after a fixed term tenancy has come to an end but relates, in whole or in part, to events occurring during that tenancy, the notice has effect notwithstanding that the tenant becomes or has become a tenant under a statutory periodic tenancy<sup>16</sup> arising on the coming to an end of the fixed term tenancy<sup>17</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'let' see PARA 1012 note 4 ante.

4 For the meaning of 'assured tenancy' see PARA 1018 ante.

5 For the meaning of 'landlord' see PARA 1020 note 3 ante.

6 For the meaning of 'tenant' see PARA 1018 note 6 ante.

7 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, regs 2, 3(c), Schedule, Form 3. For the meaning of 'prescribed' see PARA 1051 note 8 ante.

8 Ie in accordance with the Housing Act 1988 s 8 (as amended): see the text and notes 9-17 infra.

9 Ie the time limits stated in the notice in accordance with *ibid* s 8(3)-(4B) (as amended): see note 14 infra.

10 *Ibid* s 8(1), (2) (s 8(1), (3) amended by the Housing Act 1996 s 151(2), (3)). The court may not exercise the power conferred by the Housing Act 1988 s 8(1)(b) (see head (2) in the text) if the landlord seeks to recover possession on s 7(1), Sch 2 Pt I, Ground 8 (as amended) (see PARA 1116 post): s 8(5). Notice need not be given in a separate document: *Springfield Investments Ltd v Bell* (1990) 22 HLR 440, [1991] 1 EGLR 115, CA (decided under the Rent Act 1977). Oral notice may be an important factor in dispensing with the requirement for written notice but it is not a prerequisite of such dispensation: *Boyle v Verrall* (1996) 29 HLR 436, [1997] 1 EGLR 25, CA. See also *Mustafa v Ruddock* (1997) 30 HLR 495, [1997] EGCS 87, CA; *Knowsley Housing Trust v Revell* [2003] EWCA Civ 496, [2004] LGR 236, [2003] HLR 958 (on conversion of secure tenancy to assured tenancy, court ought not to order a 'blanket' dispensation without consideration of the cases of individual tenants). Under similar provisions in the Rent Act 1977 the requirement for written notice was dispensed with where oral notice

had been given (*Fernandes v Pavardin* (1982) 5 HLR 33, CA, [1982] 2 EGLR 104; *Davies v Peterson* (1988) 21 HLR 63, [1989] 1 EGLR 121, CA; *RJ Dunnell Property Investments Ltd v Thorpe* (1989) 21 HLR 559, [1989] 2 EGLR 94, CA) and where no notice was given at all (*Minay v Sentongo* (1983) 45 P & CR 190, 6 HLR 79, CA). Notice could not, however, be dispensed with under that Act where at the outset the landlord had not intended to return to live in the premises (*Bradshaw v Baldwin-Wiseman* (1985) 49 P & CR 382, [1985] 1 EGLR 123, CA) nor merely on the basis that the original agreement to occupy purported to be temporary (*Ibie v Trubshaw* (1990) 22 HLR 191).

11 le the grounds in the Housing Act 1988 Sch 2 (as amended): see PARA 1109 et seq post.

12 Ibid s 8(2). The notice must be sufficiently specific to enable the tenant to know what he must do to avoid proceedings, but need not follow the statutory wording verbatim when specifying the ground relied upon: see *Mountain v Hastings* (1993) 25 HLR 427, [1993] 2 EGLR 53, CA. As to the information to be given where the Housing Act 1988 Sch 2 Pt I, Ground 8 (as amended) (see PARA 1116 post) is cited in the notice see *Marath v MacGillivray* (1996) 28 HLR 484, [1996] NPC 11, CA.

13 le in accordance with the Housing Act 1988 s 8(4)-(4B) (substituted by the Housing Act 1996 s 151(4)). If a notice (1) specifies in accordance with the Housing Act 1988 s 8(3)(a) (see head (a) in the text), Sch 2 Pt II, Ground 14 (as substituted and amended) (see PARA 1123 post), (whether with or without other grounds), the date specified in the notice as mentioned in s 8(3)(b) (as amended) (see head (b) in the text) must not be earlier than the date of the service of the notice (s 8(4) (as so substituted)); (2) specifies in accordance with head (a) in the text any of Sch 2 Pt I Grounds 1, 2, 5-7 (as amended) (see PARAS 1109-1110, 1113-1115 post), Sch 2 Pt II, Grounds 9, 16 (as amended) (see PARAS 1118, 1126 post) (whether without other grounds or with any ground other than Sch 2 Pt II, Ground 14 (as substituted and amended)), the date specified in the notice as mentioned in head (b) in the text must not be earlier than (a) two months from the date of service of the notice; and (b) if the tenancy is a periodic tenancy, the earliest date on which, apart from s 5(1) (see PARA 1065 ante), the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the date of service of the notice under s 8 (as amended) (s 8(4A) (as so substituted)). In any other case, the date specified in the notice as mentioned in head (b) in the text must not be earlier than the expiry of the period of two weeks from the date of the service of the notice: s 8(4B) (as so substituted). For the meaning of 'tenancy' see PARA 1012 note 1 ante.

14 Ibid s 8(3) (as amended: see note 10 supra).

15 For the meaning of 'fixed term tenancy' see PARA 1051 note 2 ante.

16 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

17 Housing Act 1988 s 8(6).

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#### **1104. Additional notice requirements where possession sought on ground of domestic violence.**

Where the ground specified in a notice of proceedings for possession<sup>1</sup>, whether with or without other grounds, is Ground 14A (domestic violence)<sup>2</sup> and the partner who has left the dwelling house<sup>3</sup> as mentioned in that ground is not a tenant<sup>4</sup> of the dwelling house, the court must not entertain proceedings for possession of the dwelling house unless:

- 2247 (1) the landlord<sup>5</sup> or, in the case of joint landlords, at least one of them has served on the partner who has left a copy of the notice or has taken all reasonable steps to serve a copy of the notice on that partner; or
- 2248 (2) the court considers it just and equitable to dispense with such requirements as to service<sup>6</sup>.

Where Ground 14A is added to a notice of proceedings for possession<sup>7</sup> with the leave of the court after proceedings for possession are begun and the partner who has left the dwelling house as mentioned in that ground is not a party to the proceedings, the court must not continue to entertain the proceedings unless:

- 2249 (a) the landlord or, in the case of joint landlords, at least one of them has served a notice as described below on the partner who has left or has taken all reasonable steps to serve such a notice on that partner; or
- 2250 (b) the court considers it just and equitable to dispense with the requirement of such a notice<sup>8</sup>.

The notice mentioned in head (a) above must:

- 2251 (i) state that proceedings for the possession of the dwelling house have begun;
- 2252 (ii) specify the ground or grounds on which possession is being sought; and
- 2253 (iii) give particulars of the ground or grounds<sup>9</sup>.

1 le a notice under the Housing Act 1988 s 8 (as amended): see PARA 1103 ante.

2 le ibid s 7(1), Sch 2 Pt II, Ground 14A (as added and amended): see PARA 1124 post.

3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 For the meaning of 'landlord' see PARA 1020 note 3 ante.

6 Housing Act 1988 s 8A(1) (s 8A added by the Housing Act 1996 s 150).

7 See note 1 supra.

8 Housing Act 1988 s 8A(2) (as added: see note 6 supra).

9 Ibid s 8A(3) (as added: see note 6 supra).

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### **1105. Compensation for misrepresentation or concealment.**

Where a landlord<sup>1</sup> obtains an order for possession of a dwelling house<sup>2</sup> let<sup>3</sup> on an assured tenancy<sup>4</sup> on one or more of the statutory grounds<sup>5</sup> and it is subsequently made to appear to the court<sup>6</sup> that the order was obtained by misrepresentation or concealment of material facts, the court may order the landlord to pay to the former tenant<sup>7</sup> such sum as appears sufficient as compensation for damage or loss sustained by that tenant as a result of the order<sup>8</sup>.

1 For the meaning of 'landlord' see PARA 1020 note 3 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'let' see PARA 1012 note 4 ante.



- 4 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 5 le the grounds in the Housing Act 1988 s 7(1), Sch 2 (as amended): see PARA 1109 et seq post.
- 6 As to the jurisdiction of the court see PARA 1128 post.
- 7 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 8 Housing Act 1988 s 12. Cf the Rent Act 1977 s 102; and PARA 959 ante.

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## **(ii) Mandatory Grounds for Possession where Tenancy is Assured Shorthold**

### **1106. Fixed term tenancy.**

Without prejudice to any right of the landlord<sup>1</sup> under an assured shorthold tenancy<sup>2</sup> to recover possession of the dwelling house<sup>3</sup> let<sup>4</sup> on the tenancy<sup>5</sup> in accordance with the normal statutory provisions<sup>6</sup>, a court<sup>7</sup> must make an order for possession of the dwelling house, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy<sup>8</sup>, if it is satisfied:

- 2254 (1) that the assured shorthold tenancy has come to an end and no further assured tenancy<sup>9</sup>, whether shorthold or not, is for the time being in existence other than an assured shorthold periodic tenancy, whether statutory<sup>10</sup> or not; and
- 2255 (2) the landlord or, in the case of joint landlords, at least one of them has given to the tenant<sup>11</sup> not less than two months' notice in writing<sup>12</sup> stating that he requires<sup>13</sup> possession of the dwelling house<sup>14</sup>.

A notice may be so given before or on the day on which the tenancy comes to an end; and the above provisions<sup>15</sup> have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises<sup>16</sup>.

Where a court so makes an order for possession of a dwelling house, any statutory periodic tenancy which has arisen on the coming to an end of the assured shorthold tenancy ends, without further notice and regardless of the period, on the day on which the order takes effect<sup>17</sup>.

Unless the tenancy is a demoted assured shorthold tenancy<sup>18</sup>, where an order for possession under the above provisions is made in relation to a dwelling house let on a tenancy created on or after 28 February 1997<sup>19</sup>, the order may not be made so as to take effect earlier than:

- 2256 (a) in the case of a tenancy which is not a replacement tenancy<sup>20</sup>, six months after the beginning of the tenancy<sup>21</sup>; and
- 2257 (b) in the case of a replacement tenancy, six months after the beginning of the original tenancy<sup>22</sup>.

The landlord may bring an accelerated claim for possession of residential property let on an assured shorthold tenancy where all the relevant conditions are satisfied<sup>23</sup>.

- 1 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 2 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.
- 3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 4 For the meaning of 'let' see PARA 1012 note 4 ante.
- 5 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 6 Ie in accordance with the Housing Act 1988 Pt I (ss 1-19) (as amended): see PARA 1011 et seq ante.
- 7 As to the jurisdiction of the court see PARA 1128 post.
- 8 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.
- 9 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 10 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.
- 11 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 12 There is no prescribed form of notice. 'No legislative purpose would be served by subjecting a notice under [the Housing Act 1988] s 21 (for which no form is prescribed) to the requirements of s 8': *Panayi & Pyrkos v Roberts* [1993] 2 EGLR 51 at 53, [1993] 28 EG 125 at 126, CA, obiter per Mann LJ. As to the Housing Act 1988 s 8 (as amended) see PARA 1103 ante.
- 13 For the meaning of 'requires' see PARA 1109 note 9 post.
- 14 Housing Act 1988 s 21(1) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 103; the Housing Act 1996 s 98(2)).
- 15 Ie the Housing Act 1988 s 21(1) (as amended: see note 14 supra).
- 16 Ibid s 21(2).
- 17 Ibid s 21(3).
- 18 Ie an assured shorthold tenancy to which ibid s 20B (as added) applies: see PARA 1050 ante.
- 19 Ie a tenancy to which ibid s 19A (as added) applies: see PARA 1044 ante.
- 20 For these purposes, a replacement tenancy is a tenancy: (1) which comes into being on the coming to an end of an assured shorthold tenancy; and (2) under which, on its coming into being (a) the landlord and tenant are the same as under the earlier tenancy as at its coming to an end; and (b) the premises let are the same or substantially the same as those let under the earlier tenancy as at that time: ibid s 21(7) (s 21(5), (6), (7) added by the Housing Act 1996 s 99).
- 21 For the meaning of references to the beginning of a tenancy see PARA 1051 note 7 ante.
- 22 Housing Act 1988 s 21(5) (as added: see note 20 supra), s 21(5A) (added by the Anti-social Behaviour Act 2003 s 15(2)). The reference in head (b) in the text to the original tenancy is: (1) where the replacement tenancy came into being on the coming to an end of a tenancy which was not a replacement tenancy, to the immediately preceding tenancy; and (2) where there have been successive replacement tenancies, to the tenancy immediately preceding the first in the succession of replacement tenancies: Housing Act 1988 s 21(6) (as added: see note 20 supra).
- 23 See CPR 55.11-CPR 55.19; and PARA 1129 post.

## UPDATE

### 1106-1107 Fixed term tenancy, Periodic tenancy

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1106 Fixed term tenancy**

TEXT AND NOTE 17--Housing Act 1988 s 21(3) amended: Housing and Regeneration Act 2008 s 299, Sch 11 para 9(2). For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

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### **1107. Periodic tenancy.**

Without prejudice to any right of the landlord<sup>1</sup> under an assured shorthold tenancy<sup>2</sup> to recover possession of the dwelling house<sup>3</sup> let<sup>4</sup> on the tenancy<sup>5</sup> in accordance with the normal statutory provisions<sup>6</sup>, a court<sup>7</sup> must make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied:

- 2258 (1) that the landlord or, in the case of joint landlords, at least one of them has given to the tenant<sup>8</sup> a notice in writing stating that, after a date specified in the notice, being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling house is required<sup>9</sup>; and
- 2259 (2) that the date specified in the notice under head (1) above is not earlier than the earliest day on which the tenancy could otherwise<sup>10</sup> be brought to an end by a notice to quit given by the landlord on the same date as that notice<sup>11</sup>.

Unless the tenancy is a demoted assured shorthold tenancy<sup>12</sup>, where an order for possession under the above provisions is made in relation to a dwelling house let on a tenancy created on or after 28 February 1997<sup>13</sup>, the order may not be made so as to take effect earlier than:

- 2260 (a) in the case of a tenancy which is not a replacement tenancy<sup>14</sup>, six months after the beginning of the tenancy<sup>15</sup>; and
- 2261 (b) in the case of a replacement tenancy, six months after the beginning of the original tenancy<sup>16</sup>.

The landlord may bring an accelerated claim for possession of residential property let on an assured shorthold tenancy where all the relevant conditions are satisfied<sup>17</sup>.

1 le any right such as is referred to in the Housing Act 1988 s 21(1) (as amended): see PARA 1106 ante. For the meaning of 'landlord' see PARA 1020 note 3 ante.

2 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.

3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

- 4 For the meaning of 'let' see PARA 1012 note 4 ante.
- 5 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 6 le in accordance with the Housing Act 1988 Pt I (ss 1-19) (as amended): see PARA 1011 et seq ante.
- 7 As to the jurisdiction of the court see PARA 1128 post.
- 8 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 9 le by virtue of the Housing Act 1988 s 21 (as amended). There is no prescribed form of notice: see PARA 1106 note 12 ante.
- 10 le apart from *ibid* s 5(1): see PARA 1065 ante.
- 11 *Ibid* s 21(4) (amended by the Housing Act 1996 s 98(3)). A notice must specify a date which is the last day of a period of the tenancy and a notice that does not do so is not a valid notice for the purposes of head (1) in the text; the landlord is not required to specify a date on which he requires possession as the notice is not a notice to quit: *Fernandez v McDonald* [2003] EWCA Civ 1219, [2003] 4 All ER 1033, [2004] 1 WLR 1027. See also *Lower Street Properties Ltd v Jones* (1996) 28 HLR 877, [1996] NPC 29, CA. The phrase 'at the end of a tenancy' in a notice given pursuant to the Housing Act 1988 s 21(4) (as amended) means 'after the end of the tenancy' and thereby complies with the statutory requirements: *Notting Hill Housing Trust v Roomus* [2006] EWCA Civ 407, [2006] 1 WLR 1375, [2006] All ER (D) 432 (Mar).
- The Housing Act 1988 s 21(4) (as amended) has been held not to conflict with a defendant's Convention rights to a fair trial and to respect for his family life: see *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 at [72], [2002] QB 48, [2001] 4 All ER 604. As to Convention rights under the Human Rights Act 1998 see PARA 46 ante.
- 12 le an assured shorthold tenancy to which the Housing Act 1988 s 20B (as added) applies: see PARA 1050 ante.
- 13 le a tenancy to which *ibid* s 19A (as added) applies: see PARA 1044 ante.
- 14 For the meaning of 'replacement tenancy' for these purposes see PARA 1106 note 20 ante.
- 15 For the meaning of references to the beginning of a tenancy see PARA 1051 note 7 ante.
- 16 Housing Act 1988 s 21(5), (5A) (s 21(5), (6) added by the Housing Act 1996 s 99; the Housing Act 1988 s 21(5A) added by the Anti-social Behaviour Act 2003 s 15(2)). The reference in head (b) in the text to the original tenancy is: (1) where the replacement tenancy came into being on the coming to an end of a tenancy which was not a replacement tenancy, to the immediately preceding tenancy; and (2) where there have been successive replacement tenancies, to the tenancy immediately preceding the first in the succession of replacement tenancies: Housing Act 1988 s 21(6) (as so added).
- 17 See CPR 55.11-CPR 55.19; and PARA 1129 post.

## UPDATE

### 1106-1107 Fixed term tenancy, Periodic tenancy

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1107 Periodic tenancy

TEXT AND NOTE 11--Housing Act 1988 s 21(4A) added: Housing and Regeneration Act 2008 s 299, Sch 11 para 9(3). For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

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### **(iii) Other Mandatory Grounds for Possession**

#### **1108. Notices given for the purposes of Grounds 1 to 5.**

It is a requirement of the first five of the mandatory grounds for possession<sup>1</sup> that the tenancy is preceded by notice warning the tenant of the possibility of the ground being relied upon<sup>2</sup>. In the case of those five grounds any reference to the landlord<sup>3</sup> giving a notice in writing to the tenant<sup>4</sup> is, in the case of joint landlords, a reference to at least one of the joint landlords giving such a notice<sup>5</sup>.

If, not later than the beginning of a tenancy<sup>6</sup> ('the earlier tenancy'), the landlord gives such a notice in writing to the tenant, the notice also has effect<sup>7</sup> as if it had been given immediately before the beginning of any later tenancy which:

- 2262 (1) takes effect immediately on the coming to an end of the earlier tenancy;  
and
- 2263 (2) is granted, or deemed to be granted, to the person who was the tenant under the earlier tenancy immediately before it came to an end; and
- 2264 (3) is of substantially the same dwelling house<sup>8</sup> as the earlier tenancy<sup>9</sup>.

In relation to the assured tenancy<sup>10</sup> to which the successor<sup>11</sup> becomes entitled by succession<sup>12</sup>, any notice given to the predecessor<sup>13</sup> for the purposes of Cases 13 to 15 of the Rent Act 1977<sup>14</sup> is treated as having been given for the purposes of whichever of Grounds 3 to 5 corresponds to the Case in question<sup>15</sup>.

1 le the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-5 (as amended): see PARA 1109 et seq post.

2 There is no prescribed form of notice but it should be sufficiently clear to enable the tenant to know which ground is being relied upon: see *Fowler v Minchin* (1987) 19 HLR 224, [1987] 1 EGLR 108, CA (decided under the Rent Act 1977).

3 For the meaning of 'landlord' see PARA 1020 note 3 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 Housing Act 1988 s 7(5), Sch 2 Pt IV para 7. If, however, there are joint tenants, each of them must be served with the notice: see s 45(3) (cited in PARA 1018 note 6 ante).

6 Any reference in *ibid* Sch 2 Pt 1, Grounds 1-5 (as amended) to a notice being given not later than the beginning of the tenancy is a reference to its being given not later than the day on which the tenancy is entered into and, accordingly s 45(2) (see PARA 1051 note 7 ante) does not apply to any such reference: Sch 2 Pt IV para 11. For the meaning of 'tenancy' see PARA 1012 note 1 ante.

7 le for the purposes of the ground in question and any further application of *ibid* Sch 2 Pt IV para 8: see the text and notes 8-9 *infra*.

8 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

9 Housing Act 1988 Sch 2 Pt IV para 8(1), (2). Schedule 2 Pt IV para 8(1) does not, however, apply in relation to a later tenancy if, not later than the beginning of the tenancy, the landlord gave notice in writing to the

tenant that the tenancy is not one in respect of which possession can be recovered on the ground in question: Sch 2 Pt IV para 8(3).

10 For the meaning of 'assured tenancy' see PARA 1018 ante.

11 For these purposes, 'the successor' has the same meaning as in the Housing Act 1988 s 39 (as amended) (see PARA 1016 ante): s 39(10).

12 le as mentioned in ibid s 39 (as amended): see PARA 1016 ante.

13 For these purposes, 'the predecessor' has the same meaning as in ibid s 39 (see PARA 1016 ante): s 39(10).

14 le for the purposes of any of the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 13 (see PARA 965 ante), Case 14 (see PARA 965 ante) or Case 15 (see PARA 966 ante).

15 Housing Act 1988 s 39(10), Sch 4 para 15(1). Where Sch 4 para 15(1) applies, the regulated tenancy of the predecessor is treated, in relation to the assured tenancy of the successor, as 'the earlier tenancy' for the purposes of Sch 2 Pt IV (paras 7-11) (see the text and notes 1-9 supra; and PARAS 1109, 1111-1112 post): Sch 4 para 15(2). For the meaning of 'regulated tenancy' see PARA 854 ante.

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### **1109. Ground 1: landlord was former occupier or requires possession as only or principal home.**

The court<sup>1</sup> must make an order for possession where not later than the beginning of the tenancy<sup>2</sup> the landlord<sup>3</sup> gave notice<sup>4</sup> in writing to the tenant<sup>5</sup> that possession might be recovered on this Ground or the court is of the opinion that it is just and equitable to dispense with the requirement of notice<sup>6</sup> and, in either case:

2265 (1) at some time before the beginning of the tenancy, the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them occupied the dwelling house<sup>7</sup> as his only or principal home<sup>8</sup>; or

2266 (2) the landlord who is seeking possession or, in the case of joint landlords seeking possession, at least one of them requires<sup>9</sup> the dwelling house as his, his spouse's or his civil partner's<sup>10</sup> only or principal home and neither the landlord, or, in the case of joint landlords, any one of them, nor any other person who, as landlord, derived title under the landlord who gave the notice mentioned above acquired the reversion<sup>11</sup> on the tenancy for money or money's worth<sup>12</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house is let<sup>13</sup> on an assured fixed term tenancy<sup>14</sup> or on an assured periodic tenancy arising<sup>15</sup> under the Local Government and Housing Act 1989<sup>16</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of references to notice given not later than the beginning of the tenancy see PARA 1108 note 6 ante; and for the meaning of 'tenancy' see PARA 1012 note 1 ante.

3 For the meaning of 'landlord' see PARA 1020 note 3 ante. See also PARA 1108 the text and notes 3-5 ante.

4 As to such notice see PARA 1108 ante.

- 5 For the meaning of 'tenant' see PARA 1018 note 6 ante. See also PARA 1108 note 5 ante.
- 6 As to dispensing with the requirement of notice see PARA 1103 note 10 ante.
- 7 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 8 As to occupation as his only or principal home see PARA 1018 note 8 ante. The requirement of the dwelling house for the landlord's 'only or principal home' is a more stringent test than requirement 'as a residence' under the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 11 (as amended) (see PARA 963 ante). Cases decided under that provision have to be treated with caution for these purposes.
- 9 For the meaning of 'requires' see *Kidder v Birch* (1982) 46 P & CR 362, 5 HLR 28 (decided under the Rent Act 1977). See also *Aitken v Shaw* 1933 SLT (Sh Ct) 21. The requirement is tested at the date of the hearing: *Alexander v Mohamadzadeh* (1985) 51 P & CR 41, 18 HLR 90, CA (decided under the Rent Act 1977). The onus of proof is on the landlord: see *Epsom Grand Stand Association Ltd v Clarke* (1919) 35 TLR 525, CA. See also *Chandler v Strevett* [1947] 1 All ER 164, CA (whether or not the landlord requires possession is a question of fact for the trial judge).
- 10 There is no extended statutory definition of 'spouse or civil partner' for these purposes; cf the Housing Act 1988 s 17(4) (as substituted); and PARA 1084 note 3 ante.
- 11 Where *ibid* s 7(5), Sch 2 Pt IV para 8(1) (see PARA 1108 ante) has effect in relation to a notice so given, the reference to the reversion on the tenancy is a reference to the reversion on the earlier tenancy and on any later tenancy falling within Sch 2 Pt IV para 8(2) (see PARA 1108 ante): Sch 2 Pt IV para 9.
- 12 *Ibid* s 7(1), Sch 2 Pt I, Ground 1 (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 43(1), (2)).
- 13 For the meaning of 'let' see PARA 1012 note 4 ante.
- 14 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.
- 15 *Ie* under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 *et seq* post.
- 16 See the Housing Act 1988 s 7(5A) (as added); and PARA 1100 ante.

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### **1110. Ground 2: dwelling house mortgaged.**

The court<sup>1</sup> must make an order for possession where the dwelling house<sup>2</sup> is subject to a mortgage<sup>3</sup> granted before the beginning of the tenancy<sup>4</sup> and:

- 2267 (1) the mortgagee is entitled to exercise a power of sale conferred on him by the mortgage or by statute<sup>5</sup>; and
- 2268 (2) the mortgagee requires<sup>6</sup> possession of the dwelling house for the purpose of disposing of it with vacant possession in exercise of that power; and
- 2269 (3) either notice was given as mentioned in Ground 1<sup>7</sup> or the court is satisfied that it is just and equitable to dispense with the requirement of notice<sup>8</sup>.

An order for possession on this Ground may not be made:

- 2270 (a) to take effect at a time when the dwelling house is let<sup>9</sup> on an assured fixed term tenancy<sup>10</sup> unless the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>11</sup>;
- 2271 (b) if the dwelling house is let on an assured periodic tenancy arising<sup>12</sup> under the Local Government and Housing Act 1989<sup>13</sup>.

- 1 As to the jurisdiction of the court see PARA 1128 post.
- 2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 3 For these purposes, 'mortgage' includes a charge and 'mortgagee' is to be construed accordingly: Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 2.
- 4 For the meaning of references to the beginning of the tenancy see PARA 1051 note 7 ante; and for the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 5 le by the Law of Property Act 1925 s 101 (as amended): see MORTGAGE vol 77 (2010) PARA 443 et seq.
- 6 For the meaning of 'requires' see PARA 1109 note 9 ante.
- 7 See PARAS 1108-1109 ante.
- 8 Housing Act 1988 Sch 2 Pt 1, Ground 2. As to dispensing with the requirement of notice see PARA 1103 note 10 ante.
- 9 For the meaning of 'let' see PARA 1012 note 4 ante.
- 10 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.
- 11 See the Housing Act 1988 s 7(6); and PARA 1101 ante.
- 12 le under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 et seq post.
- 13 See the Housing Act 1988 s 7(5A) (as added); and PARA 1100 ante.

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### **1111. Ground 3: out of season lets of holiday accommodation.**

The court<sup>1</sup> must make an order for possession where the tenancy<sup>2</sup> is a fixed term tenancy<sup>3</sup> for a term not exceeding eight months and:

- 2272 (1) not later than the beginning of the tenancy<sup>4</sup> the landlord<sup>5</sup> gave notice<sup>6</sup> in writing to the tenant<sup>7</sup> that possession might be recovered on this Ground; and
- 2273 (2) at some time within the period of 12 months ending with the beginning of the tenancy<sup>8</sup> the dwelling house<sup>9</sup> was occupied under a right to occupy it for a holiday<sup>10</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house is let<sup>11</sup> on an assured fixed term tenancy<sup>12</sup>.



- 1 As to the jurisdiction of the court see PARA 1128 post.
- 2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 3 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.
- 4 For the meaning of references to notice given not later than the beginning of the tenancy see PARA 1108 note 6 ante.
- 5 For the meaning of 'landlord' see PARA 1020 note 3 ante. See also PARA 1108 the text and notes 3-5 ante.
- 6 As to such notice see PARA 1108 ante.
- 7 For the meaning of 'tenant' see PARA 1018 note 6 ante. See also PARA 1108 note 5 ante.
- 8 Where the Housing Act 1988 s 7(5), Sch 2 Pt IV para 8(1) (see PARA 1108 ante) has effect in relation to a notice given as mentioned in head (1) in the text, any second or subsequent tenancy in relation to which the notice has effect is treated for these purposes as beginning at the beginning of the tenancy in respect of which the notice was actually given: Sch 2 Pt IV para 10.
- 9 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 10 Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 3. Cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 13; and PARA 965 ante.
- 11 For the meaning of 'let' see PARA 1012 note 4 ante.
- 12 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'assured tenancy' see PARA 1018 ante.

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#### **1112. Ground 4: accommodation formerly let to student.**

The court<sup>1</sup> must make an order for possession where the tenancy<sup>2</sup> is a fixed term tenancy<sup>3</sup> for a term not exceeding 12 months and:

- 2274 (1) not later than the beginning of the tenancy<sup>4</sup> the landlord<sup>5</sup> gave notice<sup>6</sup> in writing to the tenant<sup>7</sup> that possession might be recovered on this Ground; and
- 2275 (2) at some time within the period of 12 months ending with the beginning of the tenancy<sup>8</sup> the dwelling house<sup>9</sup> was let<sup>10</sup> on a tenancy falling within the statutory provisions<sup>11</sup> relating to student lettings<sup>12</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house is let on an assured fixed term tenancy<sup>13</sup>.

- 1 As to the jurisdiction of the court see PARA 1128 post.
- 2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 3 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.
- 4 For the meaning of references to notice given not later than the beginning of the tenancy see PARA 1108 note 6 ante.

- 5 For the meaning of 'landlord' see PARA 1020 note 3 ante. See also PARA 1108 the text and notes 3-5 ante.
- 6 As to such notice see PARA 1108 ante.
- 7 For the meaning of 'tenant' see PARA 1018 note 6 ante. See also PARA 1108 note 5 ante.
- 8 Where the Housing Act 1988 s 7(5), Sch 2 Pt IV para 8(1) (see PARA 1108 ante) has effect in relation to a notice given as mentioned in head (1) supra, any second or subsequent tenancy in relation to which the notice has effect is treated for these purposes as beginning at the beginning of the tenancy in respect of which the notice was actually given: Sch 2 Pt IV para 10.
- 9 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 10 For the meaning of 'let' see PARA 1012 note 4 ante.
- 11 Ie falling within the Housing Act 1988 s 1(2), Sch 1 Pt I para 8: see PARA 1033 ante.
- 12 Ibid s 7(1), Sch 2 Pt I, Ground 4. Cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 14; and PARA 965 ante.
- 13 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'assured tenancy' see PARA 1018 ante.

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### **1113. Ground 5: accommodation required for minister of religion.**

The court<sup>1</sup> must make an order for possession where the dwelling house<sup>2</sup> is held for the purpose of being available for occupation by a minister of religion as a residence from which to perform the duties of his office and:

- 2276 (1) not later than the beginning of the tenancy<sup>3</sup> the landlord<sup>4</sup> gave notice<sup>5</sup> in writing to the tenant<sup>6</sup> that possession might be recovered on this Ground; and
- 2277 (2) the court is satisfied that the dwelling house is required<sup>7</sup> for occupation by a minister of religion as such a residence<sup>8</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house is let<sup>9</sup> on an assured fixed term tenancy<sup>10</sup> or on an assured periodic tenancy arising<sup>11</sup> under the Local Government and Housing Act 1989<sup>12</sup>.

- 1 As to the jurisdiction of the court see PARA 1128 post.
- 2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 3 For the meaning of references to notice given not later than the beginning of the tenancy see PARA 1108 note 6 ante.
- 4 For the meaning of 'landlord' see PARA 1020 note 3 ante. See also PARA 1108 the text and notes 3-5 ante.
- 5 As to such notice see PARA 1108 ante.
- 6 For the meaning of 'tenant' see PARA 1018 note 6 ante. See also PARA 1108 note 5 ante.
- 7 For the meaning of 'requires' see PARA 1109 note 9 ante.

8 Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 5. Cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 15; and PARA 966 ante.

9 For the meaning of 'let' see PARA 1012 note 4 ante.

10 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

11 le under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 et seq post.

12 See the Housing Act 1988 s 7(5A) (as added); and PARA 1100 ante.

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### **1114. Ground 6: redevelopment.**

The court<sup>1</sup> must make an order for possession where the landlord<sup>2</sup> who is seeking possession or, if that landlord is a registered social landlord<sup>3</sup> or charitable housing trust<sup>4</sup>, a superior landlord intends to demolish or reconstruct the whole or a substantial part of the dwelling house<sup>5</sup> or to carry out substantial works on the dwelling house or any part of it or any building of which it forms part and the specified conditions<sup>6</sup> are fulfilled<sup>7</sup>. Those conditions are that:

2278 (1) the intended work cannot reasonably be carried out without the tenant<sup>8</sup> giving up possession<sup>9</sup> of the dwelling house because:

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55. (a) the tenant is not willing to agree to such a variation of the terms of the tenancy<sup>10</sup> as would give such access and other facilities as would permit the intended work to be carried out; or

56. (b) the nature of the intended work is such that no such variation is practicable; or

57. (c) the tenant is not willing to accept an assured tenancy<sup>11</sup> of such part only of the dwelling house ('the reduced part') as would leave in the possession of his landlord so much of the dwelling house as would be reasonable to enable the intended work to be carried out and, where appropriate, as would give such access and other facilities over the reduced part as would permit the intended work to be carried out; or

58. (d) the nature of the intended work is such that such a tenancy is not practicable; and

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2279 (2) either the landlord seeking possession acquired his interest in the dwelling house before the grant of the tenancy<sup>12</sup> or that interest was in existence at the time of the grant and neither that landlord, or, in the case of joint landlords, any of them, nor any other person who, alone or jointly with others, has acquired that interest since that time acquired it for money or money's worth; and

2280 (3) the assured tenancy on which the dwelling house is let did not come into being by virtue of the specified<sup>13</sup> statutory provisions<sup>14</sup>.

Where a court makes an order for possession of a dwelling house let<sup>15</sup> on an assured tenancy on this Ground or on Ground 9<sup>16</sup>, but not on any other Ground, the landlord must pay to the tenant a sum equal to the reasonable expenses likely to be incurred by the tenant in removing from the dwelling house<sup>17</sup>.

An order for possession on this Ground may not be made:

2281 (i) to take effect at any time when the dwelling house is let on an assured fixed term tenancy<sup>18</sup>;

2282 (ii) if the dwelling house is let on an assured periodic tenancy which arose<sup>19</sup> on the termination of a former 1954 Act tenancy<sup>20</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1985 (see s 5(4), (5); and HOUSING vol 22 (2006 Reissue) PARAS 11, 67): Housing Act 1988 Sch 2 Pt I, Ground 6 (definition substituted by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 18(1), (13)).

4 For these purposes, 'charitable housing trust' means a housing trust, within the meaning of the Housing Associations Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 12), which is a charity within the meaning of the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 1): Housing Act 1988 Sch 2 Pt I, Ground 6 (definition amended by the Charities Act 1993 s 98(1), Sch 6 para 30; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 18(1), (13)).

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 Ie the conditions in the Housing Act 1988 Sch 2 Pt I, Ground 6 paras (a)-(c): see heads (1)-(3) in the text.

7 Ibid Sch 2 Pt I, Ground 6. (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 18(1), (13)). Cf the Landlord and Tenant Act 1954 s 30(1)(f), s 31A (as added): see PARA 741 et seq ante.

8 For the meaning of 'tenant' see PARA 1018 note 6 ante.

9 'Possession' means legal possession: *Heath v Drown* [1973] AC 498, [1972] 2 All ER 561, HL (decided under the Landlord and Tenant Act 1954 s 30(1)(f)).

10 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

11 For the meaning of 'assured tenancy' see PARA 1018 ante.

12 For these purposes, if, immediately before the grant of the tenancy, the tenant to whom it was granted, or if it was granted to joint tenants, any of them was the tenant or one of the joint tenants of the dwelling house concerned under an earlier assured tenancy or, as the case may be, under a tenancy to which the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) applied, any reference in the Housing Act 1988 Sch 2 Pt I, Ground 6 para (b) to the grant of the tenancy is a reference to the grant of that earlier assured tenancy or, as the case may be, to the grant of the tenancy to which the Local Government and Housing Act 1989 Sch 10 (as amended) applied: Housing Act 1988 Sch 2 Pt I, Ground 6 (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 108).

13 Ie any provision of the Rent Act 1977 Sch 1 (as amended by the Housing Act 1988 s 39(2), (3), Sch 4 Pt I) (see PARA 1016 ante) or, as the case may be, the Rent (Agriculture) Act 1976 s 4 (as amended by the Housing Act 1988 Sch 4 Pt II) (see PARA 1149 post).

14 Housing Act 1988 Sch 2 Pt I, Ground 6(a)-(c).

15 For the meaning of 'let' see PARA 1012 note 4 ante.

16 Ie the Housing Act 1988 Sch 2 Pt II, Ground 9: see PARA 1118 post.

17 Ibid s 11(1). Any question as to the amount of such sum may be determined by agreement between the landlord and the tenant, or in default of agreement, by the court: s 11(2). Any sum so payable to a tenant is recoverable as a civil debt due from the landlord: s 11(3). As to what may be regarded as reasonable expenses see *Nolan v Sheffield Metropolitan District Council* (1979) 38 P & CR 741, Lands Tribunal (decided under the Land Compensation Act 1973 s 38 (as amended): see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 839).

18 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

19 le under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 et seq post.

20 See the Housing Act 1988 s 7(5A) (as added); and PARA 1100 ante. For the meaning of 'former 1954 Act tenancy' see PARA 1248 note 8 post. As to the application of Sch 2 Pt I, Ground 6 (as amended) to other tenancies under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) see PARA 1251 note 3 post.

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### **1115. Ground 7: death of tenant.**

The court<sup>1</sup> must make an order for possession where the tenancy<sup>2</sup> is a periodic tenancy, including a statutory periodic tenancy<sup>3</sup>, which has devolved under the will or intestacy of the former tenant<sup>4</sup> and the proceedings for the recovery of possession<sup>5</sup> are begun not later than 12 months after the death of the former tenant or, if the court so directs, after the date on which, in the opinion of the court, the landlord<sup>6</sup> or, in the case of joint landlords, any one of them became aware of the former tenant's death<sup>7</sup>.

For these purposes, the acceptance by the landlord of rent from a new tenant after the death of the former tenant is not regarded as creating a new periodic tenancy, unless the landlord agrees in writing to a change, as compared with the tenancy before the death, in the amount of the rent, the period of the tenancy, the premises which are let or any other term of the tenancy<sup>8</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house<sup>9</sup> is let<sup>10</sup> on an assured fixed term tenancy<sup>11</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

3 For the meaning of 'statutory periodic tenancy' see PARA 1067 note 8 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante. If there was a joint tenancy, the tenancy would vest in the survivor or survivors by the right of survivorship and would not devolve under the will or intestacy until the death of the last survivor. Equally, there will be no devolution under the will or intestacy if there is a statutory transmission of the tenancy. As to succession to an assured periodic tenancy see PARA 1084 ante.

5 The phrase 'proceedings for the recovery of possession' refers, in this context, to court proceedings and not to service of the notice of intention to commence proceedings: see *Osada v Shepping* [2000] 2 EGLR 38, [2000] 30 EG 125, CA.

6 For the meaning of 'landlord' see PARA 1020 note 3 ante.

7 Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 7.

8 Ibid Sch 2 Pt I, Ground 7.

9 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

10 For the meaning of 'let' see PARA 1012 note 4 ante.

11 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

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### **1116. Ground 8: serious arrears of rent.**

The court<sup>1</sup> must make an order for possession where both at the date of service of the notice of proceedings for possession<sup>2</sup> and at the date of the hearing:

- 2283 (1) if rent<sup>3</sup> is payable weekly or fortnightly, at least eight weeks' rent is unpaid;
- 2284 (2) if rent is payable monthly, at least two months' rent is unpaid;
- 2285 (3) if rent is payable quarterly, at least one quarter's rent is more than three months in arrears; and
- 2286 (4) if rent is payable yearly, at least three months' rent is more than three months in arrears<sup>4</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house<sup>5</sup> is let<sup>6</sup> on an assured fixed term tenancy<sup>7</sup> but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>8</sup>.

There is no absolute principle that the court should never adjourn a hearing date for the sole purpose of enabling a tenant to reduce arrears of rent to below the Ground 8 threshold; however, the power to do so is only to be exercised in exceptional circumstances and it has been held that maladministration on the part of the housing benefit authority (to which the arrears of rent are attributable) is not such an exceptional circumstance<sup>9</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 The court has no discretion to dispense with the requirement of notice of proceedings where an order for possession is sought on this Ground: see s 8(5); and PARA 1103 note 10 ante. A notice specifying this Ground but omitting the words specifying the amount of rent unpaid was defective since it did not give the tenant adequate information: see *Mountain v Hastings* (1993) 25 HLR 427, [1993] 2 EGLR 53, CA. For the information that must be given see *Marath v MacGillivray* (1996) 28 HLR 484, [1996] NPC 11, CA.

3 For these purposes, 'rent' means rent lawfully due from the tenant: Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 8. For the meaning of 'tenant' see PARA 1018 note 6 ante. Where the landlord of premises let on an assured tenancy has obtained judgment for arrears of rent and an order for possession permitting him to accept payments from the tenant by way of mesne profits until possession is given, no new tenancy is created merely because the landlord has accepted a proposal by the tenant to pay regular amounts towards the money judgment. The tenant will remain in occupation as a tolerated trespasser and that will remain the position until the landlord takes a position inconsistent with the order, by seeking and obtaining an increase in the monthly payment for use and occupation: see *Stirling v Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011, [2001] 3 All ER 645, [2002] 1 WLR 499.

For rent to be lawfully due, a valid notice under the Landlord and Tenant Act 1987 s 48 (as amended) (see PARA 53 ante) must have been served; but that requirement is satisfied provided that the tenant has been informed in writing of an address in England at which he may serve notices to the landlord: see *Drew-Morgan v Hamid-Zadeh* (1999) 32 HLR 316, [1999] 2 EGLR 13, CA. It is unclear whether rent could properly be described as 'lawfully due' where the tenant has paid for the execution of work which in breach of covenant the landlord has failed to do, or where the tenant has an unqualified claim for damages which could be set off against a claim by the landlord for arrears of rent: see *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; *Asco Developments Ltd v Gordon* [1978] 2 EGLR 41, (1978) 248 Estates Gazette 683; *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179, [1980] 1 EGLR 42; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137, [1979] 2 All ER 1063; *Televantos v McCulloch* (1990) 23 HLR 412,

[1991] 1 EGLR 123, CA. For the purposes of the statutory provisions for the protection of persons serving in the reserve and auxiliary forces of the Crown which render the leave of the court necessary for the enforcement of a judgment or order for the recovery of possession of land in default of payment of rent (see the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 ss 2(3)-(5), 3, 4(1); and ARMED FORCES vol 2(2) (Reissue) PARA 82 et seq), a judgment or order for the recovery of possession of a protected dwelling house is deemed to be a judgment or order for the recovery of possession in default of payment of rent if the judgment or order was made on any of the following grounds, ie the Housing Act 1988 Sch 2 Pt I, Ground 8 (as amended), Sch 2 Pt II, Ground 10 (see PARA 1119 post) and Sch 2 Pt II, Ground 11 (see PARA 1120 post), and not on any other ground: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 4(2A) (added by the Housing Act 1988 s 140(1), Sch 17 para 1).

4 Housing Act 1988 Sch 2 Pt I, Ground 8 (amended by the Housing Act 1996 s 101). Where the parties agree for unpaid rent to be paid by means of a cheque, the acceptance of that cheque suspends the landlord's right to sue while the cheque is being cleared. At the date of the hearing, the judge has jurisdiction to adjourn the claim to see if the cheque will be paid, although he is not bound to do so if he has reason to conclude that it will not be paid. If the cheque is not paid at first presentation, then the order for possession must be made and the date of the hearing for the purpose of Sch 2 Pt I, Ground 8 (as amended) is the earlier hearing and not the adjourned hearing. *Day v Coltrane* [2003] EWCA Civ 342, [2003] 1 WLR 1379, [2003] All ER (D) 210 (Mar).

In calculating the amount of rent which is outstanding at the date of hearing for the purposes of the Housing Act 1988 Sch 2 Pt I, Ground (as amended), the court is entitled to take into account moneys which have been paid into court on account of rent arrears: *Etherington v Burt* [2004] EWHC 95 (QB), [2004] All ER (D) 117 (Feb).

5 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

6 For the meaning of 'let' see PARA 1012 note 4 ante.

7 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

8 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

9 See *North British Housing Association Ltd v Matthews, London and Quadrant Housing Ltd v Morgan* [2004] EWCA Civ 1736 at [17], [28], [30]-[32], [2005] 2 All ER 667, [2005] 1 WLR 3133.

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#### **(iv) Discretionary Grounds for Possession**

##### **1117. Extended discretion of the court in possession claims.**

The following provisions do not apply if the court<sup>1</sup> is satisfied that the landlord<sup>2</sup> is entitled to possession of the dwelling house<sup>3</sup> on any of the mandatory grounds<sup>4</sup> or on the expiry or termination<sup>5</sup> of an assured shorthold tenancy<sup>6</sup>.

The court may<sup>7</sup> adjourn for such period or periods as it thinks fit proceedings for possession<sup>8</sup> of a dwelling house let<sup>9</sup> on an assured tenancy<sup>10</sup>. On the making of an order for possession of a dwelling house so let, or at any time before the execution of such an order the court may<sup>11</sup> stay or suspend execution of the order, or postpone the date of possession, for such period or periods as the court thinks just<sup>12</sup>. On any such adjournment, stay, suspension or postponement, the court must, however, unless it considers that to do so would cause exceptional hardship to the tenant<sup>13</sup> or would otherwise be unreasonable, impose conditions with regard to payment by the tenant of arrears of rent, if any, and rent or payments in respect of occupation after the termination of the tenancy (mesne profits) and may impose such other condition as it thinks fit<sup>14</sup>. If any such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such possession order<sup>15</sup>.

In any case where:

- 2287 (1) at a time when proceedings are brought for possession of a dwelling house let on an assured tenancy, the tenant's spouse or former spouse, or civil partner or former civil partner, having home rights under Part IV of the Family Law Act 1996<sup>16</sup>, is in occupation of the dwelling house; and
- 2288 (2) the assured tenancy is terminated as a result of those proceedings,

the spouse or former spouse or the civil partner or former civil partner, so long as he or she remains in occupation, has the same rights in relation to, or in connection with, any adjournment, stay, suspension or postponement of possession proceedings<sup>17</sup> as he or she would have if those home rights were not affected by the termination of the tenancy<sup>18</sup>.

Further, in any case where:

- 2289 (a) at a time when proceedings are brought for possession of a dwelling house let on an assured tenancy:
- 48
59. (i) an order is in force<sup>19</sup> conferring rights on the former spouse or former civil partner of the tenant; or
60. (ii) an order is in force<sup>20</sup> conferring rights on a cohabitant or former cohabitant<sup>21</sup> of the tenant;
- 49
- 2290 (b) that former spouse, former civil partner, cohabitant or former cohabitant is then in occupation of the dwelling house; and
- 2291 (c) the assured tenancy is terminated as a result of those proceedings,

the former spouse, former civil partner, cohabitant or former cohabitant has the same rights in relation to, or in connection with, any adjournment stay, suspension or postponement of possession proceedings<sup>22</sup> as he or she would have if the rights conferred by the order referred to in head (a) above were not affected by the termination of the tenancy<sup>23</sup>.

1 As to the jurisdiction of the court see PARA 1128 post.

2 For the meaning of 'landlord' see PARA 1020 note 3 ante.

3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

4 Let on any of the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-8 (as amended): see PARAS 1109-1116 ante.

5 Let by virtue of *ibid* s 21(1) (as amended) (see PARA 1106 ante) or s 21(4) (as amended) (see PARA 1107 ante).

6 *Ibid* s 9(6). The effect of s 9(6) is that once the court has expressed the conclusion that it is satisfied that the landlord is entitled to possession there is no power to grant an adjournment in any circumstances. However, the court is not 'satisfied' within the meaning of s 9(6) until the judge has given a judgment and effect has been given to that judgment in a perfected order of the court: see *North British Housing Association Ltd v Matthews, London and Quadrant Housing Ltd v Morgan* [2004] EWCA Civ 1736 at [36], [2005] 2 All ER 667, [2005] 1 WLR 3133.

7 Let subject to the Housing Act 1988 s 9(6): see the text and notes 1-6 supra.

8 Let proceedings for possession on one of the discretionary grounds: see PARA 1118 et seq post.

9 For the meaning of 'let' see PARA 1012 note 4 ante.

10 Housing Act 1988 s 9(1). For the meaning of 'assured tenancy' see PARA 1018 ante. The court has the power to consider on more than one occasion the possible exercise of the jurisdiction to suspend possession proceedings: see eg *Ujima Housing Association v Smith* [2000] All ER (D) 1420.



11 See note 7 *supra*.

12 Housing Act 1988 s 9(2). Cf the Rent Act 1977 s 100 (as amended); and PARA 972 ante. For a case where the judge's exercise of this discretion was criticised by the Court of Appeal see *New Charter Housing (North) Ltd v Ashcroft* [2004] EWCA Civ 310, 148 Sol Jo LB 352, [2004] All ER (D) 153 (Mar). If no application is made under the Housing Act 1988 s 9(2) and the warrant for possession is executed, it can only be suspended or set aside if either (1) the order on which it is issued is itself set aside; (2) the warrant has been obtained by fraud; or (3) there has been an abuse of process or oppression in its execution: see *Hammersmith and Fulham London Borough Council v Hill* (1994) 92 LGR 665 at 669-670, [1994] 2 EGLR 51 at 52-53, CA, per Nourse LJ, cited in *Circle 33 Housing Trust Ltd v Ellis* [2005] EWCA Civ 1233, [2006] HLR 106, [2005] All ER (D) 133 (Sep), where the relevant authorities are reviewed.

13 For the meaning of 'tenant' see PARA 1018 note 6 ante.

14 Housing Act 1988 s 9(3). See eg *Diab v Countrywide Rentals 1 plc* [2001] All ER (D) 119 (Jul). See also *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, (2006) Times, 22 May, [2006] All ER (D) 108 (May) (judge correct in making a possession order suspended on terms that there were no further acts of nuisance on the part of the tenant or her son, but ought also to have included a term that, in the event of the landlord wishing to apply for a warrant of possession, it should first apply to the court, on notice to the defendant and her litigation friend).

15 Housing Act 1988 s 9(4).

16 *Ie* home rights under the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see PARA 1072 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

17 *Ie* any such adjournment as is referred to in the Housing Act 1988 s 9(1) or any such stay, suspension or postponement as is referred to in s 9(2): see the text and notes 7-12 *supra*.

18 *Ibid* s 9(5) (amended by the Family Law Act 1996 s 66(1), Sch 8 para 59(2); the Civil Partnership Act 2004 s 82, Sch 9 Pt 2 para 23(1), (2); for transitional provisions see Sch 9 Pt 3).

19 *Ie* under the Family Law Act 1996 s 35 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 297-298.

20 *Ie* under *ibid* s 36 (as amended): see PARA 1072 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 301-302.

21 *Ie* within the meaning of the Family Law Act 1996.

22 See note 17 *supra*.

23 Housing Act 1988 s 9(5A) (added by the Family Law Act 1996 Sch 8 para 59(3); amended by the Civil Partnership Act 2004 s 82, Sch 9 Pt 2 para 23(1), (3); for transitional provisions see Sch 9 Pt 3).

## UPDATE

### 1117 Extended discretion of the court in possession claims

NOTE 12--An assured tenancy subject to a possession order ends only when the order is executed: *Knowsley Housing Trust v White*; *Honeygan-Green v Islington LBC*; *Porter v Shepherds Bush Housing Association* [2008] UKHL 70, [2009] 3 All ER 829.

TEXT AND NOTES 14-23--Housing Act 1988 s 9 further amended: Housing and Regeneration Act 2008 s 299, Sch 11 para 8, Sch 16 (partly in force: SI 2009/1261). For transitional provisions see Housing and Regeneration Act 2008 Sch 11 para 14 (partly in force: SI 2009/1261). See also Housing and Regeneration Act 2008 Sch 11 Pt 2 (paras 15-26) (replacement of certain terminated tenancies).

PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(10) RECOVERY OF POSSESSION/(iv) Discretionary Grounds for Possession/1118. Ground 9: suitable alternative accommodation.

### **1118. Ground 9: suitable alternative accommodation.**

The court<sup>1</sup> may make an order for possession where suitable alternative accommodation is available for the tenant<sup>2</sup> or will be available for him when the order for possession takes effect<sup>3</sup>.

For these purposes, a certificate of the local housing authority<sup>4</sup> for the district<sup>5</sup> in which the dwelling house<sup>6</sup> in question is situated, certifying that the authority will provide suitable alternative accommodation for the tenant by a date specified in the certificate, is conclusive evidence that suitable alternative accommodation will be available for him by that date<sup>7</sup>. Where no such certificate is produced to the court, accommodation is deemed to be suitable for the purposes of this Ground if it consists of either:

- 2292 (1) premises which are to be let<sup>8</sup> as a separate dwelling<sup>9</sup> such that they will then be let on an assured tenancy<sup>10</sup>, other than:
- 50
61. (a) a tenancy in respect of which notice is given not later than the beginning of the tenancy that possession might be recovered on any of Grounds 1 to 5<sup>11</sup>; or
62. (b) an assured shorthold tenancy<sup>12</sup>; or
- 51
- 2293 (2) premises to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded<sup>13</sup> in the case of an assured tenancy<sup>14</sup>,

and, in the opinion of the court, the accommodation fulfils the relevant conditions<sup>15</sup>. The relevant conditions are that the accommodation is reasonably suitable to the needs of the tenant and his family as regards proximity to place of work, and either:

- 2294 (i) similar as regards rental and extent to the accommodation afforded by dwelling houses provided in the neighbourhood by any local housing authority for persons whose needs as regards extent are, in the opinion of the court, similar to those of the tenant and of his family<sup>16</sup>; or
- 2295 (ii) reasonably suitable to the means of the tenant and to the needs of the tenant and his family as regards extent and character<sup>17</sup>, and

that, if any furniture was provided for use under the assured tenancy in question, furniture is provided for use in the accommodation which is either similar to that so provided or is reasonable to the needs of the tenant and his family<sup>18</sup>.

Where the court makes an order for possession of a dwelling house let on an assured tenancy on this Ground or on Ground 6<sup>19</sup>, but not on any other Ground, the landlord must pay to the tenant a sum equal to the reasonable expenses likely to be incurred by the tenant in removing from the dwelling house<sup>20</sup>.

An order for possession on this Ground may not be made to take effect at a time when the dwelling house is let on an assured fixed term tenancy<sup>21</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 9. Cf the Rent Act 1977 s 98(1)(a), (4), Sch 15 Pt IV (as amended); and PARA 947 ante; s 99, Sch 16 Cases I, II (as amended); and PARA 948 ante.

4 For these purposes, 'local housing authority' has the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Housing Act 1988 s 7(3), Sch 2 Pt III para 6.

5 For these purposes, 'district', in relation to a local housing authority, has the same meaning as in the Housing Act 1985 (see PARA 1311 note 4 post): Housing Act 1988 Sch 2 Pt III para 6.

6 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 Housing Act 1988 Sch 2 Pt III para 1. Any document purporting to be a certificate of a local housing authority named therein issued for these purposes and to be signed by the proper officer of that authority must be received in evidence and, unless the contrary is shown, is to be deemed to be such a certificate without further proof: Sch 2 Pt III para 5.

8 For the meaning of 'let' see PARA 1012 note 4 ante.

9 As to the sharing of premises see PARA 1019 et seq ante.

10 For the meaning of 'assured tenancy' see PARA 1018 ante.

11 Ie the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-5 (as amended): see PARAS 1109-1113 ante.

12 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.

13 Ie by the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended): see PARA 1011 et seq ante.

14 Ie an assured tenancy of a kind mentioned in ibid Sch 2 Pt III para 2(a): see head (1) in the text.

15 Ibid Sch 2 Pt III para 2. In its application to an assured agricultural occupancy, Sch 2 Pt III (paras 1-6) has effect as if any reference in Sch 2 Pt III para 2 to an assured tenancy included a reference to an assured agricultural occupancy: s 25(3). For the meaning of 'assured agricultural occupancy' see PARA 1183 post.

16 For these purposes, a certificate of a local housing authority stating (1) the extent of the accommodation afforded by dwelling houses provided by the authority to meet the needs of tenants with families of such number as may be specified in the certificate; and (2) the amount of the rent charged by the authority for dwelling houses affording accommodation of that extent, is conclusive evidence of the facts so stated: ibid Sch 2 Pt III para 3(2). Such a certificate must be received in evidence: see note 7 supra.

17 Accommodation is not deemed to be suitable to the needs of the tenant and his family if the result of their occupation of the accommodation would be that it would be an overcrowded dwelling house for the purposes of the Housing Act 1985 Pt X (ss 324-344) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 443 et seq): Housing Act 1988 Sch 2 Pt III para 4.

18 Ibid Sch 2 Pt III para 3(1). As to the application of Sch 2 Pt III para 3(1) to proceedings for possession under the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended) see PARA 1264 note 3 post.

19 Ie the Housing Act 1988 Sch 2 Pt I, Ground 6 (as amended): see PARA 1114 ante.

20 Ibid s 11(1). As to the determination and recovery of any such sum see s 11(2), (3) (cited in PARA 1114 note 17 ante).

21 See ibid s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

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### **1119. Ground 10: arrears of rent.**

The court<sup>1</sup> may make an order for possession where some rent lawfully due<sup>2</sup> from the tenant<sup>3</sup>:

- 2296 (1) is unpaid on the date on which the proceedings for possession are begun;  
and  
2297 (2) was in arrears at the date of the service of the notice<sup>4</sup> relating to those proceedings except where the court considers it just and equitable to dispense with the requirement<sup>5</sup> of notice<sup>6</sup>.

An order for possession may be made on this Ground to take effect at a time when the dwelling house<sup>7</sup> is let<sup>8</sup> on an assured fixed term tenancy<sup>9</sup> but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>10</sup>.

Where the proceedings are brought by a social landlord<sup>11</sup> and are based solely on this ground, then if the tenant unreasonably fails to comply with the terms of the relevant pre-action protocol<sup>12</sup> the court may take such failure into account when considering whether it is reasonable to make a possession order and the landlord may be liable to sanctions if it unreasonably fails to comply with the terms of the protocol<sup>13</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'lawfully due' see PARA 1116 note 3 ante. See also *Riverside Housing Association Ltd v White* [2005] EWCA Civ 1385, [2006] 1 EGLR 45, [2005] All ER (D) 79 (Dec) (arrears of rent not lawfully due where landlords had not duly implemented the contractual procedures for rent increases).

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 Ie under the Housing Act 1988 s 8 (as amended): see PARA 1103 ante.

5 Ie where ibid s 8(1)(b) applies: see PARA 1103 ante. Cf Sch 2 Pt I, Ground 8 (as amended) (serious arrears of rent) where the requirement of notice cannot be dispensed with: see PARA 1116 ante. See also the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 4(2A) (as added) (cited in PARA 1116 note 3 ante).

6 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 10. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1; and PARA 949 ante.

7 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

8 For the meaning of 'let' see PARA 1012 note 4 ante.

9 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

10 See the Housing Act 1988 s 7(6); and PARA 1101 ante. As to the application of Sch 2 Pt II, Ground 10 to tenancies under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) see PARA 1251 note 4 post.

11 Ie a local authority, a registered social landlord or a housing action trust: see PARA 657 ante.

12 Ie the *Pre-action Protocol for Possession Claims based on Rent Arrears*: see PARA 657 ante.

13 See PARA 657 ante.

## UPDATE

### 1119 Ground 10: arrears of rent

NOTE 2--*Riverside*, cited, reversed: [2007] UKHL 20, [2007] 4 All ER 97.

PARAS 1386-2000)/18. ASSURED AND ASSURED SHORTHOLD TENANCIES/(10) RECOVERY OF POSSESSION/(iv) Discretionary Grounds for Possession/1120. Ground 11: persistent delay in paying rent.

### **1120. Ground 11: persistent delay in paying rent.**

The court<sup>1</sup> may make an order for possession, whether or not any rent is in arrears on the date on which proceedings for possession are begun, if the tenant<sup>2</sup> has persistently delayed paying rent which has become lawfully due<sup>3</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house<sup>4</sup> is let<sup>5</sup> on an assured fixed term tenancy<sup>6</sup>, but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>7</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 11. For the meaning of 'lawfully due' see PARA 1116 note 3 ante; and see *Drew-Morgan v Hamid-Zadeh* (1999) 32 HLR 316, [1999] 2 EGLR 13, CA. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1; and PARA 949 ante. See also the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 s 4(2A) (as added) (cited in PARA 1116 note 3 ante).

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 For the meaning of 'let' see PARA 1012 note 4 ante.

6 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

7 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

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### **1121. Ground 12: breach of obligation.**

The court<sup>1</sup> may make an order for possession where any obligation of the tenancy<sup>2</sup>, other than one related to the payment of rent, has been broken or not performed<sup>3</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house<sup>4</sup> is let<sup>5</sup> on an assured fixed term tenancy<sup>6</sup>, but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>7</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

3 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 12. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1; and PARA 949 ante. This provision is modified by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 in respect of a serviceman's rented family residence: see PARA 1081 ante.

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 For the meaning of 'let' see PARA 1012 note 4 ante.

6 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

7 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

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### **1122. Ground 13: deterioration of premises.**

The court<sup>1</sup> may make an order for possession where the condition of the dwelling house<sup>2</sup> or any of the common parts<sup>3</sup> has deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any other person residing in the dwelling house, and, in the case of an act of waste by, or the neglect or default of, a person lodging with the tenant or a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant<sup>4</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house is let<sup>5</sup> on an assured fixed term tenancy<sup>6</sup>, but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>7</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For these purposes, 'common parts' means any part of a building comprising the dwelling house and any other premises which the tenant is entitled under the terms of the tenancy to use in common with the occupiers of other dwelling houses in which the landlord has an estate or interest: Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 13. For the meaning of 'tenant' see PARA 1018 note 6 ante; for the meaning of 'tenancy' see PARA 1012 note 1 ante; and for the meaning of 'landlord' see PARA 1020 note 3 ante.

4 Ibid Sch 2 Pt II, Ground 13. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I Case 3; and PARA 951 ante.

5 For the meaning of 'let' see PARA 1012 note 4 ante.

6 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

7 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

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### **1123. Ground 14: nuisance or annoyance or immoral or illegal use.**

The court<sup>1</sup> may make an order for possession where the tenant<sup>2</sup> or a person residing in or visiting the dwelling house<sup>3</sup>:

- 2298 (1) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality; or
- 2299 (2) has been convicted of:
- 52
63. (a) using the dwelling house or allowing it to be used for immoral or illegal purposes; or
64. (b) an indictable offence committed in, or in the locality of, the dwelling house<sup>4</sup>.
- 53

An order for possession on this Ground may be made to take effect at a time when the dwelling house is let<sup>5</sup> on an assured fixed term tenancy<sup>6</sup>, but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>7</sup>.

If the court is considering<sup>8</sup> whether it is reasonable to make an order for possession on this Ground it must consider, in particular:

- 2300 (i) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought;
- 2301 (ii) any continuing effect the nuisance or annoyance is likely to have on such persons;
- 2302 (iii) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated<sup>9</sup>.

The court's discretion to postpone proceedings for possession on this Ground<sup>10</sup> ought not to be exercised where there is no evidence that the behaviour of the person causing nuisance or annoyance is likely to improve during the proposed period of postponement<sup>11</sup>.

The Court of Appeal has drawn attention to guidance issued by the Housing Corporation<sup>12</sup> stating that where the behaviour of a tenant's children is at the root of trouble on a housing estate the registered social landlord should be alert to intervene creatively at an early stage in order to do everything possible to avert recourse to eviction<sup>13</sup>.

Where the tenant's behaviour results from a mental illness or disability, the Disability Discrimination Act 1995 does not bar the making of a possession order under Ground 14 but such an order may only be made if justified under the specific circumstances<sup>14</sup> set out in that Act<sup>15</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

4 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 14 (substituted by the Housing Act 1996 s 148; amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 Pt 3 para 46). Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 2; and PARA 950 ante. As to nuisance or annoyance see PARA 500 ante; and as to use for immoral or illegal purposes see PARAS 19, 500 ante. For examples of the exercise of this power see *West Kent Housing Association Ltd v Davies* (1998) 31 HLR 415, [1998] EGCS 103, CA (tenant failing to prevent his son's racially abusive behaviour of which he had no knowledge); *New Charter Housing (North) Ltd v Ashcroft* [2004] EWCA Civ 310, 148 Sol Jo LB 352, [2004] All ER (D) 153 (Mar). See also *Pollards Hill Housing Association Ltd v Marsh* [2002] EWCA Civ 199, [2002] HLR 662, [2002] All ER (D) 61 (Feb) (relevant clause of tenant's lease read, under the heading 'Grounds for Possession': 'You or anyone living in or visiting the premises have been guilty of conduct causing or likely to cause a nuisance or annoyance to others living, visiting or carrying out a lawful activity in the locality, or you have been convicted of using the premises for immoral or illegal purposes or of an arrestable offence carried out at or in the locality of the premises (Ground 14)'; this had the effect of restricting the right to apply for possession under head (2) in the text to acts committed by the tenant alone). Cf *North*

*British Housing Association v Sheridan* (1999) 32 HLR 346, [1999] All ER (D) 922 (Ground (vi) of the tenancy agreement provided as a ground for the landlord obtaining an order for possession 'The tenant or anyone living in the premises has caused serious or persistent nuisance or annoyance to neighbours ... (Ground 14)'. That wording corresponded closely to the original statutory wording but not to the statute as subsequently amended; held that since the parties intended that the agreement should create an assured tenancy terminable on grounds which were clearly intended to mirror the grounds on which by statute an assured tenancy could be terminated, the fact that those grounds might be altered had to be taken to be in the contemplation of the parties at the time the agreement was made so that neither party was disentitled from relying on the amended provisions).

As to the relationship between this power and the power to apply for, and enforce, an anti-social behaviour order ('ASBO') see *Knowsley Housing Trust v McMullen* [2006] EWCA Civ 539, (2006) Times, 22 May, [2006] All ER (D) 108 (May) (no reason why the existence of an ASBO against the person responsible for the nuisance should prevent the making of an order for possession, whether outright or suspended, based on the Housing Act 1988 Sch 2 Pt II, Ground 14 (as so substituted and amended), although the existence of an ASBO may be a relevant matter when the court is deciding whether it was reasonable to make an order for possession, and whether to suspend it; the two orders are conceptually quite different and an order for possession will survive the revocation of an ASBO, or the ASBO will survive notwithstanding the execution or the reversal of the order for possession). As to anti-social behaviour orders see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 304 et seq.

5 For the meaning of 'let' see PARA 1012 note 4 ante.

6 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

7 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

8 Ie under *ibid* s 7(4) (as amended): see PARA 1101 ante.

9 *Ibid* s 9A(1), (2) (added by the Anti-social Behaviour Act 2003 s 16(2)). The use of the words 'in particular' does not mean that the court is not bound to take account of all relevant considerations, and the interests of the tenant's family warrant some attention: see *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287 at [157], [2005] 4 All ER 1051, [2005] 3 WLR 691.

10 Ie the discretion under the Housing Act 1988 s 9 (as amended): see PARA 1117 ante.

11 See *New Charter Housing (North) Ltd v Ashcroft* [2004] EWCA Civ 310, 148 Sol Jo LB 352, [2004] All ER (D) 153 (Mar). Cf *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287 at [162]-[163], [2005] 4 All ER 1051, [2005] 3 WLR 691.

12 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

13 See *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287 at [102], [2005] 4 All ER 1051, [2005] 3 WLR 691.

14 Ie in the circumstances set out in the Disability Discrimination Act 1995 s 24 (now as amended): see PARA 50 ante; and DISCRIMINATION vol 13 (2007 Reissue) PARA 599.

15 See eg *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB) at [22]-[24], [2003] HLR 905, [2003] All ER (D) 428 (Mar) per David Steel J. As to the relationship between disability discrimination legislation and housing legislation see further *Manchester City Council v Romano*, *Manchester City Council v Samari* [2004] EWCA Civ 834, [2004] 4 All ER 21, [2005] 1 WLR 2775, cited in PARA 1358 post.

## UPDATE

### 1123 Ground 14: nuisance or annoyance or immoral or illegal use

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 1-4--Head (2)(b) includes offences committed outside the currency of the tenancy: *Raglan Housing Association Ltd v Fairclough* [2007] EWCA Civ 1087, [2008] HLR 351, [2007] 45 EG 163 (CS).



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#### **1124. Ground 14A: domestic violence.**

The court<sup>1</sup> may make an order for possession where the dwelling house<sup>2</sup> was occupied, whether alone or with others, by a married couple, a couple who are civil partners of each other, a couple living together as husband and wife or a couple living together as if they were civil partners and:

- 2303 (1) one or both of the partners is a tenant<sup>3</sup> of the dwelling house;
- 2304 (2) the landlord who is seeking possession is a registered social landlord<sup>4</sup> or a charitable housing trust<sup>5</sup>;
- 2305 (3) one partner has left the dwelling house because of violence or threats of violence by the other towards that partner, or towards a member of the family<sup>6</sup> of that partner who was residing with that partner immediately before the partner left; and
- 2306 (4) the court is satisfied that the partner who has left is unlikely to return<sup>7</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house is let<sup>8</sup> on an assured fixed term tenancy<sup>9</sup>, but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>10</sup>.

There are additional notice requirements where possession is sought on this Ground<sup>11</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1996 Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq): Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 14A (added by the Housing Act 1996 s 149).

5 For these purposes, 'charitable housing trust' means a housing trust, within the meaning of the Housing Associations Act 1985, which is a charity within the meaning of the Charities Act 1993: Housing Act 1988 Sch 2 Pt II, Ground 14A (as added: see note 4 supra).

6 For these purposes, 'member of the family' has the same meaning as in the Housing Act 1996 Pt I (as amended) (see s 62 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 113 note 6): Housing Act 1988 Sch 2 Pt II, Ground 14A (as added: see note 4 supra).

7 Ibid Sch 2 Pt II, Ground 14A (as added (see note 4 supra); amended by the Civil Partnership Act 2004 s 81, Sch 8 para 43(1), (3)). The violence or threats of violence must be the real or effective reason for the partner leaving the property: see *Camden London Borough Council v Mallett* (2001) 33 HLR 204 (Case No 20), CA.

8 For the meaning of 'let' see PARA 1012 note 4 ante.

9 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

10 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

11 See *ibid* s 8A (as added); and PARA 1104 ante.

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### **1125. Ground 15: ill-treatment of furniture.**

The court<sup>1</sup> may make an order for possession where the condition of any furniture provided for use under the tenancy<sup>2</sup> has, in the opinion of the court, deteriorated owing to ill-treatment by the tenant<sup>3</sup> or any other person residing in the dwelling house<sup>4</sup> and, in the case of ill-treatment by a person lodging with the tenant or by a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant<sup>5</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house is let<sup>6</sup> on an assured fixed term tenancy<sup>7</sup> but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>8</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

3 For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 15. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I Case 4; and PARA 952 ante.

6 For the meaning of 'let' see PARA 1012 note 4 ante.

7 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

8 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

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### **1126. Ground 16: letting in consequence of employment.**

The court<sup>1</sup> may make an order for possession where the dwelling house<sup>2</sup> was let<sup>3</sup> to the tenant<sup>4</sup> in consequence of his employment by the landlord<sup>5</sup> seeking possession or a previous landlord under the tenancy and the tenant has ceased to be in that employment<sup>6</sup>.

An order for possession may not be made on this Ground to take effect at a time when the dwelling house is let<sup>7</sup> on an assured fixed term tenancy<sup>8</sup> or on an assured periodic tenancy arising<sup>9</sup> under the Local Government and Housing Act 1989<sup>10</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 For the meaning of 'let' see PARA 1012 note 4 ante.

4 For the meaning of 'tenant' see PARA 1018 note 6 ante.

5 For the meaning of 'landlord' see PARA 1020 note 3 ante.

6 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 16. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 8; and PARA 955 ante. For these purposes, at a time when the landlord is or was the Secretary of State, employment by a health service body as defined in the National Health Service and Community Care Act 1990 s 60(7) (as amended), or by a Local Health Board, is regarded as employment by the Secretary of State: Housing Act 1988 Sch 2 Pt II, Ground 16 proviso (added by the National Health Service and Community Care Act 1990 s 60, Sch 8 para 10; amended by the National Health Service Reform and Health Care Professions Act 2002 s 6(2), Sch 5 para 28). These provisions are modified by the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 in respect of a serviceman's family residence: see PARA 1081 ante. In its application to an assured agricultural occupancy, the Housing Act 1988 Sch 2 Pt II (Grounds 9-16) (as amended) has effect with the omission of Sch 2 Pt II, Ground 16 (as so amended): s 25(2). For the meaning of 'assured agricultural occupancy' see PARA 1183 post.

7 For the meaning of 'let' see PARA 1012 note 4 ante.

8 See the Housing Act 1988 s 7(6); and PARA 1101 ante. For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

9 le under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1254 et seq post.

10 See the Housing Act 1988 s 7(5A) (as added); and PARA 1100 ante.

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### **1127. Ground 17: false statement inducing landlord to grant tenancy.**

The court<sup>1</sup> may make an order for possession where the tenant<sup>2</sup> is the person, or one of the persons, to whom the tenancy<sup>3</sup> was granted and the landlord<sup>4</sup> was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant, or by a person acting at the tenant's instigation<sup>5</sup>.

An order for possession on this Ground may be made to take effect at a time when the dwelling house<sup>6</sup> is let<sup>7</sup> on an assured fixed term tenancy<sup>8</sup> but only if the terms of the tenancy make provision for it to be brought to an end on this Ground<sup>9</sup>.

1 As to the jurisdiction of the court see PARA 1128 post. See also PARA 1117 ante.

2 For the meaning of 'tenant' see PARA 1018 note 6 ante.

3 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

4 For the meaning of 'landlord' see PARA 1020 note 3 ante.

5 Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 17 (added by the Housing Act 1996 s 102).

6 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

7 For the meaning of 'let' see PARA 1012 note 4 ante.

8 For the meaning of 'fixed term tenancy' see PARA 1051 note 3 ante.

9 See the Housing Act 1988 s 7(6); and PARA 1101 ante.

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## **(11) JURISDICTION AND PROCEDURE**

### **(i) County Court Jurisdiction**

#### **1128. Jurisdiction of county courts.**

A county court has jurisdiction to hear and determine any question arising under any provision of the Housing Act 1988 relating to assured tenancies<sup>1</sup> other than a question falling within<sup>2</sup> the jurisdiction of a rent assessment committee<sup>3</sup>. Where any proceedings under any such provision are being taken in a county court, the court has jurisdiction to hear and determine any other proceedings joined with those proceedings, notwithstanding that those other proceedings would otherwise be outside the court's jurisdiction<sup>4</sup>.

A county court has jurisdiction under these provisions whatever the amount involved in the proceedings and whatever the value of any fund or asset connected with the proceedings<sup>5</sup>.

1 Ie any provision of the Housing Act 1988 Pt I Chs I-III (ss 1-26) (as amended): see PARA 1011 et seq ante) and Pt I Ch V (ss 34-39 (as amended): see PARA 1012 et seq ante).

2 Ie by virtue of any such provision as is mentioned in note 1 supra.

3 Housing Act 1988 s 40(1). As to rent assessment committees generally see PARAS 910, 1087-1089 ante.

4 Ibid s 40(3). The special Housing Act jurisdiction is unaffected by the restrictions on interim relief imposed by the County Court Remedies Regulations 1991, SI 1991/1222 (as amended): see reg 3(1), (4)(a). As to the jurisdiction of the county court see further PARAS 980-983 ante; and as to appeals from the county court see PARA 984 ante.

5 High Court and County Courts Jurisdiction Order 1991, SI 1991/724, art 2(1)(o).

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### **(ii) Procedure on Accelerated Possession Claims**

#### **1129. Accelerated possession claim where property is let on an assured shorthold tenancy.**

The general procedure for obtaining possession of residential property has already been set out<sup>1</sup>. Where, however, a claim is brought<sup>2</sup> to recover possession of residential property let

under an assured shorthold tenancy<sup>3</sup> and the conditions listed in heads (1) to (6) below are satisfied, the claimant may use the procedure for accelerated possession claims<sup>4</sup> by bringing a claim in the county court for the district in which the property is situated<sup>5</sup>. The conditions which must be satisfied are that:

- 2307 (1) the tenancy and any agreement for the tenancy were entered into on or after 15 January 1989;
- 2308 (2) the only purpose of the claim is to recover possession of the property and no other claim is made;
- 2309 (3) the tenancy did not immediately follow an assured tenancy<sup>6</sup> which was not an assured shorthold tenancy;
- 2310 (4) the tenancy fulfilled the relevant statutory conditions<sup>7</sup>;
- 2311 (5) the tenancy:
  - 54
  - 65. (a) was the subject of a written agreement;
  - 66. (b) arises by virtue of the statutory provisions relating to security of tenure<sup>8</sup> but follows a tenancy that was the subject of a written agreement; or
  - 67. (c) relates to the same or substantially the same property let to the same tenant and on the same terms (though not necessarily as to rent or duration) as a tenancy which was the subject of a written agreement; and
  - 55
- 2312 (6) a notice stating that possession is required<sup>9</sup> was given to the tenant in writing<sup>10</sup>.

If the tenancy is a demoted assured shorthold tenancy<sup>11</sup>, only the conditions in heads (2) and (6) above need be satisfied<sup>12</sup>.

The claim form must be in the form set out in the relevant practice direction<sup>13</sup> and must contain such information and be accompanied by such documents as are required by that form<sup>14</sup>. All relevant sections of the form must be completed<sup>15</sup>. The court will serve the claim form by first class post or an alternative service which provides for delivery on the next working day<sup>16</sup>.

1 See PARA 656 et seq ante.

2 Ie under the Housing Act 1988 s 21 (as amended): see PARAS 1106-1107 ante.

3 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante.

4 Ie the procedure under CPR Pt 55 s II: see the text and notes 5-16 infra; and PARA 1130 et seq post.

5 See CPR 55.11(1), (2). The claim may not be started online: see *Practice Direction--Possession Claims Online* PD 55B para 5.1(1).

6 For the meaning of 'assured tenancy' see PARA 1018 ante.

7 Ie the conditions provided by the Housing Act 1988 s 19A (as added) (see PARA 1044 ante) or s 20(1)(a)-(c) (as substituted) (see PARA 1051 ante).

8 Ie arises by virtue of ibid s 5 (as amended): see PARA 1065 et seq ante.

9 Ie a notice in accordance with ibid s 21(1) (as amended) or s 21(4) (as amended): see PARAS 1106-1107 ante.

10 CPR 55.12(1).

11 For these purposes, a 'demoted assured shorthold tenancy' means a demoted tenancy where the landlord is a registered social landlord: CPR 55.11(3). As to demoted assured shorthold tenancies see PARA 1050 ante.

12 CPR 55.12(2).

- 13 CPR 55.13(1)(a). See *Practice Direction--Forms* PD 4 para 3.1, Table 1 Form N26A.
- 14 CPR 55.13(1)(b).
- 15 CPR 55.13(2).
- 16 CPR 55.13(3).

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**1130. Procedure for opposing accelerated possession claim or seeking postponement of possession.**

A defendant who wishes to oppose the claim for accelerated possession<sup>1</sup> or to seek a postponement of possession<sup>2</sup> must file<sup>3</sup> his defence within 14 days after service of the claim form<sup>4</sup>. The defence should be in the form set out in the relevant practice direction<sup>5</sup>. On receipt of the defence the court will send a copy to the claimant and refer the claim and defence to a judge<sup>6</sup>.

Where the 14-day period for filing a defence<sup>7</sup> has expired without the defendant filing a defence, the claimant may file a written request for an order for possession and the court will refer that request to a judge<sup>8</sup>. Where, however, the defence is received after that 14-day period has expired but before such a request is filed, the court will still send a copy of the defence to the claimant and refer the claim and defence to a judge<sup>9</sup>.

Where the 14-day period referred to above has expired without the defendant filing a defence and the claimant has not made a request for an order for possession<sup>10</sup> within three months after the expiry of that period, the claim will be stayed<sup>11</sup>.

- 1 I.e. the claim under CPR 55.11: see PARA 1129 ante.
- 2 I.e. in accordance with CPR 55.18: see PARA 1132 post.
- 3 For the meaning of 'filing' see PARA 660 note 20 ante.
- 4 CPR 55.14(1).
- 5 CPR 55.14(2). See *Practice Direction--Forms* PD 4 para 3.1, Table 1 Form N11B.
- 6 CPR 55.15(1).
- 7 I.e. the period set out in CPR 55.14: see the text and notes 1-4 supra.
- 8 CPR 55.15(2).
- 9 See CPR 55.15(3).
- 10 I.e. under CPR 55.15(2): see the text and notes 7-8 supra.
- 11 CPR 55.15(4).

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### **1131. Judge's powers after considering claim and defence.**

After considering the claim for accelerated possession<sup>1</sup> and any defence<sup>2</sup>, the judge will:

- 2313 (1) make an order for possession<sup>3</sup>; or
- 2314 (2) where he is not satisfied as to any of the following matters:  
56
  - 68. (a) that the claim form was served<sup>4</sup>; and
  - 69. (b) that the claimant has established that he is entitled to recover possession<sup>5</sup> against the defendant,  
57
- 2315 direct that a date be fixed for a hearing and give any appropriate case management directions<sup>6</sup>; or
- 2316 (3) strike out the claim if the claim form discloses no reasonable grounds for bringing the claim<sup>7</sup>.

The court will give all parties not less than 14 days' notice of a hearing fixed under head (2) above<sup>8</sup>.

Where a claim is struck out under head (3) above the court will serve its reasons for striking out the claim with the order and the claimant may apply to restore the claim within 28 days after the date the order was served on him<sup>9</sup>.

1    Ie the claim under CPR 55.11: see PARA 1129 ante.

2    As to filing a defence see PARA 1130 ante.

3    Ie under CPR 55.17: CPR 55.15(1)(a). Except where CPR 55.16(1)(b) or (c) applies (see heads (2)-(3) in the text), the judge will make an order for possession without requiring the attendance of the parties: CPR 55.17.

4    As to service of the claim form see PARA 1129 ante.

5    Ie under the Housing Act 1988 s 21 (as amended): see PARAS 1106-1107 ante.

6    CPR 55.16(1)(b), (2). As to case management see generally CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq.

7    CPR 55.16(1)(c). As to striking out a claim see generally CIVIL PROCEDURE vol 11 (2009) PARA 520 et seq.

8    CPR 55.16(3).

9    CPR 55.16(4).

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### **1132. Postponement of possession.**

Where the defendant to a claim for accelerated possession<sup>1</sup> seeks postponement of possession on the ground of exceptional hardship<sup>2</sup> the judge may direct a hearing of that issue<sup>3</sup>. If, however, the judge is satisfied as to the specified matters<sup>4</sup> he will make an order for possession<sup>5</sup> whether or not the defendant seeks a postponement of possession on the ground of exceptional hardship<sup>6</sup>.

In a claim in which the judge is satisfied that the defendant has shown exceptional hardship, he will only postpone possession without directing a hearing if:

- 2317 (1) he considers that possession should be given up six weeks after the date of the order or, if the defendant has requested postponement to an earlier date, on that date; and
- 2318 (2) the claimant indicated on his claim form that he would be content for the court to make such an order without a hearing<sup>7</sup>.

In all other cases if the defendant seeks a postponement of possession on the ground of exceptional hardship, the judge will direct a hearing<sup>8</sup>.

Where the judge directs a hearing, the hearing must be held before the date on which possession is to be given up and the judge will direct how many days' notice the parties must be given of that hearing<sup>9</sup>.

Where the judge is satisfied, on a hearing so directed, that exceptional hardship would be caused by requiring possession to be given up by the date in the order of possession, he may vary the date on which possession must be given up<sup>10</sup> so that possession is to be given up at a later date; but that later date may be no later than six weeks after the making of the order for possession on the papers<sup>11</sup>.

1    le a claim under CPR 55.11: see PARA 1129 ante.

2    le under the Housing Act 1980 s 89: see PARA 665 ante.

3    CPR 55.18(1).

4    le the matters set out in CPR 55.16(2): see PARA 1131 ante at head (2)(a)-(b) in the text.

5    le in accordance with CPR 55.17: see PARA 1131 note 3 ante.

6    *Practice Direction--Possession Claims* PD 55 para 8.1.

7    *Practice Direction--Possession Claims* PD 55 para 8.2.

8    *Practice Direction--Possession Claims* PD 55 para 8.3.

9    CPR 55.18(2).

10   CPR 55.18(3).

11   *Practice Direction--Possession Claims* PD 55 para 8.4.



### **1133. Application to set aside or vary accelerated possession order.**

The court may set aside or vary any order for possession made in a claim for accelerated possession<sup>1</sup> either on application by a party within 14 days of service of the order or of its own initiative<sup>2</sup>.

1    le any order made under CPR 55.17: see PARA 1131 note 3 ante.

2    CPR 55.19.

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## **19. AGRICULTURAL HOUSES**

### **(1) PROTECTED OCCUPANCIES AND STATUTORY TENANCIES**

#### **(i) In general**

#### **1134. In general.**

The Rent (Agriculture) Act 1976:

2319 (1) gives security of tenure to agricultural workers housed by their employers who are not entitled to the benefit of the Rent Act 1977 because they are mere licensees or because they pay a low rent or no rent<sup>1</sup>;

2320 (2) lays down the rent payable<sup>2</sup> by, and the conditions of tenure<sup>3</sup> of, such persons, and provides for one succession to their secure status<sup>4</sup>;

2321 (3) imposes duties upon housing authorities to rehouse occupiers of dwelling houses which are needed to house agricultural workers in the interests of efficient agriculture<sup>5</sup>; and

2322 (4) provides for the establishment of committees to inquire into the matters relevant to those duties<sup>6</sup>.

The 1976 Act was brought into force generally on 1 January 1977<sup>7</sup>, but in relation to forestry workers it was not brought into force until 1 October 1977<sup>8</sup>. The date of commencement in either case is known as the 'operative date'<sup>9</sup>. The Act broadly follows the scheme of the Rent Acts but contains a number of significantly different provisions<sup>10</sup> and stands as a separate statutory scheme<sup>11</sup>. It contains transitional provisions which require it to be assumed, for the purpose of determining whether a person is a protected occupier, that the Act and the provisions applied by it were in force at all material time before the relevant operative date<sup>12</sup>.

The Rent (Agriculture) Act 1976 has diminishing significance, however, as agreements coming into effect on and after 15 January 1989 under the Housing Act 1988 which fulfill the agricultural worker condition<sup>13</sup> will be for assured agricultural occupancies<sup>14</sup> or, if created on or after 28 February 1997<sup>15</sup> and not falling within the statutory exclusions<sup>16</sup>, for assured shorthold tenancies<sup>17</sup>.

1 As to the persons entitled to protection see PARAS 1137-1138, 1141 et seq post.

2 See PARA 1156 et seq post.

3 See PARA 1150 et seq post.

4 See PARA 1145 post.

5 See PARAS 1187-1188 post.

6 See PARA 1189 post.

7 See the Rent (Agriculture) Act 1976 s 1(6); and the Rent (Agriculture) Act 1976 (Commencement No 1) Order 1976, SI 1976/2124. The Secretary of State may by order direct that any of the provisions of the Rent (Agriculture) Act 1976 shall, in their application to the Isles of Scilly, have effect subject to such exceptions, adaptations and modifications as may be specified in the order: s 35(1). Any such order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament and may be varied or revoked by a subsequent order so made: s 35(2). These powers are described as exercisable by the Secretary of State and the Minister of Agriculture, Fisheries and Food acting jointly; but see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794. At the date at which this title states the law, no such order had been made. As to the Secretary of State see PARA 27 note 3 ante.

Subject to the Rent (Agriculture) Act 1976 s 5(1) (as substituted) (see PARA 1147 post), the 1976 Act applies in relation to premises in which there subsists, or at any material time subsisted, a Crown interest as it applies to premises in which no such interest subsists or ever subsisted: s 36(1). For these purposes, 'Crown interest' means any interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall or to a government department, or which is held in trust for Her Majesty for the purposes of a government department: s 36(2). Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, or to the Duchy of Cornwall, then, for the purposes of the Rent (Agriculture) Act 1976, the Chancellor of the Duchy of Lancaster or, as the case may be, the Secretary of the Duchy of Cornwall is deemed to be the owner of the interest: Housing Act 1980 s 73(5), Sch 8 paras 9, 10.

8 See the Rent (Agriculture) Act 1976 s 1(7), Sch 3 para 8; and the Rent (Agriculture) Act 1976 (Commencement No 2) Order 1977, SI 1977/1268. For transitional provisions consequent upon the coming into operation of the Housing Act 1980 s 73 (as amended) (Crown property: see PARA 883 ante) see s 73(5), Sch 8 paras 5-8.

9 Rent (Agriculture) Act 1976 s 1(3), (6), Sch 1.

10 The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may make regulations prescribing the form of any notice or other document to be given or used in pursuance of *ibid* Pt II (ss 6-19) (as amended) (see PARAS 1150, 1158 et seq post); and any such regulations made by the Secretary of State must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: see s 18(1), (2). At the date at which this title states the law, no such regulations had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions of the Secretary of State under the 1976 Act so far as exercisable in relation to Wales see PARA 27 note 4 ante.

11 *Durman v Bell* (1988) 20 HLR 340, [1988] 2 EGLR 117, CA.

12 See the Rent (Agriculture) Act 1976 s 40(3), Sch 9 paras 2, 3. As to the interpretation of those provisions see *Skinner v Cooper* [1979] 2 All ER 836, [1979] 1 WLR 666, CA.

13 As to the agricultural worker condition see PARA 1184 post.

14 As to assured agricultural occupancies see PARAS 1183-1186 post.

15 As to the significance of this date see PARA 1044 ante.

16 *Ie* not falling within the Housing Act 1988 s 19A, Sch 2A para 9(2) or (4) (as added): see PARA 1047 ante.

17 See PARA 1044 et seq ante, PARA 1193 post.

PARAS 1386-2000)/19. AGRICULTURAL HOUSES/(1) PROTECTED OCCUPANCIES AND STATUTORY TENANCIES/(i) In general/1135. Restriction on new agricultural occupancies.

### **1135. Restriction on new agricultural occupancies.**

A licence or tenancy<sup>1</sup> which is entered into on or after 15 January 1989<sup>2</sup> cannot be a relevant licence<sup>3</sup> or relevant tenancy<sup>4</sup> unless:

- 2323 (1) it is entered into in pursuance of a contract made before 15 January 1989; or
- 2324 (2) it is granted to a person, alone or jointly with others, who, immediately before the licence or tenancy was granted, was a protected occupier<sup>5</sup> or statutory tenant<sup>6</sup> and is so granted by the person who at that time was the landlord or licensor, or one of the joint landlords or licensors, under the protected occupancy or statutory tenancy in question<sup>7</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 I.e. the commencement date of the Housing Act 1988: see s 141(3).

3 For the meaning of 'relevant licence' see PARA 1141 post.

4 For the meaning of 'relevant tenancy' see PARA 1141 post.

5 I.e. within the meaning of the Rent (Agriculture) Act 1976: see PARAS 1144-1145 post.

6 I.e. within the meaning of the Rent (Agriculture) Act 1976: see PARAS 1146-1149 post.

7 Housing Act 1988 s 34(4).

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### **1136. Meaning of 'agriculture' and 'forestry'.**

'Agriculture' includes:

- 2325 (1) dairy-farming and livestock<sup>1</sup> keeping and breeding, whether those activities involve the use of land or not;
- 2326 (2) the production of any consumable produce<sup>2</sup> which is grown for sale or for consumption or other use for the purposes of a trade or business or of any other undertaking, whether carried on for profit or not;
- 2327 (3) the use of land as grazing, meadow or pasture land or orchard or osier land;
- 2328 (4) the use of land for market gardens or nursery grounds; and
- 2329 (5) forestry<sup>3</sup>.

'Forestry' includes:

- 2330 (a) the use of land for nursery grounds for trees; and

2331 (b) the use of land for woodlands where that use is ancillary to the use of land for other agricultural purposes<sup>4</sup>.

1 For these purposes, 'livestock' includes any animal which is kept for the production of food, wool, skin or fur, or for the purpose of its use in the carrying on of any agricultural activity, and 'animal' includes bird but does not include fish: Rent (Agriculture) Act 1976 s 1(2). It has been held that pheasants reared primarily for sport are not livestock and, therefore, the gamekeeper employed to rear them was not entitled to security of tenure: *Reeve v Atterby* [1978] CLY 73; *Lord Glendyne v Rapley* [1978] 2 All ER 110, [1978] 1 WLR 601, CA, approved in *Earl of Normanton v Giles* [1980] 1 All ER 106, [1980] 1 WLR 28, HL. A person employed to repair and maintain farm machinery is, however, employed in agriculture: see *McPhail v Greensmith* [1993] 2 EGLR 228, CA.

2 For these purposes, 'consumable produce' means produce grown for consumption or other use after severance or separation from the land or other growing medium on or in which it is grown: Rent (Agriculture) Act 1976 s 1(2).

3 Ibid s 1(1)(a), (3), Sch 1.

4 Ibid s 1(1)(b), (3), Sch 1.

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### **1137. Tenant sharing accommodation with persons other than landlord.**

Where a tenant<sup>1</sup> has the exclusive occupation of any accommodation ('the separate accommodation'), and:

2332 (1) the terms as between the tenant and his landlord<sup>2</sup> on which he holds the separate accommodation include the use of other accommodation ('the shared accommodation') in common with another person or other persons, not being or including the landlord; and

2333 (2) by reason only of the circumstances mentioned in head (1) above, the separate accommodation would not otherwise be a dwelling house subject to a protected occupancy<sup>3</sup> or statutory tenancy<sup>4</sup>,

the separate accommodation is deemed<sup>5</sup> to be a dwelling house subject to a protected occupancy or statutory tenancy, as the case may be<sup>6</sup>.

While the tenant is in possession of the separate accommodation:

2334 (a) whether as a protected occupier<sup>7</sup> or statutory tenant, any term or condition of the contract of tenancy terminating or modifying, or providing for the termination or modification of, his right to the use of any of the shared accommodation which is living accommodation<sup>8</sup> is of no effect<sup>9</sup>;

2335 (b) no order may be made<sup>10</sup> for possession of any of the shared accommodation, whether on the application of the immediate landlord of the tenant or on the application of any person under whom that landlord derives title, unless a like order has been made, or is made at the same time, in respect of the separate accommodation<sup>11</sup>.

On the application of the landlord, the county court may make such order, either terminating the right of the tenant to use the whole or any part of the shared accommodation other than living accommodation, or modifying his right to use the whole or any part of the shared accommodation, whether by varying the persons or increasing the number of persons entitled to the use of that accommodation, or otherwise, as the court thinks just; but no order may be so made so as to effect any termination or modification of the rights of the tenant which could not be effected<sup>12</sup> by or under the terms of the contract of tenancy<sup>13</sup>.

1 For these purposes, unless the context otherwise requires, 'tenant' includes a statutory tenant and also includes a subtenant and any person deriving title under the original tenant or subtenant: Rent (Agriculture) Act 1976 ss 1(3), 34(1), Sch 1. References to tenancies include, unless the context otherwise requires, references to licences and cognate expressions are to be construed accordingly (s 34(2)); and 'tenancy' includes a subtenancy (s 34(1), Sch 1). For the meaning of 'statutory tenant' see PARAS 1146-1149 post.

2 For these purposes, unless the context otherwise requires, 'landlord' includes any person from time to time deriving title under the original landlord and also includes, in relation to any dwelling house, any person other than the tenant who is, or but for *ibid* Pt II (ss 6-19) (as amended) (see PARAS 1150, 1158 et seq post) would be, entitled to possession of the dwelling house: s 34(1), Sch 1. A 'dwelling house' may be a house or part of a house: s 34(3), Sch 1.

3 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 post; and for the meaning of 'protected occupancy' see PARAS 1144-1145 post.

4 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 post; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 post.

5 *Ie* subject to the Rent (Agriculture) Act 1976 s 23(2). Section 23(1) does not apply in relation to accommodation which would otherwise be deemed to be a dwelling house subject to a protected occupancy if (1) the accommodation consists of only one room; and (2) at the time when the tenancy was granted not less than three other rooms in the same building were let, or were available for letting, as residential accommodation to separate tenants on such terms as are mentioned in s 23(1)(a) (see head (1) in the text): s 23(2). For the avoidance of doubt, where, for the purpose of determining the rateable value of the separate accommodation, it is necessary to make an apportionment under the Rent (Agriculture) Act 1976, regard is to be had to the circumstances mentioned in s 23(1)(a): s 23(3). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

6 *Ibid* s 23(1). Section 23(3)-(8) (see the text and notes 7-13 *infra*) accordingly has effect: s 23(1).

7 For the meaning of 'protected occupier' see PARAS 1144-1145 post.

8 For these purposes, 'living accommodation' means accommodation of such a nature that the fact that it constitutes or is included in the shared accommodation is, or, if the tenancy has ended, was, otherwise sufficient to prevent the tenancy from constituting a protected occupancy of a dwelling house: Rent (Agriculture) Act 1976 s 23(8).

9 *Ibid* s 23(4). Where, however, the terms and conditions of the contract of tenancy are such that at any time during the tenancy the persons in common with whom the tenant is entitled to the use of the shared accommodation could be varied, or their number could be increased, nothing in s 23(4) prevents those terms and conditions from having effect so far as they relate to any such variation or increase: s 23(5).

10 *Ie* subject to *ibid* s 23(7) (see the text and notes 12-13 *infra*) and without prejudice to the enforcement of any order made thereunder.

11 *Ibid* s 23(6). The provisions of s 6 (see PARA 1166 post) apply accordingly: s 23(6).

12 *Ie* apart from *ibid* s 23(4): see the text and notes 7-9 *supra*.

13 *Ibid* s 23(7).

STATUTORY TENANCIES/(i) In general/1138. Certain sublettings not to exclude any part of sublessor's premises from protection.

**1138. Certain sublettings not to exclude any part of sublessor's premises from protection.**

Where the tenant<sup>1</sup> of any premises, consisting of a house or part of a house, has sublet a part, but not the whole, of the premises, then, as against his landlord<sup>2</sup> or any superior landlord, no part of the premises is treated as not being a dwelling house<sup>3</sup> subject to a protected occupancy<sup>4</sup> or statutory tenancy<sup>5</sup> by reason only that:

- 2336 (1) the terms on which any person claiming under the tenant holds any part of the premises include the use of accommodation in common with other persons; or  
 2337 (2) part of the premises is let to any such person at a rent which includes payments in respect of board and attendance<sup>6</sup>.

Nothing in the above provisions affects the rights against, and liabilities to, each other of the tenant and any person claiming under him, or of any two such persons<sup>7</sup>.

1 For the meaning of 'tenant' see PARA 1137 note 1 ante.

2 For the meaning of 'landlord' see PARA 1137 note 2 ante.

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 post.

5 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 post; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 post.

6 Rent (Agriculture) Act 1976 s 24(1). For the meaning of 'board' and 'attendance' see PARA 871 ante. See also PARA 1141 note 8 post.

7 Ibid s 24(2).

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**1139. Service of notices on landlord's agents.**

A document is deemed<sup>1</sup> to be duly served on the landlord<sup>2</sup> of a dwelling house<sup>3</sup> if it is served:

- 2338 (1) on any agent of the landlord named as such in the rent book or other similar document; or  
 2339 (2) on the person who receives the rent of the dwelling house<sup>4</sup>.

If for the purpose of any proceedings<sup>5</sup>, whether civil or criminal, any person serves upon any such agent or other person as is referred to in head (1) or head (2) above a notice in writing requiring the agent or other person to disclose to him the full name and place of abode or place of business of the landlord, that agent or other person must forthwith comply with the notice<sup>6</sup>. If, however, any such agent or other person fails or refuses forthwith to comply with a notice so

served on him, he is liable on summary conviction to a fine not exceeding level 4 on the standard scale unless he shows to the satisfaction of the court that he did not know, and could not with reasonable diligence have ascertained, such of the facts required by the notice to be disclosed as were not disclosed by him<sup>7</sup>.

1 le for the purposes of any proceedings arising out of the Rent (Agriculture) Act 1976 Pt I (ss 1-5) (as amended) (see PARAS 1134, 1136 ante, PARAS 1144-1149 post) or Pt II (ss 6-19) (as amended) (see PARAS 1150, 1158 et seq post).

2 For the meaning of 'landlord' see PARA 1137 note 2 ante.

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 Rent (Agriculture) Act 1976 s 25(1). As to the obligation to provide a rent book and the information to be contained in it see PARAS 253-255 ante.

5 See note 1 supra.

6 Rent (Agriculture) Act 1976 s 25(2).

7 Ibid s 25(3) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 52 note 6 ante.

Where an offence under the Rent (Agriculture) Act 1976 which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly: s 37(1). Where the affairs of a body corporate are managed by its members s 37(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 37(2).

Without prejudice to the Local Government Act 1972 s 222 (as amended) (power of local authorities to prosecute or defend legal proceedings: see LOCAL GOVERNMENT vol 69 (2009) PARA 573), proceedings for an offence under any provision of the Rent (Agriculture) Act 1976, except s 31(6) (as amended) (see PARA 1191 post), may be instituted by the housing authority concerned: s 38. 'The housing authority concerned' is the local housing authority within the meaning of the Housing Act 1985 (see PARA 1311 note 4 post): Rent (Agriculture) Act 1976 ss 1(3), 27(3), Sch 1 (s 27(3) substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (3)).

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#### **1140. Jurisdiction and procedure.**

A county court has jurisdiction to determine:

- 2340 (1) whether any person is or is not a protected occupier<sup>1</sup> or a statutory tenant<sup>2</sup>;  
or
- 2341 (2) any question concerning the subject matter, terms or conditions of a statutory tenancy<sup>3</sup>,

or any matter which is or may become material for determining a question under head (1) or head (2) above<sup>4</sup>.

The jurisdiction so conferred is exercisable either in the course of any proceedings relating to the dwelling house<sup>5</sup>, or on an application made for the purpose by the landlord<sup>6</sup> or tenant<sup>7</sup>.

A county court has jurisdiction to deal with any claim or other proceedings<sup>8</sup> notwithstanding that the case would not otherwise be within the jurisdiction of a county court<sup>9</sup>.

1 For the meaning of 'protected occupier' see PARAS 1144-1145 post.

2 For the meaning of 'statutory tenant' see PARAS 1146-1149 post.

3 For the meaning of 'statutory tenancy' see PARAS 1146-1149 post.

4 Rent (Agriculture) Act 1976 s 26(1).

5 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

6 For the meaning of 'landlord' see PARA 1137 note 2 ante.

7 Rent (Agriculture) Act 1976 s 26(4). For the meaning of 'tenant' see PARA 1137 note 1 ante.

8 In any claim or other proceedings arising out of *ibid* Pt I (ss 1-5) (as amended) (see PARAS 1134, 1136 ante, PARAS 1144-1149 post) or Pt II (ss 6-19) (as amended) (see PARAS 1150, 1158 et seq post), except Sch 4 Pt II (Cases XI-XIII) (as amended) (see PARAS 1180-1182 post).

9 *Ibid* s 26(2). There may be a costs sanction if a person brings proceedings in the High Court: see s 26(3) (prospectively repealed by the Courts and Legal Services Act 1990 s 125(7), Sch 20, as from a day to be appointed; at the date at which this title states the law, that repeal was not in force).

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## **(ii) Protected Occupancies**

### **1141. Meaning of 'relevant licence' and 'relevant tenancy'; qualifying ownership.**

Unless the context otherwise requires, 'licence' means<sup>1</sup> any contract whereby, whether or not the contract contains other terms, one person grants to another, whether or not for any consideration, the right to occupy a dwelling house<sup>2</sup> as a residence; and references to the granting of a licence are to be construed accordingly<sup>3</sup>.

'Relevant licence' means<sup>4</sup> any licence under which a person has the exclusive occupation of a dwelling house as a separate dwelling<sup>5</sup> and which:

2342 (1) if it were a tenancy<sup>6</sup>; and

2343 (2) if the provisions of Part I of the Rent Act 1977 relating to exceptions<sup>7</sup> to the definition of 'protected tenancy' were modified<sup>8</sup>,

would be a protected tenancy for the purposes of that Act<sup>9</sup>.

'Relevant tenancy' means<sup>10</sup> any tenancy under which a dwelling house is let as a separate dwelling and which:

2344 (a) is not a protected tenancy for the purposes of the Rent Act 1977; but

2345 (b) would be such a tenancy if the modifications referred to in head (2) above were made<sup>11</sup>,



other than a long residential tenancy<sup>12</sup>, a business tenancy<sup>13</sup>, a tenancy of an agricultural holding<sup>14</sup> and a farm business tenancy<sup>15</sup>.

A dwelling house in relation to which a person ('the occupier') has a licence or tenancy is in qualifying ownership<sup>16</sup> at any time if, at that time, the occupier is employed in agriculture<sup>17</sup> and the occupier's employer<sup>18</sup> either:

- 2346 (i) is the owner<sup>19</sup> of the dwelling house; or
- 2347 (ii) has made arrangements with the owner of the dwelling house for it to be used as housing accommodation for persons employed by him in agriculture<sup>20</sup>.

1 le in the Rent (Agriculture) Act 1976: see PARA 1134 et seq ante, PARA 1142 et seq post.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 Rent (Agriculture) Act 1976 ss 1(3), 34(1), Sch 1.

4 See note 1 supra.

5 For the meaning of 'let as a separate dwelling' cf the Rent Act 1977 s 1; and PARAS 819-823 ante.

6 For the meaning of 'tenancy' see PARA 1137 note 1 ante.

7 As to the exceptions see PARAS 819-827, 855-890 ante. The other provisions of the Rent Act 1977 which are relevant for the purpose of the definitions of 'relevant licence' and 'relevant tenancy' in the Rent (Agriculture) Act 1976 s 1(4), Sch 2 (as amended) and which are therefore also applied by Sch 2 (as amended) include the Rent Act 1977 s 1 (definition of 'protected tenancy': see PARA 818 ante) s 12 (as amended) (no protected tenancy in certain cases where the landlord's interest belongs to a resident landlord: see PARA 875 ante) s 13 (as substituted) (no protected or statutory tenancy where the landlord's interest belongs to the Crown: see PARA 883 ante) ss 14-16 (as amended) (no protected or statutory tenancy where the landlord's interest belongs to a local authority etc: see PARAS 884-888 ante) and s 25 (rateable value and appropriate day: see PARA 859 ante): Rent (Agriculture) Act 1976 Sch 2 para 4 (amended by the Rent Act 1977 s 155(2), Sch 23 para 81).

8 le as mentioned in the Rent (Agriculture) Act 1976 Sch 2 para 3 (substituted by the Rent Act 1977 Sch 23 para 80; amended by the Housing and Planning Act 1986 s 18, Sch 4 paras 2, 11(1)). Those modifications are as follows:

156 (1) the Rent Act 1977 s 5 (as amended) (tenancies at low rents: see PARAS 861-862 ante) and s 10 (as amended) (tenancy of a dwelling house comprised in any agricultural holding etc: see PARA 868 ante) are to be omitted;

157 (2) in s 5A(2)(g) (as added) (exclusion of shared ownership leases: see PARA 863 ante) for the reference to the Rent Act 1977 there is to be substituted a reference to the Rent (Agriculture) Act 1976;

158 (3) for the Rent Act 1977 s 7 (payments for board or attendance: see PARA 869 ante) there must be substituted: '7(1) A tenancy is not a protected tenancy if it is a bona fide term of the tenancy that the landlord provides the tenant with board or attendance. (2) For the avoidance of doubt it is hereby declared that meals provided in the course of a person's employment in agriculture do not constitute board for the purposes of this section; and a term that the landlord provides the tenant with attendance shall not be taken to be a bona fide term for those purposes unless, having regard to its value to the tenant, the attendance is substantial'.

9 Rent (Agriculture) Act 1976 Sch 1, Sch 2 para 1 (amended by the Rent Act 1977 Sch 23 para 78). The grant of a fresh licence to an occupier constitutes a 'relevant licence' despite the termination of the existing licence on cessation of employment: see *Skinner v Cooper* [1979] 2 All ER 836, [1979] 1 WLR 666, CA.

10 See note 1 supra.

11 le would be such a tenancy if the provisions of the Rent Act 1977 mentioned in the Rent (Agriculture) Act 1976 Sch 2 para 1(1)(b) (as substituted) (see head (2) in the text) were modified as mentioned in Sch 2 para 3 (as substituted and amended: see note 8 supra).

12   le a tenancy to which the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) applies.

13   le a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante) applies.

14   le a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 which is a tenancy in relation to which that Act applies: see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

15   Rent (Agriculture) Act 1976 Sch 1, Sch 2 para 2 (amended by the Rent Act 1977 Sch 23 para 79; the Local Government and Housing Act 1989 s 194(1), Sch 11 para 50; and the Agricultural Tenancies Act 1995 s 40, Schedule para 26). For these purposes, 'farm business tenancy' means a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302); Rent (Agriculture) Act 1976 Sch 2 para 2 (as so amended).

16   le for the purposes of the Rent (Agriculture) Act 1976.

17   For the meaning of 'agriculture' see PARA 1136 ante.

18   For these purposes, 'employer', in relation to the occupier, means the person or, as the case may be, one of the persons by whom he is employed in agriculture: Rent (Agriculture) Act 1976 s 1(5)(a), Sch 3 para 3(2).

19   For these purposes, 'owner', in relation to the dwelling house, means the occupier's immediate landlord or, where the occupier is a licensee, the person who would be the occupier's immediate landlord if the licence were a tenancy: *ibid* Sch 3 para 3(2). For the meaning of 'landlord' see PARA 1137 note 2 ante.

20   *Ibid* Sch 3 para 3(1).

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### **1142. Meaning of 'qualifying worker'.**

A person is a qualifying worker<sup>1</sup> at any time if, at that time, he has worked whole-time in agriculture<sup>2</sup>, or has worked in agriculture as a permit worker<sup>3</sup>, for not less than 91 out of the last 104 weeks<sup>4</sup>.

A person works whole-time in agriculture for any week in which:

2348 (1) he is employed to work in agriculture; and

2349 (2) the number of hours for which he works in agriculture, or in activities incidental to agriculture, for the person or persons by whom he is so employed is not less than the standard number of hours<sup>5</sup>.

If in any week a person who is employed in agriculture as a whole-time worker<sup>6</sup> is, for the whole or part of the week:

2350 (a) absent from work in agriculture by reason of his taking a holiday to which he is entitled; or

2351 (b) absent from work in agriculture with the consent of his employer or, where he has two or more employers, with the consent of the employer or employers concerned; or

2352 (c) incapable of whole-time work in agriculture in consequence of an injury or disease, whether a qualifying injury or disease or not<sup>7</sup>,

that week counts as a week of whole-time work in agriculture<sup>8</sup>.

If in any week a person, whether employed in agriculture as a whole-time worker or not, is, for the whole or part of the week, incapable of whole-time work in agriculture in consequence of a qualifying injury or disease, that week counts as a week of whole-time work in agriculture<sup>9</sup>.

If in any week a person who was employed in agriculture as a permit worker<sup>10</sup> was, for the whole or part of the week:

- 2353 (i) absent from work in agriculture by reason of his taking a holiday to which he was entitled; or
- 2354 (ii) absent from work in agriculture with the consent of his employer or, where he had two or more employers, with the consent of the employer or employers concerned; or
- 2355 (iii) incapable of work in agriculture as a permit worker in consequence of an injury or disease, whether a qualifying injury or disease or not<sup>11</sup>, that week counts as a week of work in agriculture as a permit worker<sup>12</sup>.

If in any week a person, whether employed in agriculture as a permit worker or not, was, for the whole or part of the week, incapable of work in agriculture as a permit worker in consequence of a qualifying injury or disease, that week counts as a week of work in agriculture as a permit worker<sup>13</sup>.

1 le for the purposes of the Rent (Agriculture) Act 1976: see PARA 1134 et seq ante, PARA 1143 et seq post.

2 For these purposes, any reference to work in agriculture or in forestry, or to employment in agriculture or forestry, is a reference to such work or such employment in the United Kingdom, including the Channel Islands and the Isle of Man, or in the territory of any other State which is a member of the European Community: *ibid* s 1(5)(c), Sch 3 para 13. 'Employment' means employment under one or more contracts of employment and cognate expressions are to be construed accordingly (Sch 3 para 11(1)); and 'contract of employment' means a contract of employment or apprenticeship, whether express or implied and, if express, whether oral or in writing (Sch 3 para 11(2)). For the meaning of 'agriculture' and 'forestry' see PARA 1136 ante; and for the meaning of 'United Kingdom' generally see PARA 25 note 18 ante.

3 For these purposes, a person worked in agriculture as a permit worker for any week in which he worked in agriculture as an employee for the whole or part of the week and there was in force in relation to him a permit granted under the Agricultural Wages Act 1948 s 5 (repealed) (which provided for the grant of permits exempting an agricultural employer from the requirement to pay an incapacitated worker the full statutory minimum wage set by Agricultural Wages Orders): see the Rent (Agriculture) Act 1976 s 1(5)(a), Sch 3 para 5(1), (2). Every permit so granted or having effect as if so granted and in force immediately before 1 October 2004 ceased to have effect on that date: see the Agricultural Wages (Abolition of Permits to Incapacitated Persons) Regulations 2004, SI 2004/2178, reg 2(2).

4 Rent (Agriculture) Act 1976 s 1(3), Sch 1, Sch 3 para 1.

5 *Ibid* Sch 3 para 4(1), (2). Where a person is employed in agriculture as a whole-time worker, any week in which by agreement with his employer or, where he has two or more employers, by agreement with the employer or employers concerned he works less than the standard number of hours counts as a week of whole-time work in agriculture: Sch 3 para 4(1), (3). For these purposes, 'the standard number of hours' means 35 hours or such other number of hours as may be specified in an order made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister: Sch 3 para 12(1). Such an order must be made by statutory instrument which is, if made by the Secretary of State, subject to annulment in pursuance of a resolution of either House of Parliament: see Sch 3 para 12(2). An order so made may contain transitional and other supplemental and incidental provisions, and may be varied or revoked by a subsequent order so made: Sch 3 para 12(3). The Secretary of State's power is described as exercisable by him and by the Minister of Agriculture, Fisheries and Food acting jointly; but see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794. At the date at which this title states the law, no such order had been made. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

6 For these purposes, a person is employed in agriculture as a whole-time worker if he is employed to work in agriculture by the week, or by any period longer than a week, and the number of hours for which he is

employed to work in agriculture, or in activities incidental to agriculture, in any week is not less than the standard number of hours: Rent (Agriculture) Act 1976 Sch 3 para 6.

7 For these purposes, a person is incapable of whole-time work in agriculture in consequence of a qualifying injury or disease if (1) he is incapable of such work in consequence of (a) an injury or disease prescribed in relation to him, by reason of his employment in agriculture, under the Social Security Contributions and Benefits Act 1992 s 108(2) (see SOCIAL SECURITY AND PENSIONS vol 44(2) (Reissue) PARA 151); or (b) an injury caused by an accident arising out of and in the course of his employment in agriculture; and (2) at the time when he become so incapable, he was employed in agriculture as a whole-time worker: Rent (Agriculture) Act 1976 Sch 1, Sch 3 para 2(1); Social Security (Consequential Provisions) Act 1992 s 2(4).

Where a person has died in consequence of any such injury or disease as is mentioned in the Rent (Agriculture) Act 1976 Sch 3 para 2(1) and, immediately before his death, he was employed in agriculture as a whole-time worker, or as a permit worker, he is regarded as having been, immediately before his death, incapable of whole-time work in agriculture, or work in agriculture as a permit worker, in consequence of a qualifying injury or disease: Sch 3 para 2(3). For the meaning of 'employed in agriculture as a permit worker' see note 10 infra.

8 Ibid Sch 3 para 4(1), (4).

9 Ibid Sch 3 para 4(1), (5).

10 For these purposes, a person was employed in agriculture as a permit worker if he was employed in agriculture and there was in force in relation to him a permit granted under the Agricultural Wages Act 1948 s 5 (repealed): Rent (Agriculture) Act 1976 Sch 3 para 7; and see note 3 supra.

11 For these purposes, a person was incapable of whole-time work in agriculture as a permit worker in consequence of a qualifying injury or disease if (1) he was incapable of such work in consequence of any such injury or disease as is mentioned in ibid Sch 3 para 2(1) (see note 7 head (1) supra); and (2) at the time when he became so incapable, he was employed in agriculture as a permit worker: see Sch 1, Sch 3 para 2(2). See also notes 3, 7 supra.

12 See ibid Sch 3 para 5(1), (3); and note 3 supra.

13 See ibid Sch 3 para 5(1), (4); and note 3 supra.

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### **1143. Forestry workers.**

The question of what is whole-time work in forestry<sup>1</sup>, or what was work in forestry as a permit worker<sup>2</sup>, is to be determined in the same way as what is whole-time work in agriculture<sup>3</sup>, or what was work in agriculture as a permit worker, is determined<sup>4</sup>; and for that purpose all work which is not in forestry must be disregarded<sup>5</sup>.

A person is employed in forestry as a whole-time worker if he is employed to work in forestry by the week, or by any period longer than a week, and the number of hours for which he is employed to work in forestry, or in activities incidental to forestry, in any week is not less than the standard number of hours<sup>6</sup>.

1 For the meaning of 'forestry' see PARA 1136 ante.

2 For these purposes, a person was employed in forestry as a permit worker if he was employed in forestry and there was in force in relation to him a permit granted under the Agricultural Wages Act 1948 s 5 (repealed): Rent (Agriculture) Act 1976 s 1(5)(b), Sch 3 para 10(3). Every permit so granted or having effect as if so granted and in force immediately before 1 October 2004 ceased to have effect on that date: see PARA 1142 note 3 ante. For the meaning of 'employment' see PARA 1142 note 2 ante.

3 For the meaning of 'agriculture' see PARA 1136 ante.

4 See PARA 1142 ante. Whole-time work in forestry, and work in forestry as a permit worker, must be left out of account in determining whether, at a date before the date of operation for forestry workers, a person was a qualifying worker: see the Rent (Agriculture) Act 1976 Sch 3 para 9(1). Employment in forestry as a whole-time worker, or as a permit worker, must be left out of account in determining whether, at a date before the date of operation for forestry workers, a person was incapable of whole-time work in agriculture or work in agriculture as a permit worker, in consequence of a qualifying injury or disease: see Sch 3 para 9(2). The date of operation for forestry workers was 1 October 1977: see s 1(3), (7), Sch 1, Sch 3 para 8; and PARA 1134 ante. For the meaning of 'incapable of whole-time work in agriculture or work in agriculture as a permit worker in consequence of a qualifying injury or disease' see PARA 1142 notes 7, 11 ante.

5 Ibid Sch 3 para 10(1).

6 Ibid Sch 3 para 10(2). For the meaning of 'the standard number of hours' see PARA 1142 note 5 ante.

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#### **1144. Protected occupiers in their own right.**

Where a person has, in relation to a dwelling house<sup>1</sup>, a relevant licence<sup>2</sup> or tenancy<sup>3</sup> and the dwelling house is in qualifying ownership<sup>4</sup>, or has been in qualifying ownership at any time during the subsistence of the licence or tenancy, whether it was at the time a relevant licence or tenancy or not, he is a protected occupier of the dwelling house:

2356 (1) if:

58

70. (a) he is a qualifying worker<sup>5</sup>; or

71. (b) he has been a qualifying worker at any time during the subsistence of the licence or tenancy, whether it was at the time a relevant licence or tenancy or not<sup>6</sup>;

59

2357 (2) if and so long as he is incapable of whole-time work in agriculture, or was incapable of work in agriculture as a permit worker, in consequence of a qualifying injury or disease<sup>7</sup>.

A person who has in relation to a dwelling house a relevant licence or tenancy is a protected occupier of the dwelling house if:

2358 (i) immediately before the licence or tenancy was granted, he was a protected occupier<sup>8</sup> or statutory tenant<sup>9</sup> of the dwelling house in his own right; or

2359 (ii) the licence or tenancy was granted in consideration of his giving up possession of another dwelling house of which he was such an occupier or such a tenant<sup>10</sup>.

1 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

2 For the meaning of 'relevant licence' see PARA 1141 ante.

3 For the meaning of 'relevant tenancy' see PARA 1141 ante; and for the meaning of 'tenancy' see PARA 1137 note 1 ante.

4 For the meaning of 'dwelling house in qualifying ownership' see PARA 1141 ante.

5 For the meaning of 'qualifying worker' see PARA 1142 ante.

6 Rent (Agriculture) Act 1976 ss 1(3), 2(1), Sch 1. A protected occupancy comes to an end by operation of law on the parties impliedly agreeing to a statutory tenancy: *Durman v Bell* (1988) 20 HLR 340, [1988] 2 EGLR 117, CA.

7 See the Rent (Agriculture) Act 1976 s 2(2), Sch 1. For the meaning of 'incapable of whole-time work in agriculture or work in agriculture as a permit worker in consequence of a qualifying injury or disease' see PARA 1142 notes 7, 11 ante; and as to permit workers see also PARA 1142 note 3 ante.

8 For these purposes, 'protected occupier in his own right' means a person who is a protected occupier by virtue of *ibid* s 2(1), (2) or (3): s 2(4), Sch 1.

9 For these purposes, 'statutory tenant in his own right' means a person who is a statutory tenant by virtue of *ibid* s 4(1) (see PARAS 1148-1149 post) and who, immediately before he became such a tenant, was a protected occupier in his own right: s 2(4).

10 *Ibid* s 2(3), Sch 1.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/19. AGRICULTURAL HOUSES/(1) PROTECTED OCCUPANCIES AND STATUTORY TENANCIES/(ii) Protected Occupancies/1145. Protected occupiers by succession.

### **1145. Protected occupiers by succession.**

The following provisions<sup>1</sup> have effect for determining what person, if any, is a protected occupier of a dwelling house<sup>2</sup> after the death of a person ('the original occupier') who, immediately before his death, was a protected occupier of the dwelling house in his own right<sup>3</sup>.

Where the original occupier was a person who died leaving a surviving partner<sup>4</sup> who was residing<sup>5</sup> in the dwelling house immediately before the original occupier's death then, after the original occupier's death, if the surviving partner has, in relation to the dwelling house, a relevant licence<sup>6</sup> or tenancy<sup>7</sup>, the surviving partner is a protected occupier of the dwelling house<sup>8</sup>.

Where:

2360 (1) the original occupier was not a person who died leaving a surviving partner who was residing in the dwelling house immediately before the original occupier's death; but

2361 (2) one or more persons who were members of the original occupier's family<sup>9</sup> were residing with the original occupier at the time of and for the period of six months immediately before the original occupier's death,

then, after the original occupier's death, if that person or, as the case may be, any one of those persons has, in relation to the dwelling house, a relevant licence or tenancy, that person or, as the case may be, such one of the persons having such a licence or tenancy as may be decided by agreement, or in default of agreement by the county court, is a protected occupier of the dwelling house<sup>10</sup>.

A person who has, in relation to a dwelling house, a relevant licence or tenancy is a protected occupier of the dwelling house if:

2362 (a) immediately before the licence or tenancy was granted, he was a protected occupier<sup>11</sup> or statutory tenant<sup>12</sup> of the dwelling house by succession; or

2363 (b) the licence or tenancy was granted in consideration of his giving up possession of another dwelling house of which he was such an occupier or such a tenant<sup>13</sup>.

A dwelling house is referred to<sup>14</sup> as subject to a protected occupancy where there is a protected occupier of it<sup>15</sup>.

1    Ie the Rent (Agriculture) Act 1976 s 3(2) (as substituted) or, as the case may be s 3(3) (as amended): see the text and notes 2-10 infra.

2    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3    Rent (Agriculture) Act 1976 ss 1(3), 3(1), Sch 1. For the meaning of 'protected occupier in his own right' see PARA 1144 note 8 ante.

4    For these purposes, and in ibid s 3(3) (as amended), 'surviving partner' means surviving spouse or surviving civil partner: s 3(3A) (added by the Civil Partnership Act 2004 s 81, Sch 8 para 9(1), (4)). Note that cohabitants are not included: cf the Rent (Agriculture) Act 1976 s 4(5A) (as added); and PARA 1149 note 7 post; the Housing Act 1988 s 24(1)(b), Sch 3 para 3(5) (as substituted); and PARA 1184 note 7 post.

5    As to whether a person is or is not residing with another cf para 843 note 7 ante.

6    For the meaning of 'relevant licence' see PARA 1141 ante.

7    For the meaning of 'relevant tenancy' see PARA 1141 ante.

8    Rent (Agriculture) Act 1976 s 3(2) (substituted by the Civil Partnership Act 2004 Sch 8 para 9(1), (2)).

9    For the meaning of 'member of the original occupier's family' cf para 846 ante.

10   Rent (Agriculture) Act 1976 s 3(3) (amended by the Housing Act 1980 s 76(3); and by the Civil Partnership Act 2004 Sch 8 para 9(1), (3)). Cf para 843 notes 11-12 ante.

11   For these purposes, 'protected occupier by succession' means a person who is a protected occupier by virtue of the Rent (Agriculture) Act 1976 s 3(2) (as substituted), s 3(3) (as amended) or s 3(4): s 3(5), Sch 1.

12   For these purposes, 'statutory tenant by succession' means a person who is a statutory tenant by virtue of ibid s 4(1) (see PARAS 1148-1149 post) and who, immediately before he became such a tenant, was a protected occupier by succession, or a person who is a statutory tenant by virtue of s 4(3) (as substituted) or (4) (as amended) (see PARAS 1148-1149 post): s 3(5), Sch 1.

13   Ibid s 3(4), Sch 1.

14   Ie in the Rent (Agriculture) Act 1976: see PARA 1134 et seq ante, PARA 1146 et seq post.

15   Ibid s 3(6), Sch 1.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/19. AGRICULTURAL HOUSES/(1) PROTECTED OCCUPANCIES AND STATUTORY TENANCIES/(iii) Statutory Tenancies/A. IN GENERAL/1146. In general.

### **(iii) Statutory Tenancies**

#### **A. IN GENERAL**

##### **1146. In general.**

Where a person ceases to be a protected occupier<sup>1</sup> of a dwelling house<sup>2</sup> on the termination, whether by notice to quit or by virtue of a notice of increase<sup>3</sup> or otherwise<sup>4</sup>, of his licence<sup>5</sup> or tenancy<sup>6</sup>, he is, if and so long as he occupies the dwelling house as his residence<sup>7</sup>, the statutory tenant of it<sup>8</sup>.

A dwelling house is referred to<sup>9</sup> as subject to a statutory tenancy where there is a statutory tenant of it<sup>10</sup>.

1 For the meaning of 'protected occupier' see PARAS 1144-1145 ante.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 ie under the Rent (Agriculture) Act 1976 s 16(3): see PARA 1164 post.

4 ie by forfeiture or effluxion of time or by termination of or resignation from his employment where it is an express or implied term of the contract of employment or licence or tenancy that the occupier's right of occupation is to determine in that event: see *Burgoyne v Griffiths & Griffiths* (1990) 23 HLR 303, [1991] 1 EGLR 14, CA, applying *Ivory v Palmer* [1975] ICR 340, CA. A protected occupancy comes to an end by operation of law on the parties impliedly agreeing to a statutory tenancy: *Durman v Bell* (1988) 20 HLR 340, [1988] 2 EGLR 117, CA.

5 For the meaning of 'licence' see PARA 1141 ante.

6 For the meaning of 'tenancy' see PARA 1137 note 1 ante.

7 For these purposes, and for the purposes of the Rent (Agriculture) Act 1976 s 4(3) (as substituted) (see PARAS 1148-1149 post) and s 4(4) (as originally enacted) (see PARA 1148 post), the phrase 'if and so long as he occupies the dwelling house as his residence' is to be construed in accordance with the Rent Act 1977 s 2(3) (see PARAS 831, 833 ante): see the Rent (Agriculture) Act 1976 s 4(5) (amended by the Rent Act 1977 s 155(2), Sch 23 para 72).

8 Rent (Agriculture) Act 1976 ss 1(3), 4(1), Sch 1. Section 4(1) is subject to s 5 (as amended) (see PARA 1147 post): s 4(1).

9 ie in the Rent (Agriculture) Act 1976: see PARA 1134 et seq ante, PARA 1147 et seq post.

10 Ibid s 4(6), Sch 1.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/19. AGRICULTURAL HOUSES/(1) PROTECTED OCCUPANCIES AND STATUTORY TENANCIES/(iii) Statutory Tenancies/A. IN GENERAL/1147. No statutory tenancy where landlord's interest belongs to the Crown or to a local authority etc.

### **1147. No statutory tenancy where landlord's interest belongs to the Crown or to a local authority etc.**

A person is not at any time a statutory tenant<sup>1</sup> of a dwelling house<sup>2</sup> if the interest of his immediate landlord<sup>3</sup> would, at that time:

2364 (1) belong to Her Majesty in right of the Crown or to a government department; or

2365 (2) be held in trust for Her Majesty for the purposes of a government department;



except that an interest belonging to Her Majesty in right of the Crown does not prevent a person from being a statutory tenant if the interest is under the management of the Crown Estate Commissioners<sup>4</sup>.

A person is not at any time a statutory tenant of a dwelling house if the interest of his immediate landlord, would, at that time, belong to any of the following bodies:

- 2366 (a) the council of a county, county borough<sup>5</sup> or district<sup>6</sup>, or the Council of the Isles of Scilly<sup>7</sup>;
- 2367 (b) the council of a London borough<sup>8</sup> or the Common Council of the City of London<sup>9</sup>;
- 2368 (c) a police authority established under the Police Act 1996<sup>10</sup>;
- 2369 (d) a joint authority established by Part IV of the Local Government Act 1985<sup>11</sup>;
- 2370 (e) the London Fire and Emergency Planning Authority<sup>12</sup>;
- 2371 (f) the Broads Authority<sup>13</sup>;
- 2372 (g) any National Park authority<sup>14</sup>;
- 2373 (h) the Commission for the New Towns<sup>15</sup>;
- 2374 (i) the Housing Corporation<sup>16</sup>;
- 2375 (j) a development corporation established by an order made, or having effect as if made, under the New Towns Act 1981<sup>17</sup>; and
- 2376 (k) a housing trust<sup>18</sup> which is<sup>19</sup> a charity<sup>20</sup>.

If any of the conditions for the time being specified in the Rent Act 1977<sup>21</sup> is fulfilled, a person is not a statutory tenant of a dwelling house at any time if the interest of his immediate landlord would, at that time, belong to a housing association<sup>22</sup> which is a registered social landlord<sup>23</sup> or is a co-operative housing association<sup>24</sup>.

1 For the meaning of 'statutory tenant' see PARA 1146 ante, PARAS 1148-1149 post.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 For the meaning of 'landlord' see PARA 1137 note 2 ante.

4 Rent (Agriculture) Act 1976 s 5(1) (substituted by the Housing Act 1980 s 73(3)). As to the application of the Rent (Agriculture) Act 1976 to Crown property see PARA 1134 note 7 ante; and as to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

5 As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq.

6 As to the districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

7 I.e. in the application of the Rent (Agriculture) Act 1976 to the Isles of Scilly: see s 35 (cited in PARA 1134 ante). As to the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

8 As to London boroughs and the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq.

9 See note 8 supra.

10 I.e. established under the Police Act 1996 s 3: see POLICE vol 36(1) (2007 Reissue) PARA 139.

11 I.e. established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

12 As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

13 As to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

14 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

15 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

16 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

17 As to development corporations for new towns see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

18 *le* as defined in the Rent Act 1977 s 15(5) (as substituted): see PARA 887 ante.

19 *le* is a charity within the meaning of the Charities Act 1993: see CHARITIES vol 8 (2010) PARA 1.

20 Rent (Agriculture) Act 1976 s 5(2), (3) (amended by the Rent Act 1977 s 155(2), Sch 23 para 73(a); the New Towns Act 1981 s 81, Sch 12 para 23; the Local Government Act 1985 ss 84, 102(2), Sch 14 para 55, Sch 17; the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 17; the Housing Act 1988 s 140(1), Sch 17 para 98; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Charities Act 1993 s 98(1), Sch 6 para 30; the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 2; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 para 52; the Environment Act 1995 s 78, Sch 10 para 17; the Police Act 1996 s 103, Sch 7 para 1(2)(m); the Government of Wales Act 1998 s 152, Sch 18 Pt VI; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 25; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 3 para 62, Sch 7 Pt 5(1)). A residuary body within the meaning of the Local Government Act 1985 was included among the bodies to which the Rent (Agriculture) Act 1976 s 5(2) applies: Local Government Act 1985 s 57(7), Sch 13 para 14(c).

21 *le* any of the conditions specified in the Rent Act 1977 s 15(4) (repealed).

22 As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

23 *le* a registered social landlord within the meaning of the Housing Act 1985 (see s 5(4), (5) (as substituted and amended); and HOUSING vol 22 (2006 Reissue) PARAS 11, 67.

24 Rent (Agriculture) Act 1976 s 5(4) (amended by the Rent Act 1977 Sch 23 para 73(b); the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (2); and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5(1), Sch 2 para 5). For these purposes, 'co-operative housing association' means a co-operative housing association within the meaning of the Housing Associations Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 11): Rent (Agriculture) Act 1976 s 5(4) (as so amended).

## UPDATE

### **1147 No statutory tenancy where landlord's interest belongs to the Crown or to a local authority etc**

TEXT AND NOTE 20--Rent (Agriculture) Act 1976 s 5(3) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 34; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 45. Rent (Agriculture) Act 1976 s 5(3A) added: Housing and Regeneration Act 2008 Sch 8 para 22.

See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### **1148. Succession to statutory tenancy where relevant death occurred on or before 15 January 1989.**

For the purpose of determining what person, if any, is the statutory tenant<sup>1</sup> of a dwelling house<sup>2</sup> at any time after the death on or before 15 January 1989<sup>3</sup> of a person ('the original occupier') who was, immediately before his death, a protected occupier<sup>4</sup> or statutory tenant<sup>5</sup> of the dwelling house in his own right<sup>6</sup>, if the original occupier was a man who died leaving a widow<sup>7</sup> who was residing<sup>8</sup> in the dwelling house immediately before his death, then, after his death, unless the widow is a protected occupier of the dwelling house<sup>9</sup>, she is the statutory tenant if and so long as she occupies the dwelling house as her residence. This provision is framed by reference to the case where the original occupier was a man, but is to be read as applying equally in the converse case where the original occupier was a woman<sup>10</sup>.

Where:

- 2377 (1) the original occupier was not a person who died leaving a surviving spouse who was residing in the dwelling house immediately before his death; but  
 2378 (2) one or more persons who were members of his family<sup>11</sup> were residing with him at the time of and for the period of six months immediately before his death,

then, after his death, unless that person or, as the case may be, one of those persons is a protected occupier of the dwelling house<sup>12</sup>, that person or, as the case may be, such one of those persons as may be decided by agreement, or in default of agreement by the county court, is the statutory tenant if and so long as he occupies the dwelling house as his residence<sup>13</sup>.

1 For the meaning of 'statutory tenant' see PARAS 1146-1147 ante.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to the position where the death occurs after that date see PARA 1149 post.

4 For the meaning of 'protected occupier in his own right' see PARA 1144 note 8 ante.

5 For the meaning of 'statutory tenant in his own right' see PARA 1144 note 9 ante.

6 Rent (Agriculture) Act 1976 s 4(2) (as originally enacted).

7 'Widow' (or, in the converse case, 'widower') does not include cohabitant for these purposes; cf para 1145 note 4 ante.

8 As to whether a person is or is not residing with another cf para 843 note 7 ante.

9 I.e. by virtue of the Rent (Agriculture) Act 1976 s 3(2) (as amended by the Housing Act 1980 s 76(3)).

10 Rent (Agriculture) Act 1976 s 4(3) (as amended by the Housing Act 1980 s 76(3)). For the meaning of 'if and so long as he occupies the dwelling house as his residence' see PARA 1146 note 7 ante.

11 For the meaning of 'member of the tenant's family' cf para 846 ante.

12 I.e. by virtue of the Rent (Agriculture) Act 1976 s 3(3) (as amended by the Housing Act 1980 s 76(3)): see PARA 1145 ante.

13 Ibid s 4(4) (as amended by the Housing Act 1980 s 76(3)). Cf para 843 notes 11-12 ante.

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### **1149. Succession to statutory tenancy where relevant death occurs after 15 January 1989.**

For the purpose of determining what person, if any, is the statutory tenant<sup>1</sup> of a dwelling house<sup>2</sup> at any time after the death after 15 January 1989<sup>3</sup> of a person ('the original occupier') who was, immediately before his death, a protected occupier<sup>4</sup> or statutory tenant<sup>5</sup> of the dwelling house in his own right<sup>6</sup>, if the original occupier was a person who died leaving a surviving partner<sup>7</sup> who was residing<sup>8</sup> in the dwelling house immediately before the original occupier's death then, after the original occupier's death, unless the surviving partner is a protected occupier of the dwelling house<sup>9</sup>, the surviving partner is the statutory tenant if and so long as he occupies the dwelling house as his residence<sup>10</sup>.

Where:

- 2379 (1) the original occupier was not a person who died leaving a surviving partner who was residing in the dwelling house immediately before the original occupier's death; but
- 2380 (2) one or more persons who were members of the original occupier's family<sup>11</sup> were residing with the original occupier in the dwelling house at the time of and for the period of two years immediately before his death,

then, after the original occupier's death, unless that person or, as the case may be, one of those persons is a protected occupier of the dwelling house<sup>12</sup>, that person or, as the case may be, such one of those persons as may be decided by agreement, or in default of agreement by the county court, is entitled to an assured tenancy of the dwelling house by succession<sup>13</sup>.

1 For the meaning of 'statutory tenant' see PARAS 1146-1147 ante.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 I.e. the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). As to the position where the death occurred before that date see PARA 1148 ante.

4 For the meaning of 'protected occupier in his own right' see PARA 1144 note 8 ante.

5 For the meaning of 'statutory tenant in his own right' see PARA 1144 note 9 ante.

6 Rent (Agriculture) Act 1976 s 4(2) (amended by the Housing Act 1988 ss 39(4), 140(2), Sch 4 para 10, Sch 18).

7 For these purposes 'surviving partner' means surviving spouse or surviving civil partner: Rent (Agriculture) Act 1976 s 4(5ZA) (s 4(5ZA), (5A) substituted by the Civil Partnership Act 2004 s 81, Sch 8 para 10(1), (4)). For the purposes of the Rent (Agriculture) Act 1976 s 4(3) (as substituted: see note 10 infra): (1) a person who was living with the original occupier as his or her husband or wife is to be treated as the spouse of the original occupier; and (2) a person who was living with the original occupier as if they were civil partners is to be treated as the civil partner of the original occupier; and, subject to s 4(5B) (as added) 'surviving spouse' and 'surviving civil partner' in s 4(5ZA) (as so substituted) are to be construed accordingly: s 4(5A) (as so substituted). If, immediately after the death of the original occupier, there is, by virtue of s 4(5A) (as so substituted), more than one person who fulfils the conditions in s 4(3) (as substituted), such one of them as may be decided by agreement or in default of agreement by the county court, is the statutory tenant by virtue of s 4(3) (as substituted): s 4(5B) (s 4(5B), (5C) added by the Housing Act 1988 s 39, Sch 4 para 12). If the original occupier died within the period of 18 months beginning on 15 January 1989, then, for the purposes of the Rent (Agriculture) Act 1976 s 4(3) (now as substituted), a person who was residing in the dwelling house with the original occupier at the time of his death and for the period which began six months before 15 January 1989 and ended at the time of his death is to be taken to have been residing with the original occupier for the period of two years immediately before his death: s 4(5C) (as so added). Cf para 1148 note 7 ante. See also PARA 843 notes 11-12 ante.

8 As to whether a person is or is not residing with another cf para 843 note 7 ante.

9 le by virtue of the Rent (Agriculture) Act 1976 s 3(2) (as substituted): see PARA 1145 ante.

10 Ibid s 4(3) (substituted by the Civil Partnership Act 2004 Sch 8, PARA 10(1), (2)). For the meaning of 'if and so long as he occupies the dwelling house as his residence' see PARA 1146 note 7 ante.

11 For the meaning of 'member of the original occupier's family' cf para 846 ante.

12 le by virtue of the Rent (Agriculture) Act 1976 s 3(3) (as amended): see PARA 1145 ante.

13 Ibid s 4(4) (amended by the Housing Act 1980 s 76(3); the Housing Act 1988 Sch 4 para 11; the Civil Partnership Act 2004 Sch 8 para 10(1), (3)). As to assured tenancies see PARA 1011 et seq ante. In any case where, by virtue of any provision of the Rent (Agriculture) Act 1976 s 4 (as amended), a person ('the successor') becomes entitled to an assured tenancy of a dwelling house by succession, that tenancy is a periodic tenancy: Housing Act 1988 s 39(5)(b). If, immediately before his death, the predecessor was a protected occupier or statutory tenant within the meaning of the Rent (Agriculture) Act 1976, the assured periodic tenancy to which the successor becomes entitled is an assured agricultural occupancy, whether or not it fulfils the conditions in the Housing Act 1988 s 24(1) (see PARA 1183 post): s 39(8). See further PARA 1016 ante.

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## ***B. TERMS OF THE STATUTORY TENANCY***

### **1150. In general.**

So long as he retains possession, the statutory tenant<sup>1</sup> must observe, and is entitled to the benefit of, all the terms<sup>2</sup> of the original contract<sup>3</sup>, whether or not the terms are express or implied or statutory<sup>4</sup>. No account is, however, to be taken of any term of the original contract under which the right of occupation depended, or which itself depended, on the occupier being employed in agriculture<sup>5</sup> or in some other way<sup>6</sup>.

If the original contract was a licence, the statutory tenancy is a weekly tenancy<sup>7</sup> and the terms of the statutory tenancy include any term which would be implied if the contract had been a contract of tenancy<sup>8</sup>.

It is a term of the statutory tenancy that the landlord provides the tenant with any services or facilities:

2381 (1) which the landlord was providing for the occupier before the beginning of the statutory tenancy, though not under the original contract, or which he had provided for the occupier, but was not providing when the original contract terminated; and

2382 (2) which are reasonably necessary for any person occupying the dwelling house<sup>9</sup> as a statutory tenant, but which such a tenant cannot reasonably be expected to provide for himself<sup>10</sup>.

The landlord's statutory obligation to repair<sup>11</sup> applies to the dwelling house so long as it is subject to the statutory tenancy<sup>12</sup>.

1 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

2 For these purposes, 'term', in relation to the statutory tenancy, or in relation to the original contract, includes a condition of the tenancy or contract: Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 1(3). For the meaning of 'tenancy' see PARA 1137 note 1 ante; and for the meaning of 'original contract' see note 3 infra.

3 For these purposes, 'original contract', in relation to a statutory tenancy, means the licence or tenancy on the termination of which the statutory tenancy arose: *ibid* Sch 5 para 1(1). For the meaning of 'licence' see PARA 1141 ante.

4 *Ibid* Sch 5 para 2(1), (2). Schedule 5 para 2(1) applies subject to the provisions of Sch 5 (as amended) (see the text and notes 5-12 infra; and PARA 1151 et seq post) and of Pt II (ss 6-19) (as amended) (see PARA 1158 et seq post): Sch 5 para 2(3).

Schedule 5 para 2 does not, however, impose any liability on the tenant to make payments to the landlord in respect of rates borne by the landlord or a superior landlord (Sch 5 para 11(1)); nor does Sch 5 impose any liability to pay rent (see s 10(2); and PARA 1159 post). For these purposes, 'rates' includes water rates and charges and an occupier's drainage rate: ss 1(3), 34(1), Sch 1. As to the abolition of domestic rates see PARA 521 ante. For the meaning of 'landlord' see PARA 1137 note 2 ante.

5 For the meaning of 'agriculture' see PARA 1136 ante.

6 Rent (Agriculture) Act 1976 Sch 5 para 1(2).

7 *Ibid* Sch 5 para 3.

8 *Ibid* Sch 5 para 4(1). This applies in particular to the landlord's covenant for quiet enjoyment (see PARA 508 et seq ante) and the tenant's obligation to use the premises in a tenantlike manner (see PARA 427 et seq ante), which are implied in any tenancy: Sch 5 para 4(2).

9 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

10 Rent (Agriculture) Act 1976 Sch 5 para 5(1). Schedule 5 para 5 may apply eg where the only convenient electricity or water supplies, or the only convenient sewage disposal facilities, are those provided by the landlord from his own installations: Sch 5 para 5(2). Schedule 5 para 5 does not, however, apply to facilities for access to the dwelling house: Sch 5 para 9(4). As to access see PARA 1152 post.

11 *Ie* the Landlord and Tenant Act 1985 s 11 (as amended): see PARA 416 et seq ante.

12 Rent (Agriculture) Act 1976 Sch 5 para 6(1) (Sch 5 para 6 amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (5)). The Rent (Agriculture) Act 1976 Sch 5 para 6(1) (as so amended) is without prejudice to the operation of Sch 5 para 2 (see the text and notes 1-4 supra) where the original contract was a tenancy to which the Landlord and Tenant Act 1985 s 11 (as amended) applied: Rent (Agriculture) Act 1976 Sch 5 para 6(2) (as so amended).

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### **1151. Tenant's obligations.**

It is a condition of the statutory tenancy<sup>1</sup> that the tenant<sup>2</sup> will not:

2383 (1) use the dwelling house<sup>3</sup>, or any part of it, for purposes other than those of a private dwelling house<sup>4</sup>;

2384 (2) assign, sublet, or part with possession of, the dwelling house, or any part of it<sup>5</sup>.

1 For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

2 For the meaning of 'tenant' see PARA 1137 note 1 ante.

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 7(1). Significant business use of premises which are also used as a residence will not of itself bring the statutory tenancy to an end, although such use is in breach of the terms of the statutory tenancy: *Durman v Bell* (1988) 20 HLR 340, [1988] 2 EGLR 117, CA.

5 Rent (Agriculture) Act 1976 Sch 5 para 7(2). Schedule 5 para 7(2) does not affect anything lawfully done before the beginning of the statutory tenancy: Sch 5 para 7(3).

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### **1152. Access.**

It is a condition of the statutory tenancy<sup>1</sup> that the tenant<sup>2</sup> will afford to the landlord<sup>3</sup> access to the dwelling house<sup>4</sup> and all reasonable facilities for executing therein any repairs which the landlord is entitled to execute<sup>5</sup>.

The landlord must afford any such right of access to the dwelling house as is reasonable in the circumstances<sup>6</sup>; but any right of access<sup>7</sup> is confined<sup>8</sup> to such right of access to the dwelling house as is reasonable in the circumstances, and without regard to any right of access afforded wholly or mainly because the occupier of the dwelling house, or his predecessor, was employed on the land<sup>9</sup>.

If it is reasonably necessary in order to prevent the spread of disease which might otherwise affect livestock or crops, whether on the landlord's land or elsewhere, the landlord may temporarily restrict access to the dwelling house so made available so long as suitable alternative access is available or is made available<sup>10</sup>.

If it is reasonably necessary in the interests of efficient agriculture<sup>11</sup>, the landlord may permanently or temporarily deprive the dwelling house of access so made available so long as suitable alternative access is available or is made available<sup>12</sup>.

1 For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

2 For the meaning of 'tenant' see PARA 1137 note 1 ante.

3 For the meaning of 'landlord' see PARA 1137 note 2 ante.

4 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

5 Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 8.

6 Ibid Sch 5 para 9(1). In applying Sch 5 para 9(1) account must be taken of any right of access to be afforded under Sch 5 para 2 (see PARA 1150 ante) or Sch 5 para 4 (see PARA 1150 ante): Sch 5 para 9(2).

7 Ie any right of access to be afforded under ibid Sch 5 para 2.

8 Ie without prejudice to the definition of 'original contract' in ibid Sch 5 para 1: see PARA 1150 note 3 ante.

9 Ibid Sch 5 para 9(3).

10 Ibid Sch 5 para 9(5).

11 For the meaning of 'agriculture' see PARA 1136 ante.

12 Rent (Agriculture) Act 1976 Sch 5 para 9(6).

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### **1153. Notice to quit served on landlord.**

If the original contract<sup>1</sup>:

- 2385 (1) was not a tenancy<sup>2</sup>; or
- 2386 (2) was a tenancy the provisions of which did not require the tenant<sup>3</sup> to give notice to quit before giving up possession,

the statutory tenant<sup>4</sup> is entitled to give up possession of the dwelling house<sup>5</sup> if, and only if, he gives not less than four weeks' notice to quit<sup>6</sup>.

If the original contract required the tenant to give notice to quit before giving up possession, the statutory tenant is entitled to give up possession of the dwelling house if, and only if, he gives that notice, or, if longer, the notice required<sup>7</sup> by the Protection from Eviction Act 1977<sup>8</sup>.

1 For the meaning of 'original contract' see PARA 1150 note 3 ante.

2 For the meaning of 'tenancy' see PARA 1137 note 1 ante.

3 For the meaning of 'tenant' see PARA 1137 note 1 ante.

4 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

5 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

6 Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 10(1).

7 Ie by the Protection from Eviction Act 1977 s 5 (as amended): see PARA 214 ante.

8 Rent (Agriculture) Act 1976 Sch 5 para 10(2) (amended by the Protection from Eviction Act 1977 s 12, Sch 1 para 4).

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### **1154. Rates, water rates etc.**

The following provisions apply as respects any rental period of the statutory tenancy<sup>1</sup>, including one as respects which an agreement<sup>2</sup> either fixes the rent or provides that no rent is payable<sup>3</sup>.



Where any rates<sup>4</sup> in respect of the dwelling house<sup>5</sup> are borne by the landlord<sup>6</sup> or a superior landlord, the amount of the rates for the rental period<sup>7</sup> is recoverable from the statutory tenant as if it were rent payable under the statutory tenancy<sup>8</sup>; but the tenant's<sup>9</sup> liability does not arise unless notice in writing<sup>10</sup> to that effect is served by the landlord on the tenant, and that notice takes effect from such date as may be specified in the notice, which must not be earlier than four weeks before service of the notice<sup>11</sup>.

If the dwelling house forms part only of a hereditament in respect of which any rates are charged, the proportion for which the statutory tenant is so liable is such as may be agreed by him with the landlord, or as may be determined by the county court; and the decision of the county court is final<sup>12</sup>.

1 For these purposes, 'rental period' means, in relation to a statutory tenancy under which no rent is payable, any period of the statutory tenancy which would be a rental period if a rent were payable under that tenancy; and in the Rent Act 1977 Sch 5 (see PARA 896 ante), as applied by the Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 11(3) (see the text and notes 4-8 infra), any reference to a rental period, or to a rating period during which the rent for a rental period is payable, is to be construed accordingly: Sch 5 para 11(6) (amended by the Rent Act 1977 s 155(2), Sch 23 para 83). For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

2 Ie under the Rent (Agriculture) Act 1976 s 11: see PARA 1160 post.

3 Ibid Sch 5 para 11(2).

4 For the meaning of 'rates' see PARA 1150 note 4 ante. As to the abolition of domestic rates see PARA 521 ante.

5 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

6 For the meaning of 'landlord' see PARA 1137 note 2 ante.

7 Ie as ascertained in accordance with the Rent Act 1977 Sch 5.

8 Rent (Agriculture) Act 1976 Sch 5 para 11(3) (amended by the Rent Act 1977 Sch 23 para 83). The Rent (Agriculture) Act 1976 Sch 5 para 11(3) (as so amended) is subject to Sch 5 para 11(4) (see the text and notes 9-11 infra): Sch 5 para 11(3) (as so amended).

9 For the meaning of 'tenant' see PARA 1137 note 1 ante.

10 A notice under the Rent (Agriculture) Act 1976 Sch 5 para 11 (as amended) binds any successor of the landlord or tenant under a statutory tenancy to the same extent as it binds the landlord or, as the case may be, the tenant: see Sch 5 para 12(5)(e); and PARA 1155 post at head (e) in the text.

11 Ibid Sch 5 para 11(4).

12 Ibid Sch 5 para 11(5).

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### **1155. Variation of statutory tenancy.**

The landlord<sup>1</sup> and the statutory tenant<sup>2</sup> may<sup>3</sup> by agreement in writing vary any of the provisions of the statutory tenancy<sup>4</sup>; and an agreement may be so made at any time, including a time before the beginning of the statutory tenancy<sup>5</sup>.

An agreement which results in:

- 2387 (1) a substantial addition to the land or premises which the statutory tenant is entitled to occupy; or
- 2388 (2) the breach of any obligation implied by law<sup>6</sup>; or
- 2389 (3) the circumstances in which the statutory tenant can give notice to quit; or
- 2390 (4) the inclusion of any term which relates to the employment by the landlord of the tenant, or of any other term unrelated to the occupation of the dwelling house<sup>7</sup>,

is not, however, authorised<sup>8</sup>.

The following bind any successor of the landlord or the tenant under a statutory tenancy to the same extent as they bind the landlord or, as the case may be, the tenant:

- 2391 (a) an agreement in writing to vary the provisions of the statutory tenancy<sup>9</sup>;
- 2392 (b) an agreement relating to rent between the landlord and the tenant<sup>10</sup>;
- 2393 (c) the statutory provision relating to rent payable after termination of an agreement<sup>11</sup>;
- 2394 (d) a notice of increase by the landlord<sup>12</sup>;
- 2395 (e) a notice<sup>13</sup> relating to rates recoverable by the landlord from a statutory tenant<sup>14</sup>.

1 For the meaning of 'landlord' see PARA 1137 note 2 ante.

2 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

3 I.e. subject to the Rent (Agriculture) Act 1976 s 10(1), (2), Sch 5 para 12: see the text and notes 4-14 infra.

4 Ibid Sch 5 para 12(1). So far as a variation of the provisions of the statutory tenancy concerns rent, it must be effected in accordance with s 11 (see PARA 1160 post); and no agreement under s 11 may conflict with any of the provisions of the Rent (Agriculture) Act 1976: Sch 5 para 12(3). For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

5 Ibid Sch 5 para 12(2).

6 I.e. and in particular the breach of the obligation imposed by the Landlord and Tenant Act 1985 s 11 (as amended): see PARA 416 et seq ante.

7 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

8 Rent (Agriculture) Act 1976 Sch 5 para 12(4).

9 I.e. an agreement under ibid Sch 5 para 12.

10 I.e. an agreement under ibid s 10(3)(b) (see PARA 1159 post) or s 11 (see PARA 1160 post).

11 I.e. ibid s 11(9): see PARA 1160 post.

12 I.e. a notice under ibid s 12 (as amended) (see PARA 1161 post) or s 14 (see PARA 1163 post).

13 I.e. a notice under ibid Sch 5 para 11 (as amended): see PARA 1154 ante.

14 Ibid Sch 5 para 12(5).

STATUTORY TENANCIES/(iv) Rent/A. IN GENERAL/1156. Avoidance of requirements for advance payment of rent.

## **(iv) Rent**

### **A. IN GENERAL**

#### **1156. Avoidance of requirements for advance payment of rent.**

Any requirement that rent under a protected occupancy<sup>1</sup>, or under a statutory tenancy<sup>2</sup>, shall be payable:

- 2396 (1) before the beginning of the rental period<sup>3</sup> in respect of which it is payable;  
or  
2397 (2) earlier than six months before the end of the rental period in respect of which it is payable, if that period is more than six months,

is void<sup>4</sup>.

Rent for any rental period to which a prohibited requirement<sup>5</sup> relates is irrecoverable from the tenant<sup>6</sup>.

A person who purports to impose a prohibited requirement is liable on summary conviction to a fine not exceeding level 3 on the standard scale; and the court by which he is convicted may order the amount of rent paid in compliance with the prohibited requirement to be repaid to the person by whom it was paid<sup>7</sup>.

1 For the meaning of 'protected occupier' see PARAS 1144-1145 ante.

2 For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

3 For these purposes, 'rental period' means a period in respect of which a payment of rent falls to be made: Rent (Agriculture) Act 1976 s 20(4).

4 Ibid s 20(1).

5 For these purposes, 'prohibited requirement' means any requirement avoided by ibid s 20 (as amended): s 20(1).

6 Ibid s 20(2).

7 Ibid s 20(3) (amended by the Criminal Justice Act 1982 ss 38, 46). For the avoidance of doubt the Rent (Agriculture) Act 1976 s 20 (as amended) does not render any amount recoverable more than once: s 20(5). As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate and the prosecution of offences see PARA 1139 note 7 ante.

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#### **1157. Recovery from landlord of sums paid in excess of recoverable rent.**

Where a tenant<sup>1</sup> has paid on account of rent any amount which is irrecoverable<sup>2</sup> by the landlord<sup>3</sup>, the tenant who paid it is entitled<sup>4</sup> to recover that amount from the landlord who received it or his personal representatives<sup>5</sup>. Any amount which a tenant is entitled so to recover may, without prejudice to any other method of recovery, be deducted<sup>6</sup> by the tenant from any rent payable by him to the landlord<sup>7</sup>; but no amount which a tenant is entitled so to recover is recoverable at any time after the expiry of two years from the date of payment<sup>8</sup>.

Any person who, in any rent book or similar document, makes an entry showing or purporting to show any tenant as being in arrears in respect of any sum on account of rent which is irrecoverable<sup>9</sup> is liable on summary conviction to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the making of the entry, the landlord had a bona fide claim that the sum was recoverable<sup>10</sup>. If, where any such entry has been made by or on behalf of any landlord, the landlord, on being requested by or on behalf of the tenant to do so, refuses or neglects to cause the entry to be deleted within seven days, the landlord is liable on summary conviction to a fine not exceeding level 3 on the standard scale, unless he proves that, at the time of the neglect or refusal to cause the entry to be deleted, he had a bona fide claim that the sum was recoverable<sup>11</sup>.

1 For the meaning of 'tenant' see PARA 1137 note 1 ante.

2 I.e. by virtue of the Rent (Agriculture) Act 1976 Pt II (ss 6-19) (as amended) (see PARA 1150 et seq ante, PARA 1158 et seq post) or Pt III (ss 20-26) (as amended) (see the text and notes 3-11 infra; and PARAS 1137-1140, 1156 ante).

3 For the meaning of 'landlord' see PARA 1137 note 2 ante.

4 I.e. subject to the Rent (Agriculture) Act 1976 s 21(3): see the text and note 8 infra.

5 Ibid s 21(1).

6 See note 4 supra.

7 Rent (Agriculture) Act 1976 s 21(2).

8 Ibid s 21(3).

9 See note 2 supra.

10 Rent (Agriculture) Act 1976 s 21(4) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 52 note 6 ante; and as to offences by bodies corporate and the prosecution of offences see PARA 1139 note 7 ante.

11 Rent (Agriculture) Act 1976 s 21(5) (amended by the Criminal Justice Act 1982 ss 38, 46).

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### **1158. Restriction on levy of distress for rent.**

No distress for the rent of any dwelling house<sup>1</sup> subject to a protected occupancy<sup>2</sup> or statutory tenancy<sup>3</sup> may be levied<sup>4</sup> except with the leave of the county court; and the court has, with respect to any application for such leave, the same or similar powers with respect to adjournment, stay, suspension, postponement and otherwise as are conferred by statute<sup>5</sup> in relation to proceedings for possession of such a dwelling house<sup>6</sup>.

- 1 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.
- 2 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 ante.
- 3 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.
- 4 le subject to the Rent (Agriculture) Act 1976 s 8(2) (as amended); see note 6 infra.
- 5 le by ibid s 7 (as amended); see PARA 1169 post.
- 6 Ibid s 8(1). Nothing in s 8(1) applies, however, to distress levied under the County Courts Act 1984 s 102 (as amended) (see CIVIL PROCEDURE vol 12 (2009) PARAS 1352-1353); Rent (Agriculture) Act 1976 s 8(2) (amended by the County Courts Act 1984 s 144, Sch 2 para 62).

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## ***B. STATUTORY TENANCIES***

### **1159. In general.**

No rent is payable under a statutory tenancy<sup>1</sup> until rent becomes payable by virtue of an agreement fixing the rent<sup>2</sup> or by virtue of a notice<sup>3</sup> of increase<sup>4</sup>.

Rent under a statutory tenancy which is a weekly tenancy<sup>5</sup> is payable weekly in arrear, except that, if a rent or equivalent payment was payable under the protected occupancy<sup>6</sup>, and was so payable otherwise than in arrear, rent under the statutory tenancy is payable in that other way<sup>7</sup>; but this provision has effect subject to any agreement between the landlord and the tenant<sup>8</sup>.

The day on which rent is so payable weekly in arrear is:

- 2398 (1) where rent or any equivalent payment was payable weekly in arrear under the protected occupancy, the day on which it was so payable;
- 2399 (2) where head (1) above does not apply, and at the end of the protected occupancy the protected occupier was being paid weekly wages, the day on which the wages were paid;
- 2400 (3) in any other case such day as the landlord and tenant may agree, or in default of agreement, Friday in each week<sup>9</sup>.

The covenants implied in the statutory tenancy include a covenant to pay<sup>10</sup> rent<sup>11</sup>.

- 1 For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.
- 2 le an agreement under the Rent (Agriculture) Act 1976 s 11: see PARA 1160 post.
- 3 le a notice under ibid s 12 (as amended) (see PARA 1161 post) or s 14 (see PARA 1163 post).
- 4 Ibid s 10(2). Section 10(1), (2), Sch 5 (as amended) (see PARA 1150 et seq ante) does not impose any liability to pay rent under a statutory tenancy, whether the protected occupier was a tenant or licensee: s 10(2). For the meaning of 'protected occupier' see PARAS 1144-1145 ante; and for the meaning of 'tenant' see PARA 1137 note 1 ante.

- 5 For the meaning of 'tenancy' see PARA 1137 note 1 ante.
- 6 For the meaning of 'protected occupancy' see PARAS 1144-1145 ante.
- 7 Rent (Agriculture) Act 1976 s 10(3)(a).
- 8 Ibid s 10(3)(b). An agreement under s 10(3)(b) binds any successor of the landlord or tenant under a statutory tenancy to the same extent as it binds the landlord or, as the case may be, the tenant: see Sch 5 para 12(5)(b); and PARA 1155 ante at head (b) in the text.
- 9 Ibid s 10(4).
- 10 In accordance with ibid Pt II (ss 6-19) (as amended): see PARA 1150 et seq ante; the text and notes 1-9 supra, 10 infra; and PARA 1160 et seq post.
- 11 Ibid s 10(5).

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### **1160. Agreed rents.**

The landlord<sup>1</sup> and the statutory tenant<sup>2</sup> may by agreement fix the rent payable under a statutory tenancy<sup>3</sup> or may agree that no rent is to be payable under the statutory tenancy<sup>4</sup>. An agreement may be so made at any time, including a time before the beginning of the statutory tenancy, or a time when a rent is registered<sup>5</sup> for the dwelling house<sup>6</sup>.

The rent so fixed may not exceed:

- 2401 (1) where a rent is registered for the dwelling house at the time when the agreement is made, the weekly or other periodical equivalent<sup>7</sup> of the amount of the rent so registered;
- 2402 (2) where a rent is not so registered, the amount of the rent based on rateable value<sup>8</sup>.

Where a rent is registered for the dwelling house at any time after the agreement is made, as from the date from which the registration takes effect the rent payable under the agreement may not exceed the weekly or other periodical equivalent of the amount of the rent so registered<sup>9</sup>.

Unless the contrary intention appears from the agreement, it is terminable by the landlord or the tenant by notice in writing served on the other<sup>10</sup>; and the notice must specify the date from which the agreement is terminated, which must not be earlier than four weeks after service of the notice<sup>11</sup>.

An agreement so made may from time to time be varied<sup>12</sup> by a further agreement so made, whether or not there has been a change in the persons who are landlord and tenant<sup>13</sup>.

If and so long as, in the period following the termination of such an agreement, no notice of increase<sup>14</sup> takes effect, and no subsequent agreement is in force, the rent payable under the statutory tenancy is the same as the rent payable, or last payable, under the agreement; and it is payable for equivalent rental periods<sup>15</sup>, and in other respects in the same way as the rent was payable, or last payable, under the agreement<sup>16</sup>. Where a rent is registered for the dwelling house at any time after the termination of the agreement, as from the date from which the registration takes effect the rent so payable<sup>17</sup> may not exceed the weekly or other periodical

equivalent of the amount of the rent so registered; and, if the rent so payable exceeds the limit so imposed, the amount of the excess is irrecoverable from the tenant<sup>18</sup>.

1 For the meaning of 'landlord' see PARA 1137 note 2 ante.

2 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante; and for the meaning of 'tenant' see PARA 1137 note 1 ante.

3 As to when rent is payable under a statutory tenancy see PARA 1159 ante. For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

4 Rent (Agriculture) Act 1976 s 11(1). An agreement under s 11 binds any successor of the landlord or tenant under a statutory tenancy to the same extent as it binds the landlord or, as the case may be, the tenant: see s 10(2), Sch 5 para 12(5)(b); and PARA 1155 ante at head (b) in the text.

5 For these purposes, 'registered' means registered in the register under the Rent Act 1977 Pt IV (ss 62-75) (as amended) (see PARA 909 et seq ante): Rent (Agriculture) Act 1976 s 19 (definition amended by the Rent Act 1977 s 155, Sch 23 para 77). As to registration of rent see PARAS 1162-1163 post.

6 Rent (Agriculture) Act 1976 s 11(2). For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

7 For these purposes, in ascertaining the weekly or other periodical equivalent of a registered rent, or of the annual amount mentioned in *ibid* s 12(9) (as amended) (see PARA 1161 post), a period of one month is treated as equivalent to one-twelfth of a year, and a period of a week as equivalent to one fifty-second of a year: s 17.

8 *Ibid* s 11(3). For these purposes, 'rent based on rateable value' means rent based on rateable value as defined in s 12 (as amended) (see PARA 1161 note 4 post): s 11(3)(b). If the rent payable under the agreement exceeds the limit imposed by s 11(3) or s 11(4) (see the text and note 9 *infra*), the amount of the excess is irrecoverable from the tenant: s 11(5). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

9 *Ibid* s 11(4). See also note 8 *supra*.

10 *Ibid* s 11(6).

11 *Ibid* s 11(7).

12 *Ie* subject to *ibid* s 11(3): see the text and notes 7-8 *supra*.

13 *Ibid* s 11(8).

14 *Ie* a notice under *ibid* s 12 (as amended) (see PARA 1161 post) or s 14 (see PARA 1163 post).

15 For these purposes, 'rental period' means a period in respect of which a payment of rent, or in the case of a licence the equivalent of rent, falls to be made: *ibid* s 19. For the meaning of 'licence' see PARA 1141 ante.

16 *Ibid* s 11(9). Section 11(9) binds any successor of the landlord or tenant under a statutory tenancy to the same extent as it binds the landlord or, as the case may be, the tenant: see Sch 5 para 12(5)(c); and PARA 1155 ante at head (c) in the text.

If the agreement mentioned in s 11(9) provided that no rent was payable under the statutory tenancy, no rent is payable in the period for which s 11(9) applies: s 11(11).

17 *Ie* under *ibid* s 11(9): see the text and notes 14-16 *supra*.

18 *Ibid* s 11(10).

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## **1161. Provisional rents.**

The following provisions apply where a rent is not registered<sup>1</sup> for a dwelling house<sup>2</sup> which is subject to a statutory tenancy<sup>3</sup>.

If the rent payable for any period of the statutory tenancy would be less than the rent based on rateable value<sup>4</sup>, it may be increased up to the amount of that rent by a notice of increase<sup>5</sup> served by the landlord<sup>6</sup> on the tenant<sup>7</sup>. The notice must specify the amount of the rent based on rateable value, and must set out the landlord's calculation of the amount<sup>8</sup>; and it should also specify the date from which the notice is to take effect, which must not be earlier than four weeks before the service of the notice, and not at a time when an agreement fixing the rent<sup>9</sup> is in force<sup>10</sup>. If the notice takes effect from the termination of an agreement fixing the rent, it must state that fact, and must specify the rent payable, or last payable, under that agreement<sup>11</sup>. If a notice is served under the above provisions at a time when an agreement fixing the rent is in force, and the date stated in the notice as that from which it is to take effect is:

- 2403 (1) a date after service of the notice; and
- 2404 (2) a date as at which the landlord could by notice served with the first-mentioned notice terminate the agreement,

the first-mentioned notice operates as a notice to terminate the agreement as at that date<sup>12</sup>.

Where a rent is registered for the dwelling house at any time after notice is served, as from the date from which the registration takes effect the rent payable in accordance with the notice may not exceed the weekly or other periodical equivalent of the amount of the rent so registered<sup>13</sup>. If the rent payable in accordance with the notice exceeds the limit so imposed, the amount of the excess is irrecoverable from the tenant<sup>14</sup>.

1 For the meaning of 'registered' see PARA 1160 note 5 ante. As to registration of rent see PARAS 1162-1163 post.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 Rent (Agriculture) Act 1976 s 12(1). For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

4 For these purposes, 'rent based on rateable value' means: (1) where the dwelling house had a rateable value on 31 March 1990, the weekly or other periodical equivalent of an annual amount equal to the prescribed multiple of the rateable value of the dwelling house on that date; (2) where the dwelling house had no rateable value on 31 March 1990, the weekly or other periodical equivalent of an annual amount equal to the rent at which it is estimated the dwelling house might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the dwelling house in a state to command that rent: *ibid* s 12(9) (a), (c) (amended and added respectively by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 11); Rent (Agriculture) Act 1976 s 19. The 'prescribed multiple' is 1.5 or such other number, whole or with a fraction, as the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order prescribe: s 12(9)(b). Such an order (a) may contain such transitional and other supplemental and incidental provisions as appear to the Secretary of State or the Assembly or minister expedient; (b) may be varied or revoked by a subsequent order so made; and (c) must be contained in a statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 12(10). At the date at which this title states the law, no such order had been made. As to ascertaining the weekly or other periodical equivalent see PARA 1160 note 7 ante. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

The date as at which the rateable value or the annual amount referred to in head (2) *supra* is to be determined for these purposes, and for the purposes of any agreement under s 11 (see PARA 1160 ante), is the date on which the notice is served or, as the case may be, the date when the agreement was made or, if that date is after 31 March 1990 and the dwelling house had a rateable value on that date, 31 March 1990: s 12(11) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 12). If there is no separate rateable value for the dwelling house on the date as at which the rateable value is to be determined for these purposes, the rateable value must be ascertained by a proper apportionment or



aggregation of the rateable value or values of the relevant hereditaments; and, until the rateable value is so ascertained, references to the amount of the rent based on rateable value are to be construed as references to the amount of the rent based on the landlord's estimate of that value: Rent (Agriculture) Act 1976 s 12(12) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 13). Any question as to the proper apportionment or aggregation under the Rent (Agriculture) Act 1976 s 12(12) (as so amended) must be determined by the county court; and the decision of the county court is final: s 12(13). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

- 5 As to notices of increase see PARA 1164 post.
- 6 For the meaning of 'landlord' see PARA 1137 note 2 ante.
- 7 Rent (Agriculture) Act 1976 s 12(2). For the meaning of 'tenant' see PARA 1137 note 1 ante.
- 8 Ibid s 12(3).
- 9 ie an agreement under ibid s 11.
- 10 Ibid s 12(4).
- 11 Ibid s 12(5).
- 12 Ibid s 12(6).
- 13 Ibid s 12(7).
- 14 Ibid s 12(8).

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### **1162. Application for registration of rent.**

There must be a part of the register under the Rent Act 1977<sup>1</sup> in which rents may be registered<sup>2</sup> for dwelling houses<sup>3</sup> which are subject to statutory tenancies<sup>4</sup>.

The registration of a rent in that part of the register takes effect:

- 2405 (1) if the rent is determined by the rent officer<sup>5</sup>, from the date when it is registered; and
- 2406 (2) if the rent is determined by a rent assessment committee<sup>6</sup>, from the date when the committee makes its decision<sup>7</sup>.

If the rent for the time being registered in that part of the register is confirmed, the confirmation takes effect:

- 2407 (a) if it is made by the rent officer, from the date when it is noted in the register; and
- 2408 (b) if it is made by a rent assessment committee, from the date when the committee makes its decision<sup>8</sup>.

The date from which the registration or confirmation of a rent takes effect must be entered in that part of the register<sup>9</sup>; and as from the date on which the registration takes effect any previous registration of a rent for the dwelling house ceases to have effect<sup>10</sup>.

A rent registered in any part of the register for a dwelling house which becomes, or ceases to be, one subject to a statutory tenancy is as effective as if it were registered in any other part of the register<sup>11</sup>.

1 le under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 et seq ante.

2 For the meaning of 'registered' see PARA 1160 note 5 ante. As to registered rents see PARA 1163 post.

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 Rent (Agriculture) Act 1976 s 13(1) (amended by the Rent Act 1977 s 155(2), Sch 23 para 75(a)). In relation to that part of the register the Rent Act 1977 s 67 (as amended) (see PARA 915 ante), s 67A (as added) (see PARA 915 ante), s 70 (as amended) (see PARA 921 ante) s 70A (as added) (see PARA 915 ante), s 71 (as amended), except s 71(3) (as amended) (see PARAS 892, 922 ante), and Sch 11 Pt I (paras 1-9) (as amended) (see PARAS 917-918 ante) have effect as if for any reference therein to a regulated tenancy there were substituted a reference to a statutory tenancy, as defined in the Rent (Agriculture) Act 1976: s 13(2) (amended by the Rent Act 1977 Sch 23 para 75(b); the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(2), Sch 2 para 1). The Rent (Agriculture) Act 1976 s 13(1), (2) (as so amended) is not to be taken as applying the Rent Act 1977 s 71(3) (as amended), s 72 (as substituted) (see PARA 923 ante) or s 73 (as amended) (see PARA 924 ante): Rent (Agriculture) Act 1976 s 13(3) (amended by the Rent Act 1977 Sch 23 para 75(c); the Housing Act 1988 s 140(2), Sch 18). For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

5 As to rent officers see PARA 911 et seq ante.

6 As to rent assessment committees see PARA 910 ante.

7 Rent (Agriculture) Act 1976 s 13(4) (s 13(4)-(6B) substituted by the Housing Act 1980 s 61(2)).

8 Rent (Agriculture) Act 1976 s 13(5) (as substituted: see note 7 supra). If, by virtue of the Rent Act 1977 s 67(4) (as amended) (see PARA 915 ante), as applied by the Rent (Agriculture) Act 1976 s 13(2) (as amended: see note 4 supra), an application for registration of a rent is made before the expiry of the period mentioned in the Rent Act 1977 s 67(3) (as amended) (see PARA 915 ante) and the resulting registration of a rent for the dwelling house, or confirmation of the rent for the time being registered, would otherwise take effect before the expiry of that period, it takes effect on the expiry of that period: Rent (Agriculture) Act 1976 s 13(6) (as so substituted).

9 Ibid s 13(6A) (as substituted: see note 7 supra).

10 Ibid s 13(6B) (as substituted: see note 7 supra).

11 Ibid s 13(7). The Rent Act 1977 s 67(3) (as amended) does not, however, apply to an application for the registration, as respects a dwelling house which is subject to a statutory tenancy, of a rent different from one which is registered in another part of the register other than the part mentioned in the Rent (Agriculture) Act 1976 s 13(1) (as amended: see note 4 supra): s 13(7) (amended by the Rent Act 1977 Sch 23 para 75(e); the Housing Act 1980 s 152, Sch 25 para 33(a)).

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### **1163. Registered rents.**

The following provisions apply where a rent is registered<sup>1</sup> for a dwelling house<sup>2</sup> subject to a statutory tenancy<sup>3</sup>.

If the rent payable for any period of the statutory tenancy beginning on or after the date of registration would be less than the registered rent, it may be increased up to the amount of that rent by a notice of increase<sup>4</sup> served by the landlord<sup>5</sup> on the tenant<sup>6</sup>. The notice must specify the amount of the registered rent, and the date from which the notice is to take effect, which must not be earlier than four weeks before the service of the notice, and not at a time when an agreement fixing the rent<sup>7</sup> is in force<sup>8</sup>. If the notice takes effect from the termination of such an agreement, it must state that fact, and must specify the rent payable, or last payable, under that agreement<sup>9</sup>. If a notice is served at a time when such an agreement is in force, and the date stated in the notice as that from which it is to take effect is:

- 2409 (1) a date after service of the notice; and
- 2410 (2) a date as at which the landlord could by notice served with the first-mentioned notice terminate the agreement, the first-mentioned notice operates as a notice to terminate the agreement as at that date<sup>10</sup>.

1 For the meaning of 'registered' see PARA 1160 note 5 ante.

2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3 Rent (Agriculture) Act 1976 s 14(1). For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

4 As to notices of increase see PARA 1164 post.

5 For the meaning of 'landlord' see PARA 1137 note 2 ante.

6 Rent (Agriculture) Act 1976 s 14(2). For the meaning of 'tenant' see PARA 1137 note 1 ante.

7 I.e. an agreement under *ibid* s 11: see PARA 1160 ante.

8 *Ibid* s 14(3).

9 *Ibid* s 14(4).

10 *Ibid* s 14(5).

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#### **1164. Notice of increase.**

Notwithstanding that a notice<sup>1</sup> relates to periods of a statutory tenancy<sup>2</sup>, it may be served before the statutory tenancy begins<sup>3</sup>. Where a notice is served before the statutory tenancy begins, and the protected occupancy<sup>4</sup> could, by a notice to quit served at the same time, be brought to an end before the date specified in the notice of increase, the notice operates to terminate the protected occupancy as from that date<sup>5</sup>.

If the county court is satisfied that any error or omission in a notice is due to a bona fide mistake on the part of the landlord<sup>6</sup>, the court may by order amend the notice by correcting any errors or supplying any omission therein which, if not corrected or supplied, would render the notice invalid and, if the court so directs, the notice as so amended has effect and is deemed to have had effect as a valid notice<sup>7</sup>.

If the county court is satisfied<sup>8</sup> that:

- 2411 (1) on 31 March 1990 there was no separate rateable value for the dwelling house<sup>9</sup>; and  
 2412 (2) the amount specified in the notice is the amount of the rent based on the landlord's estimate of the rateable value,

the court may by order amend the notice by substituting for the amount so specified the amount of the rent based on rateable value<sup>10</sup> and, if the court so directs, the notice has effect and is deemed to have had effect as so amended<sup>11</sup>.

Any amendment of such a notice<sup>12</sup> may be made on such terms and conditions with respect to arrears of rent or otherwise as appear to the court to be just and reasonable<sup>13</sup>; but no increase of rent which becomes payable by reason of an amendment of such a notice is recoverable in respect of any period of the statutory tenancy which ended more than six months before the date of the order making the amendment<sup>14</sup>.

1 For these purposes, any reference to a notice is a reference to a notice of increase under the Rent (Agriculture) Act 1976 s 12 (as amended) (see PARA 1161 ante) or s 14 (see PARA 1163 ante): s 16(1). Such a notice of increase by the landlord binds any successor of the landlord or the tenant under a statutory tenancy to the same extent as it binds the landlord or, as the case may be, the tenant: see s 10(1), (2), Sch 5 para 12(5) (b); and PARA 1155 ante at head (d) in the text.

2 For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

3 Rent (Agriculture) Act 1976 s 16(2).

4 For the meaning of 'protected occupancy' see PARAS 1144-1145 ante.

5 Rent (Agriculture) Act 1976 s 16(3).

6 For the meaning of 'landlord' see PARA 1137 note 2 ante.

7 Rent (Agriculture) Act 1976 s 16(4).

8 Ie in a case to which *ibid* s 12(12) (as amended) applies: see PARA 1161 note 4 ante.

9 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

10 For the meaning of 'rent based on rateable value' see PARA 1161 note 4 ante.

11 Rent (Agriculture) Act 1976 s 16(5) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 14). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

12 Ie a notice under the Rent (Agriculture) Act 1976 s 16(4) or (5) (as amended): see the text and notes 6-11 *supra*.

13 *Ibid* s 16(6).

14 *Ibid* s 16(7).

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## **1165. Rectification of rent books.**

Where, in any proceedings, the recoverable rent of a dwelling house<sup>1</sup> subject to a statutory tenancy<sup>2</sup> is determined by a court, then, on the application of the tenant<sup>3</sup>, whether in those or in any subsequent proceedings, the court may call for the production of the rent book or any similar document relating to the dwelling house and may direct the district judge or clerk of the court to correct any entries showing, or purporting to show, the tenant as being in arrears in respect of any sum which the court has determined to be irrecoverable<sup>4</sup>.

1 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

2 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

3 For the meaning of 'tenant' see PARA 1137 note 1 ante.

4 Rent (Agriculture) Act 1976 s 22; Courts and Legal Services Act 1990 s 74(1), (3). As to the obligation to provide a rent book, and as to the information to be contained in it see PARAS 253-255 ante; and as to offences in relation to rent books see PARA 1157 ante.

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## **(v) Security of Tenure; Recovery of Possession**

### **A. IN GENERAL**

#### **1166. Grounds for possession.**

A court may not make an order for possession of a dwelling house<sup>1</sup> subject to a protected occupancy<sup>2</sup> or statutory tenancy<sup>3</sup> except in the specified<sup>4</sup> cases<sup>5</sup>.

If the landlord<sup>6</sup> would otherwise<sup>7</sup> be entitled to recover possession of a dwelling house subject to a protected occupancy or statutory tenancy, the court must make an order for possession if the circumstances of the case are as specified in any of Cases XI to XIII<sup>8</sup>.

A landlord who obtains an order for possession of a dwelling house as against a statutory tenant<sup>9</sup> is not required to give to the statutory tenant any notice to quit<sup>10</sup>.

1 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

2 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 ante; and for the meaning of 'protected occupancy' see PARAS 1144-1145 ante.

3 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

4 I.e. the cases specified in the Rent (Agriculture) Act 1976 s 6(1), Sch 4 (as amended): see PARA 1170 et seq post.

5 Ibid s 6(1).

6 For the meaning of 'landlord' see PARA 1137 note 2 ante.

7 I.e. apart from the Rent (Agriculture) Act 1976 s 6(1): see the text and notes 1-5 supra.

8 Ibid s 6(6). As to s 6(6), Sch 4 Pt II, Cases XI-XIII (as amended) see PARAS 1180-1182 post.

9 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

10 Rent (Agriculture) Act 1976 s 6(2).

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### **1167. Effect of determination of superior tenancy etc.**

If a court makes an order for possession<sup>1</sup> of a dwelling house<sup>2</sup> from a protected occupier<sup>3</sup> or statutory tenant<sup>4</sup>, or from a protected or statutory tenant for the purposes of the Rent Act 1977<sup>5</sup>, nothing in the order affects the right of any subtenant:

- 2413 (1) to whom the dwelling house or any part of it has been lawfully sublet before the commencement of the proceedings; and
- 2414 (2) who is a protected occupier or statutory tenant thereof,

to retain possession<sup>6</sup>, nor does the order operate to give a right to possession against any such subtenant<sup>7</sup>.

Where a statutorily protected tenancy<sup>8</sup> of a dwelling house is determined, either as a result of an order for possession or for any other reason, any subtenant to whom the dwelling house or any part of it has been lawfully sublet and who is a protected occupier or statutory tenant thereof is deemed<sup>9</sup> to become the tenant<sup>10</sup> of the landlord<sup>11</sup> on the same terms as if the tenant's statutorily protected tenancy had continued<sup>12</sup>.

Where a dwelling house:

- 2415 (a) forms part of premises<sup>13</sup> which have been let as a whole on a superior tenancy but do not constitute a dwelling house let on a statutorily protected tenancy; and
- 2416 (b) is itself subject to a protected occupancy or statutory tenancy,

then, from the coming to an end of the superior tenancy, the Rent (Agriculture) Act 1976 applies in relation to the dwelling house as if, in lieu of the superior tenancy, there had been separate tenancies of the dwelling house and of the remainder of the premises, for the like purposes as under the superior tenancy, and at rents equal to the just proportion of the rent under the superior tenancy<sup>14</sup>.

Where, however, a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993<sup>15</sup>, none of the statutory provisions relating to security of tenure for tenants apply to the lease, and after the term date of the lease no person is entitled, by virtue of any sublease directly or indirectly derived out of the lease, to retain possession under the Rent (Agriculture) Act 1976<sup>16</sup>.

1 le and the order is made by virtue of the Rent (Agriculture) Act 1976 s 6(1), (5), Sch 4 Pt I (as amended) (see PARAS 1170-1179 post) or, as the case may be, the Rent Act 1977 s 98 (as amended) (see PARA 942 ante) or s 99(2) (see PARA 943 ante).

- 2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.
- 3 For the meaning of 'protected occupier' see PARAS 1144-1145 ante.
- 4 For the meaning of 'statutory tenant' see PARAS 1146-1149 ante.
- 5 As to protected and statutory tenants under the Rent Act 1977 see PARA 818 et seq ante.
- 6 le by virtue of the Rent (Agriculture) Act 1976.
- 7 Ibid s 9(1).

8 For these purposes, and for the purposes of *ibid* s 9(3) (as amended) (see the text and notes 13-14 *infra*), 'statutorily protected tenancy' means (1) a protected occupancy or statutory tenancy; (2) a protected or statutory tenancy for the purposes of the Rent Act 1977; or (3) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 which is a tenancy in relation to which that Act applies (see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (4) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302): Rent (Agriculture) Act 1976 s 9(4) (amended by the Rent Act 1977 s 155(2), Sch 23 para 74; the Agricultural Tenancies Act 1995 s 40, Schedule para 25(3)).

A long tenancy of a dwelling house which is also a tenancy at a low rent but which, had it not been a tenancy at a low rent, would have been a protected tenancy for the purposes of the Rent Act 1977, is treated for the purposes of the Rent (Agriculture) Act 1976 s 9(2) as a statutorily protected tenancy: s 9(5) (amended by the Rent Act 1977 Sch 23 para 74(b)). Notwithstanding anything in the Rent (Agriculture) Act 1976 s 9(5) (as so amended), s 9(2) does not have effect where the subtenancy in question was created, whether immediately or derivatively, out of a long tenancy falling within s 9(5) (as so amended) and, at the time of the creation of the subtenancy (a) a notice to terminate the long tenancy had been given under the Landlord and Tenant Act 1954 s 4(1) (see PARA 1212 post); or (b) the long tenancy was being continued by s 3(1) (see PARA 1209 post), unless the subtenancy was created with the consent in writing of the person who at the time when it was created was the landlord, within the meaning of Pt I (ss 1-22) (as amended) (see PARA 1196 et seq post): Rent (Agriculture) Act 1976 s 9(6). Where a tenancy has been extended under the Leasehold Reform Act 1967 s 14 (as amended), after the extended term date no person is entitled by virtue of any subtenancy directly or indirectly derived out of the tenancy to retain possession under the Rent (Agriculture) Act 1976: see the Leasehold Reform Act 1967 s 16(1) (as amended); and PARA 1483 post. See also ss 17(3), 18(5), Sch 2 para 3(2) (as amended); and PARA 1494 post.

For these purposes, 'long tenancy' means a tenancy granted for a term of years exceeding 21 years, whether or not subsequently extended by act of the parties or by any enactment; and, in determining whether a long tenancy is a tenancy at a low rent, there must be disregarded such part, if any, of the sums payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates, council tax, service, repairs, maintenance or insurance, unless it would not have been regarded by the parties as so payable: Rent (Agriculture) Act 1976 s 9(7) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 2). 'Tenancy at a low rent' means a tenancy under which either no rent is payable or the rent payable is less than two-thirds of the rateable value which is or was the rateable value of the dwelling house on the appropriate day for the purposes of the Rent Act 1977: Rent (Agriculture) Act 1976 ss 1(3), 34(1), Sch 1 (amended by the Rent Act 1977 s 155(2), Sch 23 para 77). For the meaning of 'tenancy' see PARA 1137 note 1 ante; and for the meaning of 'rates' see PARA 1150 note 4 ante. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

- 9 le subject to the provisions of the Rent (Agriculture) Act 1976.

- 10 For the meaning of 'tenant' see PARA 1137 note 1 ante.
- 11 For the meaning of 'landlord' see PARA 1137 note 2 ante.

- 12 Rent (Agriculture) Act 1976 s 9(2).

13 For these purposes, 'premises' includes an agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy in relation to which that Act applies and land comprised in a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995: Rent (Agriculture) Act 1976 s 9(3) (amended by the Agricultural Holdings Act 1986 Sch 14 para 57; the Agricultural Tenancies Act 1995 s 40, Schedule para 25(2)).

- 14 Rent (Agriculture) Act 1976 s 9(3) (as amended: see note 13 *supra*).

- 15 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 post.

16 See *ibid* s 59(2); and PARA 1723 post. See also s 61, Sch 14 para 3(1), (2)(b), (3)(b); and PARA 1727 post.

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### **1168. Exceptions under the housing legislation.**

The restrictions on the right to possession of a dwelling house subject to a protected occupancy or statutory tenancy<sup>1</sup> are removed in the following circumstances:

- 2417 (1) where possession is sought of a house in respect of which a demolition order or a prohibition order has been made<sup>2</sup>;
- 2418 (2) where the house is required to enable a local authority to exercise its powers under any enactment relating to housing<sup>3</sup>;
- 2419 (3) if the Secretary of State or, in relation to Wales, the National Assembly for Wales certifies that possession of a house acquired or appropriated and held by certain authorities for planning purposes is immediately required for those purposes<sup>4</sup>.

1 As to these restrictions see PARAS 1166-1167 ante.

2 See the Housing Act 1985 s 270(3) (as amended); the Housing Act 2004 s 33; and HOUSING vol 22 (2006 Reissue) PARAS 399, 419. For the similar exclusion of protection under the Rent Act 1977 see PARA 944 ante; and for the exclusion of protection under the Housing Act 1988 Pt I (ss 1-45) (as amended) see PARA 1102 ante.

3 See the Housing Act 1985 s 612 (as amended) and HOUSING vol 22 (2006 Reissue) PARA 587. Cf para 944 ante.

4 See the Local Government, Planning and Land Act 1980 ss 144(1), (3), Sch 28 para 10 (as amended); the New Towns Act 1981 s 22 (as amended); the Town and Country Planning Act 1990 s 242; and TOWN AND COUNTRY PLANNING vols 46(2), (3) (Reissue) PARAS 963, 1372, 1472. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 169, Sch 20 para 8 (possession of house acquired and held by the Urban Regeneration Agency). As to that Agency, which is part of English Partnerships, see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1306 et seq; TRADE AND INDUSTRY vol 97 (2010) PARA 945. Lettings by development corporations and local authorities cannot in any event be statutory tenancies: see PARA 1147 ante.

### **UPDATE**

### **1168 Exceptions under the housing legislation**

NOTE 4--Urban Regeneration Agency abolished: Housing and Regeneration Act 2008 s 49; SI 2008/2358.

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## ***B. DISCRETIONARY GROUNDS FOR POSSESSION***

### **1169. Discretion of court in giving possession.**

In Cases I to X<sup>1</sup> the court may not make an order for possession unless it considers it reasonable to do so<sup>2</sup>; and in those Cases the court may adjourn for such period or periods as it thinks fit<sup>3</sup>.

On the making of the order for possession, or at any time before execution of the order, the court may stay or suspend execution of the order or postpone the date of possession, for such period or periods as the court thinks fit<sup>4</sup>.

On any such adjournment or any such stay, suspension or postponement, the court must, unless it considers that to do so would cause exceptional hardship to the tenant<sup>5</sup> or would otherwise be unreasonable, impose conditions with regard to payment by the tenant of arrears of rent, if any, and rent or payments in respect of occupation after termination of the tenancy (mesne profits) and may impose such other conditions as it thinks fit<sup>6</sup>. If conditions so imposed are complied with, the court may, if it thinks fit, discharge or rescind the order for possession<sup>7</sup>.

In any case where:

- 2420 (1) proceedings are brought for possession of a dwelling house<sup>8</sup> which is subject to a protected occupancy<sup>9</sup> or statutory tenancy<sup>10</sup>;
- 2421 (2) the tenant's spouse or former spouse, having rights of occupation under the Family Law Act 1996<sup>11</sup>, is then in occupation of the dwelling house; and
- 2422 (3) the tenancy is terminated as a result of those proceedings,

the spouse or former spouse has, so long as he or she remains in occupation, the same rights in relation to or in connection with any such adjournment or any such stay, suspension or postponement as he or she would have if those rights of occupation were not affected by the termination of the tenancy<sup>12</sup>.

The rights of occupation of spouses, civil partners and cohabitants in respect of family homes have already been discussed<sup>13</sup> and are set out in detail elsewhere in this work<sup>14</sup>.

1 In the Rent (Agriculture) Act 1976 s 6(1), (5), Sch 4 Pt I, Cases I-X (as amended): see PARAS 1170-1179 post.

2 Ibid ss 6(5), 7(1), (2).

3 Ibid s 7(2A) (added by the Housing Act 1980 s 75(4), (5)).

4 Rent (Agriculture) Act 1976 s 7(3).

5 For these purposes, 'tenant' means a protected occupier or a statutory tenant; and 'tenancy' is to be construed accordingly: ibid s 7(6) (amended by the Housing Act 1980 s 152(1), Sch 25 para 32). For the meaning of 'protected occupier' see PARAS 1144-1145 ante; and for the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

6 Rent (Agriculture) Act 1976 s 7(4) (substituted by the Housing Act 1980 s 75(4), (6)).

7 Rent (Agriculture) Act 1976 s 7(5).

8 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

9 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 ante; and for the meaning of 'protected occupancy' see PARAS 1144-1145 ante.

10 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

11 As to rights of occupation under the Family Law Act 1996 see further PARA 836 ante.

12 Rent (Agriculture) Act 1976 s 7(5A), (5B) (added by the Housing Act 1980 s 75(4), (7)); Interpretation Act 1978 s 17(2)(a).

13 See PARA 836 ante.

14 See MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

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### **1170. Case I: alternative accommodation not provided or arranged by housing authority.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the court is satisfied that suitable alternative accommodation is available for the tenant<sup>2</sup>, or will be available for him when the order for possession takes effect<sup>3</sup>.

For these purposes, accommodation is deemed suitable if it consists of:

- 2423 (1) premises which are to be let as a separate dwelling such that they will then be let on a protected tenancy<sup>4</sup>; or
- 2424 (2) premises which are to be let as a separate dwelling on terms which will, in the opinion of the court, afford to the tenant security of tenure reasonably equivalent to the security afforded by Part VII of the Rent Act 1977<sup>5</sup> in the case of a protected tenancy,

and, in the opinion of the court, the accommodation fulfils the specified conditions<sup>6</sup>.

The specified conditions are:

- 2425 (a) the accommodation must be reasonably suitable to the needs of the tenant and his family as regards proximity to place of work and either:  
60
- 72. (i) similar as regards rental and extent to the accommodation afforded by dwelling houses<sup>7</sup> provided in the neighbourhood by the housing authority concerned<sup>8</sup> for persons whose needs as regards extent are similar to those of the tenant and his family; or
- 73. (ii) reasonably suitable to the means of the tenant, and to the needs of the tenant and his family as regards extent and character<sup>9</sup>;  
61
- 2426 (b) if any furniture was provided by the landlord<sup>10</sup> for use under the tenancy, furniture must be provided for use in the alternative accommodation which is either similar, or is reasonably suitable to the needs of the tenant and his family<sup>11</sup>.

Accommodation is not deemed to be suitable to the needs of the tenant and his family if the result of their occupation of the accommodation would be that it would be<sup>12</sup> an overcrowded dwelling house<sup>13</sup>.

1    Ie under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For these purposes, 'tenant' means a protected occupier or a statutory tenant: *ibid* s 6(4). For the meaning of 'protected occupier' see PARAS 1144-1145 ante; and for the meaning of 'statutory tenant' see PARAS 1146-1149 ante.

3    *Ibid* ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case I para 1. In Sch 4 Pt I, Case I (as amended) no account is to be taken of accommodation as respects which an offer has been made, or notice has been given, as mentioned in Sch 4 Pt I, Case II para 1 (see PARA 1171 post at heads (1)-(2) in the text): Sch 4 Pt I, Case I para 6.

4    Ie within the meaning of the Rent Act 1977: see PARA 818 ante.

5    Ie *ibid* Pt VII (ss 98-107) (as amended): see PARA 942 et seq ante.

6    Rent (Agriculture) Act 1976 Sch 4 Pt I, Case I para 2 (amended by the Rent Act 1977 s 155(2), Sch 23 para 82(a), (b)). Cf the Rent Act 1977 s 99, Sch 16 Case I (as amended); and PARA 948 ante.

7    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

8    For the meaning of 'the housing authority concerned' see PARA 1139 note 7 ante.

9    Rent (Agriculture) Act 1976 Sch 4 Pt I, Case I para 3(1). For the purposes of Sch 4 Pt I, Case I para 3(1)(a) (see head (a) in the text), a certificate of the housing authority concerned stating: (1) the extent of the accommodation afforded by dwelling houses provided by the authority to meet the needs of tenants with families of such number as may be specified in the certificate; and (2) the amount of the rent charged by the housing authority concerned for dwelling houses affording accommodation of that extent, is conclusive evidence of the facts so stated: Sch 4 Pt I, Case I para 3(2). Any document purporting to be a certificate of the housing authority concerned issued for these purposes and to be signed by the proper officer of the authority must be received in evidence and, unless the contrary is shown, is deemed to be such a certificate without further proof: Sch 4 Pt I, Case I para 5.

10   For the meaning of 'landlord' see PARA 1137 note 2 ante.

11   Rent (Agriculture) Act 1976 Sch 4 Pt I, Case I para 3(3).

12   Ie for the purposes of the Housing Act 1985 Pt X (ss 324-344) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 443 et seq.

13   Rent (Agriculture) Act 1976 Sch 4 Pt I, Case I para 4 (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (4)(a)).

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### **1171. Case II: alternative accommodation provided or arranged by housing authority.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where:

2427 (1) the housing authority concerned<sup>2</sup> has made an offer in writing to the tenant<sup>3</sup> of alternative accommodation which appears to the authority to be suitable,

specifying the date when the accommodation will be available and the date, not being less than 14 days from the date of offer, by which the offer must be accepted; or

- 2428 (2) the housing authority concerned has given notice in writing to the tenant that it has received from a person specified in the notice an offer in writing to rehouse the tenant in alternative accommodation which appears to the housing authority concerned to be suitable, and the notice specifies both the date when the accommodation will be available and the date, not being less than 14 days from the date when the notice was given to the tenant, by which the offer must be accepted<sup>4</sup>.

The landlord<sup>5</sup> must show that the tenant:

- 2429 (a) accepted the offer, by the housing authority or other person, within the time duly specified in the offer; or  
 2430 (b) did not so accept the offer, and the tenant does not satisfy the court that he acted reasonably in failing to accept the offer<sup>6</sup>.

The accommodation so offered must in the opinion of the court fulfil the following conditions:

- 2431 (i) it must be reasonably suitable to the needs of the tenant and his family as regards proximity to place of work;  
 2432 (ii) it must be reasonably suitable to the means of the tenant, and to the needs of the tenant and his family as regards extent<sup>7</sup>.

If the accommodation offered is available for a limited period only, the housing authority's offer or notice must contain an assurance that other accommodation:

- 2433 (A) the availability of which is not so limited;  
 2434 (B) which appears to the authority to be suitable; and  
 2435 (C) which fulfils the conditions in heads (i) and (ii) above,

will be offered to the tenant as soon as practicable<sup>8</sup>.

1    Ie under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'the housing authority concerned' see PARA 1139 note 7 ante.

3    For the meaning of 'tenant' see PARA 1170 note 2 ante.

4    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case II para 1.

5    For the meaning of 'landlord' see PARA 1137 note 2 ante.

6    Rent (Agriculture) Act 1976 Sch 4 Pt I, Case II para 2.

7    Ibid Sch 4 Pt I, Case II para 3(1)-(3).

8    Ibid Sch 4 Pt I, Case II para 4. Cf the Rent Act 1977 s 99, Sch 16 Case II (as amended); and PARA 948 ante.

STATUTORY TENANCIES/(v) Security of Tenure; Recovery of Possession/B. DISCRETIONARY GROUNDS FOR POSSESSION/1172. Case III: non-payment of rent or breach of lawful obligation.

### **1172. Case III: non-payment of rent or breach of lawful obligation.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the rent lawfully due from the tenant<sup>2</sup> has not been paid or any other lawful obligation of the tenancy<sup>3</sup>, whether or not it is an obligation created by statute<sup>4</sup>, has been broken or not performed<sup>5</sup>.

1    Ie under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'tenant' see PARA 1170 note 2 ante.

3    For the meaning of 'tenancy' see PARA 1137 note 1 ante.

4    Ie whether or not it is created by the Rent (Agriculture) Act 1976.

5    Ibid ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case III. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 1; and PARA 949 ante; the Housing Act 1988 s 7(2), Sch 7(2), Sch 2 Pt II, Ground 10; and PARA 1119 ante.

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### **1173. Case IV: nuisance or annoyance etc.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenant<sup>2</sup>, or any person residing or lodging with him or subtenant of his, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using the dwelling house<sup>3</sup>, or allowing the dwelling house to be used, for immoral or illegal purposes<sup>4</sup>.

1    Ie under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'tenant' see PARA 1170 note 2 ante.

3    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case IV. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 2; and PARA 950 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 14 (as substituted and amended); and PARA 1123 ante.

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### **1174. Case V: deterioration in condition of premises.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the condition of the dwelling house<sup>2</sup> has, in the opinion of the court, deteriorated owing to acts of waste by, or the neglect or default of, the tenant<sup>3</sup> or any person residing or lodging with him, or any subtenant of his<sup>4</sup>.

If the person at fault is not the tenant, the court must be satisfied that the tenant has not, before the making of the order for possession, taken such steps as he ought reasonably to have taken for the removal of the person at fault<sup>5</sup>.

1    le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3    For the meaning of 'tenant' see PARA 1170 note 2 ante.

4    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case V para 1.

5    Ibid Sch 4 Pt I, Case V para 2. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 3; and PARA 951 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 13; and PARA 1122 ante.

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### **1175. Case VI: deterioration in condition of furniture.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the condition of any furniture provided by the landlord<sup>2</sup> for use under the tenancy<sup>3</sup> has, in the opinion of the court, deteriorated owing to ill-treatment by the tenant<sup>4</sup> or any person residing or lodging with him, or any subtenant of his<sup>5</sup>.

If the person at fault is not the tenant, the court must be satisfied that the tenant has not, before the making of the order for possession, taken such steps as he ought reasonably to have taken for the removal of the person at fault<sup>6</sup>.

1    le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'landlord' see PARA 1137 note 2 ante.

3    For the meaning of 'tenancy' see PARA 1137 note 1 ante.

4    For the meaning of 'tenant' see PARA 1170 note 2 ante.

5    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case VI para 1.

6    Ibid Sch 4 Pt I, Case VI para 2. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 4; and PARA 952 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 15; and PARA 1125 ante.

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STATUTORY TENANCIES/(v) Security of Tenure; Recovery of Possession/B. DISCRETIONARY GROUNDS FOR POSSESSION/1176. Case VII: contract for sale following notice to quit.

### **1176. Case VII: contract for sale following notice to quit.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenant<sup>2</sup> has given notice to quit and in consequence of that notice the landlord<sup>3</sup> has contracted to sell or let the dwelling house<sup>4</sup>, or has taken any other steps as a result of which he would, in the opinion of the court, be seriously prejudiced if he could not obtain possession<sup>5</sup>.

This Case does not, however, apply where the tenant has given notice to terminate his employment and that notice has operated to terminate the tenancy<sup>6</sup>.

1    le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'tenant' see PARA 1170 note 2 ante.

3    For the meaning of 'landlord' see PARA 1137 note 2 ante.

4    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

5    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case VII para 1.

6    Ibid Sch 4 Pt I, Case VII para 2. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 5; and PARA 953 ante.

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### **1177. Case VIII: unlawful assignment etc.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenant<sup>2</sup> has, without the consent of the landlord<sup>3</sup>, assigned, sublet or parted with possession of the dwelling house<sup>4</sup>, or any part of it<sup>5</sup>.

This Case does not, however, apply if the assignment, subletting or parting with possession was effected before the operative date<sup>6</sup>.

1    le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'tenant' see PARA 1170 note 2 ante.

3    For the meaning of 'landlord' see PARA 1137 note 2 ante.

4    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

5    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case VIII para 1. A statutory tenant is in any event precluded from assigning, subletting or parting with possession of the dwelling house or any part of it: see s 10(1), (2), Sch 5 para 7(2); and PARA 1151 ante.

6    Ibid Sch 4 Pt I, Case VIII para 2. For the meaning of 'operative date' see PARA 1134 ante. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 6 (as amended) which applies only to assignment or subletting of the whole of the premises: see PARA 954 ante.

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**1178. Case IX: dwelling house required by landlord as residence.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the dwelling house<sup>2</sup> is reasonably required by the landlord<sup>3</sup> for occupation as a residence for:

- 2436 (1) himself; or
- 2437 (2) any son or daughter of his over 18 years of age; or
- 2438 (3) his father or mother, or the father or mother of his spouse or civil partner;
- or
- 2439 (4) his grandfather or grandmother, or the grandfather or grandmother of his spouse or civil partner,

and the landlord did not become landlord by purchasing the dwelling house, or any interest in it, after 12 April 1976<sup>4</sup>.

Having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or tenant, the court must be satisfied that no greater hardship would be caused by granting the order than by refusing to grant it<sup>5</sup>.

Where in this Case a landlord obtains an order for possession of the dwelling house, and it is subsequently made to appear to the court that the order was obtained by misrepresentation or concealment of material facts, the court may order the landlord to pay to the former tenant<sup>6</sup> such sum as appears sufficient as compensation for damage or loss sustained by the tenant as a result of the order<sup>7</sup>.

1    le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3    For the meaning of 'landlord' see PARA 1137 note 2 ante.

4    Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case IX para I (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 12). The statutory wording refers to 'wife, or husband or civil partner' and a cohabitant is thus not treated as a spouse or civil partner for these purposes. For the meaning of 'landlord by purchase' cf para 957 ante.

5    Rent (Agriculture) Act 1976 Sch 4 Pt I, Case IX para 2. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 9 (as amended); and PARA 956 ante. As to 'greater hardship' cf para 958 ante.

6    For the meaning of 'tenant' see PARA 1170 note 2 ante.

7    Rent (Agriculture) Act 1976 s 6(3). Cf the Rent Act 1977 s 102; and PARA 959 ante; the Housing Act 1988 s 12; and PARA 1105 ante.

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STATUTORY TENANCIES/(v) Security of Tenure; Recovery of Possession/B. DISCRETIONARY GROUNDS FOR POSSESSION/1179. Case X: subletting.

### **1179. Case X: subletting.**

A court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where any part of the dwelling house<sup>2</sup> is sublet<sup>3</sup>.

The court must be satisfied that the rent charged by the tenant<sup>4</sup> is or was in excess of the maximum rent recoverable<sup>5</sup> for that part<sup>6</sup>.

1   le under the Rent (Agriculture) Act 1976 ss 6(1), (5), 7 (as amended): see PARAS 1166, 1169 ante.

2   For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3   Rent (Agriculture) Act 1976 ss 6(1), (5), 7(1), (2), Sch 4 Pt I, Case X para 1. A statutory tenant is in any event precluded from subletting: see s 10(1), (2), Sch 5 para 7(2); and PARA 1151 ante.

4   For the meaning of 'tenant' see PARA 1170 note 2 ante.

5   le having regard to the provisions of the Rent Act 1977 Pt III (ss 44-61) (as amended) see PARA 892 et seq ante) or Pt V (ss 77-85) (as amended) (see PARA 989 et seq ante) or the Rent (Agriculture) Act 1976 Pt II (ss 6-19) (as amended) (see PARA 1158 et seq ante), as the case may require.

6   Ibid Sch 4 Pt I, Case X para 2 (amended by the Rent Act 1977 s 155(2), Sch 23 para 82(c); the Housing Act 1980 s 152(3), Sch 26). The Rent (Agriculture) Act 1976 Sch 4 Pt I, Case X para 2 (as so amended) does not, however, apply to a rental period beginning before the operative date: Sch 4 Pt I, Case X para 3. For the meaning of 'rental period' see PARA 1160 note 15 ante; and for the meaning of 'operative date' see PARA 1134 ante. Cf the Rent Act 1977 s 98(1)(b), Sch 15 Pt I, Case 10 (as amended); and PARA 960 ante.

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### ***C. MANDATORY GROUNDS FOR POSSESSION***

#### **1180. Case XI: dwelling house previously occupied as residence.**

A court must make an order for possession<sup>1</sup> where:

2440 (1) the person who granted the tenancy<sup>2</sup> or, as the case may be, the original tenancy<sup>3</sup> ('the original occupier') was, prior to granting it, occupying the dwelling house<sup>4</sup> as his residence<sup>5</sup>;

2441 (2) the court is satisfied that the dwelling house is required as a residence for the original occupier or any member of his family<sup>6</sup> who resided with<sup>7</sup> the original occupier when he last occupied the dwelling house as his residence<sup>8</sup>;

2442 (3) not later than the relevant date<sup>9</sup> the original occupier gave notice in writing to the tenant that possession might be recovered under this Case<sup>10</sup>;

2443 (4) the dwelling house has not since the operative date been let by the original occupier to a tenant<sup>11</sup> as respects whom the condition in head (3) above was not satisfied<sup>12</sup>.

The court may dispense with the requirements of either or both of heads (3) and (4) above if of opinion that it is just and equitable to do so<sup>13</sup>.

1 le under the Rent (Agriculture) Act 1976 s 6(1), (6): see PARA 1166 ante.

2 For the meaning of 'tenancy' see PARA 1137 note 1 ante.

3 For these purposes, and for the purposes of the Rent (Agriculture) Act 1976 s 6(1), (6), Sch 4 Pt II, Case XII (see PARA 1181 post), 'original tenancy', in relation to a statutory tenancy, means the tenancy on the termination of which the statutory tenancy arose: Sch 4 Pt II, Case XI para 6. For the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

4 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

5 Rent (Agriculture) Act 1976 Sch 4 Pt II, Case XI para 1.

6 For the meaning of 'member of the tenant's family' cf para 846 ante.

7 As to whether a person is or is not residing with another cf para 843 note 7 ante.

8 Rent (Agriculture) Act 1976 Sch 4 Pt II, Case XI para 2.

9 For these purposes, and for the purposes of ibid Sch 4 Pt II, Case XII (see PARA 1181 post), 'the relevant date' means the date of the commencement of the tenancy or, as the case may be, the original tenancy, or the expiration of the period of six months beginning with the operative date, whichever is the later: Sch 4 Pt II, Case XI para 6. For the meaning of 'operative date' see PARA 1134 ante.

10 Ibid Sch 4 Pt II, Case XI para 3.

11 For the meaning of 'tenant' see PARA 1170 note 2 ante.

12 Rent (Agriculture) Act 1976 Sch 4 Pt II, Case XI para 4.

13 Ibid Sch 4 Pt II, Case XI para 5. Cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 11 (as amended); and PARA 963 ante; the Housing Act 1988 s 7(2), Sch 2 Pt I, Ground 1 (as amended); and PARA 1109 ante. See also s 39(10), Sch 4 paras 13(2), 14 (cited in PARA 1100 note 8 ante).

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### **1181. Case XII: retirement from regular employment.**

A court must make an order for possession<sup>1</sup> where:

2444 (1) the person who granted the tenancy<sup>2</sup> or, as the case may be, the original tenancy<sup>3</sup> ('the owner') acquired the dwelling house<sup>4</sup> or any interest in it, with a view to occupying it as his residence at such time as he should retire from regular employment<sup>5</sup>;

2445 (2) the court is satisfied that the owner has retired from regular employment and requires the dwelling house as his residence or that the owner has died and the dwelling house is required as a residence for a member of his family<sup>6</sup> who was residing with him at the time of his death<sup>7</sup>;

2446 (3) not later than the relevant date<sup>8</sup> the owner gave notice in writing to the tenant that possession might be recovered under this Case<sup>9</sup>;

2447 (4) the dwelling house has not since the operative date<sup>10</sup> been let by the original occupier to a tenant<sup>11</sup> as respects whom the condition in head (3) above was not satisfied<sup>12</sup>.

The court may dispense with the requirements of either or both of heads (3) and (4) above if of opinion that it is just and equitable to do so<sup>13</sup>.

1    Ie under the Rent (Agriculture) Act 1976 s 6(1), (6): see PARA 1166 ante.

2    For the meaning of 'tenancy' see PARA 1137 note 1 ante.

3    For the meaning of 'original tenancy' see PARA 1180 note 3 ante.

4    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

5    Rent (Agriculture) Act 1976 s 6(1), (6), Sch 4 Pt II, Case XII para 1.

6    For the meaning of 'member of his family' cf para 846 ante.

7    Rent (Agriculture) Act 1976 Sch 4 Pt II, Case XII para 2. As to whether a person is or is not residing with another cf para 843 note 7 ante.

8    For the meaning of 'the relevant date' see PARA 1180 note 9 ante.

9    Rent (Agriculture) Act 1976 Sch 4 Case XII para 3.

10   For the meaning of 'operative date' see PARA 1134 ante.

11   For the meaning of 'tenant' see PARA 1170 note 2 ante.

12   Rent (Agriculture) Act 1976 Sch 4 Pt II, Case XII para 4.

13   Ibid Sch 4 Pt II, Case XII para 5. Cf the Rent Act 1977 s 98(2), Sch 15 Pt II, Case 12 (as amended); and PARA 964 ante. See also the Housing Act 1988 s 39(10), Sch 4 paras 13(2), 14 (cited in PARA 1100 note 8 ante).

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### **1182. Case XIII: overcrowding.**

A court must make an order for possession<sup>1</sup> where the dwelling house<sup>2</sup> is overcrowded<sup>3</sup>, in such circumstances as to render the occupier guilty of an offence<sup>4</sup>.

1    Ie under the Rent (Agriculture) Act 1976 s 6(1), (6): see PARA 1166 ante.

2    For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

3    Ie within the meaning of the Housing Act 1985 Pt X (ss 324-344) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 443 et seq.

4    Rent (Agriculture) Act 1976 s 6(1), (6), Sch 4 Pt II, Case XIII (amended by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (4)(b)).

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## **(2) ASSURED AGRICULTURAL OCCUPANCIES**

### **1183. Meaning of 'assured agricultural occupancy'.**

A tenancy<sup>1</sup> or licence of a dwelling house<sup>2</sup> entered into on or after 15 January 1989<sup>3</sup> is an assured agricultural occupancy if:

2448 (1) it is:

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74. (a) an assured tenancy<sup>4</sup> which is not an assured shorthold tenancy<sup>5</sup>; or

75. (b) a tenancy which does not fall within head (a) above on specified grounds<sup>6</sup> and is not an excepted tenancy<sup>7</sup>; or

76. (c) a licence under which a person has the exclusive occupation of a dwelling house as a separate dwelling and which, if it conferred a sufficient interest in land to be a tenancy, would be a tenancy falling within head (a) or head (b) above; and

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2449 (2) the agricultural worker condition is<sup>8</sup> for the time being fulfilled with respect to the dwelling house subject to the tenancy or licence<sup>9</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

3 Ie the date when the Housing Act 1988 Pt I (ss 1-45) (as amended) came into force: see s 141(3). For transitional provisions see PARA 1135 ante.

4 As to assured tenancies see PARA 1011 et seq ante.

5 As to assured shorthold tenancies see PARAS 1044 et seq, 1051 et seq ante.

6 Ie by reason only of the Housing Act 1988 s 1 (as amended), Sch 1 paras 3, 3A, 3B (as substituted) (see PARA 1028 ante) or Sch 1 para 7 (as substituted) (see PARA 1032 ante) or more than one of those provisions.

7 For these purposes, a tenancy is an excepted tenancy if it is (1) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies (see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323); or (2) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302); Housing Act 1988 s 24(2A) (added by the Housing Act 1996 s 103(3)).

8 Ie by virtue of any provision of the Housing Act 1988 s 24(1)(b), Sch 3 (as amended): see PARA 1184 post.

9 Ibid s 24(1), (2) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 28; the Housing Act 1996 s 103(2)). A tenancy which has been extended under the Leasehold Reform Act 1967 s 14 (as amended) is not an assured agricultural occupancy: see s 16(1B) (as added); and PARA 1483 post.

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**1184. The agricultural worker condition.**

The agricultural worker condition is fulfilled with respect to a dwelling house<sup>1</sup> subject to a relevant tenancy or licence if:

- 2450 (1) the dwelling house is or has been in qualifying ownership<sup>2</sup> at any time during the subsistence of the tenancy or licence, whether or not it was at that time a relevant tenancy or licence; and
- 2451 (2) the occupier<sup>3</sup> or, where there are joint occupiers, at least one of them is a qualifying worker<sup>4</sup> or has been a qualifying worker at any time during the subsistence of the tenancy or licence, whether or not it was at that time a relevant tenancy or licence, or is incapable of whole-time work in agriculture<sup>5</sup>, or was incapable of work in agriculture as a permit worker, in consequence of a qualifying injury or disease<sup>6</sup>.

The agricultural worker condition is also fulfilled with respect to a dwelling house subject to a relevant tenancy or licence if:

- 2452 (a) that condition was previously fulfilled with respect to the dwelling house but the person who was then the occupier or, as the case may be, a person who was one of the joint occupiers, whether or not under the same relevant tenancy or licence, has died; and
- 2453 (b) that condition ceased to be fulfilled on the death of the occupier referred to in head (a) above ('the previous qualifying occupier'); and
- 2454 (c) the occupier is either the qualifying surviving partner<sup>7</sup> of the previous qualifying occupier or the qualifying member of the previous qualifying occupier's family<sup>8</sup>.

The agricultural worker condition is also fulfilled with respect to a dwelling house subject to a relevant tenancy or licence if:

- 2455 (i) the tenancy or licence was granted to the occupier or, where there are joint occupiers, at least one of them<sup>9</sup> in consideration of his giving up possession of another dwelling house of which he was then occupier, or one of joint occupiers, under another relevant tenancy or licence; and
- 2456 (ii) immediately before he gave up possession of that dwelling house, as a result of his occupation the agricultural worker condition was fulfilled<sup>10</sup> with respect to it<sup>11</sup>.

Where:

- 2457 (A) the agricultural worker condition is fulfilled<sup>12</sup> with respect to a dwelling house subject to a relevant tenancy or licence ('the earlier tenancy or licence'); and
- 2458 (B) another relevant tenancy or licence of the same dwelling house ('the later tenancy or licence') is granted<sup>13</sup> to the person who, immediately before the grant, was the occupier or one of the joint occupiers under the earlier tenancy or licence and as a result of whose occupation the agricultural worker condition was fulfilled as mentioned in head (A) above,

then, so long as a person as a result of whose occupation of the dwelling house the agricultural worker condition was fulfilled with respect to the earlier tenancy or licence continues to be the

occupier, or one of the joint occupiers, under the later tenancy or licence, the agricultural worker condition is fulfilled with respect to the dwelling house<sup>14</sup>.

1 For these purposes, 'the dwelling house', in relation to a relevant tenancy or licence, means the dwelling house which is let under the tenancy or, as the case may be, is occupied under the licence: Housing Act 1988 s 24(1)(b), Sch 3 para 1(2)(b). 'Relevant tenancy or licence' means a tenancy or licence of a description specified in s 24(2) (as amended) (see PARA 1183 ante at head (1) in the text): Sch 3 para 1(1). For the meaning of 'dwelling house' generally see PARA 1012 note 4 ante.

2 For these purposes, the Rent (Agriculture) Act 1976 s 1(5)(a), Sch 3 has effect to determine whether a dwelling house is in qualifying ownership (see PARA 1141 ante): Housing Act 1988 Sch 3 para 1(1), (3)(c).

3 For these purposes, 'the occupier', in relation to a relevant tenancy or licence, means the tenant or licensee: ibid Sch 3 para 1(2)(a). For the meaning of 'tenant' see PARA 1018 note 6 ante.

4 For these purposes, the Rent (Agriculture) Act 1976 Sch 3 has effect to determine whether a person is a qualifying worker (see PARA 1142 ante): Housing Act 1988 Sch 3 para 1(1), (3)(a).

5 For these purposes, 'agriculture' has the same meaning as in the Rent (Agriculture) Act 1976 (see PARA 1136 ante): Housing Act 1988 Sch 3 para 1(1).

6 Ibid Sch 3 para 2. For these purposes, the Rent (Agriculture) Act 1976 Sch 3 has effect to determine whether a person is incapable of whole-time work in agriculture, or was incapable of work in agriculture as a permit worker, in consequence of a qualifying injury or disease (see PARA 1142 notes 3, 7, 11 ante): Housing Act 1988 Sch 3 para 1(3)(b).

7 For these purposes, (1) 'surviving partner' means widow, widower or surviving civil partner; and (2) a surviving partner of the previous qualifying occupier of the dwelling house is a qualifying surviving partner if that surviving partner was residing in the dwelling house immediately before the previous qualifying occupier's death: ibid Sch 3 para 3(2) (Sch 3 para 3(2), (5) substituted, and Sch 3 para 3(1)(c)(i), (3)(a), (6) amended, by the Civil Partnership Act 2004 s 81, Sch 8, PARA 44(1)-(3)). As to whether a person is or is not residing with another cf para 843 note 7 ante. For the purposes of head (1) supra, (a) a person who, immediately before the previous qualifying occupier's death, was living with the previous occupier as his or her wife or husband is to be treated as the widow or widower of the previous occupier; and (b) a person who, immediately before the previous qualifying occupier's death, was living with the previous occupier as if they were civil partners is to be treated as the surviving civil partner of the previous occupier: Housing Act 1988 Sch 3 para 3(5) (as so substituted). If, immediately before the death of the previous qualifying occupier, there is, by virtue of Sch 3 para 3(5) (as so substituted), more than one person who falls within Sch 3 para 3(1)(c)(i) (as amended), such one of them as may be decided by agreement or, in default of agreement, by the county court is treated as the qualifying surviving partner for the purposes of Sch 3 para 3 (as amended): Sch 3 para 3(6) (as so amended). Cf the Rent (Agriculture) Act 1976 s 3(2) (as substituted), s 3(3A) (as added); and PARA 1145 ante. See also PARA 843 notes 11-12 ante.

8 Housing Act 1988 Sch 3 para 3(1) (as amended: see note 7 supra). For these purposes, a member of the family of the previous qualifying occupier of the dwelling house is the qualifying member of the family if (1) on the death of the previous qualifying occupier there was no qualifying surviving partner; and (2) the member of the family was residing in the dwelling house with the previous qualifying occupier at the time of, and for the period of two years before, his death: Sch 3 para 3(3) (as so amended). Not more than one member of the previous qualifying occupier's family may, however, be taken into account in determining whether the agricultural worker condition is fulfilled by virtue of Sch 3 para 3 (as amended) and, accordingly, if there is more than one member of the family who is the occupier in relation to the relevant tenancy or licence and who would otherwise be the qualifying member of the family by virtue of Sch 3 para 3(3) (as so amended), only that one of those members of the family who may be decided by agreement or, in default of agreement, by the county court, is the qualifying member: Sch 3 para 3(4). For the meaning of 'member of the family' cf para 846 ante. See also PARA 843 notes 11-12 ante.

9 For these purposes, the reference to a tenancy or licence granted to the occupier or at least one of joint occupiers includes a reference to the case where the grant is to him together with one or more other persons: ibid Sch 3 para 4.

10 Ie whether by ibid Sch 3 paras 2 or 3 (as amended): see the text and notes 1-8 supra.

11 Ibid Sch 3 para 4.

12 Ie by virtue of any of ibid Sch 3 paras 2-4 (as amended): see the text and notes 1-11 supra.

13 For these purposes, the reference to the grant of the later tenancy or licence to the person mentioned includes a reference to the case where the grant is to that person together with one or more other persons: *ibid* Sch 3 para 5(1).

14 *Ibid* Sch 3 para 5(1), (2). For the purposes of Sch 3 paras 3, 4 (as amended) and any further application of Sch 3 para 5, where Sch 3 para 5(2) has effect, the agricultural worker condition is to be treated as fulfilled so far as concerns the later tenancy or licence by virtue of the same paragraph of Sch 3 (as amended) as was applicable or, as the case may be, last applicable in the case of the earlier tenancy or licence: Sch 3 para 5(3).

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### **1185. Security of tenure.**

If a statutory periodic tenancy<sup>1</sup> arises on the coming to an end of an assured agricultural occupancy<sup>2</sup>, it is an assured agricultural occupancy as long as the agricultural worker condition is<sup>3</sup> for the time being fulfilled with respect to the dwelling house<sup>4</sup> in question<sup>5</sup>.

If the tenant<sup>6</sup> under an assured agricultural occupancy gives notice to terminate his employment, then, notwithstanding anything in any agreement or otherwise, that notice does not constitute a notice to quit as respects the assured agricultural occupancy<sup>7</sup>.

1 For the meaning of 'statutory periodic tenancy' see PARA 1067 ante.

2 For the meaning of 'assured agricultural occupancy' see PARA 1183 ante.

3 *Ie* by virtue of any provision of the Housing Act 1988 s 24(1)(b), Sch 3 (as amended): see PARA 1184 ante.

4 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

5 Housing Act 1988 s 25(1)(a). If no rent was payable under the assured agricultural occupancy which constitutes the fixed term tenancy referred to in s 5(2) (see PARA 1067 ante), s 5(3)(d) (see PARA 1068 ante at head (4) in the text) applies as if for the words 'the same as those for which rent was last payable under' there were substituted 'monthly beginning on the day following the coming to an end of': s 25(1)(b).

6 For the meaning of 'tenant' see PARA 1018 note 6 ante.

7 Housing Act 1988 ss 24(3), 25(4). Nothing in s 25(4) affects the operation of an actual notice to quit given in respect of an assured agricultural occupancy: s 25(5).

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### **1186. Modification of statutory provisions relating to assured tenancies.**

Every assured agricultural occupancy<sup>1</sup> which is not an assured tenancy<sup>2</sup> is treated<sup>3</sup> as if it were such a tenancy and any reference to a tenant<sup>4</sup>, a landlord<sup>5</sup> or any other expression appropriate to a tenancy<sup>6</sup> is to be construed accordingly<sup>7</sup>. The statutory provisions relating to assured tenancies<sup>8</sup> have effect, however, in relation to every assured agricultural occupancy subject to certain modifications<sup>9</sup>.

- 1 For the meaning of 'assured agricultural occupancy' see PARA 1183 ante.
- 2 For the meaning of 'assured tenancy' see PARA 1011 ante.
- 3 For the purposes of the Housing Act 1988 Pt I Ch I (ss 1-19, Schs 1, 2 (as amended)): see PARA 1018 et seq ante) and ss 24(4), 25 (see PARAS 1092, 1118, 1126, 1185 ante).
- 4 For the meaning of 'tenant' see PARA 1018 note 6 ante.
- 5 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 6 For the meaning of 'tenancy' see PARA 1012 note 1 ante.
- 7 Housing Act 1988 s 24(3).
- 8 See *ibid* Pt I Ch 1 (ss 1-19, Schs 1, 2) (as amended).
- 9 *Ibid* s 24(3). For the specified modifications see PARAS 1092 note 12, 1118 note 15, 1126 note 6 ante. For the prescribed forms of notice under s 13(2) (as amended) (see PARA 1091 ante) proposing a new rent or licence fee for an assured agricultural occupancy see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(da), (dc), Schedule, Form 4C (England), Form 4D (Wales) (substituted by SI 2003/260 and SI 2003/307 respectively); and for the prescribed form of application under the Housing Act 1988 s 13(4) (see PARA 1091 ante) referring to a rent assessment committee a notice under s 13(2) (as amended) relating to an assured agricultural occupancy see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(e), Schedule, Form 5. As to the information which the president of the rent assessment panel must make available in a case where the rent assessment committee has made a determination or is precluded from making a determination see the Assured Tenancies and Agricultural Occupancies (Rent Information) Order 1988, SI 1988/2199, art 3, Schedule (as amended); and PARA 1089 note 3 ante. For the prescribed form of notice under the Housing Act 1988 s 8 (as amended) (see PARA 1103 ante) informing a tenant that the landlord intends to begin proceedings for possession of a dwelling house let on an assured agricultural occupancy see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(c), Schedule, Form 3.

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### **(3) REHOUSING**

#### **1187. Applications to housing authority concerned.**

An application may be made by the occupier of land used for agriculture<sup>1</sup> to the housing authority concerned<sup>2</sup> ('the authority') on the ground that:

- 2459 (1) vacant possession is or will be needed of a dwelling house<sup>3</sup> which is subject to a protected occupancy<sup>4</sup> or statutory tenancy<sup>5</sup> or an assured agricultural occupancy<sup>6</sup>, or which is let on or subject to any other specified tenancy<sup>7</sup>, in order to house a person who is or is to be employed in agriculture by the applicant, and that person's family;
- 2460 (2) the applicant is unable to provide, by any reasonable means, suitable alternative accommodation for the occupier of the dwelling house; and
- 2461 (3) the authority ought, in the interests of efficient agriculture, to provide the suitable alternative accommodation<sup>8</sup>.

1 For the meaning of 'agriculture' see PARA 1136 ante.



2 For the meaning of 'the housing authority concerned' see PARA 1139 note 7 ante.

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 ante; and for the meaning of 'protected occupancy' see PARAS 1144-1145 ante.

5 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

6 For these purposes, 'assured agricultural occupancy' has the same meaning as in the Housing Act 1988 Pt I Ch III (ss 24, 25) (as amended) (see PARAS 1183-1186 ante): Rent (Agriculture) Act 1976 s 27(3) (substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 33(1), (3); amended by the Housing Act 1988 s 26(b)).

7 Is any tenancy which is a protected or statutory tenancy for the purposes of the Rent Act 1977 (see PARA 818 et seq ante) and which (1) if it were a tenancy at a low rent; and (2) if, where relevant, any earlier tenancy granted to the tenant, or to a member of his family, had been a tenancy at a low rent, would be a protected occupancy or statutory tenancy. For the meaning of 'tenancy at a low rent' see PARA 1167 note 8 ante.

8 Rent (Agriculture) Act 1976 s 27(1), (2) (amended by the Rent Act 1977 s 155(2), Sch 23 para 77; the Housing Act 1988 s 26(a)). For these purposes, references to the authority providing housing accommodation are references to its provision by any means open to the authority, whether direct or indirect: Rent (Agriculture) Act 1976 s 28(13).

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### **1188. Duty of housing authority concerned.**

An application to the housing authority concerned<sup>1</sup> must be in writing and, if the authority so directs, must be in such form as the authority directs<sup>2</sup>. The authority must, within seven days of its receiving the application, notify the occupier of the dwelling house<sup>3</sup> of which possession is sought ('the dwelling house') that the application has been made<sup>4</sup>.

The authority, or the applicant, or the occupier of the dwelling house, may obtain advice on the case made by the applicant concerning the interests of efficient agriculture<sup>5</sup>, and regarding the urgency of the application, by applying for the services<sup>6</sup> of an agricultural dwelling house advisory committee<sup>7</sup>. The committee must tender its advice in writing to the authority, and make copies of it available for the applicant and the occupier of the dwelling house<sup>8</sup>. In assessing the case made by the applicant and in particular the importance and degree of urgency of the applicant's need, the authority must take full account of any advice tendered to it by the committee; and in any legal proceedings relating to the duty so imposed on the authority, evidence is admissible of the advice so given<sup>9</sup>. The authority must notify its decision on the application in writing to the applicant, and to the occupier of the dwelling house, within three months of its receiving the application or, if an application is made for the services of a committee, within two months of its receiving the committee's advice<sup>10</sup>.

If the authority is satisfied that the applicant's case is substantiated<sup>11</sup>, it must use its best endeavours to provide the suitable alternative accommodation; and, in assessing the priority to be given to meet the applicant's case, the authority must take into account the urgency of the case, the competing claims on the accommodation which it can provide and the resources at its disposal<sup>12</sup>. The authority is not, however, obliged to provide suitable alternative accommodation if at the time when the accommodation becomes available the person for whom it is to be provided is employed by the applicant in the same capacity as that in which he

was employed by the applicant at the time when the application was made, and he will continue to be so employed if provided with the alternative accommodation<sup>13</sup>.

Any material change of facts which have been stated to the authority, or to the committee, by the applicant or, in relation to the application, by the occupier of the dwelling house, must be notified to the authority as soon as practicable by the person making the statement unless before the change accommodation has been provided in accordance with the application, or the authority has decided that the applicant's case is not substantiated; and a person who fails without reasonable excuse to comply with that obligation is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>14</sup>.

An application lapses if the applicant ceases to be the occupier of the land used for agriculture, but without prejudice to the making of an application by any other person who is or becomes the occupier<sup>15</sup>.

If in or in connection with an application under the above provisions the applicant or any other person knowingly or recklessly makes a false statement for the purpose of inducing the authority to provide housing accommodation<sup>16</sup>, he is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>17</sup>.

1 For the meaning of 'the housing authority concerned' see PARA 1139 note 7 ante.

2 Rent (Agriculture) Act 1976 s 28(1). There is a sufficient compliance with such a direction if the application is in a form substantially to the same effect as the form specified in the direction: s 28(1).

3 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.

4 Rent (Agriculture) Act 1976 s 28(2).

5 For the meaning of 'agriculture' see PARA 1136 ante.

6 I.e. the services of a committee under the Rent (Agriculture) Act 1976 s 29: see PARA 1189 post.

7 Ibid s 28(3). The advice of the committee may be challenged by an application for judicial review: *R v Agricultural Dwelling-house Advisory Committee for Bedfordshire, Cambridgeshire and Northamptonshire, ex p Brough* (1986) 19 HLR 367, [1987] 1 EGLR 106.

8 Rent (Agriculture) Act 1976 s 28(4).

9 Ibid s 28(5).

10 Ibid s 28(6) (substituted by the Rent (Agriculture) Amendment Act 1977 s 1). The notification must state (1) if the authority is satisfied that the applicant's case is substantiated in accordance with the Rent (Agriculture) Act 1976 s 27 (as amended) (see PARA 1187 ante), what action it proposes to take on the application; (2) if it is not so satisfied, the reasons for its decision: s 28(6A) (substituted by the Rent (Agriculture) Amendment Act 1977 s 1).

11 I.e. in accordance with the Rent (Agriculture) Act 1976 s 27 (as amended).

12 Ibid s 28(7). Without prejudice to any other means of enforcing the duty imposed by s 28(7), that duty is enforceable, at the suit of the applicant, by a claim against the authority for damages for breach of statutory duty: s 28(8). The authority errs in law if it treats the occupier as being in a better position than any other applicant on its general housing waiting list: *R v East Hertfordshire District Council, ex p Dallhold Resources Management (UK) Pty Ltd* (1989) 22 HLR 77, [1990] 1 EGLR 12.

13 Rent (Agriculture) Act 1976 s 28(9). The continuance of the obligation imposed on the authority by s 28 (as amended) depends on compliance by the applicant with any reasonable request made by the authority for information about any change in circumstances which takes place after the making of the application, and which might affect the merits of the applicant's case: s 28(10).

14 Ibid s 28(11) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 52 note 6 ante. Notwithstanding anything in the Magistrates' Courts Act 1980 s 127(1) (see MAGISTRATES vol 29(2) (Reissue) PARA 589) an information relating to an offence under the Rent (Agriculture) Act 1976 s 28 (as amended) may be tried if it is laid at any time within two years after the commission of the offence and within

six months after the date on which evidence sufficient in the opinion of the housing authority concerned to justify the proceedings comes to its knowledge: s 28(14A) (added by the Housing Act 1988 s 140(1), Sch 17 para 21).

As to offences by bodies corporate and the prosecution of offences see PARA 1139 note 7 ante.

15 Rent (Agriculture) Act 1976 s 28(12).

16 For the meaning of references to the authority providing housing accommodation see PARA 1187 note 8 ante.

17 Rent (Agriculture) Act 1976 s 28(14) (amended by the Criminal Justice Act 1982 ss 38, 46). See also note 14 supra.

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### **1189. Agricultural dwelling house advisory committees.**

In the area of each agricultural wages committee<sup>1</sup> there must be one or more agricultural dwelling house advisory committees ('committees') to perform the functions given<sup>2</sup> to them<sup>3</sup>.

An application for advice<sup>4</sup> may be made to the chairman of the agricultural wages committee for the area in question for the appointment or designation of a committee to give the advice<sup>5</sup>.

Each committee must be appointed by the chairman of the agricultural wages committee and he may include persons who are not members of the agricultural wages committee<sup>6</sup>; and each committee must be composed of an independent member, who is the chairman, a member representing employers and a member representing workers in agriculture<sup>7</sup>. The chairman of the committee must be appointed from a panel of persons approved by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>8</sup>. All three members of a committee must be present at any meeting of the committee; and no meeting may be held during a vacancy in the membership<sup>9</sup>.

In carrying out their functions committees must act in accordance with any directions, whether general or specific, given to them by the Secretary of State or the Assembly or minister<sup>10</sup>. The Secretary of State or the Assembly or minister may, if he or it thinks fit, make regulations contained in a statutory instrument regulating the procedure and meetings of committees, and may from time to time give directions, whether specific or general, regarding their procedure<sup>11</sup>. Subject to regulations, or any such direction, the procedure of any committee is such as the chairman of that committee may direct<sup>12</sup>.

The Secretary of State or the Assembly or minister may appoint a secretary for a committee, and there must be paid to the members of a committee, and to the person who appoints or designates a committee, such fees and allowances by way of compensation for expenses incurred and time lost by them in the performance of their duties as the Secretary of State may sanction with the consent of the Treasury, or as the Assembly or the relevant Welsh minister may sanction<sup>13</sup>. The Secretary of State or the Assembly or minister may, with the consent of the Treasury in the case of the Secretary of State, make payments to persons other than members of a committee by way of fees or compensation for expenses incurred and time lost by them in or in connection with their giving, at the request of the committee, any advice or information<sup>14</sup>.

1    le each agricultural wages committee established under the Agricultural Wages Act 1948: see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1244.

2 le under the Rent (Agriculture) Act 1976 s 28 (as amended): see PARA 1188 ante.

3 Ibid s 29(1).

4 See note 2 supra.

5 Rent (Agriculture) Act 1976 s 29(2).

6 Ibid s 29(3).

7 Ibid s 29(5).

8 Ibid s 29(6). The statutory wording is 'approved by the Minister'; and for these purposes, 'Minister' is expressed to mean, in relation to England, the Minister of Agriculture, Fisheries and Food (s 29(14)); but see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

If there is no chairman, or if the chairman is unable to act, a vice-chairman of the agricultural wages committee may act in his place: Rent (Agriculture) Act 1976 s 29(4).

9 Rent (Agriculture) Act 1976 s 29(7).

10 Ibid s 29(8). Any power of giving directions conferred by Rent (Agriculture) Act 1976 includes power to vary or revoke directions so given: s 34(4).

11 Ibid s 29(9). At the date at which this title states the law, no such regulations had been made.

12 Ibid s 29(10).

13 Ibid s 29(11); Transfer of Functions (Minister for the Civil Service and Treasury) Order 1981, SI 1981/1670, arts 2(2), 3(5). Payments made by the Minister under the Rent (Agriculture) Act 1976 s 29 must be defrayed out of money provided by Parliament: s 29(13).

14 Ibid s 29(12); Transfer of Functions (Minister for the Civil Service and Treasury) Order 1981, SI 1981/1670, arts 2(2), 3(5).

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## **(4) POWER TO OBTAIN INFORMATION**

### **1190. Information about housing accommodation.**

The Minister<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may exercise the powers conferred on him or on it<sup>2</sup> for the purpose of obtaining information about the housing accommodation which is on, or held in connection with, or used for, agricultural or forestry land<sup>3</sup>. The Minister or the Assembly or minister may give information so obtained:

2462 (1) to the housing authority concerned<sup>4</sup> for any part of the area to which the information relates; and

2463 (2) where, since the giving of the information, other land has come into common ownership or occupation with the first-mentioned land, to the housing authority concerned for any part of the other land;

and information so given may be transmitted to any other authority to whom the Minister or the Assembly or minister may so give it<sup>5</sup>.

The Minister or the Assembly or the relevant Welsh minister may also give the information so obtained to any agricultural dwelling house advisory committee which is to give advice<sup>6</sup> concerning any part of the area to which the information relates<sup>7</sup>.

No information relating to any particular land or business which has been obtained<sup>8</sup> may be published or otherwise disclosed without the previous consent in writing:

- 2464 (a) of the person giving the information; or
- 2465 (b) if different, of any person who at the time of the disclosure is the owner<sup>9</sup> or occupier<sup>10</sup> of the land, or as the case may be, the owner of the business<sup>11</sup>;

and a person who contravenes this provision is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>12</sup>.

1 For these purposes, and for the purposes of the Rent (Agriculture) Act 1976 s 31 (as amended) (see PARA 1191 post), references to the Minister are expressed to be, in relation to England, references to the Minister of Agriculture, Fisheries and Food (but see the Ministry of Agriculture, Fisheries and Food (Dissolution) Order 2002, SI 2002/794) and, so far as references relate to forestry land, to the Forestry Commissioners: Rent (Agriculture) Act 1976 s 30(8). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante. 'Forestry land' does not include agricultural land (s 30(7)); and 'agricultural land' means land used for agriculture as defined in the Agriculture Act 1947 s 109 (as amended) (ie including horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes: see s 109(3); and AGRICULTURAL LAND vol 1 (2008) PARA 324) (Rent (Agriculture) Act 1976 s 30(7)). As to the Forestry Commissioners see FORESTRY vol 52 (2009) PARA 34 et seq.

2 Ie by the Rent (Agriculture) Act 1976 s 31 (as amended): see PARA 1191 post.

3 Ibid s 30(1).

4 For the meaning of 'the housing authority concerned' see PARA 1139 note 7 ante.

5 Rent (Agriculture) Act 1976 s 30(2).

6 Ie under ibid s 29: see PARA 1189 ante.

7 Ibid s 30(3).

8 Ie under ibid s 31 (as amended).

9 For these purposes, 'owner' includes a person exercising, as servant or agent of the owner, functions of estate management in relation to the land: ibid s 30(7).

10 For these purposes, 'occupier' includes a person responsible for the carrying on of any activity on agricultural or forestry land as servant or agent of the occupier: ibid s 30(7).

11 Ibid s 30(4). Section 30(4) does not, however, apply (1) to disclosure under s 30(2), (3) (see the text and notes 4-7 supra) but does apply to those to whom disclosure is so made; (2) to disclosure for the purposes of any criminal proceedings, or of any report of those proceedings: s 30(5).

12 Ibid s 30(6) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 52 note 6 ante. As to offences by bodies corporate and the prosecution of offences see PARA 1139 note 7 ante.

PARAS 1386-2000)/19. AGRICULTURAL HOUSES/(4) POWER TO OBTAIN INFORMATION/1191.  
Kinds of information obtainable.

### **1191. Kinds of information obtainable.**

The Minister or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>1</sup> may serve on any owner<sup>2</sup> or occupier<sup>3</sup> of agricultural<sup>4</sup> or forestry<sup>5</sup> land a notice requiring him to give such information as is specified in the notice concerning housing accommodation<sup>6</sup> on, or held in connection with, or used for, the land<sup>7</sup>. The notice must be complied with within such period, being not less than four weeks from service of the notice, as may be specified in the notice<sup>8</sup>.

The notice may in particular require information about:

- 2466 (1) the extent and nature of the accommodation;
- 2467 (2) the condition and location of the accommodation, including the state of the repair of any dwelling house<sup>9</sup>, and the means of access to it;
- 2468 (3) whether any accommodation is wholly or partly occupied by a person who is or has been employed in agriculture<sup>10</sup> or by a person who has been married to, or has been the civil partner of, such a person, or whether the accommodation is vacant, and any impending change in the state of occupation;
- 2469 (4) so far as it lies within the knowledge of the person on whom the notice is served, facts about, or related to, housing accommodation on, or held in connection with, or used for, the land at some time or times prior to the service of the notice, or even prior to the operative date<sup>11</sup>, but not at a time more than five years before the service of the notice<sup>12</sup>.

If the person served is not the owner or occupier of the land, the notice may require him to give any information in his possession which may identify the true owner or occupier and his address, or to state that he has no such information<sup>13</sup>.

The notice may be served either:

- 2470 (a) by delivering it to the person on whom it is to be served; or
- 2471 (b) by leaving it at the usual or last known place of abode of that person; or
- 2472 (c) by sending it by the recorded delivery service or by registered post in a prepaid letter addressed to that person at his usual or last known place of abode; or
- 2473 (d) in the case of an incorporated company or body, by delivering it to the secretary or clerk of the company or body at its registered or principal office or sending it, by the recorded delivery service or by registered post, in a prepaid letter addressed to the secretary or clerk of the company or body at that office; or
- 2474 (e) if it is not practicable after reasonable inquiry to ascertain the name or address of an owner or occupier of the land, as being a person having any interest in the land or having particular functions or responsibilities, by addressing it to him by the description of the person having that interest in the land, naming it, or, as the case may be, having that function or responsibility, naming it, and delivering the notice to some responsible person on the land, or by affixing it, or a copy of it, to some conspicuous object on the land<sup>14</sup>.

If any person without reasonable excuse fails in any respect to comply with a notice under the above provisions, or in purported compliance with such a notice knowingly or recklessly furnishes any information which is false in a material particular, he is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>15</sup>.

- 1 For the meaning of 'Minister' see PARA 1190 note 1 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 2 For the meaning of 'owner' see PARA 1190 note 9 ante.
- 3 For the meaning of 'occupier' see PARA 1190 note 10 ante.
- 4 For the meaning of 'agricultural land' see PARA 1190 note 1 ante.
- 5 For the meaning of 'forestry land' see PARA 1190 note 1 ante.
- 6 ie being information within the Rent (Agriculture) Act 1976 s 30 (as amended): see PARA 1190 ante.
- 7 Ibid s 31(1).
- 8 Ibid s 31(2).
- 9 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.
- 10 For the meaning of 'agriculture' see PARA 1136 ante.
- 11 For the meaning of 'operative date' see PARA 1134 ante.
- 12 Rent (Agriculture) Act 1976 31(3) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 11).
- 13 Rent (Agriculture) Act 1976 s 31(4).
- 14 Ibid s 31(5).
- 15 Ibid s 31(6) (amended by the Criminal Justice Act 1982 ss 38, 46). As to the standard scale see PARA 52 note 6 ante; and as to offences by bodies corporate see PARA 1139 note 7 ante. Proceedings for an offence under the Rent (Agriculture) Act 1976 s 31(6) (as so amended) may not, however, be instituted by the housing authority concerned: see PARA 1139 note 7 ante.

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## **(5) SUSPENSION OF CONDITION ATTACHED TO PLANNING PERMISSION**

### **1192. In general.**

Where planning permission<sup>1</sup> as respects a dwelling house<sup>2</sup> is or has been granted subject to a condition that the occupation of the dwelling house is limited to a person employed in agriculture<sup>3</sup> or forestry<sup>4</sup>, then, if and so long as the dwelling house is subject to a protected occupancy<sup>5</sup> or statutory tenancy<sup>6</sup>, or is let on or subject to an assured agricultural occupancy<sup>7</sup> or any other specified tenancy<sup>8</sup>, the condition is suspended<sup>9</sup>.

Suspension of the condition does not affect the operation of the statutory provisions<sup>10</sup> relating to planning permission for development already carried out<sup>11</sup>.

- 1 As to planning permission under the Town and Country Planning Act 1990 Pt III (ss 55-106B) (as amended) generally see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 213 et seq.
- 2 For the meaning of 'dwelling house' see PARA 1137 note 2 ante.
- 3 For the meaning of 'agriculture' see PARA 1136 ante; but see note 9 infra.

4 For the meaning of 'forestry' see PARA 1136 ante; but see note 9 infra.

5 For the meaning of 'dwelling house subject to a protected occupancy' see PARA 1145 ante; and for the meaning of 'protected occupancy' see PARAS 1144-1145 ante.

6 For the meaning of 'dwelling house subject to a statutory tenancy' see PARA 1146 ante; and for the meaning of 'statutory tenancy' see PARAS 1146-1149 ante.

7 le within the meaning of the Housing Act 1988 Pt I Ch III (ss 24, 25) (as amended): see PARAS 1183-1186 ante.

8 le any tenancy which is a protected or statutory tenancy for the purposes of the Rent Act 1977 (see PARA 818 et seq ante) and which (1) if it were a tenancy at a low rent; and (2) if, where relevant, any earlier tenancy granted to the tenant, or to a member of his family, had been a tenancy at a low rent, would be a protected occupancy or statutory tenancy. For the meaning of 'tenancy at a low rent' see PARA 1167 note 8 ante.

9 Rent (Agriculture) Act 1976 s 33(1)-(3) (amended by the Rent Act 1977 s 155(2), Sch 23 para 77; the Local Government and Housing Act 1989 s 194(1), Sch 11 para 49). The Rent (Agriculture) Act 1976 s 33(1) applies irrespective of the degree to which the condition circumscribes the employment in agriculture or forestry, irrespective of the other persons covered by the condition, and irrespective of the way in which agriculture or forestry is defined: s 33(5).

10 le the Town and Country Planning Act 1990 s 73A (as added): see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 525.

11 Rent (Agriculture) Act 1976 s 33(4) (amended by the Planning and Compensation Act 1991 s 32, Sch 7 para 4).

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## **(6) ASSURED SHORTHOLD TENANCIES GRANTED TO AGRICULTURAL WORKERS**

### **1193. Notice requirements irrespective of date of creation of the tenancy.**

Notwithstanding that the agricultural worker condition<sup>1</sup> is for the time being fulfilled<sup>2</sup> with respect to the dwelling house<sup>3</sup> subject to the tenancy, an assured shorthold tenancy<sup>4</sup> may be created<sup>5</sup> if, before it is entered into, a notice in such form as may be prescribed<sup>6</sup> and stating that the tenancy is to be a shorthold tenancy is served by the person who is to be the landlord<sup>7</sup> under the tenancy on the person who is to be the tenant<sup>8</sup> under it<sup>9</sup>. An assured shorthold tenancy cannot be created if the tenancy is an excepted tenancy<sup>10</sup>. An assured shorthold tenancy may also come into being<sup>11</sup> on the coming to an end of a previous such tenancy<sup>12</sup>.

1 As to the agricultural worker condition see PARA 1184 ante.

2 le by virtue of any provision of the Housing Act 1988 s 24, Sch 3 (as amended): see PARA 1184 ante.

3 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.

4 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 et seq ante.

5 le the Housing Act 1988 s 19A (as added) may apply: see PARA 1044 ante. Because under s 19A (as added) an assured tenancy created on or after 28 February 1997 is presumed to be an assured shorthold, subject to certain statutory exceptions, there is now normally no need for a notice such as is described in the text: see



PARA 1044 ante. Cf the position for assured shortholds created before 28 February 1997, when a statutory notice was required: see PARA 1051 ante.

6 For the prescribed form of notice see the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997, SI 1997/194, reg 3(i), Schedule Form 9.

7 For the meaning of 'landlord' see PARA 1020 note 3 ante.

8 For the meaning of 'tenant' see PARA 1018 note 6 ante.

9 See the Housing Act 1988 Sch 2A para 9(1), (2)(a) (Sch 2A para 9 added by the Housing Act 1996 s 96(2), Sch 7); and PARA 1047 ante.

10 See the Housing Act 1988 Sch 2A para 8(1), (2)(b) (as added: see note 9 supra); and PARA 1047 ante. For the meaning of 'excepted tenancy' for these purposes see PARA 1047 note 12 ante.

11 Ie by virtue of *ibid* s 5 (as amended) (security of tenure): see PARAS 1067-1071 ante.

12 See *ibid* Sch 2A para 9(4) (as added: see note 9 supra); and PARA 1047 ante.

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## **(7) SPECIAL PROTECTION FROM EVICTION FOR AGRICULTURAL WORKERS**

### **1194. Court's general discretionary power to postpone or suspend possession order.**

The following provisions apply where the tenant under the former tenancy<sup>1</sup> occupied the premises under the terms of his employment as a person employed in agriculture<sup>2</sup> but is not a statutory tenant as defined in the Rent (Agriculture) Act 1976<sup>3</sup>.

Without prejudice to any other power of the court<sup>4</sup> to postpone the operation or suspend the execution of an order for possession, if in proceedings by the owner<sup>5</sup> against the occupier<sup>6</sup> the court makes an order for the possession of the premises the court may suspend the execution of the order on such terms and conditions, including conditions as to the payment by the occupier of arrears of rent, mesne profits and otherwise as the court thinks reasonable<sup>7</sup>. In considering whether or how to exercise its powers under this provision, the court must have regard to all the circumstances and, in particular, to:

- 2475 (1) whether other suitable accommodation is or can be made available to the occupier;
- 2476 (2) whether the efficient management of any agricultural land or the efficient carrying on of any agricultural operations would be seriously prejudiced unless the premises were available for occupation by a person employed or to be employed by the owner; and
- 2477 (3) whether greater hardship would be caused by the suspension of the execution of the order than by its execution without suspension or further suspension<sup>8</sup>.

Where in proceedings for the recovery of possession of the premises the court makes an order for possession but suspends the execution of the order under the provisions set out above, it must make no order for costs, unless it appears to the court, having regard to the conduct of

the owner or of the occupier, that there are special reasons for making such an order<sup>9</sup>. Where the court has so suspended the execution of an order for possession, it may from time to time vary the period of suspension or terminate it and may vary any terms or conditions imposed by virtue of the above provisions<sup>10</sup>.

1     le within the meaning of the Protection from Eviction Act 1977 s 3 (as amended): see PARA 653 ante. In accordance with s 3(2B) (as added) (see PARA 653 note 8 ante), any reference in s 4(1), (2) (as amended) (see the text and notes 2-3, 6 infra) to the tenant under the former tenancy includes a reference to the licensee under a licence (other than an excluded licence) which has come to an end (being a licence to occupy premises as a dwelling); and in s 4(3)-(10) (see the text and notes 2-10 infra; and PARA 1195 post) the expressions 'tenancy' and 'rent' and any other expressions referable to a tenancy are to be construed accordingly: s 4(2A) (added by the Housing Act 1988 s 30(3)).

2     le as defined in the Rent (Agriculture) Act 1976 s 1: see PARA 1136 ante.

3     Protection from Eviction Act 1977 s 4(1). For the meaning of 'statutory tenant' for these purposes see PARAS 1146-1149 ante.

4     le apart from the Protection from Eviction Act 1977 s 4 (as amended). For the meaning of 'the court' for these purposes see PARA 653 note 2 ante.

5     For the meaning of 'the owner' see PARA 653 note 10 ante.

6     For these purposes, 'the occupier', in relation to any premises, means (1) the tenant under the former tenancy; or (2) the surviving spouse or surviving civil partner of the tenant under the former tenancy residing with him at his death or, if the former tenant leaves no such surviving spouse or surviving civil partner, any member of his family residing with him at his death: Protection from Eviction Act 1977 s 4(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 15).

7     Protection from Eviction Act 1977 s 4(3).

8     Ibid s 4(8).

9     Ibid s 4(9).

10    Ibid s 4(7).

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### **1195. Circumstances in which suspension of possession order is mandatory.**

Where the tenant under the former tenancy<sup>1</sup> occupied the premises under the terms of his employment as a person employed in agriculture<sup>2</sup> but is not a statutory tenant as defined in the Rent (Agriculture) Act 1976<sup>3</sup>, then where the order for possession is made within the period of six months beginning with the date when the former tenancy came to an end, the following provisions apply<sup>4</sup>. Without prejudice to any other powers of the court<sup>5</sup> to postpone the operation or suspend the execution of the order for a longer period, the court must suspend the execution of the order for the remainder of that period of six months unless the court:

2478 (1) is satisfied either:

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77. (a) that other suitable accommodation is, or will within that period be made, available to the occupier<sup>6</sup>; or

78. (b) that the efficient management of any agricultural land or the efficient carrying on of any agricultural operations would be seriously prejudiced unless the premises are available for occupation by a person employed or to be employed by the owner<sup>7</sup>; or
79. (c) that greater hardship<sup>8</sup> would be caused by the suspension of the order until the end of that period than by its execution within that period; or
80. (d) that the occupier, or any person residing or lodging with the occupier, has been causing damage to the premises or has been guilty of conduct which is a nuisance or annoyance to persons occupying other premises; and
- 65  
2479 (2) considers that it would be reasonable not to suspend the execution of the order for the remainder of that period<sup>9</sup>.

Where the court so suspends the execution of an order for possession, it must do so on such terms and conditions, including conditions as to the payment by the occupier of arrears of rent, mesne profits and otherwise as the court thinks reasonable<sup>10</sup>. A decision of the court not to suspend the execution of the order under the above provisions does not prejudice any other power of the court to postpone the operation or suspend the execution of the order for the whole or part of the period of six months mentioned above<sup>11</sup>.

Where, in the case of an order for possession of the premises to which the above provisions apply, the execution of the order is not so suspended or, the execution of the order having been so suspended, the suspension is terminated, then, if it is subsequently made to appear to the court that the failure to suspend the execution of the order or, as the case may be, the termination of the suspension was attributable to the provisions of head (1)(b) above and was due to misrepresentation or concealment of material facts by the owner of the premises, the court may order the owner to pay to the occupier such sum as appears sufficient as compensation for damage or loss sustained by the occupier as a result of that failure or termination<sup>12</sup>.

Where in proceedings for the recovery of possession of the premises the court makes an order for possession but suspends the execution of the order under the provisions set out above, it must make no order for costs, unless it appears to the court, having regard to the conduct of the owner or of the occupier, that there are special reasons for making such an order<sup>13</sup>. Where the court has so suspended the execution of an order for possession, it may from time to time vary the period of suspension or terminate it and may vary any terms or conditions imposed by virtue of the above provisions<sup>14</sup>.

1    le within the meaning of the Protection from Eviction Act 1977 s 3 (as amended): see PARA 653 ante. See further PARA 1194 note 1 ante.

2    le as defined in the Rent (Agriculture) Act 1976 s 1: see PARA 1136 ante.

3    For the meaning of 'statutory tenant' for these purposes see PARAS 1146-1149 ante.

4    Protection from Eviction Act 1977 s 4(1), (4).

5    le under ibid s 4(1)-(3) (as amended) (see PARA 1194 ante) or apart from s 4 (as amended). For the meaning of 'the court' for these purposes see PARA 653 note 2 ante.

6    For the meaning of 'the occupier' for these purposes see PARA 1194 note 6 ante.

7    For the meaning of 'the owner' see PARA 653 note 10 ante.

8    le being hardship in respect of matters other than the carrying on of such a business as is mentioned in the text.

9    Protection from Eviction Act 1977 s 4(4).

- 10 Ibid s 4(5).
- 11 Ibid s 4(6).
- 12 Ibid s 4(10).
- 13 Ibid s 4(9).
- 14 Ibid s 4(7).

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## **20. LONG RESIDENTIAL TENANCIES AT LOW RENTS**

### **(1) THE**

#### **(i) Application of the Statutory Protection**

##### **1196. In general.**

The provisions of Part I of the Landlord and Tenant Act 1954<sup>1</sup> extend the protection of the Rent Act to certain tenants occupying residential property under long leases at low rents<sup>2</sup>. On the termination, in accordance with those provisions, of a tenancy<sup>3</sup> to which those provisions apply<sup>4</sup>, the tenant<sup>5</sup> is entitled<sup>6</sup> to the protection of the Rent Act<sup>7</sup> and becomes a statutory tenant<sup>8</sup>. Where, however, a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993<sup>9</sup>, none of the statutory provisions relating to security of tenure for tenants apply to the lease; and after the term date of the lease the extension of Rent Act protection<sup>10</sup> does not apply to any sublease directly or indirectly derived out of the lease<sup>11</sup>.

Protection under the Rent Act is being phased out with the introduction of assured tenancies at market rents under the Housing Act 1988 and no new protected tenancies could be created after 14 January 1989 except in certain restricted circumstances<sup>12</sup>. It appears, however, that a new statutory tenancy may still be created after that date; but, where a long tenancy at a low rent was entered into on or after 1 April 1990<sup>13</sup>, otherwise than in pursuance of a contract made before that day, then on the termination of that tenancy the tenant will be entitled<sup>14</sup> to an assured periodic tenancy<sup>15</sup> and not to a statutory tenancy under the Rent Act<sup>16</sup>. Moreover, since 15 January 1999 the majority of long tenancies at a low rent have been governed by the protective provisions of Schedule 10 to the Local Government and Housing Act 1989 regardless of when they were created<sup>17</sup>. The extension of Rent Act protection under Part I of the Landlord and Tenant Act 1954 now only applies in specified circumstances where a lease had come to the end of its term before that date<sup>18</sup>.

1 The Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see the text and notes 2-11 *infra*; and PARA 1197 *et seq post*. Part I (ss 1-22) (as originally enacted) applied only to such long tenancies as were at a low rent: see s 2(1) (as originally enacted). The Rent Act 1957 s 21(2) (repealed) excluded all long tenancies from the Rent Acts and brought them within the scope of the Landlord and Tenant Act 1954 Pt I (ss 1-22); but this extension of Pt I (ss 1-22) was reversed by the Leasehold Reform Act 1967. For transitional provisions see s 39(2), Sch 5 paras 5-7 (as amended); and PARA 1209 note 7 *post*. As to the right of certain tenants to acquire the freehold or an extended lease under the Leasehold Reform Act 1967 see PARA 1389 *et seq post*; and as to the right of certain tenants of flats to collective enfranchisement or to the acquisition of a new lease under the Leasehold Reform, Housing and Urban Development Act 1993 see PARA 1532 *et seq post*.

- 2 See the Landlord and Tenant Act 1954 s 2(1) (as amended); and PARAS 1201, 1204 post.
- 3 For the meaning of 'tenancy' see PARA 706 note 2 ante.
- 4 See PARAS 1201-1204 post.
- 5 For the meaning of 'the tenant' see PARA 1208 post.
- 6 le subject to and in accordance with the provisions of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended).
- 7 Ibid s 1 (amended by the Rent Act 1968 s 117(2), Sch 15). For these purposes, 'the Rent Act' means the Rent Act 1977 as it applies to regulated tenancies but exclusive of Pt II (repealed), Pt III (ss 44-61) (as amended) (see PARA 891 et seq ante), Pt IV (ss 62-75) (as amended) see PARA 909 et seq ante) and Pt V (ss 77-85) (as amended) (see PARA 985 et seq ante): Landlord and Tenant Act 1954 s 22(1) (amended by the Rent Act 1968 Sch 15; the Rent Act 1977 s 155, Sch 23 para 16).
- 8 See PARA 1215 et seq post. For the meaning of 'statutory tenant' see PARA 831 ante.
- 9 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 post.
- 10 le the Landlord and Tenant Act 1954 s 1 (as amended): see the text and notes 1-7 supra.
- 11 See the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post.
- 12 See PARA 1012 et seq ante.
- 13 le the day appointed for the coming into force of the Local Government and Housing Act 1989 s 186: see s 195(2); and the Local Government and Housing Act 1989 (Commencement No 5 and Transitional Provisions) Order 1990, SI 1990/431, art 4.
- 14 le subject to and by virtue of the provisions of the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1237 et seq post.
- 15 See PARA 1254 et seq post.
- 16 See the Local Government and Housing Act 1989 s 186(1), (2); and PARA 1237 post.
- 17 See ibid s 186(3); and PARA 1237 post.
- 18 See ibid s 186(3), Sch 10 para 3(2); and PARAS 1237, 1248 post.

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### **1197. Jurisdiction and procedure of the court.**

Any jurisdiction conferred on the court by any of the provisions of Part 1 of the Landlord and Tenant Act 1954<sup>1</sup> must be exercised by the county court<sup>2</sup>. The procedure is in some respects specifically provided for<sup>3</sup> and in other respects is governed by the ordinary rules of procedure in the county court<sup>4</sup>. In any proceedings where the county court so exercises jurisdiction, the powers of the judge of summoning one or more assessors<sup>5</sup> may be exercised notwithstanding that no application is made in that behalf by one or more party to the proceedings<sup>6</sup>.

Where any question falls to be determined<sup>7</sup> by the court with reference to the circumstances at a future date<sup>8</sup>, the court must have regard to all rights, interests and obligations under or relating to the tenancy as they subsist at the time of the determination and to all relevant

circumstances as they then subsist and must assume, except in so far as the contrary is shown, that those rights, interests, obligations and circumstances will continue to subsist unchanged until that future date<sup>9</sup>.

1   Ile the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 ante, PARA 1198 et seq post.

2   Ibid s 63(1). As to the removal of proceedings into the High Court see s 63(9) (as amended); and PARA 722 ante. Section 63 (as amended) applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) as it applies in relation to the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): Local Government and Housing Act 1989 Sch 10 para 20(3).

3   See CPR 56.1, 56.2; *Practice Direction--Landlord And Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 2.1, 2.2; and PARA 57 ante.

4   See generally CIVIL PROCEDURE.

5   Ile under the County Courts Act 1984 s 63 (as amended): see CIVIL PROCEDURE vol 11 (2009) PARA 863.

6   Landlord and Tenant Act 1954 s 63(5); Interpretation Act 1978 s 17(2)(a). See further PARA 722 ante.

7   Ile under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended).

8   See eg ibid s 2(2); and PARA 1201 post.

9   Ibid s 20.

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### **1198. Application to the Crown.**

The provisions of Part I of the Landlord and Tenant Act 1954 so far as still applying<sup>1</sup> apply where:

2480 (1) there is an interest belonging to Her Majesty in right of the Crown and that interest is under the management of the Crown Estate Commissioners<sup>2</sup>; or

2481 (2) there is an interest belonging to Her Majesty in right of the Duchy of Lancaster<sup>3</sup> or belonging to the Duchy of Cornwall<sup>4</sup>,

as if it were an interest not so belonging<sup>5</sup>.

An interest which belongs to Her Majesty in right of the Crown and which is not under the management of the Crown Estate Commissioners, or an interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, is not, however, bound by those provisions<sup>6</sup>.

1   Ile the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARAS 1196-1197 ante, PARA 1199 et seq post.

2   As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

3 Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, then, for these purposes, the Chancellor of the Duchy of Lancaster is deemed to be the owner of the interest: Housing Act 1980 s 73(5), Sch 8 para 9.

4 Where an interest belongs to the Duchy of Cornwall, then, for these purposes, the Secretary of the Duchy of Cornwall is deemed to be the owner of the interest: *ibid* Sch 8 para 10.

5 Landlord and Tenant Act 1954 s 56(7) (added by the Housing Act 1980 s 73(4)(a)).

6 Landlord and Tenant Act 1954 s 21(6) (amended by the Housing Act 1980 s 73(4)(b)). See further PARA 1205 post.

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### **1199. Contracting out.**

The provisions of Part I of the Landlord and Tenant Act 1954 so far as still applying<sup>1</sup> have effect notwithstanding any agreement, whether in writing or not<sup>2</sup>, to the contrary<sup>3</sup>. Nothing in those provisions is, however, to be construed as preventing the surrender<sup>4</sup> of a tenancy<sup>5</sup>.

1 *Ie* the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1200 et seq post.

2 References in the Landlord and Tenant Act 1954 Pt I (as amended) to an agreement between the landlord and the tenant, except in s 17 (see the text and notes 3-5 *infra*), are to be construed as references to an agreement in writing between them: s 69(2).

3 *Ibid* s 17.

4 *Ie* a surrender whether by deed or by operation of law: *Curtin v Greater London Council* (1970) 60 LGR 281, CA. See also *Joseph v Joseph* [1967] Ch 78, [1966] 3 All ER 486, CA (decided on the Landlord and Tenant Act 1954 s 38 (as amended)); and PARA 709 ante. 'Surrender' means actual surrender, not an agreement to surrender a tenancy in the future, which is caught by s 17: *Re Hennessy's Agreement, Hillman v Davison* [1975] Ch 252, [1975] 1 All ER 60, applying *Joseph v Joseph* *supra*; *Allnatt London Properties Ltd v Newton* [1984] 1 All ER 423, CA.

5 Landlord and Tenant Act 1954 s 17 proviso; cf the Local Government and Housing Act 1989 s 186(4); and PARA 1240 post. Nor does the Landlord and Tenant Act 1954 s 17 invalidate an agreement conferring a right of pre-emption on the lessor if at any time during the term the lessee should wish to dispose of the lease: see *Tiffany Investments Ltd v Bircham & Co Nominees (No 2) Ltd* [2003] EWCA Civ 1759, [2004] 2 EGLR 31, [2003] All ER (D) 72 (Dec).

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### **1200. Tenant's duty to give information.**

Where the property comprised in a long tenancy<sup>1</sup> at a low rent<sup>2</sup> is or includes residential premises<sup>3</sup>, then at any time during the last two years of the term of the tenancy or, if the tenancy is being continued<sup>4</sup> after the term date<sup>5</sup>, at any time while the tenancy is being so

continued, the immediate landlord<sup>6</sup> or any superior landlord<sup>7</sup> may give to the tenant<sup>8</sup> or any subtenant<sup>9</sup> of premises comprised in the long tenancy a notice in the prescribed form<sup>10</sup> requiring him to notify the landlord or superior landlord, as the case may be:

2482 (1) whether the interest of the person to whom the notice is given has effect subject to any subtenancy on which that interest is immediately expectant; and, if so

2483 (2) what premises are comprised in the subtenancy, for what term it has effect or, if it is terminable by notice, by what notice it can be terminated, what is the rent payable thereunder, who is the subtenant and, to the best of the knowledge and belief of the person to whom the notice is given, whether the subtenant is in occupation of the premises comprised in the subtenancy or any part of those premises and, if not, what is the subtenant's address;

and it is the duty of the person to whom such a notice is given to comply therewith within one month of the giving of the notice<sup>11</sup>.

1 For the meaning of 'long tenancy' see PARA 1202 post.

2 For the meaning of 'tenancy at a low rent' see PARA 1203 post.

3 For these purposes, 'residential premises' means premises normally used, or adapted for use, as one or more dwellings: Landlord and Tenant Act 1954 s 18(2).

4 le by ibid s 3(1): see PARA 1209 post.

5 For the meaning of 'term date' see PARA 1201 note 7 post.

6 For the meaning of 'the landlord' see PARA 1205 post.

7 For the meaning of 'superior landlord' see PARA 1206 post.

8 For the meaning of 'the tenant' see PARA 1208 post.

9 For these purposes, 'subtenant', in relation to a long tenancy, means the owner of a tenancy created, whether immediately or derivatively, out of the long tenancy and includes a person retaining possession of any premises by virtue of the Rent Act after the coming to an end of a subtenancy; and 'subtenancy' includes a right so to retain possession: Landlord and Tenant Act 1954 s 18(2) (amended by the Rent Act 1968 s 117(2), Sch 15). For the meaning of 'the Rent Act' see PARA 1196 note 7 ante.

10 For the prescribed form of notice see the Landlord and Tenant (Notices) Regulations 1957, SI 1957/1157, reg 4(iii), Appendix, Form 3 (amended by SI 1967/1831). A form substantially to the same effect may be used: see reg 4. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to make regulations prescribing forms see the Landlord and Tenant Act 1954 s 66 (as amended); and PARA 702 ante; and as to the service of notices see PARA 703 ante. Section 66(4) (service of notices: see PARA 703 ante) applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) as it applies in relation to the Landlord and Tenant Act 1954: Local Government and Housing Act 1989 Sch 10 para 20(5).

11 Landlord and Tenant Act 1954 s 18(1). There is no sanction or penalty prescribed for breach of this duty. The duty under s 18(1) also applies to long residential tenancies under the Local Government and Housing Act 1989: see PARA 1242 post. For the prescribed form of notice in that case see the Long Residential Tenancies (Supplemental Forms) Regulations 1997, SI 1997/3005, reg 3, Form 7. A form substantially to the same effect may be used: see reg 2.



AND TENANT ACT 1954/(ii) Tenancies Protected; Parties Concerned/1201. Tenancies protected.

## **(ii) Tenancies Protected; Parties Concerned**

### **1201. Tenancies protected.**

Protection<sup>1</sup> is given to any long tenancy<sup>2</sup> at a low rent<sup>3</sup> which is still subject to the Rent Act protection provided by Part I of the Landlord and Tenant Act 1954<sup>4</sup> and as respects which for the time being the qualifying condition<sup>5</sup> is fulfilled<sup>6</sup>.

At any time before, but not more than 12 months before, the term date<sup>7</sup> application may be made to the court<sup>8</sup> as respects any long tenancy at a low rent, not being at the time of the application a tenancy as respects which the qualifying condition is fulfilled, for an order declaring that the tenancy is not to be treated<sup>9</sup> as a protected long tenancy at a low rent; and, where such an application is made:

2484 (1) the court, if satisfied that the tenancy is not likely<sup>10</sup>, immediately before the term date, to be a protected long tenancy at a low rent<sup>11</sup>, but not otherwise, must make the order;

2485 (2) if the court makes the order, the tenancy is not thereafter treated<sup>12</sup> as a protected long tenancy at a low rent<sup>13</sup>.

1    Ie under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1202 et seq post.

2    For the meaning of 'long tenancy' see PARA 1202 post.

3    For the meaning of 'tenancy at a low rent' see PARA 1203 post.

4    As to the limited circumstances in which the Rent Act protection provided by the Landlord and Tenant Act 1954 Pt I (as amended), and not the statutory protection under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post), applies see PARA 1196 ante.

5    For the meaning of 'the qualifying condition' see PARA 1204 post.

6    Landlord and Tenant Act 1954 s 2(1).

7    For these purposes, 'term date', in relation to a tenancy granted for a term of years certain, means the date of expiry of the term: *ibid* ss 2(6), 22(1). In relation to such a tenancy as is mentioned in *ibid* s 19(2) (see PARA 1202 post), Pt I (ss 1-22) (as amended) has effect with the substitution for s 2(6) of the following: '(6) In this Part of this Act the expression 'term date', in relation to any such tenancy as is mentioned in subsection (2) of section nineteen of this Act, means the first date after the commencement of this Act on which apart from this Act the tenancy could have been brought to an end by notice to quit given by the landlord': s 19(2), Sch 4 paras 1, 2. A fixed term of less than a year was a term of years certain within s 38(4) (as added; now repealed) (see PARA 710 ante): *Re Land and Premises at Liss, Hants* [1971] Ch 986, [1971] 3 All ER 380.

8    As to the court having jurisdiction see PARA 1197 ante.

9    Ie for the purposes of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended).

10   As to the judge's duty in determining future circumstances see PARA 1197 ante.

11   Ie a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante.

12   Ie notwithstanding anything in *ibid* s 2(1) (as amended): see the text and notes 1-6 supra; and PARA 1204 post.

13   *Ibid* s 2(2).

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### **1202. Meaning of 'long tenancy'.**

'Long tenancy' means<sup>1</sup> a tenancy<sup>2</sup> granted for a term of years certain exceeding 21 years, whether or not subsequently extended by act of the parties or by any enactment<sup>3</sup>.

Where on the coming to an end of a tenancy at a low rent<sup>4</sup> the person who was tenant thereunder immediately before the coming to an end thereof becomes, whether by grant or by implication of law, tenant of the whole or any part of the property comprised therein under another tenancy at a low rent, then, if the first tenancy was a long tenancy or is deemed<sup>5</sup> to have been a long tenancy, the second tenancy is deemed to be a long tenancy irrespective of its terms<sup>6</sup>.

In relation to a tenancy from year to year or other tenancy not granted for a term of years certain, being a tenancy which is to be so deemed<sup>7</sup> to be a long tenancy, the statutory provisions relating to protected long tenancies at a low rent<sup>8</sup> have effect subject to the specified modification<sup>9</sup>.

1    Ie in the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1203 et seq post.

2    For the meaning of 'tenancy' see PARA 706 note 2 ante.

3    Landlord and Tenant Act 1954 ss 2(4), 22(1). The reference to tenancies extended by enactment covers those tenancies temporarily extended before 1 October 1954 by the Leasehold Property (Temporary Provisions) Act 1951 (repealed). Where a long tenancy has been extended by the Leasehold Reform Act 1967 s 14 (as amended), then after the extended term date the protection does not apply to that tenancy nor to any subtenancy directly or indirectly derived out of the tenancy: see s 16(1)(c), (d), (6) (as amended); and PARA 1483 post. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post. Provisions for determining the tenancy by either the landlord or the tenant before the 21 years do not affect the position; but as to the special rule for calculating low rents see PARA 1203 post.

4    For the meaning of 'tenancy at a low rent' see PARA 1203 post.

5    Ie by virtue of the Landlord and Tenant Act 1954 s 19(1).

6    Ibid s 19(1). For the meaning of 'terms' see PARA 706 note 27 ante.

7    Ie by virtue of ibid s 19(1): see the text and notes 4-6 supra.

8    Ie ibid Pt I (ss 1-22) (as amended).

9    Ibid s 19(2). As to the modifications see PARA 1201 note 7 ante, PARAS 1209 notes 7, 10, 1214 note 5 post.

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### **1203. Meaning of 'tenancy at a low rent'.**

'Tenancy at a low rent' means<sup>1</sup> a tenancy<sup>2</sup> the rent payable in respect whereof or, where that rent is a progressive rent<sup>3</sup>, the maximum rent payable in respect whereof:

- 2486 (1) where the tenancy was entered into before 1 April 1990 or, where the property comprised in the tenancy had a rateable value<sup>4</sup> on 31 March 1990, is entered into on or after 1 April 1990 in pursuance of a contract made before that date, is less than two-thirds of the rateable value of the property; and
- 2487 (2) where the tenancy is entered into on or after 1 April 1990, otherwise than, where the property comprised in the tenancy had a rateable value on 31 March 1990, in pursuance of a contract made before 1 April 1990, is payable at a rate of £1,000 or less a year if the property is in Greater London<sup>5</sup> and £250 or less a year if the property is elsewhere<sup>6</sup>.

In determining whether a long tenancy<sup>7</sup> is, or at any time was, a tenancy at a low rent, there must be disregarded such part, if any, of the sums payable by the tenant as is expressed, in whatever terms, to be payable in respect of rates, council tax, services, repairs, maintenance or insurance, unless it could not have been regarded by the parties as a part so payable<sup>8</sup>.

1 le for the purposes of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1204 et seq post.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 'Progressive rent' is not defined in the Landlord and Tenant Act 1954. It was held that 'progressive rent', when used in the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 s 12(1)(a) proviso (repealed), included a rent to be increased in one step only or which might take effect at a time that was uncertain: *Bryanston Property Co Ltd v Edwards* [1944] KB 32, [1943] 2 All ER 646, CA; *Tedman v Whicker* [1944] KB 112, [1944] 1 All ER 26, CA; *Wheeler v Wirral Estate Ltd* [1935] 1 KB 294, CA.

4 For these purposes, the rateable value of the property is that which would be taken as its rateable value for the purposes of the Rent Act 1977 s 5(1) (as amended) (see PARA 861 ante): Landlord and Tenant Act 1954 s 2(5) (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 3). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

5 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

6 Landlord and Tenant Act 1954 s 2(5) (as substituted: see note 4 supra); s 22(1). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace any amount referred to in s 2(5)(b) (as so substituted) (see head (2) in the text) by such amount as is specified in the order; and such an order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 2(8) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 4). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions under the Landlord and Tenant Act 1954 Pt I (as amended), so far as exercisable in relation to Wales, to the Assembly see PARA 27 note 4 ante.

7 For the meaning of 'long tenancy' see PARA 1202 ante. The Landlord and Tenant Act 1954 s 2(7) (added by the Rent Act 1977 s 155(2), Sch 23 para 13; amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 1) provides that 'in this section 'long tenancy' does not include a tenancy which is, or may become, terminable before the end of the term by notice given to the tenant'. It is, however, apprehended that 'in this section' means 'in this subsection'; cf the Rent Act 1977 s 5(5); and PARA 862 ante.

8 Landlord and Tenant Act 1954 s 2(7) (as added and amended: see note 7 supra).

PARAS 1386-2000)/20. LONG RESIDENTIAL TENANCIES AT LOW RENTS/(1) THE LANDLORD AND TENANT ACT 1954/(ii) Tenancies Protected; Parties Concerned/1204. Meaning of 'the qualifying condition'.

### 1204. Meaning of 'the qualifying condition'.

The qualifying condition<sup>1</sup> is that the circumstances, as respects the property comprised in the tenancy<sup>2</sup>, the use of that property, and all other relevant matters, are such that, on the coming to an end of the long tenancy<sup>3</sup> at a low rent<sup>4</sup> at that time, the tenant would, if the tenancy had not been one at a low rent, be entitled by virtue of the Rent Act<sup>5</sup> to retain possession of the whole or part of the property comprised in the tenancy<sup>6</sup>.

The qualifying condition requires in particular that there should be a house let as a separate dwelling<sup>7</sup> within the limits of rateable value of the Rent Act<sup>8</sup> and not excluded from that Act by any circumstances other than that of low rent<sup>9</sup>. In order to fulfil the qualifying condition the tenant must reside on the premises<sup>10</sup>.

The qualifying condition must be fulfilled at the term date<sup>11</sup> if the tenancy is to be automatically continued<sup>12</sup>; but anything authorised or required to be done<sup>13</sup> is not to be treated as invalid, if done before the term date in relation to a long tenancy at a low rent, by reason only that at the time at which it was done the qualifying condition was not fulfilled as respects the tenancy<sup>14</sup>.

1 As to the significance of the qualifying condition see PARA 1201 ante.

2 For the meaning of 'tenancy' see PARA 706 note 2 ante.

3 For the meaning of 'long tenancy' see PARA 1202 ante.

4 For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

5 For the meaning of 'the Rent Act' see PARA 1196 note 7 ante.

6 Landlord and Tenant Act 1954 s 2(1) (amended by the Rent Act 1968 s 117(2), Sch 15); Landlord and Tenant Act 1954 s 22(1). For the purpose only of determining whether the qualifying condition is fulfilled with respect to a tenancy which is entered into on or after 1 April 1990, otherwise than, where the property comprised in the tenancy had a rateable value on 31 March 1990, in pursuance of a contract made before 1 April 1990, for the Rent Act 1977 s 4(4)(b), (5) (as added and amended) (see PARA 860 ante) there is to be substituted: '(b) on the date the contract for the grant of the tenancy was made (or, if there was no such contract, on the date the tenancy was entered into) R exceeded £25,000 under the formula:

$$R = \frac{P \times I}{1 - (1 + I)^{-T}}$$

where P is the premium payable as a condition of the grant of the tenancy (and includes a payment of money's worth) or, where no premium is so payable, zero; I is 0.06; and T is the term, expressed in years, granted by the tenancy (disregarding any right to terminate the tenancy before the end of the term or to extend the tenancy)': Landlord and Tenant Act 1954 s 2(1A) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 2). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace any amount referred to in the Landlord and Tenant Act 1954 s 2(1A) (as so added) and the number in the definition of 'I' supra by such amount or number as is specified in the order; and such an order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: s 2(8) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 4). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

7 For the meaning of 'house let as a separate dwelling' cf para 819 et seq ante. In determining, for the purposes of any provision of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq ante, PARA 1205 et seq post), whether the property comprised in a tenancy, or any part of that property, was let as a separate dwelling, the nature of the property or part at the time of the creation of the tenancy is deemed to have been the same as its nature at the time in relation to which the question arises; and the purpose for which it was let under the tenancy is deemed to have been the same as the purpose for which it is

or was used at the last-mentioned time: s 22(3); and see *Haines v Herbert* [1963] 3 All ER 715, [1963] 1 WLR 1401, CA; *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA; *Crown Lodge (Surbiton) Investments Ltd v Nalecz* [1967] 1 All ER 489, [1967] 1 WLR 647, CA; *Regalian Securities Ltd v Ramsden* [1981] 2 All ER 65, [1981] 1 WLR 611, HL. Where a tenant of a house purported to sublet a flat in the house for a period exceeding the residue of its own tenancy, with the effect that there was an assignment of the tenancy as to the flat, the qualifying condition was not satisfied by the intended subtenant because the tenancy under which she derived her interest was not one under which the flat had been let as a separate dwelling: *Grosvenor Estate Belgravia v Cochrane* (1991) 24 HLR 98, [1991] 2 EGLR 83.

8 See the Rent Act 1977 s 4 (as amended); and PARAS 854-858 ante. The appropriate rateable value is normally that of all property comprised in the tenancy and not only of the part occupied by the tenant: *Crown Lodge (Surbiton) Investments Ltd v Nalecz* [1967] 1 All ER 489, [1967] 1 WLR 647, CA. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

9 For the various exemptions under the Rent Act 1977 see PARA 867 et seq ante.

10 See *ibid* s 2 (as amended); and PARA 831 ante. For the meaning of 'residence' for these purposes see PARAS 832-833 ante. See further *Haines v Herbert* [1963] 3 All ER 715, [1963] 1 WLR 1401, CA; *Herbert v Byrne* [1964] 1 All ER 882, [1964] 1 WLR 519, CA; *Regalian Securities Ltd v Ramsden* [1981] 2 All ER 65, [1981] 1 WLR 611, HL.

11 For the meaning of 'term date' see PARA 1201 note 7 ante.

12 As to automatic continuation see PARA 1210 post.

13 *Ie* under the Landlord and Tenant Act 1954 ss 3-22 (as amended): see PARA 1209 et seq post.

14 *Ibid* s 2(3). For an exception see s 16(7); and PARA 1233 note 10 post.

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### **1205. Meaning of 'the landlord'.**

'The landlord' in relation to a tenancy<sup>1</sup> ('the relevant tenancy') means<sup>2</sup> the person, whether or not he is the immediate landlord, who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say:

2488 (1) that it is an interest in reversion expectant, whether immediately or not, on the termination of the relevant tenancy; and

2489 (2) that it is either the fee simple or a tenancy the duration of which is at least five years longer than that of the relevant tenancy<sup>3</sup>,

and is not itself in reversion expectant, whether immediately or not, on an interest which fulfils those conditions<sup>4</sup>.

In relation to the premises constituting the dwelling house<sup>5</sup> where the Rent Act applies<sup>6</sup>, 'the landlord' means, as respects any time falling within the period of the statutory tenancy<sup>7</sup>, the person who, as respects those premises, is landlord of the tenant for the purposes of the Rent Act<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 le in the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq ante; the text and notes 3-8 infra; and PARA 1206 et seq post) but subject to the provisions of s 21 (as amended) (see the text and notes 3-8 infra).

3 For these purposes, the question whether a tenancy ('the superior tenancy') is to be treated as having a duration at least five years longer than that of the relevant tenancy is to be determined as follows: (1) if the term date of the relevant tenancy has not passed, the superior tenancy is to be so treated unless it is due to expire at a time earlier than five years after the term date or can be brought to an end at such a time by notice to quit given by the landlord; (2) if the term date of the relevant tenancy has passed, the superior tenancy is to be so treated unless it is due to expire within five years or can be brought to an end within five years by notice to quit given by the landlord: *ibid* s 21(3). References to a notice to quit given by the landlord are references to a notice to quit given by the immediate landlord: s 21(2). For the meaning of 'term date' see PARA 1201 note 7 ante; and for the meaning of 'notice to quit' generally see PARA 704 note 19 ante.

4 *Ibid* ss 21(1), 22(1). Notwithstanding anything in s 21(1), if at any time the interest which would otherwise be the interest of the landlord is an interest not bound by Pt I (as amended) and is not the interest of the immediate landlord, then as respects that time 'the landlord' means in Pt I (as amended), subject to the provisions of s 21(2) (see note 3 supra), the person, whether or not he is the immediate landlord, who has the interest in the property comprised in the relevant tenancy immediately derived out of the interest not bound by Pt I (as amended): s 21(6). For these purposes, 'interest not bound by Pt I (as amended)' means an interest which belongs to Her Majesty in right of the Crown and is not under the management of the Crown Estate Commissioners or an interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department: s 21(6) (amended by the Housing Act 1980 s 73(4)(b)).

The Landlord and Tenant Act 1954 s 21 (as amended) applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) as it applies in relation to the Landlord and Tenant Act 1954 Pt I (as amended) subject to the following modification: (1) any reference to Pt I (as amended) is to be construed as a reference to the Local Government and Housing Act 1989 Sch 10 (as amended); and (2) the Landlord and Tenant Act 1954 s 21(4) (as amended) (see the text and notes 5-8 infra) is to be omitted: Local Government and Housing Act 1989 Sch 10 para 19(1).

5 For these purposes, 'the dwelling house' means the premises agreed between the landlord and the tenant or determined by the court (1) if the agreement or determination is made on or after the term date of the former tenancy, to be the premises which as respects that tenancy are the premises qualifying for protection; (2) if the agreement or determination is made before the term date of the former tenancy, to be the premises which are likely to be the premises qualifying for the protection: Landlord and Tenant Act 1954 ss 6(3), 22(1). 'The premises qualifying for protection' means the aggregate of the premises of which, if the tenancy in question were not one at a low rent, the tenant would be entitled to retain possession by virtue of the Rent Act after the coming to an end of the tenancy at the term date: Landlord and Tenant Act 1954 ss 3(3), 22(1) (amended by the Rent Act 1968 s 117(2), Sch 15). For the meaning of 'the tenant' see PARA 1208 post; for the meaning of 'the former tenancy' see PARA 1215 post; and for the meaning of 'the Rent Act' see PARA 1196 note 7 ante.

6 le by virtue of the Landlord and Tenant Act 1954 s 6(1) (as amended): see PARAS 1215-1217 post.

7 For these purposes, 'the period of the statutory tenancy' means the period beginning with the coming to an end of the former tenancy and ending with the earliest date by which the tenant, and any successor to his statutory tenancy, have ceased to retain possession of the dwelling house by virtue of the Rent Act: Landlord and Tenant Act 1954 s 7(6) (amended by the Rent Act 1968 s 117(2), Sch 15).

8 Landlord and Tenant Act 1954 s 21(4) (amended by the Rent Act 1968 s 117(2), Sch 15); Landlord and Tenant Act 1954 s 22(1). See also note 4 supra. In relation to the carrying out of initial repairs and to any payment for accrued tenant's repairs, 'the landlord', as respects any time falling within the period of the statutory tenancy, means the person whose interest in the dwelling house fulfils the following conditions, that is to say (1) that it is not due to expire within five years and is not capable of being brought to an end within five years by notice to quit given by the landlord; and (2) that it is not itself in reversion expectant on an interest which is not so due to expire or capable of being so brought to an end: ss 21(4) proviso, 22(1). For the meaning of 'initial repairs' see PARA 1219 post; and for the meaning of 'payment for accrued tenant's repairs' see PARA 1222 post.

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## 1206. Acts of competent landlord binding on other landlords.

Any notice given<sup>1</sup> by the competent landlord<sup>2</sup>, any agreement made<sup>3</sup> between that landlord and the tenant<sup>4</sup> under the relevant tenancy, and any determination<sup>5</sup> of the court<sup>6</sup> in proceedings between that landlord and that tenant, bind the interest of every other landlord<sup>7</sup>, if any<sup>8</sup>.

If a notice is given<sup>9</sup> by the competent landlord, or an agreement<sup>10</sup> is made with the tenant by that landlord, without the written consent of every other landlord<sup>11</sup>, if any, any other landlord whose written consent has not been given thereto is entitled<sup>12</sup> to compensation<sup>13</sup> from the competent landlord for any loss arising in consequence of the giving of the notice or the making of the agreement<sup>14</sup>.

The competent landlord may serve on any other landlord a notice in the prescribed form<sup>15</sup> requiring him to consent to the giving or making of any such notice or agreement; and, if within one month after the service of such a notice:

2490 (1) the consent has not been given; or

2491 (2) conditions have been imposed on the giving of the consent which are in the opinion of the court unreasonable in all the circumstances,

the court, on an application by the competent landlord, may, if it thinks fit, order that the other landlord shall be deemed to have consented, either without qualification or subject to such conditions, including conditions as to the modification of the proposed notice or agreement or as to the payment of compensation by the competent landlord, as may be specified in the order<sup>16</sup>.

1 le under the Landlord and Tenant Act 1954 s 4(1): see PARA 1212 post.

2 For these purposes, 'the competent landlord' means, in relation to a tenancy ('the relevant tenancy'), the person who in relation to the relevant tenancy is for the time being the landlord, as defined by ibid s 21 (as amended) (see PARA 1205 ante), for the purposes of Pt I (ss 1-22) (as amended): s 21(5), Sch 5 para 1(1).

3 le under ibid Pt I (as amended): see PARA 1196 et seq ante, PARA 1207 et seq post.

4 For the meaning of 'the tenant' see PARA 1208 post.

5 See note 3 supra.

6 As to the court having jurisdiction see PARA 1197 ante.

7 For these purposes, references to 'other landlords' are references to persons who are either mesne landlords or superior landlords: Landlord and Tenant Act 1954 s 21(5), Sch 5 para 1(2).

'Mesne landlord' means a tenant whose interest is intermediate between the relevant tenancy and the interest of the competent landlord: and 'superior landlord', except in Sch 5 para 9 (see PARA 1234 post), means a person, whether the owner of the fee simple or a tenant, whose interest is superior to the interest of the competent landlord: Sch 5 para 1(1).

8 Landlord and Tenant Act 1954 Sch 5 para 2.

9 See note 1 supra.

10 See note 3 supra.

11 Where in the Landlord and Tenant Act 1954 Sch 5 paras 4-7 (as amended) (see the text and notes 12-16 infra; and PARA 1219 post) reference is made to other landlords or to mesne landlords, the reference is to be taken not to include a mesne landlord whose interest is due to expire within the period of two months beginning with the relevant date or is terminable within that period by notice to quit given by his landlord: Sch 5 para 3(1). For these purposes, 'the relevant date' means: (1) if the term date of the relevant tenancy has not passed, that date; (2) if that date has passed, and no notice has been given under s 4(1) (see PARA 1212 post) to terminate

the relevant tenancy, the earliest date at which that tenancy could be brought to an end by such a notice; (3) if such a notice has been given, the date of termination specified in the notice: Sch 5 para 3(2). For the meaning of 'term date' see PARA 1201 note 7 ante.

12 le subject to ibid Sch 5 para 5: see the text and notes 15-16 infra.

13 The amount of any such compensation must, in default of agreement, be determined by the court on the application of the person claiming it: ibid Sch 5 para 4(2).

14 Ibid Sch 5 para 4(1). As to the conditions which may be attached on the giving of such a consent see PARA 1219 post.

In accordance with the Local Government and Housing Act 1989 s 186, Sch 10 para 19(1) (see PARA 1205 note 4 ante), the Landlord and Tenant Act 1954 Sch 5 (as amended) also applies for the purposes of the Local Government and Housing Act 1989 Sch 10 (as amended), subject to the modifications set out in Sch 10 para 19(3). Those modifications are as follows:

- 159 (1) any reference to the Landlord and Tenant Act 1954 Pt I (as amended) is to be construed as a reference to the provisions of the Local Government and Housing Act 1989 Sch 10 (as amended) other than Sch 10 para 19(3);
- 160 (2) any reference to the Landlord and Tenant Act 1954 s 21 (as amended) (see PARA 1205 ante) is to be construed as a reference to s 21 (as amended) as it applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended);
- 161 (3) any reference to the Landlord and Tenant Act 1954 s 4(1) (see PARA 1212 post) is to be construed as a reference to the Local Government and Housing Act 1989 Sch 10 para 4(1) (see PARA 1249 post);
- 162 (4) any reference to the court includes a reference to a rent assessment committee;
- 163 (5) the Landlord and Tenant Act 1954 Sch 5 paras 6-8 (as amended) (see PARAS 1218-1219 post) and Sch 5 para 11 (see PARA 1235 post) are to be omitted;
- 164 (6) any reference to a particular subsection of s 16 (see PARA 1232 post) is to be construed as a reference to that subsection as it applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended);
- 165 (7) any reference to a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) (see PARA 1196 ante) applies is to be construed as a reference to a long residential tenancy; and
- 166 (8) expressions to which a meaning is assigned by any provision of the Local Government and Housing Act 1989 Sch 10 (as amended), other than Sch 10 para 19(3), are to be given that meaning.

For the meaning of 'long residential tenancy' for these purposes see PARA 1244 post.

15 For the prescribed forms of notice see the Landlord and Tenant (Notices) Regulations 1957, SI 1957/1157, reg 4(v), (vi), Appendix, Forms 5, 6. A form substantially to the like effect may be used: see reg 4. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to make regulations prescribing forms see the Landlord and Tenant Act 1954 s 66 (as amended); and PARA 702 ante; and as to the service of notice see PARA 703 ante. For the prescribed forms of notice under Sch 5 para 5 as applied by the Local Government and Housing Act 1989 Sch 10 para 19(3) (see note 14 supra) see the Long Residential Tenancies (Supplemental Forms) Regulations 1997, SI 1997/3005, reg 3, Schedule, Forms 8, 9. A form substantially to the like effect may be used: see reg 2.

16 Ibid Sch 5 para 5. As to the conditions which may be attached on the making of such an order see PARA 1219 post.



AND TENANT ACT 1954/(ii) Tenancies Protected; Parties Concerned/1207. Mortgage of reversion.

### **1207. Mortgage of reversion.**

Anything authorised or required<sup>1</sup> to be done at any time by, to or with the landlord, or a landlord of a specified description, is deemed, if at that time the interest of the landlord in question is subject to a mortgage<sup>2</sup> and the mortgagee<sup>3</sup> is in possession or a receiver appointed by the mortgagee or by the court is in receipt of the rents and profits, to be authorised or required to be done by, to or with the mortgagee instead of that landlord<sup>4</sup>.

1     le by the provisions of the Landlord and Tenant Act 1954, other than s 40(3) (as substituted: see PARA 704 ante): see PARAS 701 et seq, 1196 et seq ante, PARA 1208 et seq post.

2     For the meaning of 'mortgage' see PARA 704 note 15 ante.

3     For the meaning of 'mortgagee' see PARA 704 note 15 ante.

4     Landlord and Tenant Act 1954 s 67 (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(2), Sch 6); and see *Meah v Mouskos* [1964] 2 QB 23, [1963] 3 All ER 908, CA; and PARA 715 note 16 ante. The Landlord and Tenant Act 1954 s 67 (as amended) applies for the purposes of the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) except that for the reference to the Landlord and Tenant Act 1954 there is to be substituted a reference to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post): Sch 10 para 19(2).

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### **1208. Meaning of 'the tenant'.**

In relation to the premises constituting the dwelling house<sup>1</sup>, 'the tenant' means<sup>2</sup> the tenant under the former tenancy<sup>3</sup> and, except as respects any payment for accrued tenant's repairs<sup>4</sup> not payable by instalments, includes any successor to his statutory tenancy<sup>5</sup>.

1     For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

2     le in the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1209 et seq post.

3     For the meaning of 'the former tenancy' see PARA 1215 post.

4     For the meaning of 'accrued tenant's repairs' see PARA 1222 post. As to accrued tenant's repairs see PARAS 1222-1226 post.

5     Landlord and Tenant Act 1954 s 22(2). For these purposes, 'successor to his statutory tenancy', in relation to the tenant under the former tenancy, means a person who after the tenant's death retains possession of the dwelling house by virtue of the Rent Act: Landlord and Tenant Act 1954 s 22(2) (amended by the Rent Act 1968 s 117(2), Sch 15). For the meaning of 'the Rent Act' see PARA 1196 note 7 ante. As to the succession to a statutory tenancy see PARAS 843-844 ante; and as to the protection of subtenants see PARA 975 ante. As to the application of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) to joint tenancies see *De Rothschild v Bell (a bankrupt)* [2000] QB 33, [1999] 2 All ER 722, CA.

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### **(iii) Continuation and Termination of Contractual Tenancies**

#### **1209. Continuation of protected long tenancy.**

A tenancy<sup>1</sup> which was current immediately before the term date<sup>2</sup> and is then a protected long tenancy<sup>3</sup> at a low rent<sup>4</sup> does not come to an end on that date except by being terminated under the provisions of Part I of the Landlord and Tenant Act 1954<sup>5</sup> and, if not then so terminated, it continues until so terminated<sup>6</sup> and, while so continuing, is deemed, notwithstanding any change in circumstances, to be a protected long tenancy at a low rent<sup>7</sup>.

Where a tenancy is so continued after the term date, then:

2492 (1) if the premises qualifying for protection<sup>8</sup> are the whole of the property comprised in the tenancy, the tenancy continues at the same rent and in other respects on the same terms<sup>9</sup> as before the term date;

2493 (2) if the premises qualifying for protection are only part of the property comprised in the tenancy, the tenancy, while continuing after the term date, has effect as a tenancy of those premises to the exclusion of the remainder of the property, and at a rent to be ascertained by apportioning the rent payable before the term date as between those premises and the remainder of the property, and in other respects on the same terms, subject to any necessary modifications, as before the term date<sup>10</sup>.

Any question arising under head (2) above as to the premises comprised in a tenancy so continuing, as to the rent payable in respect of a tenancy so continuing, or as to any of the terms of such a tenancy, must be determined by agreement<sup>11</sup> between the landlord and the tenant or, on the application of either of them, by the court<sup>12</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For these purposes, the term date must have fallen before 15 January 1999: see PARA 1196 ante. For the meaning of 'term date' see PARA 1201 note 7 ante.

3 For the meaning of 'long tenancy' see PARA 1202 ante.

4 It is a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

5 It is *ibid* Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1210 et seq post. Section 3(1) continues the common law tenancy with a statutory variation as to the mode of termination; cf s 24 (as amended); and PARA 713 ante; and see *HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159, [1956] 3 All ER 624, CA. See further PARA 713 ante and the cases there cited. See also *Byrne v Herbert* [1966] 2 QB 121, [1965] 3 All ER 705.

6 Where a contractual tenancy of residential property on a long lease at a low rent expires by effluxion of time, a sole residing tenant is entitled to a continuation tenancy under the 1954 Act, notwithstanding that the contractual tenancy was originally granted to two or more tenants jointly: *De Rothschild v Bell (a bankrupt)* [2000] QB 33, [1999] 2 All ER 722, CA.

7 Landlord and Tenant Act 1954 s 3(1). In relation to such a tenancy as is mentioned in s 19(2) (see PARA 1202 ante), Pt I (as amended) has the following effect: s 19(2), Sch 4 para 1. Where the tenancy is not

terminated under the provisions of Pt I (as amended) at the term date thereof, then, whether or not it would have continued after that date apart from the Landlord and Tenant Act 1954, it is to be treated for the purposes of that Act as being continued by virtue of s 3(1): s 19(2), Sch 4 para 5.

Although the statutory protection now applies only to long tenancies at low rents, prior to the Leasehold Reform Act 1967 it applied to all long tenancies: see PARA 1196 ante. That Act contained transitional provisions (see s 39(2), Sch 5 paras 5-7) with the effect that if, in relation to a tenancy to which the special protection applied immediately before 27 November 1967 there was in force on that date a landlord's notice proposing a statutory tenancy and all the terms of the tenancy had been agreed or determined or an application for their determination had been made to the court, then the 1967 Act did not affect the position: see Sch 5 para 5. If, alternatively, on 27 November 1967 a long tenancy was continuing under the Landlord and Tenant Act 1954 s 3, then Pt I (as amended) applied as if that date were the term date of the tenancy and as if, if this was not the case, the tenancy were at a low rent: see the Leasehold Reform Act 1967 Sch 5 para 6(1), (2). Special transitional provisions applied where the reason that the Landlord and Tenant Act 1954 would not apply after 27 November 1967 was the change in rateable value limits: see Sch 5 para 7 (as amended). These transitional provisions remain unaffected after the enactment of the Rent Act 1968 (repealed) and the Rent Act 1977: Rent Act 1968 s 117(3), Sch 16 para 26 (repealed); Rent Act 1977 s 155(3), Sch 24 para 32.

8 For the meaning of 'the premises qualifying for protection' see PARA 1205 note 5 ante.

9 For the meaning of 'terms' see PARA 706 note 27 ante. A covenant to reinstate at the end of the term is not a term that is continued: *Byrne v Herbert* [1966] 2 QB 121, [1965] 3 All ER 705.

10 Landlord and Tenant Act 1954 s 3(2). In relation to such a tenancy as is mentioned in s 19(2), Pt I (as amended) has the following effect: Sch 4 para 1. Notwithstanding anything in s 3(2), where by virtue of s 3(1) (see the text and notes 1-7 supra) the tenancy is continued after the term date thereof, the provisions of Pt I (as amended) as to the termination of a tenancy by notice have effect in substitution for, and not in addition to, any such provisions included in the terms on which the tenancy had effect before its term date: Sch 4 para 4.

11 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante; for the meaning of 'the landlord' see PARA 1205 ante; and for the meaning of 'the tenant' see PARA 1208 ante.

12 Landlord and Tenant Act 1954 s 3(4). As to the court having jurisdiction see PARA 1197 ante.

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### **1210. Interim continuation pending application.**

In any case where:

- 2494 (1) a notice to terminate a tenancy<sup>1</sup> has been given<sup>2</sup>; and
- 2495 (2) an application<sup>3</sup> to the court<sup>4</sup> has been made; and
- 2496 (3) the effect of the notice would otherwise<sup>5</sup> be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of<sup>6</sup>,

the effect of the notice is to terminate the tenancy at the expiration of that period of three months and not at any other time<sup>7</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 Ie under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1211 et seq post. As to the giving of such a notice see PARA 1212 post.

3   le a landlord's application for the determination of the terms of the proposed statutory tenancy under *ibid* s 7 (as amended) (see PARAS 1216-1217 post) or a landlord's application for possession under s 13 (see PARA 1229 post).

4   As to the court having jurisdiction see PARA 1197 ante.

5   le apart from the Landlord and Tenant Act 1954 s 64 (as amended).

6   *Ibid* s 64(1). For the meaning of references to the date on which an application is finally disposed of see PARA 729 note 7 ante.

7   Landlord and Tenant Act 1954 s 64(1).

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### **1211. Reversions.**

Where a tenancy<sup>1</sup> ('the inferior tenancy') is continued<sup>2</sup> for a period such as to extend to or beyond the end of the term of a superior tenancy, the superior tenancy is deemed<sup>3</sup>, so long as it subsists, to be an interest in reversion expectant upon the termination of the inferior tenancy and, if there is no intermediate tenancy, to be the interest in reversion immediately expectant upon the termination thereof<sup>4</sup>.

Where a tenancy ('the continuing tenancy') is continued<sup>5</sup> beyond the beginning of a reversionary tenancy which was granted<sup>6</sup> so as to begin on or after the date on which<sup>7</sup> the continuing tenancy would have come to an end, the reversionary tenancy has effect as if it had been granted subject to the continuing tenancy<sup>8</sup>.

Where a tenancy ('the new tenancy') is granted<sup>9</sup> for a period beginning on the same date as a reversionary tenancy or for a period such as to extend beyond the beginning of the term of a reversionary tenancy<sup>10</sup>, the reversionary tenancy has effect as if it had been granted subject to the new tenancy<sup>11</sup>.

1   For the meaning of 'tenancy' see PARA 706 note 2 ante.

2   le by virtue of any provision of the Landlord and Tenant Act 1954.

3   le for the purposes of the Landlord and Tenant Act 1954 and of any other enactment and of any rule of law.

4   *Ibid* s 65(1); and see PARA 714 ante. Section 65 applies for the purposes of the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended) (see PARA 1237 et seq post) except that for any reference to the Landlord and Tenant Act 1954 there is to be substituted a reference to the Local Government and Housing Act 1989 Sch 10 (as amended): Sch 10 para 20(4).

In the case of a tenancy continuing by virtue of any provision of the Landlord and Tenant Act 1954 after the coming to an end of the interest in reversion immediately expectant upon the termination thereof, the Law of Property Act 1925 s 139(1) (effect of extinguishment of reversion: see PARAS 638-641 ante) applies as if references in s 139(1) to the surrender or merger of the reversion included references to the coming to an end of the reversion for any reason other than surrender or merger: Landlord and Tenant Act 1954 s 65(2); and see PARA 714 ante. See further *Green v Bowes-Lyon* [1960] 1 All ER 301, [1960] 1 WLR 176; affd sub nom *Bowes-Lyon v Green* [1963] AC 420, [1961] 3 All ER 843, HL.

5   See note 2 supra.

6   le whether before or after 1 October 1954.

- 7    le apart from the Landlord and Tenant Act 1954.
- 8    Ibid s 65(3); and see PARA 714 ante.
- 9    See note 2 supra.
- 10   le whether the reversionary tenancy in question was granted before or after 1 October 1954.
- 11   Landlord and Tenant Act 1954 s 65(4); and see PARA 714 ante.

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### **1212. Termination by the landlord.**

The landlord<sup>1</sup> may terminate a protected<sup>2</sup> long tenancy<sup>3</sup> at a low rent<sup>4</sup> by notice given to the tenant<sup>5</sup> in the prescribed form<sup>6</sup> specifying the date at which the tenancy is to come to an end ('the date of termination'), being either the term date<sup>7</sup> of the tenancy or a later date<sup>8</sup>.

Such a notice does not have effect unless:

- 2497 (1) it is given not more than 12 nor less than six months before the date of termination specified therein<sup>9</sup>;
- 2498 (2) it specifies the premises which the landlord believes to be, or to be likely to be, the premises qualifying for protection<sup>10</sup>, and either:
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81. (a) it contains proposals for a statutory tenancy<sup>11</sup>; or
82. (b) it contains notice that, if the tenant is not willing to give up possession at the date of termination of the tenancy of all the property then comprised in the tenancy, the landlord proposes to apply to the court<sup>12</sup>, on one or more of the specified grounds<sup>13</sup>, for possession of the property comprised in the tenancy, and states the ground or grounds on which he proposes to apply<sup>14</sup>.
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Such a notice must invite the tenant, within two months after the giving of the notice, to notify the landlord in writing whether he is willing to give up possession as mentioned in head (2)(b) above<sup>15</sup>.

1    For the meaning of 'the landlord' see PARA 1205 ante. As to the effect of the notice on other landlords see also the Landlord and Tenant Act 1954 s 21(5), Sch 5 para 2; and PARA 1206 ante.

2    le a tenancy to which ibid s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante.

3    For the meaning of 'long tenancy' see PARA 1202 ante.

4    For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

5    For the meaning of 'the tenant' see PARA 1208 ante. Where there is more than one tenant, the landlord's notice should be served on all the tenants: *Norton v Charles Deane Production Ltd* (1969) 214 Estates Gazette 559; *Pearson v Aloy* (1989) 60 P & CR 56, [1990] 1 EGLR 114, CA; *Smith v Draper* (1990) 60 P & CR 252, [1990] 2 EGLR 69, CA (notice under the Landlord and Tenant Act 1954 s 25 (now as amended) (see PARA 716 ante)).

Service may be effected on the tenant's agent: see *Galinski v McHugh* (1988) 57 P & CR 359, [1989] 1 EGLR 109, CA.

6 For the prescribed forms of notice see the Landlord and Tenant (Notices) Regulations 1957, SI 1957/1157, reg 4(i), (ii), Appendix, Forms 1, 2 (amended by SI 1967/1831). Forms substantially to the like effect may be used: see reg 4. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to make regulations prescribing forms see the Landlord and Tenant Act 1954 s 66 (as amended); and PARA 702 ante; and as to the service of notice see PARA 703 ante. A solicitor may have ostensible authority to receive notices as agent for the tenant: *Galinski v McHugh* (1988) 57 P & CR 359, [1989] 1 EGLR 109, CA.

7 For the meaning of 'term date' see PARA 1201 note 7 ante.

8 Landlord and Tenant Act 1954 ss 4(1), 22(1). As to the additional information which may need to be included see PARA 716 note 3 ante.

The date specified need not be the date on which the tenancy could have been brought to an end by a notice to quit at common law: *Magdalen and Lasher Charity Trustees, Hastings v Shelower* (1968) 19 P & CR 389, CA, applying *Commercial Properties Ltd v Wood* [1968] 1 QB 15, [1967] 2 All ER 916, CA (decided under the Landlord and Tenant Act 1954 s 25). The validity of a landlord's notice depends upon the facts and the exact nature of the tenant's rights, if any, which exist at the date of termination of the tenancy: *St Ermins Property Co Ltd v Patel* (1997) 75 P & CR 46, [1997] 2 EGLR 61, CA. If the premises qualifying for protection are the whole of the property comprised in the tenancy, then a landlord's notice of termination is effective only when he gives notice specifying when the tenancy of the whole property comes to an end, even though the tenant may be entitled to protection under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) in respect of only part of it: *St Ermins Property Co Ltd v Patel (No 2)* [2001] EWCA Civ 804, [2002] 1 P & CR 32, [2001] All ER (D) 337 (May), CA. The notice must be addressed to the tenant either expressly by name or implicitly by status as tenant: see *R (on the application of Morris) v London Rent Assessment Committee* [2002] EWCA Civ 276, [2002] 2 EGLR 13, [2002] All ER (D) 75 (Mar).

The Landlord and Tenant Act 1954 s 4(1) has effect subject to the provisions of Pt I (ss 1-22) (as amended) (see PARA 1213 et seq post) as to the annulment of notices in certain cases and subject to the provisions of Pt IV (ss 51-70) (as amended) (see PARA 1210 ante) as to the interim continuation of tenancies pending disposal of applications to the court: s 4(1) proviso.

A notice under s 4(1) containing proposals such as are mentioned in s 4(3)(a) (see head (a) in the text) is referred to as a 'landlord's notice proposing a statutory tenancy'; and a notice under s 4(1) not containing such proposals is referred to as a 'landlord's notice to resume possession': ss 4(5), 22(1). A landlord's notice under s 4 is of no effect if given or served during the currency of a claim to exercise the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 or the right to acquire a new lease of a flat under that Act: see PARAS 1594, 1685 post.

9 Landlord and Tenant Act 1954 s 4(2). The required periods are different in certain circumstances where a landlord serves a notice proposing a statutory tenancy after he has served a notice to resume possession: see s 14(3), (5); and PARA 1232 post. The periods are also different in certain circumstances where the tenant has made an ineffective claim to acquire the freehold or an extended lease: see PARAS 1434, 1591, 1683 post.

10 For the meaning of 'the premises qualifying for protection' see PARA 1205 note 5 ante.

11 *Ie* as defined by the Landlord and Tenant Act 1954 s 7(3) (as amended). 'Proposals for a statutory tenancy' means proposals as to the rent of the dwelling house during the period of the statutory tenancy' proposals as to the matters specified in s 7(2)(b)-(e) (as amended) (rent and initial repairs: see PARA 1216 post at heads (2)-(5) in the text), and such other proposals, if any, as to the terms mentioned in s 7(1) (as amended) (see PARA 1216 post) as the landlord may include in his notice: s 7(3) (amended by the Leasehold Reform Act 1967 s 39(2), Sch 5 para 3(1)(b)). Any such proposals: (1) must be made, and be expressed to be made, on the assumption that the dwelling house will be the premises specified in the landlord's notice in accordance with the Landlord and Tenant Act 1954 s 4(3); (2) are not to be treated as failing to satisfy the requirements of s 4(3) by reason only of a difference between the premises to which the proposals relate and the premises subsequently agreed to be the dwelling house; and, in the event of any such difference, the landlord is not bound by his proposals notwithstanding that they may have been accepted by the tenant: s 7(4). For the meaning of 'the dwelling house' see PARA 1205 note 5 ante; and for the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

12 As to the court having jurisdiction see PARA 1197 ante.

13 *Ie* one or more of the grounds mentioned in the Landlord and Tenant Act 1954 s 12 (as amended): see PARA 1227 post.

14 *Ibid* s 4(3).

15 Ibid s 4(4). References in Pt I (as amended) to an election by the tenant to retain possession are references to his notifying the landlord, in accordance with s 4(4), that he will not be willing to give up possession: ss 4(6), 22(1). No form is prescribed for the tenant's notification.

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### **1213. Record of state of repair.**

A landlord's notice proposing a statutory tenancy<sup>1</sup> may contain a requirement that, if the tenant<sup>2</sup> retains possession<sup>3</sup>, a record shall be made of the state of repair of the dwelling house<sup>4</sup>. Where the landlord gives such a notice which does not contain such a requirement, then, if the tenant elects to retain possession<sup>5</sup>, his notification in that behalf may include a requirement that a record shall be made of the state of repair of the dwelling house<sup>6</sup>.

Where the tenant retains possession of the dwelling house<sup>7</sup> and either the landlord or the tenant has made a requirement that such a record of the state of repair shall be made<sup>8</sup>, the record must be made as soon as may be after the completion of any initial repairs<sup>9</sup> to be carried out or, in the absence of any agreement or determination requiring the carrying out of initial repairs, as soon as may be after the beginning of the period of the statutory tenancy<sup>10</sup>.

In default of agreement between the landlord and the tenant:

- 2499 (1) any record required to be so made must be made by a person appointed by the President of the Royal Institution of Chartered Surveyors<sup>11</sup>; and
- 2500 (2) the cost of making any such record must be borne by the landlord and the tenant in equal shares<sup>12</sup>.

1 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante; and for the meaning of 'the landlord' see PARA 1205 ante.

2 For the meaning of 'the tenant' see PARA 1208 ante.

3 I.e. by virtue of the Landlord and Tenant Act 1954 s 6(1) (as amended); see PARA 1215 post.

4 Ibid s 8(5), Sch 2 para 7. For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

5 For the meaning of 'election to retain possession' see PARA 1212 note 15 ante.

6 Landlord and Tenant Act 1954 Sch 2 para 8.

7 See note 3 supra.

8 I.e. either the landlord or the tenant has made such a requirement as is mentioned in the Landlord and Tenant Act 1954 Sch 2 para 7 or Sch 2 para 8.

9 For the meaning of 'initial repairs' see PARA 1222 post.

10 Landlord and Tenant Act 1954 Sch 2 para 9. For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

11 Ibid Sch 2 para 10.

12 Ibid Sch 2 para 11.

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#### **1214. Termination by the tenant.**

A protected long tenancy<sup>1</sup> at a low rent<sup>2</sup> may be brought to an end at its term date<sup>3</sup> by not less than one month's notice in writing given by the tenant<sup>4</sup> to the immediate landlord<sup>5</sup>.

A tenancy continuing after its term date<sup>6</sup> may be brought to an end at any time by not less than one month's notice in writing given by the tenant to the immediate landlord, whether the notice is given after or before the term date of the tenancy<sup>7</sup>.

The fact that the landlord has given a notice to terminate the tenancy<sup>8</sup>, or that the tenant has elected to retain possession<sup>9</sup>, does not prevent the tenant from giving a notice terminating the tenancy at a date earlier than the date of termination<sup>10</sup> specified in the landlord's notice<sup>11</sup>.

1    Ie a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'long tenancy' see PARA 1202 ante.

2    For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

3    For the meaning of 'term date' see PARA 1201 note 7 ante.

4    For the meaning of 'the tenant' see PARA 1208 ante.

5    Landlord and Tenant Act 1954 s 5(1). For the meaning of 'the landlord' see PARA 1205 ante. In relation to such a tenancy as is mentioned in s 19(2) (see PARA 1202 ante), for s 5(1) there must be substituted the following: '(1) A tenancy to which section one of this Act applies may be brought to an end at the term date thereof by notice in writing given by the tenant to the immediate landlord. The length of any such notice shall be not less than one month nor less than the length of notice by which the tenant could apart from this Act have brought the tenancy to an end at the term date thereof.': s 19(2), Sch 4 paras 1, 3.

6    Ie by virtue of *ibid* s 3 (as amended): see PARA 1209 ante.

7    *Ibid* s 5(2). For the transitional provisions on the enactment of the Leasehold Reform Act 1967 see s 39(2) (as amended), Sch 5 paras 6(6), 7(2), (3).

8    Ie a notice under the Landlord and Tenant Act 1954 s 4(1): see PARA 1212 ante.

9    For the meaning of 'election to retain possession' see PARA 1212 note 15 ante.

10   For the meaning of 'the date of termination' see PARA 1212 ante.

11   Landlord and Tenant Act 1954 s 5(3). A notice given by the tenant of a flat during the currency of a claim (1) to exercise the right to collective enfranchisement; or (2) to acquire a new lease, is, however, ineffective: see PARAS 1594, 1685 post.

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## **(iv) Statutory Tenancy on Termination of Contractual Tenancy**

### **A. NATURE AND TERMS OF STATUTORY TENANCY**

#### **1215. Nature of statutory tenancy.**

Where a tenancy<sup>1</sup> is terminated by a landlord's notice proposing a statutory tenancy<sup>2</sup>, the Rent Act<sup>3</sup> applies<sup>4</sup> as if the tenancy ('the former tenancy'):

- 2501 (1) had been a tenancy of the dwelling house<sup>5</sup>; and
- 2502 (2) had not been a tenancy at a low rent<sup>6</sup> and, except as regards the duration of the tenancy and the amount of the rent, had been a tenancy on the terms<sup>7</sup> agreed or determined in accordance with the relevant statutory provisions<sup>8</sup> and no other terms<sup>9</sup>.

The Rent Act does not, however, so apply if at the end of the period of two months after the service of the landlord's notice the qualifying condition<sup>10</sup> was not fulfilled as respects the tenancy, unless the tenant<sup>11</sup> has elected to retain possession<sup>12</sup>.

If on the termination of the former tenancy the tenant so retains possession of the dwelling house, any liability, whether of the tenant or of any predecessor in title of his, arising under the terms of the former tenancy is extinguished; but this provision does not affect any liability:

- 2503 (a) for failure to pay rent<sup>13</sup> or rates<sup>14</sup> or to insure or keep insured<sup>15</sup>; or
- 2504 (b) in respect of the use of any premises for immoral or illegal purposes<sup>16</sup>;

or any liability under the terms of the former tenancy in so far as those terms related to property other than the dwelling house<sup>17</sup>.

Some relief against liability for past dilapidations is also given by the provisions relating to initial repairs and accrued tenant's repairs<sup>18</sup>.

1 For the meaning of 'tenancy' see PARA 706 note 2 ante.

2 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

3 For the meaning of 'the Rent Act' see PARA 1196 note 7 ante.

4 I.e. subject to the Landlord and Tenant Act 1954 s 6(2): see the text and notes 10-12 infra. As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante.

5 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

6 For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

7 For the meaning of 'terms' see PARA 706 note 27 ante.

8 I.e. in accordance with the Landlord and Tenant Act 1954 s 7 (as amended): see PARA 1216 post.

9 Ibid s 6(1) (amended by the Leasehold Reform Act 1967 s 39(2), Sch 5 para 3(1)(a); the Rent Act 1968 s 117(2), Sch 15); Landlord and Tenant Act 1954 s 22(1). As to the settlement of terms see PARA 1216 post.

For the transitional provisions on the enactment of the Leasehold Reform Act 1967 see s 39(2), Sch 5 paras 5-7.

10 For the meaning of 'the qualifying condition' see PARA 1204 ante.

11 For the meaning of 'the tenant' see PARA 1208 ante.

12 Landlord and Tenant Act 1954 s 6(2) (amended by the Rent Act 1968 Sch 15). For the meaning of 'election to retain possession' see PARA 1212 note 15 ante.

13 For these purposes, 'rent' is to be strictly interpreted as a payment reserved on a demise, for non-payment of which distress is leviable; it does not include a service charge: *Blatherwick (Services) Ltd v King* [1991] Ch 218, [1991] 2 All ER 874, CA.

14 As to the abolition of domestic rates see PARA 521 ante.

15 As to insurance see PARA 359 et seq ante.

16 As to use for immoral or illegal purposes see PARA 500 notes 7-9 ante.

17 Landlord and Tenant Act 1954 s 10(1). Outstanding service charges payable by the tenant of a flat in a converted house as a proportion of the general repair and maintenance of the house constitute a liability under a term relating to 'property other than the dwelling house': *Blatherwick (Services) Ltd v King* [1991] Ch 218, [1991] 2 All ER 874, CA.

During the period of the statutory tenancy no order may be made for the recovery of possession of the dwelling house from the tenant in any of the circumstances specified in the Rent Act 1977 s 98(1), Sch 15 Pt I, Cases 1-3 (see PARAS 949-951 ante) by reason only of any act or default occurring before the date of termination of the former tenancy: Landlord and Tenant Act 1954 s 10(2) (amended by the Rent Act 1968 Sch 15; the Rent Act 1977 s 155(2), Sch 23 para 14). For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante: and for the meaning of 'the date of termination' see PARA 1212 ante.

18 See PARA 1219 et seq post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/20. LONG RESIDENTIAL TENANCIES AT LOW RENTS/(1) THE LANDLORD AND TENANT ACT 1954/(iv) Statutory Tenancy on Termination of Contractual Tenancy/A. NATURE AND TERMS OF STATUTORY TENANCY/1216. Settlement of terms other than rent.

### **1216. Settlement of terms other than rent.**

The terms<sup>1</sup> on which the tenant<sup>2</sup> and any successor to his statutory tenancy<sup>3</sup> may retain possession of the dwelling house<sup>4</sup> during that period<sup>5</sup>, other than the amount of the rent, are such as may be agreed between the landlord<sup>6</sup> and the tenant<sup>7</sup> or determined by the court<sup>8</sup>.

A landlord's notice proposing a statutory tenancy<sup>9</sup> and anything done in pursuance of it cease to have effect if by the beginning of the period of two months ending with the date of termination<sup>10</sup> specified in the notice any of the following matters, that is to say:

- 2505 (1) what premises are to constitute the dwelling house;
- 2506 (2) as regards the rent of the dwelling house during the period of the statutory tenancy, the intervals at which instalments of that rent are to be payable, and whether they are to be payable in advance or in arrear<sup>11</sup>;
- 2507 (3) whether any, and if so what, initial repairs<sup>12</sup> are to be carried out on the dwelling house;
- 2508 (4) whether initial repairs to be so carried out are to be carried out by the landlord or by the tenant, or which of them are to be carried out by the landlord and which by the tenant; and
- 2509 (5) the matters required<sup>13</sup> to be agreed or determined in relation to repairs before the beginning of the period of the statutory tenancy,

has not been agreed between the landlord and the tenant and no application has been made by the beginning of that period of two months for the determination by the court of such of those matters as have not been agreed<sup>14</sup>. This provision does not, however, have effect if at the

end of the period of two months after the service of the landlord's notice the qualifying condition<sup>15</sup> was not fulfilled as respects the tenancy unless the tenant has elected to retain possession<sup>16</sup>.

1 For the meaning of 'terms' see PARA 706 note 27 ante.

2 For the meaning of 'the tenant' see PARA 1208 ante.

3 For the meaning of 'successor to his statutory tenancy' see PARA 1208 note 5 ante.

4 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

5 le the period of the statutory tenancy. For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

6 For the meaning of 'the landlord' see PARA 1205 ante. As to the effect of any agreement between that landlord and the tenant on other landlords see the Landlord and Tenant Act 1954 s 21(5), Sch 5 para 2; and PARA 1206 ante.

7 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante.

8 Landlord and Tenant Act 1954 s 7(1) (amended by the Rent Act 1957 s 26(3), Sch 8 Pt I; the Leasehold Reform Act 1967 s 39(2), Sch 5 para 3(1)(b)). As to determination by the court see PARA 1218 post.

The obligations of the landlord and the tenant as respects the repair of the dwelling house during the period of the statutory tenancy are, subject to the Landlord and Tenant Act 1954 s 8(1), (2) (see PARA 1222 post), such as may be agreed between them or as may be determined by the court: s 8(3).

9 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

10 For the meaning of 'the date of termination' see PARA 1212 ante.

11 As to the settlement and registration of rent see PARA 1217 post.

12 For the meaning of 'initial repairs' see PARA 1219 post.

13 le by the Landlord and Tenant Act 1954 s 8: see PARA 1222 et seq post.

14 Ibid s 7(2) (amended by the Leasehold Reform Act 1967 Sch 5 para 3(1)(b)). Where the landlord gives a landlord's notice proposing a statutory tenancy which specifies as the date of termination a date earlier than six months after the giving of the notice, and it is (1) given by the landlord by virtue of the Landlord and Tenant Act 1954 s 14(3) or (5) (see PARA 1232 post); or (2) given by virtue of the Leasehold Reform Act 1967 ss 22, 34, Sch 3 para 2(3) (as amended) (see PARA 1434 post) where the tenant has made an ineffective claim to acquire the freehold or an extended lease; or (3) given by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 13, Sch 3 para 2(4) (see PARA 1591 post) where the tenant of a flat has made an ineffective claim to exercise the right to collective enfranchisement; or (4) given by virtue of s 42, Sch 12 para 2(5) (see PARA 1683 post) where the tenant of a flat has made an ineffective claim to acquire a new lease, the Landlord and Tenant Act 1954 s 7(2) (as so amended) applies in relation to the notice with the substitution, for references to the period of two months ending with the date of termination specified in the notice and the beginning of that period, of references to the period of three months beginning with the giving of the notice and the end of that period: s 14(6); Leasehold Reform Act 1967 Sch 3 para 2(4)(a); Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 2(5), Sch 12 para 2(6).

15 For the meaning of 'the qualifying condition' see PARA 1204 ante.

16 Landlord and Tenant Act 1954 s 7(2) proviso. For the meaning of 'election to retain possession' see PARA 1212 note 15 ante.

AND TENANT ACT 1954/(iv) Statutory Tenancy on Termination of Contractual Tenancy/A. NATURE AND TERMS OF STATUTORY TENANCY/1217. Settlement and registration of rent.

### **1217. Settlement and registration of rent.**

Subject to the statutory provisions relating to initial repairs<sup>1</sup> and subject to the operation, as regards the fixing of a fair rent<sup>2</sup> and otherwise, of the Rent Act 1977, the amount of the rent payable under a regulated tenancy arising by virtue of the statutory protection for long tenancies at low rents<sup>3</sup> is such amount as may be agreed between the landlord<sup>4</sup> and the tenant<sup>5</sup> or, in default of agreement, the same amount as the rent last payable under the long tenancy<sup>6</sup>.

In relation to a rent registered<sup>7</sup> or to be registered for a dwelling house<sup>8</sup> on an application made with reference to a regulated tenancy so arising, the Rent Act 1977 has effect subject to the following provisions<sup>9</sup>.

An application for the registration of a rent may be made by the landlord or the tenant, or jointly by the landlord and the tenant, before the commencement of the statutory tenancy, but not before the terms of that tenancy other than the amount of the rent have been agreed or determined<sup>10</sup> in accordance with the relevant statutory requirements<sup>11</sup>. Where a rent is registered in pursuance of an application so made, a notice<sup>12</sup> increasing the rent payable may, if the notice is given within four weeks after the date on which the rent is registered, specify as the date from which the increase is to take effect any date not earlier than the commencement of the tenancy nor earlier than the date from which the registration takes effect<sup>13</sup>.

Where initial repairs<sup>14</sup> remain to be carried out to the dwelling house, then, in determining what rent is or would be a fair rent, regard must be had<sup>15</sup> to the state of repair which may be expected to subsist after the completion of the initial repairs<sup>16</sup>.

Any entry in the register of a rent or of its confirmation by the rent assessment committee<sup>17</sup> must indicate that the rent is registered on an application made with reference to<sup>18</sup> a statutory tenancy<sup>19</sup>.

1    Ie the provisions in the Landlord and Tenant Act 1954: see PARAS 1219-1221 post.

2    Ie under the Rent Act 1977 Pt III (ss 44-61) (as amended) (see PARA 891 et seq ante) and Pt IV (ss 62-75) (as amended) (see PARA 909 et seq ante).

3    Ie the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1218 et seq post.

4    For the meaning of 'the landlord' see PARA 1205 ante.

5    For the meaning of 'the tenant' see PARA 1208 ante.

6    Leasehold Reform Act 1967 s 39(2), Sch 5 para 3(1) (amended by the Rent Act 1977 s 155(2), Sch 23 para 46(a)). As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante. Where the rent payable under the statutory tenancy is arrived at in accordance with the Leasehold Reform Act 1967 Sch 5 para 3(1) (as so amended), the Rent Act 1977 applies with the following adaptations: (1) s 45(2) (see PARA 894 ante (under which the rent payable for a statutory period of a tenancy is not to exceed that payable for the last contractual period) (sic) does not apply; (2) ss 46, 47 (which provide for variations of rent in respect of changes in the burden on the landlord for rates, provision of services etc: see PARAS 895, 897 ante) apply only if the rent is one arrived at by agreement, and then apply as if references to the last contractual period were references to the first statutory period: Leasehold Reform Act 1967 Sch 5 para 3(2) (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent Act 1977 Sch 23 para 46(a)-(c)). It is apprehended that the reference to the Rent Act 1977 s 45(2) should be a reference to s 45(1) (see PARA 893 ante): see the Rent Act 1968 s 22(1) (repealed) which was the provision referred to prior to the 1977 amendment.

7    As to registration of rent see PARA 909 et seq ante.

8    For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

- 9 Leasehold Reform Act 1967 Sch 5 para 4(1) (amended by the Rent Act 1977 Sch 23 para 46(a)).
- 10 Ie in accordance with the Landlord and Tenant Act 1954 s 7 (as amended): see PARA 1216 ante.
- 11 Leasehold Reform Act 1967 Sch 5 para 4(2). The provisions of the Rent Act 1977, including the provisions of s 72 (as substituted) (see PARA 923 ante) as to the date from which the registration takes effect, apply accordingly: Leasehold Reform Act 1967 Sch 5 para 4(2) (amended by the Rent Act 1977 Sch 23 para 46(a), (d)).
- 12 Ie under the Rent Act 1977 s 45(2)(b): see PARA 894 ante.
- 13 Leasehold Reform Act 1967 Sch 5 para 4(3) (amended by the Rent Act 1977 Sch 23 para 46(e)).
- 14 Ie within the meaning of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1219 post.
- 15 Ie under the Rent Act 1977 s 70(1) (as amended): see PARA 921 ante.
- 16 Leasehold Reform Act 1967 Sch 5 para 4(4) (amended by the Rent Act 1977 Sch 23 para 46(f)). The provisions of the Rent Act 1977 as to the amount of rent recoverable are to be taken as applying to the amount before account before account is taken of the provisions of the Landlord and Tenant Act 1954 as to initial repairs: Leasehold Reform Act 1967 Sch 5 para 4(5) (amended by the Rent Act 1977 Sch 23 para 46(a)).
- 17 As to rent assessment committees see PARA 910 et seq ante.
- 18 Ie with reference to a statutory tenancy arising by virtue of the Landlord and Tenant Act 1954 Pt I (as amended): see PARA 1196 et seq ante, PARA 1218 et seq post.
- 19 Leasehold Reform Act 1967 Sch 5 para 4(6). For the prescribed form of application for registration of a fair rent in the case of a statutory tenancy arising at the end of a long tenancy see the Rent Act 1977 (Forms etc) Regulations 1980, SI 1980/1697, reg 3(2)(a)(i), Sch 1, Form 6 (substituted by SI 1984/1319; amended by SI 1993/655); and for the corresponding form in Welsh see the Rent Act 1977 (Forms etc) (Welsh Forms and Particulars) Regulations 1993, SI 1993/1511, reg 2, Schedule, Form 6 (amended by SI 1994/725).

## UPDATE

### 1217 Settlement and registration of rent

NOTE 19--SI 1980/1697 further amended: SI 2008/2831. See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 1218. Determination of terms by the court.

An application to the court<sup>1</sup> to settle the terms<sup>2</sup>, other than rent<sup>3</sup>, of a statutory tenancy must be made by the landlord<sup>4</sup>; and

- 2510 (1) must be made during the currency of the landlord's notice proposing a statutory tenancy<sup>5</sup> and not earlier than two months after the giving thereof but, if the tenant has elected to retain possession<sup>6</sup>, it may be made at a time not earlier than one month after the giving of the notice;

2511 (2) may not be made for the determination of any matter as to which agreement<sup>7</sup> has already been reached between the landlord and the tenant<sup>8</sup>.

Any obligations imposed by the court as to keeping the dwelling house<sup>9</sup> in repair during the period of the statutory tenancy<sup>10</sup> must not be such as to require the dwelling house to be kept in a better state of repair<sup>11</sup> than the state which may be expected to subsist after the completion of any initial repairs<sup>12</sup> to be carried out or, in the absence of any agreement or determination requiring the carrying out of initial repairs, in a better state of repair than the state subsisting at the time of the court's determination of what obligations are to be imposed<sup>13</sup>.

1 As to the court having jurisdiction see PARA 1197 ante.

2 For the meaning of 'terms' see PARA 706 note 27 ante.

3 As to rent under the statutory tenancy see PARA 1217 ante.

4 For the meaning of 'the landlord' see PARA 1205 ante. As to the effect of any determination by the court on the other landlords see the Landlord and Tenant Act 1954 s 21(5), Sch 5 para 2; and PARA 1206 ante.

5 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

6 For the meaning of references to an election by the tenant to retain possession see PARA 1212 note 15 ante.

7 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante; and for the meaning of 'the tenant' see PARA 1208 ante.

8 Landlord and Tenant Act 1954 s 7(5).

9 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

10 For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

11 As to references to the state of repair see PARA 760 note 12 ante.

12 For the meaning of 'initial repairs' see PARA 1219 post.

13 Landlord and Tenant Act 1954 s 9(4). Otherwise the terms of the statutory tenancy are a matter for the court's judicial discretion: *Lagens Properties Ltd v Bandino* [1965] EGD 69 (express permission during the long tenancy to divide premises into three and to sublet).

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## **B. INITIAL REPAIRS AND ACCRUED TENANT'S REPAIRS**

### **(A) INITIAL REPAIRS**

#### **1219. Terms as to initial repairs.**

The landlord<sup>1</sup> and the tenant<sup>2</sup> may agree<sup>3</sup>, or the court<sup>4</sup> may determine, that the terms of the statutory tenancy are to include a term that specified repairs<sup>5</sup> ('initial repairs') be carried out<sup>6</sup>.

The landlord's notice proposing a statutory tenancy<sup>7</sup> must contain proposals as to what initial repairs, if any, are to be done and who is to do them<sup>8</sup>.

Where it falls to the court to determine what initial repairs, if any, should be carried out by the landlord, the court may not, except with the consent of the landlord and the tenant, require the carrying out of initial repairs in excess of what is required to bring the dwelling house<sup>9</sup> into good repair<sup>10</sup> or the carrying out of any repairs not specified by the landlord in his application as repairs which he is willing to carry out<sup>11</sup>.

The court does not have power<sup>12</sup> to determine that any initial repairs shall be carried out by the tenant except with his consent<sup>13</sup>.

It may be made a condition either of the giving of consent by a person whose consent is required<sup>14</sup> or of the making of an order dispensing with such a consent<sup>15</sup> that the initial repairs which the competent landlord<sup>16</sup> will agree to carry out or which, as the case may be, he will specify<sup>17</sup> as repairs which he is willing to carry out, shall include such repairs as may be specified in the consent or order<sup>18</sup>. In so far as any cost reasonably incurred by the competent landlord in carrying out such repairs is not recovered by way of payment for accrued tenant's repairs<sup>19</sup> and is not recoverable otherwise than by way of such payment, it is recoverable by the competent landlord from the person whose consent was or is deemed to have been given subject to the condition or, if he is dead, from his personal representatives as a debt due from him at the time of his death<sup>20</sup>.

Where the competent landlord is required by an agreement or by a determination of the court to carry out initial repairs to any premises, he may serve on any mesne landlord<sup>21</sup> a notice requiring him to pay to the competent landlord a contribution towards the cost reasonably incurred by the competent landlord in carrying out those repairs, if and in so far as that cost is not recovered by way of payment for accrued tenant's repairs and is not recoverable<sup>22</sup> otherwise than by way of such payment<sup>23</sup>. Where a notice has been so served, then, in default of agreement between the competent landlord and the mesne landlord on whom the notice was served, the court may order the mesne landlord to pay such a contribution<sup>24</sup>; and a contribution so ordered must be such as the court determines to be reasonable having regard to the difference between the rent under the relevant tenancy<sup>25</sup> and the rent which, if the tenant retains possession, will be recoverable during the period of the statutory tenancy<sup>26</sup>.

Any amount paid by a mortgagee<sup>27</sup> in respect of expenses incurred in carrying out initial repairs in accordance with an agreement or determination<sup>28</sup> is treated as if it were secured by the mortgage<sup>29</sup> with the like priority and with interest at the same rate as the mortgage money; but, without prejudice to the recovery of interest, any such amount is not recoverable from the mortgagor personally<sup>30</sup>.

1 For the meaning of 'the landlord' see PARA 1205 ante.

2 For the meaning of 'the tenant' see PARA 1208 ante.

3 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante.

4 As to the court having jurisdiction see PARA 1197 ante.

5 For the meaning of 'repairs' see PARA 760 note 12 ante.

6 See the Landlord and Tenant Act 1954 s 8(1); and PARA 1222 post.

7 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

8 See the Landlord and Tenant Act 1954 ss 4(3), 7(3); and PARA 1212 ante; see also s 7(2)(c), (d); and PARA 1216 ante at heads (3)-(4) in the text.

9 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

10 For these purposes, 'good repair' means good repair as respects both structure and decoration, having regard to the age, character and locality of the dwelling house: Landlord and Tenant Act 1954 s 9(2).

11 Ibid s 9(1).

12 Ie notwithstanding ibid s 7(1) (as amended): see PARA 1216 ante.

13 Ibid s 9(3).

14 Ie under ibid s 21, Sch 5 para 4: see PARA 1206 ante.

15 Ie an order under ibid Sch 5 para 5: see PARA 1206 ante.

16 For the meaning of 'the competent landlord' see PARA 1206 note 2 ante.

17 Ie in accordance with the Landlord and Tenant Act 1954 s 9(1).

18 Ibid Sch 5 para 6(1). In the application of Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post), the Landlord and Tenant Act 1954 Sch 5 para 6 is to be omitted: see PARA 1206 note 14 ante.

19 For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 post.

20 Landlord and Tenant Act 1954 Sch 5 para 6(2). See also note 18 supra.

21 For the meaning of 'mesne landlord' see PARA 1206 notes 7, 11 ante.

22 Ie apart from the Landlord and Tenant Act 1954 Sch 5 para 7(1).

23 Ibid Sch 5 para 7(1). In the application of Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended), the Landlord and Tenant Act 1954 Sch 5 para 7 (as amended) is to be omitted: see PARA 1206 note 14 ante.

24 Ibid Sch 5 para 7(2). See also note 23 supra.

25 For the meaning of 'the relevant tenancy' see PARA 1206 note 2 ante.

26 Landlord and Tenant Act 1954 Sch 5 para 7(3) (amended by the Leasehold Reform Act 1967 s 41(2), Sch 7 Pt I). See also note 23 supra. For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

27 For the meaning of 'mortgagee' see PARA 704 note 15 ante.

28 Ie under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1220 et seq post.

29 For the meaning of 'mortgage' see PARA 704 note 15 ante.

30 Landlord and Tenant Act 1954 s 8(5), Sch 2 para 5.

The purposes authorised for the application of capital money by the Settled Land Act 1925 s 73 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 808) and by the Universities and College Estates Act 1925 s 26 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1379), and the purposes authorised by the Settled Land Act 1925 s 71 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 849-850) and by the Universities and the College Estates Act 1925 s 30 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1379), as purposes for which moneys may be raised by mortgage, include the payment of any such expenses as are mentioned in the Landlord and Tenant Act 1954 Sch 2 para 5 and the making of any such payment as is therein mentioned: Sch 2 para 6 (amended by the Universities and College Estates Act 1964 s 4(1), Sch 3 Pt II; the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4).

The like provisions have effect as to the repayment of capital money applied by virtue of the Landlord and Tenant Act 1954 Sch 2 para 6 (as so amended) as have effect in the case of improvements authorised by the Settled Land Act 1925 s 83, Sch 3 Pt II (improvements the cost of which may be required to be replaced out of income: see SETTLEMENTS vol 42 (Reissue) PARA 817): Landlord and Tenant Act 1954 Sch 2 para 6 proviso.



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## **1220. Landlord's failure to carry out initial repairs.**

Where:

- 2512 (1) the tenant<sup>1</sup> retains possession<sup>2</sup> of the dwelling house<sup>3</sup>; and  
 2513 (2) by virtue of an agreement or of a determination of the court<sup>4</sup>, the landlord<sup>5</sup> is required to carry out initial repairs<sup>6</sup> to the dwelling house,

then, if on an application made by the tenant during the period of the statutory tenancy<sup>7</sup> the court is satisfied that the initial repairs have not been carried out within a reasonable time in accordance with the agreement or determination, the court may by order direct that, until the discharge of the order or the end of the period of the statutory tenancy, whichever first occurs, the rent payable in respect of the dwelling house shall be reduced to such amount specified in the order as the court thinks just having regard to the extent to which the landlord has failed to comply with the agreement or determination<sup>8</sup>.

Where the court so orders a reduction of rent, the court may further order that during the same period any instalments of a payment for accrued tenant's repairs<sup>9</sup> shall be suspended<sup>10</sup>. Such an order may include a provision that the reduction of rent shall take effect from a specified date before the making of the order, being such date as the court thinks just having regard to the landlord's delay in carrying out the initial repairs<sup>11</sup>.

Where such an order is in force, and on an application by the landlord the court is satisfied that the initial repairs have been carried out in accordance with the agreement or determination, the court must discharge the order<sup>12</sup>. If, while such an order is in force, it is agreed between the landlord and the tenant that the initial repairs in question have been carried out in accordance with the agreement or determination, the order is discharged by virtue of that agreement in the like manner as if it had been discharged by the court<sup>13</sup>.

Where, in consequence of the failure of the competent landlord<sup>14</sup> to carry out initial repairs, the amount of any payment of rent is so reduced, and the competent landlord is not the immediate landlord of the tenant, the person who is for the time being the immediate landlord is entitled to recover from the competent landlord the amount of the reduction<sup>15</sup>.

1 For the meaning of 'the tenant' see PARA 1208 ante.

2 ie by virtue of the Landlord and Tenant Act 1954 s 6(1) (as amended): see PARA 1215 ante.

3 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

4 As to the court having jurisdiction see PARA 1197 ante.

5 For the meaning of 'the landlord' see PARA 1205 ante.

6 For the meaning of 'initial repairs' see PARA 1219 ante; and for the meaning of 'repairs' see PARA 760 note 12 ante.

7 For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

8 Landlord and Tenant Act 1954 s 8(5), Sch 2 para 1(1). The provisions of the Rent Act 1977 relating to the recoverable rent are otherwise not affected: see the Leasehold Reform Act 1967 s 39(2), Sch 5 para 4(5) (as

amended); and PARA 1217 note 16 ante. As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante.

9 For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 post.

10 Landlord and Tenant Act 1954 Sch 2 para 1(2).

11 Ibid Sch 2 para 1(3). Where an order contains such a provision, then, in addition to the reduction ordered by virtue of Sch 2 para 1(1), such number of payments of rent next falling due after the date of the order must be reduced by such amount as may be specified in the order for the purpose of giving effect to that provision: Sch 2 para 1(3).

12 Ibid Sch 2 para 2. Schedule 2 para 2 is without prejudice to the operation of the order as respects any period before the date on which it is discharged or to any reduction ordered under Sch 2 para 1(3): Sch 2 para 2.

13 Ibid Sch 2 para 3.

14 For the meaning of 'the competent landlord' see PARA 1206 note 2 ante.

15 Landlord and Tenant Act 1954 s 21(5), Sch 5 para 8. In the application of Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post), the Landlord and Tenant Act 1954 Sch 5 para 8 is to be omitted: see PARA 1206 note 14 ante.

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### **1221. Tenant's failure to carry out initial repairs.**

Where, by virtue of an agreement or of a determination of the court, the tenant<sup>1</sup> is required to carry out initial repairs<sup>2</sup> to the dwelling house<sup>3</sup>, failure by the tenant to carry out the repairs within a reasonable time in accordance with the agreement or determination is treated<sup>4</sup> as a breach of the obligations of the tenancy<sup>5</sup>.

1 For the meaning of 'the tenant' see PARA 1208 ante.

2 For the meaning of 'initial repairs' see PARA 1219 ante; and for the meaning of 'repairs' see PARA 760 note 12 ante.

3 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

4 Ie for the purposes of the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1: see PARA 949 ante. As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante.

5 Landlord and Tenant Act 1954 s 8(5), Sch 2 para 4 (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent Act 1977 s 155(2), Sch 23 para 19). For the meaning of 'tenancy' see PARA 706 note 2 ante.

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## (B) ACCRUED TENANT'S REPAIRS

### **1222. Payment for accrued tenant's repairs.**

Where it is agreed<sup>1</sup> between the landlord and the tenant, or determined by the court, that the terms of the statutory tenancy shall include the carrying out of specified repairs ('initial repairs'), and any of the initial repairs are required in consequence of the failure by the tenant to fulfil his obligations under the former tenancy<sup>2</sup>, the landlord is entitled to a payment (a 'payment for accrued tenant's repairs') of an amount equal to the cost reasonably incurred by the landlord in ascertaining what repairs are so required and in carrying out such of the initial repairs as are so required and as respects which it has been agreed or determined that they are to be carried out by the landlord, excluding any part of that cost which is recoverable by the landlord otherwise than from the tenant or his predecessor in title<sup>3</sup>.

A payment for accrued tenant's repairs may be made either by instalments or otherwise, as may be so agreed or determined<sup>4</sup>.

The landlord's notice proposing a statutory tenancy<sup>5</sup> must deal<sup>6</sup> with:

- 2514 (1) which of the initial repairs, if any, are required in consequence of failure by the tenant to fulfil his obligations under the former tenancy and, where there are any initial repairs so required, the amount to be included in the payment for accrued tenant's repairs in respect of the cost incurred by the landlord in ascertaining what initial repairs are so required;
- 2515 (2) the estimated cost of the repairs so required in so far as they are to be carried out by the landlord;
- 2516 (3) whether any payment for accrued tenant's repairs is to be payable by instalments or otherwise and, if by instalments, the amount of each instalment, subject to any necessary reduction of the last, the time at which the first is to be payable and the frequency of the instalments;
- 2517 (4) whether there are to be any, and if so what, obligations as respects the repair of the dwelling house<sup>7</sup> during the period of the statutory tenancy<sup>8</sup>, other than the execution of initial repairs<sup>9</sup>.

Subject to the above provisions<sup>10</sup>, the obligations of the landlord and the tenant as respects the repair of the dwelling house during the period of the statutory tenancy are such as may be agreed between them or determined by the court<sup>11</sup>.

1 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante; for the meaning of 'the landlord' see PARA 1205 ante; and for the meaning of 'the tenant' see PARA 1208 ante.

2 For the meaning of 'the former tenancy' see PARA 1215 ante.

3 Landlord and Tenant Act 1954 ss 8(1), 22(1).

4 Ibid s 8(2). As to payment by instalments see PARA 1223 post. The provisions of s 8(2), Sch 1 (as amended) (see PARAS 1223-1226 post) have effect as to the time for, and method of, recovery of such payments, the person from whom they are to be recoverable, and otherwise in relation thereto: s 8(2).

5 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

6 Ie under the Landlord and Tenant Act 1954 s 7(2)(e): see PARA 1216 ante at head (5) in the text.

7 For the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

8 For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

9 Landlord and Tenant Act 1954 s 8(4).

10 le subject to ibid s 8(1), (2).

11 Ibid s 8(3).

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### **1223. Payment in lump sum.**

A payment for accrued tenant's repairs<sup>1</sup> which is to be payable otherwise than by instalments becomes payable<sup>2</sup> when the relevant initial repairs<sup>3</sup> have been completed unless the landlord<sup>4</sup> and the tenant<sup>5</sup> agree<sup>6</sup> that it shall become payable wholly or in part at some other date<sup>7</sup>.

Where it is determined by the court that a payment for accrued tenant's repairs is to be payable otherwise than by instalments, the court may determine that any specified part of the payment shall become payable when any specified part of the relevant initial repairs has been completed<sup>8</sup>.

A payment for accrued tenant's repairs which is payable otherwise than by instalments, or any part of such a payment, is recoverable from the tenant<sup>9</sup>.

Where it has been agreed or determined that a payment for accrued tenant's repairs should be paid otherwise than by instalments, and the period of the statutory tenancy<sup>10</sup> ends before the relevant initial repairs have been begun, or at a time when they have been begun but not completed, the following provisions have effect<sup>11</sup>. If the relevant initial repairs have not been begun and are no longer required<sup>12</sup>, no payment for accrued tenant's repairs is<sup>13</sup> recoverable<sup>14</sup>. In any other case, the time for recovery of the payment for accrued tenant's repairs is the same as if all the relevant initial repairs had been completed immediately before the end of the period of the statutory tenancy, and the amount of the payment is:

- 2518 (1) if the relevant initial repairs have not been begun, the estimated cost of the repairs or of so much thereof as is still required;
- 2519 (2) if the relevant initial repairs have been begun but not completed, an amount equal to the expenses reasonably incurred by the landlord for the purposes of so much of the relevant initial repairs as has been carried out together, unless the remainder is no longer required, with the estimated cost of the remainder or of so much of it as is still required;

but there must be disregarded so much, if any, of such expenses or estimated cost as is recoverable by the landlord otherwise than from the tenant or his predecessor in title<sup>15</sup>.

Any question arising under the above provisions<sup>16</sup> whether repairs are no longer required, whether any expenses were incurred, or reasonably incurred, by the landlord, or as to the amount of the estimated cost of any repairs must be determined by agreement between the landlord and the tenant or by the court on the application of either of them<sup>17</sup>.

- 1 For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 ante.
- 2 le subject to the Landlord and Tenant Act 1954 s 8(2), Sch 1 Pt I (paras 1-5): see the text and notes 3-17 infra.
- 3 For these purposes, 'relevant initial repairs' means the repairs in respect of which the payment for accrued tenant's repairs is payable: *ibid* Sch 1 para 19. For the meaning of 'initial repairs' see PARA 1219 ante; and for the meaning of 'repairs' see PARA 760 note 12 ante.
- 4 For the meaning of 'the landlord' see PARA 1205 ante.
- 5 For the meaning of 'the tenant' see PARA 1208 ante.
- 6 For the meaning of references to an agreement between the landlord and the tenant see PARA 1199 note 2 ante.
- 7 Landlord and Tenant Act 1954 Sch 1 para 1.
- 8 *Ibid* Sch 1 para 2.
- 9 *Ibid* Sch 1 para 3.
- 10 For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.
- 11 Landlord and Tenant Act 1954 Sch 1 para 4(1). In a case falling within Sch 1 para 4(1) where a payment for accrued tenant's repairs would otherwise include an amount in respect of cost incurred by the landlord in ascertaining what initial repairs are required in consequence of a failure by the tenant to fulfil his obligations under the former tenancy, the following provisions have effect: (1) that amount is recoverable notwithstanding anything in Sch 1 para 4(2); (2) in a case falling within Sch 1 para 4(3), such amount is recoverable in addition to the amount specified therein; (3) the time for recovery of such amount is, as well in a case falling within Sch 1 para 4(2) as in one falling within Sch 1 para 4(3), that mentioned in Sch 1 para 4(3): Sch 1 para 4(6). For the meaning of 'the former tenancy' see PARA 1215 ante.
- 12 For these purposes, initial repairs are deemed to be no longer required after the end of the period of the statutory tenancy if, and only if, it is shown that the dwelling house, in whatever state of repair it may then be, is at or shortly after the end of that period to be pulled down, or that such structural alterations are to be made in the dwelling house as would render those repairs valueless if they were completed: *ibid* Sch 1 para 4(5). For the meaning of 'the dwelling house' see PARA 1205 note 5 ante; and for the meaning of references to the state of repair see PARA 760 note 12 ante.
- 13 le notwithstanding anything in *ibid* s 8: see PARA 1222 ante.
- 14 *Ibid* Sch 1 para 4(2). See also note 11 supra. In relation to a case where the court exercises the power conferred by Sch 1 para 2, references in Sch 1 para 4 to the relevant initial repairs are to be construed as references to any such part of those repairs as is referred to in Sch 1 para 2, being a part which at the material time has not been begun or, as the case may be, has been begun but not completed; and references to the payment for accrued tenant's repairs are to be construed accordingly: Sch 1 para 5.
- 15 *Ibid* Sch 1 para 4(3). See also note 11 supra.
- 16 le under *ibid* Sch 1 para 4.
- 17 *Ibid* Sch 1 para 4(4).

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## **1224. Payment by instalments.**

Where it is agreed or determined<sup>1</sup> that a payment for accrued tenant's repairs<sup>2</sup> is to be payable by instalments, the instalments become payable at the times so agreed or determined<sup>3</sup>. Any such instalment becoming payable at a time falling before the end of the period of the statutory tenancy<sup>4</sup> is payable by the tenant<sup>5</sup>.

Where the landlord<sup>6</sup> is not the immediate landlord<sup>7</sup> of the dwelling house, the landlord and the immediate landlord may serve on the tenant a notice in the prescribed form<sup>8</sup> requiring him to pay the instalments of the payment for the accrued tenant's repairs to the immediate landlord for transmission to the landlord<sup>9</sup>; and any such notice may be revoked by a subsequent notice given to the tenant by the landlord, with or without the concurrence of the immediate landlord<sup>10</sup>.

Any instalment becoming payable at a time when the landlord is the immediate landlord or when a notice<sup>11</sup> is in force is recoverable by the immediate landlord in the like manner and subject to the like provisions as the rent<sup>12</sup>.

If the period of the statutory tenancy comes to an end before all instalments of the payment for accrued tenant's repairs have been paid, the remaining instalments become payable immediately after the end of that period, are recoverable by the person who immediately before the end thereof was the landlord, and are so recoverable from the person who immediately before the end thereof was the tenant<sup>13</sup>.

Where, during the period of the statutory tenancy and before all instalments of the payment for accrued tenant's repairs have become payable, the interest of the landlord comes to an end or ceases to be a specified interest<sup>14</sup>, he is thereupon entitled to recover from the person who thereupon becomes the landlord such amount, if any, as is equal to so much of the expenses reasonably incurred by the landlord:

- 2520 (1) in ascertaining what initial repairs are required in consequence of failure by the tenant to fulfil his obligations under the former tenancy<sup>15</sup>; and
- 2521 (2) for the purposes of the relevant initial repairs,

as is recoverable from the tenant and has not been recovered<sup>16</sup>.

1    le under the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante, PARA 1225 et seq post), but subject to s 8(2), Sch 1 Pt II (paras 6-12): see the text and notes 2-16 infra.

2    For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 ante.

3    Landlord and Tenant Act 1954 Sch 1 para 6.

4    For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

5    Landlord and Tenant Act 1954 Sch 1 para 7. For the meaning of 'the tenant' see PARA 1208 ante.

6    For the meaning of 'the landlord' see PARA 1205 ante.

7    For these purposes, 'immediate landlord' means the person who, as respects the dwelling house, is the tenant's landlord for the purposes of the Rent Act: Landlord and Tenant Act 1954 Sch 1 para 19 (amended by the Rent Act 1968 s 117(2), Sch 15). For the meaning of 'the Rent Act' see PARA 1196 note 7 ante; and for the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

8    For the prescribed form of notice see the Landlord and Tenant (Notices) Regulations 1957, SI 1957/1157, reg 4, Appendix, Form 4.

9    Landlord and Tenant Act 1954 Sch 1 para 8(1).

10   Ibid Sch 1 para 8(2).

11   le a notice under ibid Sch 1 para 8(1): see the text and notes 6-9 supra.

12 Ibid Sch 1 para 9. The provisions of the Rent Act 1977 as to the recoverable rent are otherwise not affected: see the Leasehold Reform Act 1967 s 39(2), Sch 5 para 4(5) (as amended); and PARA 1217 note 16 ante. As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante.

13 Landlord and Tenant Act 1954 Sch 1 para 10. In the application of Sch 1 para 10 to a case where the period of the statutory tenancy comes to an end before the relevant initial repairs have been begun, or at a time when they have been begun but not completed, the provisions of Sch 1 para 4 (see PARA 1223 ante) have effect, with the necessary modifications, for limiting the recovery of any remaining instalments under Sch 1 para 10: Sch 1 para 11. For the meaning of 'relevant initial repairs' see PARA 1223 note 3 ante.

14 Ie an interest falling within ibid s 21(4) proviso (a), (b): see PARA 1205 ante.

15 For the meaning of 'the former tenancy' see PARA 1215 ante.

16 Landlord and Tenant Act 1954 Sch 1 para 12. The provisions of Sch 2 paras 5, 6 (as amended) concerning the expenses incurred by mortgagees and limited owners in carrying out initial repairs apply also in relation to payments made under a liability imposed by Sch 1 para 12: see Sch 2 para 5, 6 (as amended); and PARA 1219 ante.

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### **1225. Variation of agreement or determination as to time for making payment.**

The tenant<sup>1</sup> may apply to the court<sup>2</sup> for the variation, on the grounds and to the extent specified below, of any agreement or determination for the making of a payment for accrued tenant's repairs<sup>3</sup>.

The grounds on which an agreement or determination may be varied on such an application are the following:

- 2522 (1) that the expenditure reasonably incurred by the landlord<sup>4</sup> in carrying out the relevant initial repairs<sup>5</sup> substantially exceeded the estimated cost thereof; or
- 2523 (2) that the applicant is not the person who was the tenant at the time of the previous agreement or determination and that there are considerations arising out of the personal circumstances of the applicant which ought to be taken into account in determining the manner of making the payment<sup>6</sup>.

The extent to which an agreement or determination may be so varied on such an application is the following:

- 2524 (a) if the agreement or determination was for the making of the payment otherwise than by instalments, and the payment has not been fully made, by substituting therefor a determination that the payment or balance of the payment should be made by instalments;
- 2525 (b) if the agreement or determination was for the making of a payment by instalments, by substituting for the instalments agreed or determined instalments of such smaller amounts, payable at such times, as may be determined by the court<sup>7</sup>.

Where an agreement or determination is so varied, the statutory provisions as to the making of payments<sup>8</sup> thereafter apply with the necessary modifications<sup>9</sup>.

- 1 For the meaning of 'the tenant' see PARA 1208 ante.
- 2 As to the court having jurisdiction see PARA 1197 ante.
- 3 Landlord and Tenant Act 1954 s 8(2), Sch 1 para 13. For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 ante.
- 4 For the meaning of 'the landlord' see PARA 1205 ante.
- 5 For the meaning of 'relevant initial repairs' see PARA 1223 note 3 ante.
- 6 Landlord and Tenant Act 1954 Sch 1 para 14.
- 7 Ibid Sch 1 para 15.
- 8 I.e. the provisions of ibid Sch 1 paras 1-12: see PARAS 1223-1224 ante.
- 9 Ibid Sch 1 para 16.

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## **1226. Default and overpayment.**

Any failure by the tenant<sup>1</sup> to make a payment for accrued tenant's repairs<sup>2</sup>, or any part or instalment of such a payment, at the time when it becomes due is treated<sup>3</sup> as a breach of the obligations of the tenancy<sup>4</sup>.

Where any sum in respect of a payment for accrued tenant's repairs has been recovered in advance of the carrying out of the relevant initial repairs<sup>5</sup>, then in certain cases<sup>6</sup> such repayment must be made as may be just<sup>7</sup>.

- 1 For the meaning of 'the tenant' see PARA 1208 ante.
- 2 For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 ante.
- 3 I.e. for the purposes of the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1: see PARA 949 ante. As to the limited circumstances in which such Rent Act protection still applies see PARA 1196 the text and notes 17-18 ante.
- 4 Landlord and Tenant Act 1954 s 8(2), Sch 1 para 17 (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent Act 1977 s 155(2), Sch 23 para 19).
- 5 For the meaning of 'relevant initial repairs' see PARA 1223 note 3 ante.
- 6 I.e. in any case where the Landlord and Tenant Act 1954 Sch 1 para 4 (see PARA 1223 ante) or Sch 1 para 11 (see PARA 1224 ante) applies.
- 7 Ibid Sch 1 para 18.



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## **(v) Possession; Relief against Enforcement of Covenants**

### **A. POSSESSION**

#### **1227. In general.**

The grounds on which a landlord<sup>1</sup> may apply to the court<sup>2</sup> for possession of the property comprised in a protected long tenancy<sup>3</sup> at a low rent<sup>4</sup> are the following:

- 2526 (1) that for purposes of redevelopment after the termination of the tenancy the landlord proposes to demolish or reconstruct the whole or a substantial part of the relevant premises<sup>5</sup>;
- 2527 (2) the specified<sup>6</sup> statutory grounds<sup>7</sup>.

<sup>1</sup> For the meaning of 'the landlord' see PARA 1205 ante.

<sup>2</sup> As to the application to the court see PARA 1230 post.

<sup>3</sup> For the meaning of 'long tenancy' see PARA 1202 ante; and for the meaning of 'tenancy' see PARA 706 note 2 ante.

<sup>4</sup> I.e. a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

<sup>5</sup> Ibid s 12(1)(a). For these purposes, 'the relevant premises' means (1) as respects any time after the term date, the premises of which, if the tenancy were not one at a low rent, the tenant would have been entitled to retain possession by virtue of the Rent Act after the coming to an end of the tenancy at the term date; (2) as respects any time before the term date, the premises agreed between the landlord and the tenant or determined by the court to be likely to be the premises of which, if the tenancy were not one at a low rent, the tenant would be entitled so to retain possession: s 12(2) (amended by the Rent Act 1968 s 117(2), Sch 15). For the meaning of 'term date' see PARA 1201 note 7 ante; and for the meaning of 'the Rent Act' see PARA 1196 note 7 ante.

<sup>6</sup> I.e. the grounds specified in the Landlord and Tenant Act 1954 s 12(1), Sch 3: see PARA 1228 post at heads (1)-(4) in the text. Those grounds correspond, subject to the necessary modifications, to the Rent Act 1977 s 98, Sch 15 Pt I, Cases 1-9 (as amended) (see PARAS 949-956 ante) which specify circumstances in which the court may make an order for possession under the Rent Act 1977: Landlord and Tenant Act 1954 s 12(1)(b) (amended by the Rent Act 1968 Sch 15; the Rent Act 1977 s 155(2), Sch 23 para 15). This statement is, however, misleading. Where the grounds do not correspond, there are appropriate cross-references to the appropriate provisions of the Rent Act 1977.

<sup>7</sup> Landlord and Tenant Act 1954 s 12(1)(b).

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#### **1228. Specified grounds for possession.**

The grounds<sup>1</sup> on which the landlord<sup>2</sup> may apply to the court<sup>3</sup> for possession of the property comprised in the protected long tenancy<sup>4</sup> at a low rent<sup>5</sup> are:

- 2528 (1) that suitable alternative accommodation<sup>6</sup> will be available for the tenant<sup>7</sup> at the date of termination of the tenancy<sup>8</sup>;
- 2529 (2) that the tenant has failed to comply with any term<sup>9</sup> of the tenancy<sup>10</sup> as to payment of rent or rates or as to insuring or keeping insured any premises<sup>11</sup>;
- 2530 (3) that the tenant or a person residing or lodging with him or being his subtenant has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers, or has been convicted of using any premises comprised in the tenancy or allowing such premises to be used for an immoral or illegal purpose and, where the person in question is a lodger or subtenant, that the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant<sup>12</sup>; and
- 2531 (4) that premises comprised in the tenancy, and consisting of or including the relevant premises<sup>13</sup>, are reasonably required by the landlord for occupation as a residence for himself, or any son or daughter of his over 18 years of age, or his father or mother, or the father or mother of his spouse or civil partner and, if the landlord is not the immediate landlord<sup>14</sup>, that he will be the immediate landlord at the date of termination<sup>15</sup>.

Where the ground or one of the grounds for claiming possession specified in the landlord's notice was one mentioned in heads (1) to (4) above, then, if on an application to the court, the court is satisfied that the landlord has established that ground and that it is reasonable that the landlord should be granted possession, the court must order that the tenant shall, on the termination of the tenancy, give up possession of all the property then comprised in the tenancy<sup>16</sup>.

1 The grounds referred to in the Landlord and Tenant Act 1954 s 12(1)(b): see PARA 1227 ante at head (2) in the text.

2 For the meaning of 'the landlord' see PARA 1205 ante.

3 As to the court having jurisdiction see PARA 1197 ante; and as to the application see PARA 1230 post.

4 For the meaning of 'long tenancy' see PARA 1202 ante.

5 The tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante. If, however, a statutory tenancy has already arisen (see PARAS 1212, 1215 ante), the landlord must establish a ground for possession under the Rent Act 1977 s 98, Sch 15 (as amended): see PARA 949 et seq ante.

6 Ibid Sch 15 Pt IV (paras 3-8) (as amended) (see PARA 947 ante) applies for the purposes of the Landlord and Tenant Act 1954 Sch 3 (as amended) as it applies for the purposes of the Rent Act 1977 s 98(1)(a) (see PARA 942 ante): Landlord and Tenant Act 1954 Sch 3 para 2 (amended by the Rent Act 1968 Sch 15; the Rent Act 1977 Sch 23 para 20).

7 For the meaning of 'the tenant' see PARA 1208 ante.

8 Landlord and Tenant Act 1954 Sch 3 para 1(a).

9 For the meaning of 'terms' see PARA 706 note 27 ante.

10 For the meaning of 'tenancy' see PARA 706 note 2 ante.

11 Landlord and Tenant Act 1954 Sch 3 para 1(b). This ground covers part of that covered by the Rent Act 1977 Sch 15 Pt I, Case 1: see PARA 949 ante.

12 Landlord and Tenant Act 1954 Sch 3 para 1(c). For the similar provisions in the Rent Act 1977 Sch 15 Pt I, Case 2 see PARA 950 ante. As to use for an immoral or illegal purpose see PARA 500 notes 7-9 ante.

13 For the meaning of 'the relevant premises' see PARA 1227 note 5 ante.

14 See PARA 1205 ante.

15 Landlord and Tenant Act 1954 Sch 3 para 1(e) (amended by the Civil Partnership Act 2004, s 81, Sch 8, PARA 2). The court may not, however, make an order under the Landlord and Tenant Act 1954 s 13 (see PARA 1230 post) on the grounds specified in Sch 3 para 1(e) (as so amended) if (1) the interest of the landlord, or an interest which has merged in that interest and, but for the merger, would be the interest of the landlord, was purchased or created after 18 February 1966; or (2) the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by making the order than by refusing to make it: Sch 3 para 1 proviso (amended by the Rent Act 1957 s 26(1), Sch 6 para 27(2); the Leasehold Reform Act 1967 Sch 5 para 1 (b)). For the similar provisions in the Rent Act 1977 Sch 15 Pt I, Case 9 (as amended) see PARAS 956, 958 ante.

The Leasehold Reform Act 1967 contained transitional provisions providing for compensation to the tenant where the landlord obtained possession on this ground: see s 35(4)(b), (6)-(9) (repealed).

16 Landlord and Tenant Act 1954 s 13(4). Nothing in s 13(4) prejudices any power of the tenant under s 5 (see PARA 1214 ante) to terminate the tenancy: s 13(5). As to reasonableness of the Rent Act 1977 s 98 (as amended); and PARA 945 ante; and as to the termination of the tenancy and the provisions on interim continuation see PARA 1210 ante.

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### **1229. Possession on the ground of redevelopment.**

Where the ground or one of the grounds for claiming possession specified in the landlord's notice was that for the purposes of redevelopment after the termination of the tenancy the landlord proposes to demolish or reconstruct the whole or a substantial part of the relevant premises<sup>1</sup>, then, if on such an application the court<sup>2</sup> is satisfied that the landlord has established that ground as respects premises specified in the application, and is further satisfied:

2532 (1) that on that ground possession of the premises will be required by the landlord on the termination of the tenancy; and

2533 (2) that the landlord has made such preparations, including the obtaining or, if that is not reasonably practicable in the circumstances, preparations relating to the obtaining, of any requisite permission or consent, whether from any authority whose permission or consent is required under any enactment or from the owner of any interest in any property, for proceeding with the redevelopment as are reasonable in the circumstances,

the court must order that the tenant<sup>3</sup> shall, on the termination of the tenancy, give up possession of all the property then comprised in the tenancy<sup>4</sup>.

Where in such a case the court is not so satisfied, but would be satisfied if the date of termination of the tenancy had been such date ('the postponed date') as the court may determine, being a date later, but not more than one year later, than the date of termination specified in the landlord's notice, then, if the landlord so requires, the court must, if the

landlord so requires, make an order specifying the postponed date and otherwise to the following effect:

- 2534 (a) that the tenancy shall not come to an end on the date of termination<sup>5</sup> specified in the landlord's notice but shall continue thereafter, as respects the whole of the property comprised therein, at the same rent and in other respects on the same terms as before that date;
- 2535 (b) that, unless the tenancy comes to an end before the postponed date, the tenant shall on that date give up possession of all the property then comprised in the tenancy<sup>6</sup>.

1 Where the ground or one of the grounds for claiming possession was that mentioned in the Landlord and Tenant Act 1954 s 12(1)(a): see PARA 1227 ante. For the meaning of 'tenancy' see PARA 706 note 2 ante; for the meaning of 'the landlord' see PARA 1205 ante; and for the meaning of 'the relevant premises' see PARA 1227 note 5 ante.

The grounds on which a landlord may apply to the court for possession of property comprised in a tenancy, and which may accordingly under s 4 (see PARA 1212 ante) be specified in a landlord's notice to resume possession, in the case of applications made after 27 November 1967, do not include the ground mentioned in s 12(1)(a) except where the landlord seeking to obtain possession is a body to which the Leasehold Reform Act 1967 s 28 (as amended) (see PARA 1487 post) applies and the property is required for relevant development within the meaning of s 28 (as amended) (see PARA 1487 note 13 post); but on any application by such a body under the Landlord and Tenant Act 1954 s 13 (see PARA 1230 post) for possession on that ground a certificate by a Minister of the Crown as provided by the Leasehold Reform Act 1967 s 28(1) is conclusive that the property is so required: s 38(1).

2 As to the court having jurisdiction see PARA 1197 ante.

3 For the meaning of 'the tenant' see PARA 1208 ante.

4 Landlord and Tenant Act 1954 s 13(2). Nothing in s 13(2) or s 13(3) prejudices any power of the tenant under s 5 (see PARA 1214 ante) to terminate the tenancy; and s 13(2) applies where the tenancy is continued by an order of the court under s 13(3) as it applies where the tenancy is continued by virtue of s 3 (as amended: see PARA 1209 ante): s 13(5).

For similar provisions under Pt II (ss 23-46) (as amended) see PARAS 741-744 ante. Cases under those provisions must, however, be applied with care as there are differences in the respective language used, eg 'proposes to demolish or reconstruct' is less burdensome than 'intends': *Magdalen and Lasher Charity Trustees, Hastings v Shelower* (1968) 19 P & CR 389, CA.

5 For the meaning of 'the date of termination' see PARA 1212 ante.

6 Landlord and Tenant Act 1954 s 13(3). See also note 4 supra.

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### **1230. Landlord's application for possession.**

Where a landlord's<sup>1</sup> notice to resume possession<sup>2</sup> has been served and either:

- 2536 (1) the tenant<sup>3</sup> elects to retain possession<sup>4</sup>; or
- 2537 (2) at the end of the period of two months after the service of the landlord's notice the qualifying condition<sup>5</sup> is fulfilled as respects the tenancy<sup>6</sup>,

the landlord may apply to the court<sup>7</sup> for an order on such of the statutory grounds<sup>8</sup> as may be specified in the notice; but the application may not be made later than two months after the tenant elects to retain possession or, if he has not elected to retain possession, later than four months after the service of the notice<sup>9</sup>.

1 For the meaning of 'the landlord' see PARA 1205 ante.

2 For the meaning of 'landlord's notice to resume possession' see PARA 1212 note 8 ante.

3 For the meaning of 'the tenant' see PARA 1208 ante.

4 For the meaning of references to an election by the tenant to retain possession see PARA 1212 note 15 ante.

5 For the meaning of 'qualifying condition' see PARA 1204 ante.

6 For the meaning of 'tenancy' see PARA 706 note 2 ante.

7 As to the court having jurisdiction see PARA 1197 ante.

8 I.e. the grounds mentioned in the Landlord and Tenant Act 1954 s 12 (as amended); see PARAS 1227-1229 ante.

9 Ibid s 13(1). Nothing in s 13(1) prejudices any power of the tenant under s 5 (see PARA 1214 ante) to terminate the tenancy: s 13(5).

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### **1231. Compensation for possession obtained by misrepresentation.**

Where an order is made for possession of the property comprised in a protected long tenancy<sup>1</sup> at a low rent<sup>2</sup> and it is subsequently made to appear to the court<sup>3</sup> that the order was obtained by misrepresentation or the concealment of material facts, the court may order the landlord<sup>4</sup> to pay to the tenant<sup>5</sup> such a sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order<sup>6</sup>.

1 For the meaning of 'long tenancy' see PARA 1202 ante.

2 I.e. a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

3 As to the court having jurisdiction see PARA 1197 ante.

4 For the meaning of 'the landlord' see PARA 1205 ante.

5 For the meaning of 'the tenant' see PARA 1208 ante.

6 Landlord and Tenant Act 1954 s 14A (added by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(1), Sch 5, PARAS 1, 2). Cf the Rent Act 1977 s 102; and PARA 959 ante; the Housing Act 1988 s 12; and PARA 1105 ante.

The Landlord and Tenant Act 1954 s 14A (as so added) applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) as it applies in relation to the Landlord and

Tenant Act 1954 Pt I (ss 1-22) (as amended): Local Government and Housing Act 1989 Sch 10 para 20(2); Interpretation Act 1978 s 17(2)(a).

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### **1232. Effect of refusal of order.**

The following provisions have effect where a landlord's notice to resume possession has been served and either:

- 2538 (1) the tenant elects to retain possession; or
- 2539 (2) at the end of the period of two months after the service of the landlord's notice the qualifying condition is fulfilled as respects the tenancy<sup>1</sup>,

and the landlord does not obtain an order<sup>2</sup> for possession<sup>3</sup>.

If, at the expiration of the period within which an application<sup>4</sup> may be made, the landlord has not made such an application, the landlord's notice and anything done in pursuance thereof cease thereupon to have effect<sup>5</sup>. If, before the expiration of that period, the landlord has made an application, but the result of the application, at the time when it is finally disposed of<sup>6</sup>, is that no order is made, the landlord's notice ceases to have effect; but, if within one month after the application to the court<sup>7</sup> is finally disposed of the landlord gives a landlord's notice proposing a statutory tenancy<sup>8</sup>, the earliest date which may be specified therein as the date of termination<sup>9</sup> is<sup>10</sup> the expiration of three months from the giving of the subsequent notice<sup>11</sup>.

A landlord's notice to resume possession may be withdrawn at any time by notice in writing served on the tenant<sup>12</sup>; and, if within one month of the withdrawal of a landlord's notice to resume possession the landlord gives a landlord's notice proposing a statutory tenancy, the earliest date which may be specified therein as the date of termination is<sup>13</sup> the expiration of three months from the giving of subsequent notice or six months from the giving of the withdrawn notice, whichever is the later<sup>14</sup>.

1    Ie in a case falling within the Landlord and Tenant Act 1954 s 13(1)(a) or (b): see PARA 1230 ante at heads (1)-(2) in the text. For the meaning of 'the landlord' see PARA 1205 ante; and for the meaning of 'the landlord's notice to resume possession' see PARA 1212 note 8 ante.

2    Ie under ibid s 13: see PARA 1230 ante.

3    Ibid s 14(1).

4    See note 2 supra.

5    Landlord and Tenant Act 1954 s 14(2).

6    For these purposes, the reference to the time at which an application is finally disposed of is to be construed as a reference to the earliest time at which the proceedings on the application, including any proceedings on or in consequence of an appeal, have been determined and any time for appealing or further appealing has expired, except that, if the application is withdrawn or any appeal is abandoned, the reference is to be construed as a reference to the time of withdrawal or abandonment: ibid s 14(4).

7    As to the court having jurisdiction see PARA 1197 ante.

8 For the meaning of 'landlord's notice proposing a statutory tenancy' see PARA 1212 note 8 ante.

9 For the meaning of 'the date of termination' see PARA 1212 ante.

10 Ie notwithstanding anything in the Landlord and Tenant Act 1954 s 4(2): see PARA 1212 ante.

11 Ibid s 14(3). Where, by virtue of s 14(3) or s 14(5), the landlord gives a landlord's notice proposing a statutory tenancy which specifies as the date of termination a date earlier than six months after the giving of the notice, s 7(2) (as amended) (see PARA 1216 ante) applies in relation to the notice with the substitution for references to the period of two months ending with the date of termination specified in the notice and the beginning of that period, of references to the period of three months beginning with the giving of the notice and the end of that period: s 14(6).

12 Ie without prejudice to the power of the court to make an order as to costs if the notice is withdrawn after the landlord has made an application under ibid s 13. See *Demag Industrial Equipment Ltd v Canada Dry (UK) Ltd* [1969] 2 All ER 936, [1969] 1 WLR 985 (decided under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended)).

13 See note 10 supra.

14 Landlord and Tenant Act 1954 s 14(5). See also note 11 supra.

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## **B. RELIEF AGAINST ENFORCEMENT OF COVENANTS**

### **1233. Relief for tenant where landlord proceeding to enforce covenants.**

Where, in the case of a protected long tenancy<sup>1</sup> at a low rent<sup>2</sup>:

2540 (1) the immediate landlord<sup>3</sup> has brought proceedings to enforce a right of re-entry or forfeiture or a right to damages in respect of a failure to comply with any terms<sup>4</sup> of the tenancy<sup>5</sup>;

2541 (2) the tenant has made application in the proceedings for relief; and

2542 (3) the court<sup>6</sup> makes an order for the recovery from the tenant of possession of the property comprised in the tenancy or for the payment by the tenant of such damages, and the order is made at a time earlier than seven months before the term date<sup>7</sup> of the tenancy,

the operation of the order is suspended for a period of 14 days from the making thereof; and, if before the end of that period the tenant gives notice in writing to the immediate landlord that he desires the following provisions<sup>8</sup> to have effect, and lodges a copy of the notice in the court:

2543 (a) the order does not thereafter have effect except if and in so far as it provides for the payment of costs; and

2544 (b) the tenancy thereafter has effect, and the statutory provisions relating to the security of tenure of occupying tenants of residential properties under long leases at low rents<sup>9</sup> have effect in relation thereto, as if it had been granted for a term expiring at the expiration of seven months from the making of the order<sup>10</sup>.

In any case falling within heads (1) and (2) above, the court may not make any such order as is mentioned in head (3) above unless the time of the making of the order falls earlier than seven months before the term date of the tenancy; but this does not prevent<sup>11</sup> the making of an order for damages in respect of a failure, as respects any premises, to comply with the terms of a tenancy if, at the time when the order is made, the tenancy has come to an end as respects those premises<sup>12</sup>.

The above provisions do not have effect in relation to a failure to comply with:

- 2545 (i) any term of a tenancy as to payment of rent or rates or as to insuring or keeping insured any premises<sup>13</sup>; or
- 2546 (ii) any term restricting the use of any premises for immoral or illegal purposes<sup>14</sup>.

Nothing in the above provisions prejudices any right to apply for relief under any other enactment<sup>15</sup>.

1 For the meaning of 'long tenancy' see PARA 1202 ante.

2 Ie a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

Section 16 applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post) as it applies in relation to the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq ante, PARAS 1234-1236 post), subject to the modification that in s 16(1) the reference to a tenancy to which s 1 (as amended) applies is to be construed as a reference to a long residential tenancy: Local Government and Housing Act 1989 Sch 10 para 20(1)(a). For the meaning of 'long residential tenancy' see PARA 1244 post.

3 For the meaning of 'the landlord' see PARA 1205 ante.

4 For the meaning of 'terms' see PARA 706 note 27 ante.

5 For the meaning of 'tenancy' see PARA 706 note 2 ante. For these purposes, references to proceedings to enforce a right to damages in respect of a failure to comply with any terms of a tenancy are to be construed as including references to proceedings for recovery from the tenant of expenditure incurred by or recovered from the immediate landlord in consequence of such a failure on the part of the tenant: Landlord and Tenant Act 1954 s 16(5). For the meaning of 'the tenant' see PARA 1208 ante.

6 As to the court having jurisdiction see PARA 1197 ante.

7 For the meaning of 'term date' see PARA 1201 note 7 ante.

8 Ie the Landlord and Tenant Act 1954 s 16(2)(a), (b).

9 Ie *ibid* Pt I (as amended). Section 16 applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) as it applies in relation to the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended), subject to the modification that in s 16(2) the reference to Pt I (ss 1-22) (as amended) is to be construed as a reference to the Local Government and Housing Act 1989 Sch 10 (as amended): Sch 10 para 20(1)(b). See also note 2 *supra*.

10 Landlord and Tenant Act 1954 s 16(1), (2). A tenant who applies for relief under s 16 is not thereby precluded from claiming to acquire the freehold or an extended lease, or a new lease of a flat; but, if he gives notice under s 16(2), any such claim made by him is of no effect or, if already made, ceases to have effect: see the Leasehold Reform Act 1967 s 22, Sch 3 para 4(4); and PARA 1430 post; the Leasehold Reform, Housing and Urban Development Act 1993 s 42, Sch 12 para 7(1); and PARA 1688 post. The references in the Leasehold Reform Act 1967 Sch 3 para 4 (as amended) to the Landlord and Tenant Act 1954 s 16 and to s 16(2) include references to those provisions as they apply in relation to the Local Government and Housing Act 1989 Sch 10 (as amended): Leasehold Reform Act 1967 Sch 3 para 4(6)(a) (added by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(4)).

The Landlord and Tenant Act 1954 s 2(3) (see PARA 1204 ante) does not have effect in relation to s 16: s 16(7). Section 16 applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) as it applies



in relation to the Landlord and Tenant Act 1954 Pt I (as amended), subject to the modification that in s 16(7) the reference to s 2(3) is to be construed as a reference to the Local Government and Housing Act 1989 Sch 10 para 1(6) (see PARA 1244 post): Sch 10 para 20(1)(d).

11 le without prejudice to the Landlord and Tenant Act 1954 s 10 (as amended): see PARA 1215 ante.

12 Ibid s 16(3). Section 16 applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) as it applies in relation to the Landlord and Tenant Act 1954 Pt I (as amended), subject to the modification that s 16(3) has effect as if the words '(without prejudice to section 10 of this Act)' were omitted: Local Government and Housing Act 1989 Sch 10 para 20(1)(c).

13 As to insurance see PARA 359 et seq ante.

14 Landlord and Tenant Act 1954 s 16(4); cf para 1215 ante. As to use for immoral or illegal purposes see PARA 500 notes 7-9 ante.

15 Ibid s 16(6).

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### **1234. Proceedings by superior landlord.**

Where in the case of a protected long tenancy<sup>1</sup> at a low rent<sup>2</sup>:

- 2547 (1) the interest of the immediate landlord<sup>3</sup> is itself a tenancy<sup>4</sup> ('the mesne tenancy'); and
- 2548 (2) a superior landlord has brought proceedings to enforce a right of re-entry or forfeiture in respect of a failure to comply with any terms<sup>5</sup> of the mesne tenancy, or of a superior tenancy having effect subject to the mesne tenancy; and
- 2549 (3) the court<sup>6</sup> makes an order for the recovery by the superior landlord of possession of the property comprised in the tenancy,

the tenant<sup>7</sup> is not required to give up possession unless he has been a party to the proceedings or has been given notice of the order; and the following provisions<sup>8</sup> have effect where he has been such a party or has been given such a notice<sup>9</sup>. Where, however, the tenant has been a party to the proceedings, the following provisions do not apply unless he has at any time before the making of the order made application in the proceedings for relief<sup>10</sup>.

If the tenant within 14 days after the making of the order or, where he has not been a party to the proceedings, within 14 days after the notice, gives notice in writing to the superior landlord that he desires that the following provisions shall have effect and lodges a copy of the notice in the court:

- 2550 (a) the tenant is not required to give up possession of the property but the tenancy mentioned in head (2) above is deemed as between the tenant and the superior landlord to have been surrendered on the date of the order; and
- 2551 (b) if the term date<sup>11</sup> of the tenant's tenancy would otherwise fall later, it is deemed to fall at the expiration of seven months from the making of the order<sup>12</sup>.

Nothing in the above provisions prejudices the operation of any order for the recovery of possession from the tenant under the mesne tenancy, or from the tenant under any superior tenancy having effect subject to the mesne tenancy<sup>13</sup>.

1 For the meaning of 'long tenancy' see PARA 1202 ante.

2 le a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante. For the meaning of 'tenancy at a low rent' see PARA 1203 ante.

3 For the meaning of 'the landlord' see PARA 1205 ante.

4 For the meaning of 'tenancy' see PARA 706 note 2 ante.

5 For the meaning of 'terms' see PARA 706 note 27 ante.

6 As to the court having jurisdiction see PARA 1197 ante.

7 For the meaning of 'the tenant' see PARA 1208 ante.

8 le the Landlord and Tenant Act 1954 s 21(5), Sch 5 para 9(2).

9 Ibid Sch 5 para 9(1). Section 16(4), (6), (7) (see PARA 1233 ante) applies with the necessary modifications for the purposes of Sch 5 para 9: Sch 5 para 9(4).

A tenant who so applies for relief is not thereby precluded from claiming to acquire the freehold or an extended lease, or a new lease of a flat; but, if he gives notice under the Landlord and Tenant Act 1954 Sch 5 para 9(2), any such claim made by him is of no effect or, if already made, ceases to have effect: see the Leasehold Reform Act 1967 s 22, Sch 3 para 4(4), (5); and PARA 1430 post; the Leasehold Reform, Housing and Urban Development Act 1993 s 42, Sch 12 para 7(1), (2); and PARA 1688 post. The references in the Leasehold Reform Act 1967 Sch 3 para 4 (as amended) to the Landlord and Tenant Act 1954 Sch 5 para 9 and to Sch 5 para 9(2) include references to those provisions as they apply in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): Leasehold Reform Act 1967 Sch 3 para 4(6)(b) (added by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(4)).

As to the application of the Landlord and Tenant Act 1954 Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) see PARA 1206 note 14 ante.

10 Landlord and Tenant Act 1954 Sch 5 para 9(1) proviso.

11 For the meaning of 'term date' see PARA 1201 note 7 ante.

12 Landlord and Tenant Act 1954 Sch 5 para 9(2).

13 Ibid Sch 5 para 9(3).

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### **1235. Relief for mesne landlord.**

Where, in the case of a protected long tenancy<sup>1</sup> at a low rent<sup>2</sup>:

2552 (1) the competent landlord<sup>3</sup> is not the immediate landlord; and

2553 (2) the competent landlord has brought proceedings against a mesne landlord<sup>4</sup> to enforce a right to damages in respect of a failure to comply with any terms<sup>5</sup> of the mesne landlord's tenancy; and

- 2554 (3) the mesne landlord has made application in the proceedings for relief under these provisions; and  
 2555 (4) the court<sup>6</sup> makes an order for the payment by the mesne landlord of any such damages,

the operation of the order is suspended for a period of 14 days from the making thereof; and, if before the end of that period the mesne landlord gives notice in writing to the competent landlord that he desires that the following provisions shall have effect and lodges a copy of the notice in the court:

- 2556 (a) the order is not enforceable except if and in so far as it provides for the payment of costs; and  
 2557 (b) the interest of the mesne landlord, unless it has then come to an end, is deemed to be surrendered, and his rights and liabilities thereunder to be extinguished, as from the date of the giving of the notice<sup>7</sup>.

1 For the meaning of 'long tenancy' see PARA 1202 ante.

2 Is a tenancy to which the Landlord and Tenant Act 1954 s 1 (as amended) applies: see PARA 1196 ante. As to the limited circumstances in which s 1 (as amended) still applies see PARA 1196 the text and notes 17-18 ante.

3 For the meaning of 'the competent landlord' see PARA 1206 note 2 ante.

4 For the meaning of 'mesne landlord' see PARA 1206 notes 7, 11 ante.

5 For the meaning of 'terms' see PARA 706 note 27 ante.

6 As to the court having jurisdiction see PARA 1197 ante.

7 Landlord and Tenant Act 1954 s 21(5), Sch 5 paras 10(1), (2). Section 16(4)-(7) (see PARA 1233 ante) applies with the necessary modifications for the purposes of Sch 5 para 10: Sch 5 para 10(3).

As to the application of Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) see PARA 1206 note 14 ante.

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### **1236. Covenants in superior leases.**

Where the tenant<sup>1</sup> obtains a statutory tenancy so that his liability on the covenants in the original lease is extinguished and thereafter he holds on the terms<sup>2</sup> of the statutory tenancy<sup>3</sup>, any terms of any tenancy owned by the competent landlord<sup>4</sup> or by any other landlord<sup>5</sup>, whether to be performed during that tenancy or on or after the expiration or determination thereof<sup>6</sup>, cease to have effect in so far as they relate to the premises constituting the dwelling house; and any liability of the competent landlord or any mesne landlord<sup>7</sup> or of any predecessor in title of the competent landlord or any mesne landlord, under any such terms, is deemed, in so far as it related to those premises and was a liability subsisting at the termination of the relevant tenancy<sup>8</sup>, to have been extinguished on the termination of that tenancy<sup>9</sup>.

Where in such a case the competent landlord satisfies the court<sup>10</sup>:

- 2558 (1) that the obligations under the tenancy which in relation to him is the immediate mesne tenancy<sup>11</sup> differ from the obligations under the relevant tenancy; and
- 2559 (2) that, if the obligations under the relevant tenancy had been the same as those under the first-mentioned tenancy, he would have been entitled to recover any amount by way of payment for accrued tenant's repairs<sup>12</sup> which he is not entitled to recover,

he is entitled to recover that amount from the tenant under the first-mentioned tenancy or, if that tenancy has come to an end, from the person who was the tenant under it immediately before it came to an end<sup>13</sup>.

If, however, the interest of the competent landlord, being a tenancy, or the interest of any mesne landlord, has not come to an end by the end of the period of the statutory tenancy<sup>14</sup>, and the terms on which that interest was held included an obligation to repair or maintain the dwelling house or the dwelling house and other premises, then as from the end of the statutory tenancy the instrument creating the interest of the competent landlord or mesne landlord is deemed to contain a covenant with the grantor of the interest that the grantee of the interest will at all times maintain the dwelling house in a state of repair no less good than that in which it was after the completion of any initial repairs<sup>15</sup> to be carried out thereon in accordance with the statutory provisions<sup>16</sup> and will yield up possession of the dwelling house in such a state on the coming to an end of the interest of that landlord<sup>17</sup>.

1 For the meaning of 'the tenant' see PARA 1208 ante.

2 For the meaning of 'terms' see PARA 706 note 27 ante.

3 ie where the Landlord and Tenant Act 1954 s 10(1) applies: see PARA 1215 ante.

4 For the meaning of 'the competent landlord' see PARA 1206 note 2 ante.

5 For the meaning of 'other landlords' see PARA 1206 notes 7, 11 ante.

6 ie except any such terms as are mentioned in the Landlord and Tenant Act 1954 s 10(1) proviso (a) or (b): see PARA 1215 ante at heads (a)-(b) in the text. Where any term to which s 21(5), Sch 5 para 11 applies relates both to the dwelling house and to other premises, nothing in Sch 5 para 11 affects its operation in relation to the other premises: Sch 5 para 11(2) proviso. For the meaning of 'tenancy' see PARA 706 note 2 ante; and for the meaning of 'the dwelling house' see PARA 1205 note 5 ante.

7 For the meaning of 'mesne landlord' see PARA 1206 notes 7, 11 ante.

8 For the meaning of 'the relevant tenancy' see PARA 1206 note 2 ante.

9 Landlord and Tenant Act 1954 Sch 5 para 11(1), (2). In the application of Sch 5 (as amended) in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq post), the Landlord and Tenant Act 1954 Sch 5 para 11 is to be omitted: see PARA 1206 note 14 ante.

10 As to the court having jurisdiction see PARA 1197 ante.

11 For these purposes, 'the immediate mesne tenancy', in relation to the competent landlord or to a mesne landlord, means the tenancy on which his interest in those premises is immediately expectant: Landlord and Tenant Act 1954 Sch 5 para 11(6).

12 For the meaning of 'payment for accrued tenant's repairs' see PARA 1222 ante.

13 Landlord and Tenant Act 1954 Sch 5 para 11(4). See also note 9 supra. Where, in accordance with Sch 5 para 11(4) or with Sch 5 para 11(4) as applied by the following provisions, any sum is so recoverable from a person, Sch 5 para 11(4) applies, with the necessary modifications, as between him and the person entitled to the interest, if any, which in relation to him is the immediate mesne tenancy or, if such an interest formerly

subsisted but has come to an end, as between him and the person last entitled to that interest: Sch 5 para 11(5).

14 For the meaning of 'the period of the statutory tenancy' see PARA 1205 note 7 ante.

15 For the meaning of 'initial repairs' see PARA 1219 ante; and as to references to the state of repair see PARA 760 note 12 ante.

16 le in accordance with the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante.

17 Ibid Sch 5 para 11(3). See also note 9 supra.

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## **(2) THE**

### **(i) Application of the Statutory Protection**

#### **1237. In general.**

The provisions of the Local Government and Housing Act 1989 relating to long residential tenancies<sup>1</sup> have effect<sup>2</sup> to confer security of tenure on certain tenants under long tenancies and, in particular, to establish assured periodic tenancies when such long tenancies come to an end<sup>3</sup>. Those provisions apply<sup>4</sup> to a tenancy of a dwelling house which is:

- 2560 (1) a long tenancy<sup>5</sup> at a low rent<sup>6</sup>; and
- 2561 (2) entered into on or after 1 April 1990<sup>7</sup> otherwise than in pursuance of a contract made before that day<sup>8</sup>.

If a tenancy:

- 2562 (a) was in existence on 15 January 1999; and
- 2563 (b) does not fall within heads (1) and (2) above; and
- 2564 (c) immediately before that date was, or was deemed to be, a long tenancy at a low rent for the purposes of Part I of the Landlord and Tenant Act 1954<sup>9</sup>,

then, on and after that date, and so far as concerns any notice specifying a date of termination on or after that date and any steps taken in consequence thereof, the relevant provisions of that Act<sup>10</sup> ceased to apply to it and the relevant provisions of the Local Government and Housing Act 1989<sup>11</sup> apply to it unless, before that date, the landlord had served a notice<sup>12</sup> specifying a date of termination which was earlier than that date<sup>13</sup>.

Where, however, a new lease has been granted under the Leasehold Reform, Housing and Urban Development Act 1993<sup>14</sup>, none of the statutory provisions relating to security of tenure for tenants apply to the lease, and after the term date of the lease the statutory protection for long residential tenancies<sup>15</sup> does not apply to any sublease directly or indirectly derived out of the lease<sup>16</sup>.

- 1    le the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1238 et seq post.
- 2    le in place of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante.
- 3    Local Government and Housing Act 1989 s 186(1).
- 4    le and the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) does not apply.
- 5    le as defined in the Local Government and Housing Act 1989 Sch 10 (as amended): see PARA 1245 post.
- 6    le as defined in ibid Sch 10 (as amended): see PARA 1246 post.
- 7    le the day appointed for the coming into force of the Local Government and Housing Act 1989 s 186: see s 195(2); and the Local Government and Housing Act 1989 (Commencement No 5 and Transitional Provisions) Order 1990, SI 1990/431, art 4.
- 8    Local Government and Housing Act 1989 s 186(2).
- 9    le the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended).
- 10   le ibid s 1 (as amended): see PARA 1196 ante.
- 11   See note 1 supra.
- 12   le under Landlord and Tenant Act 1954 s 4: see PARA 1212 ante.
- 13   Local Government and Housing Act 1989 s 186(3). Where, by virtue of s 186(3), Sch 10 (as amended) applies to a tenancy which is not a long tenancy at a low rent as defined therein (see PARAS 1245-1246 post), it is deemed to be such a tenancy for those purposes: s 186(6).
- 14   le under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 post.
- 15   See note 1 supra.
- 16   See the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post. Similarly the Local Government and Housing Act 1989 Sch 10 (as amended) does not apply to a tenancy which has been extended under the Leasehold Reform Act 1967 s 14 (as amended): see s 16(1B) (as added); and PARA 1483 post.

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### **1238. Application of the Landlord and Tenant Act 1954.**

Certain provisions of the Landlord and Tenant Act 1954 relating to:

- 2565   (1)   landlords<sup>1</sup> and mortgagees in possession<sup>2</sup>;
- 2566   (2)   relief for the tenant where the landlord is proceeding to enforce covenants<sup>3</sup>;
- 2567   (3)   compensation for possession obtained by misrepresentation<sup>4</sup>;
- 2568   (4)   the jurisdiction of the court<sup>5</sup>;
- 2569   (5)   reversions<sup>6</sup>; and
- 2570   (6)   the service of notices<sup>7</sup>,

apply for the purposes of the statutory provisions relating to long residential tenancies<sup>8</sup> with certain modifications<sup>9</sup>.

- 1    Ie the Landlord and Tenant Act 1954 s 21, Sch 5 (as amended) (meaning of 'the landlord' and provisions as to mesne landlords): see PARAS 1205-1206, 1219-1220, 1234-1236 ante.
- 2    Ie ibid s 67: see PARA 1207 ante.
- 3    Ie ibid s 16: see PARA 1233 ante.
- 4    Ie ibid s 14A (as added): see PARA 1231 ante.
- 5    Ie ibid s 63 (as amended): see PARA 1197 ante.
- 6    Ie ibid s 65: see PARA 1211 ante.
- 7    Ie ibid s 66(4): see PARA 703 ante.
- 8    Ie the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1239 et seq post.
- 9    See ibid Sch 10 paras 19(1)-(3), 20(1)-(5). For the specified modifications see PARAS 1197 note 2, 1205 note 4, 1206 note 14, 1207 note 4, 1211 note 4, 1233 notes 2, 9-10, 12 ante. The Landlord and Tenant Act 1954 s 18 (as amended) also applies: see PARA 1242 post.

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### **1239. Application to the Crown.**

The statutory provisions relating to long residential tenancies<sup>1</sup> apply where:

- 2571 (1) there is an interest belonging to Her Majesty in right of the Crown and that interest is under the management of the Crown Estate Commissioners<sup>2</sup>; or
- 2572 (2) there is an interest belonging to Her Majesty in right of the Duchy of Lancaster<sup>3</sup> or belonging to the Duchy of Cornwall<sup>4</sup>,

as if it were an interest not so belonging<sup>5</sup>.

- 1    Ie the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1238 ante, PARA 1240 et seq post.
- 2    As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.
- 3    Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, then, for these purposes, the Chancellor of the Duchy of Lancaster is deemed to be the owner of the interest: Local Government and Housing Act 1989 Sch 10 para 22(2).
- 4    Where an interest belongs to the Duchy of Cornwall, then, for these purposes, such person as the Duke of Cornwall or other possessor for the time being of the Duchy of Cornwall appoints is deemed to be the owner of the interest: ibid Sch 10 para 22(3).
- 5    Ibid Sch 10 para 22(1).

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### **1240. Contracting out.**

The statutory provisions relating to long residential tenancies<sup>1</sup> have effect notwithstanding any agreement to the contrary<sup>2</sup>. Nothing in those provisions is, however, to be construed as preventing the surrender of a tenancy<sup>3</sup>.

1    le the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1237 et seq ante, PARA 1241 et seq post.

2    Ibid s 186(4).

3    Ibid s 186(4). As to surrender see PARA 630 et seq ante.

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### **1241. Agreements as to the grant of new tenancies.**

In any case where, prior to the date of termination<sup>1</sup> of a long residential tenancy<sup>2</sup>, the landlord<sup>3</sup> and the tenant<sup>4</sup> agree for the grant to the tenant of a future tenancy of the whole or part of the property let<sup>5</sup> under the tenancy at a rent other than a low rent<sup>6</sup> and on terms and from a date specified in the agreement, the tenancy continues until that date but no longer; and, in such a case, the statutory provisions relating to long residential tenancies<sup>7</sup> cease to apply in relation to the tenancy with effect from the date of the agreement<sup>8</sup>.

1    For these purposes, 'the date of termination' has the meaning assigned by the Local Government and Housing Act 1989 s 186(1), Sch 10 para 4(4) (see PARA 1250 note 8 post): Sch 10 para 2(1), (6).

2    For the meaning of 'long residential tenancy' see PARA 1244 post.

3    For these purposes (1) 'landlord' is to be construed in accordance with the Local Government and Housing Act 1989 Sch 10 para 19(1) (see PARA 1238 ante at head (1) in the text) (Sch 10 para 2(1), (6)); (2) except where the context otherwise requires, (a) 'landlord' includes any person from time to time deriving title under the original landlord and also includes, in relation to a dwelling house, any person other than a tenant who is or, but for the existence of an assured tenancy would be, entitled to possession of the dwelling house; and (b) where two or more persons jointly constitute the landlord in relation to a tenancy, any reference to the landlord is a reference to all the persons who jointly constitute the landlord (Housing Act 1988 s 45(1), (3) (applied by the Local Government and Housing Act 1989 Sch 10 para 2(1), (2)). For the meaning of 'tenant' see note 4 infra; for the meaning of 'tenancy' see note 5 infra; and for the meaning of 'assured tenancy' see PARA 1018 ante.

4    For these purposes, except where the context otherwise requires, 'tenant' includes a subtenant and any person deriving title under the original tenant or subtenant; and, where two or more persons jointly constitute the tenant in relation to a tenancy, any reference to the tenant is a reference to all the persons who jointly constitute the tenant: Housing Act 1988 s 45(1), (3) (applied by the Local Government and Housing Act 1989 Sch 10 para 2(1), (2)).



5 For these purposes, except where the context otherwise requires, 'let' includes 'sublet': Housing Act 1988 s 45(1) (applied by the Local Government and Housing Act 1989 Sch 10 para 2(1), (2)). In determining for the purposes of any provision of Sch 10 (as amended) whether the property let as a tenancy was let as a separate dwelling, the nature of the property at the time of the creation of the tenancy is deemed to have been the same as its nature at the time in relation to which the question arises; and the purpose for which it was let under the tenancy is deemed to have been the same as the purpose for which it is or was used at the last-mentioned time: Sch 10 para 1(7). Except where the context otherwise requires, 'tenancy' includes a subtenancy and an agreement for a tenancy or subtenancy: Housing Act 1988 s 45(1) (applied by the Local Government and Housing Act 1989 Sch 10 para 2(1), (2)).

6 For the meaning of 'low rent' see PARA 1246 post.

7 Ie the Local Government and Housing Act 1989 Sch 10 (as amended): see PARAS 1238-1240 ante, PARA 1244 et seq post.

8 Ibid Sch 10 para 17.

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### **1242. Duty to give information.**

The statutory duty<sup>1</sup> of tenants of residential property to give information to landlords or superior landlords applies<sup>2</sup> in relation to property comprised in a long tenancy<sup>3</sup> at a low rent<sup>4</sup> as it applies to property comprised in such a tenancy within the meaning of Part I<sup>5</sup> of the Landlord and Tenant Act 1954<sup>6</sup>.

1 Ie under the Landlord and Tenant Act 1954 s 18 (as amended): see PARA 1200 ante.

2 Ie with the modification that the reference in ibid s 18 (as amended) to s 3(1) is to be construed as a reference to the Local Government and Housing Act 1989 s 186(1), Sch 10 para 3(1): see PARA 1248 post.

3 Ie within the meaning of ibid Sch 10 (as amended): see PARA 1245 post.

4 Ie within the meaning of ibid Sch 10 (as amended): see PARA 1246 post.

5 Ie within the meaning of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante.

6 Local Government and Housing Act 1989 s 186(5). For the prescribed form of notice see the Long Residential Tenancies (Supplemental Forms) Regulations 1997, SI 1997/3005, reg 3(a), Schedule Form 7. A form substantially to the same effect may be used: reg 2.

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### **1243. Power to make regulations.**

Any power to make regulations conferred by any relevant statutory provision<sup>1</sup> is exercisable by statutory instrument<sup>2</sup>. Under any such power to make regulations, different provision may be made for different cases and different descriptions of cases, including different provision for different areas<sup>3</sup>.

1     I.e. any provision of the Local Government and Housing Act 1989: see PARA 1237 et seq ante; the text and notes 2-3 infra; and PARA 1244 et seq post.

2     Ibid s 190(2). A statutory instrument containing regulations under s 186(1), Sch 10 (as amended) (see PARA 1238 et seq ante, PARA 1244 et seq post) is not, however, subject to annulment in pursuance of a resolution of either House of Parliament: see s 190(2).

3     Ibid s 190(1). Where any provision of the Local Government and Housing Act 1989 which extends to England and Wales confers, directly or by amendment of another Act, a power on the Secretary of State to make regulations, orders, rules or determinations or to give directions or specify any matter, the power may be exercised differently for England and Wales, whether or not it is exercised separately: s 191(1). Section 191 is without prejudice to s 190(1) and to any other provision of the Local Government and Housing Act 1989 or of any Act amended thereby by virtue of which powers may be exercised differently in different cases or in any other circumstances: s 191(2). As to the transfer of functions of the Secretary of State under ss 190, 191, Sch 10 (as amended) so far as exercisable in relation to Wales see PARA 27 note 4 ante; and as to the Secretary of State see PARA 27 note 3 ante.

The Local Government and Housing Act 1989 applies to the Isles of Scilly subject to such exceptions, adaptations and modifications as the Secretary of State may by order direct; and the power to make such an order is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 193(1), (2). At the date at which this title states the law, no such order had been made.

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## **(ii) Qualification for Protection**

### **1244. The qualifying condition.**

The statutory provisions relating to long residential tenancies<sup>1</sup> apply to a long tenancy<sup>2</sup> of a dwelling house<sup>3</sup> at a low rent<sup>4</sup> as respects which for the time being the following condition ('the qualifying condition') is fulfilled, that is to say that the circumstances, as respects the property let<sup>5</sup> under the tenancy, the use of that property and all other relevant matters, are such that, if the tenancy were not at a low rent, it would at that time be an assured tenancy within the meaning of Part I<sup>6</sup> of the Housing Act 1988<sup>7</sup>. A tenancy to which those statutory provisions<sup>8</sup> apply is referred to as a long residential tenancy<sup>9</sup>.

Anything authorised or required to be done<sup>10</sup> in relation to a long residential tenancy, if done before the term date<sup>11</sup> in relation to a long tenancy of a dwelling house at a low rent, is not to be treated as invalid by reason only that at the time at which it was done the qualifying condition was not fulfilled as respects the tenancy<sup>12</sup>.

1     I.e. the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1238 et seq ante; the text and notes 2-12 infra; and PARA 1245 et seq post.

2     For the meaning of 'long tenancy' see PARA 1245 post.

3 For these purposes, except where the context otherwise requires, 'dwelling house' may be a house or part of a house: Housing Act 1988 s 45(1) (applied by the Local Government and Housing Act 1989 Sch 10 para 2(1), (2)).

4 For the meaning of 'low rent' see PARA 1246 post.

5 For the meaning of 'let' see PARA 1241 note 5 ante.

6 Ie within the meaning of the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq ante.

7 Local Government and Housing Act 1989 Sch 10 paras 1(1), 2(1), (6). For the purpose only of determining whether the qualifying condition is fulfilled: (1) with respect to a tenancy, the Housing Act 1988 s 1, Sch 1 (as amended) (tenancies which cannot be assured tenancies: see PARA 1024 et seq ante) has effect with the omission of Sch 1 para 1 (exclusion of tenancies entered into before, or pursuant to contracts made before, 15 January 1989) (Local Government and Housing Act 1989 Sch 10 para 1(2)); (2) with respect to a tenancy which is entered into on or after 1 April 1990, otherwise than, where the dwelling house had a rateable value on 31 March 1990, in pursuance of a contract made before 1 April 1990, for the Housing Act 1988 Sch 1 para 2(1)(b), (2) (as substituted) there is to be substituted: '(b) where (on the date the contract for the grant of the tenancy was made or, if there was no such contract, on the date the tenancy was entered into) R exceeded £25,000 under the formula:

$$R = \frac{P \times I}{1 - (1 + I)^{-T}}$$

where P is the premium payable as a condition of the grant of the tenancy (and includes a payment of money's worth) or, where no premium is payable, zero; I is 0.06; T is the term, expressed in years, granted by the tenancy (disregarding any right to terminate the tenancy before the end of the term or to extend the tenancy)': Local Government and Housing Act 1989 Sch 10 para 1(2A) (Sch 10 paras 1(2A), (8) added by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule paras 31, 32). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order replace the number in the definition of 'I' in the Local Government and Housing Act 1989 Sch 10 para 1 (2A) (as so added) and any amount referred to therein by such number or amount as is specified in the order; and such an order must be made by the statutory instrument which is subject' if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Sch 10 para 1(8) (as so added). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

8 See note 1 supra.

9 Local Government and Housing Act 1989 Sch 10 paras 1(5), 2(1), (6).

10 Ie under ibid Sch 10 paras 2-22 (as amended).

11 For these purposes, 'term date', in relation to a tenancy granted for a term of years certain, means the date of expiry of that term: ibid Sch 10 para 2(1), (6). In relation, however, to any such tenancy as is mentioned in Sch 10 para 16(2) (see PARA 1245 post), 'term date' means the first date after 1 April 1990 on which the tenancy could, apart from Sch 10 (as amended), have been brought to an end by notice to quit given by the landlord: Sch 10 para 2(6) (substituted for these purposes by Sch 10 para 16(3)). For the meaning of 'landlord' see PARA 1241 note 3 ante.

12 Ibid Sch 10 para 1(6).

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### **1245. Meaning of 'long tenancy'; tenancies granted in continuation of long tenancies.**

'Long tenancy' means a tenancy<sup>1</sup> granted for a term of years certain exceeding 21 years, whether or not subsequently extended by act of the parties or by any enactment, but excluding any tenancy which is, or may become, terminable before the end of the term by notice given to the tenant<sup>2</sup>.

Where on the coming to the end of a tenancy at a low rent<sup>3</sup> the person who was the tenant immediately before the coming to an end thereof becomes, whether by grant or by implication of the law, the tenant under another tenancy at a low rent of a dwelling house<sup>4</sup> which consists of the whole or any part of the property let<sup>5</sup> under the previous tenancy, then, if the previous tenancy was a long tenancy or is deemed<sup>6</sup> to have been a long tenancy, the new tenancy is deemed<sup>7</sup> to be a long tenancy, irrespective of its terms<sup>8</sup>.

In relation to a tenancy from year to year or other tenancy not granted for a term of years certain, being a tenancy which is so deemed<sup>9</sup> to be a long tenancy, the statutory provisions relating to long residential tenancies<sup>10</sup> have effect subject to certain modifications<sup>11</sup>.

Where the tenancy is not terminated<sup>12</sup> at the term date<sup>13</sup>, then, whether or not it would otherwise have continued after that date, it is treated<sup>14</sup> as being continued<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

2 Local Government and Housing Act 1989 s 186(1), Sch 10 para 2(3). See also s 186(3), (6); and PARA 1237 ante. Where, however, a long tenancy has been extended by the Leasehold Reform Act 1967 s 14 (as amended), the protection of the Local Government and Housing Act 1989 Sch 10 (as amended) does not apply to a tenancy so extended: see the Leasehold Reform Act 1967 s 16(1B) (as added); and PARA 1483 post. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 59(2); and PARA 1723 post. For the meaning of 'tenant' see PARA 1241 note 4 ante; and for the meaning of 'term of years certain' see PARA 710 note 3 ante.

3 For the meaning of 'low rent' see PARA 1246 post.

4 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.

5 For the meaning of 'let' see PARA 1241 note 5 ante.

6 Ie by virtue of the Local Government and Housing Act 1989 Sch 10 para 16: see the text and notes 7-15 infra.

7 Ie for the purposes of ibid Sch 10 (as amended): see PARA 1238 et seq ante, PARA 1246 et seq post.

8 Ibid Sch 10 para 16(1).

9 Ie by virtue of ibid Sch 10 para 16(1).

10 Ie ibid Sch 10 paras 1-15 (as amended): see PARA 1244 ante, PARA 1246 et seq post.

11 Ibid Sch 10 para 16(2). As to the modifications see PARA 1244 note 11 ante, PARA 1248 note 14 post.

12 Ie under ibid Sch 10 para 4 (see PARAS 1249-1250 post) or Sch 10 para 8 (see PARA 1252 post).

13 For the meaning of 'term date' see PARA 1244 note 11 ante.

14 Ie by virtue of the Local Government and Housing Act 1989 Sch 10 para 3 (see PARA 1248 post) and for the purposes of Sch 10 (as amended).

15 Ibid Sch 10 para 16(6).

GOVERNMENT AND HOUSING ACT 1989/(ii) Qualification for Protection/1246. Meaning of 'low rent'.

### **1246. Meaning of 'low rent'.**

A tenancy<sup>1</sup> is at a low rent if under the tenancy:

- 2573 (1) no rent is payable; or
- 2574 (2) where the tenancy is entered into on or after 1 April 1990, otherwise than, where the dwelling house<sup>2</sup> had a rateable value<sup>3</sup> on 31 March 1990, in pursuance of a contract made before 1 April 1990, the maximum rent payable at any time is payable at a rate of:
  - 68
  - 83. (a) £1,000 or less a year if the dwelling house is in Greater London<sup>4</sup>; and
  - 84. (b) £250 or less a year if the dwelling house is elsewhere; or
  - 69
- 2575 (3) where the tenancy was entered into before 1 April 1990 or, where the dwelling house had a rateable value on 31 March 1990, is entered into on or after 1 April 1990 in pursuance of a contract made before that date, the maximum rent payable at any time is less than two-thirds of the rateable value of the dwelling house on 31 March 1990<sup>5</sup>.

1 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

2 For the meaning of 'dwelling house' see PARA 1244 note 5 ante.

3 The Housing Act 1988 s 1, Sch 1 Pt II (paras 14-16) (see PARA 1027 ante) applies to determine the rateable value of a dwelling house for these purposes: Local Government and Housing Act 1989 s 186(1), Sch 10 para 2(1), (5), (6).

4 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

5 Local Government and Housing Act 1989 Sch 10 para 2(4) (Sch 10 para 2(4) substituted, and Sch 10 para 2(5) amended, by the References to Rating (Housing) Regulations) 1990, SI 1990/434, reg 2, Schedule paras 33, 34). The Housing Act 1988 Sch 1 para 2(2) (as substituted) (see PARA 1026 ante) applies to determine whether the rent under a tenancy falls within the Local Government and Housing Act 1989 Sch 10 para 2(4) (as so substituted): Sch 10 para 2(5) (as so amended). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

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### **1247. Application that tenancy be excluded from protection.**

At any time within the period of 12 months ending on the day preceding the term date<sup>1</sup>, application may be made to the court<sup>2</sup> as respects any long tenancy<sup>3</sup> of a dwelling house<sup>4</sup> at a low rent<sup>5</sup>, not being at the time of the application a tenancy as respects which the qualifying condition<sup>6</sup> is fulfilled, for an order declaring that the tenancy is not to be treated as a long residential<sup>7</sup> tenancy<sup>8</sup>. Where an application is so made, the court must make the order if satisfied that the tenancy is not likely<sup>9</sup> immediately before the term date to be a long

residential tenancy<sup>10</sup> but not otherwise<sup>11</sup>. If the court makes the order, then the tenancy is not thereafter to be treated<sup>12</sup> as a long residential tenancy<sup>13</sup>.

1 For the meaning of 'term date' see PARA 1244 note 11 ante.

2 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

3 For the meaning of 'long tenancy' see PARA 1245 ante.

4 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.

5 For the meaning of 'low rent' see PARA 1246 ante.

6 For the meaning of 'the qualifying condition' see PARA 1244 ante.

7 Ie as a tenancy to which the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended) applies: see PARA 1237 et seq ante, PARA 1248 et seq post.

8 Ibid Sch 10 para 1(3).

9 Where any question falls to be determined for these purposes by the court or a rent assessment committee by reference to circumstances at a future date, the court or committee must have regard to all rights, interests and obligations under or relating to the tenancy as they subsist at the time of the determination and to all relevant circumstances as those then subsist and must assume, except in so far as the contrary is shown, that those rights, interests, obligations and circumstances will continue to subsist unchanged until that future date: *ibid* Sch 10 para 18. As to rent assessment committees see PARA 910 ante. For the meaning of 'tenancy' see PARA 1241 note 5 ante.

10 See note 7 *supra*.

11 Local Government and Housing Act 1989 Sch 10 para 1(4)(a).

12 Ie notwithstanding anything in *ibid* Sch 10 para 1(1): see PARA 1244 ante.

13 *Ibid* Sch 10 para 1(4)(b).

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### **(iii) Continuation and Termination of Long Residential Tenancies**

#### **A. CONTINUATION**

##### **1248. Continuation of long residential tenancies.**

A tenancy<sup>1</sup> which, immediately before the term date<sup>2</sup>, is a long residential tenancy<sup>3</sup> does not come to an end on that date except by being terminated<sup>4</sup> under the relevant statutory provisions<sup>5</sup>. If not then so terminated, the tenancy continues<sup>6</sup> until so terminated and, while so continuing, is deemed to be a long residential tenancy notwithstanding any change in circumstances<sup>7</sup>.

The above provisions do not, however, apply in the case of a former 1954 Act tenancy<sup>8</sup> the term date of which falls before 15 January 1999 but if, in the case of such a tenancy:

2576 (1) the tenancy was continuing immediately before that date<sup>9</sup>; and

2577 (2) on that date the qualifying condition<sup>10</sup> was fulfilled,

then the tenancy continues<sup>11</sup> until terminated under the relevant statutory provisions<sup>12</sup> and, while so continuing, is deemed to be a long residential tenancy notwithstanding any change in circumstances<sup>13</sup>.

Where a tenancy continues after the term date by virtue of these provisions, the tenancy continues at the same rent and in other respects on the same terms as before the term date<sup>14</sup>.

1 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

2 For the meaning of 'term date' see PARA 1244 note 11 ante.

3 For the meaning of 'long residential tenancy' see PARA 1244 ante.

4 Ie under the provisions of the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1237 et seq ante, PARA 1249 et seq post. As to termination of the tenancy see PARAS 1249-1252 post.

5 Ibid Sch 10 para 3(1).

6 Ie subject to ibid Sch 10 (as amended).

7 Ibid Sch 10 para 3(1).

8 For these purposes, 'former 1954 Act tenancy' means a tenancy to which, by virtue of the Local Government and Housing Act 1989 s 186(3) (see PARA 1237 ante), Sch 10 (as amended) applies on and after 15 January 1999: Sch 10 para 2(1), (6). Where Sch 10 (as amended) has effect in relation to a former 1954 Act tenancy the term date of which fell before 15 January 1999, any reference, however expressed, to the dwelling house or the property let under the tenancy has effect for these purposes as a reference to the premises qualifying for protection within the meaning of the Landlord and Tenant Act 1954: Local Government and Housing Act 1989 Sch 10 para 21(1). Notwithstanding that at any time the Landlord and Tenant Act 1954 s 1 (as amended) does not, and the Local Government and Housing Act 1989 Sch 10 (as amended) does, apply to a former 1954 Act tenancy, any question of what are the premises qualifying for protection or, in that context, what is the tenancy is to be determined for these purposes in accordance with the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 et seq ante): Local Government and Housing Act 1989 Sch 10 para 21(2).

9 Ie by virtue of the Landlord and Tenant Act 1954 s 3 (as amended): see PARA 1209 ante.

10 For the meaning of 'the qualifying condition' see PARA 1244 ante.

11 See note 6 supra.

12 See note 4 supra.

13 Local Government and Housing Act 1989 Sch 10 para 3(2).

14 Ibid Sch 10 para 3(3). Notwithstanding anything in Sch 10 para 3(3), where by virtue thereof the tenancy is continued after the term date, the provisions of Sch 10 (as amended) as to the termination of a tenancy by notice have effect, subject to Sch 10 para 16(5), in substitution for and not in addition to any such provisions included in the terms on which the tenancy had effect before the term date: Sch 10 para 16(4). The minimum period of notice referred to in Sch 10 para 8(1) (see PARA 1252 post) is one month or such longer period as the tenant would have been required to give to bring the tenancy to an end at the term date: Sch 10 para 16(5).

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## **B. TERMINATION BY THE LANDLORD**

### 1249. Termination of tenancy by the landlord.

The landlord<sup>1</sup> may terminate a long residential tenancy<sup>2</sup> by a notice in the prescribed form<sup>3</sup> served on the tenant<sup>4</sup>:

- 2578 (1) specifying the date at which the tenancy is to come to an end, being either the term date<sup>5</sup> or a later date; and
- 2579 (2) so served not more than 12 nor less than six months before the date so specified<sup>6</sup>.

In any case where:

- 2580 (a) a landlord's notice<sup>7</sup> has been served; and
- 2581 (b) an application has been made<sup>8</sup> to the court<sup>9</sup> or a rent assessment committee<sup>10</sup>; and
- 2582 (c) the effect of the notice would otherwise be to terminate the tenancy before the expiry of the period of three months beginning with the date on which the application is finally disposed of<sup>11</sup>,

the effect of the notice is to terminate the tenancy at the expiry of that period of three months and not at any other time<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 1241 note 3 ante.

2 For the meaning of 'long residential tenancy' see PARA 1244 ante.

3 For these purposes, except where the context otherwise requires, 'prescribed' means prescribed by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister by statutory instrument; and regulations so made may make different provision with respect to different cases or descriptions of case, including different provision for different areas: Housing Act 1988 s 45(1), (5) (applied by the Local Government and Housing Act 1989 s 186(1), Sch 10 para 2(1), (2), (6)). For the prescribed forms of notice see the Long Residential Tenancies (Principal Forms) Regulations 1997, SI 1997/3008, reg 3(a), (b), Schedule Forms 1, 2 (amended in relation to England by SI 2002/2227 and in relation to Wales by SI 2003/233). A form substantially to the same effect may be used: see the Long Residential Tenancies (Principal Forms) Regulations 1997, SI 1997/3008, reg 2. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

4 For the meaning of 'tenant' see PARA 1241 note 4 ante.

5 For the meaning of 'term date' see PARA 1244 note 11 ante.

6 Local Government and Housing Act 1989 Sch 10 para 4(1). As to the service of notices see PARA 1238 ante at head (6) in the text; and as to the additional information which may need to be included see PARA 716 note 3 ante. The periods are different in certain circumstances where the tenant has made an ineffective claim to acquire the freehold or an extended lease: see PARAS 1434, 1591, 1683 post.

7 For these purposes, 'landlord's notice' means a notice under the Local Government and Housing Act 1989 Sch 10 para 4(1); and such a notice is (1) a 'landlord's notice proposing an assured tenancy' if it contains such proposals as are mentioned in Sch 10 para 4(5)(a) (see PARA 1250 post at head (1) in the text); and (2) a 'landlord's notice to resume possession' if it contains such proposals as are referred to in Sch 10 para 4(5)(b) (see PARA 1250 post at head (2) in the text): Sch 10 para 2(1), (6). A landlord's notice is of no effect if served during the currency of a claim (a) made in respect of the tenancy to acquire the freehold or an extended lease of the property under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1434 post); or (b) to exercise the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 or the right to acquire a new lease of a flat under that Act (see and PARAS 1594, 1685 post).

8 Ie under the Local Government and Housing Act 1989 Sch 10 paras 4(3)-(7), 5 et seq (as amended) (see PARA 1250 et seq post) other than Sch 10 para 6 (see PARA 1253 post).



9 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

10 As to rent assessment committees see PARA 910 ante.

11 The reference to the date on which the application is finally disposed of is to be construed as a reference to the earliest date by which the proceedings on the application, including any proceedings on or in consequence of an appeal, have been determined and any time for appealing or further appealing has expired, except that, if the application is withdrawn or any appeal is abandoned, the reference is to be construed as a reference to the date of withdrawal or abandonment: Local Government and Housing Act 1989 Sch 10 para 4(3).

12 Ibid Sch 10 para 4(2).

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### **1250. Contents of effective landlord's notice.**

A landlord's notice<sup>1</sup> does not have effect unless:

- 2583 (1) it proposes an assured monthly periodic tenancy<sup>2</sup> of the dwelling house<sup>3</sup> and a rent for that tenancy, such that it would not be a tenancy at a low rent<sup>4</sup>, and states<sup>5</sup> that the other terms of the tenancy are to be the same as those of the long residential tenancy<sup>6</sup> immediately before it is terminated ('the implied terms')<sup>7</sup>; or
- 2584 (2) it gives notice that, if the tenant is not willing to give up possession at the date of termination<sup>8</sup> of the property let<sup>9</sup> under the tenancy, the landlord proposes to apply to the court<sup>10</sup>, on one or more of the specified grounds<sup>11</sup>, for the possession of the property let under the tenancy and states the ground or grounds on which he proposes to apply<sup>12</sup>.

A landlord's notice must invite the tenant<sup>13</sup>, within the period of two months beginning on the date on which the notice was served, to notify the landlord in writing whether:

- 2585 (a) in the case of a landlord's notice proposing an assured tenancy<sup>14</sup>, the tenant wishes to remain in possession; and
- 2586 (b) in the case of a landlord's notice to resume possession<sup>15</sup>, the tenant is willing to give up<sup>16</sup> possession<sup>17</sup>.

1 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

2 For these purposes, 'assured periodic tenancy' is to be construed in accordance with the Local Government and Housing Act 1989 s 186(1), Sch 10 para 9(4) (see PARA 1254 note 6 post): Sch 10 para 2(1), (6).

3 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.

4 For the meaning of 'low rent' see PARA 1246 ante.

5 Ie subject to the Local Government and Housing Act 1989 Sch 10 para 4(6): see note 7 infra.

6 For the meaning of 'long residential tenancy' see PARA 1244 ante.

7 Local Government and Housing Act 1989 Sch 10 paras 2(1), (6), 4(5)(a). In the landlord's notice proposing an assured tenancy the landlord may propose terms of the tenancy so referred to different from the implied

terms; and any reference to the terms of the tenancy specified in the landlord's notice is a reference to the implied terms or, if the implied terms are varied by virtue hereof, to the implied terms as so varied: Sch 10 para 4(6). For the meaning of 'landlord' see PARA 1241 note 3 ante.

8 For these purposes, in relation to a tenancy in respect of which a landlord's notice is served: (1) 'the date of termination' means (a) where the tenancy is continued as mentioned in *ibid* Sch 10 para 4(2) (see PARA 1249 ante), the last day of the period of three months referred to therein; and (b) in any other case, the specified date of termination (Sch 10 paras 2(1), (6), 4(4)); and (2) 'specified date of termination' means the date specified in the notice as mentioned in Sch 10 para 4(1)(a) (see PARA 1249 ante) (Sch 10 para 2(1), (6)).

9 For the meaning of 'let' see PARA 1241 note 5 ante.

10 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

11 *Ie* the grounds specified in the Local Government and Housing Act 1989 Sch 10 para 5(1): see PARA 1251 post.

12 *Ibid* Sch 10 para 4(5)(b). As to applications for possession see PARAS 1261-1265 post.

13 For the meaning of 'tenant' see PARA 1241 note 4 ante.

14 For the meaning of 'landlord's notice proposing an assured tenancy' see PARA 1249 note 7 ante.

15 For the meaning of 'landlord's notice to resume possession' see PARA 1249 note 7 ante.

16 *Ie* as mentioned in the Local Government and Housing Act 1989 Sch 10 para 4(5)(b).

17 *Ibid* Sch 10 para 4(7). As to the service of notices see PARA 1238 ante at head (6) in the text.

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### **1251. Specified grounds for possession.**

The specified grounds for possession<sup>1</sup> are<sup>2</sup>:

2587 (1) Ground 6<sup>3</sup> and Grounds 9 to 15<sup>4</sup> in the Housing Act 1988<sup>5</sup>;

2588 (2) the ground that, for the purposes of redevelopment after the termination of the tenancy, the landlord<sup>6</sup> proposes to demolish or reconstruct the whole or a substantial part of the premises<sup>7</sup>; and

2589 (3) the ground that the premises or part of them are reasonably required by the landlord for occupation as a residence for himself, any son or daughter of his over 18 years of age, his father or mother, or the father or mother of his spouse or civil partner, and, if the landlord is not the immediate landlord, that he will be at the specified date of termination<sup>8</sup>.

1 *Ie* the grounds mentioned in the Local Government and Housing Act 1989 s 186(1), Sch 10 para 4(5)(b): see PARA 1250 ante.

2 *Ie* subject to *ibid* Sch 10 para 5(2)-(5): see the text and notes 3-8 *infra*.

3 *Ie* the Housing Act 1988 s 7, Sch 2 Pt I, Ground 6 (as amended): see PARA 1114 ante. Schedule 2 Pt I, Ground 6 (as amended) may not be specified in a landlord's notice to resume possession if the tenancy is a former 1954 Act tenancy; and in the application of that ground in accordance with the Local Government and Housing Act 1989 Sch 10 para 5(1) in any other case, the Housing Act 1988 Sch 2 Pt I, Ground 6 para (c) is to be omitted: Local Government and Housing Act 1989 Sch 10 para 5(2). For the meaning of 'landlord's notice to

resume possession' see PARA 1249 note 7 ante; for the meaning of 'tenancy' see PARA 1241 note 5 ante; and for the meaning of 'former 1954 Act tenancy' see PARA 1248 note 8 ante.

4    le the Housing Act 1988 Sch 2 Pt II, Grounds 9-15 (as amended): see PARAS 1118-1125 ante. In its application in accordance with the Local Government and Housing Act 1989 Sch 10 para 5(1), the Housing Act 1988 Sch 2 Pt II, Ground 10 (see PARA 1119 ante) has effect as if, in Sch 2 Pt II, Ground 10 para (b): (1) the words 'except where subsection (1)(b) of section 8 of this Act applies' were omitted; and (2) for the words 'notice under that section relating to those proceedings' there were substituted 'landlord's notice to resume possession (within the meaning of Schedule 10 to the Local Government and Housing Act 1989)': Sch 10 para 5(3).

5    Ibid Sch 10 para 5(1)(a).

6    The ground mentioned in ibid Sch 10 para 5(1)(b) (see head (2) in the text) may not be specified in a landlord's notice to resume possession unless the landlord is a body to which the Leasehold Reform Act 1967 s 28 (as amended) (see PARA 1487 post) applies and the premises are required for relevant development within the meaning of s 28 (as amended); and, on any application by such a body under the Local Government and Housing Act 1989 Sch 10 para 13 (see PARA 1261 post) for possession on that ground, a certificate given by a Minister of the Crown as provided by the Leasehold Reform Act 1967 s 28(1) is conclusive evidence that the premises are so required: Local Government and Housing Act 1989 Sch 10 para 5(4). For the meaning of 'landlord' generally see PARA 1241 note 3 ante.

7    Ibid Sch 10 para 5(1)(b).

8    Ibid Sch 10 para 5(1)(c) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 46). This ground may not be specified in a landlord's notice to resume possession if the interest of the landlord, or an interest which is merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after 18 February 1966: Local Government and Housing Act 1989 Sch 10 para 5(5).

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### ***C. TERMINATION BY THE TENANT***

#### **1252. Termination of tenancy by the tenant.**

A long residential tenancy<sup>1</sup> may be brought to an end at the term date<sup>2</sup> by not less than one month's notice in writing given by the tenant<sup>3</sup> to his immediate landlord<sup>4</sup>. A tenancy which is continuing<sup>5</sup> after the term date may be brought to an end at any time by not less than one month's notice in writing given by the tenant to his immediate landlord, whether the notice is given before or after the term date of the tenancy<sup>6</sup>.

The fact that the landlord has served a landlord's notice<sup>7</sup> or that there has been an election by the tenant to retain possession<sup>8</sup> does not prevent the tenant from giving notice<sup>9</sup> terminating the tenancy at a date earlier than the specified date of termination<sup>10</sup>.

1    For the meaning of 'long residential tenancy' see PARA 1244 ante.

2    For the meaning of 'term date' see PARA 1244 note 11 ante.

3    For the meaning of 'tenant' see PARA 1241 note 4 ante.

4    Local Government and Housing Act 1989 s 186(1), Sch 10 para 8(1). See also PARA 1248 note 14 ante. For the meaning of 'landlord' see PARA 1241 note 3 ante.

5    Ie by virtue of ibid Sch 10 para 3: see PARA 1248 ante.

6 Ibid Sch 10 para 8(2). See also PARA 1263 note 13 post.

7 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

8 For these purposes, 'election by the tenant to retain possession' is to be construed in accordance with the Local Government and Housing Act 1989 Sch 10 para 4(7) (see PARA 1250 ante): Sch 10 para 2(1), (6).

9 Ie under ibid Sch 10 para 8: see the text and notes 1-6 supra.

10 Ibid Sch 10 para 8(3). For the meaning of 'specified date of termination' see PARA 1250 note 8 ante. A notice given by the tenant of a flat during the currency of a claim (1) to exercise the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993; or (2) to acquire a new lease under that Act, is, however, ineffective: see PARAS 1594, 1685 post.

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## ***D. INTERIM RENT***

### **1253. Interim rent.**

On the date of service of a landlord's notice proposing an assured tenancy<sup>1</sup>, or at any time between that date and the date of termination<sup>2</sup>, the landlord<sup>3</sup> may serve a notice on the tenant<sup>4</sup> in the prescribed form<sup>5</sup> proposing an interim monthly rent<sup>6</sup> to take effect from a date specified in the notice, being not earlier than the specified date of termination<sup>7</sup>, and to continue while the tenancy<sup>8</sup> is continued<sup>9</sup> by virtue of the relevant statutory provisions<sup>10</sup>.

Where a notice has been so served:

2590 (1) the tenant may, within the period of two months beginning on the date of service, refer the interim monthly rent proposed in the notice to a rent assessment committee<sup>11</sup>; and

2591 (2) if the notice is not so referred, the interim monthly rent proposed in the notice is the rent under the tenancy with effect from the date specified in the notice or, if it is later, the expiry of the period mentioned in head (1) above<sup>12</sup>.

Where the rent specified in a landlord's notice is so referred to a rent assessment committee, the committee must determine the monthly rent at which the committee considers<sup>13</sup> that the premises let<sup>14</sup> under the tenancy might reasonably be expected to be let on the open market by a willing landlord under a monthly periodic tenancy:

2592 (a) which begins on the day following the specified date of termination;

2593 (b) under which the other terms are the same as those of the existing tenancy at the date on which the landlord's notice proposing an assured tenancy was given; and

2594 (c) which affords the tenant security of tenure equivalent to that afforded<sup>15</sup> in the case of an assured tenancy<sup>16</sup>, other than an assured shorthold tenancy<sup>17</sup>, in respect of which possession may not be recovered under any of Grounds 1 to 5<sup>18</sup> in the Housing Act 1988<sup>19</sup>.

Where a reference has been so made to a rent assessment committee, then the rent determined by the committee is to be<sup>20</sup> the rent under the tenancy with effect from the date specified in the notice served by the landlord<sup>21</sup> or, if it is later, the expiry of the two-month period mentioned in head (1) above<sup>22</sup>.

Nothing in the above provisions:

- 2595 (i) affects the right of the landlord and the tenant to agree the interim monthly rent which is to have effect while the tenancy is continued<sup>23</sup> and the date from which that rent is to take effect; and in such a case that rent is to be<sup>24</sup> the rent under the tenancy with effect from that date and no steps or, as the case may be, no further steps, may be taken<sup>25</sup> by the landlord or the tenant under those provisions<sup>26</sup>;
- 2596 (ii) requires a rent assessment committee to continue with a determination<sup>27</sup> if the tenant gives notice in writing that he no longer requires such a determination or if the long residential tenancy has come to an end on or before the specified date of termination<sup>28</sup>.

Notwithstanding that a tenancy in respect of which an interim monthly rent has effect<sup>29</sup> is no longer at a low rent<sup>30</sup>, it continues to be regarded as a tenancy at a low rent and, accordingly, continues to be a long residential tenancy<sup>31</sup>.

1 For the meaning of 'landlord's notice proposing an assured tenancy' see PARA 1249 note 7 ante; and as to the service of notices see PARA 1238 ante at head (6) in the text.

2 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

3 For the meaning of 'landlord' see PARA 1241 note 3 ante.

4 For the meaning of 'tenant' see PARA 1241 note 4 ante.

5 For the meaning of 'prescribed' see PARA 1249 note 3 ante. For the prescribed form see the Long Residential Tenancies (Principal Forms) Regulations 1997, SI 1997/3008, reg 3(c), Schedule Form 3. A form substantially to the same effect may be used: see reg 2.

6 For the purposes of the Local Government and Housing Act 1989 s 186(1), Sch 10 para 6 (as amended), 'rent' is to be construed in accordance with the Housing Act 1988 s 14(4) (as amended) (see PARA 1092 note 5 ante); Local Government and Housing Act 1989 Sch 10 para 6(4).

7 For the meaning of 'specified date of termination' see PARA 1250 note 8 ante.

8 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

9 Ie by virtue of the Local Government and Housing Act 1989 Sch 10 paras 1-5 (as amended): see PARA 1244 et seq ante.

10 Ibid Sch 10 para 6(1).

11 As to rent assessment committees see PARA 910 ante.

12 Local Government and Housing Act 1989 Sch 10 para 6(2).

13 Ie subject to ibid Sch 10 para 6(4) (as amended). The following provisions of the Housing Act 1988 s 14 (as amended), ie s 14(2) (see PARA 1093 ante), s 14(3A) (as added) (see PARA 1093 ante), s 14(4) (as amended) (see PARA 1092 ante) and s 14(5) (see PARA 1093 ante) apply in relation to a determination of rent for these purposes as they apply in relation to a determination under s 14 (as amended) subject to the specified modifications: Local Government and Housing Act 1989 Sch 10 para 6(4) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 20). The modifications so specified are that (1) the reference in the Housing Act 1988 s 14(2)(b) to a relevant improvement being carried out is to be construed as a reference to an improvement being carried out during the long residential tenancy; and (2) the reference in s 14(2)(c) to a failure to comply with any term of the tenancy is to be construed as a reference to a failure to comply with any term of the long residential tenancy:

Local Government and Housing Act 1989 Sch 10 para 6(5). As to the procedure on such a reference see also PARA 1256 post.

The Housing Act 1988 s 41(2)-(4) (rent assessment committees; information powers: see PARA 1087 ante) applies where there is a reference to a rent assessment committee under the Local Government and Housing Act 1989 Sch 10 paras 1-11 (as amended) (see the text and notes 14-31 infra; and PARAS 1255, 1258-1259 post) as it applies where a matter is referred to such a committee under the Housing Act 1988 Pt I Ch I (ss 1-19) (as amended) (see PARA 1011 et seq ante) or Pt I Ch II (ss 19A-23 (as amended) (see PARAS 1044 et seq, 1106 et seq ante): Local Government and Housing Act 1989 Sch 10 para 12(1). For the meaning of 'long residential tenancy' see PARA 1244 ante.

14 For the meaning of 'let' see PARA 1241 note 5 ante.

15 Ie by the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1011 et seq ante.

16 For the meaning of 'assured tenancy' see PARA 1018 ante.

17 For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante.

18 Ie the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-5 (as amended): see PARAS 1109-1113 ante.

19 Local Government and Housing Act 1989 Sch 10 paras 2(1), (2), 6(3).

20 Ie subject, in a case where the Housing Act 1988 s 14(5) applies, to the addition of the appropriate amount in respect of rates. As to the abolition of domestic rates see PARA 521 ante.

21 Ie under the Local Government and Housing Act 1989 Sch 10 para 6(1).

22 Ibid Sch 10 para 6(6).

23 See note 9 supra.

24 Ie notwithstanding the provisions of the Local Government and Housing Act 1989 Sch 10 para 6 (as amended).

25 Ie under ibid Sch 10 para 6 (as amended).

26 Ibid Sch 10 para 7(1).

27 Ie under ibid Sch 10 para 6(3).

28 Ibid Sch 10 para 7(2).

29 Ie in accordance with ibid Sch 10 para 6 (as amended) or Sch 10 para 7.

30 For the meaning of 'low rent' see PARA 1246 ante.

31 Local Government and Housing Act 1989 Sch 10 para 7(3).

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#### **(iv) Assured Periodic Tenancy on Termination of Former Tenancy**

##### **A. NATURE AND TERMS OF TENANCY**

##### **1254. The assured periodic tenancy.**

Where a long residential tenancy<sup>1</sup> ('the former tenancy') is terminated by a landlord's notice proposing an assured tenancy<sup>2</sup>, the tenant<sup>3</sup> is entitled<sup>4</sup> to remain in possession of the dwelling house<sup>5</sup> and his right to possession depends upon an assured periodic tenancy<sup>6</sup> arising by virtue of these provisions<sup>7</sup>.

The assured periodic tenancy is one:

- 2597 (1) taking effect in possession on the day following the date of termination<sup>8</sup>;
- 2598 (2) deemed to have been granted by the person who was the landlord<sup>9</sup> under the former tenancy on the date of termination to the person who was then the tenant under that tenancy<sup>10</sup>;
- 2599 (3) under which the premises let<sup>11</sup> are the dwelling house;
- 2600 (4) under which the periods of the tenancy, and the intervals at which rent is to be paid, are monthly beginning on the day following the date of termination;
- 2601 (5) under which the rent is determined in accordance with the relevant statutory provisions<sup>12</sup>; and
- 2602 (6) under which the other terms are determined in accordance with those provisions<sup>13</sup>.

If, however, at the end of the period of two months beginning on the date of service of the landlord's notice, the qualifying condition<sup>14</sup> was not fulfilled as respects the tenancy, the tenant is not entitled to remain in possession<sup>15</sup> unless there has been an election by the tenant to retain possession<sup>16</sup>; and, if at the specified date of termination<sup>17</sup> the qualifying condition is not fulfilled as respects the tenancy, then, notwithstanding that there has been such an election, the tenant is not entitled<sup>18</sup> to remain in possession<sup>19</sup>.

1 For the meaning of 'long residential tenancy' see PARA 1244 ante.

2 For the meaning of 'landlord's notice proposing an assured tenancy' see PARA 1249 note 7 ante.

3 For the meaning of 'tenant' see PARA 1241 note 4 ante.

4 I.e. subject to the Local Government and Housing Act 1989 s 186(1), Sch 10 para 9(3): see the text and notes 14-19 infra.

5 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.

6 For these purposes, any reference to an assured periodic tenancy is a reference to an assured periodic tenancy arising by virtue of the Local Government and Housing Act 1989 Sch 10 para 9: Sch 10 paras 2(1), (6), 9(4).

7 Ibid Sch 10 para 9(1).

8 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

9 For the meaning of 'landlord' see PARA 1241 note 3 ante.

10 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

11 For the meaning of 'let' see PARA 1241 note 5 ante.

12 I.e. in accordance with the Local Government and Housing Act 1989 Sch 10 paras 10-12: see PARAS 1255-1260 post.

13 Ibid Sch 10 para 9(2).

14 For the meaning of 'the qualifying condition' see PARA 1244 ante.

15 I.e. as mentioned in the Local Government and Housing Act 1989 Sch 10 para 9(1): see the text and notes 1-7 supra.

16 For the meaning of 'election by the tenant to retain possession' see PARA 1252 note 8 ante.

17 For the meaning of 'specified date of termination' see PARA 1250 note 8 ante.

18 See note 15 supra.

19 Local Government and Housing Act 1989 Sch 10 para 9(3). As to the service of notices see PARA 1238 ante at head (6) in the text.

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### **1255. Initial rent under and terms of assured periodic tenancy.**

Where a landlord's notice proposing an assured tenancy<sup>1</sup> has been served on the tenant<sup>2</sup> the tenant may, within the period of two months beginning on the date of service of the notice, serve on the landlord<sup>3</sup> a notice in the prescribed form<sup>4</sup> (a 'tenant's notice') proposing either or both of the following, that is to say:

- 2603 (1) a rent for the assured periodic tenancy<sup>5</sup> different from that proposed in the landlord's notice; and
- 2604 (2) terms of the tenancy different from those specified in the landlord's notice<sup>6</sup>.

If a tenant's notice is not so served, then with effect from the date on which the assured periodic tenancy takes effect in possession:

- 2605 (a) the rent proposed in the landlord's notice is the rent under the tenancy; and
- 2606 (b) the terms of the tenancy specified in the landlord's notice<sup>7</sup> are the terms of the tenancy<sup>8</sup>.

Where a tenant's notice has been so served on the landlord, the landlord may, within the period of two months beginning on the date of service of the notice, by an application in the prescribed form<sup>9</sup> refer the notice to a rent assessment committee<sup>10</sup>.

If the notice is not so referred, then, with effect from the date on which the assured periodic tenancy takes effect in possession:

- 2607 (i) the rent, if any, proposed in the tenant's notice or, if no rent is so proposed, the rent proposed in the landlord's notice, is the rent under the tenancy; and
- 2608 (ii) the other terms of the tenancy, if any, proposed in the tenant's notice and, in so far as they do not conflict with the terms so proposed, the terms specified in the landlord's notice are the terms of the tenancy<sup>11</sup>.

1 For the meaning of 'landlord's notice proposing an assured tenancy' see PARA 1249 note 7 ante.

2 For the meaning of 'tenant' see PARA 1241 note 4 ante.



- 3 For the meaning of 'landlord' see PARA 1241 note 3 ante.
- 4 For the meaning of 'prescribed' see PARA 1249 note 3 ante. For the prescribed form of notice see the Long Residential Tenancies (Principal Forms) Regulations 1997, SI 1997/3008, reg 3(d), Schedule Form 4. A form substantially to the same effect may be used: see reg 2.
- 5 For the meaning of 'assured periodic tenancy' see PARA 1254 note 6 ante.
- 6 Local Government and Housing Act 1989 s 186 (1), Sch 10 para 10(1)(a). For these purposes, 'tenant's notice' is to be construed in accordance with Sch 10 para 10(1)(a); Sch 10 para 2(1), (6). As to the service of notices see PARA 1238 ante at head (6) in the text.
- 7 For the meaning of 'terms of the tenancy specified in the landlord's notice' see PARA 1250 note 7 ante.
- 8 Local Government and Housing Act 1989 Sch 10 para 10(1)(b).
- 9 For the prescribed form of notice see the Long Residential Tenancies (Principal Forms) Regulations 1997, SI 1997/3008, reg 3(e), Schedule Form 5. A form substantially to the same effect may be used: see reg 2.
- 10 Local Government and Housing Act 1989 Sch 10 para 10(2)(a). As to rent assessment committees see PARA 910 ante; and as to reference to such a committee see PARA 1256 et seq post.
- 11 Ibid Sch 10 para 10(2)(b).

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## ***B. DETERMINATION BY RENT ASSESSMENT COMMITTEE***

### **1256. Procedure on reference to rent assessment committee.**

Where a reference is made to a rent assessment committee<sup>1</sup>, the committee must serve on each party a notice specifying a period of not less than seven days from the service of the notice during which either representations in writing or a request to make oral representations may be made by that party to the committee<sup>2</sup>. A notice so served on the party who did not make the reference must be accompanied by a copy of the reference<sup>3</sup>.

Where a party makes a request to make oral representations within the specified period or such further period as a committee may allow, the committee must give him an opportunity to be heard in person or by a person authorised by him, whether or not that person is of counsel or a solicitor<sup>4</sup>.

The committee must make such inquiry, if any, as it thinks fit and consider any information supplied or representation so made to it<sup>5</sup>.

<sup>1</sup> ie under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 6(2) (see PARA 1253 ante) or Sch 10 para 10(2) (see PARA 1255 ante).

<sup>2</sup> Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(1), (2) (reg 2A added by SI 1988/2200; amended by SI 1997/3007).

<sup>3</sup> Rent Assessment Committees (England and Wales) Regulations 1971, SI 1971/1065, reg 2A(3) (as added: see note 2 supra).

<sup>4</sup> Ibid reg 2A(4) (as added: see note 2 supra).

5 Ibid reg 2A(5) (as added: see note 2 supra).

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### **1257. Reference to rent assessment committee; in general.**

Where a tenant's notice<sup>1</sup> is referred<sup>2</sup> to a rent assessment committee<sup>3</sup>, the committee, having regard only to the contents of the landlord's notice<sup>4</sup> and the tenant's notice, must decide:

- 2609 (1) whether there is any dispute as to the terms, other than those relating to the amount of the rent<sup>5</sup>, of the assured periodic tenancy<sup>6</sup> ('disputed terms') and, if so, what the disputed terms are; and
- 2610 (2) whether there is any dispute as to rent under the tenancy,

and, where the committee decides that there are disputed terms and that there is a dispute as to the rent under the tenancy, it must make a determination as to the disputed terms<sup>7</sup> before it makes a determination<sup>8</sup> as to the rent<sup>9</sup>.

Where a reference has been made to a rent assessment committee<sup>10</sup>, then:

- 2611 (a) if the committee decides that there are no disputed terms and that there is no dispute as to the rent, the statutory provisions relating to the rent and terms of the tenancy<sup>11</sup> apply as if the notice had not been so referred;
- 2612 (b) where head (a) above does not apply, then, so far as concerns the amount of the rent under the tenancy, if there is a dispute as to the rent, the rent determined by the committee<sup>12</sup> and, if there is no dispute as to the rent, the rent specified in the landlord's notice or, as the case may be, the tenant's notice<sup>13</sup> is the rent under the tenancy; and
- 2613 (c) where head (a) above does not apply and there are disputed terms, then, so far as concerns the subject matter of those terms, the terms determined by the committee<sup>14</sup> are the terms of the tenancy and, so far as concerns any undisputed terms<sup>15</sup>, those terms are<sup>16</sup> also terms of the tenancy,

with effect from the date on which the assured periodic tenancy takes effect in possession<sup>17</sup>.

1 For the meaning of 'tenant's notice' see PARA 1255 note 6 ante.

2 Ie under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 10(2): see PARA 1255 ante.

3 As to rent assessment committees see PARA 910 ante; and as to information powers of rent assessment committees see PARA 1253 note 13 ante.

4 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

5 For these purposes, 'rent is to be construed in accordance with the Housing Act 1988 s 14(4) (as amended) (see PARA 1092 note 5 ante): Local Government and Housing Act 1989 Sch 10 para 11(6).

6 For the meaning of 'assured periodic tenancy' see PARA 1254 note 6 ante.

7    Ie under the Local Government and Housing Act 1989 Sch 10 para 11(3): see PARA 1258 post. For these purposes, 'disputed terms' is to be construed in accordance with Sch 10 para 11(1) (a) (see head (1) supra): Sch 10 para 2(1), (6).

8    Ie under ibid Sch 10 para 11(5): see PARA 1259 post.

9    Ibid Sch 10 para 11(1).

10   See note 2 supra.

11   Ie the Local Government and Housing Act 1989 Sch 10 para 10(2)(b): see PARA 1255 ante.

12   Ie subject, in a case where the Housing Act 1988 s 14(5) (see PARA 1093 ante) applies, to the addition of the appropriate amount in respect of rates. As to the abolition of domestic rates see PARA 521 ante.

13   Ie subject to any adjustment under the Local Government and Housing Act 1989 Sch 10 para 11(3): see PARA 1258 post.

14   See note 7 supra.

15   Where a tenant's notice is referred to a rent assessment committee under the Local Government and Housing Act 1989 Sch 10 para 10(2) (see PARA 1255 ante), any reference to the undisputed terms is a reference to those terms, if any, which (1) are proposed in the landlord's notice or the tenant's notice; and (2) do not relate to the amount of the rent; and (3) are not disputed terms: Sch 10 paras 2(1), (6), 11(2).

16   See note 13 supra.

17   Local Government and Housing Act 1989 Sch 10 para 11(8).

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### **1258. Determination of disputed terms.**

If the rent assessment committee<sup>1</sup> decides that there are disputed terms<sup>2</sup>, the committee must determine whether the terms in the landlord's notice<sup>3</sup>, the terms in the tenant's notice<sup>4</sup>, or some other terms dealing with the same subject matter as the disputed terms are such as, in the committee's opinion, might reasonably be expected to be found in an assured monthly periodic tenancy<sup>5</sup> of the dwelling house<sup>6</sup>, not being an assured shorthold tenancy<sup>7</sup>:

2614 (1) which begins on the day following the date of termination<sup>8</sup>;

2615 (2) which is granted by a willing landlord on terms which, except so far as they relate to the subject matter of the disputed terms, are the undisputed terms<sup>9</sup>; and

2616 (3) in respect of which possession may not be recovered under any of the specified grounds<sup>10</sup>;

and the committee must, if it considers it appropriate, specify an adjustment of the undisputed terms to take account of the terms so determined and must, if it considers it appropriate, specify an adjustment of the rent<sup>11</sup> to take account of the terms so determined and, if applicable, so adjusted<sup>12</sup>. In so making a determination or specifying an adjustment of the rent or undisputed terms, there must be disregarded any effect on the terms or the amount of rent attributable to the granting of a tenancy to a sitting tenant<sup>13</sup>.

- 1 As to rent assessment committees see PARA 910 ante; and as to information powers of rent assessment committees see PARA 1253 note 13 ante.
- 2 For the meaning of 'disputed terms' see PARA 1257 note 7 ante.
- 3 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.
- 4 For the meaning of 'tenant's notice' see PARA 1255 note 6 ante.
- 5 For the meaning of 'assured periodic tenancy' see PARA 1254 note 6 ante.
- 6 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.
- 7 For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante.
- 8 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.
- 9 For the meaning of 'undisputed terms' see PARA 1257 note 15 ante.
- 10 le under any of the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-5 (as amended): see PARAS 1109-1113 ante.
- 11 For the meaning of 'rent' for these purposes see PARA 1257 note 5 ante.
- 12 Local Government and Housing Act 1989 Sch 10 paras 2(1), (2), 11(3).
- 13 Ibid Sch 10 para 11(4).

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### **1259. Determination of dispute as to rent.**

If the rent assessment committee<sup>1</sup> decides that there is a dispute as to the rent<sup>2</sup> under the assured periodic tenancy<sup>3</sup>, the committee must determine the monthly rent at which<sup>4</sup> the committee considers that the dwelling house<sup>5</sup> might reasonably be expected to be let<sup>6</sup> in the open market by a willing landlord<sup>7</sup> under an assured tenancy<sup>8</sup>, not being an assured shorthold tenancy<sup>9</sup>:

- 2617 (1) which is a monthly periodic tenancy;
- 2618 (2) which begins on the day following the date of termination<sup>10</sup>;
- 2619 (3) in respect of which possession may not be recovered under any of the specified grounds<sup>11</sup>; and
- 2620 (4) the terms of which, other than those relating to the amount of the rent, are the same as:
  - 70
  85. (a) the undisputed terms<sup>12</sup>; or
  86. (b) if there has been a determination as to the disputed terms<sup>13</sup>, the terms determined by the committee and the undisputed<sup>14</sup> terms<sup>15</sup>.
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- 1 As to rent assessment committees see PARA 910 ante; and as to information powers of rent assessment committees see PARA 1253 note 13 ante.
- 2 For the meaning of 'rent' for these purposes see PARA 1257 note 5 ante.
- 3 For the meaning of 'assured periodic tenancy' see PARA 1254 note 6 ante.
- 4 Ie subject to the Local Government and Housing Act 1989 s 186(1), Sch 10 para 11(6) (as amended). The following provisions of the Housing Act 1988, ie s 14(2) (see PARA 1093 ante), s 14(3A) (as added) (see PARA 1093 ante), s 14(4) (as amended) (see PARA 1092 ante) and s 14(5) (see PARA 1093 ante) apply in relation to a determination of rent for these purposes as they apply in relation to a determination under s 14 (as amended) subject to the specified modifications: Local Government and Housing Act 1989 Sch 10 para 11(6) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 20). The modifications so specified are that: (1) the reference in the Housing Act 1988 s 14(2)(b) to a relevant improvement being carried out is to be construed as a reference to an improvement being carried out during the long residential tenancy; and (2) the reference in s 14(2)(c) to a failure to comply with any term of the tenancy is to be construed as a reference to a failure to comply with any term of the long residential tenancy: Local Government and Housing Act 1989 Sch 10 to para 11(7). For the meaning of 'long residential tenancy' see PARA 1244 ante.
- 5 For the meaning of 'dwelling house' see PARA 1244 note 3 ante.
- 6 For the meaning of 'let' see PARA 1241 note 5 ante.
- 7 For the meaning of 'landlord' see PARA 1241 note 3 ante.
- 8 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 9 For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante.
- 10 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.
- 11 Ie under any of the Housing Act 1988 s 7(1), Sch 2 Pt I, Grounds 1-5 (as amended): see PARAS 1109-1113 ante.
- 12 For the meaning of 'undisputed terms' see PARA 1257 note 15 ante.
- 13 Ie under the Local Government and Housing Act 1989 Sch 10 para 11(3): see PARA 1258 ante.
- 14 Ie as adjusted, if at all, under ibid Sch 10 para 11(3).
- 15 Ibid Sch 10 paras 2(1), (2), 11(5).

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### ***C. EXPRESS AGREEMENT; VARIATION BY AGREEMENT ETC***

#### **1260. Power to agree and vary terms by agreement; withdrawal of reference to committee.**

Nothing in the statutory provisions relating to long residential tenancies<sup>1</sup> affects the right of the landlord<sup>2</sup> and the tenant<sup>3</sup> under the assured periodic tenancy<sup>4</sup> to vary by agreement any term of the tenancy, including a term relating to rent<sup>5</sup>.

Nothing in the statutory provisions relating to the initial rent and terms of the assured periodic tenancy and the determination of disputes<sup>6</sup> affects the right of the landlord and the tenant to

agree any terms of the assured periodic tenancy, including a term relating to the rent, before the tenancy takes effect in possession ('the expressly agreed terms'); and, in such a case:

2621 (1) the expressly agreed terms are the terms of the tenancy in substitution for any terms dealing with the same subject matter which would otherwise<sup>7</sup> be the terms of the tenancy; and

2622 (2) where a reference has already been made to a rent assessment committee<sup>8</sup> but there has been no determination by the committee<sup>9</sup>:

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87. (a) the committee must have regard to the expressly agreed terms, as notified to it by the landlord and the tenant, in deciding<sup>10</sup> what the disputed terms<sup>11</sup> are and whether there is any dispute as to the rent; and

88. (b) in making any determination<sup>12</sup> the committee may not make any adjustment of the expressly agreed terms as so notified<sup>13</sup>.

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Nothing in the statutory provisions relating to the determination of disputes<sup>14</sup> requires a rent assessment committee to continue with a determination thereunder if the long residential tenancy has come to an end, or if the landlord serves notice in writing on the committee that he no longer requires such a determination<sup>15</sup>.

1    Ie the Local Government and Housing Act 1989 s 186(1), Sch 10 (as amended): see PARA 1238 et seq ante, PARA 1261 et seq post.

2    For the meaning of 'landlord' see PARA 1241 note 3 ante.

3    For the meaning of 'tenant' see PARA 1241 note 4 ante.

4    For the meaning of 'assured periodic tenancy' see PARA 1254 note 6 ante.

5    Local Government and Housing Act 1989 Sch 10 para 11(9). For the meaning of 'rent' for these purposes see PARA 1257 note 5 ante.

6    Ie ibid Sch 10 paras 10, 11 (as amended): see PARAS 1257-1259 ante.

7    Ie by virtue of ibid Sch 10 para 10 (see PARA 1257 ante) or Sch 10 para 11 (as amended) (see PARAS 1258-1259 ante).

8    Ie under ibid Sch 10 para 10(2): see PARA 1257 ante. As to rent assessment committees see PARA 910 ante; and as to information powers of rent assessment committees see PARA 1253 note 13 ante.

9    Ie under ibid Sch 10 para 11 (as amended): see PARAS 1258-1259 ante.

10   Ie for the purposes of ibid Sch 10 para 11 (as amended): see PARAS 1258-1259 ante.

11   For the meaning of 'disputed terms' see PARA 1257 note 7 ante.

12   See note 9 supra.

13   Local Government and Housing Act 1989 Sch 10 para 12(2).

14   Ie ibid Sch 10 para 11 (as amended): see PARAS 1258-1259 ante.

15   Ibid Sch 10 para 12(3). As to the service of notices see PARA 1238 ante at head (6) in the text. Where the landlord so serves notice, then, for the purposes of Sch 10 para 10(2) (see PARA 1255 ante), the landlord is treated as not having made a reference under Sch 10 para 10(2)(a) and accordingly Sch 10 para 10(2)(b) has effect, subject to Sch 10 para 12(2), for determining rent and other terms of the assured periodic tenancy: Sch 10 para 12(3).

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## **(v) Recovery of Possession**

### **A. APPLICATION FOR ORDER FOR POSSESSION**

#### **1261. Landlord's application for possession.**

Where a landlord's notice to resume possession<sup>1</sup> has been served on the tenant<sup>2</sup> and either:

- 2623 (1) there is an election by the tenant to retain possession<sup>3</sup>; or
- 2624 (2) at the end of the period of two months beginning on the date of service of the notice, the qualifying condition<sup>4</sup> is fulfilled as respects the tenancy<sup>5</sup>,

the landlord<sup>6</sup> may apply to the court<sup>7</sup> for an order<sup>8</sup> on such of the statutory grounds<sup>9</sup> as may be specified in the notice<sup>10</sup>. The court may not, however, entertain such an application unless it is made:

- 2625 (a) within the period of two months beginning on the date of the election by the tenant to retain possession; or
- 2626 (b) if there is no election by the tenant to retain possession, within the period of four months beginning on the date of service of the landlord's notice<sup>11</sup>.

1 For the meaning of 'landlord's notice to resume possession' see PARA 1249 note 7 ante.

2 For the meaning of 'tenant' see PARA 1241 note 4 ante.

3 For the meaning of 'election by the tenant to retain possession' see PARA 1252 note 8 ante.

4 For the meaning of 'the qualifying condition' see PARA 1244 ante.

5 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

6 For the meaning of 'landlord' see PARA 1241 note 3 ante.

7 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

8 Ie under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13: see the text and notes 1-7 supra, 9-11 infra; and PARA 1262 post.

9 Ie the grounds mentioned in ibid Sch 10 para 5(1) (as amended): see PARA 1251 ante.

10 Ibid Sch 10 para 13(1). As to the service of notices see PARA 1238 ante at head (6) in the text.

11 Ibid Sch 10 para 13(2).

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## ***B. GROUNDS ON WHICH ORDER FOR POSSESSION MAY BE MADE***

### **1262. Mandatory ground under the Housing Act 1988.**

Where the ground or one of the grounds for claiming possession specified in the landlord's notice<sup>1</sup> is Ground 6 under the Housing Act 1988<sup>2</sup>, then, if on an application duly made<sup>3</sup> the court<sup>4</sup> is satisfied that the landlord<sup>5</sup> has established that ground, the court must order that the tenant<sup>6</sup> shall, on the date of termination<sup>7</sup>, give up possession of the property then let<sup>8</sup> under the tenancy<sup>9</sup>.

Nothing in the above provisions prejudices any power of the tenant<sup>10</sup> to terminate the tenancy<sup>11</sup>.

1 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

2 In the Housing Act 1988 s 7, Sch 2 Pt I, Ground 6 (as amended): see PARA 1114 ante. See also PARA 1251 ante.

3 In the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13(1): see PARA 1261 ante.

4 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

5 For the meaning of 'landlord' see PARA 1241 note 3 ante.

6 For the meaning of 'tenant' see PARA 1241 note 4 ante.

7 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

8 For the meaning of 'let' see PARA 1241 note 5 ante.

9 Local Government and Housing Act 1989 Sch 10 para 13(3). For the meaning of 'tenancy' see PARA 1241 note 5 ante.

10 In the Local Government and Housing Act 1989 Sch 10 para 8: see PARA 1252 ante.

11 Ibid Sch 10 para 14(4).

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### **1263. Additional mandatory ground.**

Where the ground or one of the grounds for claiming possession specified in the landlord's notice<sup>1</sup> is that for the purposes of redevelopment after the termination of the tenancy the landlord proposes to demolish or reconstruct the whole or a substantial part of the premises<sup>2</sup>, then, if on an application duly made<sup>3</sup> the court<sup>4</sup> is satisfied that the landlord<sup>5</sup> has established that ground and is further satisfied:

2627 (1) that on that ground possession of those premises will be required by the landlord on the date of termination<sup>6</sup>; and

2628 (2) that the landlord has made such preparations, including the obtaining or, if that is not reasonably practicable in the circumstances, preparations relating to the obtaining, of any requisite permission or consent, whether from any authority



whose permission or consent is required under any enactment or from the owner of any interest in any property, for proceeding with the redevelopment as are reasonable in the circumstances,

the court must order that the tenant<sup>7</sup> shall, on the date of termination, give up possession of the property then let<sup>8</sup> under the tenancy<sup>9</sup>.

Where the court is not so satisfied but would be satisfied if the date of termination of the tenancy had been such date ('the postponed date') as the court may determine, being a date later, but not more than one year later, than the specified date of termination<sup>10</sup>, the court must, if the landlord so requires, make an order by which it specifies the postponed date and orders:

- 2629 (a) that the tenancy shall not come to an end on the date of termination but shall continue thereafter, as respects the whole of the property let under the tenancy, at the same rent and in other respects on the same terms as before that date; and
- 2630 (b) that, unless the tenancy comes to an end before the postponed date, the tenant shall on that date give up possession of the property then let under the tenancy<sup>11</sup>.

Nothing in the above provisions prejudices any power of the tenant<sup>12</sup> to terminate the tenancy<sup>13</sup>.

1 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

2 Ie the ground mentioned in the Local Government and Housing Act 1989 s 186(1), Sch 10 para 5(1)(b); see PARA 1251 ante.

3 Ie under ibid Sch 10 para 13(1): see PARA 1261 ante.

4 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

5 For the meaning of 'landlord' see PARA 1241 note 3 ante.

6 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

7 For the meaning of 'tenant' see PARA 1241 note 4 ante.

8 For the meaning of 'let' see PARA 1241 note 5 ante.

9 Local Government and Housing Act 1989 Sch 10 para 13(7). For the meaning of 'tenancy' see PARA 1241 note 5 ante.

10 For the meaning of 'specified date of termination' see PARA 1250 note 8 ante.

11 Local Government and Housing Act 1989 Sch 10 para 14(1), (2).

12 Ie under ibid Sch 10 para 8: see PARA 1252 ante.

13 Ibid Sch 10 para 14(4). Schedule 10 para 8(2) applies where the tenancy is continued by an order under Sch 10 para 14(2) as it applies where the tenancy is continued by virtue of Sch 10 para 3 (see PARA 1248 ante): Sch 10 para 14(4).

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## 1264. Discretionary grounds.

Where the ground or one of the grounds for claiming possession specified in the landlord's notice<sup>1</sup> is<sup>2</sup>:

- 2631 (1) any of Grounds 9 to 15 under the Housing Act 1988<sup>3</sup>; or
- 2632 (2) the ground that the premises or part of them are reasonably required by the landlord for occupation as a residence for himself or certain members of his family<sup>4</sup>,

then, if on an application duly made<sup>5</sup> the court<sup>6</sup> is satisfied that the landlord<sup>7</sup> has established that ground and that it is reasonable that the landlord should be granted possession, the court must order that the tenant<sup>8</sup> shall, on the date of termination<sup>9</sup>, give up possession of the property then let<sup>10</sup> under the tenancy<sup>11</sup>.

Where, however, the ground or one of the grounds for claiming possession so specified is that mentioned in head (2) above, the court may not make the order<sup>12</sup> on that ground if it is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by making the order than by refusing to make it<sup>13</sup>.

Nothing in the above provisions prejudices any power of the tenant<sup>14</sup> to terminate the tenancy<sup>15</sup>.

1 For the meaning of 'landlord's notice' see PARA 1249 note 7 ante.

2 I.e. subject to the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13(6): see the text and notes 12-13 infra.

3 I.e. the Housing Act 1988 s 7(2), Sch 2 Pt II, Grounds 9-15 (as amended): see PARAS 1118-1125 ante. See also PARA 1251 ante. Schedule 2 Pt III (paras 1-6) (suitable alternative accommodation: see PARA 1118 ante) has effect for supplementing Sch 2 Pt II, Ground 9 as that ground applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) as it has effect for supplementing that ground for the purposes of the Housing Act 1988, subject to the modification that in Sch 2 Pt III para 3(1), in the words following para 3(1)(b) the reference to the assured tenancy in question is to be construed as a reference to the long residential tenancy in question: Local Government and Housing Act 1989 Sch 10 para 13(5). For the meaning of 'assured tenancy' see PARA 1018 ante; and for the meaning of 'long residential tenancy' see PARA 1244 ante.

4 I.e. the ground mentioned in *ibid* Sch 10 para 5(1)(c) (as amended): see PARA 1251 ante.

5 I.e. under *ibid* Sch 10 para 13(1): see PARA 1261 ante.

6 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

7 For the meaning of 'landlord' see PARA 1241 note 3 ante.

8 For the meaning of 'tenant' see PARA 1241 note 4 ante.

9 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

10 For the meaning of 'let' see PARA 1241 note 5 ante.

11 Local Government and Housing Act 1989 Sch 10 para 13(4). For the meaning of 'tenancy' see PARA 1241 note 5 ante.

12 I.e. under *ibid* Sch 10 para 13(4).

13 *Ibid* Sch 10 para 13(6).

14 I.e. under *ibid* Sch 10 para 8: see PARA 1252 ante.

15 Ibid Sch 10 para 14(4).

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### **1265. Qualifying condition not fulfilled.**

Notwithstanding the statutory provisions relating to applications by the landlord for possession<sup>1</sup>, and notwithstanding that there has been an election by the tenant to retain possession<sup>2</sup>, if the court<sup>3</sup> is satisfied, at the date of the hearing, that the qualifying condition<sup>4</sup> is not fulfilled as respects the tenancy<sup>5</sup>, the court must order that the tenant shall, on the date of termination<sup>6</sup>, give up possession of the property then let<sup>7</sup> under the tenancy<sup>8</sup>.

Nothing in the above provisions prejudices any power of the tenant<sup>9</sup> to terminate the tenancy<sup>10</sup>.

1 Ibid the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13 (see PARAS 1261-1264 ante) and Sch 10 para 14(1), (2) (see PARA 1263 ante).

2 For the meaning of 'election by the tenant to retain possession' see PARA 1252 note 8 ante; and for the meaning of 'tenant' see PARA 1241 note 4 ante.

3 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

4 For the meaning of 'the qualifying condition' see PARA 1244 ante.

5 For the meaning of 'tenancy' see PARA 1241 note 5 ante.

6 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

7 For the meaning of 'let' see PARA 1241 note 5 ante.

8 Local Government and Housing Act 1989 Sch 10 para 14(3).

9 Ibid under ibid Sch 10 para 8: see PARA 1252 ante.

10 Ibid Sch 10 para 14(4).

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### ***C. CONSEQUENCES WHERE NO ORDER FOR POSSESSION MADE***

#### **1266. Tenant not ordered to give up possession.**

Where the landlord<sup>1</sup> is entitled to make an application for possession<sup>2</sup> but does not obtain an order for possession<sup>3</sup>, the following provisions apply<sup>4</sup>.

If:

2633 (1) at the expiration of the period within which such an application may be made the landlord has not made such an application, the landlord's notice to resume possession<sup>5</sup>, and anything done in pursuance thereof, ceases to have effect<sup>6</sup>;

2634 (2) before the expiration of that period the landlord has made such an application but the result of the application, at the time when it is finally disposed of<sup>7</sup>, is that no order is made, the landlord's notice to resume possession ceases to have effect<sup>8</sup>.

In any case where head (2) above applies, then, if within the period of one month beginning on the date that the application to the court<sup>9</sup> is finally disposed of the landlord serves on the tenant<sup>10</sup> a landlord's notice proposing an assured tenancy<sup>11</sup>, the earliest date which may be specified in the notice as the date of termination<sup>12</sup> is<sup>13</sup> the day following the last day of the period of four months beginning on the date of service of the subsequent notice<sup>14</sup>.

A landlord's notice to resume possession may be withdrawn at any time by notice in writing served on the tenant<sup>15</sup>; and in any such case, then, if within the period of one month beginning on the date of withdrawal of the landlord's notice to resume possession the landlord serves on the tenant a landlord's notice proposing an assured tenancy, the earliest date which may be specified in the notice as the date of termination is<sup>16</sup> the day following the last day of the period of four months beginning on the date of service of the subsequent notice or the day following the last day of the period of six months beginning on the date of service of the withdrawn notice, whichever is the later<sup>17</sup>.

1 For the meaning of 'landlord' see PARA 1241 note 3 ante.

2 Ie under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 13(1): see PARA 1261 ante.

3 Ie under ibid Sch 10 para 13 (see PARAS 1261-1264 ante) or Sch 10 para 14 (see PARAS 1264-1265 ante).

4 Ibid Sch 10 para 15(1).

5 For the meaning of 'landlord's notice to resume possession' see PARA 1249 note 7 ante.

6 Local Government and Housing Act 1989 Sch 10 para 15(2).

7 The reference in ibid Sch 10 para 15(3), (4) to the time at which an application is finally disposed of is to be construed as a reference to the earliest time at which the proceedings on the application, including any proceedings on or in consequence of an appeal, have been determined and any time for appealing or further appealing has expired, except that, if the application is withdrawn or any appeal is abandoned, the reference is to be construed as a reference to the time of withdrawal or abandonment: Sch 10 para 15(5).

8 Ibid Sch 10 para 15(3).

9 As to the jurisdiction of the court see PARA 1238 ante at head (4) in the text.

10 For the meaning of 'tenant' see PARA 1241 note 4 ante.

11 For the meaning of 'landlord's notice proposing an assured tenancy' see PARA 1249 note 7 ante.

12 For the meaning of 'the date of termination' see PARA 1250 note 8 ante.

13 Ie notwithstanding anything in the Local Government and Housing Act 1989 Sch 10 para 4(1)(b): see PARA 1249 ante.

14 Ibid Sch 10 para 15(4). See also note 7 supra. As to the service of notices see PARA 1238 ante at head (6) in the text.

15 Ibid Sch 10 para 15(6). Schedule 10 para 15(6) is, however, without prejudice to the power of the court to make an order as to costs if the notice is withdrawn after the landlord has made an application under Sch 10 para 13(1): Sch 10 para 15(6).

16 See note 13 *supra*.

17 Local Government and Housing Act 1989 Sch 10 para 15(7).

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## 21. MOBILE HOMES

### (1) IN GENERAL

#### 1267. Meaning of 'mobile home'.

'Mobile home' means<sup>1</sup> any structure designed or adapted for human habitation which is capable of being moved from one place to another, whether by being towed, or by being transported on a motor vehicle or trailer, and any motor vehicle so designed or adapted, but does not include:

2635 (1) any railway rolling stock which is for the time being on rails forming part of a railway system; or

2636 (2) any tent<sup>2</sup>; or

2637 (3) a structure designed or adapted for human habitation which:

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89. (a) is composed of not more than two sections separately constructed<sup>3</sup> and designed to be assembled on a site by means of bolts, clamps or other devices; and

90. (b) is, when assembled<sup>4</sup>, physically capable of being moved by road from one place to another whether by being towed, or by being transported on a motor vehicle or trailer,

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2638 if its dimensions when assembled exceed any of the prescribed<sup>5</sup> limits<sup>6</sup>.

A structure falling within heads 3(a) and 3(b) above is not, however, treated as not being, or as not having been, a mobile home by reason only that it cannot lawfully be so moved on a highway when assembled<sup>7</sup>.

A motor vehicle is not a mobile home unless it has been designed, or physically altered so as to adapt it, for human habitation<sup>8</sup>.

1 For the purposes of the Mobile Homes Act 1975 and the Mobile Homes Act 1983: see PARA 1268 et seq post. 'Mobile home' has the same meaning as 'caravan' in the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-30) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1032 et seq); Mobile Homes Act 1975 s 9(1); Mobile Homes Act 1983 s 5(1). A motor vehicle is not a caravan unless it has been designed, or physically altered so as to adapt it, for human habitation: *Backer v Secretary of State for the Environment* [1983] 2 All ER 1021, [1983] 1 WLR 1485.

A houseboat moored to a caravan site could not be said to be a 'caravan': *Roy Crimble Ltd v Edgecombe* (1981) 131 NLJ 928, CA.

The word 'caravan' is to be construed in accordance with the statutory definition in the Caravan Sites and Control of Development Act 1960 s 29(1) and not in accordance with its ordinary and natural meaning: *Wyre Forest District Council v Secretary of State for the Environment* [1990] 2 AC 357, [1990] 1 All ER 780, HL (a

chalet lacking wheels but capable of being moved is a mobile home), disapproving *Hammond v Horsham District Council* (1989) 58 P & CR 410, DC.

2 Caravan Sites and Control of Development Act 1960 s 29(1) (applied by the Mobile Homes Act 1975 s 9(1); the Mobile Homes Act 1983 s 5(1)).

3 To satisfy the 'construction' test, there should be two sections separately constructed which are then designed to be assembled on site: *Byrne v Secretary of State for the Environment and Arun District Council* (1997) 74 P & CR 420 at 424.

4 The words 'when assembled' require mobility to be tested by reference to the circumstances of where and how the structure has been assembled and do not simply mean 'in its assembled state': *Byrne v Secretary of State for the Environment and Arun District Council* (1997) 74 P & CR 420. Whether the addition of a porch extension to a caravan changes its character as a mobile home was treated at first instance as a question of fact and degree; but if the structure was a mobile home at the commencement of the agreement permitting occupation of a plot on a protected site, the question is more likely to be whether the agreement has been validly terminated: see *Howard v Charlton* [2002] EWCA Civ 1086, [2003] 1 P & CR 343, sub nom *Charlton v Howard* [2002] All ER (D) 367 (Jul). A structure comprising four units bolted together on site has been held not to be a mobile home: see *Carter v Secretary of State for the Environment* [1994] 1 WLR 1212, [1994] 2 EGLR 194, CA.

5 The prescribed limits are: (1) length, exclusive of any drawbar, in England, 65.616 feet (20 metres) or in Wales 60 feet (18.288 metres); (2) width, in England 23.309 feet (6.8 metres) or in Wales 20 feet (6.096 metres); (3) overall height of living accommodation measured internally from the floor at the lowest level to the ceiling at the highest level, in England 10.006 feet (3.05 metres) or in Wales 10 feet (3.048 metres): Caravan Sites Act 1968 s 13(2)(a)-(c) (amended in relation to England by the Caravan Sites Act 1968 and Social Landlords (Permissible Additional Purposes) (England) Order 2006 (Definition of Caravan) (Amendment) (England) Order 2006, SI 2006/2374, art 2; applied by the Mobile Homes Act 1975 s 9(1); the Mobile Homes Act 1983 s 5(1)). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister, may by order made by statutory instrument, after consultation with such persons or bodies as appear to him or to it to be concerned, substitute for any figure mentioned in the Caravan Sites Act 1968 s 13(2) such other figure as may be specified in the order: ss 13(3), 16 (as so applied). Any statutory instrument so made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament: s 13(4) (as so applied). As to the exercise of this power by the Secretary of State see the Caravan Sites Act 1968 and Social Landlords (Permissible Additional Purposes) (England) Order 2006 (Definition of Caravan) (Amendment) (England) Order 2006, SI 2006/2374, art 2. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions under the Caravan Sites Act 1968 ss 13, 16 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

6 Ibid s 13(2).

7 Ibid s 13(1); and see *Wyre Forest District Council v Secretary of State for the Environment* [1990] 2 AC 357, [1990] 1 All ER 780, HL.

8 *Backer v Secretary of State for the Environment* [1983] 2 All ER 1021, [1983] 1 WLR 1485, DC.

## UPDATE

### 1267 Meaning of 'mobile home'

NOTE 5--Head (2) for '23.309 feet' read '22.309 feet': SI 2006/2374, art 2 (modified by correction slip). In relation to Wales, heads (1) for '60 feet (18.288 metres)' read '65.616 feet (20 metres)'; (2) for '20 feet (6.096 metres)' read '22.309 feet (6.8 metres)'; and (3) for '10 feet (3.048 metres)' read '10.006 feet (3.05 metres)': 1968 Act s 13(2)(a)-(c) (amended by SI 2007/3163).

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### 1268. Duty of site owners to give written statements.

Before making an agreement<sup>1</sup> to which the Mobile Homes Act 1983 applies<sup>2</sup>, that is to say, any agreement under which a person ('the occupier')<sup>3</sup> is entitled to station a mobile home<sup>4</sup> on land forming part of a protected site<sup>5</sup> and to occupy the mobile home as his only or main residence<sup>6</sup>, the owner of the protected site ('the owner')<sup>7</sup> must give to the proposed occupier under the agreement a written statement<sup>8</sup> which:

- 2639 (1) specifies the names and addresses of the parties;
- 2640 (2) includes particulars of the land on which the proposed occupier is to be entitled to station the mobile home that are sufficient to identify that land;
- 2641 (3) sets out the express terms to be contained in the agreement;
- 2642 (4) sets out the terms to be implied by statute<sup>9</sup>; and
- 2643 (5) complies with such other requirements as may be prescribed by regulations made by the appropriate national authority<sup>10</sup>.

The written statement so required must be given:

- 2644 (a) not later than 28 days before the date on which any agreement for the sale of the mobile home to the proposed occupier is made; or
- 2645 (b) if no such agreement as is mentioned in head (a) above is made before the making of the agreement to which the 1983 Act applies, not later than 28 days before the date on which the agreement to which the Act applies is made<sup>11</sup>.

If, however, the proposed occupier consents in writing to that statement being given to him by a date ('the chosen date') which is less than 28 days before the date mentioned in head (a) or head (b) above, the statement must be given to him not later than the chosen date<sup>12</sup>.

If the owner has failed to give the occupier a written statement in accordance with the above provisions, the occupier may, at any time after the making of the agreement, apply to the court<sup>13</sup> for an order requiring the owner:

- 2646 (i) to give him a written statement which complies with heads (1) to (5) above, read with any modifications necessary to reflect the fact that the agreement has been made; and
- 2647 (ii) to do so not later than such date as is specified in the order<sup>14</sup>.

If any express term is contained in an agreement<sup>15</sup> but was not set out in a written statement given to the proposed occupier in accordance with the statutory requirements<sup>16</sup>, the term is unenforceable by the owner or any successor in title or person claiming through or under the owner or successor<sup>17</sup>; but this is subject to any order made by the court under its statutory power<sup>18</sup> to vary or delete terms or to provide that such a term is to have full effect<sup>19</sup>.

The court has jurisdiction to determine any question arising under the 1983 Act or any agreement to which it applies, and to entertain any proceedings brought under that Act or any such agreement<sup>20</sup>.

1 As to whether 'agreement' includes a wholly gratuitous arrangement see *Balthasar v Mullane* (1985) 51 P & CR 107, 17 HLR 561, CA.

2 Any reference in the Mobile Homes Act 1983 s 1 (as substituted) to the making of an agreement to which that Act applies includes a reference to any variation of an agreement by virtue of which the agreement becomes one to which that Act applies: s 1(8) (s 1 substituted by the Housing Act 2004 s 206(1); for transitional provisions see s 206(4)).

3 For these purposes, but subject to the Mobile Homes Act 1983 s 3(4) (see PARA 1269 post), any reference to the occupier includes a reference to any person who is entitled to the benefit of and bound by the agreement by virtue of s 3(2) or (3) (as amended) (see PARA 1269 post): s 5(2)(b).

4 For the meaning of 'mobile home' see PARA 1267 ante.

5 For these purposes, 'protected site' does not include any land occupied by a local authority as a caravan site providing accommodation for gypsies but, subject to that, has the same meaning as in the Caravan Sites Act 1968 Pt I (ss 1-5) (as amended) (see PARA 1281 post): Mobile Homes Act 1983 s 5(1). Cf the Caravan Sites Act 1968 s 1(2) (as amended), for the purposes of which such a local authority site is protected; and PARA 1281 post. See also *Greenwich London Borough Council v Powell* [1989] AC 995, [1989] 1 All ER 65, HL. 'Protected site' does not include a site for which planning permission is required but has not been granted: *Balthasar v Mullane* (1985) 17 HLR 561, 51 P & CR 107, CA; *Adams v Watkins* (1989) 88 LGR 576, [1990] 2 EGLR 185, CA. If a site licence is required, the site is a protected site even if no site licence has been obtained: *National By-Products Ltd v Brice* (1983) 81 LGR 652, 46 P & CR 281, CA (decided under the Mobile Homes Act 1975).

6 For the meaning of 'only or main residence' cf the Rent Act 1977 s 2(1)(a) ('occupation as a residence'); and PARAS 832-836 ante; the Housing Act 1988 s 1(1)(b) ('only or principal home'); and PARA 1018 note 8 ante. See also *Omar Parks Ltd v Elkington, Ron Grundy (Melbourne) Ltd v Boneheyo* [1993] 1 All ER 282, [1992] 1 WLR 1270, CA (cited in PARA 1272 note 13 post).

7 For these purposes, unless the context otherwise requires, 'owner' means, in relation to a protected site, the person who, by virtue of an estate or interest held by him, is entitled to possession of the site or would be so entitled but for the rights of any persons to station mobile homes on land forming part of the site (Mobile Homes Act 1983 s 5(1)); and any reference to the owner includes a reference to any person who is bound by and entitled to the benefit of the agreement by virtue of s 3(1) (see PARA 1269 post) (s 5(2)(a)).

8 A statement required to be given to a person under *ibid* s 1 (as substituted) may be either delivered to him personally or sent to him by post: s 1(7) (as substituted: see note 2 supra).

9 The terms implied by *ibid* s 2(1): see PARAS 1271-1278 post.

10 *Ibid* s 1(1), (2) (as substituted: see note 2 supra). 'The appropriate national authority' means in relation to England, the Secretary of State and in relation to Wales, the National Assembly for Wales: s 5(1) (definition added by the Housing Act 2004 s 206(3)). As to the Secretary of State see PARA 27 note 3 ante; as to the Assembly see CONSTITUTIONAL LAW AND HUMAN RIGHTS; and as to the exercise of functions in relation to Wales by the Assembly or the relevant Welsh minister see PARA 27 note 4 ante.

Such regulations (1) must be made by statutory instrument; (2) if made by the Secretary of State, are subject to annulment in pursuance of a resolution of either House of Parliament; and (3) may make different provision with respect to different cases or descriptions of case, including different provision for different areas: s 1(9) (as so substituted). Head (2) supra does not affect the continuing validity of any regulations made under s 1 before the passing of the Housing Act 2004 (ie 18 November 2004): s 206(5). For the regulations so made in relation to England, see the Mobile Homes (Written Statement) (England) Regulations 2006, SI 2006/2275, which came into operation on 1 October 2006 (reg 1(1) and apply in relation to every written statement given after that date with respect to an agreement (a) for the stationing of a mobile home on a protected site; and (b) to which the Mobile Homes Act 1983 will apply (Mobile Homes (Written Statement) (England) Regulations 2006, SI 2006/2275, reg 1(2)). The requirements with which a written statement must comply for the statutory purposes, in addition to the requirements of the Mobile Homes Act 1983 s 1(2)(a)-(d) (as so substituted) are (i) that it must contain the note preceding the Mobile Homes (Written Statement) (England) Regulations 2006, SI 2006/2275, Schedule Pt 1 and the particulars mentioned in Schedule Pt 1 (so far as not required by the Mobile Homes Act 1983 s 1(2)(a)-(d) (as so substituted) and the Mobile Homes (Written Statement) (England) Regulations 2006, SI 2006/2275, Schedule Pts 2 and 4; and (ii) that it must be in the form set out in that Schedule or a form substantially to the same effect: reg 3. In relation to Wales, the Mobile Homes (Written Statement) Regulations 1983, SI 1983/749, which came into operation on 20 May 1983 (see reg 1) and which are revoked in relation to England, continue to apply and provide that the written statement must be in the prescribed form or a form substantially to the like effect (reg 2). For the prescribed form of agreement see reg 2, Schedule.

11 Mobile Homes Act 1983 s 1(3) (as substituted: see note 2 supra). As to agreements to which the 1983 Act applies see note 2 supra.

12 *Ibid* s 1(4) (as substituted: see note 2 supra).

13 For these purposes, unless the context otherwise requires, 'the court' means the county court for the district in which the protected site is situated or, where the parties have agreed in writing to submit to arbitration any question arising under the Mobile Homes Act 1983 or, as the case may be, any agreement to which that Act applies, the arbitrator: s 5(1).



No special procedure is laid down for appealing or challenging such an arbitrator's award and the Arbitration Act 1996 will thus apply: see generally ARBITRATION.

- 14 Mobile Homes Act 1983 s 1(6) (as substituted: see note 2 supra).
- 15 Ie an agreement to which the Mobile Homes Act 1983 applies: see the text and notes 1-6 supra.
- 16 Ie in accordance with ibid s 1(2)-(4) (as substituted): see the text and notes 7-12 supra.
- 17 Ie the term is unenforceable by the owner or any person within ibid s 3(1): see PARA 1269 post.
- 18 Ie under ibid s 2(3) (as substituted): see PARA 1271 post.
- 19 Ibid s 1(5) (as substituted: see note 2 supra).
- 20 Ibid s 4.

## UPDATE

### 1268 Duty of site owners to give written statements

NOTE 10--SI 1983/749 replaced, in relation to Wales, by the Mobile Homes (Written Statement) (Wales) Regulations 2007, SI 2007/3164.

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### 1269. Successors in title.

An agreement to which the Mobile Homes Act 1983 applies<sup>1</sup> is binding on and enures for the benefit of any successor in title of the owner<sup>2</sup> and any person claiming through or under the owner or any such successor<sup>3</sup>.

Where such an agreement is lawfully assigned<sup>4</sup> to any person, the agreement enures for the benefit of and is binding on that person<sup>5</sup>.

Where a person entitled to the benefit of and bound by such an agreement dies at a time when he is occupying the mobile home<sup>6</sup> as his only or main residence<sup>7</sup>, the agreement enures for the benefit of and is binding on:

- 2648 (1) any person residing with that person ('the deceased') at that time being:  
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- 91. (a) the widow, widower or surviving civil partner of the deceased; or
- 92. (b) in default of a widow, widower or surviving civil partner so residing, any  
member of the deceased's family<sup>8</sup>; or
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- 2649 (2) in default of any such person so residing, the person entitled to the mobile  
home by virtue of the deceased's will or under the law relating to intestacy<sup>9</sup>.

1 As to the agreements to which the Mobile Homes Act 1983 applies see PARA 1268 ante.

2 For the meaning of 'owner' see PARA 1268 note 7 ante.

3 Mobile Homes Act 1983 s 3(1).

- 4 For the implied terms in relation to assignment see PARA 1273 post.
- 5 Mobile Homes Act 1983 s 3(2).
- 6 For the meaning of 'mobile home' see PARA 1267 ante.
- 7 For the meaning of 'only or main residence' see PARA 1268 note 6 ante.
- 8 For the meaning of 'member of another's family' see PARA 1273 note 6 post.
- 9 Mobile Homes Act 1983 s 3(3) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 87). Such an agreement does not, however, enure for the benefit of, nor is it binding on, a person by virtue of the Mobile Homes Act 1983 s 3(3)(b) (see head (2) in the text) in so far as it would otherwise enable or require that person to occupy the mobile home, or it includes terms implied by virtue of s 2(1), Sch 1 Pt I para 5 or Sch 1 Pt I para 9 (as amended) (see PARAS 1272-1273 post): s 3(4).

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### **1270. Power to prescribe minimum standards.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may<sup>3</sup> prescribe by order<sup>4</sup> minimum standards with respect to the layout of, and the provision of facilities, services and equipment for, protected sites<sup>5</sup> on which there are mobile homes<sup>6</sup> occupied as an only or main residence<sup>7</sup>. Any such order may apply generally or to a particular area or to protected sites in a particular category, and may prescribe different minimum standards in relation to protected sites in different categories<sup>8</sup>.

- 1 As to the Secretary of State see PARA 27 note 3 ante.
- 2 As to the transfer of functions under the Mobile Homes Act 1975 so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 3 Ie without prejudice to their powers under the Caravan Sites and Control of Development Act 1960 s 5(6): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1043.
- 4 The power so to make orders is exercisable by statutory instrument (Mobile Homes Act 1975 s 7(3)); and any such order made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament (see s 7(4)). Any power to make an order under any provision of s 7 includes a power to make an order varying or revoking any order previously made under that provision: s 7(5). At the date at which this title states the law, no such order had been made.
- 5 For the meaning of 'protected site' see PARA 1268 note 5 ante.
- 6 For the meaning of 'mobile home' see PARA 1267 ante.
- 7 Mobile Homes Act 1975 ss 7(1), 9(1). For the meaning of 'only or main residence' see PARA 1268 note 6 ante.
- 8 Ibid s 7(2).

## **UPDATE**

### **1270 Power to prescribe minimum standards**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## **(2) TERMS OF THE AGREEMENT**

### **(i) In general**

#### **1271. Terms of the agreement.**

In any agreement to which the Mobile Homes Act 1983 applies<sup>1</sup> specified terms are to be implied<sup>2</sup> notwithstanding any express term of the agreement<sup>3</sup>.

On the application of either party made within the relevant period<sup>4</sup>, the court<sup>5</sup> may:

- 2650 (1) order that there shall be implied into the agreement terms concerning specified<sup>6</sup> matters<sup>7</sup>;
- 2651 (2) make an order:
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- 93. (a) varying or deleting any express term of the agreement;
- 94. (b) in the case of any express term which would otherwise be unenforceable<sup>8</sup>, provide for the term to have full effect or to have such effect subject to any variation specified in the order<sup>9</sup>.
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On any such application the court must make such provision as it considers just and equitable in the circumstances<sup>10</sup>.

1 As to the agreements to which the Mobile Homes Act 1983 applies see PARA 1268 ante.

2 I.e. the terms set out in *ibid* s 2(1), Sch 1 Pt I (paras 1-29) (as amended); see PARA 1272 et seq post. However, whether a caravan site owner is entitled to terminate an agreement permitting occupation of a plot on the site because the occupier has altered his home so that it is no longer a mobile home is to be determined by interpreting the agreement between the parties in accordance with the ordinary principles of contract rather than in accordance with the terms implied by statute: *Howard v Charlton* [2002] EWCA Civ 1086, [2003] 1 P & CR 343, sub nom *Charlton v Howard* [2002] All ER (D) 367 (Jul).

3 *Ibid* s 2(1).

4 For these purposes, 'the relevant period' means the period beginning with the date on which the agreement is made and ending (1) six months after that date; or (2) where a written statement relating to the agreement is given to the occupier after that date (whether or not in compliance with an order under s 1(6) (as substituted: see PARA 1268 ante)), six months after the date on which the statement is given; and s 1(8) (as substituted: see PARA 1268 ante) applies for these purposes as it applies for the purposes of s 1 (as substituted): s 2(3A) (s 2(3), (3A) substituted by the Housing Act 2004 s 206(2)(b); for transitional provisions see s 206(4)).

A statement given voluntarily but late brings s 2(2), (3) (as amended) (see the text and notes 5-9 *infra*) into operation: *Barton and Barton v Care and Care* (1992) 24 HLR 684, [1992] 2 EGLR 174, CA.

5 For the meaning of 'the court' see PARA 1268 note 13 ante; and as to the jurisdiction of the court see PARA 1268 ante.

6 le the matters mentioned in the Mobile Homes Act 1983 s 2(2), Sch 1 Pt II (paras 1-7) (as amended): see PARA 1279 post.

7 Ibid s 2(2) (amended by the Housing Act 2004 s 206(2)(a); for transitional provisions see s 206(4)).

8 le any term to which the Mobile Homes Act 1983 s 1(6) (as substituted) applies: see PARA 1268 ante.

9 Ibid s 2(3) (as substituted: see note 4 supra); and see *Stroud v Weir Associates Ltd* (1987) 19 HLR 151, [1987] 1 EGLR 190, CA; *Barton and Barton v Care and Care* (1992) 24 HLR 684, [1992] 2 EGLR 174, CA (cited in note 4 supra).

10 Mobile Homes Act 1983 s 2(4); and see *Grant v Allen* [1981] QB 486, [1980] 1 All ER 720, CA (decided under the Mobile Homes Act 1975).

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## (ii) Terms Automatically Implied

### 1272. Duration of agreement; termination by occupier or owner.

Notwithstanding any express term of the agreement<sup>1</sup>, the following terms must be implied therein:

2652 (1) the right to station the mobile home<sup>2</sup> on land forming part of the protected site<sup>3</sup> subsists until the agreement is determined under head (3), head (4), head (5) or head (6) below<sup>4</sup>;

2653 (2) if the owner's<sup>5</sup> estate or interest is insufficient to enable him to grant the right for an indefinite period, the period for which the right subsists does not extend beyond the date when the owner's estate or interest determines<sup>6</sup>;

2654 (3) the occupier<sup>7</sup> is entitled to terminate the agreement by notice in writing<sup>8</sup> given to the owner not less than four weeks before the date on which it is to take effect<sup>9</sup>;

2655 (4) the owner is entitled to terminate the agreement forthwith if, on the application of the owner, the court<sup>10</sup> is satisfied that the occupier has breached a term of the agreement and, after service of a notice to remedy the breach<sup>11</sup>, has not complied with the notice within a reasonable time, and the court considers it reasonable for the agreement to be terminated<sup>12</sup>;

2656 (5) the owner is entitled to terminate the agreement forthwith if, on application of the owner, the court:

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95. (a) in England, is satisfied that the occupier is not occupying the mobile home as his only or main residence and considers it reasonable for the agreement to be terminated;

96. (b) in Wales, is satisfied that the occupier is not occupying the mobile home as his only or main residence<sup>13</sup>;

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2657 (6) the owner is entitled to terminate the agreement:

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97. (a) in England, forthwith if, on the application of the owner, the court is satisfied that, having regard to its condition, the mobile home is having a

detrimental effect on the amenity of the site and the court considers it reasonable for the agreement to be terminated;

98. (b) in Wales, at the end of a relevant period<sup>14</sup> if, on the application of the owner, the court is satisfied that, having regard to its condition, the mobile home is having a detrimental effect on the amenity of the site or is likely to have such an effect before the end of the next relevant period<sup>15</sup>;

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- 2658 (7) where the agreement is terminated as mentioned in head (3), head (4), head (5) or head (6) above, the occupier is entitled to recover from the owner so much of any payment made by him in pursuance of the agreement as is attributable to a period beginning after the termination<sup>16</sup>.

1 le any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 For the meaning of 'mobile home' see PARA 1267 ante.

3 For the meaning of 'protected site' see PARA 1268 note 5 ante.

4 Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 1. Sch 1 Pt I para 1 is subject to Sch 1 Pt I para 2 (see head (2) in the text): Sch 1 Pt I para 1.

5 For the meaning of 'owner' see PARA 1268 note 7 ante.

6 Mobile Homes Act 1983 Sch 1 Pt I para 2(1). If planning permission for the use of the protected site as a site for mobile homes has been granted in terms such that it will expire at the end of a specified period, the period for which the right subsists does not extend beyond the date when the planning permission expires: Sch 1 Pt I para 2(2). If before the end of a period so determined there is a change in circumstances which allows a longer period, account is to be taken of that change: Sch 1 Pt I para 2(3). For these purposes, 'planning permission' means permission under the Town and Country Planning Act 1990 Pt III (ss 55-106B) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 213 et seq): Mobile Homes Act 1983 s 5(1) (definition amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 59).

7 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

8 There is no prescribed form for notice of termination.

9 Mobile Homes Act 1983 Sch 1 Pt I para 3.

10 For the meaning of 'the court' see PARA 1268 note 13 ante.

11 There is no prescribed form for notice of remedy of a breach. The ordinary principles of contract law are to be applied to determine whether or not there has been a breach: *Howard v Charlton* [2002] EWCA Civ 1086, [2003] 1 P & CR 343, sub nom *Charlton v Howard* [2002] All ER (D) 367 (Jul).

12 Mobile Homes Act 1983 Sch 1 Pt I para 4; and see *Loveridge v Healey* [2004] EWCA Civ 173, (2004) Times, 27 February, [2004] All ER (D) 359 (Feb) (notice of termination not served but defendant admitted that claimants had given him a notice calling on him to remedy the fact that the weight and condition of the mobile home rendered it immovable; held that the court was not bound as a matter of law to hold that the notice had not been served). Quaere to what extent this provision would, in the case of a tenancy, interrelate with the law of forfeiture and the Law of Property Act 1925 s 146 (as amended). As to forfeiture see PARA 603 et seq ante.

A claim under the Mobile Homes Act 1983 Sch 1 Pt I paras 4, 5 or 6 (as amended) (see heads (4)-(6) in the text) may be brought using the procedure set out in CPR Pt 55 s 1 (CPR 55.1-CPR 55.10A) (see PARA 660 et seq ante) if the claim is started in the same claim form as a claim enforcing the rights referred to in the Caravan Sites Act 1968 s 3(1)(b) (see PARA 1283 post at head (2) in the text): *Practice Direction--Possession Claims* PD 55 para 1.8.

13 Mobile Homes Act 1983 Sch 1 Pt I para 5 (amended in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (2)); and see note 12 supra. For these purposes, 'only or main residence' should be given its ordinary meaning and accordingly refers to the nature of the occupation at the time of the hearing and not at the time when the site owner makes an application to the court: see *Omar Parks Ltd v Elkington*, *Ron Grundy (Melbourne) Ltd v Boneheyo* [1993] 1 All ER 282, [1992] 1 WLR 1270, CA. See also PARA 1268 note 6 ante.

14 For these purposes, 'relevant period' means the period of five years beginning with the commencement of the agreement and each succeeding period of five years: Mobile Homes Act 1983 Sch 1 Pt I para 6(2) (repealed in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (3)(b)).

15 Mobile Homes Act 1983 Sch 1 Pt I para 6(1) (amended by the Housing Act 2004 ss 207(1), (2)(a), 266, Sch 16; for transitional provisions see s 207(6), (7)(a); further amended in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (3)(a)). See also note 12 supra. If, on such an application by the owner, the court (1) in England considers that, having regard to the present condition of the mobile home, head (6)(a) in the text applies to it, but the court also considers that it would be reasonably practicable for particular repairs to be carried out on the mobile home that would result in that head not applying to it; or (2) in Wales, considers that, having regard to the present condition of the mobile home, either limb of the condition set out in head (6)(b) in the text applies to it, but the court also considers that it would be reasonably practicable for particular repairs to be carried out on the mobile home that would result in neither of those limbs of that condition applying to it and, in both England and Wales, the occupier indicates that he intends to carry out those repairs, then in such a case the court may make an order adjourning proceedings on the application for such period specified in the order as the court considers reasonable to allow the repairs to be carried out: Mobile Homes Act 1983 Sch 1 Pt I para 6(3), (4) (Sch 1 Pt I para 6(3)-(5) added by the Housing Act 2004 s 207(1), (2)(b); for transitional provisions see s 207(6), (7)(a); further amended in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (3)(c)). The repairs must be set out in the order: Mobile Homes Act 1983 Sch 1 Pt I para 6(4) (as so added). If the court makes such an order, the application must not be further proceeded with unless the court is satisfied that the specified period has expired without the repairs having been carried out: Sch 1 Pt I para 6(5) (as so added).

16 Ibid Sch 1 Pt I para 7.

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

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### 1273. Sale or gift of mobile home and assignment of agreement.

Notwithstanding any express term of the agreement<sup>1</sup>, the following terms must be implied therein:

- 2659 (1) the occupier<sup>2</sup> is entitled to sell the mobile home<sup>3</sup>, and to assign the agreement, to a person approved of by the owner<sup>4</sup>, whose approval must not be unreasonably withheld<sup>5</sup>;
- 2660 (2) the occupier is entitled to give the mobile home, and to assign the agreement, to a member of his family<sup>6</sup> approved by the owner, whose approval must not be unreasonably withheld<sup>7</sup>.

1 le any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

3 For the meaning of 'mobile home' see PARA 1267 ante.

4 For the meaning of 'owner' see PARA 1268 note 7 ante.

5 Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 8(1). For the meaning of 'unreasonably withheld' see *Lee v Berkeley Leisure Group Ltd* (1995) 73 P & CR 493, sub nom *Berkeley Leisure Group v Lee* 29 HLR 663, CA; cf the Landlord and Tenant Act 1927 s 19(1); and PARA 486 ante. The occupier may serve on the owner a request for the owner to approve a person for these purposes: Mobile Homes Act 1983 Sch 1 Pt I para 8(1A) (Sch 1 Pt I para 8(1A)-(1G) added by the Housing Act 2004 s 207(2), (3)(a); for transitional provisions see s 207(6), (7)(b)). Where the owner receives such a request, he must, within the period of 28 days beginning with the date on which he received the request (1) approve the person, unless it is reasonable for him not to do so; and (2) serve on the occupier notice of his decision whether or not to approve the person: Mobile Homes Act 1983 Sch 1 Pt I para 8(1B) (as so added).

In England, the owner may not give his approval subject to conditions and if the approval is withheld, the notice under Sch 1 Pt I para 8(1B) (as so added) must specify the reasons for withholding it: Sch 1 Pt I para 8(1C), (1D) (substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (4)(a), (b)). As to the application of these amendments see further PARA 1274 note 2 post.

In Wales, the notice given by the owner must specify: (a) if the approval is given subject to conditions, the conditions; and (b) if the approval is withheld, the reasons for withholding it: Mobile Homes Act 1983 Sch 1 Pt I para 8(1C) (as so added). The giving of approval subject to any condition that is not a reasonable condition does not satisfy the requirement in head (2) supra: Sch 1 Pt I para 8(1D) (as so added).

If the owner fails to notify the occupier as required in England by Sch 1 Pt I para 8(1B) (as added) and, if applicable, Sch 1 Pt I para 8(1D) (as substituted) or in Wales by Sch 1 Pt I para 8(1B), 8(1C) (as so added), the occupier may apply to the court for an order declaring that the person is approved for the purposes of head (1) in the text; and the court may make such an order if it thinks fit: Sch 1 Pt I para 8(1E) (as so added; amended in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (4)(a), (c)).

It is for the owner: (i) if he served a notice in England as mentioned in the Mobile Homes Act 1983 Sch 1 Pt I para 8(1B) (as so added) and, if applicable, Sch 1 Pt I para 8(1D) (as substituted) or in Wales as mentioned in Sch 1 Pt I para 8(1B), 8(1C) (as so added) and the question arises whether he served the notice within the required period of 28 days, to show that he did; (ii) in Wales, if he gave his approval subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was; (iii) in England and Wales if he did not give his approval and the question arises whether it was reasonable for him not to do so, to show that it was reasonable: Sch 1 Pt I para 8(1F) (as so added; amended in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (4)(a), (d)). A request or notice under the Mobile Homes Act 1983 Sch 1 Pt I para 8 (as amended) must be in writing and may be served by post: Sch 1 Pt I para 8(1G) (as so added).

Where the occupier so sells the mobile home and assigns the agreement, the owner is entitled to receive a commission on the sale at a rate not exceeding such rate as may be specified by an order made by the appropriate national authority: Mobile Homes Act 1983 Sch 1 Pt I para 8(2) (amended by the Housing Act 2004 s 207(1), (3)(b)). Such an order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament, and may make different provision for different areas or for sales at different prices: Mobile Homes Act 1983 Sch 1 Pt I para 8(3) (amended by the Housing Act 2004 s 207(1), (3)(c)). For the meaning of 'the appropriate national authority' see PARA 1268 note 10 ante; to the Secretary of State see PARA 27 note 3 ante; and as to the Assembly see PARA 27 note 4 ante; and CONSTITUTIONAL LAW AND HUMAN RIGHTS. As to the exercise of this power see the Mobile Homes (Commissions) Order 1983, SI 1983/748, which came into force on 20 May 1983 (see art 1) and provides that the maximum rate of commission to which an owner is entitled on the sale by an occupier of a mobile home is 10% (see art 2). In England, except to the extent mentioned in the Mobile Homes Act 1983 Sch 1 Pt I para 8(2) (as so amended), the owner may not require any payment to be made (whether to himself or otherwise) in connection with the sale of the mobile home, and the assignment of the agreement, as mentioned in Sch 1 Pt I para 8(1) (as amended): Sch 1 Pt I para 8(2A) (added in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (4)(a), (e)).

The following provisions apply to a request by the occupier for the owner to approve a person for the purposes of head (1) or head (2) in the text: Mobile Homes Act 1983 s 2(5), Sch 1 Pt III para 1(1) (s 2(5), Sch 1 Pt III added by the Housing Act 2004 ss 265(1), s 207(5), Sch 15 para 9). If a person ('the recipient') receives such a request and he, though not the owner, has an estate or interest in the protected site, and believes that another person is the owner (and that the other person has not received such a request), the recipient owes a duty to the occupier to take such steps as are reasonable to secure that the other person receives the request within the period of 28 days beginning with the date on which the recipient receives it: Mobile Homes Act 1983 Sch 1 Pt III para 1(2) (as so added). In Sch 1 Pt I para 8(1B) (as added), as it applies to any such request, any reference to the owner receiving such a request includes a reference to his receiving it in accordance with Sch 1 Pt III para 1(2): Sch 1 Pt III para 1(3) (as so added). A claim that a person has broken the duty under Sch 1 Pt III para 1(2) (as added) may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty; and the right so conferred is in addition to any right to bring proceedings, in respect of a breach of any implied term having effect by virtue of Sch 1 Pt I para 8 (as amended) (see head (1) in the text) or Sch 1 Pt I para 9 (as amended) (see head (2) in the text), against a person bound by that term: Sch 1 Pt III para 2(1), (2) (as so added).

6 For these purposes, a person is a member of another's family if (1) he is his spouse, civil partner, parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece, treating (a) any relationship by marriage or civil partnership as a relationship by blood, any relationship of the half blood as a relationship of the whole blood and the stepchild of any person as his child; and (b) an illegitimate person as the legitimate child of his mother and reputed father; or (2) if they live together as husband and wife or as if they were civil partners: *ibid* s 5(3) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 88).

7 Mobile Homes Act 1983 Sch 1 Pt I para 9(1) (numbered as such, and Sch 1 Pt I para 9(2) added, by the Housing Act 2004 s 207(1), (4)). The Mobile Homes Act 1983 Sch 1 Pt I para 8(1A)-(1G) (as added) applies in relation to the approval of a person for these purposes as it applies in relation to the approval of a person for the purposes of head (1) in the text: Sch 1 Pt I para 9(2) (as so added). See note 5 *supra*. In England, the owner may not require any payment to be made (whether to himself or otherwise) in connection with the gift of the mobile home, and the assignment of the agreement, as mentioned in Sch 1 Pt I para 9(1) (as so amended): Sch 1 Pt I para 9(3) (added in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (5)). As to the application of these amendments see further *PARA 1274* note 2 *post*.

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(ii) Terms Automatically Implied/1274. Resiting of mobile home.

### 1274. Resiting of mobile home.

Notwithstanding any express term of the agreement<sup>1</sup>, the following terms must be implied therein:

2661 (1) in England<sup>2</sup>:

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99. (a) the owner<sup>3</sup> is entitled to require that the occupier's<sup>4</sup> right to station the mobile home<sup>5</sup> is exercisable for any period in relation to another pitch<sup>6</sup> forming part of the protected site ('the other pitch') if, and only if, on the application of the owner, the court<sup>7</sup> is satisfied that the other pitch is broadly comparable to the occupier's original pitch and that it is reasonable for the mobile home to be stationed on the other pitch for that period, or that the owner needs to carry out essential repair or emergency works<sup>8</sup> that can only be carried out if the mobile home is moved to the other pitch for that period, and the other pitch is broadly comparable to the occupier's original pitch;

100. (b) if the owner requires the occupier to station the mobile home on the other pitch so that he can replace, or carry out repairs to, the base on which the mobile home is stationed, he must if the occupier so requires, or the court on the application of the occupier so orders, secure that the mobile home is returned to the original pitch on the completion of the replacement or repairs; and

101. (c) the owner must pay all the costs and expenses incurred by the occupier in connection with his mobile home being moved to and from the other pitch<sup>9</sup>;

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2662 (2) in Wales, if the owner is entitled to require that the occupier's right to station the mobile home shall be exercisable for any period in relation to other land forming part of the protected site:

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102. (a) that other land must be broadly comparable to the land on which the occupier was originally entitled to station the mobile home; and

103. (b) all costs and expenses incurred in consequence of the requirement must be paid by the owner<sup>10</sup>.

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1 le any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 The amendments made to the Mobile Homes Act 1983 s 2(1), Sch 1 by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, apply in relation to any agreement to which that Act applies and which relates to the stationing of a mobile home in England, and apply in relation to any such agreement made at any time before 1 October 2006 as well as in relation to such agreements made on or after that date: Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 1(2), (3). However, in relation to an agreement which commenced at any time before 1 October 2006 ('the relevant date'), the terms implied in the agreement by virtue of that 2006 Order have effect only in relation to times falling on or after the relevant date: art 4(1), (2). If the terms so implied make provision which is inconsistent with (1) any express term of the agreement; or (2) any term implied in the agreement by virtue of the Mobile Homes Act 1983 s 2(2) (as amended), the term referred to in head (1) or head (2) supra ceases to have effect, in relation to times falling on or after the relevant date, so far as it is inconsistent with the terms implied by virtue of the 2006 Order: Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 4(3). Nothing in that Order affects (a) any right or liability which has accrued before the relevant date, or any remedy in respect of any such right or liability, (b) any application to terminate the agreement which was made before that date by virtue of the Mobile Homes Act 1983 Sch 1 Pt I para 4, 5 or 6 (as amended) (termination by owner); (c) any request for approval which was made before that date by virtue of Sch 1 Pt I para 8 (as amended) (sale of mobile home) or Sch 1 Pt I para 9 (as amended) (gift of mobile home); (d) the amount of any new pitch fee payable in respect of any period which falls (wholly or in part) on or after the relevant date which was determined before that date; or (e) (without prejudice to the generality of head (a) supra) any right to the determination of a new pitch fee payable as from a date before the relevant date, and in respect of any period which falls (wholly or in part) on or after the relevant date, if that right subsists immediately before the relevant date: Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 4(4).

3 For the meaning of 'owner' see PARA 1268 note 7 ante.

4 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

5 For the meaning of 'mobile home' see PARA 1267 ante.

6 'Pitch' means the land, forming part of the protected site and including any garden area, on which the occupier is entitled to station the mobile home under the terms of the agreement: Mobile Homes Act 1983 Sch 1 Pt I para 29 (Sch 1 Pt I paras 10-29 substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (6), with effect from 1 October 2006: see art 1(1)). See also note 2 supra.

7 For the meaning of 'the court' see PARA 1268 note 13 ante; and as to the jurisdiction of the court see PARA 1268 ante.

8 'Essential repair or emergency works' means (1) repairs to the base on which the mobile home is stationed; (2) works or repairs needed to comply with any relevant legal requirements; or (3) works or repairs in connection with restoration following flood, landslide or other natural disaster: Mobile Homes Act 1983 Sch 1 Pt I para 10(4) (as substituted: see note 6 supra). See also note 2 supra.

9 Ibid Sch 1 Pt I para 10(1)-(3) (as substituted: see note 6 supra). See also note 2 supra.

10 Mobile Homes Act 1983 Sch 1 Pt I para 10 (as originally enacted).

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(ii) Terms Automatically Implied/1275. Quiet enjoyment of the mobile home; owner's rights of entry to pitch.

### **1275. Quiet enjoyment of the mobile home; owner's rights of entry to pitch.**

Notwithstanding any express term of the agreement<sup>1</sup>, the following additional terms must be implied therein in relation to England only<sup>2</sup>:

- 2663 (1) the occupier<sup>3</sup> is entitled to quiet enjoyment of the mobile home<sup>4</sup> together with the pitch<sup>5</sup> during the continuance of the agreement, subject to the implied term relating to resiting of the mobile home<sup>6</sup> and to heads (2) to (4) below<sup>7</sup>; and the rights conferred on the owner<sup>8</sup> by heads (2) to (4) below do not extend to the mobile home<sup>9</sup>;
- 2664 (2) the owner may enter the pitch without prior notice between the hours of 9 am and 6 pm to deliver written communications, including post and notices, to the occupier and to read any meter for gas, electricity, water, sewerage or other services supplied by the owner<sup>10</sup>;
- 2665 (3) the owner may enter the pitch to carry out essential repair or emergency works<sup>11</sup> on giving as much notice to the occupier, whether in writing or otherwise, as is reasonably practicable in the circumstances<sup>12</sup>;
- 2666 (4) unless the occupier has agreed otherwise, the owner may enter the pitch for a reason other than one specified in head (2) or head (3) above only if he has given the occupier at least 14 clear days' written notice of the date, time and reason for his visit<sup>13</sup>.

1 In any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 As to the application of these provisions see PARA 1274 note 2 ante.

3 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

4 For the meaning of 'mobile home' see PARA 1267 ante.

5 For the meaning of 'pitch' see PARA 1274 note 6 ante.

6 In subject to the Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 10 (as substituted): see PARA 1274 ante.

7 Mobile Homes Act 1983 Sch 1 Pt I para 11 (Sch 1 Pt I paras 10-29 substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (6), with effect from 1 October 2006: see art 1(1)). See also note 2 supra.

8 For the meaning of 'owner' see PARA 1268 note 7 ante.

9 Mobile Homes Act 1983 Sch 1 Pt I para 15 (as substituted: see note 7 supra).

10 Ibid Sch 1 Pt I para 12 (as substituted: see note 7 supra). See also the text and notes 8-9 supra.

11 For the meaning of 'essential repair or emergency works' see PARA 1274 note 8 ante.

12 Mobile Homes Act 1983 Sch 1 Pt I para 13 (as substituted: see note 7 supra). See also the text and notes 8-9 supra.

13 Ibid Sch 1 Pt I para 14 (as substituted: see note 7 supra). See also the text and notes 8-9 supra.

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(ii) Terms Automatically Implied/1276. Pitch fee.

### 1276. Pitch fee.

Notwithstanding any express term of the agreement<sup>1</sup>, the following additional terms must be implied therein in relation to England only<sup>2</sup>:

- 2667 (1) the pitch fee<sup>3</sup> can only be changed in accordance with head (2) below, either with the agreement of the occupier<sup>4</sup> or if the court<sup>5</sup>, on the application of the owner<sup>6</sup> or the occupier, considers it reasonable for the pitch fee to be changed and makes an order determining the amount of the new pitch fee<sup>7</sup>;
- 2668 (2) the pitch fee must be reviewed annually as at the review date<sup>8</sup> and in accordance with the statutory procedure<sup>9</sup>;
- 2669 (3) when determining the amount of the new pitch fee particular regard must be had to any sums expended by the owner since the last review date<sup>10</sup> on specified improvements<sup>11</sup>, to any decrease in the amenity of the protected site<sup>12</sup> since the last review date and to the effect of any enactment<sup>13</sup> which has come into force since the last review date<sup>14</sup>;
- 2670 (4) when determining the amount of the new pitch fee, any costs incurred by the owner in connection with expanding the protected site are not to be taken into account<sup>15</sup>;
- 2671 (5) there is a presumption that the pitch fee is to increase or decrease by a percentage which is no more than any percentage increase or decrease in the retail prices index<sup>16</sup> since the last review date, unless this would be unreasonable having regard to head (3) above<sup>17</sup>.

1 In any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 As to the application of these provisions see PARA 1274 note 2 ante.

3 'Pitch fee' means the amount which the occupier is required by the agreement to pay to the owner for the right to station the mobile home on the pitch and for use of the common areas of the protected site and their maintenance, but does not include amounts due in respect of gas, electricity, water and sewerage or other services, unless the agreement expressly provides that the pitch fee includes such amounts: Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 29 (Sch 1 Pt I paras 10-29 substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (6), with effect from 1 October 2006: see art 1(1)). See also note 2 supra. For the meaning of 'pitch' see PARA 1274 note 6 ante; and for the meaning of 'mobile home' see PARA 1267 ante.

4 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

5 For the meaning of 'the court' see PARA 1268 note 13 ante; and as to the jurisdiction of the court see PARA 1268 ante.

6 For the meaning of 'owner' see PARA 1268 note 7 ante.

7 Mobile Homes Act 1983 Sch 1 Pt I para 16 (as substituted: see note 3 supra).

8 Ibid Sch 1 Pt I para 17(1) (as substituted: see note 3 supra). 'Review date' means the date specified in the written statement as the date on which the pitch fee will be reviewed in each year, or if no such date is specified, each anniversary of the date the agreement commenced; and 'written statement' means the written statement that the owner of the protected site is required to give to the occupier by s 1(2) (as substituted): Sch 1 Pt I para 29 (as substituted: see note 3 supra). If the review date in 2006 fell on the relevant date (ie 1 October 2006), or fell after that date but before 30 October 2006, then for the purposes of Sch 1 Pt I para 17(2), (5) (as substituted) (see note 9 infra) the review date was deemed to be 30 October 2006, but any written notice served on the occupier by the owner before the relevant date and setting out the owner's proposals in respect of the new pitch fee payable as from the review date in 2006 were as effective for the purposes of Sch 1 Pt I para 17(2) (as substituted) as one served on the relevant date: Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 4(5).

9 At least 28 clear days before the review date the owner must serve on the occupier a written notice setting out his proposals in respect of the new pitch fee: Mobile Homes Act 1983 Sch 1 Pt I para 17(2) (as substituted: see note 3 supra). See also note 8 supra. If the occupier agrees to the proposed new pitch fee, it is payable as from the review date: Sch 1 Pt I para 17(3) (as so substituted). If the occupier does not agree to the proposed new pitch fee (1) the owner may apply to the court for an order under Sch 1 Pt I para 16(b) (as substituted) determining the amount of the new pitch fee; (2) the occupier must continue to pay the current pitch fee to the owner until such time as the new pitch fee is agreed by the occupier or an order determining the amount of the new pitch fee is made by the court under Sch 1 Pt I para 16(b) (as substituted); and (3) the new pitch fee is payable as from the review date but the occupier is not to be treated as being in arrears until the twenty-eighth day after the date on which the new pitch fee is agreed or, as the case may be, the twenty-eighth day after the date of the court order determining the amount of the new pitch fee: Sch 1 Pt I para 17(4) (as so substituted). An application under head (1) supra may be made at any time after the end of the period of 28 days beginning with the review date: Sch 1 Pt I para 17(5) (as so substituted).

If the owner (a) has not served the notice required by Sch 1 Pt I para 17(2) (as substituted) by the time by which it was required to be served; but (b) at any time thereafter serves on the occupier a written notice setting out his proposals in respect of a new pitch fee, the following provisions apply: Sch 1 Pt I para 17(6) (as so substituted). If (at any time) the occupier agrees to the proposed pitch fee, it is payable as from the twenty-eighth day after the date on which the owner serves the notice under head (b) supra: Sch 1 Pt I para 17(7) (as so substituted). If the occupier has not agreed to the proposed pitch fee: (i) the owner may apply to the court for an order under Sch 1 Pt I para 16(b) (as substituted) determining the amount of the new pitch fee; (ii) the occupier must continue to pay the current pitch fee to the owner until such time as the new pitch fee is agreed by the occupier or an order determining the amount of the new pitch fee is made by the court under Sch 1 Pt I para 16(b) (as substituted); and (iii) if the court makes such an order, the new pitch fee is payable as from the twenty-eighth day after the date on which the owner serves the notice under Sch 1 Pt I para 16(b) (as substituted): Sch 1 Pt I para 17(8) (as so substituted). Such an application may be made at any time after the end of the period of 56 days beginning with date on which the owner serves the notice under Sch 1 Pt I para 16(b) (as substituted): Sch 1 Pt I para 17(9) (as so substituted). The occupier is not to be treated as being in arrears (A) where Sch 1 Pt I para 17(7) (as substituted) applies, until the twenty-eighth day after the date on which the new pitch fee is agreed; or (B) where head (ii) supra applies, until the twenty-eighth day after the date on which the new pitch fee is agreed or, as the case may be, the twenty-eighth day after the date of the court order determining the amount of the new pitch fee: Sch 1 Pt I para 17(10) (as so substituted).

10 In a case where the pitch fee has not been previously reviewed, references in head (3) in the text to the last review date are to be read as references to the date when the agreement commenced: ibid Sch 1 Pt I para 18(3) (as substituted: see note 3 supra).

11 The improvements (1) which are for the benefit of the occupiers of mobile homes on the protected site; (2) which were the subject of consultation in accordance with ibid Sch 1 Pt I para 22(e) and (f) (as substituted) PARA 1278 post); and (3) to which a majority of the occupiers have not disagreed in writing or which, in the case of such disagreement, the court, on the application of the owner, has ordered should be taken into account when determining the amount of the new pitch fee: Sch 1 Pt I para 18(1)(a) (as substituted: see note 3 supra). When calculating what constitutes a majority of the occupiers for the purposes of head (3) supra each mobile home is to be taken to have only one occupier and, in the event of there being more than one occupier of a mobile home, its occupier is to be taken to be the occupier whose name first appears on the agreement: Sch 1 Pt I para 18(2) (as so substituted). In the case of improvements begun on the relevant date (ie 1 October 2006), or after that date but before 30 October 2006, regard may be had to any sums expended on such improvements when determining the amount of a new pitch fee in accordance with Sch 1 Pt I para 18 (as substituted) even if the consultation requirements mentioned in head (2) supra have not been complied with by the owner in relation to the improvements: Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 4(6).

12 For the meaning of 'protected site' see PARA 1268 note 5 ante.

13    le other than an order under the Mobile Homes Act 1983 Sch 1 Pt I para 8(2) (as amended): see PARA 1273 ante.

14    Mobile Homes Act 1983 Sch 1 Pt I para 18(1) (as substituted: see note 3 supra).

15    Ibid Sch 1 Pt I para 19 (as substituted: see note 3 supra).

16    'Retail prices index' means the general index (for all items) published by the Office for National Statistics or, if that index is not published for a relevant month, any substituted index or index figures published by that Office: ibid Sch 1 Pt I para 29 (as substituted: see note 3 supra).

17    Ibid Sch 1 Pt I para 20(1) (as substituted: see note 3 supra). Schedule I Pt I para 18(3) (as substituted) (see note 3 supra) applies for these purposes as it applies for the purposes of Sch 1 Pt I para 18 (as substituted): Sch 1 Pt I para 20(2) (as so substituted).

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

### 1276 Pitch fee

NOTE 16--Reference to Office for National Statistics now to Statistics Board (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 605): 1983 Act Sch 1 Pt I para 29 (definition amended by Statistics and Registration Service Act 2007 Sch 3 para 2).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(ii) Terms Automatically Implied/1277. Occupier's obligations.

### 1277. Occupier's obligations.

Notwithstanding any express term of the agreement<sup>1</sup>, the following additional terms must be implied therein in relation to England only<sup>2</sup>. The occupier<sup>3</sup> must:

- 2672 (1) pay the pitch fee<sup>4</sup> to the owner<sup>5</sup>;
- 2673 (2) pay to the owner all sums due under the agreement in respect of gas, electricity, water, sewerage or other services supplied by the owner;
- 2674 (3) keep the mobile home<sup>6</sup> in a sound state of repair;
- 2675 (4) maintain the outside of the mobile home, and the pitch<sup>7</sup>, including all fences and outbuildings belonging to, or enjoyed with, it and the mobile home, in a clean and tidy condition; and
- 2676 (5) if requested by the owner, provide him with documentary evidence of any costs or expenses in respect of which the occupier seeks reimbursement<sup>8</sup>.

1    le any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2    As to the application of these provisions see PARA 1274 note 2 ante.

3    For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

4 For the meaning of 'pitch fee' see PARA 1276 note 3 ante.

5 For the meaning of 'owner' see PARA 1268 note 7 ante.

6 For the meaning of 'mobile home' see PARA 1267 ante.

7 For the meaning of 'pitch' see PARA 1274 note 6 ante.

8 Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 21 (substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (6), with effect from 1 October 2006: see art 1(1)). See also note 2 supra.

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(ii) Terms Automatically Implied/1278. Owner's obligations.

### 1278. Owner's obligations.

Notwithstanding any express term of the agreement<sup>1</sup>, the following additional terms must be implied therein in relation to England only<sup>2</sup>:

2677 (1) the owner<sup>3</sup> must:

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104. (a) if requested by the occupier<sup>4</sup>, and on payment by the occupier of a charge of not more than £30, provide accurate written details of the size of the pitch<sup>5</sup> and the base on which the mobile home<sup>6</sup> is stationed and the location of the pitch and the base within the protected site<sup>7</sup>; and such details must include measurements between identifiable fixed points on the protected site and the pitch and the base;

105. (b) if requested by the occupier, provide, free of charge, documentary evidence in support and explanation of any new pitch fee, of any charges for gas, electricity, water, sewerage or other services payable by the occupier to the owner under the agreement and of any other charges, costs or expenses payable by the occupier to the owner under the agreement;

106. (c) be responsible for repairing the base on which the mobile home is stationed and for maintaining any gas, electricity, water, sewerage or other services supplied by the owner to the pitch or to the mobile home;

107. (d) maintain in a clean and tidy condition those parts of the protected site, including access ways, site boundary fences and trees, which are not the responsibility of any occupier of a mobile home stationed on the protected site;

108. (e) consult<sup>8</sup> the occupier about improvements to the protected site in general, and in particular about those which the owner wishes to be taken into account when determining the amount of any new pitch fee; and

109. (f) consult a qualifying residents' association<sup>9</sup>, if there is one, about all matters which relate to the operation and management of, or improvements to, the protected site and may affect the occupiers either directly or indirectly<sup>10</sup>;

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- 2678 (2) the owner must not do or cause to be done anything which may adversely affect the ability of the occupier to perform his obligations with regard to repair or maintenance<sup>11</sup>;
- 2679 (3) the owner must by notice inform the occupier and any qualifying residents' association of the address in England or Wales at which notices, including notices of proceedings, may be served on him by the occupier or a qualifying residents' association; and if he fails to comply with this obligation, then unless by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager whose functions include receiving from the occupier the pitch fee, payments for services supplied or other charges<sup>12</sup>, any amount otherwise due from the occupier to the owner in respect of the pitch fee is to be treated for all purposes as not being due from the occupier to the owner at any time before the owner does so comply<sup>13</sup>;
- 2680 (4) where in accordance with the agreement the owner gives any written notice to the occupier or, as the case may be, a qualifying residents' association, the notice must contain the following information:
- 90
110. (a) the name and address of the owner; and
111. (b) if that address is not in England or Wales, an address in England or Wales at which notices, including notices of proceedings, may be served on the owner;
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- 2681 and where the occupier or a qualifying residents' association receives such a notice, but it does not contain the information so required to be contained in it, then unless there is in force an appointment of a receiver or manager as described in head (3) above<sup>14</sup>, the notice is to be treated as not having been given until such time as the owner gives the information to the occupier or, as the case may be, the association in respect of the notice<sup>15</sup>;
- 2682 (5) where the owner makes any demand for payment by the occupier of the pitch fee, or in respect of services supplied or other charges, the demand must contain:
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112. (a) the name and address of the owner; and
113. (b) if that address is not in England or Wales, an address in England or Wales at which notices, including notices of proceedings, may be served on the owner;
- 93
- 2683 and where the occupier receives such a demand, but it does not contain the information so required to be contained in it, the amount demanded is to be treated for all purposes as not being due from the occupier to the owner at any time before the owner gives that information to the occupier in respect of the demand, except in relation to any time when, by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager whose functions include receiving from the occupier the pitch fee, payments for services supplied or other charges<sup>16</sup>.

1 le any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

2 As to the application of these provisions see PARA 1274 note 2 ante.

3 For the meaning of 'owner' see PARA 1268 note 7 ante.

4 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

5 For the meaning of 'pitch' see PARA 1274 note 3 ante.

6 For the meaning of 'mobile home' see PARA 1267 ante.

7 For the meaning of 'protected site' see PARA 1268 note 5 ante.

8 For these purposes, to 'consult' the occupier means (1) to give the occupier at least 28 clear days' notice in writing of the proposed improvements which (a) describes the proposed improvements and how they will benefit the occupier in the long and short term; (b) details how the pitch fee may be affected when it is next reviewed; and (c) states when and where the occupier can make representations about the proposed improvements; and (2) to take into account any representations made by the occupier about the proposed improvements, in accordance with head (c) supra, before undertaking them: Mobile Homes Act 1983 s 2(1), Sch 1 Pt I para 24 (Sch 1 Pt I paras 24-29 substituted in relation to England by the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755, art 2(1), (6), with effect from 1 October 2006: see art 1(1)). See also note 2 supra.

9 A residents' association is a qualifying residents' association in relation to a protected site if (1) it is an association representing the occupiers of mobile homes on that site; (2) at least 50% of the occupiers of the mobile homes on that site are members of the association; (3) it is independent from the owner, who together with any agent or employee of his is excluded from membership; (4) subject to head (3) supra, membership is open to all occupiers who own a mobile home on that site; (5) it maintains a list of members which is open to public inspection together with the rules and constitution of the residents' association; (6) it has a chairman, secretary and treasurer who are elected by and from among the members; (7) with the exception of administrative decisions taken by the chairman, secretary and treasurer acting in their official capacities, decisions are taken by voting and there is only one vote for each mobile home; and (8) the owner has acknowledged in writing to the secretary that the association is a qualifying residents' association, or, in default of this, the court has so ordered: Mobile Homes Act 1983 Sch 1 Pt I para 28(1) (as substituted: see note 8 supra). When calculating the percentage of occupiers for the purpose of head (2) supra, each mobile home must be taken to have only one occupier and, in the event of there being more than one occupier of a mobile home, its occupier is to be taken to be the occupier whose name first appears on the agreement: Sch 1 Pt I para 28(2) (as so substituted). For these purposes, to 'consult' a qualifying residents' association means (a) to give the association at least 28 clear days' notice in writing of the matters referred to in head (f) in the text which (i) describes the matters and how they may affect the occupiers either directly or indirectly in the long and short term; and (ii) states when and where the association can make representations about the matters; and (b) to take into account any representations made by the association, in accordance with head (a)(ii) supra, before proceeding with the matters: Sch 1 Pt I para 25 (as so substituted).

10 Ibid Sch 1 Pt I para 22 (as substituted: see note 8 supra).

11 Ibid Sch 1 Pt I para 23 (as substituted: see note 8 supra). The obligations referred to are those under Sch 1 Pt I para 21(c) or (d) (as substituted): see PARA 1277 ante at heads (3)-(4) in the text.

12 An amount or notice within ibid Sch 1 Pt I para 26(2) or (4) (as substituted) (as the case may be) is not to be treated as so mentioned in relation to any time when, by virtue of an order of any court or tribunal, there is in force an appointment of a receiver or manager whose functions include receiving from the occupier the pitch fee, payments for services supplied or other charges: Sch 1 Pt I para 26(5) (as substituted: see note 8 supra). Nothing in Sch 1 Pt I para 26(3)-(5) (as substituted) applies to any notice containing a demand to which Sch 1 Pt I para 27(1) (as substituted) (see head (5) in the text) applies: Sch 1 Pt I para 26(6) (as so substituted).

13 Ibid Sch 1 Pt I para 26(1), (2) (as substituted: see note 8 supra).

14 See note 12 supra.

15 Mobile Homes Act 1983 Sch 1 Pt I para 26(3), (4) (as substituted: see note 8 supra). See also note 12 supra.

16 Ibid Sch 1 Pt I para 27(1)-(3) (as substituted: see note 8 supra).

## UPDATE

### 1272-1278 Terms Automatically Implied

1983 Act Sch 1 Pt I amended in relation to Wales: SI 2007/3151.



PARAS 1386-2000)/(21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(iii) Terms which may be Implied by the Court/1279. Court's power to imply terms.

### **(iii) Terms which may be Implied by the Court**

#### **1279. Court's power to imply terms.**

The court<sup>1</sup> may, on the application of either party<sup>2</sup>, order that there shall be implied in the agreement<sup>3</sup> terms concerning the following matters:

- 2684 (1) the sums payable by the occupier<sup>4</sup> in pursuance of the agreement and the times at which they are paid<sup>5</sup>;
- 2685 (2) the review at yearly intervals of the sums so payable<sup>6</sup>;
- 2686 (3) provision or improvement of services available on the protected site<sup>7</sup>, and the use by the occupier of such services<sup>8</sup>;
- 2687 (4) the preservation of the amenity of the protected site<sup>9</sup>.

In relation to Wales only, the court may also on such an application order that there shall be implied in the agreement terms concerning the following matters, which are automatically implied in relation to England:

- 2688 (a) the right of the occupier to quiet enjoyment of the mobile home<sup>10</sup>;
- 2689 (b) the maintenance and repair of the protected site by the owner<sup>11</sup> and the maintenance and repair of the mobile home by the occupier<sup>12</sup>;
- 2690 (c) access by the owner to the land on which the occupier is entitled to station the mobile home<sup>13</sup>.

1 For the meaning of 'the court' see PARA 1268 note 13 ante; and as to the jurisdiction of the court see PARA 1268 ante.

2 As to the time for making such an application, and as to the court's powers on hearing such an application see PARA 1271 ante.

3 In any agreement to which Mobile Homes Act 1983 applies: see PARA 1268 ante.

4 For the meaning of 'occupier' see PARA 1268 the text and note 3 ante.

5 Mobile Homes Act 1983 s 2(2) (as amended), Sch 1 Pt II para 2.

6 Ibid Sch 1 Pt II para 3. As to whether the concept of 'fair market rent' is applicable to the fixing of annual pitch fees see *Stroud v Weir Associates Ltd* (1987) 19 HLR 151, [1987] 1 EGLR 190, CA (evidence of comparable transactions not relevant in relation to particular review clause then provided by the National Federation of Site Operators and the National Caravan Council because operation of the review was limited to the effect of factors 'applicable to the operation of the park'). As to pitch fees see further PARA 1276 ante.

7 For the meaning of 'protected site' see PARA 1268 note 5 ante.

8 Mobile Homes Act 1983 Sch 1 Pt II para 4.

9 Ibid Sch 1 Pt II para 5.

10 Mobile Homes Act 1983 Sch 1 Pt II para 1. For the meaning of 'mobile home' see PARA 1267 ante. As to the terms about quiet enjoyment which are automatically applied in relation to England see PARA 1275 ante; as to the covenant for quiet enjoyment contained in a lease see PARA 508 et seq ante; and as to the protection of mobile home occupiers on a protected site from unlawful eviction and harassment see PARA 1281 et seq post.

11 For the meaning of 'owner' see PARA 1268 note 7 ante.

12 Mobile Homes Act 1983 Sch 1 Pt II para 6. As to the occupier's and owner's obligations which are automatically applied in relation to England see PARAS 1277-1278 ante.

13 Ibid Sch 1 Pt II para 7. As to the owner's rights of access which are automatically applied in relation to England see PARA 1275 ante.

## UPDATE

### 1279 Court's power to imply terms

TEXT AND NOTES 10-13--1983 Act Sch 1 Pt I paras 1, 6, 7 repealed in relation to Wales: SI 2007/3151.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(2) TERMS OF THE AGREEMENT/(iv) Amendment of Implied Terms/1280. Power to amend implied terms.

## (iv) Amendment of Implied Terms

### 1280. Power to amend implied terms.

The appropriate national authority<sup>1</sup> may by order make such amendments of the terms which are automatically implied in an agreement<sup>2</sup> or of the terms which may be implied by the court<sup>3</sup> as the authority considers appropriate<sup>4</sup>. Such an order:

- 2691 (1) must be made by statutory instrument<sup>5</sup>;
- 2692 (2) may make different provision with respect to different cases or descriptions of case, including different provision for different areas;
- 2693 (3) may contain such incidental, supplementary, consequential, transitional or saving provisions as the authority making the order considers appropriate<sup>6</sup>.

The first order so made in relation to England or Wales respectively may provide for all or any of its provisions to apply in relation to agreements to which the Mobile Homes Act 1983 applies<sup>7</sup> that were made at any time before the day on which the order comes into force, as well as in relation to such agreements made on or after that day<sup>8</sup>.

No order may be so made by the appropriate national authority unless the authority has consulted<sup>9</sup>:

- 2694 (a) such organisations as appear to it to be representative of interests substantially affected by the order; and
- 2695 (b) such other persons as it considers appropriate<sup>10</sup>.

At the date at which this title states the law, these powers had been exercised in relation to England<sup>11</sup> but not in relation to Wales.

1 For the meaning of 'the appropriate national authority' see PARA 1268 note 10 ante.

2 ie amendments of the Mobile Homes Act 1983 s 2(1), Sch 1 Pt I (as amended): see PARA 1272 ante.

3 ie amendments of ibid s 2(2) (as amended), Sch 1 Pt II: see PARA 1279 ante.

4 Ibid s 2A(1) (s 2A added by the Housing Act 2004 s 208(1)).

5 No order may be so made by the Secretary of State unless a draft of the order has been laid before, and approved by a resolution of, each House of Parliament: Mobile Homes Act 1983 s 2A(6) (as added: see note 4 supra). As to the Secretary of State see PARA 27 note 3 ante.

6 Ibid s 2A(2) (as added: see note 4 supra). Without prejudice to the generality of s 2A(1), (2) (as added), an order under s 2A (as added) may: (1) make provision for or in connection with the determination by the court of such questions, or the making by the court of such orders, as are specified in the order; (2) make such amendments of any provision of the 1983 Act as the authority making the order considers appropriate in consequence of any amendment made by the order in Sch 1 Pt I (as amended) or Sch 1 Part II: s 2A(3) (as so added).

7 As to the agreements to which the Mobile Homes Act 1983 applies see PARA 1268 ante.

8 Ibid s 2A(4) (as added: see note 4 supra).

9 For these purposes, consultation undertaken before the date of the passing of the Housing Act 2004 (ie 18 November 2004) constitutes as effective compliance with heads (a)-(b) in the text as if undertaken on or after that date: s 208(2).

10 Mobile Homes Act 1983 s 2A(5) (as added: see note 4 supra).

11 See the Mobile Homes Act 1983 (Amendment of Schedule 1) (England) Order 2006, SI 2006/1755; and PARA 1272 et seq ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(3) PROTECTION FOR RESIDENTIAL OCCUPIERS/1281. Application of protective provisions.

### **(3) PROTECTION FOR RESIDENTIAL OCCUPIERS**

#### **1281. Application of protective provisions.**

The statutory protection for residential occupiers of caravans<sup>1</sup> applies in relation to any licence or contract ('a residential contract'), whether made before or after 26 July 1968<sup>2</sup>, under which a person ('the occupier') is entitled to station a caravan<sup>3</sup> on a protected site and occupy it as his residence, or to occupy as his residence a caravan stationed on any such site<sup>4</sup>. For the purposes of that protection, a protected site is any land in respect of which a site licence is required under Part I of the Caravan Sites and Control of Development Act 1960<sup>5</sup> or would be so required if the provisions of that Act exempting gypsy and other local authority sites<sup>6</sup> were omitted, not being land in respect of which the relevant planning permission<sup>7</sup> or site licence:

- 2696 (1) is expressed to be granted for holiday use only; or
- 2697 (2) is otherwise so expressed or subject to such conditions that there are times of the year when no caravan may be stationed on the land for human habitation<sup>8</sup>.

1 ie the Caravan Sites Act 1968 Pt I (ss 1-5) (as amended): see the text and notes 2-7 infra; and PARAS 1282-1284 post.

2 ie whether made before or after the passing of the Caravan Sites Act 1968: see s 1(1).

3 For these purposes, 'caravan' has the same meaning as in the Caravan Sites and Control of Development Act 1960 Pt I as amended by the Caravan Sites Act 1968 (see PARA 1267 ante; and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1033): Caravan Sites Act 1968 s 16.

4 Ibid s 1(1).

5 le under the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-32) (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1032 et seq.

6 le ibid Sch 1 para 11 or Sch 1 para 11A (as added): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1036 at heads (11)-(12) in the text. Note that sites for gypsies and travellers may also be provided in England by registered social landlords: see the Social Landlords (Permissible Additional Purposes) (England) Order 2006, SI 2006/1968, art 2; and HOUSING. As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

7 For these purposes, 'planning permission' means permission under the Town and Country Planning Act 1990 Pt III (ss 55-106B) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 217 et seq): Caravan Sites Act 1968 s 16 (definition amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 21(2)). The site must be one in respect of which planning permission has been granted for the stationing of one or more caravans: *Balthasar v Mullane* (1985) 17 HLR 561, 51 P & CR 107, CA. The land may, however, be a protected site where the reason that there is no site licence is the defendant's fault in not having acquired planning permission: *Hooper v Eaglestone* (1977) 76 LGR 308, 34 P & CR 311, DC.

8 Caravan Sites Act 1968 s 1(2) (amended by the Housing Act 2004 s 209(1), (2) with effect from 18 January 2005). That amendment does not affect the operation of: (1) the Caravan Sites Act 1968 s 2 (minimum length of notice: see PARA 1282 post) in relation to any notice given before 18 January 2005; or (2) s 3 (protection from eviction: see PARA 1283 post) in relation to any conduct occurring before that day; or (3) s 4 (suspension of eviction orders: see PARA 1284 post) in relation to any proceedings begun before that day: Housing Act 2004 s 209(3). In head (2) supra, the reference to the Caravan Sites Act 1968 s 3 is to that section whether as amended by the Housing Act 2004 s 210 or otherwise: s 209(4). As to the previous position see *Stoke-on-Trent City Council v Frost* (1991) 64 P & CR 135, 24 HLR 290, CA.

## UPDATE

### 1281-1284 Protection for Residential Occupiers

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(3) PROTECTION FOR RESIDENTIAL OCCUPIERS/1282. Minimum length of notice.

### 1282. Minimum length of notice.

In any case where a residential contract<sup>1</sup> is determinable by notice given by either party to the other, a notice so given is to be of no effect unless it is given not less than four weeks before the date on which it is to take effect<sup>2</sup>. Nothing in this provision, however, affects the operation of the provisions of the Compulsory Purchase Act 1965<sup>3</sup> relating to the delivery of possession of land which the acquiring authority under that Act is authorised to enter and of which it is authorised to acquire possession<sup>4</sup>.

1 For the meaning of 'residential contract' see PARA 1281 ante.

2 Caravan Sites Act 1968 s 2. As to the application of this provision see s 1 (as amended); and PARA 1281 ante. The Caravan Sites and Control of Development Act 1960 s 12(1) (power of site occupier to take possession and terminate a licence or tenancy in cases of contravention of s 1 (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1034) has effect subject to this provision: Caravan Sites Act 1968 s 5(4).

3     le the Compulsory Purchase Act 1965 s 13: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 646-647.

4     Caravan Sites Act 1968 s 5(3).

## UPDATE

### 1281-1284 Protection for Residential Occupiers

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(3) PROTECTION FOR RESIDENTIAL OCCUPIERS/1283. Protection of occupiers against eviction and harassment.

### 1283. Protection of occupiers against eviction and harassment.

The Protection from Eviction Act 1977<sup>1</sup> does not apply to any premises being a caravan<sup>2</sup> stationed on a protected site<sup>3</sup>. A person is, however, guilty of an offence<sup>4</sup> if:

- 2698 (1) during the subsistence of a residential contract<sup>5</sup>, he unlawfully deprives the occupier<sup>6</sup> of his occupation on a protected site of any caravan which the occupier is entitled by the contract to station and occupy, or to occupy, as his residence thereon; or
- 2699 (2) after the expiration or determination of a residential contract, he enforces, otherwise than by proceedings in the court<sup>7</sup>, any right to exclude the occupier from the protected site or from any such caravan, or to remove or exclude any such caravan from the site; or
- 2700 (3) whether during the subsistence or after the expiration or determination of a residential contract, with intent to cause the occupier to abandon the occupation of the caravan or remove it from the site, or to refrain from exercising any right or pursuing any remedy in respect thereof,

he does acts likely to<sup>8</sup> interfere with the peace or comfort of the occupier or persons residing with him, or persistently withdraws or withholds services or facilities reasonably required for the occupation of the caravan as a residence on the site<sup>9</sup>. In proceedings for an offence under head (1) or head (2) above it is a defence to prove that the defendant believed, and had reasonable cause to believe, that the occupier of the caravan had ceased to reside on the site<sup>10</sup>.

Further, the owner of a protected site<sup>11</sup> or his agent is guilty of an offence if, whether during the subsistence or after the expiration or determination of a residential contract:

- 2701 (a) he does acts likely to interfere with the peace or comfort of the occupier or persons residing with him; or
- 2702 (b) he persistently withdraws or withholds services or facilities reasonably required for the occupation of the caravan as a residence on the site,

and (in either case) he knows, or has reasonable cause to believe, that that conduct is likely to cause the occupier to do any of the things mentioned in head (3) above<sup>12</sup>. In proceedings for

such an offence<sup>13</sup> it is a defence to prove that the defendant had reasonable grounds for doing the acts or withdrawing or withholding the services or facilities in question<sup>14</sup>.

A person guilty of any such offence<sup>15</sup> is liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine, or to both, or on summary conviction to imprisonment for a term not exceeding 12 months, or a fine not exceeding the statutory maximum, or to both<sup>16</sup>.

Nothing in the provisions set out above affects the operation of the provisions of the Compulsory Purchase Act 1965<sup>17</sup> relating to the delivery of possession of land which the acquiring authority under that Act is authorised to enter and of which it is authorised to acquire possession<sup>18</sup>.

1     le the Protection from Eviction Act 1977 (protection against harassment and eviction without due process of law): see PARAS 214, 653, 1194 ante; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 608-609.

2     For the meaning of 'caravan' see PARA 1281 note 3 ante.

3     Caravan Sites Act 1968 s 5(5) (amended by the Protection from Eviction Act 1977 s 12, Sch 1 para 3). For the meaning of 'protected site' see PARA 1281 ante.

4     Nothing in the Caravan Sites Act 1968 s 3 (as amended) (see the text and notes 5-16 infra) applies to the exercise by any person of a right to take possession of a caravan of which he is the owner, other than a right conferred by or arising on the expiration or determination of a residential contract, or to anything done pursuant to the order of any court: s 3(5). For the purposes of Pt I (ss 1-5) (as amended) (see PARAS 1281-1282 ante; the text and notes 1-3 supra, 5-18 infra; and PARA 1284 post), references to the owner of a protected site are references to the person who is or would apart from any residential contract be entitled to possession of the land: s 1(3).

5     For the meaning of 'residential contract' see PARA 1281 ante.

6     'Occupier' includes the person who was the occupier under a residential contract which has expired or been determined and, in the case of the death of the occupier (whether during the subsistence or after the expiration or determination of the contract), includes any person then residing with the occupier being the widow, widower or surviving civil partner of the occupier, or, in default of a widow, widower or surviving civil partner so residing, any member of the occupier's family: Caravan Sites Act 1968 s 3(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 8).

7     'The court' means the county court: Caravan Sites Act 1968 s 5(1). As to the court's power to suspend an order enforcing the rights described in head (2) in the text see s 4(1); and PARA 1284 post. A claim to enforce the rights set out in head (2) in the text must be brought under CPR Pt 55 s 1 (CPR 55.1-CPR 55.10A) (see PARA 665 et seq ante): *Practice Direction--Possession Claims* PD 55 para 1.8.

8     In a similar context 'calculated to' has been construed as meaning 'likely to': *R v AMK (Property Management) Ltd* [1985] Crim LR 600, CA (Protection from Eviction Act 1977 s 1(3), amended by the substitution of 'likely to' by the Housing Act 1988 s 29(1)). The word 'calculated' required that there had to be proved the element of calculated acts or of persistent withdrawal or withholding of services, as the case might be: *Westminster City Council v Peart* (1968) 19 P & CR 736, DC; *R v Abrol* [1972] Crim LR 318, CA (both decided under the Rent Act 1965 s 30 (repealed)).

9     Caravan Sites Act 1968 s 3(1) (amended by the Housing Act 2004 s 210(1), (2)). Where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who is purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against and punished accordingly: Caravan Sites Act 1968 s 14(1).

10    Ibid s 3(4).

11    For these purposes, references to the owner of a protected site include references to a person with an estate or interest in the site which is superior to that of the owner: ibid s 3(1B) (added by the Housing Act 2004 s 210(1), (3)).

12    Caravan Sites Act 1968 s 3(1A) (added by the Housing Act 2004 s 210(1), (3); the amendments made by s 210 do not apply in relation to any conduct occurring before 18 January 2005: s 210(1), (6)).

13 le under the Caravan Sites Act 1968 s 3(1A) (as added: see note 12 supra).

14 Ibid s 3(4A) (added by the Housing Act 2004 s 210(1), (5); and see note 12 supra).

15 le an offence under the Caravan Sites Act 1968 s 3(1) (as amended) or s 3(1A) (as added).

16 Ibid s 3(3) (substituted by the Housing Act 2004 s 210(1), (4)). In the case of an offence committed before the Criminal Justice Act 2003 s 154(1) comes into force, however, the maximum term of imprisonment on summary conviction is six months by virtue of the Housing Act 2004 s 210(1), (7). At the date at which this title states the law, the Criminal Justice Act 2003 s 154(1) was not in force. The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended; prospectively amended): see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 140. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

The Caravan Sites Act 1968 s 3(3) (as so substituted) is without prejudice to any liability or remedy to which a person guilty of an offence may be subject in civil proceedings: s 3(3) (as so substituted). Proceedings for any such offence may be instituted by any local authority: Caravan Sites Act 1968 s 14(2). For these purposes, 'local authority' means a council of a London borough or a district, the Common Council of the City of London and the Council of the Isles of Scilly but, in relation to Wales, means the council of a Welsh county or county borough: Caravan Sites and Control of Development Act 1960 s 29(1) (definition amended by the London Government Act 1963 s 83(1), Sch 17 para 21(1); the Greater London Council (General Powers) Act 1976 s 11; and the Local Government (Wales) Act 1994 s 66(6), Sch 16, PARA 16(3); applied by the Caravan Sites Act 1968 s 16). As to the London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

17 le the Compulsory Purchase Act 1965 s 13: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 646-647.

18 Caravan Sites Act 1968 s 5(3).

## UPDATE

### 1281-1284 Protection for Residential Occupiers

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/21. MOBILE HOMES/(3) PROTECTION FOR RESIDENTIAL OCCUPIERS/1284. Provision for suspension of eviction orders.

### 1284. Provision for suspension of eviction orders.

If in proceedings by the owner<sup>1</sup> of a protected site<sup>2</sup> the court<sup>3</sup> makes an order for enforcing in relation thereto any right, after the expiration or determination of a residential contract<sup>4</sup>, to exclude the occupier<sup>5</sup> from the protected site or from any caravan<sup>6</sup>, or to remove or exclude any caravan from the site<sup>7</sup>, the court may, without prejudice to any other power to postpone the operation or suspend the execution of an order, and subject to the following provisions, suspend the enforcement of the order for such period not exceeding 12 months from the date of the order as the court thinks reasonable<sup>8</sup>. It must not, however, suspend the enforcement of

an order by virtue of these provisions if no site licence<sup>9</sup> is in force in respect of the site and the exemptions for gypsy and other local authority sites<sup>10</sup> do not apply<sup>11</sup>.

Where the court suspends the enforcement of an order by virtue of these provisions, it may impose such terms and conditions, including conditions as to the payment of rent or other periodical payments or of arrears of such rent or payments, as the court thinks reasonable<sup>12</sup>.

The court may from time to time, on the application of either party, extend, reduce or terminate the period of suspension so ordered, or vary any terms or conditions so imposed, but must not extend the period of suspension for more than 12 months at a time<sup>13</sup>.

In considering whether or how to exercise its powers under the above provisions, the court must have regard to all the circumstances, and in particular to the questions:

- 2703 (1) whether the occupier of the caravan has failed, whether before or after the expiration or determination of the relevant residential contract, to observe any terms or conditions of that contract, any conditions of the site licence, or any reasonable rules made by the owner for the management and conduct of the site or the maintenance of caravans thereon;
- 2704 (2) whether the occupier has unreasonably refused an offer by the owner to renew the residential contract or make another such contract for a reasonable period and on reasonable terms;
- 2705 (3) whether the occupier has failed to make reasonable efforts to obtain elsewhere other suitable accommodation for his caravan or, as the case may be, another suitable caravan and accommodation for it<sup>14</sup>.

Where the court makes such an order as is mentioned above but suspends the enforcement of that order<sup>15</sup>, the court must make no order for costs unless it appears to the court, having regard to the conduct of the owner or of the occupier, that there are special reasons for making such an order<sup>16</sup>.

1 For the meaning of 'the owner' see PARA 1283 note 4 ante.

2 For the meaning of 'protected site' see PARA 1281 ante.

3 For the meaning of 'the court' see PARA 1283 note 7 ante.

4 For the meaning of 'residential contract' see PARA 1281 ante.

5 For the meaning of 'the occupier' see PARA 1281 ante.

6 For the meaning of 'caravan' see PARA see PARA 1281 note 3 ante.

7 Ie any such right as is mentioned in the Caravan Sites Act 1968 s 3(1)(b): see PARA 1283 ante at head (2) in the text.

8 Ibid s 4(1). Any powers of a county court in such proceedings as are mentioned in s 4(1) may be exercised with the leave of the judge by any district judge of the court, except in so far as rules of court otherwise provide: s 5(1).

9 Ie under the Caravan Sites and Control of Development Act 1960 Pt I (ss 1-32) (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1032 et seq.

10 Ie ibid Sch 1 para 11 or Sch 1 para 11A (as added): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1036.

11 Caravan Sites Act 1968 s 4(6) (amended by the Housing Act 2004 s 211(1), with effect from 18 January 2005; that amendment does not apply in relation to proceedings begun before that day: see s 211(2)).

12 Caravan Sites Act 1968 s 4(2).



13 Ibid s 4(3).

14 Ibid s 4(4).

15 ie by virtue of ibid s 4 (as amended).

16 Ibid s 4(5).

## **UPDATE**

### **1281-1284 Protection for Residential Occupiers**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(1) INTRODUCTORY TENANCIES/(i) Tenancies which are Introductory Tenancies/1285. Background to the legislation.

## **22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES**

### **(1) INTRODUCTORY TENANCIES**

#### **(i) Tenancies which are Introductory Tenancies**

##### **1285. Background to the legislation.**

Local housing authorities<sup>1</sup> and other social landlords have the following statutory powers<sup>2</sup> to deal with anti-social behaviour<sup>3</sup> by tenants, their families or visitors:

2706 (1) a local housing authority or housing action trust may elect to operate an introductory tenancy regime<sup>4</sup>; under an introductory tenancy the tenant will not become a secure tenant<sup>5</sup> until 12 months after the start of the tenancy and the landlord can recover possession if it believes that the tenant's conduct is unsatisfactory<sup>6</sup>;

2707 (2) the right of local authorities and other social landlords to recover possession in cases of anti-social behaviour is extended; in particular, nuisance as a possession ground applies to behaviour in the locality of a tenant's home and to misbehaviour by the tenant's visitors<sup>7</sup> and landlords may start proceedings as soon as a notice of possession proceedings has been issued where nuisance or other anti-social behaviour is alleged<sup>8</sup>;

2708 (3) provision is made for the demotion of tenancies as an additional measure for dealing with anti-social behaviour; a demoted tenancy becomes a secure tenancy only at the end of the period of one year (the demotion period) starting with the day on which the demotion order takes effect<sup>9</sup>;

2709 (4) a power of arrest may be sought when applying for an injunction to prevent anti-social behaviour; such an injunction may be obtained to restrain a breach of the tenancy agreement or to prevent the commission of anti-social behaviour on housing estates or the use of housing accommodation for unlawful purposes<sup>10</sup>.

1 For the meaning of local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).

2 See *ibid* Pt V (ss 124-158) (as amended): see PARAS 1286 et seq, 1376 et seq post; and HOUSING vol 22 (2006 Reissue) PARA 268 et seq.

3 Local housing authorities, housing action trusts and registered social landlords have a statutory duty to prepare a policy in relation to anti-social behaviour, and procedures for dealing with it: see *ibid* s 218A (as added); and PARA 1340 post.

4 See PARA 1286 et seq post.

5 For the meaning of 'secure tenancy' see PARA 1300 post.

6 See the Housing Act 1996 s 127; and PARA 1297 post.

7 See the Housing Act 1985 s 84, Sch 2 Pt I Ground 2 (substituted by the Housing Act 1996 s 144; and as amended); and PARA 1358 post.

8 See the Housing Act 1985 s 83 (substituted by the Housing Act 1996 s 147(1); and as amended); and PARA 1352 post.

9 See the Housing Act 1985 Pt V Ch 1A (ss 143A-143P) (added by the Anti-social Behaviour Act 2003 Sch 1); and PARA 1376 et seq post.

10 See the Housing Act 1996 Pt V Ch III (ss 152-158) (as amended); and HOUSING vol 22 (2006 Reissue) PARA 268 et seq.

## UPDATE

### 1285 Background to the legislation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(1) INTRODUCTORY TENANCIES/(i) Tenancies which are Introductory Tenancies/1286. Election to operate introductory tenancy regime.

### 1286. Election to operate introductory tenancy regime.

A local housing authority<sup>1</sup> or a housing action trust<sup>2</sup> may elect to operate an introductory tenancy regime<sup>3</sup>. Such an election may be revoked at any time, without prejudice to the making of a further election<sup>4</sup>.

When such an election is in force, every periodic tenancy<sup>5</sup> of a dwelling house<sup>6</sup> entered into or adopted<sup>7</sup> by the authority or trust must, if it would otherwise be a secure tenancy<sup>8</sup>, be an introductory tenancy<sup>9</sup>. However, this is not the case if:

- 2710 (1) immediately before the tenancy was entered into or adopted the tenant or, in the case of joint tenants, one or more of them, was either a secure tenant of the same or another dwelling house or an assured tenant<sup>10</sup> of a registered social

landlord<sup>11</sup> (otherwise than under an assured shorthold tenancy<sup>12</sup>) in respect of the same or another dwelling house<sup>13</sup>;  
 2711 (2) a tenancy was entered into or adopted in pursuance of a contract made before the election was made<sup>14</sup>.

It is important to emphasise that the use of introductory tenancies is not mandatory and each local housing authority or housing action trust can decide whether or not it wishes to introduce such a regime<sup>15</sup>. When considering the introduction of such a regime, landlords may have to consider consulting their secure tenants under the statutory procedures laid down in the Housing Act 1985<sup>16</sup>.

1 For the meaning of local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).

2 For these purposes, 'housing action trust' has the same meaning as in the Housing Act 1988 (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq): Housing Act 1996 s 230.

3 Housing Act 1996 s 124(1).

4 Ibid s 124(5).

5 For these purposes of the Housing Act 1996, 'lease' and 'tenancy' have the same meaning; and both expressions include (1) a sublease or subtenancy; and (2) an agreement for a lease or tenancy, or sublease or subtenancy: s 229(1), (2). The expressions 'lessor and 'lessee' and 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly: s 229(3). For a judicial discussion of the tenant's role see *R (on the application of Chowdhury) v Newham London Borough Council* [2003] EWHC 2837 (Admin) at [41], [2003] All ER (D) 397 (Nov) per Grigson J ('the role of tenant is [not] a passive one. ... If a tenant does not understand the obligations that he undertakes when entering into a tenancy agreement, he should take steps to discover what they are. He alone knows whether he does or does not understand his obligations. There are numbers of agencies who would assist him, not least the letting department of the housing authority. When the housing authority write to him, he is not entitled to disregard the letters nor to assume that they are merely circulars. There is no justification for such an assumption. If he has difficulty understanding what is written, that is a matter singularly within his knowledge. It is for him to take steps to discover what the letters contain. If he fails to fulfil his obligation, because of his failure to understand correspondence the failure is his').

6 For these purposes, a dwelling house may be a house or part of a house: Housing Act 1996 s 139(1). Land let together with a dwelling house is treated as part of the dwelling house unless the land is agricultural land which would not be treated as part of a dwelling house for the purposes of the Housing Act 1985 Pt IV (ss 79-117) (as amended) (see s 112(2); and PARA 1300 post): Housing Act 1996 s 139(2).

7 For these purposes, a periodic tenancy is adopted by a person if that person becomes the landlord under the tenancy, whether on a disposal or surrender of the interest of the former landlord: ibid s 124(4).

8 For the meaning of 'secure tenancy' and 'secure tenant' see PARA 1300 post (definitions applied by ibid s 230).

9 Ibid s 124(2).

10 For the meaning of 'assured tenancy' and 'assured tenant' see PARA 1018 ante (definitions applied by ibid s 230).

11 Ie a registered social landlord within the meaning of ibid Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq (definition applied by s 230).

12 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante (definition applied by ibid s 230).

13 See ibid s 124(2).

14 See ibid s 124(3). A decision to terminate an introductory tenancy may be subject to judicial review: see by analogy *Bristol District Council v Clark* [1975] 3 All ER 976, [1975] 1 WLR 1443, CA; *Cannock Chase District Council v Kelly* [1978] 1 All ER 152, [1978] 1 WLR 1, CA; and cf *Sevenoaks District Council v Emmott* (1979) 78

LGR 346, 39 P & CR 404, CA. As to the statutory provision for review of a decision to seek possession see the Housing Act 1996 s 129; and PARA 1298 post.

15 See the text and notes 1-3 supra. Advocating the use of introductory tenancies, a consultation document stated 'A probationary tenancy, to be converted automatically on its satisfactory completion, will give a clear signal to new tenants that anti-social behaviour is unacceptable and that it will result in the loss of their homes. It would also give reassurance to existing tenants that their authority would take prompt action to remove any new tenants acting in this way': see Department of the Environment consultation document *Anti-social Behaviour on Council Estates* para 3.2 (April 1995).

16 See HL Official Report, 10 July 1996, col 411. The statutory procedures referred to are those laid down in the Housing Act 1985 s 105 (as amended): see PARA 1342 post.

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### **1287. Duration of introductory tenancy.**

Unless proceedings for possession are begun<sup>1</sup>, a tenancy<sup>2</sup> remains an introductory tenancy<sup>3</sup> until the end of the trial period, unless one of the events specified in heads (a) to (d) below occurs before the end of that period<sup>4</sup>. The 'trial period' is, subject to the statutory power to extend it for six months<sup>5</sup>, the period of one year beginning with:

- 2712 (1) in the case of a tenancy which was entered into by a local housing authority<sup>6</sup> or housing action trust<sup>7</sup>, the date on which the tenancy was entered into, or, if later, the date on which a tenant<sup>8</sup> was first entitled to possession under the tenancy; or
- 2713 (2) in the case of a tenancy which was adopted<sup>9</sup> by a local housing authority or housing action trust, the date of adoption<sup>10</sup>.

Where the tenant under an introductory tenancy<sup>11</sup> was formerly a tenant under another introductory tenancy, or held an assured shorthold tenancy<sup>12</sup> from a registered social landlord<sup>13</sup>, any period or periods during which he was such a tenant is or are to count towards the trial period, provided that if there was one such period, it ended immediately before the date specified in head (1) or head (2) above, and if there was more than one such period, the most recent period ended immediately before that date and each period succeeded the other without interruption<sup>14</sup>.

A tenancy ceases to be an introductory tenancy if, before the end of the trial period:

- 2714 (a) the circumstances are such that the tenancy would not otherwise be a secure tenancy<sup>15</sup>;
- 2715 (b) a person or body other than a local housing authority or housing action trust becomes the landlord under the tenancy;
- 2716 (c) the election in force when the tenancy was entered into or adopted is revoked; or
- 2717 (d) the tenancy ceases to be an introductory tenancy by virtue of certain statutory provisions<sup>16</sup> relating to succession<sup>17</sup>.

A tenancy does not come to an end merely because it ceases to be an introductory tenancy, but a tenancy which has once ceased to be an introductory tenancy cannot subsequently

become an introductory tenancy<sup>18</sup>. Thus if a tenant gives up possession, he ceases to be an introductory tenant and will not later become an introductory tenant by returning to the dwelling.

In the case of a joint introductory tenancy, one of the tenants may give notice to quit without the consent of the other and this will bring the introductory tenancy to an end<sup>19</sup>.

1 As to the effect of beginning proceedings for possession see the Housing Act 1996 s 130; and PARA 1299 post.

2 For the meaning of 'tenancy' see PARA 1286 note 5 ante.

3 As to elections to operate an introductory tenancy regime see PARA 1286 ante.

4 See the Housing Act 1996 s 125(1), (7). As to the continuation of an introductory tenancy despite the disposal and subsequent leaseback of the public sector landlord's interest in the premises under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) see s 37, Sch 10 para 2(2) (as amended); and PARA 1668 post.

5 In subject to the Housing Act 1996 s 125A (as added): see PARA 1288 post.

6 For the meaning of 'local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).

7 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

8 For the meaning of 'tenant' see PARA 1286 note 5 ante.

9 As to when a tenancy is adopted for these purposes see PARA 1286 note 7 ante.

10 Housing Act 1996 s 125(2) (amended by the Housing Act 2004 s 179(1), (2), except in relation to any tenancy entered into, or in pursuance of an agreement made, before 6 June 2005 in England or 25 November 2005 in Wales: see s 179(4)). This is subject to the Housing Act 1996 s 125(3), (4): see the text and notes 11-14 infra: s 125(2) (as so amended).

11 Where there are joint tenants under an introductory tenancy, this reference to the tenant must be construed as referring to the joint tenant in whose case the application of *ibid* s 125(3) produces the earliest starting date for the trial period: s 125(4).

12 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante (definition applied by *ibid* s 230).

13 For the meaning of 'registered social landlord' see PARA 1286 note 11 ante.

14 Housing Act 1996 s 125(3).

15 For the meaning of 'secure tenancy' see PARAS 1300-1301 post (definition applied by *ibid* s 230).

16 In *ibid* s 133(3) (as amended); see PARA 1291 post.

17 *Ibid* s 125(5).

18 *Ibid* s 125(6).

19 See *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, [1992] 1 All ER 1, HL (a periodic joint tenancy held by two or more joint tenants may be determined at common law by a notice to quit given by one of the joint tenants without the concurrence of any other joint tenant unless the terms of the tenancy provide otherwise); *Fletcher v Brent London Borough Council* [2006] EWCA Civ 960, [2006] All ER (D) 96 (Jul). Where the joint tenants are husband and wife and one spouse serves notice to quit, it has been held that the other spouse cannot have the notice set aside under the Matrimonial Causes Act 1973 s 37 (as amended) (avoidance of transactions intended to prevent or reduce financial relief: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 586): see *Newlon Housing Trust v Alsulaimen* [1999] 1 AC 313, [1998] 4 All ER 1, HL.

After a joint tenancy is terminated by notice to quit given by one of the tenants, the possession proceedings brought by the local housing authority do not violate the essence of the right to respect for the home under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the

Human Rights Act 1998 Sch 1 Pt I art 8: see *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [2003] 4 All ER 461 (a decision in relation to secure tenancies) cited in PARA 47 note 8 ante.

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### **1288. Extension of introductory tenancy.**

If both of the following conditions are met in relation to an introductory tenancy<sup>1</sup>, the trial period<sup>2</sup> is extended by six months<sup>3</sup>. The first condition is that the landlord<sup>4</sup> has served a notice of extension on the tenant<sup>5</sup> at least eight weeks before the original expiry date<sup>6</sup>, and the second condition is that either:

- 2718 (1) the tenant has not requested a review of the landlord's decision<sup>7</sup>; or
- 2719 (2) if he has, the decision on the review was to confirm the landlord's decision to extend the trial period<sup>8</sup>.

A notice of extension is a notice stating that the landlord has decided that the period for which the tenancy is to be an introductory tenancy should be extended by six months, and complying with the following provisions<sup>9</sup>. It must set out the reasons for the landlord's decision, and inform the tenant of his right to request a review of the landlord's decision and of the time within which such a request must be made<sup>10</sup>.

A request for review of the landlord's decision that the trial period for an introductory tenancy should be extended must be made before the end of the period of 14 days beginning with the day on which the notice of extension is served<sup>11</sup>. On a request being duly made to it, the landlord must review its decision<sup>12</sup>. The Secretary of State<sup>13</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>14</sup> may make provision by regulations as to the procedure to be followed in connection with such a review<sup>15</sup>. Provision may be made by regulations requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision, and as to the circumstances in which the person concerned is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing<sup>16</sup>.

The landlord<sup>17</sup> must give to the tenant<sup>18</sup> at least ten clear days' notice of the date of a review and, in the case of a review by way of oral hearing<sup>19</sup>, the time and place of the review<sup>20</sup>. The review must be carried out by a person who was not involved in the decision to extend the trial period<sup>21</sup>; and where the review is of a decision made by an officer of the landlord and is to be carried out by another officer, the officer reviewing the decision must occupy a position within the organisation of the landlord which is senior to that of the officer who made the decision<sup>22</sup>.

The tenant may make written representations to the landlord in connection with the review<sup>23</sup>. Any such representations must be received by the landlord at least two clear days before the date of the review<sup>24</sup> and the landlord must consider any written representations which are submitted by that date<sup>25</sup>.

Subject to the provisions of the relevant regulations, the procedure at review by way of oral hearing is to be determined by the person who carries it out<sup>26</sup>. The tenant who has requested a hearing has the right:

- 2720 (a) to be heard and to be accompanied or to be represented by another person, whether that person is professionally qualified or not;  
 2721 (b) to call any person to give evidence; and  
 2722 (c) to put any question to any person who gives evidence at the hearing<sup>27</sup>;

and any representative who attends the hearing has the rights and powers which the tenant has under those regulations<sup>28</sup>.

Where the landlord has given notice<sup>29</sup> of a review by way of an oral hearing and neither the tenant nor the tenant's representative attends on the date, and at the time and place notified, the person carrying out the review may either proceed with the hearing or make any other directions with a view to the conduct of the review that he considers appropriate, taking into account all relevant circumstances including any explanation offered for the absence<sup>30</sup>. Where the landlord has so given notice of a review by way of an oral hearing and the tenant requests a postponement, the landlord may grant or refuse the request as he sees fit<sup>31</sup>; and if the landlord agrees to postpone the hearing, the landlord must give reasonable notice to the tenant of the time, date and place of the reconvened hearing<sup>32</sup>.

The person carrying out a review by way of an oral hearing may adjourn it at any time on his own initiative, at the request of the tenant, his representative or the landlord<sup>33</sup>. If such a review is being carried out by more than one person and any of those persons are absent, the hearing must be adjourned, unless the tenant or his representative gives his consent to the continuation of the hearing<sup>34</sup>. If such a review is adjourned part-heard and the person conducting the reconvened hearing is not the person who carried out the previously adjourned hearing, then a complete rehearing must be conducted unless the tenant or his representative gives his consent to the continuation of the hearing<sup>35</sup>. If such a review is adjourned, the tenant must be given reasonable notice of the date, time, and place of the reconvened hearing<sup>36</sup>.

The landlord must notify the tenant of the decision on the review, and if the decision is to confirm the original decision, the landlord must also notify him of the reasons for the decision<sup>37</sup>. The review must be carried out and the tenant notified before the original expiry date<sup>38</sup>.

1 For the meaning of 'tenancy' see PARA 1286 note 5 ante. As to elections to operate an introductory tenancy regime see PARA 1286 ante.

2 As to the normal duration of the trial period see PARA 1287 ante.

3 Housing Act 1996 s 125A(1) (ss 125A, 125B added by the Housing Act 2004 s 179(1), (3), except in relation to any tenancy entered into, or in pursuance of an agreement made, before 6 June 2005 in England or 25 November 2005 in Wales: see s 179(4)).

4 For the meaning of 'landlord' see PARA 1286 note 5 ante.

5 For the meaning of 'tenant' see PARA 1286 note 5 ante.

6 Housing Act 1996 s 125A(2) (as added: see note 3 supra). In ss 125A, 125B (as added), 'the original expiry date' means the last day of the period of one year that would apply as the trial period apart from s 125A (as added): s 125A(6) (as so added).

7 *Ibid* s 125B (as added) in accordance with s 125B(1) (as added): see the text and notes 11-18 *infra*.

8 *Ibid* s 125A(3) (as added: see note 3 supra).

9 *Ibid* s 125A(4) (as added: see note 3 supra).

10 *Ibid* s 125A(5) (as added: see note 3 supra).

11 *Ibid* s 125B(1) (as added: see note 3 supra).

12 Ibid s 125B(2) (as added: see note 3 supra).

13 As to the Secretary of State see PARA 27 note 3 ante.

14 As to the transfer of functions of the Secretary of State under the Housing Act 1996 so far as exercisable in relation to Wales see PARA 27 note 4 ante; and see also the Housing Act 2004 s 267.

15 Housing Act 1996 s 125B(3) (as added: see note 3 supra). Nothing in s 125B(4), (6) (as added) affects the generality of this power: s 125B(3) (as so added). In the exercise of this power and the power in s 125B(4) (as added) (see the text and note 16 infra), the Secretary of State has made the Introductory Tenancies (Review of Decisions to Extend a Trial Period) (England) Regulations 2006, SI 2006/1077, which came into force on 3 May 2006 and apply in relation to dwelling houses in England only: reg 1(1), (2). See the text and notes 17-36 infra. At the date at which this title states the law, no equivalent regulations had been made in relation to Wales.

16 Housing Act 1996 s 125B(4) (as added: see note 3 supra).

17 For these purposes, references to a landlord are to a local housing authority or housing action trust which has elected to operate an introductory tenancy regime: Introductory Tenancies (Review of Decisions to Extend a Trial Period) (England) Regulations 2006, SI 2006/1077, reg 1(3)(b).

18 For these purposes, references to a tenant are to an introductory tenant: *ibid* reg 1(3)(a).

19 A review of a decision to extend a trial period is not to be by way of an oral hearing unless before the end of the time permitted under the Housing Act 1996 s 125B(1) (as added) (see the text and note 11 supra), the tenant informs the landlord that he wishes to have an oral hearing: Introductory Tenancies (Review of Decisions to Extend a Trial Period) (England) Regulations 2006, SI 2006/1077, reg 2.

20 Ibid reg 3.

21 Ibid reg 4(1).

22 Ibid reg 4(2).

23 Ibid reg 5(1).

24 Ibid reg 5(2).

25 Ibid reg 5(3).

26 Ibid reg 6(1).

27 Ibid reg 6(2).

28 Ibid reg 6(3).

29 *Ie* in accordance with *ibid* reg 3: see the text and note 20 supra.

30 Ibid reg 7.

31 Ibid reg 8(1).

32 Ibid reg 8(2).

33 Ibid reg 9(1).

34 Ibid reg 9(2).

35 Ibid reg 9(3).

36 Ibid reg 9(4).

37 Housing Act 1996 s 125B(5) (as added: see note 3 supra).

38 Ibid s 125B(6) (as added: see note 3 supra).

## **UPDATE**

### **1288 Extension of introductory tenancy**



TEXT AND NOTES 15-36--For corresponding regulations in relation to Wales, see the Introductory Tenancies (Review of Decisions to Extend a Trial Period) (Wales) Regulations 2006, SI 2006/2983.

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### **1289. Licences.**

The statutory provisions relating to introductory tenancies<sup>1</sup> apply in relation to a licence to occupy a dwelling house<sup>2</sup>, whether or not granted for a consideration, as they apply in relation to a tenancy<sup>3</sup>; but they do not apply to a licence granted as a temporary expedient to a person who entered the dwelling house or any other land as a trespasser, whether or not, before the grant of that licence, another licence to occupy that or another dwelling house had been granted to him<sup>4</sup>. It is, however, unlikely, in view of the decision of the House of Lords in a leading case<sup>5</sup>, that valid licences will be granted<sup>6</sup>.

1 The Housing Act 1996 Pt V Ch I (ss 124-143) (as amended): see PARAS 1286-1288 ante, PARA 1290 et seq post.

2 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

3 Housing Act 1996 s 126(1). For the meaning of 'tenancy' see PARA 1286 note 5 ante.

4 See *ibid* s 126(2).

5 See *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL (an arrangement under which an occupier has exclusive possession for a term and pays rent will usually constitute a tenancy, regardless of the label the parties put on it).

6 See PARA 6 et seq. In relation to secure tenancies, it has been held that a 'licence' for the purposes of the similar provisions in the Housing Act 1985 s 79 must constitute a licence giving exclusive possession: see *Westminster City Council v Clarke* [1992] 2 AC 288, [1992] 1 All ER 695, HL. The premises must be let as a separate dwelling: see *Central YMCA Housing Association Ltd v Saunders* (1990) 23 HLR 212, CA (decided on the Housing Act 1985 s 79). See also PARA 1300 post.

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### **(ii) Rights of Succession**

#### **1290. Persons qualified to succeed tenant.**

A person is qualified to succeed the tenant<sup>1</sup> under an introductory tenancy<sup>2</sup> if he occupies the dwelling house<sup>3</sup> as his only or principal home at the time of the tenant's death and either he is the tenant's spouse or civil partner, or he is another member of the tenant's family<sup>4</sup> and has

resided with the tenant throughout the period of 12 months ending with the tenant's death unless, in either case, the tenant was himself a successor<sup>5</sup>.

The tenant is himself a successor if:

- 2723 (1) the tenancy vested in him by virtue of the statutory provision for succession to an introductory tenancy<sup>6</sup>;
- 2724 (2) he was a joint tenant and has become the sole tenant;
- 2725 (3) he became the tenant on the tenancy being assigned to him<sup>7</sup>; or
- 2726 (4) he became the tenant on the tenancy being vested in him on the death of the previous tenant<sup>8</sup>.

Where within six months of the coming to an end of an introductory tenancy ('the former tenancy') the tenant becomes a tenant under another introductory tenancy, and:

- 2727 (a) the tenant was a successor in relation to the former tenancy; and
- 2728 (b) under the other tenancy either the dwelling house or the landlord<sup>9</sup>, or both, are the same as under the former tenancy,

the tenant is also a successor in relation to the other tenancy unless the agreement creating that tenancy otherwise provides<sup>10</sup>.

1 For the meaning of 'tenant' see PARA 1286 note 5 ante.

2 As to election to operate an introductory tenancy regime see PARA 1286 ante.

3 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

4 A person is a member of another's family within the meaning of the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) if (1) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners; or (2) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece; and for the purposes of head (2) supra, a relationship by marriage or civil partnership must be treated as a relationship by blood; (b) a relationship of the half-blood must be treated as a relationship of the whole blood; and (c) the stepchild of a person must be treated as his child: s 140(1), (2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 51).

5 Housing Act 1996 s 131 (amended by the Civil Partnership (Family Proceedings and Housing Consequential Amendments) Order 2005, SI 2005/3336, art 20). It is still open to a local housing authority to consider granting a fresh tenancy in a person's name if he has been barred from succeeding by the one succession rule: see HC Official Report SC G (Housing Bill) cols 372-374, 27 February 1996. As to succession to secure tenancies see PARAS 1319-1322 post; and as to succession to assured tenancies see PARA 1084 ante. As to the meaning of 'resided' see *Camden London Borough Council v Goldenberg* (1996) 95 LGR 693, 28 HLR 727, CA.

6 Ie by virtue of the Housing Act 1996 s 133 (as amended): see PARA 1291 post.

7 As to assignment see PARA 1292 post. A tenant to whom the tenancy was assigned in pursuance of an order under the Matrimonial Causes Act 1973 s 24 (as amended) (property adjustment orders etc in connection with matrimonial proceedings) or the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted) (property adjustment orders etc after overseas divorce etc) is a successor only if the other party to the marriage was a successor: Housing Act 1996 s 132(2). The Matrimonial Causes Act 1973 s 24 (as amended) is prospectively substituted, and the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted) is prospectively amended, by the Family Law Act 1996 ss 15, 66(1), Sch 2 paras 1, 6, Sch 8 Pt I (as amended), as from a day to be appointed under s 67(3). At the date at which this title states the law, no such day had been appointed.

A tenant to whom the tenancy was assigned in pursuance of an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3) (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc) is a successor only if the other civil partner was a successor: Housing Act 1996 s 132(2A) (added by the Civil Partnership Act 2004 s 81, Sch 8, PARA 52).

8 Housing Act 1996 s 132(1).

9 For the meaning of 'landlord' see PARA 1286 note 5 ante.

10 Housing Act 1996 s 132(3).

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### **1291. Succession to introductory tenancy.**

The following provisions apply where a tenant<sup>1</sup> under an introductory tenancy<sup>2</sup> dies<sup>3</sup>. Where there is a person qualified to succeed the tenant<sup>4</sup>, the tenancy vests in that person, or if there is more than one such person in the one to be preferred in accordance with the following rules:

- 2729 (1) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family<sup>5</sup>;
- 2730 (2) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord<sup>6</sup>.

Where there is no person qualified to succeed the tenant, the tenancy ceases to be an introductory tenancy:

- 2731 (a) when it is vested or otherwise disposed of in the course of the administration of the tenant's estate, unless the vesting or other disposal is in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>7</sup>, a property adjustment order after an overseas divorce, etc<sup>8</sup>, an order for financial relief against a parent<sup>9</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>10</sup>; or
- 2732 (b) when it is known that when the tenancy is so vested or disposed of it will not be in pursuance of such an order<sup>11</sup>.

1 For the meaning of 'tenant' see PARA 1286 note 5 ante.

2 As to election to operate an introductory tenancy regime see PARA 1286 ante.

3 Housing Act 1996 s 133(1). As to succession to secure tenancies see PARAS 1319-1322 post; and as to succession to assured tenancies see PARA 1084 ante.

4 As to persons qualified to succeed see PARA 1290 ante.

5 As to who is a member of the tenant's family see PARA 1290 note 4 ante.

6 Housing Act 1996 s 133(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 53(1), (2)). For the meaning of 'landlord' see PARA 1286 note 5 ante.

7 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante).

8 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

9     le in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

10    le an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

11    Housing Act 1996 s 133(3) (amended by the Civil Partnership Act 2004 ss 81, 261(4), Sch 8 para 53(3), Sch 30).

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### **(iii) Terms of the Introductory Tenancy**

#### **1292. General prohibition on assignment.**

An introductory tenancy<sup>1</sup> is not capable of being assigned except in certain excepted cases<sup>2</sup> and this prohibition also applies to a tenancy which is not an introductory tenancy but would be if the tenant<sup>3</sup>, or where the tenancy is a joint tenancy, at least one of the tenants, were occupying or continuing to occupy the dwelling house<sup>4</sup> as his only or principal home<sup>5</sup>.

The exceptions are:

2733 (1) an assignment in pursuance of a property adjustment order in connection with matrimonial proceedings<sup>6</sup>, a property adjustment order after an overseas divorce, etc<sup>7</sup>, an order for financial relief against a parent<sup>8</sup>, or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of civil partnership<sup>9</sup>;

2734 (2) an assignment to a person who would be qualified to succeed the tenant<sup>10</sup> if the tenant died immediately before the assignment<sup>11</sup>.

1 As to election to operate an introductory tenancy regime see PARA 1286 ante.

2 Housing Act 1996 s 134(1).

3 For the meaning of 'tenant' see PARA 1286 note 5 ante.

4 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

5 Housing Act 1996 s 134(3). As to occupation as his only or principal home cf para 1300 note 19 post.

6 le in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante).

7 le in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

8 le in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

9 le an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

10 As to persons qualified to succeed see PARA 1290 ante.

11 Housing Act 1996 s 134(2) (amended by the Civil Partnership Act 2004 ss 81, 261(4), Sch 8 para 54, Sch 30). See also *Peabody Donation Fund (Governors) v Higgins* [1983] 3 All ER 122, [1983] 1 WLR 1091, CA (assignment of father's interest in secure tenancy to daughter). An assignment must be by deed if it is to be effective: see *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA.

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### **1293. Repairs.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by regulations<sup>3</sup> apply to introductory tenants<sup>4</sup> any provision made under the right to repair provisions<sup>5</sup> of the Housing Act 1985 in relation to secure tenants<sup>6</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 Ie regulations made under the Housing Act 1985 s 96 (as substituted): see PARA 1329 post.

4 As to election to operate an introductory tenancy regime see PARA 1286 ante; and for the meaning of 'tenant' see PARA 1286 note 5 ante.

5 Ie under the Housing Act 1985 s 96 (as substituted): see PARA 1329 post.

6 Housing Act 1996 s 135. In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Secure Tenants of Local Housing Authorities (Right to Repair) (Amendment) Regulations 1997, SI 1997/73, which came into force on 12 February 1997: see reg 1. As to the application of the right to repair provisions to introductory tenants see reg 2; and for the relevant provisions see the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133 (as amended); and PARA 1329 post.

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### **1294. Variation of terms.**

The terms<sup>1</sup> of an introductory tenancy<sup>2</sup> may be varied<sup>3</sup> in the following ways, and not otherwise<sup>4</sup>:

2735 (1) by agreement between the landlord<sup>5</sup> and the tenant<sup>6</sup>;

2736 (2) to the extent that the variation relates to rent or to payments in respect of rates, council tax or services, by the landlord or the tenant in accordance with a provision in the lease<sup>7</sup> or agreement creating the tenancy, or in an agreement varying it;

2737 (3) by notice of variation<sup>8</sup> of a periodic tenancy<sup>9</sup>.

The terms of an introductory tenancy which is a periodic tenancy<sup>10</sup> may be varied by the landlord by a notice of variation served on the tenant<sup>11</sup>. Before serving a notice of variation on the tenant, the landlord must serve on him a preliminary notice.

- 2738 (a) informing the tenant of the landlord's intention to serve a notice of variation;
- 2739 (b) specifying the proposed variation and its effect; and
- 2740 (c) inviting the tenant to comment on the proposed variation within such time, specified in the notice, as the landlord considers reasonable;

and the landlord must consider any comments made by the tenant within the specified time<sup>12</sup>.

The notice of variation must specify:

- 2741 (i) the variation effected by it; and
- 2742 (ii) the date on which it takes effect;

and the period between the date on which it is served and the date on which it takes effect must be at least four weeks or the rental period<sup>13</sup>, whichever is the longer<sup>14</sup>.

The notice of variation, when served, must be accompanied by such information as the landlord considers necessary to inform the tenant of the nature and effect of the variation<sup>15</sup>.

If, after the service of a notice of variation, the tenant, before the date on which the variation is to take effect, gives a valid notice to quit, the notice of variation does not take effect unless the tenant, with the written agreement of the landlord, withdraws his notice to quit before that date<sup>16</sup>.

1 The statutory definition of 'term' (see PARA 1302 note 8 post) does not appear to apply for these purposes.

2 For the meaning of 'introductory tenancy' see PARA 1286 ante.

3 For these purposes, and for the purposes of the Housing Act 1985 s 103 (as applied to introductory tenancies) (see the text and notes 10-16 infra), references to variation include addition and deletion; and the conversion of a monthly tenancy into a weekly tenancy, or a weekly tenancy into a monthly tenancy, is a variation of a term of the tenancy, but a variation of the premises let under a tenancy is not: s 102(2) (ss 102(1), (2), (3)(a), 103 applied to introductory tenancies by s 111A (added by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 3(i)).

4 The mere circulation of a booklet to tenants is not sufficient to vary the terms of the tenancy: see *Palmer v Metropolitan Borough of Sandwell* (1987) 20 HLR 74, [1987] 2 EGLR 79, CA.

5 For the meaning of 'landlord' see PARA 1300 note 1 post.

6 For the meaning of 'tenant' see PARA 1300 note 1 post.

7 For the meaning of 'lease' see PARA 1300 note 1 post.

8 In accordance with the Housing Act 1985 s 103 ((see the text and notes 10-16 infra).

9 Ibid s 102(1) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 2 para 13; applied to introductory tenancies (see note 3 supra)). The Housing Act 1985 s 102 (as so amended and applied) does not apply to a term of a tenancy which is implied by an enactment: s 102(3)(a) (as so applied). See also *R (on the application of Kilby) v Basildon District Council* [2006] EWHC 1892 (Admin), (2006) Times, 21 August, [2006] All ER (D) 372 (Jul) (a case on secure tenancies) where it was held that a clause of a tenancy agreement whereby it was agreed that the authority could only vary the terms of the agreement if tenants' representatives agreed to the change was void as an unlawful fetter on the statutory powers of variation in the 1985 Act).

10 As to periodic tenancies see PARA 233 ante.

11 Housing Act 1985 s 103(1) (as applied: see note 3 supra). Section 103 does not apply to a term of a tenancy which is implied by an enactment: s 102(3)(a) (as so applied).

12 Ibid s 103(2) (as applied: see note 3 supra). Section 103(2) (as so applied) does not apply, however, to a variation of the rent, or of payments in respect of services or facilities provided by the landlord or of payments in respect of rates: s 103(3) (as so applied). As to the abolition of domestic rates see PARA 521 ante.

13 The statutory definition of 'rental period' (see PARA 1338 note 8 post) does not appear to apply for these purposes.

14 Housing Act 1985 s 103(4) (as applied: see note 3 supra).

15 Ibid s 103(5) (as applied: see note 3 supra).

16 Ibid s 103(6) (as applied: see note 3 supra).

## UPDATE

### 1294 Variation of terms

NOTE 9--*Kilby*, cited, reported at [2006] HLR 892.

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## (iv) Information and Consultation

### 1295. Provision of information about tenancies and heating charges.

Every local housing authority<sup>1</sup> or housing action trust<sup>2</sup> which lets<sup>3</sup> dwelling houses<sup>4</sup> under introductory tenancies<sup>5</sup> must from time to time publish information about its introductory tenancies, in such form as it considers best suited to explain in simple terms, and, so far as it considers it appropriate, the effect of the express terms<sup>6</sup> of its introductory tenancies, the provisions of the Housing Act 1996 relating to introductory tenancies<sup>7</sup> and the provisions of the Landlord and Tenant Act 1985 relating to the landlord's repairing obligations<sup>8</sup>, and must ensure that so far as is reasonably practicable the information so published is kept up to date<sup>9</sup>. The landlord<sup>10</sup> under an introductory tenancy must supply the tenant<sup>11</sup> with a copy of the information for introductory tenants published by it under these provisions and a written statement of the terms of the tenancy, so far as they are neither expressed in the lease<sup>12</sup> or written tenancy agreement, if any, nor implied by law<sup>13</sup>. The statement so required must be supplied on the grant of the tenancy or as soon as practicable afterwards<sup>14</sup>.

The statutory provisions relating to information about heating charges to be provided to secure tenants<sup>15</sup> apply in relation to introductory tenancies as they apply in relation to secure tenancies<sup>16</sup>.

1 For the meaning of local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).

2 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

3 For the meaning of 'let' see PARA 1286 note 5 ante.

- 4 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.
- 5 As to election to operate an introductory tenancy regime see PARA 1286 ante.
- 6 For the meaning of 'terms' see PARA 1286 note 5 ante.
- 7 Ie the provisions of the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended): see PARA 1286 et seq ante, PARA 1296 et seq post.
- 8 Ie the provisions of the Landlord and Tenant Act 1985 ss 11-16 (as amended): see PARAS 416-420 ante.
- 9 Housing Act 1996 s 136(1). For similar provisions in relation to secure tenancies see the Housing Act 1985 s 104 (as amended); and PARA 1339 post; and as to publication of a statement of policy and procedures in relation to anti-social behaviour see the Housing Act 1996 s 218A (as added); and PARA 1340 post.
- 10 For the meaning of 'landlord' see PARA 1286 note 5 ante.
- 11 For the meaning of 'tenant' see PARA 1286 note 5 ante.
- 12 For the meaning of 'lease' see PARA 1286 note 5 ante.
- 13 Housing Act 1996 s 136(2)(a), (b).
- 14 Ibid s 136(2). The jurisdiction of the county court under Pt V Ch I (as amended) includes jurisdiction to entertain proceedings as to whether a statement supplied in pursuance of s 136(2)(b) is accurate notwithstanding that no other relief is sought than a declaration: s 138(2). As to the county court's jurisdiction see further PARA 1297 note 3 post.
- 15 Ie the Housing Act 1985 s 108 (as amended): see PARA 1349 post.
- 16 Ibid s 111A (added by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 3(i)). For the meaning of 'secure tenancy' see PARAS 1300-1301 post.

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### **1296. Consultation on matters of housing management.**

The following provisions apply in relation to every local housing authority<sup>1</sup> and housing action trust<sup>2</sup> which lets<sup>3</sup> dwelling houses<sup>4</sup> under introductory tenancies<sup>5</sup> and which is a landlord authority for the purposes of the statutory provisions<sup>6</sup> relating to secure tenancies<sup>7</sup>. The authority or trust must maintain such arrangements as it considers appropriate to enable those of its introductory tenants who are likely to be substantially affected by a relevant matter of housing management to be informed of the proposals of the authority or trust in respect of the matter, and to make their views known to the authority or trust within a specified period, and the authority or trust must, before making a decision on the matter, consider any representations made to it in accordance with those arrangements<sup>8</sup>.

A matter is one of housing management if, in the opinion of the authority or trust concerned, it relates to:

- 2743 (1) the management, improvement, maintenance or demolition of dwelling houses let by the authority or trust under introductory or secure tenancies; or
- 2744 (2) the provision of services or amenities<sup>9</sup> in connection with such dwelling houses,



but not so far as it relates to the rent payable under an introductory or secure tenancy or to charges for services or facilities provided by the authority or trust<sup>10</sup>; and a matter is relevant if, in the opinion of the authority or trust concerned, it represents a new programme of maintenance, improvement or demolition, or a change in the practice or policy of the authority or trust, and is likely substantially to affect either its introductory tenants as a whole or a group of them who form a distinct social group or occupy dwelling houses which constitute a distinct class (whether by reference to the kind of dwelling house, or the housing estate or other larger area in which they are situated)<sup>11</sup>.

The authority or trust must publish details of the arrangements which it makes under these provisions, and a copy of the documents so published must be made available at its principal office for inspection at all reasonable hours, without charge, by members of the public, and be given, on payment of a reasonable fee, to any member of the public who asks for one<sup>12</sup>.

1 For the meaning of local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).

2 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

3 For the meaning of 'let' see PARA 1286 note 5 ante.

4 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

5 As to election to operate an introductory tenancy regime see PARA 1286 ante.

6 Ie for the purposes of the Housing Act 1985 Pt IV (ss 79-117) (as amended): see PARA 1300 et seq post.

7 Housing Act 1996 s 137(1). However, except as otherwise provided (1) by regulations made under the Housing Act 1985 s 27BA (as added), the provisions of those regulations are to apply in relation to consultation as to the authority's management functions; (2) by regulations made under s 27AB (as added and amended), the provisions of those regulations are to apply in relation to the entering into of a management agreement with a tenant management organisation, in the case of introductory tenants and in place of the provisions of the Housing Act 1996 s 137: see the Housing Act 1985 s 27BA(9) (added by the Housing Act 1996 s 222, Sch 18 para 3(1), (2)); the Housing Act 1985 s 27AB(7)(b)(iv) (as added and amended); and HOUSING vol 22 (2006 Reissue) PARAS 257, 260. As to the statutory obligation to consult secure tenants on matters of housing management see the Housing Act 1985 s 105 (as amended); and PARA 1342 post. See also *R v Hammersmith and Fulham London Borough Council, ex p Beddowes* [1987] QB 1050, [1987] 1 All ER 369, CA.

8 Housing Act 1996 s 137(2).

9 In the case of a local housing authority, this reference to the provision of services or amenities is a reference only to the provision of services or amenities by the authority acting in its capacity as landlord of the dwelling houses concerned: *ibid* s 137(5).

10 *Ibid* s 137(3).

11 *Ibid* s 137(4).

12 *Ibid* s 137(6).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(1) INTRODUCTORY TENANCIES/(v) Proceedings for Possession/1297. In general.

## **(v) Proceedings for Possession**

### **1297. In general.**

The landlord<sup>1</sup> may only bring an introductory tenancy<sup>2</sup> to an end by obtaining an order of the court<sup>3</sup> for the possession of the dwelling house<sup>4</sup>. The court must make such an order unless the provisions set out below<sup>5</sup> apply<sup>6</sup>.

The court must not entertain proceedings for the possession of a dwelling house let<sup>7</sup> under an introductory tenancy unless the landlord has served on the tenant<sup>8</sup> a notice of proceedings complying with the following provisions<sup>9</sup>. The notice must:

- 2745 (1) state that the court will be asked to make an order for the possession of the dwelling house<sup>10</sup>;
- 2746 (2) set out the reasons for the landlord's decision to apply for such an order<sup>11</sup>;
- 2747 (3) specify a date after which proceedings for the possession of the dwelling house may be begun, which must not be earlier than the date on which the tenancy could otherwise<sup>12</sup> be brought to an end by notice to quit given by the landlord on the same date as the notice of proceedings<sup>13</sup>;
- 2748 (4) inform the tenant of his right to request a review of the landlord's decision to seek an order for possession and of the time within which such a request must be made<sup>14</sup>; and
- 2749 (5) inform the tenant that if he needs help or advice about the notice, and what to do about it, he should take it immediately to a citizens' advice bureau, a housing aid centre, a law centre or a solicitor<sup>15</sup>.

The court must not entertain any proceedings for possession of the dwelling house unless they are begun after the date specified in the notice of proceedings<sup>16</sup>.

Where the court makes an order for possession of the dwelling house, the tenancy comes to an end on the date on which the tenant is to give up possession in pursuance of the order<sup>17</sup>. Thus where the local housing authority is entitled to possession, the court has no discretion and cannot make a suspended possession order.

1 For the meaning of 'landlord' see PARA 1286 note 5 ante.

2 As to elections to introduce an introductory tenancy regime see PARA 1286 ante.

3 A county court has jurisdiction to determine questions arising under the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) and to entertain proceedings brought thereunder and claims, for whatever amount, in connection with an introductory tenancy: s 138(1). If a person takes proceedings in the High Court which, by virtue of s 138, he could have taken in the county court, he is not entitled to recover any costs: s 138(3).

A decision to terminate an introductory tenancy is subject to judicial review. As to whether the tenant can raise, in county court possession proceedings, an issue such as the lawfulness of a local housing authority's rent increases see *Wandsworth London Borough Council v Winder* [1985] AC 461, [1984] 3 All ER 976, HL (a case involving a secure tenant). It has been held that a possession order does not contravene the right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)), art 6(1), now set out in the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6 or the right to respect for private and family life under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the Human Rights Act 1998 Sch 1 Pt I art 8: *R (on the application of McLellan) v Bracknell Forest Borough Council, Reigate and Banstead Borough Council v Benfield* [2001] EWCA Civ 1510, [2002] QB 1129, [2002] 1 All ER 899, affg *R (on the application of Johns) v Bracknell Forest District Council* [2000] All ER (D) 2448; and see *R (on the application of McDonagh) v Salisbury District Council* [2001] EWHC 567 (Admin), (2001) Times, 15 August, [2001] All ER (D) 58 (Jul). As to those Convention rights see PARA 46 ante. Courts ought to proceed on the assumption that domestic law strikes a fair balance and is compatible with the tenant's Convention rights (*Kay v Lambeth London Borough Council, Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 4 All ER 128, [2006] 2 FCR 20 per Lord Bingham of Cornhill, with whom the majority concurred on this point); but cf *Merton London Borough Council v Williams* [2002] EWCA Civ 980, [2003] HLR 257, [2002] All ER (D) 263 (Jul) (not cited to the court in *Kay v Lambeth London Borough Council, Leeds City Council v Price* supra) (the court has a general duty in possession proceedings relating to an introductory tenancy to consider the procedure which has been followed, and to have in mind both the statutory procedure and the Convention for the Protection of Human Rights and Fundamental Freedoms. If a tenant is protesting that an order for possession would be wrong for some reason, and some apparent basis exists for saying that there has been a serious flaw in the procedure, including the reasons expressed for any review

decision, the court ought to raise the possible flaw of its own motion and give both parties the opportunity to consider it).

4 Housing Act 1996 s 127(1). For the meaning of 'dwelling house' see PARA 1286 note 6 ante. Proceedings for possession under ss 127, 128 cannot be begun after the expiry of the introductory period, since the tenancy will have become a secure tenancy: see eg *Salford City Council v Garner* [2004] EWCA Civ 364, [2004] HLR 572, [2004] All ER (D) 465 (Feb). As to the procedure on a claim for possession see generally para 656 et seq ante.

5 le the Housing Act 1996 s 128: see the text and notes 7-16 infra.

6 Ibid s 127(2). The mandatory terms in which s 127(2) is drafted have been judicially described as 'a remarkable constriction of the court's powers'; the function of the court is reduced to that of ascertaining that it has jurisdiction to entertain the proceedings and once it has done so it is required to make a possession order and has no discretion in the matter at all: see *Manchester City Council v Cochrane* [1999] 1 WLR 809 at 819, [1999] LGR 626 at 636, CA, per Sir John Knox. The court has, however, a general duty to consider the procedure which has been followed in the light of the statutory requirements and the Convention for the Protection of Human Rights and Fundamental Freedoms (1950): see *Merton London Borough Council v Williams* [2002] EWCA Civ 980, [2003] HLR 257, [2002] All ER (D) 263 (Jul), cited in note 3 supra; but cf *Kay v Lambeth London Borough Council*, *Leeds City Council v Price* [2006] UKHL 10 at [39], [2006] 4 All ER 128, [2006] 2 FCR 20.

7 For the meaning of 'let' see PARA 1286 note 5 ante.

8 For the meaning of 'tenant' see PARA 1286 note 5 ante.

9 Housing Act 1996 s 128(1). A landlord need not give a second notice before seeking a court order following resumption of possession proceedings previously suspended (see *R (on the application of Stone) v Cardiff City Council* [2002] EWCA Civ 298, [2003] HLR 678, [2002] All ER (D) 379 (Jan), cited in note 17 infra); but cf *Forbes v Lambeth London Borough Council*, *R (on the application of Forbes) v Lambeth London Borough Council* [2003] EWHC 222 (Admin), [2003] HLR 702, [2003] All ER (D) 236 (Feb) (letter, sent to tenant by landlord, stating that, for time being, it would not proceed with possession proceedings, even though it had already served notice for possession, had effect of quashing original notice and rendering subsequent order for possession null and void).

10 Housing Act 1996 s 128(2).

11 Ibid s 128(3).

12 le apart from ibid Pt V Ch I (as amended).

13 Ibid s 128(4).

14 Ibid s 128(6). As to such reviews see PARA 1298 post. Where additional grounds for seeking possession are to be taken into account on a review, the correct procedure is normally to serve a fresh notice under s 128 specifying those grounds, but a failure to do so will not necessarily render the review unfair: see *R (on the application of Laporte) v Newham London Borough Council* [2004] EWHC 227 (Admin), [2004] All ER (D) 309 (Jan).

15 Housing Act 1996 s 128(7).

16 Ibid s 128(5).

17 Ibid s 127(3). Where on a review hearing a local housing authority agrees that the tenant can remain in the property provided that arrears of rent are paid off, but that otherwise possession proceedings will be brought, and the arrears are not paid, there is no need for the authority to issue a fresh notice under s 128 and it can rely on its original notice; the position of a landlord ought not be prejudiced simply because it has chosen to make allowances for a tenant's difficulties and defer proceedings to bring the tenancy immediately to an end: see *R (on the application of Stone) v Cardiff City Council* [2002] EWCA Civ 298, [2003] HLR 678, [2002] All ER (D) 379 (Jan).

## UPDATE

### 1297 In general

TEXT AND NOTES 4, 6, 17--Housing Act 1996 s 127(1), (2) amended, s 127(1A) added and s 127(3) repealed: Housing and Regeneration Act 2008 s 299, Sch 11 para 11, Sch 16. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also

the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(1) INTRODUCTORY TENANCIES/(v) Proceedings for Possession/1298. Review of decision to seek possession.

### **1298. Review of decision to seek possession.**

A request for review of the landlord's<sup>1</sup> decision to seek an order for possession of a dwelling house<sup>2</sup> let<sup>3</sup> under an introductory tenancy<sup>4</sup> must be made before the end of the period of 14 days beginning with the day on which the notice of proceedings is served<sup>5</sup>. On a request being duly made to it, the landlord must review its decision<sup>6</sup>.

The Secretary of State<sup>7</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>8</sup> may make provision by regulations as to the procedure to be followed in connection with such a review and nothing in the following provisions affects the generality of this power<sup>9</sup>. Provision may be made by regulations requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision, and as to the circumstances in which the person concerned is entitled to an oral hearing, and whether and by whom he may be represented at such a hearing<sup>10</sup>.

The review of the decision to seek an order for possession of a dwelling house let under an introductory tenancy is not to be by way of an oral hearing unless the tenant informs the landlord that he wishes to have such a hearing before the end of the time permitted to request a review of that decision<sup>11</sup>. The review must be carried out by a person who was not involved in the decision to apply for an order for possession<sup>12</sup> and where the review of a decision made by an officer is also to be made by an officer, that officer must be someone who is senior to the officer who made the original decision<sup>13</sup>.

If there is not to be a hearing the tenant may make representations in writing in connection with the review and such representations must be considered by the landlord who must inform the tenant of the date by which such representations must be received, which must not be earlier than five clear days after receipt of this information by the tenant<sup>14</sup>.

Subject as follows, the procedure in connection with a review by way of hearing is to be such as the person hearing the review determines<sup>15</sup>. However, a tenant who has requested a hearing has the right to:

- 2750 (1) be heard and to be accompanied and may be represented by another person whether that person is professionally qualified or not<sup>16</sup>;
- 2751 (2) call persons to give evidence;
- 2752 (3) put questions to any person who gives evidence at the hearing; and
- 2753 (4) make representations in writing<sup>17</sup>.

The landlord must give the tenant notice of the date, time and place of the hearing, which must be not less than five days after receipt of the request for a hearing<sup>18</sup>. If the tenant has not been given such notice, the hearing may only proceed with the consent of the tenant or his representative<sup>19</sup>. If, after having been duly given notice, any person fails to appear at the hearing, the person conducting the review may, having regard to all the circumstances including any explanation offered for the absence, proceed with the hearing notwithstanding

his absence, or give such directions with a view to the conduct of the further review as that person may think proper<sup>20</sup>.

A tenant may apply to the landlord requesting a postponement of the hearing and the landlord may grant or refuse the application as it sees fit<sup>21</sup>. A hearing may be adjourned by the person hearing the review at any time during the hearing on the application of the tenant, his representative, or at the motion of the person hearing the review and, if a hearing is adjourned part heard and after the adjournment the person or persons hearing the review differ from those at the first hearing<sup>22</sup>, proceedings must be by way of a complete rehearing of the case<sup>23</sup>.

Where more than one person is conducting the review, the hearing may be proceeded with in the absence of one of the persons who is to determine the review provided the tenant, or his representative, agree<sup>24</sup>.

The landlord must notify the person concerned of the decision on the review and, if the decision is to confirm the original decision, the landlord must also notify him of the reasons for the decision<sup>25</sup>.

The review must be carried out and the tenant notified before the date specified in the notice of proceedings as the date after which proceedings for the possession of the dwelling house may be begun<sup>26</sup>.

1 For the meaning of 'landlord' see PARA 1286 note 5 ante.

2 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

3 For the meaning of 'let' see PARA 1286 note 5 ante.

4 As to elections to operate an introductory tenancy regime see PARA 1286 ante.

5 Housing Act 1996 s 129(1). As to service of the notice of proceedings see PARA 1297 ante.

6 Ibid s 129(2).

7 As to the Secretary of State see PARA 27 note 3 ante.

8 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

9 Housing Act 1996 s 129(3). Any regulations or orders under Pt V Ch I (ss 124-143) (as amended) may contain such incidental, supplementary or transitional provisions, or savings, as the Secretary of State or the Assembly thinks fit and must be made by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 142. In the exercise of this power, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Introductory Tenants (Review) Regulations 1997, SI 1997/72, which came into force on 12 February 1997: see reg 1(1). See further the text and notes 11-24 infra.

10 Housing Act 1996 s 129(4).

11 Introductory Tenants (Review) Regulations 1997, SI 1997/72, reg 2. For these purposes, references to a tenant are to an introductory tenant and references to a landlord are to a local authority or housing action trust which has elected to operate an introductory tenancy regime: reg 1(2). For the meaning of 'local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230); and for the meaning of 'housing action trust' see PARA 1286 note 2 ante.

12 Introductory Tenants (Review) Regulations 1997, SI 1997/72, reg 3(1).

13 Ibid reg 3(2).

14 Ibid reg 4.

15 Ibid reg 5(1).

16 For the purposes of the proceedings any representative has the rights and powers which the tenant has under the Introductory Tenants (Review) Regulations 1997, SI 1997/72: reg 5(2)(a).

- 17 Ibid reg 5(2)(a)-(d).
- 18 Ibid reg 6.
- 19 See note 18 *supra*.
- 20 See the Introductory Tenants (Review) Regulations 1997, SI 1997/72, reg 7.
- 21 Ibid reg 8.
- 22 Ie otherwise than through the operation of *ibid* reg 7: see the text and note 20 *supra*.
- 23 Ibid reg 9.
- 24 See *ibid* reg 10.
- 25 Housing Act 1996 s 129(5).
- 26 Ibid s 129(6). A breach of s 129(6) does not automatically invalidate the review proceedings: *R (on the application of McDonagh) v Salisbury District Council* [2001] EWHC 567 (Admin), (2001) Times, 15 August, [2001] All ER (D) 58 (Jul); *R (on the application of Chelfat) v Tower Hamlets London Borough Council* [2006] EWHC 313 (Admin), [2006] All ER (D) 139 (Feb).

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### **1299. Effect of beginning proceedings for possession.**

Where the landlord<sup>1</sup> has begun proceedings for the possession of a dwelling house<sup>2</sup> let<sup>3</sup> under an introductory tenancy<sup>4</sup> and the trial period<sup>5</sup> ends, or any of the specified events<sup>6</sup> occurs, then subject as follows, the tenancy remains an introductory tenancy until the tenancy comes to an end<sup>7</sup> on the date on which the tenant is to give up possession in pursuance of an order of the court, or until the proceedings are otherwise finally determined<sup>8</sup>. If:

- 2754 (1) a person or body other than a local housing authority<sup>9</sup> or housing action trust<sup>10</sup> becomes the landlord under the tenancy; or
- 2755 (2) the election in force when the tenancy was entered into or adopted is revoked; or
- 2756 (3) the tenancy ceases to be an introductory tenancy by virtue of certain statutory provisions<sup>11</sup> relating to succession<sup>12</sup>,

the tenancy thereupon ceases to be an introductory tenancy but the landlord (or, as the case may be, the new landlord) may continue the proceedings, and if he or it does so, the statutory provisions relating to termination by the landlord<sup>13</sup> apply as if the tenancy had remained an introductory tenancy<sup>14</sup>. Where a tenancy so ceases to be an introductory tenancy and becomes a secure tenancy<sup>15</sup>, the tenant is not entitled to exercise the right to buy<sup>16</sup> unless and until the proceedings are finally determined on terms such that he is not required to give up possession of the dwelling house<sup>17</sup>.

1 For the meaning of 'landlord' see PARA 1286 note 5 ante.

2 For the meaning of 'dwelling house' see PARA 1286 note 6 ante.

- 3 For the meaning of 'let' see PARA 1286 note 5 ante.
- 4 As to election to operate an introductory tenancy regime see PARA 1286 ante.
- 5 As to the trial period see PARA 1287 ante.
- 6 Ie any of the events specified in the Housing Act 1996 s 125(5) (events on which a tenancy ceases to be an introductory tenancy): see PARA 1287 ante.
- 7 Ie in pursuance of *ibid* s 127(3): see PARA 1297 ante.
- 8 *Ibid* s 130(1), (2). For these purposes, proceedings are to be treated as finally determined if they are withdrawn or any appeal is abandoned or the time for appealing expires without an appeal being brought: s 130(5). Proceedings are begun for the purposes of s 130 when the court issues a claim form: *Salford City Council v Garner* [2004] EWCA Civ 364, [2004] HLR 572, [2004] All ER (D) 465 (Feb), CA.
- 9 For the meaning of 'local housing authority' see PARA 1311 note 4 post (definition applied by the Housing Act 1996 s 230).
- 10 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.
- 11 Ie by virtue of the Housing Act 1996 s 133(3) (as amended): see PARA 1291 ante.
- 12 Ie if any of the events specified in *ibid* s 125(5)(b)-(d) occurs: see PARA 1287 ante.
- 13 Ie *ibid* s 127(2), (3): see PARA 1297 ante.
- 14 *Ibid* s 130(3).
- 15 For the meaning of 'secure tenancy' see PARA 1300 post (definition applied by *ibid* s 230).
- 16 Ie under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.
- 17 Housing Act 1996 s 130(4).

## UPDATE

### 1299 Effect of beginning proceedings for possession

TEXT AND NOTES 8, 14--Housing Act 1996 s 130(2), (3) amended: Housing and Regeneration Act 2008 s 299, Sch 11 para 12. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(i) Tenancies which are Secure Tenancies/1300. Meaning of 'secure tenancy'.

## (2) SECURE TENANCIES

### (i) Tenancies which are Secure Tenancies

#### 1300. Meaning of 'secure tenancy'.

A tenancy<sup>1</sup> under which a dwelling house<sup>2</sup> is let as a separate dwelling<sup>3</sup> is a secure tenancy at any time when<sup>4</sup> the landlord condition<sup>5</sup> and the tenant condition<sup>6</sup> are satisfied<sup>7</sup>.

The landlord condition is that the interest belongs to one of the following authorities or bodies:

- 2757 (1) a local authority<sup>8</sup>;
  - 2758 (2) a new town corporation<sup>9</sup>;
  - 2759 (3) a housing action trust<sup>10</sup>;
  - 2760 (4) an urban development corporation<sup>11</sup>;
  - 2761 (5) a housing co-operative<sup>12</sup> where the dwelling house is comprised in a housing co-operative agreement<sup>13</sup>;
  - 2762 (6) where the tenancy was created before 15 January 1989:
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- 1. (a) the relevant authority<sup>14</sup>;
  - 2. (b) a housing trust<sup>15</sup> which is a charity<sup>16</sup>;
  - 3. (c) a registered social landlord other than a co-operative housing association<sup>17</sup>;
  - 4. (d) a co-operative housing association which is not a registered social landlord<sup>18</sup>.
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The tenant condition is that the tenant is an individual and occupies the dwelling house as his only or principal home<sup>19</sup> or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling house as his only or principal home<sup>20</sup>.

1 For these purposes, 'lease' and 'tenancy' have the same meaning; and both expressions include a sublease or subtenancy and an agreement for a lease or tenancy or sublease or subtenancy: Housing Act 1985 s 621(1), (2). The expressions 'lessor' and 'lessee' and 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or terms, are to be construed accordingly: s 621(3).

The provisions of Pt IV (ss 79-117) (as amended) (see the text and notes 2-12 *infra*; and PARA 1301 *et seq post*) apply in relation to a licence to occupy a dwelling house, whether or not granted for a consideration, as they apply in relation to a tenancy: s 79(3). Section 79(3) does not, however, apply to a licence granted as a temporary expedient to a person who entered the dwelling house or any other land as a trespasser, whether or not, before the grant of that licence, another licence to occupy that or another dwelling house had been granted to him: s 79(4). For the meaning of 'dwelling house' see note 2 *infra*. A licence must constitute a licence giving exclusive possession: *Family Housing Association v Miah* (1982) 5 HLR 94, CA; *Kensington Royal Borough Council v Hayden* (1984) 17 HLR 114, CA; *Westminster City Council v Clarke* [1992] 2 AC 288, [1992] 1 All ER 695, HL (clarified in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, [2002] 1 All ER 46 (a decision on the meaning of 'dwelling house' for the purposes of the Housing Act 1988 s 1 (as amended) (see PARA 1018 *ante*)); *Parkins v Westminster City Council* (1997) 30 HLR 894, [1998] 1 EGLR 22, CA. A person occupying pending determination of a right of occupation and court proceedings does not have a 'licence' for these purposes: *Hammersmith and Fulham London Borough Council v Harrison* [1981] 2 All ER 588, sub nom *Harrison v London Borough of Hammersmith and Fulham* [1981] 1 WLR 650, CA. See also *Restormel Borough Council v Buscombe* (1982) 14 HLR 91, CA ('tolerated trespassers'); *Camden London Borough Council v Shortlife Community Housing Ltd* (1992) 25 HLR 330 ('shortlife accommodation').

2 For these purposes, a dwelling house may be a house or part of a house; and land let together with a dwelling house is treated as part of the dwelling house unless the land is agricultural land, as defined in the General Rate Act 1967 s 26(3)(a) (as amended; saved for these purposes) (see PARA 867 note 2 *ante*), exceeding two acres: Housing Act 1985 s 112(1), (2). Cf the Rent Act 1977 ss 1, 26; and PARAS 818, 867 *ante*.

3 For the meaning of 'let as a separate dwelling' cf *ibid* s 1; and PARAS 819-823 *ante*. See also *Tomkins v Basildon District Council* [2002] EWCA Civ 876, [2002] 3 EGLR 33, [2002] All ER (D) 179 (Jun); *Parkins v Westminster City Council* (1997) 30 HLR 894, [1998] 1 EGLR 22, CA. Accommodation with shared kitchen facilities is not 'let as a separate dwelling': *Central YMCA Housing Association Ltd v Saunders* (1990) 23 HLR 212, CA. See also *Central YMCA Housing Association Ltd & St Giles Hotel Ltd v Goodman* (1991) 24 HLR 109, CA. Where there is a tenancy for mixed business and residential purposes, a unilateral change of use which takes the tenancy outside the protection of the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 *et seq ante*) does not render the tenancy a secure tenancy for the purposes of the Housing Act 1985: *Webb and Barrett v London Borough of Barnet* (1988) 21 HLR 228, [1989] 1 EGLR 49, CA.

4 For the meaning of 'at any time when' cf the Rent Act 1977 ss 14-16 (as amended); and PARA 884 note 3 *ante*.



5 le the condition described in the Housing Act 1985 s 80 (as amended) as the landlord condition: see heads (1)-(6) in the text. The landlord condition is not satisfied when the interest of the landlord belongs to two authorities or bodies jointly one of which is one of the specified authorities and one of which is not: *R v Plymouth City Council and Cornwall County Council, ex p Freeman* (1987) 19 HLR 328, CA. Nor is the landlord condition satisfied in relation to a sublease where the local authority is the head lessor but the intermediate lessor does not satisfy the landlord condition: *Lambeth London Borough Council v Kay* [2004] EWCA Civ 926, [2005] QB 352, [2004] All ER (D) 344 (Jul); affd [2006] UKHL 10, [2006] 4 All ER 128, [2006] 2 FCR 20. As to the continuation of a secure tenancy despite the disposal and subsequent leaseback of the public sector landlord's interest in the premises under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) see s 37, Sch 10 para 2(2) (as amended); and PARA 1668 post.

6 le the condition described in the Housing Act 1985 s 81 as the tenant condition: see the text and notes 19-20 infra.

7 Ibid s 79(1). Section 79(1) has effect subject to (1) the exceptions in Sch 1 (as amended) (see PARA 1303 et seq post); (2) s 89(3), (4) (as amended) (see PARA 1321 post) and s 90(3), (4) (as amended) (see PARA 1322 post); and (3) s 91(2) (see PARA 1323 post) and s 93(2) (see PARA 1326 post): s 79(2).

8 For these purposes, 'local authority' means a county, county borough, district or London borough council, the Common Council of the City of London or the Council of the Isles of Scilly and in the Housing Act 1985 s 80(1) (as amended) (see head (1) in the text), s 157(1) (as amended) (see PARA 1899 post) s 171(2) (as amended) (see PARA 1798 post), Sch 1 para 2(1) (as amended) (see PARA 1306 post), Sch 2, Grounds 7, 12 (as amended) (see PARAS 1364, 1371 post), Sch 3, Ground 5 (as amended) (see PARA 1325 post), Sch 4 para 7(1) (as amended) (see PARA 1823 post) and Sch 5 para 5(1) (as amended) (see PARA 1812 post) includes the Broads Authority, a police authority established under the Police Act 1996 s 3 (see POLICE vol 36(1) (2007 Reissue) PARA 139) and a joint authority established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq) and the London Fire and Emergency Planning Authority (see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217); Housing Act 1985 s 4(e) (amended by the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 25; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5(3); the Police and Magistrates' Courts Act 1994 ss 43, 93, Sch 4 Pt I para 58, Sch 9 Pt I; the Police Act 1996 s 103, Sch 7 para 1(2)(v); the Police Act 1997 s 134(1), Sch 9 para 49; the Greater London Authority Act 1999 ss 325, 328, 423, Sch 27, PARA 51, Sch 29 Pt I para 42, Sch 34 Pt VIII; the Criminal Justice and Police Act 2001 ss 128(1), 137, Sch 6 Pt 3 para 67, Sch 7 Pt 5(1); the Police Reform Act 2002 ss 100(1), 107(2), Sch 8). As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq; as to districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq; as to the London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq; as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36; and as to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734. The former body corporate known as the Residuary Body for Wales (Corff Gweddilliol Cymru) was to be treated as a local authority for the purposes of the Housing Act 1985 s 80 (as amended) (see the Local Government (Wales) Act 1994 Sch 13 para 21(c)); and a residuary body within the meaning of the Local Government Act 1985 was to be treated as a local authority for the purposes of the Housing Act 1985 Pt IV (ss 79-117) (as amended) and Pt V (ss 118-188) (as amended): see PARA 1795 et seq post) (see the Local Government Act 1985 s 57(7), Sch 13 para 22 (substituted by the Housing (Consequential Provisions) Act 1985 s 4, Sch 2 para 61)). See also the Combined Fire Authorities (Secure Tenancies) (England) Regulations 1998, SI 1998/2213, reg 3 (amended by SI 2004/3168); the Combined Fire Authorities (Secure Tenancies) (Wales) Regulations 1998, SI 1998/2214, reg 3 (amended by SI 2005/2929) (combined fire and rescue authority constituted by a combination scheme is to be treated for these purposes as a local authority).

9 For these purposes, 'new town corporation' means a development corporation or the Commission for the New Towns and 'development corporation' means a development corporation established by an order made, or having effect as if made, under the New Towns Act 1981: Housing Act 1985 s 4(b), (c). As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq; and as to new town development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

10 For these purposes, 'housing action trust' means a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq); Housing Act 1985 s 4(f) (added by the Housing Act 1988 s 62(7)).

11 For these purposes, 'urban development corporation' means an urban development corporation established under the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1426 et seq); Housing Act 1985 s 4(d).

12 le a housing co-operative within the meaning of ibid s 27B (as added and amended) (agreements under certain superseded provisions).

13 Ibid s 80(1), (4) (amended by the Housing and Planning Act 1986 s 24(2), Sch 5 Pt II para 26; the Housing Act 1988 s 83(1), (2), 140(2), Sch 18; the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to secure tenancies created on or after 15 January 1989 see further PARA 1301 post; and as to the transfer of existing tenancies from the public to the private sector see PARA 1015 ante.

14 Ie the relevant authority within the meaning of the Housing Act 1985 s 6A (as added): see HOUSING vol 22 (2006 Reissue) PARA 5.

15 For the meaning of 'housing trust' see ibid s 6; and HOUSING vol 22 (2006 Reissue) PARA 12.

16 In the Housing Act 1985 'charity' now has the same meaning as in the Charities Act 1993: see the Housing Act 1985 s 622(1) (definition amended by the Charities Act 1993 s 98(1), Sch 6 para 30); and CHARITIES vol 8 (2010) PARA 1.

17 'Co-operative housing association' means a fully mutual housing association which is a society registered under the Industrial and Provident Societies Act 1965; and 'fully mutual', in relation to a housing association, means that the rules of the association restrict membership to persons who are tenants or prospective tenants of the association, and preclude the granting or assignment of tenancies to persons other than members: Housing Act 1985 s 5(2). As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

18 See ibid s 80(1), (2) (as originally enacted; s 80(2) repealed with savings by the Housing Act 1988 s 140, Sch 18 and amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(8)). If a co-operative housing association ceases to be a registered social landlord, it must, within the period of 21 days beginning with the date on which it ceases to be a registered social landlord, notify each of its tenants who thereby becomes a secure tenant, in writing, that he has become a secure tenant: Housing Act 1985 s 80(3) (as so amended).

The repeals in the Housing Act 1985 s 80 effected by the Housing Act 1988 (see note 8 supra): (1) have effect, subject to the Housing Act 1988 s 35(5) (as amended) (see PARA 1301 note 15 post), in relation to any tenancy or licence entered into before 15 January 1989 unless, immediately before that time, the landlord or, as the case may be, the licensor is a body which, in accordance with the repeals, would cease to be within the Housing Act 1985 s 80 (now as amended); (2) do not have effect in relation to a tenancy or licence entered into on or after 15 January 1989 if the tenancy or licence falls within any of the Housing Act 1988 s 35(4)(c)-(f) (see PARA 1301 post at heads (3)-(6) in the text); and (3) do not have effect in relation to a tenancy while it is a housing association tenancy: s 140(2), Sch 18 para 4 (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 112). For the meaning of 'housing association tenancy' see PARA 1013 note 3 ante. On its true construction, the Housing Act 1988 Sch 18 para 4(c) creates the possibility of a housing association tenancy becoming a secure tenancy in the future if the landlord's interest should become vested in a non-mutual association: see *Bhai v Black Roof Community Housing Association Ltd* [2001] 2 All ER 865, [2000] All ER (D) 1668, CA.

Where an authority or body within the Housing Act 1985 s 80 (as amended) becomes the landlord of a dwelling house subject to a statutory tenancy, the tenancy is treated for all purposes as if it were a contractual tenancy on the same terms; and the provisions of Pt IV (as amended) (see PARA 1302 et seq post) apply accordingly: s 109A (added by the Housing and Planning Act 1986 s 24(1)(b), Sch 5 para 2). For these purposes, 'statutory tenancy' and 'statutory tenant' mean a statutory tenancy or statutory tenant within the meaning of the Rent Act 1977 (see PARA 831 ante) or the Rent (Agriculture) Act 1976 (see PARAS 1146-1149 ante): Housing Act 1985 s 622.

19 For the meaning of 'only or principal home' see *Crawley Borough Council v Sawyer* (1987) 86 LGR 629, 20 HLR 98, CA (an individual may occupy as his home more than one dwelling at a time). Physical presence is not, therefore, necessary to occupation; but where the whole premises are sublet, the tenant condition is no longer fulfilled: see eg *Lewisham London Borough Council v Robinson* [2003] EWHC 2630 (Ch), [2003] All ER (D) 239 (Oct). See also *Notting Hill Housing Trust v Etoria* [1989] CLY 1912 (a convicted prisoner serving a life sentence with a possibility of early release on licence who had left his brother in occupation of his flat as caretaker had demonstrated an intention to return; held that he continued to enjoy a secure tenancy). Cf *Braintree District Council v Vincent* [2004] EWCA Civ 415, [2004] All ER (D) 167 (Mar) (elderly tenant admitted to hospital and from there to long-term residence in a nursing home; held that the tenant condition in relation to her bungalow was no longer fulfilled) and *Hammersmith and Fulham London Borough Council v Clarke* [2000] All ER (D) 1893, CA (tenant's furniture remained in the property and she spent time living there between spells at a nursing home; held that the tenant retained an enduring intention to return to the house).

20 Housing Act 1985 s 81. The tenant condition cannot be fulfilled by a corporate body; thus, where a corporate body is a licensee of the landlord, a person occupying the premises by virtue of a licence granted by that corporate body cannot be a secure tenant: *Shepherds Bush Housing Association Ltd v HATS Co-operative* (1991) 24 HLR 176, CA.

## UPDATE

### 1300 Meaning of 'secure tenancy'

TEXT AND NOTES 1-18--Housing Act 1985 s 80 further amended: SI 2008/3002.

NOTE 8--Housing Act 1985 s 4(e) (now s 4(1)(e)) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 41; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 68. Housing Act 1985 s 4(2) added by Local Government and Public Involvement in Health Act 2007 Sch 13 para 41, and amended by Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 68.

NOTE 9--Housing Act 1985 s 4(b) (now s 4(1)(b)) amended, s 4(1)(g) added: SI 2008/3002.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(i) Tenancies which are Secure Tenancies/1301. Secure tenancies created on or after 15 January 1989.

#### 1301. Secure tenancies created on or after 15 January 1989.

A tenancy<sup>1</sup> or licence which is entered into on or after 15 January 1989 cannot be<sup>2</sup> a secure tenancy<sup>3</sup> unless:

- 2763 (1) the interest of the landlord<sup>4</sup> belongs to a local authority<sup>5</sup>, a new town corporation<sup>6</sup> or an urban development corporation<sup>7</sup> or a housing action trust<sup>8</sup>; or
- 2764 (2) the interest of the landlord belongs to a housing co-operative<sup>9</sup> and the tenancy or licence is of a dwelling house<sup>10</sup> comprised in a housing co-operative agreement<sup>11</sup>; or
- 2765 (3) it is entered into in pursuance of a contract made before 15 January 1989; or
- 2766 (4) it is granted to a person, alone or jointly with others, who, immediately before it was entered into, was a secure tenant and is so granted by the body which at that time was the landlord or licensor under the secure tenancy; or
- 2767 (5) it is granted to a person, alone or jointly with others, in the following circumstances:

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- 5. (a) prior to the grant of the tenancy or licence, an order for possession of a dwelling house was made against him, alone or jointly with others, on the court being satisfied that suitable accommodation was available for him<sup>12</sup>; and
- 6. (b) the tenancy or licence is of the premises which constitute the suitable accommodation as to which the court was so satisfied; and
- 7. (c) in the proceedings for possession the court considered that, in the circumstances, the grant of an assured tenancy<sup>13</sup> would not afford the required security and accordingly directed that the tenancy or licence would be a secure tenancy; or

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- 2768 (6) it is granted pursuant to an obligation<sup>14</sup> to grant a secure tenancy<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 1012 note 1 ante.

- 2 le subject to the Housing Act 1988 s 38(4A) (as added and amended): see PARA 1015 ante.
- 3 For these purposes, 'secure tenancy' has the meaning assigned by the Housing Act 1985 s 79 (see PARA 1300 ante): Housing Act 1988 s 45(1).
- 4 For the meaning of 'landlord' see PARA 1020 note 3 ante.
- 5 le within the meaning of the Housing Act 1985 s 80 (as amended): see PARA 1300 note 8 ante.
- 6 le within the meaning of ibid s 80 (as amended): see PARA 1300 note 9 ante.
- 7 le within the meaning of ibid s 80 (as amended): see PARA 1300 note 10 ante.
- 8 le established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.
- 9 le within the meaning of the Housing Act 1985 s 27B (as added and amended): see PARA 1300 note 12 ante.
- 10 For the meaning of 'dwelling house' see PARA 1012 note 4 ante.
- 11 le falling with the Housing Act 1985 s 27B (as added and amended).
- 12 le the court being satisfied as mentioned in ibid s 84(2)(b) or (c): see PARA 1354 post at heads (2)-(3) in the text.
- 13 For the meaning of 'assured tenancy' see PARA 1018 ante.
- 14 le an obligation under the Housing Act 1985 s 554(2A) (as added and amended): see HOUSING vol 22 (2006 Reissue) PARA 732.
- 15 Housing Act 1988 s 35(4) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 105(2); the Government of Wales Act 1998 s 129, Sch 15 para 15). If, on or after 15 January 1989, the interest of the landlord under a protected or statutory tenancy becomes held by a housing association, a housing trust or the Housing Corporation, or, where that interest becomes held by him as the result of the exercise by him of functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 18 et seq), the Secretary of State, nothing in the Housing Act 1988 s 35(4) (as so amended) prevents the tenancy from being a housing association tenancy or a secure tenancy; and accordingly in such a case the Housing Act 1985 s 80 (as amended), and any enactment which refers thereto, has effect without regard to the repeal of provisions of s 80 (as amended) effected by the Housing Act 1988: s 35(5) (amended by the Government of Wales Act 1998 s 140, Sch 16 para 60; the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 3(1), (2)). For these purposes, 'housing association' and 'housing trust' have the same meanings as in the Housing Act 1985 (see PARA 863 note 5, PARA 1300 note 15 ante): Housing Act 1988 s 35(6). For the meaning of 'housing association tenancy' see PARA 1013 note 3 ante; for the meaning of 'protected tenancy' see the Rent Act 1977 s 1; and PARA 818 ante; and for the meaning of 'statutory tenancy' see s 2 (as amended); and PARA 831 ante. As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18 et seq; and as to the removal of special regimes for housing association tenancies see PARA 1013 ante.

## UPDATE

### 1301 Secure tenancies created on or after 15 January 1989

TEXT AND NOTE 15--Housing Act 1988 s 35(4) further amended: SI 2008/3002.

Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE

TENANCIES/(i) Tenancies which are Secure Tenancies/1302. Periodic tenancy arising on termination of fixed term.

### **1302. Periodic tenancy arising on termination of fixed term.**

Where a secure tenancy<sup>1</sup> ('the first tenancy') is a tenancy for a term certain<sup>2</sup> and comes to an end by effluxion of time or by an order of the court pursuant to a right of re-entry or forfeiture<sup>3</sup>, a periodic tenancy<sup>4</sup> of the same dwelling house<sup>5</sup> arises unless the tenant<sup>6</sup> is granted another secure tenancy of the same dwelling house, whether a tenancy for a term certain or a periodic tenancy, to begin on the coming to an end of the first tenancy<sup>7</sup>.

Where a periodic tenancy so arises:

2769 (1) the periods of the tenancy are the same as those for which rent was last payable under the first tenancy; and

2770 (2) the parties and the terms<sup>8</sup> of the same as those of the first tenancy at the end of it;

except that the terms are confined to those which are compatible with a periodic tenancy and do not include any provision for re-entry or forfeiture<sup>9</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 As to the nature of a term certain see PARA 235 et seq ante.

3 I.e. an order of the court under the Housing Act 1985 s 82(3): see PARA 1350 post. As to the court having jurisdiction see PARA 1385 post.

4 As to periodic tenancies see PARA 233 ante.

5 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 Housing Act 1985 s 86(1).

8 For these purposes, 'term', in relation to a secure tenancy, includes a condition of the tenancy: *ibid* s 116.

9 *Ibid* s 86(2). A tenancy which is a secure tenancy within the meaning of Pt IV (ss 79-117) (as amended) and which is not capable of being assigned except in the cases mentioned in s 91(3) (as amended) (see PARA 1323 post) would normally be excluded from a bankrupt's estate: see the Insolvency Act 1986 s 283(3A) (as added); para 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 216. Such a tenancy may, however, vest in the trustee in bankruptcy on service of a notice under the Insolvency Act 1986 s 308A (as added): see PARA 598 note 2 ante; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 393.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1303. Long tenancies.

## **(ii) Exceptions**

### **1303. Long tenancies.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is a long tenancy<sup>3</sup>.

For these purposes, the following are long tenancies:

- 2771 (1) a tenancy granted for a term certain<sup>4</sup> exceeding 21 years, whether or not it is, or may become, terminable before the end of that term by notice given by the tenant<sup>5</sup> or by re-entry or forfeiture<sup>6</sup>;
- 2772 (2) a tenancy for a term fixed by law under a grant with a covenant or obligation for perpetual renewal<sup>7</sup>, other than a tenancy by sub-demise from one which is not a long tenancy;
- 2773 (3) any tenancy granted in pursuance of the right to buy<sup>8</sup> or the right<sup>9</sup> to acquire<sup>10</sup>.

A tenancy granted so as to become terminable by notice after a death<sup>11</sup> is not, however, a long tenancy for these purposes unless:

- 2774 (a) it is granted by a housing association which at the time of the grant is a registered social landlord<sup>12</sup>;
- 2775 (b) it is granted at a premium calculated by reference to a percentage of the value of the dwelling house<sup>13</sup> or of the cost of providing it; and
- 2776 (c) at the time it is granted it complies with the requirements of the regulations relating to conditions for excluding shared ownership leases from the right to enfranchise<sup>14</sup> or, in the case of a tenancy granted before any such regulations were brought into force, with the first such regulations to be in force<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 Housing Act 1985 s 79(2)(a), Sch 1 para 1.

4 As to the nature of a term certain see PARA 235 et seq ante.

5 For the meaning of 'tenant' see PARA 1300 note 1 ante.

6 As to re-entry and forfeiture see PARA 603 et seq ante.

7 As to covenants for perpetual renewal see PARAS 540-541 ante.

8 le granted in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.

9 le granted in pursuance of ibid Pt V (as amended) as it has effect by virtue of the Housing Act 1996 s 17 (the right to acquire): see PARA 1806 post.

10 Housing Act 1985 s 115(1) (amended by the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 2, Schedule para 3(2)).

11 As to leases for a term determinable on notice after death see PARA 240 ante.

12 As to housing associations which are registered social landlords see HOUSING vol 22 (2006 Reissue) PARA 11.

13 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

14 le it complies with the requirements of regulations then in force under the Housing Act 1980 s 140(4)(b) (repealed) or the Leasehold Reform Act 1967 s 33A, Sch 4A para 4(2)(b) (as added) (see PARA 1413 post).

15 Housing Act 1985 s 115(2) (amended by the Housing Act 1988 s 140, Sch 17 Pt I para 40; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2). As to the abolition of the right to be granted a shared ownership lease see PARA 1795 post.

**UPDATE****1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1304. Introductory tenancies.

**1304. Introductory tenancies.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is an introductory tenancy<sup>3</sup> or a tenancy which has ceased to be an introductory tenancy:

- 2777 (1) by virtue of its disposal on the death of the tenant to a non-qualifying person<sup>4</sup>; or  
 2778 (2) by virtue of the tenant, or in the case of a joint tenancy every tenant, ceasing to occupy the dwelling house as his only or principal home<sup>5</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For these purposes, 'introductory tenancy' has the same meaning as in the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) (see PARA 1286 et seq ante): Housing Act 1985 s 115A (added by the Housing Act 1996, s 141(1), Sch 14 para 3).

4 ie by virtue of the Housing Act 1996 s 133(3) (as amended): see PARA 1291 ante.

5 Housing Act 1985 s 79(2)(a), Sch 1 para 1A (added by the Housing Act 1996 s 141(1), Sch 14 para 5). As to occupation as his 'only or principal home' cf para 1300 note 19 ante.

**UPDATE****1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1305. Demoted tenancies.

### **1305. Demoted tenancies.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is a demoted<sup>3</sup> tenancy<sup>4</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 Ie within the meaning of the Housing Act 1996 s 143A (as added): see PARA 1376 post.

4 Housing Act 1985 s 79(2)(a), Sch 1 para 1B (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 2(1), (4)).

## **UPDATE**

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### **1305 Demoted tenancies**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1306. Premises occupied in connection with employment.

### **1306. Premises occupied in connection with employment.**

A tenancy<sup>1</sup> is not<sup>2</sup> a secure tenancy<sup>3</sup>:

2779 (1) if the tenant<sup>4</sup> is an employee of the landlord<sup>5</sup> or of a local authority<sup>6</sup>, a new town corporation<sup>7</sup>, a housing action trust<sup>8</sup>, an urban development corporation<sup>9</sup> or the governors of an aided school<sup>10</sup> and his contract of employment<sup>11</sup> requires him to occupy the dwelling house<sup>12</sup> for the better performance of his duties<sup>13</sup>;

2780 (2) if the tenant is a member of a police force<sup>14</sup> and the dwelling house is provided<sup>15</sup> for him free of rent and rates<sup>16</sup>;



- 2781 (3) if the tenant is an employee of a fire and rescue authority<sup>17</sup> and his contract of employment requires him to live in close proximity to a particular fire station and the dwelling house was let to him by the authority in consequence of that requirement<sup>18</sup>;
- 2782 (4) if, within the period of three years immediately preceding the grant, the conditions in heads (1), (2) or (3) above have been satisfied with respect to a tenancy of the dwelling house and before the grant the landlord notified the tenant in writing of the circumstances in which this exception applies and that in its opinion the proposed tenancy would fall within this exception<sup>19</sup>.

Except where the landlord is a local housing authority<sup>20</sup>, a tenancy under head (4) above becomes a secure tenancy when the periods, during which the conditions mentioned in head (1), head (2) or head (3) above are not satisfied with respect to the tenancy, amount in aggregate to more than three years<sup>21</sup>; and where the landlord is a local housing authority, a tenancy under any of heads (1) to (4) above becomes a secure tenancy if the authority notifies the tenant that the tenancy is to be regarded as a secure tenancy<sup>22</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 The subject, in the case of heads (1)-(3) in the text, to the Housing Act 1985 s 79(2)(a), Sch 1 para 2(4A) (as added) and in the case of head (4) in the text to Sch 1 para 2(4A), (4B) (as added).

3 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

4 For the meaning of 'tenant' see PARA 1300 note 1 ante.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'local authority' see PARA 1300 note 8 ante.

7 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.

8 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

9 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

10 As to voluntary aided schools see EDUCATION vol 15(1) (2006 Reissue) PARA 104.

11 For these purposes, 'contract of employment' means a contract of service or apprenticeship, whether express or implied and, if express, whether oral or in writing: Housing Act 1985 s 79(2)(a), Sch 1 para 2(5). See *South Glamorgan County Council v Griffiths* (1992) 24 HLR 334, CA (implied term of school caretaker's contract of employment that he was required to reside in the dwelling house for the better performance of his duties).

12 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

13 Housing Act 1985 Sch 1 para 2(1) (amended by the Housing Act 1988 s 83(1), (6)(a); the Housing Act 1996 s 173, Sch 16 para 2(2); the Government of Wales Act 1998 s 152, Sch 18 Pt IV); and see *Hughes v Greenwich London Borough Council* [1994] 1 AC 170, [1993] 4 All ER 577, HL (headmaster occupied house in school grounds owned by employing authority; no express contractual term that house to be occupied for the better performance of headmaster's duties; headmaster held to be a secure tenant and thus qualified for the right to buy), explained in *Surrey County Council v Lamond* (1998) 31 HLR 1051, [1998] All ER (D) 745, CA. See also *Brent London Borough Council v Charles* (1997) 29 HLR 876, CA. As to the right to buy see PARA 1795 et seq post. The Housing Act 1985 Sch 1 para 2(1) (as so amended) is not to be construed as laying down a once-and-for-all condition which has to be satisfied when the tenancy first commenced but instead it applies to remove a tenancy out of the category of secure tenancy at any time when the tenant's contract of employment requires him to occupy the premises for the better performance of his duties: *Elvidge v Coventry City Council* [1994] QB 241 [1993] 4 All ER 903, CA. The status of the tenancy is not unchangeably fixed at the moment it is entered into and whether or not a change in the tenant's circumstances causes a change in the status of the tenancy is to be determined by asking (1) whether the occupation of the house is still referable to the terms of the tenant's employment and the requirement that he occupy it for the better performance of his duties; and (2) whether there has been any agreed or intended change in the nature or purpose of that occupation: *Greenfield v Berkshire County Council* (1996) 95 LGR 327, 73 P & CR 280, CA.

- 14 For the meaning of 'police force' see POLICE vol 36(1) (2007 Reissue) PARA 102.
- 15 le in pursuance of regulations made under the Police Act 1996 s 50: see POLICE vol 36(1) (2007 Reissue) PARA 228.
- 16 Housing Act 1985 Sch 1 para 2(2) (amended by the Housing Act 1996 s 173, Sch 16 para 2(2); the Police Act 1996 s 103, Sch 7 para 40). As to the abolition of domestic rates see PARA 521 ante.
- 17 As to fire and rescue authorities see FIRE SERVICES.
- 18 Housing Act 1985 Sch 1 para 2(3) (amended by the Housing Act 1996 s 173, Sch 16 para 2(2); the Fire and Rescue Services Act 2004 s 53(1), Sch 1 para 62(1), (3)).
- 19 Housing Act 1985 Sch 1 para 2(4) (amended by the Housing Act 1996 ss 173, 227, Sch 16 para 2(2), (3), Sch 19 Pt VII).
- 20 For the meaning of 'local housing authority' see PARA 1311 note 4 post.
- 21 Housing Act 1985 Sch 1 para 2(4A) (Sch 1 para 2(4A), (4B) added by the Housing Act 1996 s 173, Sch 16 para 2(4)).
- 22 Housing Act 1985 Sch 1 para 2(4B) (as added: see note 21 supra).

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### 1306 Premises occupied in connection with employment

TEXT AND NOTE 13--Housing Act 1985 Sch 1 para 2(1) further amended: SI 2008/3002.

NOTE 13--Immaterial that particular employee has not used property in such way as to produce better performance, question is whether contractual requirement is intended to promote and is reasonably capable of promoting better performance of employee's duties: *Wragg v Surrey CC* [2008] EWCA Civ 19, [2008] HLR 464, [2008] All ER (D) 09 (Feb).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1307. Land acquired for development.

### 1307. Land acquired for development.

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if the dwelling house<sup>3</sup> is on land which has been acquired for development<sup>4</sup> and the dwelling house is used by the landlord<sup>5</sup>, pending development of the land, as temporary housing accommodation<sup>6</sup>.

- 1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.
- 2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 4 For these purposes, 'development' has the meaning given by the Town and Country Planning Act 1990 s 55 (as amended) (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 217): Housing Act 1985 s 79(2)(a), Sch 1 para 3(2) (amended by the Planning (Consequential Provisions) Act 1990 s 4, Sch 2 para 71(6)).
- 5 The landlord need not be the body which acquired the land for development: *Hyde Housing Association Ltd v Harrison* (1990) 23 HLR 57, [1991] 1 EGLR 51, CA. For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 6 Housing Act 1985 Sch 1 para 3(1). Development of the land must be pending; if there is no evidence that this is the case, eg if planning permission has not been granted, then the exception ceases to apply and the tenancy becomes a secure tenancy: see *Lillieshall Road Housing Co operative Ltd v Brennan and Brennan* (1991) 24 HLR 195, CA.

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1308. Accommodation for homeless persons.

### 1308. Accommodation for homeless persons.

A tenancy<sup>1</sup> granted in pursuance of any function under Part VII of the Housing Act 1996<sup>2</sup> (local housing authority duties to the homeless) is not a secure tenancy<sup>3</sup> unless the local housing authority<sup>4</sup> concerned has notified the tenant<sup>5</sup> that the tenancy is to be regarded as a secure tenancy<sup>6</sup>.

- 1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.
- 2 ie the Housing Act 1996 Pt VII (ss 175-218) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 275 et seq.
- 3 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 4 For the meaning of 'local housing authority' see PARA 1311 note 4 post.
- 5 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 6 Housing Act 1985 s 79(2)(a), Sch 1 para 4 (substituted by the Housing Act 1996 s 216, Sch 17 para 3).

## UPDATE

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### **1308 Accommodation for homeless persons**

TEXT AND NOTES--The 1985 Act Sch 1 para 4 does not require limitation in light of Sch 1 para 6, as Sch 1 para 6 extends to situations outside the scope of Sch 1 para 4, such as where a landlord of a relevant tenancy is not a local housing authority performing duties under the Housing Act 1996 Pt VII: *Westminster City Council v Boralu* [2007] EWCA Civ 1339, [2008] 1 WLR 2408, [2007] All ER (D) 34 (Nov).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1309. Accommodation for asylum-seekers.

### **1309. Accommodation for asylum-seekers.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is granted in order to provide accommodation under Part VI of the Immigration and Asylum Act 1999<sup>3</sup> (support for asylum-seekers)<sup>4</sup>. Such a tenancy, however, becomes a secure tenancy if the landlord<sup>5</sup> notifies the tenant<sup>6</sup> that it is to be regarded as a secure tenancy<sup>7</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 Ie under the Immigration and Asylum Act 1999 Pt VI (ss 94-127) (as amended): see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 246 et seq.

4 Housing Act 1985 s 79(2)(a), Sch 1 para 4A(1) (Sch 1 para 4A added by the Immigration and Asylum Act 1999 s 169(1), Sch 14 para 81).

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 Housing Act 1985 Sch 1 para 4A(2) (as added: see note 4 supra).

### **UPDATE**

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298;

Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

### **1309 Accommodation for asylum-seekers**

TEXT AND NOTE 3--Or under the Immigration and Asylum Act 1999 s 4: Housing Act 1985 Sch 1 para 4A(1) (amended by the Immigration, Asylum and Nationality Act 2006 s 43(4)(d)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1310. Accommodation for persons with temporary protection.

### **1310. Accommodation for persons with temporary protection.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is granted in order to provide accommodation<sup>3</sup> under the Displaced Persons (Temporary Protection) Regulations 2005<sup>4</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 I.e. under the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379: see reg 5 (accommodation for any person granted temporary protection); and BRITISH NATIONALITY, IMMIGRATION AND ASYLUM. 'Temporary protection' means limited leave to enter or remain granted pursuant to the Immigration Rules Pt 11A: see the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379, reg 2(1)(h).

4 Housing Act 1985 s 79(2)(a), Sch 1 para 4B (added by the Displaced Persons (Temporary Protection) Regulations 2005, SI 2005/1379, Schedule para 4).

## **UPDATE**

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1311. Temporary accommodation for persons taking up employment.

### **1311. Temporary accommodation for persons taking up employment.**

A tenancy<sup>1</sup> is not<sup>2</sup> a secure tenancy<sup>3</sup> before the expiry of one year from the grant if:

- 2783 (1) the person to whom the tenancy was granted was not, immediately before the grant, resident in the district<sup>4</sup> in which the dwelling house<sup>5</sup> is situated;
- 2784 (2) before the grant of the tenancy, he obtained employment, or an offer of employment, in the district or its surrounding area<sup>6</sup>;
- 2785 (3) the tenancy was granted to him for the purpose of meeting his need for temporary accommodation in the district or its surrounding area in order to work there, and of enabling him to find permanent accommodation there; and
- 2786 (4) the landlord<sup>7</sup> notified him in writing of the circumstances in which this exception applies and that in its opinion the proposed tenancy would fall within this exception<sup>8</sup>.

Except where the landlord is a local housing authority, such a tenancy becomes a secure tenancy on the expiry of one year from the grant or on earlier notification by the landlord to the tenant<sup>9</sup> that the tenancy is to be regarded as a secure tenancy<sup>10</sup>; and where the landlord is a local housing authority, such a becomes a secure tenancy if at any time the authority notifies the tenant that the tenancy is to be regarded as a secure tenancy<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 le subject to the Housing Act 1985 s 79(2)(a), Sch 1 para 5(1A), (1B) (as added): see the text and notes 9-10 infra.

3 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

4 For these purposes, 'district' means district of a local housing authority (Housing Act 1985 s 79(2)(a), Sch 1 para 5(2)); and 'local housing authority' means a district council, a London borough council, the Common Council of the City of London, a Welsh county council or county borough council or the Council of the Isles of Scilly (s 1 (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5). References to the district of a local housing authority are to the area of the council concerned, ie to the district, London borough, the City of London, the Welsh county or county borough or the Isles of Scilly, as the case may be (Housing Act 1985 s 2(1) (as so amended)); and references to 'the local housing authority', in relation to land, are to the local housing authority in whose district the land is situated (s 2(2)).

As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq; as to the districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq; as to the London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30; as to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq; and as to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

5 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6 For these purposes, 'surrounding area', in relation to a district, means the area consisting of each district that adjoins it: Housing Act 1985 Sch 1 para 5(2).

7 For the meaning of 'landlord' see PARA 1300 note 1 ante.

8 Housing Act 1985 Sch 1 para 5(1) (amended, and Sch 1 para 5(1A), (1B) added, by the Housing Act 1996 ss 173, 227, Sch 16 paras 2(5), (6), Sch 19 Pt VII).

9 For the meaning of 'tenant' see PARA 1300 note 1 ante.

10 Housing Act 1985 Sch 1 para 5(1A) (as added: see note 8 supra).

11 Ibid Sch 1 para 5(1B) (as added: see note 8 supra).

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1312. Short-term arrangements.

### **1312. Short-term arrangements.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if:

- 2787 (1) the dwelling house<sup>3</sup> has been leased<sup>4</sup> to the landlord<sup>5</sup> with vacant possession for use as temporary housing accommodation;
- 2788 (2) the terms on which it has been leased include provision for the lessor<sup>6</sup> to obtain vacant possession from the landlord on the expiry of a specified period or when required by the lessor<sup>7</sup>;
- 2789 (3) the lessor is not a body which is capable of granting secure tenancies<sup>8</sup>; and
- 2790 (4) the landlord has no interest in the dwelling house other than under the lease in question or as a mortgagee<sup>9</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of references to the grant of a lease see PARA 1300 note 1 ante. See also note 8 infra.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'lessor' see PARA 1300 note 1 ante.

7 The statutory wording of head (2) in the text is to be read as requiring a single provision for obtaining vacant possession in either event; it is not sufficient if the lease includes the first alternative (for the lessor to obtain vacant possession from the landlord on the expiry of a specified period) but not the second (for the lessor to obtain vacant possession when he requires it): see *Haringey London Borough Council v Hickey* [2006] EWCA Civ 373 at [17]-[19], (2006) Times, 5 June, [2006] All ER (D) 130 (Apr) per Sir Martin Nourse.

8 As to the bodies capable of granting secure tenancies see PARAS 1300-1301 ante.

9 Housing Act 1985 s 79(2)(a), Sch 1 para 6. Premises held by a local housing authority under a licence from a third party in order to provide temporary housing accommodation for homeless persons fall within Sch 1 para 6, since for these purposes a 'leased' dwelling house includes a dwelling house held under a lesser interest such as a licence: *Tower Hamlets London Borough Council v Miah* [1992] QB 622, [1992] 2 All ER 667, CA. See also *Tower Hamlets London Borough v Abdi* (1992) 25 HLR 80, [1993] 1 EGLR 68, CA; *Bromley London Borough Council v Smith* [2003] EWHC 1166 (QB), [2003] All ER (D) 361 (May).

## **UPDATE**

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1313. Temporary accommodation during works.

### **1313. Temporary accommodation during works.**

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if:

- 2791 (1) the dwelling house<sup>3</sup> has been made available for occupation by the tenant<sup>4</sup>, or a predecessor in title of his, while works are carried out on the dwelling house which he previously occupied as his home; and
- 2792 (2) the tenant or predecessor was not a secure tenant of that other dwelling house at the time when he ceased to occupy it as his home<sup>5</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'tenant' see PARA 1300 note 1 ante.

5 Housing Act 1985 s 79(2)(a), Sch 1 para 7.

## **UPDATE**

### **1303-1318 Exceptions**

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1314. Agricultural holdings and farm business tenancies.

### **1314. Agricultural holdings and farm business tenancies.**



A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if:

2793 (1) the dwelling house<sup>3</sup> is comprised in an agricultural holding<sup>4</sup> and is occupied by the person responsible for the control, whether as tenant<sup>5</sup> or as servant or agent of the tenant, of the farming of the holding<sup>6</sup>; or

2794 (2) the dwelling house is comprised in the holding held under a farm business tenancy<sup>7</sup> and is occupied by the person responsible for the control, whether as tenant or as servant or agent of the tenant, of the management of the holding<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For these purposes, 'agricultural holding' means any agricultural holding within the meaning of the Agricultural Holdings Act 1986 held under a tenancy in relation to which that Act applies: Housing Act 1985 s 79(2)(a), Sch 5 para 8(2)(a) (Sch 1 para 8 substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 30). As to such agricultural holdings see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

5 For the meaning of 'tenant' see PARA 1300 note 1 ante.

6 Housing Act 1985 Sch 1 para 8(1)(a) (as substituted: see note 4 supra).

7 For these purposes, 'farm business tenancy', and 'holding' in relation to such a tenancy, have the same meaning as in the Agricultural Tenancies Act 1995: Housing Act 1985 Sch 5 para 8(2)(b) (as substituted: see note 4 supra). As to such tenancies and holdings see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302.

8 Ibid Sch 1 para 8(1)(b) (as substituted: see note 4 supra).

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1315. Licensed premises.

### 1315. Licensed premises.

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if the dwelling house<sup>3</sup> consists of or includes premises which, by virtue of a premises licence under the Licensing Act 2003, may be used for the supply of alcohol<sup>4</sup> for consumption on the premises<sup>5</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 le within the meaning of the Licensing Act 2003 s 14.

5 Housing Act 1985 s 79(2)(a), Sch 1 para 9 (amended by the Licensing Act 2003 Sch 6 paras 102, 104). With effect from 1 January 1991, tenancies of licensed premises will usually fall within the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see the Landlord and Tenant (Licensed Premises) Act 1990 ss 1, 2(2), (3); and PARA 775 ante.

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(ii) Exceptions/1316. Student lettings.

### 1316. Student lettings.

A tenancy<sup>1</sup> of a dwelling house<sup>2</sup> is not<sup>3</sup> a secure tenancy<sup>4</sup> if:

2795 (1) it is granted for the purpose of enabling the tenant<sup>5</sup> to attend a designated course<sup>6</sup> at an educational establishment<sup>7</sup>; and

2796 (2) before the grant of the tenancy the landlord<sup>8</sup> notified him in writing<sup>9</sup> of the circumstances in which this exception applies and that in its opinion the proposed tenancy would fall within this exception<sup>10</sup>.

Except where the landlord is a local housing authority<sup>11</sup>, such a tenancy becomes a secure tenancy on the expiry of the specified period<sup>12</sup> or on earlier notification by the landlord to the tenant that the tenancy is to be regarded as a secure tenancy<sup>13</sup>; and where the landlord is a local housing authority, such a tenancy becomes a secure tenancy if at any time the authority notifies the tenant that the tenancy is to be regarded as a secure tenancy<sup>14</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3 le subject to the Housing Act 1985 s 79(2)(a), Sch 1 para 10(2A), (2B) (as added): see the text and notes 11-14 infra.

4 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

5 For the meaning of 'tenant' see PARA 1300 note 1 ante.

6 For these purposes, 'designated course' means a course of any kind designated by regulations made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister: Housing Act 1985 Sch 1 para 10(4). Sch regulations must be made by statutory instrument and may make different provision with respect to different cases or descriptions of case, including different provision for different areas: Sch 1 para 10(5). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions of the Secretary of State under the Housing Act 1985 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

For the courses so designated see the Secure Tenancies (Designated Courses) Regulations 1980, SI 1980/1407, reg 2 (amended by SI 1993/931).

7 For these purposes, 'educational establishment' means a university or institution which provides higher education or further education (or both); and for the purposes of this definition 'higher education' and 'further education' have the same meaning as in the Education Act 1996 (see EDUCATION vol 15(1) (2006 Reissue) PARAS 18-19): Housing Act 1985 Sch 1 para 10(4) (definition amended by the Education Reform Act 1988 s 237(1), Sch 12 Pt III para 95; the Education Act 1996 s 582(1), Sch 37 para 62).

8 For the meaning of 'landlord' see PARA 1300 note 1 ante.

9 A landlord's notice must specify the educational establishment which the person concerned proposes to attend: Housing Act 1985 Sch 1 para 10(2).

10 Ibid Sch 1 para 10(1) (Sch 1 para 10(1), (3) amended, and Sch 1 para 10(2A), (2B) added, by the Housing Act 1996 ss 173, 227, Sch 16 para 2(7)-(9), Sch 19 Pt VII).

11 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

12 In the period specified in the Housing Act 1985 Sch 1 para 10(3) (as amended). That period is: (1) in a case where the tenant attends a designated course at the educational establishment specified in the landlord's notice, the period ending six months after the tenant ceases to attend that (or any other) designated course at that establishment; (2) in any other case, the period ending six months after the grant of the tenancy: Sch 1 para 10(3) (as amended: see note 10 supra).

13 Ibid Sch 1 para 10(2A) (as added: see note 10 supra).

14 Ibid Sch 1 para 10(2B) (as added: see note 10 supra).

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### 1317. Business premises.

A tenancy<sup>1</sup> is not a secure tenancy<sup>2</sup> if it is one to which Part II of the Landlord and Tenant Act 1954<sup>3</sup> applies<sup>4</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

- 2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 3 In the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.
- 4 Housing Act 1985 s 79(2)(a), Sch 1 para 11.

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### 1318. Almshouses.

A licence to occupy a dwelling house<sup>1</sup> is not a secure tenancy<sup>2</sup> if:

- 2797 (1) the dwelling house is an almshouse<sup>3</sup>; and
- 2798 (2) the licence was granted by or on behalf of a charity<sup>4</sup> which is authorised under its trusts<sup>5</sup> to maintain the dwelling house as an almshouse and has no power under its trusts to grant a tenancy<sup>6</sup> of the dwelling house<sup>7</sup>.

- 1 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 3 For these purposes, 'almshouse' means any premises maintained as an almshouse, whether they are called an almshouse or not: Housing Act 1985 s 79(2)(a), Sch 1 para 12 (substituted by the Charities Act 1992 s 78(1), Sch 6 para 12).
- 4 For the meaning of 'charity' see PARA 1300 note 16 ante.
- 5 For these purposes, 'trusts', in relation to a charity, means the provisions establishing it as a charity and regulating its purposes and administration, whether those provisions take effect by way of trust or not: Housing Act 1985 Sch 1 para 12 (as substituted: see note 3 supra).
- 6 For the meaning of 'tenancy' see PARA 1300 note 1 ante.
- 7 Housing Act 1985 Sch 1 para 12 (as substituted: see note 3 supra).

## UPDATE

### 1303-1318 Exceptions

See also Housing Act 1985 Sch 1 para 4ZA (added by the Housing and Regeneration Act 2008 s 297(1)) which provides that a tenancy is not a secure tenancy if it is a family intervention tenancy. For provision in relation to the termination of local housing authority family intervention tenancies see Housing and Regeneration Act 2008 s 298; Family Intervention Tenancies (Review of Local Authority Decisions) (England) Regulations 2008, SI 2008/3111.

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### **(iii) Rights of Succession**

#### **1319. Persons qualified to succeed tenant.**

A person is qualified to succeed the tenant<sup>1</sup> under a secure tenancy<sup>2</sup> if he occupies the dwelling house<sup>3</sup> as his only or principal home<sup>4</sup> at the time of the tenant's death and either:

- 2799 (1) he is the tenant's spouse or civil partner; or
- 2800 (2) he is another member of the tenant's family<sup>5</sup> and has resided with the tenant throughout the period of 12 months ending with the tenant's death<sup>6</sup>;

unless, in either case, the tenant was<sup>7</sup> himself a successor<sup>8</sup>.

It has been held that the statutory rules of succession<sup>9</sup> do not infringe the provisions of the European Convention on Human Rights prohibiting discrimination<sup>10</sup>, as read with the Convention right<sup>11</sup> to respect for private and family life<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'only or principal home' see PARA 1300 note 19 ante. See also *Southwark London Borough Council v O'Sullivan* [2004] EWHC 75 (Ch), [2004] All ER (D) 72 (Jan).

5 For these purposes, a person is a member of another's family if (1) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners; or (2) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece: Housing Act 1985 s 113(1) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 27(1), (2)). For the purposes of head (2) supra: (a) a relationship by marriage or civil partnership is treated as a relationship by blood; (b) a relationship of the half-blood is treated as a relationship of the whole blood; (c) the stepchild of a person is treated as his child; and (d) an illegitimate child is treated as the legitimate child of his mother and reputed father: Housing Act 1985 s 113(2) (amended by the Civil Partnership Act 2004 Sch 8 para 27(1), (3)). As to 'living together as husband and wife' see PARA 846 note 17 ante; and see *Westminster City Council v Peart* (1991) 24 HLR 389, CA. An adopted child is treated as a natural child: *Reading Borough Council v Ilesley* [1981] CLY 1323. A foster child is not included in the statutory definition; but see *Sheffield City Council v Personal Representatives of Wall* [2006] EWCA Civ 495, [2006] All ER (D) 360 (Mar), CA (where the judge estopped the council from submitting that, in the particular circumstances, the defendant was not a member of his deceased foster mother's family, and this part of his decision was upheld by the Court of Appeal).

6 The requirement of 12 months' residence with the tenant prior to his or her death does not have to be at a particular house, or even in a house which was subject to a secure tenancy. The successor must simply have resided for a period of 12 months as a member of the family of the deceased: *Waltham Forest London Borough Council v Thomas* [1992] 2 AC 198, [1992] 3 All ER 244, HL, overruling *South Northamptonshire District Council*

*v Power* [1987] 3 All ER 831, [1987] 1 WLR 1433, CA. A period of absence from a property does not necessarily break the continuity of residence; in order to determine whether or not that continuity is broken, regard must be had (1) to the nature and extent of the continuing connection with the property in dispute throughout the period of absence; and (2) to the quality of the intention to return to the property: *Camden London Borough Council v Goldenberg* (1996) 95 LGR 693, [1996] 3 FCR 9, CA. See also PARA 843 note 7 ante.

7     le if he was himself a successor as defined in the Housing Act 1985 s 88 (as amended): see PARA 1320 post.

8     Ibid s 87 (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 20). Where a person who was previously a successor in relation to a secure tenancy is granted a new secure tenancy by a public sector landlord under the mandatory leaseback provisions contained in the Leasehold Reform, Housing and Urban Development Act 1993 s 36, Sch 9 (as amended), he is also a successor in relation to the new secure tenancy: see s 37, Sch 10 para 2(3) (as amended); and PARA 1668 post.

Where a successor remains in occupation in breach of a suspended possession order against him, he becomes a tolerated trespasser and no new tenancy arises to which such a person as is described in heads (1)-(2) in the text can succeed: see *Newham London Borough Council v Hawkins* [2005] EWCA Civ 451, [2005] LGR 750, [2005] All ER (D) 319 (Apr), considering *Burrows v Brent London Borough Council* [1996] 4 All ER 577, [1996] 1 WLR 1448, HL.

9     le the provisions of the Housing Act 1985 ss 87-89 (as amended): see the text and notes 1-8 supra; and PARAS 1320-1321 post.

10    le the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 14, now incorporated into domestic law by the Human Rights Act 1998 Sch 1 Pt I art 14: see PARA 46 ante.

11    le under ibid Sch 1 Pt I art 8: see PARA 46 ante.

12    See *R (on the application of Gangera) v Hounslow London Borough Council* [2003] EWHC 794 (Admin), [2003] HLR 1028, [2003] All ER (D) 200 (Apr), applied in *Hounslow London Borough Council v Adjei* [2004] EWHC 207 (Ch), [2004] 2 All ER 636, [2004] 2 FCR 465. See also *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.

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### **1320. Cases where the tenant is a successor.**

The tenant<sup>1</sup> is himself a successor if:

- 2801 (1) the tenancy<sup>2</sup> vested in him on succession to a periodic tenancy<sup>3</sup>; or
- 2802 (2) he was a joint tenant and had become the sole tenant<sup>4</sup>; or
- 2803 (3) the tenancy is a periodic tenancy arising on the ending of a term certain<sup>5</sup> and the first tenancy<sup>6</sup> was granted to another person or jointly to him and another person; or
- 2804 (4) he became the tenant on the tenancy being assigned to him<sup>7</sup>; or
- 2805 (5) he become the tenant on the tenancy being vested in him on the death of the previous tenant; or
- 2806 (6) the tenancy was previously an introductory tenancy<sup>8</sup> and he was a successor to the introductory tenancy<sup>9</sup>.

A tenant to whom the tenancy was assigned in pursuance of a property adjustment order in connection with matrimonial proceedings or after overseas divorce etc<sup>10</sup> is a successor only if the other party to the marriage was a successor<sup>11</sup>; and a tenant to whom the tenancy was assigned in pursuance of a property adjustment order in connection with civil partnership

proceedings or after overseas dissolution of a civil partnership etc<sup>12</sup> is a successor only if the other civil partner was a successor<sup>13</sup>.

A tenant to whom the tenancy was assigned by way of exchange<sup>14</sup> is a successor only if he was a successor in relation to the tenancy which he himself assigned<sup>15</sup>.

Where, within six months of the coming to an end of a secure tenancy which is a periodic tenancy ('the former tenancy'), the tenant becomes a tenant under another secure tenancy which is a periodic tenancy, and:

- 2807 (a) the tenant was a successor in relation to the former tenancy; and
- 2808 (b) under the other tenancy either the dwelling house<sup>16</sup> or the landlord<sup>17</sup>, or both, are the same as under the former tenancy,

the tenant is also a successor in relation to the other tenancy unless the agreement creating that tenancy otherwise provides<sup>18</sup>.

1 For the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

3 Ie the tenancy vested in him by virtue of the Housing Act 1985 s 89 (as amended): see PARA 1321 post.

4 See, however, *Walker v Birmingham City Council* [2006] EWCA Civ 815, [2006] 2 FCR 623, (2006) Independent, 28 June (a person who had been a joint contractual tenant and became a sole contractual tenant by right of survivorship, and then a secure tenant under the Housing Act 1980 (the relevant provisions of which are now repealed), was not a successor under the Housing Act 1985 s 88 (as amended)).

5 Ie the tenancy arose by virtue of *ibid* s 86: see PARA 1302 ante.

6 For the meaning of 'the first tenancy' see PARA 1302 ante.

7 Ie but subject to the Housing Act 1985 s 88(2)-(3) (as amended): see the text and notes 10-15 *infra*.

8 For the meaning of 'introductory tenancy' see PARA 1304 note 3 ante.

9 Housing Act 1985 s 88(1) (amended by the Housing Act 1996 s 141(1), Sch 14 para 1; the Civil Partnership Act 2004 s 81, Sch 8 para 21(1), (2)).

10 Ie in pursuance of an order under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 ante) or in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

11 Housing Act 1985 s 88(2) (amended by the Housing Act 1996 s 222, Sch 18 para 9; the Family Law Act 1996 s 66(1), Sch 8 para 34).

12 Ie in pursuance of an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

13 Housing Act 1985 s 88(2A) (added by the Civil Partnership Act 2004 s 81, Sch 8 para 21(1), (3)).

14 Ie by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 post.

15 *Ibid* s 88(3).

16 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

17 For the meaning of 'landlord' see PARA 1300 note 1 ante.

18 Housing Act 1985 s 88(4). See also *Bassetlaw District Council v Renshaw* [1992] 1 All ER 925, 90 LGR 145, CA (joint tenancy between husband and wife determined and wife taking sole tenancy; wife not a 'successor'); *Epping District Council v Pomphrett and Pomphrett* (1990) 22 HLR 475, [1990] 2 EGLR 46, CA (effect of tenant dying intestate on persons qualified to succeed). See also PARA 1319 note 8 ante.

**UPDATE****1320 Cases where the tenant is a successor**

NOTE 4--*Walker*, cited, affirmed: *Birmingham City Council v Walker* [2007] UKHL 22, [2007] 3 All ER 445.

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**1321. Succession to a periodic tenancy.**

The following provisions apply where a secure tenant<sup>1</sup> dies and the tenancy<sup>2</sup> is a periodic tenancy<sup>3</sup>.

Where there is a person qualified to succeed<sup>4</sup> the tenant, the tenancy vests<sup>5</sup> in that person or, if there is more than one such person, in the one to be preferred in accordance with the following rules:

- 2809 (1) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family<sup>6</sup>;
- 2810 (2) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord<sup>7</sup>.

Where there is no person qualified to succeed the tenant, the tenancy ceases to be a secure tenancy:

- 2811 (a) when it is vested or otherwise disposed of in the course of the administration of the tenant's estate, unless the vesting or other disposal is in pursuance of a property adjustment made in connection with matrimonial proceedings<sup>8</sup>, a property adjustment order after an overseas divorce, etc<sup>9</sup>, an order for financial relief against a parent<sup>10</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>11</sup>;
- 2812 (b) when it is known that when the tenancy is so vested or disposed of it will not be in pursuance of such an order as is mentioned in head (a) above<sup>12</sup>.

A tenancy which so ceases to be a secure tenancy cannot subsequently become a secure tenancy<sup>13</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

3 Housing Act 1985 s 89(1).



4 As to the persons qualified to succeed see PARA 1319 ante. A minor may succeed to the secure periodic tenancy in equity: see *Newham London Borough Council v Ria* [2004] EWCA Civ 41, [2004] All ER (D) 88 (Jan); *Royal Borough of Kingston upon Thames v Prince* [1999] LGR 333, [1999] 1 FLR 593, CA.

5 le by virtue of the Housing Act 1985 s 89 (as amended): see the text and notes 6-13 infra.

6 For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.

7 Housing Act 1985 s 89(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 22(1), (2)). Where a family agreement has been made that one family member is to be the successor, a document signed by that person purporting to create a joint tenancy cannot lead to an inference of surrender in the absence of an act pointing unequivocally to surrender: *Newham London Borough Council v Phillips* (1997) 96 LGR 788, [1998] 1 FLR 613, CA. For the meaning of 'landlord' see PARA 1300 note 1 ante; and as to surrender by operation of law see PARA 633 et seq ante.

8 le in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 ante).

9 le in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

10 le in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

11 le an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

12 Housing Act 1985 s 89(3) (substituted by the Housing Act 1996 s 222, Sch 18 para 10; amended by the Civil Partnership Act 2004 ss 81, 261(4), Sch 8 para 22(1), (3), Sch 30; prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 34, as from a day to be appointed). The Housing Act 1985 s 99B(2)(c) (as added) (qualifying person in relation to compensation for tenant's improvements: see PARA 1333 post at head (2)(c) in the text) does not apply in any case where the tenancy so ceases to be a secure tenancy: see PARA 1333 note 13 post.

13 Ibid s 89(4). See also PARA 1319 note 8 ante.

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### **1322. Devolution of term certain.**

The following provisions apply where a secure tenant<sup>1</sup> dies and the tenancy<sup>2</sup> is a tenancy for a term certain<sup>3</sup>.

The tenancy remains a secure tenancy until:

2813 (1) it is vested or otherwise disposed of in the course of the administration of the tenant's estate<sup>4</sup>; or

2814 (2) it is known that, when it is so vested or disposed of, it will not be a secure tenancy<sup>5</sup>.

The tenancy ceases to be a secure tenancy on being vested or otherwise disposed of in the course of administration of the tenant's estate unless:

2815 (a) the vesting or other disposal is in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>6</sup>, a property adjustment

order after an overseas divorce, etc<sup>7</sup>, an order for financial relief against a parent<sup>8</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>9</sup>; or  
 2816 (b) the vesting or other disposal is to a person qualified to succeed the tenant<sup>10</sup>.

A tenancy which so ceases to be a secure tenancy cannot subsequently become a secure tenancy<sup>11</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

3 Housing Act 1985 s 90(1). As to tenancies for a term certain see PARA 235 et seq ante.

4 Ie as mentioned in ibid s 90(3) (as amended): see heads (a)-(b) in the text.

5 Ibid s 90(2).

6 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 ante).

7 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

8 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

9 Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

10 Housing Act 1985 s 90(3) (amended by the Housing Act 1996 s 222, Sch 18 para 11; the Civil Partnership Act 2004 ss 81, s 261(4), Sch 8 para 23, Sch 30; prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 34, as from a day to be appointed). As to the persons qualified to succeed see PARA 1319 ante. The Housing Act 1985 s 99B(2)(c) (as added) (qualifying person in relation to compensation for tenant's improvements: see PARA 1333 post at head (2)(c) in the text) does not apply in any case where the tenancy so ceases to be a secure tenancy: see PARA 1333 note 13 post.

11 Ibid s 90(4).

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#### **(iv) Terms of the Secure Tenancy**

##### **A. ASSIGNMENT, LODGERS AND SUBLETTING**

##### **1323. Assignment in general prohibited.**

A secure tenancy<sup>1</sup> which is a periodic tenancy<sup>2</sup> or a tenancy for a term certain<sup>3</sup> granted on or after 5 November 1982 is not capable of being assigned except where the assignment is:

2817 (1) by way of exchange<sup>4</sup>; or

- 2818 (2) in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>5</sup>, a property adjustment order after an overseas divorce, etc<sup>6</sup>, an order for financial relief against a parent<sup>7</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>8</sup>;
- 2819 (3) to a person who would be qualified to succeed<sup>9</sup> the tenant<sup>10</sup> if the tenant died immediately before the assignment<sup>11</sup>.

If a secure tenancy for a term certain granted before 5 November 1982 is assigned, then, except in the cases specified in heads (1) to (3) above, it ceases to be a secure tenancy and cannot subsequently become a secure tenancy<sup>12</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 As to periodic tenancies see PARA 233 ante.

3 As to the nature of a term certain see PARA 235 et seq ante.

4 Ie an assignment in accordance with the Housing Act 1985 s 92 (as amended): see PARA 1324 post.

5 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 ante).

6 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

7 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

8 Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

9 As to the persons qualified to succeed see PARA 1319 ante.

10 For the meaning of 'tenant' see PARA 1300 note 1 ante.

11 Housing Act 1985 s 91(1), (3) (amended by the Housing Act 1996 s 222, Sch 18 para 12; the Civil Partnership Act 2004 ss s 81, 261(4), Sch 8 para 24, Sch 30; prospectively amended by the Family Law Act 1996 s 66(1), Sch 8 para 34). The Housing Act 1985 s 91 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; as to housing associations and other registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq; and for the meaning of 'landlord' see PARA 1300 note 1 ante.

On its true construction, the Housing Act 1985 s 91(1) precludes one joint tenant of a periodic secure tenancy from transferring his interest in that tenancy to the other joint tenant, irrespective of the label attached to the means of transfer; thus a deed of release cannot operate as an 'assignment' for the statutory purposes: *Burton v Camden London Borough Council* [2000] 2 AC 399, [2000] 1 All ER 943, HL.

12 Housing Act 1985 s 91(2). See also note 11 supra; and *Governors of the Peabody Donation Fund v Higgins* [1983] 3 All ER 122, [1983] 1 WLR 1091, CA.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(iv) Terms of the Secure Tenancy/A. ASSIGNMENT, LODGERS AND SUBLETTING/1324. Assignments by way of exchange.

### **1324. Assignments by way of exchange.**

It is a term<sup>1</sup> of every secure tenancy<sup>2</sup> that the tenant<sup>3</sup> may, with the written consent of the landlord<sup>4</sup>, assign the tenancy to another secure tenant who satisfies the specified condition<sup>5</sup> or to an assured tenant<sup>6</sup> who satisfies the specified<sup>7</sup> conditions<sup>8</sup>.

The condition which the other secure tenant must satisfy is that he has the written consent of his landlord to an assignment of his tenancy either to the first-mentioned tenant or to another secure tenant who satisfies this condition<sup>9</sup>.

The conditions to be satisfied with respect to an assured tenant are:

- 2820 (1) that the landlord under his assured tenancy is either the Housing Corporation<sup>10</sup>, a registered social landlord<sup>11</sup> or a housing trust<sup>12</sup> which is a charity<sup>13</sup>; and
- 2821 (2) that he intends to assign his assured tenancy to the secure tenant or to another secure tenant who satisfies the specified<sup>14</sup> condition<sup>15</sup>.

The consent so required may not be withheld except on one or more of the specified grounds<sup>16</sup> and, if withheld otherwise than on one of those grounds, is to be treated as given<sup>17</sup>. The landlord may not rely on any of those grounds unless he has, within 42 days of the tenant's application for the consent, served on the tenant a notice specifying the ground and giving particulars of it<sup>18</sup>.

Where rent lawfully due from the tenant has not been paid or an obligation of the tenancy has been broken or not performed, the consent so required may be given subject to a condition requiring the tenant to pay the outstanding rent, remedy the breach or perform the obligation<sup>19</sup>. A consent so required cannot otherwise be given subject to a condition; and a condition imposed otherwise than as so provided must be disregarded<sup>20</sup>.

1 For the meaning of 'term' see PARA 1302 note 8 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 I.e. the condition in the Housing Act 1985 s 92(2): see the text and note 9 infra.

6 For these purposes, 'assured tenancy' has the same meaning as in the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARA 1011 et seq ante): Housing Act 1985 s 622(1) (definition added by the Housing Act 1988 s 140(1), Sch 17 Pt I para 64).

7 I.e. the conditions in the Housing Act 1985 s 92(2A) (as added): see heads (1)-(2) in the text.

8 Ibid s 92(1) (amended by the Local Government and Housing Act 1989 s 163(1), (2)). The Housing Act 1985 s 92 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

There are two relevant transactions, the assignment and the consent to the assignment, and the fact that the consent has been obtained by fraud does not vitiate the assignment: see *Sanctuary Housing Association v Baker* (1997) 30 HLR 809, [1998] 1 EGLR 42, CA.

9 Housing Act 1985 s 92(2). See also note 8 supra.

10 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

11 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

12 As to housing trusts see HOUSING vol 22 (2006 Reissue) PARA 12.

- 13 For the meaning of 'charity' see PARA 1300 note 16 ante.
- 14 Ie the condition in the Housing Act 1985 s 92(2): see the text and note 9 supra.
- 15 Ibid s 92(2A) (added by the Local Government and Housing Act 1989 s 163(1), (3); amended by the Government of Wales Act 1998 ss 140, 152, Sch 16 para 10, Sch 18 Pt VI; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2, PARA 14(9)). See also note 8 supra.
- 16 Ie the grounds set out in the Housing Act 1985 s 92(3), Sch 3 (as amended): see PARA 1325 post.
- 17 Ibid s 92(3). See also note 8 supra.
- 18 Ibid s 92(4). See also note 8 supra.
- 19 Ibid s 92(5). See also note 8 supra.
- 20 Ibid s 92(6). See also note 8 supra.

## UPDATE

### 1324 Assignments by way of exchange

TEXT AND NOTE 10--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(iv) Terms of the Secure Tenancy/A. ASSIGNMENT, LODGERS AND SUBLETTING/1325. Grounds for withholding consent.

### 1325. Grounds for withholding consent.

The grounds for withholding consent to an assignment by way of exchange<sup>1</sup> are:

- 2822 (1) the tenant<sup>2</sup> or the proposed assignee is obliged to give up possession of the dwelling house<sup>3</sup> of which he is the secure tenant<sup>4</sup> in pursuance of an order of the court, or will be so obliged at a date specified in such an order<sup>5</sup>;
- 2823 (2) proceedings have been begun for possession of the dwelling house of which the tenant or the proposed assignee is the secure tenant on one or more of the grounds on which possession may be ordered despite the absence of suitable alternative accommodation<sup>6</sup>, or there has been served on the tenant or the proposed assignee a notice of proceedings for possession<sup>7</sup> which specifies one or more of those grounds and is still in force<sup>8</sup>;
- 2824 (3) either:
- 171 8. (a) a relevant order<sup>9</sup> or suspended Ground 2 or Ground 14 possession order<sup>10</sup> is in force; or
9. (b) an application is pending before any court for a relevant order, a demotion order<sup>11</sup> or a Ground 2 or Ground 14 possession order to be made,
- 172 2825 in respect of the tenant or the proposed assignee or a person who is residing with either of them<sup>12</sup>;

- 2826 (4) the accommodation afforded by the dwelling house is substantially more extensive than is reasonably required by the proposed assignee<sup>13</sup>;
- 2827 (5) the extent of the accommodation afforded by the dwelling house is not reasonably suitable to the needs of the proposed assignee and his family<sup>14</sup>;
- 2828 (6) the dwelling house:
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10. (a) forms part of or is within the curtilage of a building which, or so much of it as is held by the landlord<sup>15</sup>, is held mainly for purposes other than housing purposes<sup>16</sup> and consists mainly of accommodation other than housing accommodation, or is situated in a cemetery<sup>17</sup>; and
11. (b) was let to the tenant or a predecessor in title of his in consequence of the tenant or predecessor being in the employment of the landlord, a local authority<sup>18</sup>, a new town corporation<sup>19</sup>, a housing action trust<sup>20</sup>, an urban development corporation<sup>21</sup> or the governors of an aided school<sup>22</sup>;
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- 2829 (7) the landlord is a charity<sup>23</sup> and the proposed assignee's occupation of the dwelling house would conflict with the objects of the charity<sup>24</sup>;
- 2830 (8) the dwelling house has features which are substantially different from those of ordinary dwelling houses and which are designed to make it suitable for occupation by a physically disabled person who requires accommodation of the kind provided by the dwelling house and, if the assignment were made, there would no longer be such a person residing in the dwelling house<sup>25</sup>;
- 2831 (9) the landlord is a housing association<sup>26</sup> or housing trust<sup>27</sup> which lets dwelling houses only for occupation, alone or with others, by persons whose circumstances, other than merely financial circumstances, make it especially difficult for them to satisfy their need for housing and, if the assignment were made, there would no longer be such a person residing in the dwelling house<sup>28</sup>;
- 2832 (10) the dwelling house is one of a group of dwelling houses which it is the practice of the landlord to let for occupation by persons with special needs and a social service or special facility is provided in close proximity to the group of dwelling houses in order to assist persons with those special needs and, if the assignment were made, there would no longer be a person with those special needs residing in the dwelling house<sup>29</sup>;
- 2833 (11) the dwelling house is the subject of a management agreement<sup>30</sup> under which the manager is a housing association of which at least half the members are tenants of dwelling houses subject to the agreement, at least half the tenants of the dwelling houses are members of the association and the proposed assignee is not, and is not willing to become, a member of the association<sup>31</sup>.

1 le under the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

5 Housing Act 1985 s 92(3), Sch 3, Ground 1.

6 le one or more of *ibid* s 84(2)(a), Sch 2 Pt I, Grounds 1-6 (as amended): see PARAS 1357-1363 post.

7 le a notice under *ibid* s 83 (as substituted and amended): see PARA 1352 post.

8 *Ibid* Sch 3, Ground 2.

9 For these purposes, a 'relevant order' means (1) an injunction under the Housing Act 1996 s 152 (now repealed) (injunctions against anti-social behaviour); (2) an injunction to which a power of arrest is attached by virtue of s 153 (now repealed) (other injunctions against anti-social behaviour); (3) an injunction under s 153A, s

153B or s 153D (each as added) (injunctions against anti-social behaviour on application of certain social landlords: see HOUSING vol 22 (2006 Reissue) PARA 268 et seq); (4) an anti-social behaviour order under the Crime and Disorder Act 1998 s 1 (as amended) (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 496; or (5) an injunction to which a power of arrest is attached by virtue of the Anti-social Behaviour Act 2003 s 91: Housing Act 1985 Sch 3, Ground 2A (added by the Housing Act 2004 s 191(1)).

10 For these purposes, a 'Ground 2 or 14 possession order' means an order for possession under the Housing Act 1985 Sch 2 Pt I, Ground 2 (as substituted and amended) (see PARA 1358 post) or under the Housing Act 1988 Sch 2 Pt II, Ground 14 (as substituted and amended) (see PARA 1123 ante): Housing Act 1985 Sch 3, Ground 2A (as added: see note 9 supra).

11 For these purposes, a 'demotion order' means a demotion order under *ibid* s 82A (as added) (see PARA 1351 post) or the Housing Act 1988 s 6A (as added) (see PARA 1066 ante): Housing Act 1985 Sch 3, Ground 2A (as added: see note 9 supra).

12 *Ibid* Sch 3, Ground 2A (as added: see note 9 supra). For these purposes, where the tenancy of the tenant or the proposed assignee is a joint tenancy, any reference to that person includes (where the context permits) a reference to any of the joint tenants: Sch 3, Ground 2A (as so added). As to the disclosure of information for the purpose of enabling the landlord to decide whether to invoke this ground see PARA 1341 post.

13 *Ibid* Sch 3, Ground 3.

14 *Ibid* Sch 3, Ground 4.

15 For the meaning of 'landlord' see PARA 1300 note 1 ante.

16 'Housing purposes' means the purposes for which dwelling houses are held by local housing authorities under the Housing Act 1985 Pt II (ss 8-57) (as amended); see HOUSING vol 22 (2006 Reissue) PARA 220 et seq) or purposes corresponding to those purposes: s 116.

17 For these purposes, 'cemetery' has the same meaning as in the Local Government Act 1972 s 214 (as amended) (see CREMATION AND BURIAL vol 10 (Reissue) PARA 908 note 6): Housing Act 1985 s 622(1).

18 For the meaning of 'local authority' see PARA 1300 note 8 ante.

19 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.

20 For the meaning of housing action trust' see PARA 1300 note 10 ante.

21 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

22 Housing Act 1985 Sch 3, Ground 5 (amended by the Housing Act 1988 s 83(1), (6)(c); the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to voluntary aided schools see EDUCATION vol 15(1) (2006 Reissue) PARA 104.

23 For the meaning of 'charity' see PARA 1300 note 16 ante.

24 Housing Act 1985 Sch 3, Ground 6.

25 *Ibid* Sch 3, Ground 7.

26 As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

27 As to housing trusts see HOUSING vol 22 (2006 Reissue) PARA 12.

28 Housing Act 1985 Sch 3, Ground 8.

29 *Ibid* Sch 3, Ground 9.

30 As to management agreements see HOUSING vol 22 (2006 Reissue) PARA 259 et seq.

31 Housing Act 1985 Sch 3, Ground 10 (added by the Housing and Planning Act 1986 s 24(1)(g), Sch 5 para 7).

## UPDATE

### 1325 Grounds for withholding consent

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTE 5--Housing Act 1985 Sch 3, Ground 1 substituted: Housing and Regeneration Act 2008 s 299, Sch 11 para 4. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

TEXT AND NOTE 22--Housing Act 1985 Sch 3, Ground 5 further amended: SI 2008/3002.

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### **1326. Lodgers and subletting.**

It is a term<sup>1</sup> of every secure tenancy<sup>2</sup> that the tenant<sup>3</sup>.

2834 (1) may allow any persons to reside as lodgers in the dwelling house<sup>4</sup>; but  
2835 (2) will not, without the written consent<sup>5</sup> of the landlord<sup>6</sup>, sublet or part with possession of part of the dwelling house<sup>7</sup>.

If the tenant under a secure tenancy parts with the possession of the dwelling house or sublets the whole of it, or sublets first part of it and then the remainder, the tenancy ceases to be a secure tenancy and cannot subsequently become a secure tenancy<sup>8</sup>.

1 For the meaning of 'term' see PARA 1302 note 8 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

5 As to consent to subletting see PARA 1327 post.

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 Housing Act 1985 s 93(1). Section 93 does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

8 Ibid s 93(2). See also note 7 supra.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE



TENANCIES/(iv) Terms of the Secure Tenancy/A. ASSIGNMENT, LODGERS AND SUBLETTING/1327. Consent to subletting.

### **1327. Consent to subletting.**

The following provisions apply to the landlord's consent<sup>1</sup> to subletting part of a dwelling house<sup>2</sup>.

Consent may not be unreasonably withheld and, if unreasonably withheld, is treated as given; and, if a question arises whether the withholding of consent was unreasonable, it is for the landlord to show that it was not<sup>3</sup>. In determining that question, the following matters, if shown by the landlord, are among those to be taken into account:

- 2836 (1) that the consent would lead to overcrowding of the dwelling house<sup>4</sup>;
- 2837 (2) that the landlord proposes to carry out works on the dwelling house, or on the building of which it forms part, and that the proposed works will affect the accommodation likely to be used by the subtenant who would reside in the dwelling house as a result of the consent<sup>5</sup>.

Consent may be validly given notwithstanding that it follows, instead of preceding, the action requiring it<sup>6</sup>.

Consent cannot be given subject to a condition and, if purporting to be given subject to a condition, is treated as given unconditionally<sup>7</sup>.

Where the tenant<sup>8</sup> has applied in writing for consent, then:

- 2838 (a) if the landlord refuses to give consent, it must give the tenant a written statement of the reasons why consent was refused; and
- 2839 (b) if the landlord neither gives nor refuses to give consent within a reasonable time, consent is taken to have been withheld<sup>9</sup>.

1    Ie the consent required by the Housing Act 1985 s 93(1)(b): see PARA 1326 ante at head (2) in the text. For the meaning of 'landlord' see PARA 1300 note 1 ante.

2    Ibid s 94(1). For the meaning of 'dwelling house' see PARA 1300 note 2 ante. Section 94 does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

3    Ibid s 94(2). See also note 2 supra.

4    Ie within the meaning of ibid Pt X (ss 324-344) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 443 et seq.

5    Ibid s 94(3). See also note 2 supra.

6    Ibid s 94(4). See also note 2 supra.

7    Ibid s 94(5). See also note 2 supra.

8    For the meaning of 'tenant' see PARA 1300 note 1 ante.

9    Housing Act 1985 s 94(6). See also note 2 supra.

TENANCIES/(iv) Terms of the Secure Tenancy/A. ASSIGNMENT, LODGERS AND SUBLETTING/1328. Assignment or subletting where tenant condition not satisfied.

### **1328. Assignment or subletting where tenant condition not satisfied.**

The following provisions apply to a tenancy<sup>1</sup> which is not a secure tenancy<sup>2</sup> but would be if the tenant condition<sup>3</sup> were satisfied<sup>4</sup>.

The statutory restrictions on assignment or subletting of the whole dwelling house<sup>5</sup> apply to such a tenancy as they apply to a secure tenancy, except that:

- 2840 (1) the statutory provisions relating to assignments excepted from the restrictions<sup>6</sup> do not apply to such a tenancy for a term certain<sup>7</sup> granted before 5 November 1982; and
- 2841 (2) references to the tenancy ceasing to be secure are to be disregarded, without prejudice to the application of the remainder of the provisions in which those references occur<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'the tenant condition' see PARA 1300 ante.

4 Housing Act 1985 s 95(1). Section 95 does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'landlord' see PARA 1300 note 1 ante; for the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 *le ibid* s 91 (as amended) (see PARA 1323 ante) and s 93(2) (see PARA 1326 ante). For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6 *le ibid* s 91(3)(b), (c) (as amended): see PARA 1323 ante at heads (2)-(3) in the text.

7 As to the nature of a term certain see PARA 235 et seq ante.

8 Housing Act 1985 s 95(2). See also note 4 supra.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(iv) Terms of the Secure Tenancy/B. REPAIRS, MAINTENANCE AND IMPROVEMENTS/1329. Right to have repairs carried out.

## ***B. REPAIRS, MAINTENANCE AND IMPROVEMENTS***

### **1329. Right to have repairs carried out.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may make regulations<sup>3</sup> for entitling secure tenants<sup>4</sup> whose landlords<sup>5</sup> are local housing authorities<sup>6</sup>, subject to and in accordance with the regulations, to have qualifying repairs<sup>7</sup> carried out, at their landlords' expense, to the dwelling houses of which they are such tenants<sup>8</sup>.

The regulations may make all or any of the following provisions, namely:

- 2842 (1) provision that, where a secure tenant makes an application to his landlord  
for a qualifying repair to be carried out, the landlord shall issue a repair notice:  
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12. (a) specifying the nature of the repair, the listed contractor<sup>9</sup> by whom the  
repair is to be carried out and the last day of any prescribed period; and
13. (b) containing such other particulars as may be prescribed<sup>10</sup>;  
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- 2843 (2) provision that, if the contractor specified in a repair notice fails to carry out  
the repair within a prescribed period, the landlord shall issue a further repair notice  
specifying such other listed contractor as the tenant may require<sup>11</sup>; and
- 2844 (3) provision that, if the contractor specified in a repair notice fails to carry out  
the repair within a prescribed period, the landlord shall pay to the tenant such sum  
by way of compensation as may be determined by or under the regulations<sup>12</sup>.

The regulations may also make such procedural, incidental, supplementary and transitional provisions as may appear to the Secretary of State or the Assembly or minister to be necessary or expedient, and may in particular:

- 2845 (i) require a landlord to take such steps as may be prescribed to make its  
secure tenants aware of the provisions of the regulations;
- 2846 (ii) require a landlord to maintain a list of contractors who are prepared to  
carry out repairs for which it is responsible under the regulations;
- 2847 (iii) provide that, where a landlord issues a repair notice, it shall give to the  
tenant a copy of the notice and the prescribed particulars of at least two other  
listed contractors who are competent to carry out the repair;
- 2848 (iv) provide for questions arising under the regulations to be determined by  
the county court<sup>13</sup>; and
- 2849 (v) enable the landlord to set off against any compensation payable under the  
regulations any sums owed to it by the tenant<sup>14</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 Regulations under the Housing Act 1985 s 96 (as substituted) (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument which is subject, in the case of regulations made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 96(5) (s 96 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 121). See also note 8 infra. In exercise of the power under s 96 (as substituted), and prior to the transfer of functions in relation to Wales, the Secretary of State made the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133 (now as amended) which came into force on 1 April 1994: reg 1.

4 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

7 For these purposes, 'qualifying repair', in relation to a dwelling house, means any repair of a prescribed description which the landlord is obliged by a repairing covenant to carry out; and a prescribed description may be framed by reference to any circumstances whatever: Housing Act 1985 s 96(6) (as substituted: see note 3 supra). 'Repairing covenant', in relation to a dwelling house, means a covenant, whether express or implied, obliging the landlord to keep in repair the dwelling house or any part of the dwelling house: Housing Act 1985 s 96(6) (as so substituted). For the meaning of 'dwelling house' see PARA 1300 note 2 ante. See also note 8 infra.

A repair to a dwelling house which (1) remedies a defect specified in the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, Schedule col 1; and (2) will not, in the opinion of

the landlord, cost more than £250 to carry out, is a repair of a prescribed description for the purpose of the definition of a qualifying repair in the Housing Act 1985 s 96(6) (as so substituted): Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 4.

8 Housing Act 1985 s 96(1) (as substituted: see note 3 supra). Section 96 (as substituted) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations and other registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

Subject to and in accordance with the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133 (as amended), secure tenants and introductory tenants whose landlords are local housing authorities are entitled (1) to have qualifying repairs carried out, at their landlords' expense, to the dwelling houses of which they are such tenants; and (2) to receive compensation from their landlords if qualifying repairs are not carried out within a prescribed period; but this right does not apply in a case where the landlord has less than 100 relevant dwelling houses on the day it receives an application from the tenant to have a repair carried out; and for these purposes 'a relevant dwelling house' means a dwelling house let to a secure tenant or to an introductory tenant: see reg 3(1), (2) (amended by SI 1997/73). Further, the right to have qualifying repairs carried out ceases to apply in relation to a repair if (a) the tenant informs the landlord that he no longer wants the repair carried out; or (b) the tenant, although he has been given a reasonable opportunity, fails (i) to provide details of the arrangements for the contractor to obtain access to the dwelling house, or (ii) to provide access for an inspection or for the repair to be carried out: Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 3(3). For the meaning of 'introductory tenant' see PARA 1304 note 3 ante.

9 For these purposes, 'listed contractor', in relation to a landlord, means any contractor (which may include the landlord) who is specified in the landlord's list of contractors: Housing Act 1985 s 96(6) (as substituted: see note 3 supra). See also the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 2(1) (amended by SI 1994/844) which provides that 'contractor' means a person prepared to carry out a qualifying repair and may include the landlord.

10 Housing Act 1985 s 96(2)(a) (as substituted: see note 6 supra). Nothing in s 96(2) (as so substituted) or s 96(3) (as substituted) (see heads (i)-(v) in the text) is to be taken as prejudicing the generality of s 96(1) (as substituted): s 96(4) (as so substituted). See also note 8 supra.

Where a secure tenant or introductory tenant of a local housing authority applies to his landlord for a repair to be carried out to the dwelling house of which he is the secure tenant or introductory tenant; (1) if the landlord considers it necessary to inspect the dwelling house to satisfy itself that the repair is (or is not) a qualifying repair, the landlord must forthwith inspect the dwelling house; (2) if the landlord is satisfied that the repair is not a qualifying repair, it must notify the tenant of that and explain why it is so satisfied and give the tenant an explanation of the provisions of the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133 (as amended); and (3) if the landlord is satisfied that the repair is a qualifying repair, the landlord must issue a repair notice to a contractor and give to the tenant a copy of the notice and an explanation of the provisions of the 1994 Regulations: reg 5(1) (amended by SI 1997/73). A repair notice must contain a reference sufficient to identify the completed notice and must specify (a) the name of the secure tenant or introductory tenant; (b) the address of the dwelling house; (c) the nature of the repair; (d) the name, address and telephone number of the contractor who is to carry out the repair; (e) the arrangements made for the contractor to obtain access to the dwelling house; and (f) the last day of the first prescribed period: Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 5(2) (as so amended). 'First prescribed period' means, in relation to repairing a defect described in Schedule col 1, the period specified in Schedule col 2 opposite the description of that defect starting (i) in a case where the landlord considers it necessary to inspect the dwelling house to satisfy itself that a repair is a qualifying repair (A) if the day the landlord issues the repair notice under reg 5(1)(c) to the contractor is a working day, on the first working day after the day of issue, and (B) in any other case, on the second working day after the day of issue; and (ii) in any other case (A) if the day the landlord receives the application for the qualifying repair to be carried out is a working day, on the first working day after that day, and (B) in any other case, on the second working day after the day the application is received; and 'working day' means a day which is not a public holiday, a Saturday or a Sunday. reg 2(1). The first prescribed period or, as the case may be, the second prescribed period (see note 11 infra), is to be suspended for so long as there are circumstances of an exceptional nature, beyond the control of the landlord or the contractor who is to carry out the qualifying repair, which prevent the repair being carried out: reg 8.

Any notice required to be issued or given by the 1994 Regulations may be issued or given by post: reg 9.

11 Housing Act 1985 s 96(2)(b) (as substituted: see note 3 supra). See also note 8 supra.

Subject to the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 6(3) and reg 8 (see note 10 supra), if (1) the qualifying repair has not been carried out within the first prescribed period; and (2) the tenant notifies the landlord that he requires another contractor to carry out the qualifying repair, the landlord, where it is reasonably practicable, must issue a further repair notice to another contractor and give a copy of the notice to the tenant: reg 6(1). The further repair notice must contain a

reference sufficient to identify it and specify the matters referred to in reg 5(2)(a)-(e) (see note 10 supra) and the last day of the second prescribed period: reg 6(2). This does not, however, apply if compliance with reg 6(1) would infringe the terms of a guarantee for work done or materials supplied of which the landlord has the benefit: reg 6(3). 'Second prescribed period' means, in relation to repairing a defect described in Schedule col 1, the period specified in Schedule col 2 opposite the description of that defect starting (1) if the day the landlord receives notification from the tenant that he requires another contractor to carry out the qualifying repair is a working day, on the first working day after that day; and (2) in any other case, on the second working day after the day the notification is received: reg 2(1).

12 Housing Act 1985 s 96(2)(c) (as substituted: see note 3 supra). See also note 8 supra.

Subject to the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 8 (see note 10 supra), the landlord must pay the specified sum to the secure tenant or introductory tenant if the qualifying repair has not been carried out within the second prescribed period: see reg 7(1), (2) (amended by SI 1997/73). The landlord may, however, set off any sums owed to it by the secure tenant or introductory tenant against any compensation so payable: Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133, reg 7(3) (as so amended).

13 For the provision so made see *ibid* reg 10.

14 Housing Act 1985 s 96(3) (as substituted: see note 3 supra). See also note 8 supra. For the provision made under head (v) in the text see note 12 supra.

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### **1330. Tenant's improvements require consent.**

It is a term<sup>1</sup> of every secure tenancy<sup>2</sup> that the tenant<sup>3</sup> will not make any improvement<sup>4</sup> without the written consent<sup>5</sup> of the landlord<sup>6</sup>; and the consent so required may not be unreasonably withheld and, if unreasonably withheld, is to be treated as given<sup>7</sup>.

1 For the meaning of 'term' see PARA 1302 note 8 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For these purposes, 'improvement' means any alteration in, or addition to, a dwelling house and includes (1) any addition to or alteration in landlord's fixtures and fittings; (2) any addition or alteration connected with the provision of services to the dwelling house; (3) the erection of a wireless or television aerial; and (4) the carrying out of external decoration: Housing Act 1985 s 97(2). For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 As to consent see PARA 1331 post.

6 Housing Act 1985 s 97(1). The provisions of s 97 have effect, in relation to secure tenancies, in place of the Landlord and Tenant Act 1927 s 19(2) (see PARA 470 ante): Housing Act 1985 s 97(4).

Section 97 does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

7 *Ibid* s 97(3). See also note 6 supra.

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### **1331. Consent to improvements.**

If a question arises whether the withholding by a landlord<sup>1</sup> of consent to tenant's improvements<sup>2</sup> was unreasonable, it is for the landlord to show that it was not<sup>3</sup>. In determining that question, the court must in particular have regard to the extent to which the improvement<sup>4</sup> would be likely:

- 2850 (1) to make the dwelling house<sup>5</sup>, or any other premises, less safe for occupiers;
- 2851 (2) to cause the landlord to incur expenditure which it would be unlikely to incur if the improvement were not made; or
- 2852 (3) to reduce the price which the dwelling house would fetch if sold on the open market or the rent which the landlord would be able to charge on letting the dwelling house<sup>6</sup>.

A consent so required may be validly given notwithstanding that it follows, instead of preceding, the action requiring it<sup>7</sup>.

Where a tenant has applied in writing for such a consent:

- 2853 (a) the landlord must, if it refuses consent, give the tenant a written statement of the reason why consent was refused; and
- 2854 (b) if the landlord neither gives nor refuses to give consent within a reasonable time, consent is taken to have been withheld<sup>8</sup>.

A landlord's consent to improvements may be given subject to conditions<sup>9</sup>; but, if the tenant has applied in writing for consent and the landlord gives consent subject to an unreasonable condition, consent is to be taken to have been unreasonably withheld<sup>10</sup>. If a question arises whether a condition was reasonable, it is for the landlord to show that it was<sup>11</sup>.

A failure by a secure tenant to satisfy a reasonable condition imposed by his landlord in giving consent to an improvement which the tenant proposes to make, or has made, is treated as a breach by the tenant of an obligation of his tenancy<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 Is a consent required by virtue of the Housing Act 1985 s 97: see PARA 1330 ante. For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 Ibid s 98(1). Sections 98, 99 (see the text and notes 4-12 infra) do not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

4 For the meaning of 'improvement' see PARA 1330 note 4 ante.

5 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6 Housing Act 1985 s 98(2). See also note 3 supra.

7 Ibid s 98(3). See also note 3 supra.

- 8 Ibid s 98(4). See also note 3 supra.
- 9 Ibid s 99(1). See also note 3 supra.
- 10 Ibid s 99(2). See also note 3 supra.
- 11 Ibid s 99(3). See also note 3 supra.
- 12 Ibid s 99(4). See also note 3 supra.

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### **1332. Right to compensation for improvements.**

The powers conferred by the following provisions are exercisable as respects cases where a secure tenant<sup>1</sup> has made an improvement<sup>2</sup> and:

- 2855 (1) the work on the improvement was begun not earlier than 1 April 1994;
- 2856 (2) the landlord<sup>3</sup>, or a predecessor in title of the landlord, being a local authority<sup>4</sup>, has given its written consent to the improvement or is to be treated as having given its consent; and
- 2857 (3) at the time when the tenancy comes to an end<sup>5</sup> the landlord is a local authority and the tenancy is a secure tenancy<sup>6</sup>.

The Secretary of State<sup>7</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>8</sup> may make regulations<sup>9</sup> for entitling the qualifying person or persons<sup>10</sup> at the time when the tenancy comes to an end, and subject to and in accordance with the regulations, to be paid compensation by the landlord in respect of the improvement<sup>11</sup>. The regulations may provide that compensation shall not, however, be payable if:

- 2858 (a) the improvement is not of a prescribed description<sup>12</sup>;
- 2859 (b) the tenancy comes to an end in prescribed circumstances<sup>13</sup>;
- 2860 (c) compensation has been paid<sup>14</sup> in respect of the improvement<sup>15</sup>; or
- 2861 (d) the amount of any compensation which would otherwise be payable is less than a prescribed amount<sup>16</sup>;

and, for these purposes, a prescribed description may be framed by reference to any circumstances whatever<sup>17</sup>.

The regulations may provide that the amount of any compensation payable shall not exceed a prescribed amount<sup>18</sup> but, subject thereto, must be determined by the landlord, or calculated, in such manner, and taking into account such matters, as may be prescribed<sup>19</sup>.

The regulations may also make such procedural, incidental, supplementary and transitional provisions as may appear to the Secretary of State or to the Assembly or the relevant Welsh minister to be necessary or expedient, and may in particular:

- 2862 (i) provide for the manner in which and the period within which claims for compensation under the regulations are to be made, and for the procedure to be followed in determining such claims<sup>20</sup>;

- 2863 (ii) prescribe the form of any document required to be used for the purposes of or in connection with such claims<sup>21</sup>;
- 2864 (iii) provide for questions arising under the regulations to be determined by the district valuer<sup>22</sup> or the county court<sup>23</sup>; and
- 2865 (iv) enable the landlord to set off against any compensation payable under the regulations any sums owed to it by the qualifying person or persons<sup>24</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'improvement' see PARA 1330 note 4 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'local authority' see PARA 1300 note 8 ante.

5 For these purposes, and for the purposes of the Housing Act 1985 s 99B (as added) (see PARA 1333 post), a tenancy is treated as coming to an end if (1) it ceases to be a secure tenancy by reason of the landlord condition no longer being satisfied; or (2) it is assigned, with the consent of the landlord (a) to another secure tenant who satisfies the condition in s 92(2) (see PARA 1324 ante); or (b) to an assured tenant who satisfies the conditions in s 92(2A) (as added) (see PARA 1324 ante): s 99A(8) (s 99A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 122). For the meaning of 'the landlord condition' see PARA 1300 ante; and for the meaning of 'assured tenancy' see PARA 1324 note 6 ante.

6 Housing Act 1985 s 99A(1) (as added: see note 5 supra); Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 3) Order 1993, SI 1993/2762, arts 4(b), 5(2). The Housing Act 1985 s 99A (as added) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

7 As to the Secretary of State see PARA 27 note 3 ante.

8 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

9 Such regulations: (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument which, if made by the Secretary of State and except in the case of regulations making only such provision as is mentioned in head (ii) in the text, are subject to annulment in pursuance of a resolution of either House of Parliament: Housing Act 1985 s 99A(7) (as added: see note 5 supra). In exercise of this power, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, which came into force on 1 April 1994: reg 1.

10 Ie within the meaning given by the Housing Act 1985 s 99B (as added): see PARA 1333 post.

11 Ibid s 99A(2) (as added: see note 5 supra). See also note 6 supra.

Subject to and in accordance with the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, regs 3(2), 4-7, in the cases described by the Housing Act 1985 s 99A(1) (as added) (see the text and notes 1-6 supra), a qualifying person is entitled to be paid compensation by his landlord in respect of a qualifying improvement at the time when his tenancy comes to an end: Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, reg 3(1). 'Qualifying improvement' means an improvement consisting of the installation or replacement of an item specified in Schedule, col A: reg 2(1). As to calculating the amount of compensation see reg 4(1), (2). No compensation is payable if the amount which would otherwise be payable would be less than £50 (reg 3(2)(a)) or to the extent that the amount of compensation for a qualifying improvement would exceed £3,000 (reg 4(3)(a)).

12 As to qualifying improvements see note 11 supra.

13 The following circumstances are prescribed for these purposes, ie where the tenancy comes to an end because (1) an order for possession was made on any of the grounds in the Housing Act 1985 Sch 2 Pt I (Grounds 1-8) (as amended) (see PARA 1357 et seq post); (2) the right to buy (see PARA 1795 et seq post) or the (former) right to acquire on rent to mortgage terms in Pt V (ss 118-188) (as amended) has been exercised; (3) the dwelling house has been disposed of to the tenant or one of the joint tenants under s 32 (as amended) or s 43 (as amended) (see HOUSING vol 22 (2006 Reissue) PARAS 305, 314); or (4) a new tenancy of the same, or substantially the same, dwelling house has been granted to the qualifying person (or, in the case of a joint



tenancy, to all of the joint tenants) whether or not with anyone else: see the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, reg 3(2)(b).

14    le under the Housing Act 1985 s 100 (as amended): see PARA 1334 post.

15    See the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, reg 4(3)(b).

16    See *ibid* reg 3(2)(a), cited in note 11 *supra*.

17    Housing Act 1985 s 99A(3) (as added: see note 5 *supra*). Nothing in s 99A(3) (as so added) and s 99A(4), (5) (as added) is to be taken as prejudicing the generality of s 99A(2) (as added): s 99A(6) (as so added). See also note 6 *supra*.

18    The prescribed amount is £3,000: see note 11 *supra*.

19    Housing Act 1985 s 99A(4) (as added: see note 5 *supra*). See also notes 6, 17 *supra*.

20    *Ibid* s 99A(5)(a) (as added: see note 5 *supra*). See also notes 6, 17 *supra*.

A claim for compensation (1) must contain sufficient information for the landlord to determine the claim; (2) must be made in writing within the period starting 28 days before, and ending 14 days after, the tenancy comes to an end; and (3) may be served by post: Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, reg 6.

21    Housing Act 1985 s 99A(5)(b) (as added: see note 5 *supra*). See also notes 6, 17 *supra*. At the date at which this title states the law, no such form had been prescribed.

22    For these purposes, 'district valuer', in relation to any land in the district of a local housing authority, means an officer of the Commissioners for Her Majesty's Revenue and Customs appointed by them for the purpose of exercising, in relation to that district, the functions of the district valuer under the Housing Act 1985: s 622(1) (definition substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 23; amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)). For the meaning of 'local housing authority' and for the meaning of references to the district of such an authority see PARA 1311 note 4 *ante*.

23    Housing Act 1985 s 99A(5)(c) (as added: see note 5 *supra*). See also notes 6, 17 *supra*. Any question arising under the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, is to be determined by the county court: reg 7.

24    Housing Act 1985 s 99A(5)(d) (as added: see note 5 *supra*). See also notes 6, 17 *supra*.; and see the Secure Tenants of Local Authorities (Compensation for Improvements) Regulations 1994, SI 1994/613, reg 5 (which provides that the landlord may set off against any compensation payable under the 1994 Regulations any sums owed to it by the qualifying person).

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### **1333. Meaning of 'qualifying person'.**

A person is a qualifying person<sup>1</sup> if:

2866 (1)   he is, at the time when the tenancy comes to an end<sup>2</sup>, the tenant<sup>3</sup> or, in the case of a joint tenancy at that time, one of the tenants; and

2867 (2)   he is:

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14.   (a)   the improving tenant<sup>4</sup>;

15. (b)   a person who became a tenant jointly with the improving tenant;

16. (c) a person in whom the tenancy was vested, or to whom the tenancy was disposed of, by way of succession to a periodic tenancy<sup>5</sup> or on the devolution of a term certain<sup>6</sup> on the death of the improving tenant or in the course of the administration of his estate;
  17. (d) a person to whom the tenancy was assigned by the improving tenant and who would have been qualified to succeed<sup>7</sup> him if he had died immediately before the assignment;
  18. (e) a person to whom the tenancy was assigned by the improving tenant in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>8</sup>, a property adjustment order after an overseas divorce, etc<sup>9</sup>, an order for financial relief against a parent<sup>10</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>11</sup>;
  19. (f) a spouse, former spouse, civil partner, former civil partner, cohabitant or former cohabitant of the improving tenant to whom the tenancy has been transferred by an order<sup>12</sup> made on divorce, separation etc<sup>13</sup>.
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Where, in the case of two or more qualifying persons, one of them ('the missing person') cannot be found:

- 2868 (i) a claim under the regulations<sup>14</sup> may be made by, and compensation under those regulations may be paid to, the other qualifying person or persons; but
- 2869 (ii) the missing person is entitled to recover his share of any compensation so paid from that person or those persons<sup>15</sup>.

1    Ie for the purposes of the Housing Act 1985 s 99A(2) (as added): see PARA 1332 ante.

2    As to when a tenancy is treated as coming to an end for these purposes see PARA 1332 note 5 ante. For the meaning of 'tenancy' see PARA 1300 note 1 ante.

3    For the meaning of 'tenant' see PARA 1300 note 1 ante.

4    For these purposes, 'the improving tenant' means (1) the tenant by whom the improvement mentioned in the Housing Act 1985 s 99A(1) (as added) (see PARA 1332 ante) was made; or (2) in the case of a joint tenancy at the time when the improvement was made, any of the tenants at that time: s 99B(5) (s 99B added by the Leasehold Reform, Housing and Urban Development Act 1993 s 122). The insertion so made by the Leasehold Reform, Housing and Urban Development Act 1993 s 122 does not have effect in a case where work on the improvement was begun before 1 April 1994: Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 3) Order 1993, SI 1993/2762, arts 4(b), 5(2); and see PARA 1332 ante.

5    Ie under the Housing Act 1985 s 89 (as amended): see PARA 1321 ante.

6    Ie under *ibid* s 90 (as amended): see PARA 1322 ante.

7    As to the person qualified to succeed see PARA 1319 ante.

8    Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 ante).

9    Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

10   Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

11   Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

12    le an order under the Matrimonial Homes Act 1983 Sch 1 (repealed) or the Family Law Act 1996 Sch 7 (as amended): see PARA 836 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 310 et seq.

13    Housing Act 1985 s 99B(1), (2) (as added (see note 4 supra); s 99B(2) amended by the Housing Act 1996 s 222, Sch 18 para 13; the Family Law Act 1996 s 66(1), Sch 8 paras 34, 54; the Civil Partnership Act 2004 ss 81, 82, 261(4), Sch 8 para 25, Sch 9 Pt 2 para 19, Sch 30). The Housing Act 1985 s 99B(2)(c) (as so added) (see head (2)(c) in the text) does not apply in any case where the tenancy ceased to be a secure tenancy by virtue of s 89(3) (as amended) (see PARA 1321 ante) or, as the case may be s 90(3) (as amended) (see PARA 1322 ante): s 99B(3) (as so added). See also note 4 supra.

Section 99B (as added) does not apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

14    le regulations made under *ibid* s 99A (as added): see PARA 1332 ante.

15    Ibid s 99B(4) (as added: see note 4 supra). See also note 13 supra.

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### **1334. Power to reimburse cost of tenant's improvements.**

Where a secure tenant<sup>1</sup> has made an improvement<sup>2</sup> and:

- 2870 (1) the work on the improvement was begun on or after 3 October 1980;
- 2871 (2) the landlord<sup>3</sup>, or a predecessor in title of the landlord, has given its written consent to the improvement or is treated as having given its consent; and
- 2872 (3) the improvement has materially added to the price which the dwelling house<sup>4</sup> may be expected to fetch if sold on the open market, or the rent which the landlord may be expected to be able to charge on letting the dwelling house,

the landlord may, at or after the end of the tenancy, make to the tenant, or his personal representatives, such payment in respect of the improvement as the landlord considers to be appropriate<sup>5</sup>. The power so conferred to make such payments as are mentioned above is in addition to any other power of the landlord to make such payments<sup>6</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 For the meaning of 'improvement' see PARA 1330 note 4 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

5 Housing Act 1985 s 100(1). Section 100 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

6 Ibid s 100(3). See also note 5 supra.

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### **1335. Rent not to be increased on account of tenant's improvements.**

The following provisions apply where a person (the improving tenant<sup>1</sup>) who is or was the secure tenant<sup>1</sup> of a dwelling house<sup>2</sup> has lawfully made an improvement<sup>3</sup> and has borne the whole or part of its cost<sup>4</sup>.

In determining, at any time whilst the improving tenant or his qualifying successor is a secure tenant of the dwelling house, whether or to what extent to increase the rent, the landlord must treat the improvement as justifying only such part of an increase which would otherwise be attributable to the improvement as corresponds to the part of the cost which was not borne by the tenant, and accordingly as not justifying an increase if he bore the whole cost<sup>5</sup>.

The following are qualifying successors of an improving tenant:

- 2873 (1) a person in whom the tenancy was vested, or to whom the tenancy was disposed of, by succession to a periodic tenancy<sup>6</sup> or on devolution of a term certain<sup>7</sup> on the death of the tenant or in the course of the administration of his estate;
- 2874 (2) a person to whom the tenancy was assigned by the tenant and who would have been qualified to succeed<sup>8</sup> him if he had died immediately before the assignment;
- 2875 (3) a person to whom the tenancy was assigned by the tenant in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>9</sup>, a property adjustment order after an overseas divorce, etc<sup>10</sup>, an order for financial relief against a parent<sup>11</sup> or a property adjustment order in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>12</sup>;
- 2876 (4) a spouse, former spouse, civil partner, former civil partner, cohabitant or former cohabitant of the improving tenant to whom the tenancy has been transferred by an order<sup>13</sup> made on divorce, separation etc<sup>14</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3 For the meaning of 'improvement' see PARA 1330 note 4 ante.

4 Housing Act 1985 s 101(1). For these purposes, a person is treated as having borne any cost which he would have borne but for a renovation grant or common parts grant under the Housing Grants, Construction and Regeneration Act 1996 Pt I Ch I (ss 1-59) (as amended) (grants for the renewal of private sector housing): Housing Act 1985 s 101(1) (amended by the Housing Grants, Construction and Regeneration Act 1996 s 103, Sch 1 para 5(1)). Note that such grants are now only available from local housing authorities towards the cost of works required for the provision of facilities for disabled persons (1) in dwellings, qualifying houseboats and caravans; and (2) in the common parts of buildings containing one or more flats: see the Housing Grants, Construction and Regeneration Act 1996 s 1(1) (amended by the Housing Act 2004 s 224(1), (2); and by the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002, SI 2002/1860, arts 11(1), 15(1), Sch 3 paras 1, 2, Sch 6); and HOUSING vol 22 (2006 Reissue) PARA 621 et seq.

The Housing Act 1985 s 101 (as amended) does not apply to an increase of rent attributable to rates or to council tax (s 101(4) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 2 para 12)); nor does the Housing Act 1985 s 101 (as amended) apply to a tenancy when the interest of the landlord belongs to a co-operative housing association (s 109). For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11; and for the meaning of 'landlord' see PARA 1300 note 1 ante.

- 5 Ibid s 101(2). See also note 4 *supra*.
- 6 Ie under *ibid* s 89 (as amended): see PARA 1321 *ante*.
- 7 Ie under *ibid* s 90 (as amended): see PARA 1322 *ante*.
- 8 As to the persons qualified to succeed see PARA 1319 *ante*.
- 9 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended) or, as from a day to be appointed, under s 23A (as prospectively added) or s 24 (as prospectively substituted: see PARA 1290 note 7 *ante*).
- 10 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 *ante*).
- 11 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.
- 12 Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 *et seq*, 531.
- 13 Ie an order under the Matrimonial Homes Act 1983 Sch 1 (repealed) or the Family Law Act 1996 Sch 7 (as amended): see PARA 836 *ante*; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 310 *et seq*.
- 14 Housing Act 1985 s 101(3) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 10; the Housing Act 1996 s 222, Sch 18 para 14; the Family Law Act 1996 s 66(1), Sch 8 para 34; the Civil Partnership Act 2004 ss 81, 82, 261(4), Sch 8 para 26, Sch 9 Pt 2 para 20, Sch 30). See also note 4 *supra*.

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### **1336. Directions as to service charges by social landlords.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may give directions<sup>3</sup> to social landlords<sup>4</sup> about the making of service charges<sup>5</sup> in respect of works of repair, maintenance or improvement:

- 2877 (1) requiring or permitting the waiver or reduction of charges<sup>6</sup> where relevant assistance<sup>7</sup> is given by the Secretary of State or the Assembly; and
- 2878 (2) permitting the waiver or reduction of charges in such other circumstances as may be specified in the directions<sup>8</sup>.

A direction may not require the waiver or reduction of charges by reference to assistance for which application was made before the date on which the direction was given, but subject to that directions may relate to past charges or works to such extent as appears to the Secretary of State or to the Assembly or the relevant Welsh minister to be appropriate<sup>9</sup>. Directions which require or permit the waiver or reduction of charges have corresponding effect:

- 2879 (a) in relation to charges already demanded so as to require or permit the non-enforcement of the charges; and
- 2880 (b) in relation to charges already paid so as to require or permit a refund<sup>10</sup>.

The Secretary of State or the Assembly or minister must publish any such direction relating to all social landlords or any description of social landlords in such manner as he or the Assembly or minister considers appropriate for bringing it to the notice of the landlords concerned<sup>11</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 Directions under the Housing Act 1996 s 219 (see the text and notes 4-10 infra) may make different provision for different cases or descriptions of case; and this includes power to make (1) different provision for different social landlords or descriptions of social landlords, and (2) different provision for different areas: ss 219(6), 220(1).

4 For these purposes, 'social landlord' means (1) an authority or body within the Housing Act 1985 s 80(1) (as amended) (the landlord condition for secure tenancies: see PARA 1300 ante), other than a housing co-operative; or (2) a registered social landlord: Housing Act 1996 s 219(4). For the meaning of 'housing co-operative' see PARA 1300 note 12 ante; and as to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

5 For these purposes, 'service charge' means an amount payable by a lessee of a dwelling (1) which is payable, directly or indirectly, for repairs, maintenance or improvements; and (2) the whole or part of which varies or may vary according to the relevant costs: *ibid* s 220(5). The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the social landlord, or a superior landlord, in connection with the matters for which the service charge is payable; and for this purpose costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period: s 220(6). 'Costs' includes overheads and 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling: s 220(7).

6 Directions under *ibid* s 219 requiring the reduction of a service charge (see head (1) in the text) may specify the amount (or proportion) of the reduction or provide for its determination in such manner as may be specified; and such directions permitting the waiver or reduction of a service charge (see heads (1)-(2) in the text) may specify criteria to which the social landlord is to have regard in deciding whether to do so or to what extent: s 220(2), (3).

7 For these purposes, 'assistance' means grant or other financial assistance of any kind; and directions may specify what assistance is relevant for these purposes and to what buildings or other land any assistance is to be regarded as relevant: *ibid* s 219(5).

8 *Ibid* s 219(1).

9 *Ibid* s 219(2).

10 *Ibid* s 219(3).

11 *Ibid* s 220(4).

## UPDATE

### 1336 Directions as to service charges by social landlords

NOTE 4--Housing Act 1996 s 219(4) amended: SI 2008/3002.

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## (v) Variation of Terms of Secure Tenancy

### 1337. Variation of terms of secure tenancy.

The terms<sup>1</sup> of a secure tenancy<sup>2</sup> may be varied<sup>3</sup> in the following ways, and not otherwise<sup>4</sup>:

- 2881 (1) by agreement between the landlord<sup>5</sup> and the tenant<sup>6</sup>;
- 2882 (2) to the extent that the variation relates to rent or to payments in respect of rates, council tax or services, by the landlord or the tenant in accordance with a provision in the lease<sup>7</sup> or agreement creating the tenancy, or in an agreement varying it;
- 2883 (3) by notice of variation<sup>8</sup> of a periodic tenancy<sup>9</sup>.

A clause of a tenancy agreement whereby it was agreed that the authority could only vary the terms of the agreement if tenants' representatives agreed to the change has been held to be void as an unlawful fetter on these statutory powers of variation<sup>10</sup>.

1 For the meaning of 'term' see PARA 1302 note 8 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For these purposes, and for the purposes of the Housing Act 1985 s 103 (see PARA 1338 post), references to variation include addition and deletion; and the conversion of a monthly tenancy into a weekly tenancy, or a weekly tenancy into a monthly tenancy, is a variation of a term of the tenancy, but a variation of the premises let under a tenancy is not: s 102(2).

4 The mere circulation of a booklet to tenants is not sufficient to vary the terms of the tenancy: see *Palmer v Metropolitan Borough of Sandwell* (1987) 20 HLR 74, [1987] 2 EGLR 79, CA.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 For the meaning of 'lease' see PARA 1300 note 1 ante.

8 In accordance with the Housing Act 1985 s 103: see PARA 1338 post.

9 Ibid s 102(1) (amended by the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 2 para 13). The Housing Act 1985 s 102 (as amended) does not apply to a term of a tenancy which is implied by an enactment or may be varied under the Rent Act 1977 s 93 (as amended) (see PARA 907 ante) (Housing Act 1985 s 102(3)); nor does s 102 (as amended) apply to a tenancy when the interest of the landlord belongs to a co-operative housing association (s 109). For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

Section 102 (as amended) does, however, apply in relation to the terms of a periodic tenancy arising by virtue of s 86 (see PARA 1302 ante) as it would have applied to the terms of the first tenancy mentioned in s 86 had that tenancy been a periodic tenancy: s 102(4).

10 See *R (on the application of Kilby) v Basildon District Council* [2006] EWHC 1892 (Admin), (2006) Times, 21 August, [2006] All ER (D) 372 (Jul).

### UPDATE

### 1337 Variation of terms of secure tenancy

NOTE 9--*Kilby*, cited, reported at [2006] HLR 892.

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### **1338. Notice of variation of periodic tenancy.**

The terms<sup>1</sup> of a secure tenancy<sup>2</sup> which is a periodic tenancy<sup>3</sup> may be varied<sup>4</sup> by the landlord<sup>5</sup> by a notice of variation served on the tenant<sup>6</sup>. Before serving a notice of variation on the tenant, the landlord must serve on him a preliminary notice.

2884 (1) informing the tenant of the landlord's intention to serve a notice of variation;

2885 (2) specifying the proposed variation and its effect; and

2886 (3) inviting the tenant to comment on the proposed variation within such time, specified in the notice, as the landlord considers reasonable;

and the landlord must consider any comments made by the tenant within the specified time<sup>7</sup>.

The notice of variation must specify:

2887 (a) the variation effected by it; and

2888 (b) the date on which it takes effect;

and the period between the date on which it is served and the date on which it takes effect must be at least four weeks or the rental period<sup>8</sup>, whichever is the longer<sup>9</sup>.

The notice of variation, when served, must be accompanied by such information as the landlord considers necessary to inform the tenant of the nature and effect of the variation<sup>10</sup>.

If, after the service of a notice of variation, the tenant, before the date on which the variation is to take effect, gives a valid notice to quit, the notice of variation does not take effect unless the tenant, with the written agreement of the landlord, withdraws his notice to quit before that date<sup>11</sup>.

1 For the meaning of 'term' see PARA 1302 note 8 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 As to periodic tenancies see PARA 233 ante.

4 For the meaning of references to variation see PARA 1337 note 3 ante.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 Housing Act 1985 s 103(1). For the meaning of 'tenant' see PARA 1300 note 1 ante. Section 103 does not apply to a term of a tenancy which is implied by an enactment or may be varied under the Rent Act 1977 s 93 (as amended) (see PARA 907 ante) (Housing Act 1985 s 102(3)); nor does s 103 apply to a tenancy when the interest of the landlord belongs to a co-operative housing association (s 109). For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

Section 103 does, however, apply in relation to the terms of a periodic tenancy arising by virtue of s 86 (see PARA 1302 ante) as it would have applied to the terms of the first tenancy mentioned in s 86 had that tenancy been a periodic tenancy: s 102(4).

7 Ibid s 103(2). Section 103(2) does not apply, however, to a variation of the rent, or of payments in respect of services or facilities provided by the landlord or of payments in respect of rates: s 103(3). Variation under s



103 represents no substantial diminution in tenants' rights, since their basic protection is afforded by statute: see *R v London Borough of Brent, ex p Blatt* (1991) 24 HLR 319, DC. See also note 6 supra. As to the abolition of domestic rates see PARA 521 ante.

8 For these purposes, 'rental period' means a period in respect of which a payment of rent falls to be made: Housing Act 1985 s 116.

9 Ibid s 103(4). See also note 6 supra.

10 Ibid s 103(5). See also note 6 supra.

11 Ibid s 103(6). See also note 6 supra.

## UPDATE

### 1338 Notice of variation of periodic tenancy

NOTE 6--See *Governors of the Peabody Trust v Reeve* [2008] EWHC 1432 (Ch), [2008] 43 EG 196 (social landlord could not vary its tenancy agreement unilaterally).

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## (vi) Provision of Information; Consultation

### A. IN GENERAL

#### 1339. Provision of information about tenancies.

Every body which lets dwelling houses<sup>1</sup> under secure tenancies<sup>2</sup> must from time to time publish information about its secure tenancies, in such form as it considers best suited to explain in simple terms, and so far as it considers appropriate, the effect of:

- 2889 (1) the express terms<sup>3</sup> of its secure tenancies;
- 2890 (2) the statutory provisions relating to secure tenancies<sup>4</sup>; and
- 2891 (3) the statutory provisions relating to a landlord's repairing obligations<sup>5</sup>;

and must ensure that, so far as is reasonably practicable, the information so published is kept up to date<sup>6</sup>.

The landlord<sup>7</sup> under a secure tenancy must supply the tenant<sup>8</sup> with:

- 2892 (a) a copy of the information for secure tenants so published by it; and
- 2893 (b) a written statement of the terms of the tenancy, so far as they are neither expressed in the lease<sup>9</sup> or written tenancy agreement, if any, nor implied by law;

and the statement required by head (b) above must be supplied when the secure tenancy arises or as soon as practicable afterwards<sup>10</sup>.

A local authority<sup>11</sup> which is the landlord under a secure tenancy must supply the tenant, at least once in every relevant year<sup>12</sup>, with a copy of such information relating to the provisions in head (2) and (3) above as was last published by it<sup>13</sup>.

- 1 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 3 For the meaning of 'term' see PARA 1302 note 8 ante.
- 4 Ie the Housing Act 1985 Pt IV (ss 79-117) (as amended): see PARA 1300 et seq ante, PARA 1342 et seq post.
- 5 Ie the Landlord and Tenant Act 1985 ss 11-16 (as amended): see PARAS 416-420 ante.
- 6 Housing Act 1985 s 104(1) (amended by the Housing Act 2004 ss 189(2), 266, Sch 16). The Housing Act 1985 104 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.
- 7 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 8 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 9 For the meaning of 'lease' see PARA 1300 note 1 ante.
- 10 Housing Act 1985 s 104(2) (amended by the Housing Act 1996 s 141(1), Sch 14 para 2). See also note 6 supra.
- 11 For the meaning of 'local authority' see PARA 1300 note 8 ante.
- 12 For these purposes, 'relevant year' means any period of 12 months beginning with the anniversary of the date of such publication: Housing Act 1985 s 104(3) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 123).
- 13 Housing Act 1985 s 104(3) (as added: see note 13 supra). See also note 7 supra.

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### **1340. Policies and procedures about anti-social behaviour.**

The provisions set out below apply to the following landlords:

- |      |     |   |
|------|-----|---|
| 2894 | (1) | a local housing authority <sup>1</sup> ;    |
| 2895 | (2) | a housing action trust <sup>2</sup> ;       |
| 2896 | (3) | a registered social landlord <sup>3</sup> . |

The landlord must prepare a policy in relation to anti-social behaviour<sup>4</sup> and procedures for dealing with occurrences of anti-social behaviour<sup>5</sup> and must publish<sup>6</sup> a statement of the policy and procedures so prepared<sup>7</sup>.

The landlord must from time to time keep the policy and procedures under review and, when it thinks appropriate, publish a revised statement<sup>8</sup>. In preparing and reviewing the policy and procedures the landlord must have regard to guidance issued:

- 2897 (a) by the Secretary of State<sup>9</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>10</sup> in the case of a local housing authority or a housing action trust;
- 2898 (b) by the relevant authority<sup>11</sup> in the case of a registered social landlord<sup>12</sup>.

A copy of a statement or revised statement so published must be available for inspection at all reasonable hours at the landlord's principal office and must be provided on payment of a reasonable fee to any person who requests it<sup>13</sup>. The landlord must also prepare a summary of its current policy and procedures and provide a copy of the summary, without charge, to any person who requests it<sup>14</sup>.

1 For the meaning of 'local housing authority' para 1311 note 4 ante (definition applied by the Housing Act 1996 s 230).

2 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

3 Housing Act 1996 s 218A(1) (s 218A added by the Anti-social Behaviour Act 2003 s 12(1)). As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

4 For these purposes, anti-social behaviour is any conduct to which the Housing Act 1996 s 153A or s 153B (each as added) (injunctions against anti-social behaviour: see HOUSING vol 22 (2006 Reissue) PARA 268 et seq) applies: s 218A(8) (as added: see note 3 supra).

5 Ibid s 218A(2) (as added: see note 3 supra).

6 The statement was to be published not later than six months after the commencement of the Anti-social Behaviour Act 2003 s 12 (ie 30 June 2004 in relation to England and 30 April 2005 in relation to Wales): see the Housing Act 1996 s 218A(3) (as added: see note 3 supra).

7 Ibid s 218A(3) (as added: see note 3 supra).

8 Ibid s 218A(4) (as added: see note 3 supra).

9 As to the Secretary of State see PARA 27 note 3 ante.

10 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

11 Ie under the Housing Act 1996 s 36 (as amended): see HOUSING vol 22 (2006 Reissue) PARA 58. For these purposes, 'relevant authority' has the same meaning as in Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 5): s 218A(9) (as added: see note 3 supra).

12 Ibid s 218A(7) (as added: see note 3 supra).

13 See ibid s 218A(5) (as added: see note 3 supra).

14 Ibid s 218A(6) (as added: see note 3 supra).

## UPDATE

### 1340 Policies and procedures about anti-social behaviour

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--Anti-social behaviour is (1) any housing-related anti-social conduct, or (2) any conduct to which the 1996 Act s 153B applies: s 218A(8) (s 218A(8), (8A) substituted by the Police and Justice Act 2006 Sch 14 para 33). Housing-related anti-social conduct has the same meaning as in the 1996 Act s 153A: s 218A(8A) (s 218A(8A) as so substituted).

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### **1341. Disclosure of information as to orders etc in respect of anti-social behaviour.**

Any person may disclose relevant information<sup>1</sup> to a landlord under a secure tenancy<sup>2</sup> if the information is disclosed for the purpose of enabling the landlord:

- 2899 (1) to decide whether either of the specified provisions of the Housing Act 1985<sup>3</sup> can be invoked in relation to the tenant under the tenancy<sup>4</sup>; or
- 2900 (2) to take any appropriate action in relation to the tenant in reliance on either of those provisions<sup>5</sup>.

The specified provisions for these purposes are:

- 2901 (a) the provision allowing the landlord to withhold consent to an assignment by way of mutual exchange where an order is in force or an application is pending in connection with anti-social behaviour<sup>6</sup>; and
- 2902 (b) the provision suspending the landlord's obligation to complete a purchase in pursuance of the right to buy<sup>7</sup> while an application is pending in connection with such behaviour<sup>8</sup>.

1 For these purposes, 'relevant information' means information relating to any order or application relevant for the purposes of either of the provisions mentioned in the Housing Act 2004 s 194(2) (see heads (a)-(b) in the text), including (in particular) information identifying the person in respect of whom any such order or application has been made: s 194(3)(a).

2 For the meaning of 'secure tenancy' see PARA 1300 ante (meaning applied by *ibid* s 194(3)(b)).

3 *Ie* the provisions mentioned in *ibid* s 194(2): see heads (a)-(b) in the text.

4 For these purposes, any reference to the tenant under a secure tenancy is, in relation to a joint tenancy, a reference to any of the joint tenants: *ibid* s 194(3)(c).

5 *Ibid* s 194(1).

6 *Ie* the Housing Act 1985 s 92(3), Sch 3, Ground 2A (as added): see PARA 1325 ante at head (3) in the text.

7 *Ie* *ibid* s 138(2B) (as added): see PARA 1843 post.

8 Housing Act 2004 s 194(3).

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### **1342. Consultation on matters of housing management.**

A landlord authority<sup>1</sup> must maintain such arrangements as it considers appropriate to enable those of its secure tenants<sup>2</sup> who are likely to be substantially affected by a matter of housing management<sup>3</sup> to which these provisions apply<sup>4</sup>:

- 2903 (1) to be informed of the authority's proposals in respect of the matter; and
- 2904 (2) to make their views known to the authority within a specified period;

and the authority must, before making any decision on the matter, consider any representations made to it in accordance with those arrangements<sup>5</sup>.

A landlord authority must publish details of the arrangements which it so makes, and a copy of the documents so published must:

- 2905 (a) be made available at the authority's principal office for inspection at all reasonable hours, without charge, by members of the public; and
- 2906 (b) be given, on payment of a reasonable fee, to any member of the public who asks for one<sup>6</sup>.

A landlord authority which is a registered social landlord<sup>7</sup> must, instead of complying with head (a) above, send a copy of any document so published:

- 2907 (i) to the relevant authority<sup>8</sup>; and
- 2908 (ii) to the council of any district<sup>9</sup>, Welsh county or county borough<sup>10</sup> or London borough<sup>11</sup> in which there are dwelling houses let by the landlord authority under secure tenancies;

and a council to which a copy is so sent must make it available at its principal office for inspection at all reasonable hours, without charge, by members of the public<sup>12</sup>.

1 For the meaning of 'landlord authority' see PARA 1344 post.

2 For these purposes, secure tenants include demoted tenants, and secure tenancies include demoted tenancies, within the meaning of the Housing Act 1996 s 143A (as added) (see PARA 1376 post): Housing Act 1985 s 105(7) (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 2(1), (2)). For the meaning of 'secure tenancy' generally see PARAS 1300-1301 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For these purposes, a matter is one of housing management if, in the opinion of the landlord authority, it relates to (1) the management, maintenance, improvement or demolition of dwelling houses let by the authority under secure tenancies; or (2) the provision of services or amenities in connection with such dwelling houses; but not so far as it relates to the rent payable under a secure tenancy or to charges for services or facilities provided by the authority: Housing Act 1985 s 105(2). In the case of a landlord authority which is a local housing authority, the reference in s 105(2) to the provision of services or amenities is a reference only to the provision of services or amenities by the authority acting in its capacity as landlord of the dwelling houses concerned: s 105(4). For the meaning of 'dwelling house' see PARA 1300 note 2 ante; for the meaning of 'improvement' see PARA 1330 note 4 ante; and for the meaning of 'local housing authority' see PARA 1311 note 4 ante.

4 Ibid s 105 (as amended) applies to matters of housing management which, in the opinion of the landlord authority, represent (1) a new programme of maintenance, improvement or demolition; or (2) a change in the practice or policy of the authority, and are likely substantially to affect either its secure tenants as a whole or a group of them who form a distinct social group or occupy dwelling houses which constitute a distinct class, whether by reference to the kind of dwelling house, or the housing estate or other larger area in which they are situated: s 105(3).

5 Ibid s 105(1). Section 105 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing

association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11. In relation to a disposal to which s 106A, Sch 3A (as added and amended) (see PARAS 1345-1348 post) applies, the provisions of Sch 3A (as added and amended) apply in place of the provisions of s 105 (as amended) (see s 106A(2) (as added and amended)); and PARA 1345 note 1 post); and in relation to the approval or variation of a redevelopment scheme the provisions of s 84(2)(b), Sch 2 Pt V para 2 (as added) apply in place of the provisions of s 105 (as amended) (see Sch 2 Pt V para 2(3) (as added); and PARA 1369 note 13 post).

Section 105 does not require an authority to inform every tenant, only to ensure that the tenants are able to be informed of its decisions: *R v Brent London Borough Council, ex p Morris* (1997) 30 HLR 324, CA. There is no legal requirement that a local authority must set out the case against its proposals in its publicity material; the obligation in the Housing Act 1985 s 105(1) is to inform the relevant group of the authority's proposals and not to canvass the disadvantages of its proposals: see *R (on the application of Beale) v Camden London Borough Council* [2004] EWHC 6 (Admin), [2004] HLR 917, [2004] All ER (D) 52 (Jan).

6 Housing Act 1985 s 105(5). See also note 5 supra.

7 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

8 As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5.

9 As to the districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

10 As to the counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

11 As to London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq.

12 Housing Act 1985 s 105(6) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5(7); the Government of Wales Act 1998 s 140, Sch 16 para 5; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(10)). See also note 5 supra.

## UPDATE

### 1342 Consultation on matters of housing management

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/A. IN GENERAL/1343. Information about housing allocation.

### 1343. Information about housing allocation.

A landlord authority<sup>1</sup> must publish a summary of its rules:

2909 (1) for determining priority as between applicants in the allocation of its housing accommodation; and

2910 (2) governing cases where secure tenants<sup>2</sup> wish to move, whether or not by way of exchange of dwelling houses<sup>3</sup>, to other dwelling houses let under secure tenancies by that authority or another body<sup>4</sup>.

A landlord authority must:

- 2911 (a) maintain a set of such rules and of the rules which it has laid down governing the procedure to be followed in allocating its housing accommodation; and
- 2912 (b) make them available at its principal office for inspection at all reasonable hours, without charge, by members of the public<sup>5</sup>.

A landlord authority which is a registered social landlord<sup>6</sup> must, however, instead of complying with head (b) above, send a set of the rules referred to in head (a) above:

- 2913 (i) to the relevant authority<sup>7</sup>; and
- 2914 (ii) to the council of any district<sup>8</sup>, Welsh county or county borough<sup>9</sup> or London borough<sup>10</sup> in which there are dwelling houses let or to be let by the landlord authority under secure tenancies;

and a council to which a set of the rules is so sent must make it available at its principal office for inspection at all reasonable hours, without charge, by members of the public<sup>11</sup>.

At the request of a person who has applied to it for housing accommodation, a landlord authority must make available to him, at all reasonable times and without charge, details of the particulars which he has given to the authority about himself and his family and which the authority has recorded as being relevant to his application for accommodation<sup>12</sup>.

1 For the meaning of 'landlord authority' see PARA 1344 post.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 Housing Act 1985 s 106(1). A copy of the summary so published must be given without charge to any member of the public who asks for one: s 106(4).

The provisions of s 106 (as amended) do not, however, apply to a landlord authority which is a local housing authority so far as they impose requirements corresponding to those to which such an authority is subject under the Housing Act 1996 s 168 (as amended) (provision of information about allocation schemes: see HOUSING vol 22 (2006 Reissue) PARA 245): Housing Act 1985 s 106(6) (added by the Housing Act 1996 s 173, Sch 16 para 1; amended by the Homelessness Act 2002 s 18(1), (2), Sch 1 para 1, Sch 2). Nor does the Housing Act 1985 s 106 (as amended) apply to a tenancy when the interest to the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 Ibid s 106(2). A copy of the set of rules so maintained must be given on payment of a reasonable fee to any member of the public who asks for one: s 106(2). See also note 4 supra.

6 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

7 As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5.

8 As to the districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

9 As to the counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 37 et seq.

10 As to London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 31 et seq.

11 Housing Act 1985 s 106(3) (amended by the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 5(7); the Government of Wales Act 1998 s 140, Sch 16 para 5; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(11)). See also note 4 supra.

12 Housing Act 1985 s 106(5). See also note 4 supra.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/A. IN GENERAL/1344. Meaning of 'landlord authority'.

### **1344. Meaning of 'landlord authority'.**

'Landlord authority' means<sup>1</sup>;

- 2915 (1) a local housing authority<sup>2</sup>;
- 2916 (2) a registered social landlord<sup>3</sup> other than a co-operative housing association<sup>4</sup>;
- 2917 (3) a housing trust<sup>5</sup> which is a charity<sup>6</sup>;
- 2918 (4) a development corporation<sup>7</sup>;
- 2919 (5) a housing action trust<sup>8</sup>; or
- 2920 (6) an urban development corporation<sup>9</sup>,

other than an authority in respect of which an exemption certificate has been issued<sup>10</sup>.

On an application duly made by the authority concerned, the Secretary of State<sup>11</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>12</sup> may issue an exemption certificate to a development corporation, a housing action trust or an urban development corporation if he is satisfied that it has transferred, or otherwise disposed of, at least three-quarters of the dwellings which have at any time before the making of the application been vested in it<sup>13</sup>. The application must be in such form and must be accompanied by such information as the Secretary of State or the Assembly or minister may, either generally or in relation to a particular case, direct<sup>14</sup>.

1 le in the Housing Act 1985 Pt IV (ss 79-117) (as amended): see PARA 1300 et seq ante, PARA 1343 et seq post.

2 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

3 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

4 For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 As to housing trusts see HOUSING vol 22 (2006 Reissue) PARA 12.

6 For the meaning of 'charity' see PARA 1300 note 16 ante.

7 For the meaning of 'development corporation' see PARA 1360 note 9 ante.

8 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

9 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

10 Housing Act 1985 s 114(1) (amended by the Housing Act 1988 s 83(1), 83(1); the Government of Wales Act 1998 ss 129, 152, Sch 15 para 10, Sch 18 Pt IV; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2, PARA 14(12)).

11 As to the Secretary of State see PARA 27 note 3 ante.

12 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

13 Housing Act 1985 s 114(2) (amended by the Housing Act 1988 s 83(1), (4); the Government of Wales Act 1998 ss 129, 152, Sch 15 para 10, Sch 18 Pt IV).



14 Housing Act 1985 s 114(3).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/B. CONSULTATION BEFORE DISPOSAL TO PRIVATE SECTOR LANDLORD/1345. Consultation before disposal; in general.

## ***B. CONSULTATION BEFORE DISPOSAL TO PRIVATE SECTOR LANDLORD***

### **1345. Consultation before disposal; in general.**

The following provisions<sup>1</sup> have effect with respect to the duties:

- 2921 (1) of a local authority<sup>2</sup> proposing to dispose of dwelling houses<sup>3</sup> subject to secure tenancies<sup>4</sup> or introductory tenancies<sup>5</sup>; and  
 2922 (2) of the Secretary of State<sup>6</sup> or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister<sup>7</sup> in considering whether to give his or its consent to such a disposal<sup>8</sup>,

to have regard to the views of tenants<sup>9</sup> liable as a result of the disposal to cease to be secure tenants or introductory tenants<sup>10</sup>.

The disposals to which those provisions apply are disposals by a local authority of an interest in land as a result of which a secure tenant or an introductory tenant of the authority will become the tenant of a private sector landlord<sup>11</sup>. The grant of an option which, if exercised, would result in a secure tenant or an introductory tenant of a local authority becoming the tenant of a private sector landlord is treated as a disposal of the interest which is the subject of the option<sup>12</sup>.

1 The provisions of the Housing Act 1985 s 106A, Sch 3A (as added and amended): see the text and notes 2-12 *infra*; and PARAS 1346-1348 *post*. In relation to a disposal to which Sch 3A (as added and amended) applies, the provisions of Sch 3A (as added and amended) apply in place of the provisions of s 105 (as amended) (consultation on matters of housing management: see PARA 1342 *ante*) in the case of secure tenants and the Housing Act 1996 s 137 (consultation on matters of housing management: see PARA 1296 *ante*) in the case of introductory tenants: Housing Act 1985 s 106A(2) (s 106A added by the Housing and Planning Act 1986 s 6(1); the Housing Act 1985 s 106A(1), (2) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 3(h)).

2 For the meaning of 'local authority' see PARA 1300 note 8 *ante*.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 *ante*.

4 For the meaning of 'secure tenancy' see PARAS 1300-1301 *ante*.

5 For the meaning of 'introductory tenancy' see PARA 1304 note 3 *ante*.

6 As to the Secretary of State see PARA 27 note 3 *ante*.

7 As to the transfer of functions in relation to Wales see PARA 27 note 4 *ante*.

8 References for these purposes to the Secretary of State's or the Assembly's or minister's consent to a disposal are to the consent required by the Housing Act 1985 s 32 (as amended) or s 43 (as amended) (general requirement of consent for disposal of houses or land held for housing purposes: see HOUSING vol 22 (2006 Reissue) PARAS 305, 314): see Sch 3A para 2(3) (Sch 3A added by the Housing and Planning Act 1986 s 6(2), Sch 1).

The Secretary of State's or Assembly's or minister's consent to a disposal is not invalidated by a failure on his or its part or that of the local authority to comply with the requirements of the Housing Act 1985 Sch 3A (as added and amended): see Sch 3A para 6 (as so added).

9 For the meaning of 'tenant' see PARA 1300 note 1 ante.

10 Housing Act 1985 s 106A(1) (as added and amended: see note 1 supra). Section 106A (as added and amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

11 Ibid Sch 3A para 1(1) (as added (see note 8 supra); Sch 3A para 1(1), (2) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 3(l)). For these purposes, 'private sector landlord' means a person other than an authority or body within the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante): Sch 3A para 1(4) (as so added).

Where a disposal of land by a local authority is in part a disposal to which Sch 3A (as added and amended) applies, the provisions of Sch 3A (as added and amended) apply to that part as to a separate disposal: Sch 3A para 1(3) (as so added).

12 Ibid Sch 3A para 1(2) (as added and amended: see notes 8, 11 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/B. CONSULTATION BEFORE DISPOSAL TO PRIVATE SECTOR LANDLORD/1346. Application for the Secretary of State's or the Assembly etc's consent.

### **1346. Application for the Secretary of State's or the Assembly etc's consent.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may not entertain an application for his or its consent to a disposal<sup>3</sup> unless the authority certifies either:

- 2923 (1) that the requirements as to consultation<sup>4</sup> have been complied with; or
- 2924 (2) that those requirements as to consultation have been complied with except in relation to tenants<sup>5</sup> expected to have vacated the dwelling house<sup>6</sup> in question before the disposal;

and the certificate must be accompanied by a copy of the notices given<sup>7</sup> by the authority<sup>8</sup>.

Where the certificate is in the latter form, the Secretary of State or the Assembly may not determine the application until the authority certifies as regards the tenants not originally consulted:

- 2925 (a) that they have vacated the dwelling house in question; or
- 2926 (b) that the requirements as to consultation have been complied with;

and a certificate under head (b) above must be accompanied by a copy of the notices given<sup>9</sup> by the authority<sup>10</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

- 3     le a disposal to which the Housing Act 1985 s 106A, Sch 3A (as added and amended) applies: see PARA 1345 ante. For the meaning of references to the Secretary of State's or the Assembly's or minister's consent to a disposal see PARA 1345 note 8 ante.
- 4     le the requirements of *ibid* Sch 3A para 3 (as added and amended): see PARA 1347 post.
- 5     For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 6     For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 7     le in accordance with the Housing Act 1985 Sch 3A para 3 (as added and amended).
- 8     *Ibid* Sch 3A para 2(1) (Sch 2A added by the Housing and Planning Act 1986 s 6(2), Sch 1).
- 9     See note 7 *supra*.
- 10    Housing Act 1985 Sch 3A para 2(2) (as added: see note 8 *supra*).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/B. CONSULTATION BEFORE DISPOSAL TO PRIVATE SECTOR LANDLORD/1347. Requirements as to consultation.

### **1347. Requirements as to consultation.**

The statutory requirements as to consultation<sup>1</sup> are as follows<sup>2</sup>. The authority must serve a notice in writing on the tenant<sup>3</sup> informing him of:

- 2927 (1) such details of its proposal as the authority considers appropriate, but including the identity of the person to whom the disposal is to be made;
- 2928 (2) the likely consequences of the disposal for the tenant; and
- 2929 (3) the effect of the statutory provisions as to consultation<sup>4</sup> and, in the case of a secure tenant<sup>5</sup>, of the statutory preservation of the right to buy on a disposal to a private sector landlord<sup>6</sup>,

and informing him that he may, within such reasonable period as may be specified in the notice, make representations to the authority<sup>7</sup>.

The authority must consider any representations made to it within that period and must serve a further written notice on the tenant informing him:

- 2930 (a) of any significant changes in the authority's proposal; and
- 2931 (b) that he may within such period as is specified, which must be at least 28 days after the service of the notice, communicate to the Secretary of State<sup>8</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>9</sup> his objection to the proposal,

and, in the case of a secure tenant, informing him of the effect of the statutory provision<sup>10</sup> requiring consent to be withheld if the majority of the tenants are opposed<sup>11</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister may require the authority to carry out such further consultation with its tenants, and to give him or the Assembly or minister such information as to the results of that consultation, as he or it may direct<sup>12</sup>.

- 1 le as referred to in the Housing Act 1985 s 106A, Sch 3A para 2 (as added): see PARA 1346 ante.
- 2 Ibid Sch 3A para 3(1) (Sch 3A added by the Housing and Planning Act 1986 s 6(2), Sch 1).
- 3 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 4 le the effect of the Housing Act 1985 Sch 3A (as added and amended): see PARAS 1345-1346 ante; the text and notes 5-12 infra; and PARA 1348 post.
- 5 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 6 le the effect of the Housing Act 1985 ss 171A-171H (as added and amended): see PARA 1900 et seq post. For the meaning of 'private sector landlord' see PARA 1345 note 11 ante.
- 7 Ibid Sch 3A para 3(2) (as added (see note 2 supra); Sch 3A para 3(2), (3) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 3(l)).
- 8 As to the Secretary of State see PARA 27 note 3 ante.
- 9 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.
- 10 le the effect of the Housing Act 1985 Sch 3A para 5 (as added): see PARA 1348 post.
- 11 Ibid Sch 3A para 3(3) (as added and amended: see notes 2, 7 supra).
- 12 Ibid Sch 3A para 4 (as added: see note 2 supra).

## UPDATE

### 1347 Requirements as to consultation

TEXT AND NOTES 1-11--Housing Act 1985 Sch 3A para 3 further amended: Housing and Regeneration Act 2008 s 294.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/B. CONSULTATION BEFORE DISPOSAL TO PRIVATE SECTOR LANDLORD/1348. Consent to be withheld if majority of tenants are opposed.

### 1348. Consent to be withheld if majority of tenants are opposed.

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may not give his or its consent<sup>3</sup> if it appears to him or to the Assembly or minister that a majority of the tenants<sup>4</sup> of the dwelling houses<sup>5</sup> to which the application relates does not wish the disposal to proceed; but this does not affect his or its general discretion to refuse consent on grounds relating to whether a disposal has the support of the tenants or on any other ground<sup>6</sup>.

In making his or its decision, the Secretary of State or the Assembly or the relevant Welsh minister may have regard to any information available to him or to it; and the local authority<sup>7</sup> must give him or the Assembly or minister such information as to the representations made to that authority by tenants and others, and other relevant matters, as he or the Assembly or minister may require<sup>8</sup>.

- 1 As to the Secretary of State see PARA 27 note 3 ante.
- 2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.
- 3 For the meaning of references to the Secretary of State's or Assembly etc's consent to a disposal see PARA 1345 note 8 ante.
- 4 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 5 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 6 Housing Act 1985 s 106A, Sch 3A para 5(1) (Sch 3A added by the Housing and Planning Act 1986 s 6(2), Sch 1).
- 7 For the meaning of 'local authority' see PARA 1300 note 8 ante.
- 8 Housing Act 1985 Sch 3A para 5(2) (as added: see note 6 supra).

## UPDATE

### **1348 Consent to be withheld if majority of tenants are opposed**

TEXT AND NOTES--Housing Act 1985 Sch 3A para 5 amended, Sch 3A para 5A added: Housing and Regeneration Act 2008 s 294.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/(vi) Provision of Information; Consultation/C. HEATING CHARGES/1349. Heating charges.

## ***C. HEATING CHARGES***

### **1349. Heating charges.**

The following provisions apply to secure tenants<sup>1</sup> of dwelling houses<sup>2</sup> to which a heating authority<sup>3</sup> supplies heat produced at a heating installation<sup>4</sup>.

The Secretary of State<sup>5</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>6</sup> may by regulations require heating authorities to adopt such methods for determining heating charges<sup>7</sup> payable by such tenants as will secure that the proportion of heating costs<sup>8</sup> borne by each of those tenants is no greater than is reasonable<sup>9</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister may by regulations make provision for entitling such tenants, subject to and in accordance with the regulations, to require the heating authority:

- 2932 (1) to give them, in such form as may be prescribed by the regulations, such information as to heating charges and heating costs as may be so prescribed; and
- 2933 (2) where such information has been given, to afford them reasonable facilities for inspecting the accounts, receipts and other documents supporting the information and for taking copies or extracts from them<sup>10</sup>.

Such regulations:

- 2934 (a) may make different provision with respect to different cases or descriptions of case, including different provision for different areas;
- 2935 (b) may make such procedural, incidental, supplementary and transitional provision as appears to the Secretary of State or to the Assembly or minister to be necessary or expedient, and may in particular provide for any question arising under the regulations to be referred to and determined by the county court; and
- 2936 (c) must be made by statutory instrument<sup>11</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3 For these purposes, 'heating authority' means a housing authority or housing action trust which operates a heating installation and supplies to premises heat produced at the installation; 'heating installation' means a generating station or other installation for producing heat; and references to heat produced at an installation include steam produced from, and air and water heated by, heat so produced: Housing Act 1985 s 108(5)(a)-(c) (amended by the Housing Act 1988 s 83(1), (3)). 'Housing authority' means a local housing authority or a new town corporation: Housing Act 1985 s 4(a) (amended by the Government of Wales Act 1998 s 129, Sch 15 para 7). For the meaning of 'local housing authority' see PARA 1311 note 4 ante; for the meaning of 'new town corporation' see PARA 1300 note 9 ante; and for the meaning of 'housing action trust' see PARA 1300 note 10 ante.

4 Housing Act 1985 s 108(1). Section 108 (as amended) does not, however, apply to a tenancy when the interest of the landlord belongs to a co-operative housing association: s 109. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante; and as to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 As to the Secretary of State see PARA 27 note 3 ante.

6 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

7 For these purposes, 'heating charge' means an amount payable to a heating authority in respect of heat produced at a heating installation and supplied to premises, including in the case of heat supplied to premises let by the authority such an amount payable as part of the rent: Housing Act 1985 s 108(5)(d).

8 For these purposes, 'heating costs' means expenses incurred by a heating authority in operating a heating installation: *ibid* s 108(5)(e).

9 *Ibid* s 108(2). At the date at which this title states the law, no such regulations had been made and none had effect as if so made. See also note 4 *supra*.

10 *Ibid* s 108(3). See also notes 4, 9 *supra*.

11 *Ibid* s 108(4). See also notes 4, 9 *supra*. If made by the Secretary of State, the statutory instrument by which the regulations are made is subject to annulment in pursuance of a resolution of either House of Parliament: see s 108(4).

## UPDATE

### 1349 Heating charges

NOTE 3--Housing Act 1985 s 4(a) (now s 4(1)(a)).

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## (vii) Security of Tenure; Recovery of Possession

### A. IN GENERAL

#### 1350. Security of tenure; in general.

A secure tenancy<sup>1</sup> which is either a weekly or other periodic tenancy<sup>2</sup> or a tenancy for a term certain<sup>3</sup> but subject to termination by the landlord<sup>4</sup> cannot be brought to an end by the landlord except by obtaining:

- 2937 (1) an order of the court for the possession of the dwelling house<sup>5</sup>;
- 2938 (2) an order terminating the tenancy<sup>6</sup>; or
- 2939 (3) a demotion order<sup>7</sup>.

Where the landlord obtains an order for the possession of the dwelling house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order<sup>8</sup>.

Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture<sup>9</sup>, the court may not order possession of the dwelling house in pursuance of that provision; but in a case where the court would have made such an order, it must instead make an order terminating the tenancy on a date specified in the order and the statutory provisions relating to a periodic tenancy arising on the termination of a fixed term<sup>10</sup> apply<sup>11</sup>.

A secure tenancy which is a joint tenancy may be brought to an end by notice to quit served by one of the tenants<sup>12</sup> and in that case the possession proceedings brought by the local housing authority after termination of the tenancy do not violate the essence of the Convention right<sup>13</sup> to respect for private and family life<sup>14</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante. A landlord is entitled to treat a tenancy as ended by no longer being secure where the tenant condition is no longer satisfied: *R v London Borough of Croydon Council, ex p Toth* (1987) 20 HLR 576, CA. As to the tenant condition see PARA 1300 ante. It has, however, been held that a local authority which housed an illegal immigrant before becoming aware of his true immigration status could not deny him his statutory right of protection against unlawful eviction, as that right derived from the security of tenure which he enjoyed under the Housing Act 1985 Pt II (ss 79-117) (as amended) and the local authority's powers are not limited by public policy to render void a tenancy granted to a person unlawfully resident: see *Akinbolu v Hackney London Borough Council* (1996) 29 HLR 259, [1996] NPC 60, CA.

2 As to periodic tenancies see PARA 233 ante.

3 As to the nature of a term certain see PARA 235 et seq ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 As to the grounds for making a possession order see PARA 1354 et seq post; for the meaning of 'dwelling house' see PARA 1300 note 2 ante; and as to the procedure on a claim for possession see generally para 656 et seq ante.

6 I.e. under the Housing Act 1985 s 82(3): see the text and notes 9-11 infra.

7 Ibid s 82(1), (1A) (s 82(1) amended, and s 82(1A) added, by the Anti-social Behaviour Act 2003, s 14(1)). As to demotion orders see s 82A (as added); and PARA 1351 post. The landlord cannot bring the tenancy to an end by obtaining any other order, eg an order for rescission: see *Islington London Borough Council v Uckac* [2006] EWCA Civ 340, [2006] 1 WLR 1303, [2006] All ER (D) 441 (Mar).

8 Housing Act 1985 s 82(2). If the period of suspension of a possession order is extended, that does not of itself change the date on which the tenant is to give up possession, for the purposes of s 82(2), if that date has already arrived: *Richmond v Kensington and Chelsea London Borough Council* [2006] EWCA Civ 68, [2006] 1

WLR 1693, [2006] All ER (D) 193 (Feb). Where a possession order is suspended pending punctual payment of current rent and arrears and the tenant fails to comply with the terms of the order, the tenancy terminates at the moment of the breach: *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 86 LGR 245, CA. Where a possession order was made and suspended pending payment of the current rent and arrears, and the tenant was later declared bankrupt on his own petition, the secure tenancy had already ended so that the maintenance of the possession order did not constitute 'a remedy against the property of the defendant' which would have been precluded by the Insolvency Act 1986 s 285(3)(a) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 218): *Harlow District Council v Hall* [2006] EWCA Civ 156, [2006] 1 WLR 2116, [2006] All ER (D) 393 (Feb).

9 As to re-entry and forfeiture see PARA 603 et seq ante.

10 Ie the Housing Act 1985 s 86: see PARA 1302 ante.

11 Ibid s 82(3). The Law of Property Act 1925 s 146 (as amended) (see PARA 619 et seq ante), except s 146(4) (see PARA 627 ante), and any other enactment or rule of law relating to forfeiture, apply in relation to proceedings for an order under the Housing Act 1985 s 82(3) as if they were proceedings to enforce a right of re-entry or forfeiture: s 82(4).

12 As to notice to quit see PARA 213 et seq ante.

13 Ie under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the Human Rights Act 1998 Sch 1 Pt I art 8: para 46 ante.

14 See *Harrow London Borough Council v Qazi* [2003] UKHL 43, [2004] 1 AC 983, [2003] 4 All ER 461 cited in PARA 47 note 8 ante.

## UPDATE

### **1350-1352 Security of tenure; in general...Notice of proceedings for possession, termination or demotion; in general**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1350 Security of tenure; in general**

TEXT AND NOTES 7, 8--Housing Act 1985 s 82(1) further amended and s 82(1A), (2) substituted: Housing and Regeneration Act 2008 s 299, Sch 11 para 2. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

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### **1351. Demotion because of anti-social behaviour.**

The following provisions apply to a secure tenancy<sup>1</sup> if the landlord<sup>2</sup> is a local housing authority<sup>3</sup>, a housing action trust<sup>4</sup> or a registered social landlord<sup>5</sup>.

The landlord may apply to a county court for a demotion order<sup>6</sup>; and a demotion order has the following effect:



- 2940 (1) the secure tenancy is terminated with effect from the date specified in the order;
- 2941 (2) if the tenant<sup>7</sup> remains in occupation of the dwelling house<sup>8</sup> after that date a demoted tenancy<sup>9</sup> is created with effect from that date<sup>10</sup>;
- 2942 (3) it is a term of the demoted tenancy that any arrears of rent payable at the termination of the secure tenancy become payable under the demoted tenancy;
- 2943 (4) it is also a term of the demoted tenancy that any rent paid in advance or overpaid at the termination of the secure tenancy is credited to the tenant's liability to pay rent under the demoted tenancy<sup>11</sup>.

The court must not entertain proceedings for a demotion order unless the statutory notice requirements<sup>12</sup> are satisfied<sup>13</sup>. The procedure on a demotion claim has already been discussed in the context of proceedings for a demotion order under the Housing Act 1988<sup>14</sup>. The court must not make a demotion order unless it is satisfied that the tenant or a person residing in or visiting the dwelling house has engaged or has threatened to engage in conduct amounting to anti-social behaviour or use of the premises for unlawful purposes<sup>15</sup> and that it is reasonable to make the order<sup>16</sup>.

A demotion order may be claimed in the alternative to a possession order, in which case there are different procedural rules<sup>17</sup>.

1 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

4 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

5 Housing Act 1985 s 82A(1) (s 82A added by the Anti-social Behaviour Act 2003 s 14(2)). As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

6 Housing Act 1985 s 82A(2) (as added: see note 5 supra).

7 For the meaning of 'tenant' see PARA 1300 note 1 ante.

8 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

9 For these purposes, a demoted tenancy is (1) a tenancy to which the Housing Act 1996 s 143A (as added) applies (see PARA 1376 post) if the landlord of the secure tenancy is a local housing authority or a housing action trust; (2) a tenancy to which the Housing Act 1988 s 20B (as added) (see PARA 1050 ante) applies if the landlord of the secure tenancy is a registered social landlord: Housing Act 1985 s 82A(8) (as added: see note 5 supra).

10 Each of the following has effect in respect of a demoted tenancy at the time it is created by virtue of an order under *ibid* s 82A (as added) as it has effect in relation to the secure tenancy at the time it is terminated by virtue of the order: (1) the parties to the tenancy; (2) the period of the tenancy; (3) the amount of the rent; (4) the dates on which the rent is payable: s 82A(5) (as added: see note 5 supra). Section 82A(5)(b) (as so added) (see head (2) supra) does not, however, apply if the secure tenancy was for a fixed term and in such a case the demoted tenancy is a weekly periodic tenancy: s 82A(6) (as so added). If the landlord of the demoted tenancy serves on the tenant a statement of any other express terms of the secure tenancy which are to apply to the demoted tenancy such terms are also terms of the demoted tenancy: s 82A(7) (as so added).

11 *Ibid* s 82A(3) (as added: see note 5 supra).

12 *Ie* the requirements of *ibid* s 83 (as substituted and amended): see PARA 1352 post.

13 See *ibid* s 83(1) (as substituted and amended); and PARA 1352 post.

14 See PARA 1066 ante.

15 *Ie* conduct to which the Housing Act 1996 s 153A or 153B (each as added) (injunctions against anti-social behaviour: see HOUSING vol 22 (2006 Reissue) PARA 268) applies: Housing Act 1985 s 82A(4)(a) (as added: see

note 5 supra). The claimant's evidence should include details of the conduct to which the Housing Act 1996 s 153A or s 153B (each as added) applies and in respect of which the demotion claim is made: see PARA 1066 note 22 ante.

16 Housing Act 1985 s 82A(4)(b) (as added: see note 5 supra).

17 See PARA 1066 note 24 ante.

## UPDATE

### **1350-1352 Security of tenure; in general...Notice of proceedings for possession, termination or demotion; in general**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1351 Demotion because of anti-social behaviour**

TEXT AND NOTE 15--For 'conduct ...unlawful purposes' read 'housing-related anti-social conduct, or conduct to which the 1996 Act s 153B applies': 1985 Act s 82A(4)(a) (s 82A(4)(a) amended, s 82A(7A) added by the Police and Justice Act 2006 Sch 14 para 12(2), (3)). In the 1985 Act s 82A(4)(a), 'housing-related anti-social conduct' has the same meaning as in the 1996 Act s 153A: 1985 Act s 82A(7A).

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### **1352. Notice of proceedings for possession, termination or demotion; in general.**

The court may not entertain proceedings for an order<sup>1</sup> for the possession of a dwelling house<sup>2</sup> let on a secure tenancy<sup>3</sup>, an order terminating the tenancy or a demotion order<sup>4</sup> unless:

2944 (1) the landlord<sup>5</sup> has served a notice on the tenant<sup>6</sup> complying with the following provisions; or

2945 (2) the court considers it just and equitable to dispense with the requirement of such a notice<sup>7</sup>.

A notice under head (1) above must:

2946 (a) be in a form prescribed by regulations<sup>8</sup> made by the Secretary of State<sup>9</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>10</sup>;

2947 (b) specify the ground on which the court will be asked to make the order; and

2948 (c) give particulars of that ground<sup>11</sup>.

Where the tenancy is a periodic tenancy and the ground or one of the grounds specified in the notice is Ground 2 (nuisance or other anti-social behaviour)<sup>12</sup>, the notice must also state that proceedings for the possession of the dwelling house may be begun immediately<sup>13</sup> and specify

the date<sup>14</sup> sought by the landlord as the date on which the tenant is to give up possession of the dwelling house<sup>15</sup>. The notice ceases to be in force 12 months after the date so specified<sup>16</sup>.

Where the tenancy is a periodic tenancy and Ground 2<sup>17</sup> is not specified in the notice, the notice must also specify the date<sup>18</sup> after which proceedings for the possession of the dwelling house may be begun<sup>19</sup>. The notice ceases to be in force 12 months after the date so specified<sup>20</sup>.

If the proceedings are for a demotion order<sup>21</sup> the notice must specify the date<sup>22</sup> after which the proceedings may be begun<sup>23</sup> and ceases to be in force 12 months after the date so specified<sup>24</sup>.

Where a notice under these provisions is served with respect to a secure tenancy for a term certain, it has effect also with respect to any periodic tenancy arising<sup>25</sup> on the termination of that tenancy<sup>26</sup>.

1    le an order mentioned in the Housing Act 1985 s 82(1A) (as added); see PARA 1350 ante.

2    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3    For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

4    As to demotion orders see PARA 1351 ante.

5    For the meaning of 'landlord' see PARA 1300 note 1 ante.

6    For the meaning of 'tenant' see PARA 1300 note 1 ante.

7    Housing Act 1985 s 83(1) (s 83 substituted by the Housing Act 1996 s 147(1); the Housing Act 1985 s 83(1), (2), (5) amended, and s 83(4A) added, by the Anti-social Behaviour Act 2003 s 14(3)). Where, after the service of such a notice, the ownership of the dwelling houses is transferred to a registered social landlord which does not satisfy the landlord condition in the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante), service of the notice under s 83 (as amended) cannot be relied upon to found proceedings for possession under the Housing Act 1988 (see PARA 1100 et seq ante) without amendment of the pleadings or the service of a fresh notice under that Act: see *Knowsley Housing Trust v Revell*, *Helena Housing Ltd v Curtis* [2003] EWCA Civ 496, [2004] LGR 236, [2003] All ER (D) 137 (Apr).

8    Regulations under the Housing Act 1985 s 83 (as substituted and amended) must be made by statutory instrument and may make different provision with respect to different cases or descriptions of case, including different provision for different areas: s 83(7) (as substituted: see note 7 supra).

For the prescribed forms of notice to be served before the court may entertain proceedings: (1) for possession of a dwelling house let under a secure tenancy which is a periodic tenancy see the Secure Tenancies (Notices) Regulations 1987, SI 1987/755, reg 2(1), Schedule Pt I (amended by SI 1997/71; SI 1997/377); (2) for possession of a dwelling house let under a secure tenancy which is a tenancy for a term certain, and for possession of the dwelling house let under that tenancy see the Secure Tenancies (Notices) Regulations 1987, SI 1987/755, reg 2(2), Schedule Pt II; and (3) for a demotion order see reg 3, Schedule Pt III (added in relation to England by SI 2004/1627 and in relation to Wales by SI 2005/1226). A form substantially to the same effect may be used: see the Secure Tenancies (Notices) Regulations 1987, SI 1987/755, reg 2(1), (2), reg 3 (as so added); and *Dudley Metropolitan Borough Council v Bailey* (1990) 22 HLR 424, [1991] 1 EGLR 53, CA. As to periodic tenancies see PARA 233 ante; and as to the nature of a term certain see PARA 235 et seq ante.

9    As to the Secretary of State see PARA 27 note 3 ante.

10   As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

11   Housing Act 1985 s 83(2) (as substituted and amended: see note 7 supra). Mere repetition of the ground on which possession is sought is not sufficient; there must be a specification sufficiently informative to tell the tenant what has to be done to put matters right: *Torridge District Council v Jones* (1985) 18 HLR 107, [1985] 2 EGLR 54, CA.

12   le the Housing Act 1985 Sch 2 Pt I, Ground 2 (as substituted and amended): see PARA 1358 post.

13   Ibid s 83(3)(a)(i) (as substituted: see note 7 supra). The court may not entertain proceedings for the possession of the dwelling house unless they are begun at a time when the notice is still in force: see s 83A(1) (as substituted); and PARA 1353 post.

14 The date specified in accordance with *ibid* s 83(3), (4) or (4A) (as substituted and amended) must not be earlier than the date on which the tenancy could, apart from Pt IV (ss 79-117) (as amended), be brought to an end by notice to quit given by the landlord on the same date as the notice under s 83 (as substituted and amended): s 83(5) (as substituted and amended: see note 7 *supra*).

15 *Ibid* s 83(3)(a)(ii) (as substituted: see note 7 *supra*). See also note 13 *supra*. Where a date is so specified, the court may not make an order which requires the tenant to give up possession of the dwelling house in question before that date: see s 84(4) (as substituted); and PARA 1354 *post*.

16 *Ibid* s 83(3)(b) (as substituted: see note 7 *supra*).

17 See note 12 *supra*.

18 See note 14 *supra*.

19 Housing Act 1985 s 83(4)(a) (as substituted: see note 7 *supra*). The court may not entertain proceedings for the possession of the dwelling house unless they are begun after the date so specified and at a time when the notice is still in force: see s 83A(2) (as substituted); and PARA 1353 *post*. Proceedings are brought when the claim form has been issued by the court: see *Osada v Shepping* (2000) 33 HLR 146 (Case No 13), [2000] 2 EGLR 38, [2000] 30 EG 125, CA.

20 Housing Act 1985 s 83(4)(b) (as substituted: see note 7 *supra*).

21 *Ie* under *ibid* s 82A (as added): see PARA 1351 *ante*.

22 See note 14 *supra*.

23 Housing Act 1985 s 84(4A)(a) (as added: see note 7 *supra*).

24 *Ibid* s 84(4A)(b) (as added: see note 7 *supra*).

25 *Ie* by virtue of *ibid* s 86: see PARA 1302 *ante*.

26 *Ibid* s 83(6) (as substituted: see note 7 *supra*). Section 83(3)-(5) (as substituted and amended) does not apply to the notice: s 83(6) (as so substituted).

## UPDATE

### **1350-1352 Security of tenure; in general...Notice of proceedings for possession, termination or demotion; in general**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1352 Notice of proceedings for possession, termination or demotion; in general**

NOTE 7--As to failure by landlord to follow statutory scheme for evicting a tenant, see Application 19009/04 *McCann v United Kingdom* [2009] 1 FCR 390, ECtHR (notice to quit procured from one joint tenant dispossessed other tenant of home); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 152. The landlord's right to seek possession is a purely statutory rather than a proprietary right. It follows that where a tenant dishonestly withholds a fact from the landlord in order to avoid being served with a notice for possession within the applicable time limit, this will give rise to an estoppel by representation rather than a proprietary estoppel, which cannot be relied on to found an action for possession: *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 WLR 1884, [2009] All ER (D) 12 (Feb).

NOTE 8--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### **1353. Notice of proceedings for possession; additional requirements.**

Where a notice in the prescribed form<sup>1</sup> has been served on a tenant<sup>2</sup> containing the following information<sup>3</sup>, that is that proceedings for the possession of the dwelling house<sup>4</sup> may be begun immediately and specifying the date sought by the landlord<sup>5</sup> as the date on which the tenant is to give up possession of the dwelling house, the court may not entertain proceedings for the possession of the dwelling house unless they are begun at a time when the notice is still in force<sup>6</sup>.

Where a notice<sup>7</sup> has been served on a tenant and a date after which proceedings may be begun has been specified in the notice<sup>8</sup>, the court may not entertain proceedings for the possession of the dwelling house unless they are begun after the date so specified and at a time when the notice is still in force<sup>9</sup>.

Where the ground or one of the grounds specified in a notice<sup>10</sup> is Ground 2A (domestic violence)<sup>11</sup>, and the partner who has left the dwelling house as mentioned in that ground is not a tenant of the dwelling house, the court may not entertain proceedings for the possession of the dwelling house unless it is satisfied that the landlord has served a copy of the notice on the partner who has left or has taken all reasonable steps to serve a copy of the notice on that partner<sup>12</sup>; but this requirement as to service may be dispensed with where Ground 2 (nuisance or anti-social behaviour)<sup>13</sup> is also specified in the notice and the court considers it just and equitable to dispense with the service requirement<sup>14</sup>. Similarly, where Ground 2A is added to a notice<sup>15</sup> with the leave of the court after proceedings for possession are begun, and the partner who has left the dwelling house as mentioned in that ground is not a party to the proceedings, the court may not continue to entertain the proceedings unless it is satisfied that the landlord has served a notice containing the specified information<sup>16</sup> on the partner who has left or has taken all reasonable steps to serve such a notice on that partner<sup>17</sup>. Where, however, Ground 2 is also specified in the first-mentioned notice, the court may dispense with the requirements as to service in relation to the partner who has left the dwelling house if it considers it just and equitable to do so<sup>18</sup>.

<sup>1</sup> I.e. a notice under the Housing Act 1985 s 83 (as substituted and amended): see PARA 1352 ante.

<sup>2</sup> For the meaning of 'tenant' see PARA 1300 note 1 ante.

<sup>3</sup> I.e. the information mentioned in the Housing Act 1985 s 83(3)(a) (as substituted): see PARA 1352 the text and notes 12-15 ante.

<sup>4</sup> For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

<sup>5</sup> For the meaning of 'landlord' see PARA 1300 note 1 ante.

<sup>6</sup> Housing Act 1985 s 83A(1) (s 83A substituted by the Housing Act 1996 s 147(1)).

<sup>7</sup> See note 1 supra.

<sup>8</sup> I.e. in accordance with the Housing Act 1985 s 83(4)(a) (as substituted): see PARA 1352 the text and notes 17-19 ante.

- 9 Ibid s 83A(2) (as substituted: see note 6 supra).
- 10 See note 1 supra.
- 11 Ie ibid Sch 2 Pt I, Ground 2A (as added and amended): see PARA 1359 post.
- 12 Ibid s 83A(3) (as substituted: see note 6 supra).
- 13 Ie ibid Sch 2 Pt I, Ground 2 (as substituted and amended): see PARA 1358 post.
- 14 Ibid s 83A(3), (5) (as substituted: see note 6 supra).
- 15 See note 1 supra.
- 16 Ie a notice under the Housing Act 1985 s 83A(6) (as substituted). Such a notice must: (1) state that proceedings for the possession of the dwelling house have begun; (2) specify the ground or grounds on which possession is being sought; and (3) give particulars of the ground or grounds: s 83A(6) (as substituted: see note 6 supra).
- 17 Ibid s 83A(4) (as substituted: see note 6 supra).
- 18 Ibid s 83A(4), (5) (as substituted: see note 6 supra).

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### **1354. Grounds and orders for possession; in general.**

The court may not make an order for the possession of a dwelling house<sup>1</sup> let under a secure tenancy<sup>2</sup> except on one or more of the specified<sup>3</sup> grounds<sup>4</sup>.

The court may not make an order for possession:

- 2949 (1) on Grounds 1 to 8<sup>5</sup>, unless it considers it reasonable to make the order<sup>6</sup>;
- 2950 (2) on Grounds 9 to 11<sup>7</sup>, unless it is satisfied that suitable accommodation<sup>8</sup> will be available for the tenant<sup>9</sup> when the order takes effect<sup>10</sup>;
- 2951 (3) on Grounds 12 to 16<sup>11</sup>, unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect<sup>12</sup>.

Where a notice in the prescribed form<sup>13</sup> has been served on the tenant, the court may not make such an order on any of the above grounds unless the ground is specified in the notice; but the grounds so specified may be altered or added to with the leave of the court<sup>14</sup>. Furthermore, where a date is specified in such a notice as the date sought by the landlord<sup>15</sup> as the date on which the tenant is to give up possession of the dwelling house<sup>16</sup>, the court may not make an order which requires the tenant to give up possession of the dwelling house in question before the date so specified<sup>17</sup>.

Where possession is sought by the landlord and the tenant is claiming to exercise the right to buy<sup>18</sup>, the court will normally hear both claims together in order to balance the parties' competing claims<sup>19</sup>.

1 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

- 2 For the meaning of 'secure tenancy' see PARAS 1300, 1301 ante.
- 3 Ie the grounds set out in the Housing Act 1985 s 84(1), Schedule 2 (as amended): see PARA 1357 et seq post.
- 4 Ibid s 84(1).
- 5 Ie ibid Sch 2 Pt I, Grounds 1-8 (as amended): see PARAS 1357-1365 post.
- 6 Ibid s 84(2)(a). Cf the Rent Act 1977 s 98(1); and PARA 942 ante. The propriety of a landlord council's policy is not a factor relevant to the exercise of discretion, since the trial judge is concerned, not with the propriety or impropriety of a policy rule, but with the reasonableness in the particular case of ordering possession: see *London Borough of Barking and Dagenham v Hyatt and Hyatt* (1991) 24 HLR 406, CA. In considering whether it is reasonable to make a possession order, it is relevant to have in mind that, if a possession order is made, the date of possession can be postponed, or the execution of the order stayed or suspended, under the powers conferred by the Housing Act 1985 s 85(2), (3) (see PARA 1356 post): *Norwich City Council v Famuyiwa* [2004] EWCA Civ 1770, (2005) Times, 24 January, [2004] All ER (D) 332 (Dec). As to the reasonableness of making a possession order when the defendant has absented himself from court see *Lambeth London Borough Council v Henry* (1999) 32 HLR 874, [2000] 1 EGLR 33, CA.
- 7 Ie the Housing Act 1985 Sch 2 Pt II, Grounds 9-11 (as amended): see PARAS 1366-1370 post.
- 8 Ibid Sch 2 Pt IV (paras 1-4) (as amended) (see PARA 1355 post) has effect for determining whether suitable accommodation will be available for a tenant: s 84(2).
- 9 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 10 Housing Act 1985 s 84(2)(b). Suitable accommodation must be available for the tenant and his family (see PARA 1355 post); thus every member of the tenant's family living in the premises is a person with a potential interest in any possession proceedings and is entitled to be joined as a party to the proceedings: *Wandsworth London Borough Council v Fadayomi* [1987] 3 All ER 474, [1987] 1 WLR 1473, CA.
- 11 Ie the Housing Act 1985 Sch 2 Pt III, Grounds 12-16 (as amended): see PARAS 1371-1375 post.
- 12 Ibid s 84(2)(c).
- 13 Ie notice under ibid s 83 (as substituted and amended): see PARA 1352 ante.
- 14 Ibid s 84(3) (s 84(3), (4) substituted by the Housing Act 1996 s 147(2)); and see *Camden London Borough Council v Oppong* (1996) 28 HLR 701, CA.
- 15 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 16 Ie in accordance with the Housing Act 1985 s 83(3) (as substituted): see PARA 1352 ante.
- 17 Ibid s 84(4) (as substituted: see note 14 supra).
- 18 Ie under ibid Pt V (ss 118-188) (as amended): see PARA 1795 et seq post.
- 19 See *Basildon District Council v Wahlen* [2006] EWCA Civ 326, [2006] 1 WLR 2744, [2006] All ER (D) 413 (Mar).

## UPDATE

### 1354 Grounds and orders for possession; in general

NOTE 12--See also *Bracknell Forest BC v Green* [2009] EWCA Civ 238, [2009] HLR 654, [2009] All ER (D) 211 (Mar).

TENANCIES/ (vii) Security of Tenure; Recovery of Possession/A. IN GENERAL/1355. Suitability of accommodation.

### **1355. Suitability of accommodation.**

Accommodation is suitable<sup>1</sup> if it consists of premises which are to be let as a separate dwelling:

- 2952 (1) under a secure tenancy<sup>2</sup>; or
- 2953 (2) under a protected tenancy<sup>3</sup>, not being a tenancy under which the landlord might recover possession under one of the Cases in the Rent Act 1977 where the court must order possession<sup>4</sup>; or
- 2954 (3) under an assured tenancy<sup>5</sup> which is neither an assured shorthold tenancy<sup>6</sup> nor a tenancy under which the landlord might recover possession under any of the specified grounds in the Housing Act 1988<sup>7</sup>,

and in the opinion of the court the accommodation is reasonably suitable to the needs of the tenant<sup>8</sup> and his family<sup>9</sup>.

In determining whether the accommodation is reasonably suitable to the needs of the tenant and his family, regard must be had to:

- 2955 (a) the nature of the accommodation which it is the practice of the landlord<sup>10</sup> to allocate to persons with similar needs;
- 2956 (b) the distance of the accommodation available from the place of work or education of the tenant and of any members of his family<sup>11</sup>;
- 2957 (c) its distance from the home of any member of the tenant's family if proximity to it is essential to that member's or the tenant's well-being;
- 2958 (d) the needs, as regards extent of accommodation, and means of the tenant and his family;
- 2959 (e) the terms on which the accommodation is available and the terms of the secure tenancy;
- 2960 (f) if furniture was provided by the landlord for use under the secure tenancy, whether furniture is to be provided for use in the other accommodation and, if so, the nature of the furniture to be provided<sup>12</sup>.

Where possession of a dwelling house<sup>13</sup> is sought on Ground 9<sup>14</sup>, other accommodation may be reasonably suitable to the needs of the tenant and his family notwithstanding that the permitted number of persons for that accommodation<sup>15</sup> is less than the number of persons living in the dwelling house of which possession is sought<sup>16</sup>.

A certificate of the appropriate local housing authority<sup>17</sup> that it will provide suitable accommodation for the tenant by a date specified in the certificate is conclusive evidence that suitable accommodation will be available for him by that date<sup>18</sup>.

1 le for the purposes of the Housing Act 1985 s 84(2)(b) or (c): see PARA 1354 ante at heads (2)-(3) in the text.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 For these purposes, 'protected tenancy' has the same meaning as in the Rent Act 1977 (see PARA 818 ante); Housing Act 1985 s 622. No new protected tenancies may be created after 14 January 1989 save in certain transitional cases: see PARA 1012 ante.

4 le under one of the Rent Act 1977 s 98(2), Sch 15 Pt II, Cases 11-20 (as amended): see PARAS 963-971 ante.

5 For the meaning of 'assured tenancy' see PARA 1324 note 6 ante.



- 6 le within the meaning of the Housing Act 1988 Pt I (ss 1-45): see PARA 1044 et seq ante.
- 7 le under any of ibid s 7, Sch 2 Pt I, Grounds 1-5 (as amended): see PARAS 1109-1113 ante.
- 8 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 9 Housing Act 1985 s 84(2), Sch 2 Pt IV para 1 (amended by the Housing Act 1988 s 140(1), Sch 17 para 65).
- 10 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 11 For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.
- 12 Housing Act 1985 Sch 2 Pt IV para 2. Cf the Rent Act 1977 s 98(4), Sch 15 Pt IV (paras 3-8) (as amended): see PARA 947 ante.
- 13 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 14 le the Housing Act 1985 Sch 2 Pt II, Ground 9: see PARA 1366 post.
- 15 le as defined in ibid s 326(3) (the space standard): see HOUSING vol 22 (2006 Reissue) PARA 446.
- 16 Ibid Sch 2 Pt IV para 3.
- 17 For these purposes, the appropriate local housing authority is the authority for the district in which the dwelling house of which possession is sought is situated: ibid Sch 2 Pt IV para 4(2). For the meanings of 'local housing authority' and of references to the district of a local housing authority see PARA 1311 note 4 ante.
- 18 Ibid Sch 2 Pt IV para 4(1). Schedule 2 Pt IV para 4 does not, however, apply where the landlord is a local housing authority: Sch 2 Pt IV para 4(3). Cf the Rent Act 1977 Sch 15 Pt IV paras 3, 8 (as amended): see PARA 947 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/A. IN GENERAL/1356. Extended discretion of the court in certain proceedings for possession.

### **1356. Extended discretion of the court in certain proceedings for possession.**

Where proceedings are brought for possession of a dwelling house<sup>1</sup> let under a secure tenancy<sup>2</sup> on any of Grounds 1 to 8<sup>3</sup> and Grounds 12 to 16<sup>4</sup>, the court may adjourn the proceedings for such period or periods as it thinks fit<sup>5</sup>.

On the making of an order for possession of such a dwelling house on any of those grounds, or at any time before the execution of the order, the court may:

- 2961 (1) stay or suspend the execution of the order; or
- 2962 (2) postpone the date of possession,

for such period or periods as the court thinks fit<sup>6</sup>.

On such an adjournment, stay, suspension or postponement the court:

- 2963 (a) must impose conditions with respect to the payment by the tenant<sup>7</sup> of arrears of rent, if any, and rent or payments in respect of occupation after the termination of the tenancy (mesne profits), unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable; and
- 2964 (b) may impose such other conditions as it thinks fit<sup>8</sup>.

If the conditions are complied with, the court may, if it thinks fit, discharge or rescind the order for possession<sup>9</sup>.

Where proceedings are brought for possession of a dwelling house which is let under a secure tenancy and:

- 2965 (i) the tenant's spouse or former spouse, or civil partner or former civil partner, having home rights under Part IV of the Family Law Act 1996<sup>10</sup>, is then in occupation of the dwelling house;
- 2966 (ii) the tenancy is terminated as a result of those proceedings,

the spouse or former spouse, or the civil partner or former civil partner, so long as he or she remains in occupation, has the same rights in relation to, or in connection with, any adjournment, stay, suspension or postponement in pursuance of the above provisions as he or she would have if those home rights were not affected by the termination of the tenancy<sup>11</sup>.

If proceedings are brought for possession of a dwelling house which is let under a secure tenancy and:

- 2967 (A) an order is in force<sup>12</sup> conferring rights on the former spouse or former civil partner of the tenant or an order is in force<sup>13</sup> conferring rights on a cohabitant or former cohabitant<sup>14</sup> of the tenant;
- 2968 (B) the former spouse, former civil partner, cohabitant or former cohabitant is then in occupation of the dwelling house; and
- 2969 (C) the tenancy is terminated as a result of those proceedings,

the former spouse, former civil partner, cohabitant or former cohabitant has, so long as he or she remains in occupation, the same rights in relation to, or in connection with, any adjournment, stay, suspension or postponement in pursuance of the above provisions as he or she would have if the rights conferred by the order referred to in head (i) above were not affected by the termination of the tenancy<sup>15</sup>.

1 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

2 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

3 I.e. the Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Grounds 1-8 (as amended): see PARAS 1357-1365 post.

4 I.e. *ibid* s 84(2)(c), Sch 2 Pt III, Grounds 12-16 (as amended): see PARAS 1371-1375 post.

5 *Ibid* s 85(1).

6 *Ibid* s 85(2). A judge is not obliged to set an absolute date for possession on the face of the order; it is therefore lawful for him to make an order which sets out a date for possession but provides that the date will be postponed and the tenancy will continue so long as the conditions set out in the order continue to be satisfied: *Bristol City Council v Hassan*, *Bristol City Council v Glastonbury* [2006] EWCA Civ 656, [2006] 4 All ER 420, [2006] 1 WLR 2582. For a suggested form of order see *Bristol City Council v Hassan*, *Bristol City Council v Glastonbury* *supra* at [39]; for the prescribed form of order see *Practice Direction--Forms* PD 4, Table 1, Form N28A. Where the discretion under the Housing Act 1985 s 85(2) is not exercised, the reasons for making an immediate possession order must be stated: see *Gallagher v Castle Vale Action Trust Ltd* [2001] EWCA Civ 944, 33 HLR 810, [2001] All ER (D) 409 (Feb). For a case where the court's exercise of its discretion to suspend a possession order was overturned on appeal see *Manchester City Council v Higgins* [2005] EWCA Civ 1423, [2006] 1 All ER 841, [2005] 48 EG 222 (CS). The Housing Act 1985 s 85(2) does not deprive the court of its power to set aside a writ of possession even after execution: *Governors of the Peabody Donation Fund v Hay* (1986) 19 HLR 145, CA, distinguished in *Brent London Borough Council v Botu* [2000] 11 LS Gaz R 40, [2000] All ER (D) 298, CA. However, the court has no power under the Housing Act 1985 s 85(2) to postpone the date of possession under a previous order for possession in circumstances where possession has been given up by the

tenant without the need for execution of the order: *Dunn v Bradford Metropolitan District Council, Marston v Leeds City Council* [2002] EWCA Civ 1137, [2003] HLR 154, [2002] All ER (D) 479 (Jul).

Where the court has made an order postponing the date for possession under the Housing Act 1985 s 85(2)(b) (see head (2) in the text), then if the defendant fails to comply with any of the terms of the order which relate to payment, the claimant, after following the procedure set out in *Practice Direction--Possession Claims* PD 55 para 10.3, may apply for an order fixing the date upon which the defendant has to give up possession of the property; and unless the court further postpones the date for possession, the defendant will be required to give up possession on that date: paras 10.1, 10.2. At least 14 days and not more than three months before applying for such an order, the claimant must give written notice to the defendant which must: (1) state that the claimant intends to apply for an order fixing the date upon which the defendant is to give up possession of the property; (2) record the current arrears and state how the defendant has failed to comply with the order postponing the date for possession by reference to a statement of the rent account enclosed with the notice; (3) request that the defendant reply to the claimant within seven days, agreeing or disputing the stated arrears; and (4) inform the defendant of his right to apply to the court: (a) for a further postponement of the date for possession; or (b) to stay or suspend enforcement: paras 10.3, 10.4. In his reply to the notice, the defendant must: (i) where he disputes the stated arrears, provide details of payments or credits made; (ii) where he agrees the stated arrears, explain why payments have not been made: para 10.5. An application for an order under para 10.2 must be made by filing an application notice in accordance with CPR Pt 23 (see CIVIL PROCEDURE vol 11 (2009) PARA 304 et seq) which must state whether or not there is any outstanding claim by the defendant for housing benefit: *Practice Direction--Possession Claims* PD 55 para 10.6. The claimant must file the following documents with the application notice: (A) a copy of the notice referred to in PARA 10.3; (B) a copy of the defendant's reply, if any, to the notice and any relevant subsequent correspondence between the claimant and the defendant; (C) a statement of the rent account showing either the arrears that have accrued since the first failure to pay in accordance with the order referred to in PARA 10.2 or the arrears that have accrued during the period of two years immediately preceding the date of the application notice, where the first such failure to pay occurs more than two years before that date: para 10.7. CPR 23.2.3-CPR 23.2.5 (dealing with applications without a hearing), CPR 23.7 (service of a copy of an application notice), and CPR 23.10 (right to set aside or vary an order made without service of the application notice) do not apply to such an application: *Practice Direction--Possession Claims* PD 55 para 10.8. On being filed, the application will be referred to the district judge who will normally determine the application without a hearing by fixing the date for possession as the next working day but, if he considers that a hearing is necessary, will fix a date for the application to be heard and direct service of the application notice and supporting evidence on the defendant: para 10.9. The court does not have jurisdiction to review a decision that it was reasonable to make an order for possession: para 10.10.

The tenant is not entitled to notice of an application for a warrant of possession and the warrant may be executed without the tenant's knowledge: *Leicester City Council v Aldwinckle* (1991) 24 HLR 40, CA, followed in *Hammersmith and Fulham London Borough Council v Hill* (1994) 92 LGR 665, 27 HLR 368, CA and applied in *Jephson Homes Housing Association v Moisejevs* [2001] 2 All ER 901, [2000] EGCS 123, CA (a possession warrant obtained and executed without fault on anyone's part could not properly be set aside as oppressive merely because of the court's sympathy towards the tenant's plight and its realisation that he would have been well advised to make an application under the Housing Act 1985 s 85(2)). The procedure adopted under the Housing Act 1985 leading to the court issuing a warrant of possession and arrangements for execution following non-compliance by the tenant with a suspended order for possession has been held not to breach the tenant's right to a fair trial under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) (Cmd 8969)), art 6(1), now set out in the Human Rights Act 1998 s 1(3), Sch 1 Pt I art 6 or the right to respect for private and family life under the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) art 8 now set out in the Human Rights Act 1998 Sch 1 Pt I art 8: see *Southwark London Borough Council v St Brice* [2001] EWCA Civ 1138, [2002] 1 WLR 1537, [2002] LGR 117. There is no free-standing duty on a court or landlord to positively inform a tenant of any right to apply to the court to set aside a warrant of possession prior to execution providing nothing misleading is communicated: *Southwark London Borough Council v Pommels* [2001] All ER (D) 336 (Mar). Cf *Lambeth London Borough Council v Hughes* [2000] All ER (D) 622, CA (local housing authority ought not to have sent out a letter suggesting that a tenant had no remedy except by payment of the whole rent arrears, since a tenant had the possibility of applying to the court for a suspension without having to pay all the arrears; the fact that a housing officer had advised the tenant to obtain legal advice did not save the execution of the warrant from being oppressive). There is no good reason why an authority should not send out an eviction notice in plenty of time so as to allow a person who is going to be evicted adequate time to apply to suspend the warrant: *Lambeth London Borough Council v Hughes* supra. As to warrants of possession see further CIVIL PROCEDURE vol 12 (2009) PARAS 1247, 1292.

Where the power to postpone a possession order is exercised, liberty to apply to the court is implicit, without the need to start new proceedings, and the court has jurisdiction to make a new order, even if the old order has not expired or if the new order will provide for possession to be given up forthwith: see *Manchester City Council v Finn* [2002] EWCA Civ 1998, [2003] HLR 596, [2002] All ER (D) 299 (Dec).

The legislation does not confine the court, in exercising the discretion given to it under the Housing Act 1985 s 85(2), to consideration of the grounds for seeking possession initially relied on by a landlord in giving a tenant notice of his intention to seek possession, nor is the court restricted by the grounds actually relied on by the

landlord in his claim for possession; however, that does not mean that a landlord will always be allowed to rely on other matters in opposing an application for a stay or suspension of a warrant for possession, because it is clear that there may be circumstances in which it will be wrong to allow him to do so: see *Sheffield City Council v Hopkins* [2001] EWCA Civ 1023, [2002] 1 P & CR D7, [2001] All ER (D) 196 (Jun).

7 For the meaning of 'tenant' see PARA 1300 note 1 ante.

8 Housing Act 1985 s 85(3). An agreement between a local authority and a secure tenant who is in arrears to the effect that a possession order (whether suspended on conditions or immediate and unconditional) obtained by reason of the arrears will not be executed provided the tenant observes the conditions of the agreement does not operate to create a new secure tenancy requiring the local authority to obtain a further possession order in the event of the tenant not observing the conditions; s 85(2),(3)(a) demonstrate that the original tenancy terminated by a possession order can be revived at any time until the original order is executed: see *Burrows v Brent London Borough Council* [1996] 4 All ER 577, [1996] 1 WLR 1448, HL, applied in *Brent London Borough Council v Knightley* [1997] 3 FCR 7, [1997] 2 FLR 1, CA, and followed in *Lambeth London Borough Council v Rogers* [2000] LGR 191, 32 HLR 361, CA.

9 Housing Act 1985 s 85(4). If, however, the tenant is in breach of the conditions, the tenancy terminates as from the moment of the breach: see *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 86 LGR 245, CA (cited in PARA 1350 note 8 ante). A former tenant remaining in occupation with the agreement of the landlord is a tolerated trespasser unless the facts are such as to give rise to the inference that a new tenancy has been created: see eg *Swindon Borough Council v Aston* [2002] EWCA Civ 1850, [2003] 2 P & CR 309, [2002] All ER (D) 325 (Dec) (arrears of rent finally paid off; held that on the facts of that case a new tenancy had been created); cf *Marshall v Bradford Metropolitan District Council* [2001] EWCA Civ 594, [2002] HLR 428, [2001] All ER (D) 211 (Apr) (no revival of secure tenancy once arrears of rent paid off). See also *Hackney London Borough Council v Porter* (1996) 29 HLR 401, CA. A tolerated trespasser still retains the exclusive occupation and possession of the property and has a sufficient interest in the premises to sustain a claim in trespass or nuisance both against a third party and against the council: see *Pemberton v Southwark London Borough Council* [2000] 3 All ER 924, [2000] 1 WLR 1672, CA. The Law Commission has recommended the abolition of the 'troublesome' concept of tolerated trespass: see *Renting Homes: The Final Report* (Law Com No 297) (2006) PARA 4.55.

10 As to home rights under the Family Law Act 1996 Pt IV (ss 30-63) (as amended) see PARA 836 ante; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

11 Housing Act 1985 s 85(5) (amended by the Family Law Act 1996 s 66(1), Sch 8 para 53; the Civil Partnership Act 2004 s 82, Sch 9 Pt 2 para 18(1), (2)).

12 Ie under the Family Law Act 1996 s 35 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 297-298.

13 Ie under ibid s 36 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 301-302.

14 Ie within the meaning of the Family Law Act 1996: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292.

15 Housing Act 1985 s 85(5A) (added by the Family Law Act 1996 s 66(1), Sch 8 para 53(3); amended by the Civil Partnership Act 2004 s 82, Sch 9 Pt 2 para 18(1), (3)).

## UPDATE

### 1356 Extended discretion of the court in certain proceedings for possession

TEXT AND NOTES 8-15--Housing Act 1985 s 85 further amended to prevent the creation in future of 'tolerated trespassers': Housing and Regeneration Act 2008 s 299, Sch 11 para 3, Sch 16 (partly in force: SI 2009/1261). For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). The Housing and Regeneration Act 2008 Sch 11 Pt 2 provides that where before the commencement of the Housing and Regeneration Act 2008 s 299 a tenant has already become a tolerated trespasser, a new tenancy will arise. The Housing and Regeneration Act 2008 Sch 11 Pt 2 applies with modifications to successor landlord cases (see Sch 11 para 24(2)): Housing (Replacement of Terminated Tenancies) (Successor Landlords) (England) Order 2009, SI 2009/1262; Housing (Replacement of Terminated Tenancies) (Successor Landlords) (Wales) Order 2009, SI 2009/1262.

NOTE 8--*Knightley*, cited, applied: *Austin v Southwark LBC* [2009] EWCA Civ 66, [2009] 25 EG 138, [2009] All ER (D) 145 (Feb).

NOTE 9--On the true construction of the 1985 Act s 85, it is open to the court to include a proleptic discharge provision in a suspended order for possession; the wording of s 85 does not preclude it from effectively committing itself in advance to discharging a suspended order, provided that certain conditions are complied with and neither party seeks in the meantime to vary the terms of the discharge provision: *Knowsley Housing Trust v White*; *Honeygan-Green v Islington LBC*; *Porter v Shepherds Bush Housing Association* [2008] UKHL 70, [2009] 2 All ER 829, overruling *Swindon* and *Marshall*, both cited. See also *London and Quadrant Housing Trust v Ansell* [2007] EWCA Civ 326, [2007] HLR 561 (tenancy ended following breach of possession order, but tenant remained in occupation; landlord entitled to bring fresh possession claim once arrears of rent eventually paid); and *Wandsworth LBC v Whibley* [2008] EWCA Civ 1249, [2009] PTSR 1242, [2008] All ER (D) 150 (Nov) (where landlord applied to set date for possession on ground of breach of condition, appropriate for court to give summary judgment if tenant failed to respond or gave plainly spurious or irrelevant response).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(A) Where Possession Order Reasonable/1357. Ground 1: non-payment of rent or breach of other obligation.

## **B. GROUNDS FOR POSSESSION**

### **(A) WHERE POSSESSION ORDER REASONABLE**

#### **1357. Ground 1: non-payment of rent or breach of other obligation.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where rent lawfully due from the tenant<sup>2</sup> has not been paid or an obligation of the tenancy<sup>3</sup> has been broken or not performed<sup>4</sup>.

Where the proceedings are based solely on the ground of non-payment of rent, then if the tenant unreasonably fails to comply with the terms of the relevant pre-action protocol<sup>5</sup> the court may take such failure into account when considering whether it is reasonable to make a possession order and the landlord may be liable to sanctions if it unreasonably fails to comply with the terms of the protocol<sup>6</sup>.

1    le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2    For the meaning of 'tenant' see PARA 1300 note 1 ante.

3    For the meaning of 'tenancy' see PARA 1300 note 1 ante.

4    Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 1. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 1; and PARA 949 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 10; and PARA 1119 ante. As to the court's extended discretion in such proceedings see PARA 1356 ante; and as to the exercise of this discretion in a case of serious arrears of rent see *Haringey London Borough Council v Stewart* (1991) 23 HLR 557, [1991] 2 EGLR 252, CA. Where possession is sought on the ground that the rent is in arrears, the notice served under the Housing Act 1985 s 83(2) (as substituted) (see PARA 1352 ante) must specify the amount of rent unpaid: see *Torridge District Council v Jones* (1985) 18 HLR 107, [1985] 2 EGLR 54, CA.

As to evidence of unlawful subletting see *Lambeth London Borough Council v Vandra* [2005] EWCA Civ 1801, [2005] All ER (D) 273 (Dec); and as to breach of an obligation of the tenancy cf *Wandsworth London Borough Council v Hargraves* (1994) 27 HLR 142, [1994] EGCS 115, CA (breach of covenant not to permit anything to be done which would increase the risk of fire; visitor making petrol bombs on the property but judge's exercise of discretion that it was not reasonable to order possession was upheld as the tenant had not taken an active part in the events leading to the fire) and *Sheffield City Council v Jepson* (1993) 25 HLR 299, CA (deliberate and persistent breach of covenant not to keep a dog; held that suspended order for possession would be reasonable).

5 le the *Pre-action Protocol for Possession Claims based on Rent Arrears*: see PARA 657 ante.

6 See PARA 657 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(A) Where Possession Order Reasonable/1358. Ground 2: nuisance or annoyance or immoral or illegal use.

### **1358. Ground 2: nuisance or annoyance or immoral or illegal use.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenant<sup>2</sup> or a person residing in or visiting the dwelling house<sup>3</sup>:

- 2970 (1) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality; or
- 2971 (2) has been convicted of:
- 179 20. (a) using the dwelling house or allowing it to be used for immoral or illegal purposes; or
- 21. (b) an indictable offence committed in, or in the locality of, the dwelling house<sup>4</sup>.
- 180

If the court is considering<sup>5</sup> whether it is reasonable to make an order for possession on this ground, the court must consider, in particular:

- 2972 (i) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought;
- 2973 (ii) any continuing effect the nuisance or annoyance is likely to have on such persons;
- 2974 (iii) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated<sup>6</sup>.

A possession order may be granted on this ground notwithstanding that the tenant has no personal knowledge of the nuisance caused by persons residing in or visiting the property in question or that there has been no personal fault on the part of the tenant for it; but this does not create strict or absolute liability on the part of the tenant. When deciding whether an order should be made, the extent of the personal knowledge or blame on the part of the tenant is a relevant consideration but the court has also to balance the interests of the tenant and his family with those of the neighbours, because it would be intolerable if the neighbours were

deprived of all relief due to an ineffectual tenant who was unable to control the actions of those residing in or visiting the property<sup>7</sup>.

In appropriate cases where the tenant's behaviour may be attributable to some form of mental impairment, the court must take the provisions of the Disability Discrimination Act 1995<sup>8</sup> into account when deciding whether or not to make a possession order on this ground<sup>9</sup>. The Court of Appeal has stated that sending a warning letter to a tenant about his conduct does not subject him to a detriment within the meaning of the 1995 Act; however at that stage the local housing authority would be wise to consider whether it will be able to justify bringing possession proceedings against him because of the effect of his behaviour on the health or safety of one or more of his neighbours<sup>10</sup>.

1 le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 2 (substituted by the Housing Act 1996 s 144; amended by the Serious Organised Crime and Police Act 2005 s 111, Sch 7 Pt 3 para 45). Cf the Rent Act 1977 s 98(1), Sch 15, Pt I, Case 2; and PARA 950 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 14 (as substituted and amended); and PARA 1123 ante. As to the court's extended discretion in such proceedings see PARA 1356 ante; as to nuisance or annoyance see PARA 500 ante; and as to use for illegal or immoral purposes see PARAS 19, 500 ante.

5 le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante.

6 Ibid s 85A(1), (2) (added by the Anti-social Behaviour Act 2003 s 16(1)); and see eg *Manchester City Council v Higgins* [2005] EWCA Civ 1423, [2006] 1 All ER 841, [2005] 48 EG 222 (CS).

7 See *Portsmouth City Council v Bryant* (2000) 32 HLR 906, [2000] All ER (D) 729, CA (no dispute as to the behaviour complained of; the defendant had allowed her grandsons to act in that way and had closed her mind to the reality that her grandsons were out of control; held that the court had been correct in making a possession order). See also *Kensington and Chelsea Royal London Borough Council v Simmonds* [1996] 3 FCR 246, 29 HLR 507, CA; *Norwich City Council v Famuyiwa* [2004] EWCA Civ 1770, (2005) Times, 24 January, [2004] All ER (D) 332 (Dec).

8 The effect of the Disability Discrimination Act 1995 may be to make the eviction unlawful (see s 22(3)(c)) unless it is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person) or the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent (see s 24(3)(a), (b)). See further PARA 50 ante; and DISCRIMINATION vol 13 (2007 Reissue) PARA 599.

9 See *Manchester City Council v Romano*, *Manchester City Council v Samari* [2004] EWCA Civ 834, [2004] 4 All ER 21, [2005] 1 WLR 2775.

10 See *Manchester City Council v Romano*, *Manchester City Council v Samari* [2004] EWCA Civ 834 at [118], [2004] 4 All ER 21, [2005] 1 WLR 2775.

## UPDATE

### 1358 Ground 2: nuisance or annoyance or immoral or illegal use

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 6--Unless there is cogent evidence providing a real hope that the person against whom possession is sought has mended his ways, an outright order for possession should be granted: *Sandwell MBC v Hensley* [2007] EWCA Civ 1425, [2008] HLR 358, [2008] All ER (D) 34 (Jan). Reliance should not be placed on alleged breaches of

antisocial behaviour orders for which a person has not been convicted: *Wandsworth LBC v Webb* [2008] All ER (D) 111 (Nov), CA.

NOTE 9--As to the reasonableness of a decision to seek possession for anti-social behaviour against a tenant suffering from a permanent personality disorder see *Barber v Croydon LBC* [2010] EWCA Civ 51, [2010] All ER (D) 152 (Feb).

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### **1359. Ground 2A; domestic violence.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the dwelling house<sup>2</sup> was occupied, whether alone or with others, by a married couple, a couple who are civil partners of each other, a couple living together as husband and wife or a couple living together as if they were civil partners and:

- 2975 (1) one or both of the partners is a tenant<sup>3</sup> of the dwelling house;
- 2976 (2) one partner has left because of violence or threats of violence by the other towards that partner, or towards a member of the family<sup>4</sup> of that partner who was residing with that partner immediately before the partner left<sup>5</sup>; and
- 2977 (3) the court is satisfied that the partner who has left is unlikely to return<sup>6</sup>.

There are additional notice requirements where possession is sought on this ground<sup>7</sup>.

It has been held that the existence of this statutory mechanism to obtain possession on the grounds of domestic violence by a tenant does not of itself render other methods of achieving the same result unlawful; where notice to quit can be given, there is no justification for requiring a different mechanism to be used, particularly as the statutory route is likely to be lengthy and expensive<sup>8</sup>.

1    le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3    For the meaning of 'tenant' see PARA 1300 note 1 ante.

4    For the meaning of 'member of the family' see PARA 1319 note 5 ante.

5    The violence or threats of violence must be the real or effective reason for the partner leaving the property: *Camden London Borough Council v Mallett* (2001) 33 HLR 204 (Case No 20), CA.

6    Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 2A (added by the Housing Act 1996 s 145; amended by the Civil Partnership Act 2004 s 81, Sch 8 para 33). As to the court's extended discretion in such proceedings see PARA 1356 ante.

7    See the Housing Act 1985 s 83A(3)-(6) (as substituted); and PARA 1353 ante.

8    See *R (on the application of McCann) v Birmingham City Council* [2004] EWHC 2156 (Admin), [2004] All ER (D) 144 (Sep).



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### **1360. Ground 3: deterioration in condition of premises.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the condition of the dwelling house<sup>2</sup> or of any of the common parts<sup>3</sup> has deteriorated owing to acts of waste by, or the neglect or default of, the tenant<sup>4</sup> or a person residing in the dwelling house and, in the case of an act of waste by, or the neglect or default of, a person lodging with the tenant or a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant<sup>5</sup>.

1   le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2   For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

3   For these purposes, 'common parts,' in relation to a dwelling house let under a tenancy, means any part of a building comprising the dwelling house and any other premises which the tenant is entitled under the terms of the tenancy to use in common with the occupiers of other dwelling houses let by the landlord: Housing Act 1985 s 116. For the meaning of 'tenancy' see PARA 1300 note 1 ante; for the meaning of 'term' see PARA 1302 note 8 ante; and for the meaning of 'landlord' see PARA 1300 note 1 ante.

4   For the meaning of 'tenant' see PARA 1300 note 1 ante.

5   Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 3. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 3; and PARA 951 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 13; and PARA 1122 ante. As to the court's extended discretion in such proceedings see PARA 1356 ante.

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### **1361. Ground 4: deterioration in condition of furniture.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the condition of furniture provided by the landlord<sup>2</sup> for use under the tenancy<sup>3</sup>, or for use in the common parts<sup>4</sup>, has deteriorated owing to ill-treatment by the tenant<sup>5</sup> or a person residing in the dwelling house<sup>6</sup> and, in the case of ill-treatment by a person lodging with the tenant or a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant<sup>7</sup>.

1   le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2   For the meaning of 'landlord' see PARA 1300 note 1 ante.

3   For the meaning of 'tenancy' see PARA 1300 note 1 ante.

4   For the meaning of 'common parts' see PARA 1360 note 3 ante.

5 For the meaning of 'tenant' see PARA 1300 note 1 ante.

6 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

7 Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 4. Cf the Rent Act 1977 s 98(1), Sch 15 Pt I, Case 4; and PARA 952 ante; the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 15; and PARA 1125 ante. As to the court's extended discretion in such proceedings see PARA 1356 ante.

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### **1362. Ground 5: tenancy granted pursuant to false statement.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenant<sup>2</sup> is the person, or one of the persons, to whom the tenancy<sup>3</sup> was granted and the landlord<sup>4</sup> was induced to grant the tenancy by a false statement made knowingly or recklessly by the tenant<sup>5</sup> or by a person acting at the tenant's instigation<sup>6</sup>.

1 le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'tenancy' see PARA 1300 note 1 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 A false statement made by a predecessor in title does not suffice: see *Islington London Borough Council v Uckac* [2006] EWCA Civ 340, [2006] 1 WLR 1303, [2006] All ER (D) 441 (Mar).

6 Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 5 (amended by the Housing Act 1996 s 146). See eg *Waltham Forest London Borough Council v Roberts* [2004] EWCA Civ 940, 148 Sol Jo LB 910, [2004] All ER (D) 254 (Jul) (tenant falsely stating on housing application that she did not own any residential property; held that this was a material misrepresentation and that once materiality had been established, it was a fair inference of fact that the misrepresentee had been influenced by the statement). Cf the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 17 (as added); and PARA 1127 ante. There is no comparable provision in the Rent Act 1977; but see *Killick v Roberts* [1991] 4 All ER 289, [1991] 1 WLR 1146, CA (cited in PARA 820 note 10 ante). As to the court's extended discretion in such proceedings see PARA 1356 ante. Notwithstanding the risk that, if a tenant is evicted on this ground, he may be declared intentionally homeless, the question of reasonableness is primarily for the trial judge and the Court of Appeal should be slow to differ from a judge who thinks it of prime importance that deceitful applications should be discouraged: see *Rushcliffe Borough Council v Watson* (1991) 24 HLR 124, CA. When a defendant has deliberately lied to obtain public housing, the court will only consider the effect of the homelessness legislation in exceptional circumstances; however, factors which are relevant include the nature and degree of any untrue statements, the circumstances in which they were made and whether they were made deliberately or recklessly. The court may also consider the situation in which a defendant finds himself or herself, but ought to bear in mind the importance of honesty in such matters: *Shrewsbury and Atcham Borough Council v Evans* (1997) 30 HLR 123, CA; and see *Lewisham London Borough Council v Adeyemi* [1999] EGCS 74, CA.

'Instigate' in this context means more than to tolerate, but to bring about, to urge or to incite: see *Merton London Borough Council v Richards* [2005] HLR 722, [2005] All ER (D) 152 (May), CA.

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### **1363. Ground 6: payment of premium on assignment by way of exchange.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the tenancy<sup>2</sup> was assigned to the tenant<sup>3</sup>, or to a predecessor in title of his who is a member of his family<sup>4</sup> and is residing in the dwelling house<sup>5</sup>, by an assignment by way of exchange<sup>6</sup> and a premium<sup>7</sup> was paid either in connection with that assignment or the assignment which the tenant or predecessor himself made by way of exchange<sup>8</sup>.

1    le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2    For the meaning of 'tenancy' see PARA 1300 note 1 ante.

3    For the meaning of 'tenant' see PARA 1300 note 1 ante.

4    For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.

5    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6    le an assignment by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.

7    For these purposes, 'premium' means any fine or other like sum and any other pecuniary consideration in addition to rent: Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 6.

8    Ibid Sch 2 Pt I, Ground 6. As to the court's extended discretion in such proceedings see PARA 1356 ante.

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### **1364. Ground 7: misconduct.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the dwelling house<sup>2</sup>, forms part of, or is within the curtilage of, a building which, or so much of it as is held by the landlord<sup>3</sup>, is held mainly for purposes other than housing purposes<sup>4</sup> and consists mainly of accommodation other than housing accommodation and:

2978 (1) the dwelling house was let to the tenant<sup>5</sup> or a predecessor in title of his in consequence of the tenant or predecessor being in the employment of the landlord or of a local authority<sup>6</sup>, a new town corporation<sup>7</sup>, a housing action trust<sup>8</sup>, an urban development corporation<sup>9</sup> or the governors of an aided school<sup>10</sup>; and

2979 (2) the tenant or a person residing in the dwelling house has been guilty of conduct such that, having regard to the purpose for which the building is used, it would not be right for him to continue in occupation of the dwelling house<sup>11</sup>.

1    le under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

- 3 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 4 For the meaning of 'housing purposes' see PARA 1325 note 16 ante.
- 5 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 6 For the meaning of 'local authority' see PARA 1300 note 8 ante.
- 7 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.
- 8 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.
- 9 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.
- 10 As to voluntary aided schools see EDUCATION vol 15(1) (2006 Reissue) PARA 104.
- 11 Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 7 (amended by the Housing Act 1988 s 83(1), (6)(b); the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to the court's extended discretion in such proceedings see PARA 1356 ante.

## UPDATE

### 1364 Ground 7: misconduct

TEXT AND NOTE 11--Housing Act 1985 Sch 2 Pt 1, Ground 7 further amended: SI 2008/3002.

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### 1365. Ground 8: occupation while works carried out to premises previously occupied.

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so, where the dwelling house<sup>2</sup> was made available for occupation by the tenant<sup>3</sup>, or a predecessor in title of his, while works were carried out on the dwelling house which he previously occupied as his only or principal home<sup>4</sup> and:

- 2980 (1) the tenant, or predecessor, was a secure tenant<sup>5</sup> of the other dwelling house at the time when he ceased to occupy it as his home;
- 2981 (2) the tenant, or predecessor, accepted the tenancy<sup>6</sup> of the dwelling house of which possession is sought on the understanding that he would give up occupation when, on completion of the works, the other dwelling house was again available for occupation by him under a secure tenancy; and
- 2982 (3) the works have been completed and the other dwelling house is so available<sup>7</sup>.

1 ie under the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (1) in the text.

2 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

- 3 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 4 For the meaning of 'only or principal home' see PARA 1300 note 19 ante.
- 5 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.
- 6 For the meaning of 'tenancy' see PARA 1300 note 1 ante.
- 7 Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 8. There is no comparable provision in the Rent Act 1977 or the Housing Act 1988. As to the court's extended discretion in such proceedings see PARA 1356 ante.

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## (B) WHERE SUITABLE ALTERNATIVE ACCOMMODATION AVAILABLE

### **1366. Ground 9: overcrowding.**

The court may make an order for possession<sup>1</sup> if suitable accommodation<sup>2</sup> will be available where the dwelling house<sup>3</sup> is overcrowded<sup>4</sup> in such circumstances as to render the occupier guilty of an offence<sup>5</sup>.

- 1 Ie under the Housing Act 1985 s 84(2)(b):see PARA 1354 ante at head (2) in the text.
- 2 For the meaning of 'suitable accommodation' see PARA 1355 ante.
- 3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 4 Ie within the meaning of the Housing Act 1985 Pt X (ss 324-344) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 443 et seq.
- 5 Ibid s 84(2)(b), Sch 2 Pt II, Ground 9. Where possession is sought on this ground, other accommodation may be suitable even if the statutory space standard is breached: see Sch 2 Pt IV para 3 (cited in PARA 1355 ante).

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### **1367. Ground 10: demolition or reconstruction.**

The court may make an order for possession<sup>1</sup> if suitable accommodation<sup>2</sup> will be available where the landlord<sup>3</sup> intends, within a reasonable time of obtaining possession of the dwelling house<sup>4</sup>:

- 2983 (1) to demolish or reconstruct the building or part of the building comprising the dwelling house; or
- 2984 (2) to carry out work on that building or on land let together with, and thus treated as part of, the dwelling house,

and cannot reasonably do so without obtaining possession of the dwelling house<sup>5</sup>.

1    le under the Housing Act 1985 s 84(2)(b): see PARA 1354 ante at head (2) in the text.

2    For the meaning of 'suitable accommodation' see PARA 1355 ante.

3    For the meaning of 'landlord' see PARA 1300 note 1 ante.

4    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

5    Housing Act 1985 s 84(2)(b), Sch 2 Pt II, Ground 10. Cf the Landlord and Tenant Act 1954 s 30(1)(f); and PARAS 741-744 ante. See also *Wansbeck District Council v Marley* (1987) 20 HLR 247, CA.

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### **1368. Ground 10A: redevelopment schemes.**

The court may make an order for possession<sup>1</sup> if suitable accommodation<sup>2</sup> will be available where:

- 2985 (1) the dwelling house<sup>3</sup> is in an area which is the subject of a redevelopment scheme approved<sup>4</sup> by the Secretary of State<sup>5</sup> or the Housing Corporation<sup>6</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>7</sup> and the landlord<sup>8</sup> intends within a reasonable time of obtaining possession to dispose of the dwelling house in accordance with the scheme; or
- 2986 (2) part of the dwelling house is in such an area and the landlord intends within a reasonable time of obtaining possession to dispose of that part in accordance with the scheme and for that purpose reasonably requires possession of the dwelling house<sup>9</sup>.

1    le under the Housing Act 1985 s 84(2)(b): see PARA 1354 ante at head (2) in the text.

2    For the meaning of 'suitable accommodation' see PARA 1355 ante.

3    For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4    le in accordance with the Housing Act 1985 Sch 2 Pt V (as added and amended): see PARA 1369 post.

5    As to the Secretary of State see PARA 27 note 3 ante.

6    As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

7    As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

8    For the meaning of 'landlord' see PARA 1300 note 1 ante.

9 Housing Act 1985 s 84(2)(b), Pt II, Ground 10A (added by the Housing and Planning Act 1986 s 9(1); amended by the Government of Wales Act 1998 s 140, Sch 16 para 21(2)). Cf the Housing Act 1988 s 7(1), Sch 2 Pt I, Ground 6 (as amended); and PARA 1114 ante.

## UPDATE

### 1368 Ground 10A: redevelopment schemes

TEXT AND NOTE 6--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(B) Where Suitable Alternative Accommodation Available/1369. Approval of redevelopment schemes.

### 1369. Approval of redevelopment schemes.

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may, on the application of the landlord<sup>3</sup>, approve<sup>4</sup> a scheme for the disposal<sup>5</sup> and redevelopment<sup>6</sup> of an area of land consisting of or including the whole or part of one or more dwelling houses<sup>7</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister<sup>8</sup> may, on the application of the landlord, approve a variation of a scheme previously approved by him or by it and may in particular approve a variation adding land to the area subject to the scheme<sup>9</sup>.

Where a landlord proposes to apply to the Secretary of State or the Assembly or minister<sup>10</sup> for the approval of a scheme or variation, it must serve a notice in writing on any secure tenant<sup>11</sup> of a dwelling house affected by the proposal stating:

- 2987 (1) the main feature of the proposed scheme or, as the case may be, the scheme as proposed to be varied;
- 2988 (2) that the landlord proposes so to apply for approval of the scheme or variation; and
- 2989 (3) the effect of such approval<sup>12</sup> in relation to proceedings for possession of the dwelling house,

and informing the tenant that he may, within such period as the landlord may allow, which must be at least 28 days from service of the notice, make representations to the landlord about the proposal<sup>13</sup>. The landlord may not so apply until it has considered any representations made to it within that period<sup>14</sup>.

In considering whether to give his or its approval to a scheme or variation, the Secretary of State or the Assembly or the relevant Welsh minister<sup>15</sup> must take into account, in particular:

- 2990 (a) the effect of the scheme on the extent and character of housing accommodation in the neighbourhood;

- 2991 (b) over what period of time it is proposed that the disposal and redevelopment will take place in accordance with the scheme; and  
 2992 (c) to what extent the scheme includes provision for housing under the scheme to be sold or let to existing tenants or persons nominated by the landlord;

and he or the Assembly or minister must take into account any representations made to him or to it and, so far as they are brought to his or its notice, any representations made to the landlord<sup>16</sup>. The landlord must give to the Secretary of State or the Assembly or minister such information as to the representations made to it, and other relevant matters, as the Secretary of State or the Assembly or minister may require<sup>17</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister<sup>18</sup> may not approve a scheme or variation so as to include in the area subject to the scheme:

- 2993 (i) part only of one or more dwelling houses; or  
 2994 (ii) one or more dwelling houses not themselves affected by the works involved in redevelopment but which are proposed to be disposed of along with other land which is so affected,

unless he or it is satisfied that the inclusion is justified in the circumstances<sup>19</sup>.

Approval may be given subject to conditions and may be expressed to expire after a specified period<sup>20</sup>, and where approval is given subject to conditions, the landlord may serve a notice of proceedings for possession<sup>21</sup> specifying Ground 10A<sup>22</sup> notwithstanding that the conditions are not yet fulfilled, but the court may not make an order for possession on that ground unless satisfied that they are or will be fulfilled<sup>23</sup>.

The Secretary of State or the Assembly or the relevant Welsh minister<sup>24</sup> may, on the application of the landlord or otherwise, vary an approval so given so as to:

- 2995 (A) add, remove or vary conditions to which the approval is subject; or  
 2996 (B) extend or restrict the period after which the approval is to expire<sup>25</sup>.

1 Where the landlord is a social landlord registered in the register maintained by the Housing Corporation under the Housing Act 1996 s 1 (as amended), the Housing Corporation and not the Secretary of State has the functions conferred by the Housing Act 1985 s 84(2)(b), Sch 2 Pt V (as added and amended): Sch 2 Pt V para 6 (Sch 2 Pt V added by the Housing and Planning Act 1986 s 9(2); the Housing Act 1985 Sch 2 Pt V para 6 amended by the Government of Wales Act 1998 s 140, Sch 16 para 21(3)). For the meaning of 'landlord' see PARA 1300 note 1 ante; as to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18; as to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq; and as to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

3 For these purposes, references to the landlord of a dwelling house include any authority or body within the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante) having an interest of any description in the dwelling house: Sch 2 Pt V para 7 (as added: see note 1 supra). For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 Ie for the purposes of the Housing Act 1985 s 84(2)(b), Sch 2 Pt II, Ground 10A (as added and amended): see PARA 1368 ante.

5 For these purposes, 'disposal' means a disposal of any interest in the land, including the grant of an option; and it is immaterial whether the disposal is to precede or follow the redevelopment: *ibid* Sch 2 Pt V para 1(2)(a) (as added: see note 1 supra). For the meaning of 'redevelopment' see note 6 infra.

6 For these purposes, 'redevelopment' means the demolition or reconstruction of buildings or the carrying out of other works to buildings or land: *ibid* Sch 2 Pt V para 1(2)(b) (as added: see note 1 supra).

7 *Ibid* Sch 2 Pt V para 1(1) (as added: see note 1 supra).



- 8 As to when the Secretary of State's functions are exercised by the Housing Corporation see note 1 supra.
- 9 Housing Act 1985 Sch 2 Pt V para 1(3) (as added: see note 1 supra).
- 10 See note 8 supra.
- 11 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.
- 12 Ie by virtue of the Housing Act 1985 s 84 (as amended) (see PARA 1354 ante) and Sch 2 Pt II, Ground 10A (as added and amended).
- 13 Ibid Sch 2 Pt V para 2(1) (as added: see note 1 supra). In the case of a landlord to which the Housing Act 1985 s 105 (as amended) applies (see PARA 1342 ante), the provisions of Sch 2 Pt V para 2 (as added) apply in place of the provisions of s 105 (as amended): Sch 2 Pt V para 2(3) (as so added).
- 14 Ibid Sch 2 Pt V para 2(2) (as added: see note 1 supra).
- 15 See note 8 supra.
- 16 Housing Act 1985 Sch 2 Pt V para 3(1) (as added: see note 1 supra).
- 17 Ibid Sch 2 Pt V para 3(2) (as added: see note 1 supra). See also note 8 supra.
- 18 See note 8 supra.
- 19 Housing Act 1985 Sch 2 Pt V para 4 (as added: see note 1 supra).
- 20 Ibid Sch 2 Pt V para 5(1) (as added: see note 1 supra).
- 21 Ie a notice under ibid s 83 (as substituted and amended): see PARA 1352 ante.
- 22 Ie specifying ibid Sch 2 Pt II, Ground 10A (as added and amended): see PARA 1369 ante.
- 23 Ibid Sch 2 Pt V para 5(3) (as added: see note 1 supra).
- 24 See note 8 supra.
- 25 Housing Act 1985 Sch 2 Pt V para 5(2) (as added: see note 1 supra).

## **UPDATE**

### **1369 Approval of redevelopment schemes**

NOTE 1--Reference to Housing Corporation treated as reference to the Regulator of Social Housing: Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(B) Where Suitable Alternative Accommodation Available/1370. Ground 11: occupation in conflict with objects of charity.

### **1370. Ground 11: occupation in conflict with objects of charity.**

The court may make an order for possession<sup>1</sup> if suitable accommodation<sup>2</sup> will be available where the landlord<sup>3</sup> is a charity<sup>4</sup> and the tenant's continued occupation of the dwelling house<sup>5</sup> would conflict with the objects of the charity<sup>6</sup>.

1 lie under the Housing Act 1985 s 84(2)(b): see PARA 1354 ante at head (2) in the text.

2 For the meaning of 'suitable accommodation' see PARA 1355 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'charity' see PARA 1300 note 16 ante.

5 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

6 Housing Act 1985 s 84(2)(b), Sch 2 Pt II, Ground 11.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(C) Where Possession Order Reasonable and Suitable Alternative Accommodation Available/1371. Ground 12: premises required for person in landlord's employment.

### (C) WHERE POSSESSION ORDER REASONABLE AND SUITABLE ALTERNATIVE ACCOMMODATION AVAILABLE

#### **1371. Ground 12: premises required for person in landlord's employment.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so and suitable accommodation<sup>2</sup> will be available, where the dwelling house<sup>3</sup> forms part of, or is within the curtilage of, a building which, or so much of it as is held by the landlord<sup>4</sup>, is held mainly for purposes other than housing purposes<sup>5</sup> and consists mainly of accommodation other than housing accommodation, or is situated in a cemetery<sup>6</sup> and:

2997 (1) the dwelling house was let to the tenant<sup>7</sup> or a predecessor in title of his in consequence of the tenant or predecessor being in the employment of the landlord or of a local authority<sup>8</sup>, a new town corporation<sup>9</sup>, a housing action trust<sup>10</sup>, an urban development corporation<sup>11</sup> or the governors of an aided school<sup>12</sup> and that employment has ceased; and

2998 (2) the landlord reasonably requires the dwelling house for occupation as a residence for some person either engaged in the employment of the landlord, or of such a body, or with whom a contract for such employment has been entered into conditional on housing being provided<sup>13</sup>.

1 lie under the Housing Act 1985 s 84(2)(c): see PARA 1354 ante at head (3) in the text.

2 For the meaning of 'suitable accommodation' see PARA 1355 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'housing purposes' see PARA 1325 note 16 ante.

6 For the meaning of 'cemetery' see PARA 1325 note 17 ante.

- 7 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 8 For the meaning of 'local authority' see PARA 1300 note 8 ante.
- 9 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.
- 10 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.
- 11 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.
- 12 As to voluntary aided schools see EDUCATION vol 15(1) (2006 Reissue) PARA 104.
- 13 Housing Act 1985 s 84(2)(c), Sch 2 Pt III, Ground 12 (amended by the Housing Act 1988 s 83(1), (6)(b); the Government of Wales Act 1998 s 152, Sch 18 Pt IV). As to the court's extended discretion in such proceedings see PARA 1356 ante.

## UPDATE

### **1371 Ground 12: premises required for person in landlord's employment**

TEXT AND NOTE 13--Housing Act 1985 Sch 2 Pt 3, Ground 12 further amended: SI 2008/3002.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(C) Where Possession Order Reasonable and Suitable Alternative Accommodation Available/1372. Ground 13: dwelling house designed for physically disabled person.

### **1372. Ground 13: dwelling house designed for physically disabled person.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so and suitable accommodation<sup>2</sup> will be available, where the dwelling house<sup>3</sup> has features which are substantially different from those of ordinary dwelling houses and which are designed to make it suitable for occupation by a physically disabled person who requires accommodation of a kind provided by the dwelling house and:

- 2999 (1) there is no longer such a person residing in the dwelling house; and
- 3000 (2) the landlord<sup>4</sup> requires it for occupation, whether alone or with members of his family<sup>5</sup>, by such a person<sup>6</sup>.

1 ie under the Housing Act 1985 s 84(2)(c): see PARA 1354 ante at head (3) in the text.

2 For the meaning of 'suitable accommodation' see PARA 1355 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.

6 Housing 1985 s 84(2)(c), Sch 2 Pt III, Ground 13. As to the court's extended discretion in such proceedings see PARA 1356 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(C) Where Possession Order Reasonable and Suitable Alternative Accommodation Available/1373. Ground 14: dwelling house for occupation by persons whose circumstances make it difficult for them to satisfy need for housing.

**1373. Ground 14: dwelling house for occupation by persons whose circumstances make it difficult for them to satisfy need for housing.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so and suitable accommodation<sup>2</sup> is available, where the landlord<sup>3</sup> is a housing association<sup>4</sup> or housing trust<sup>5</sup> which lets dwelling houses<sup>6</sup> only for occupation, whether alone or with others, by persons whose circumstances, other than merely financial circumstances, make it especially difficult for them to satisfy their need for housing and:

- 3001 (1) either there is no longer such a person residing in the dwelling house or the tenant<sup>7</sup> has received from a local housing authority<sup>8</sup> an offer of accommodation in premises which are to be let as a separate dwelling under a secure tenancy<sup>9</sup>; and  
 3002 (2) the landlord requires the dwelling house for occupation, whether alone or with members of his family<sup>10</sup>, by such a person<sup>11</sup>.

1 le under the Housing Act 1985 s 84(2)(c): see PARA 1354 ante at head (3) in the text.

2 For the meaning of 'suitable accommodation' see PARA 1355 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 As to housing associations and other registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

5 As to housing trusts see HOUSING vol 22 (2006 Reissue) PARA 12.

6 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

7 For the meaning of 'tenant' see PARA 1300 note 1 ante.

8 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

9 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

10 For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.

11 Housing Act 1985 s 84(2)(c), Sch 2 Pt III, Ground 14. As to the court's extended discretion in such proceedings see PARA 1356 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(2) SECURE TENANCIES/ (vii) Security of Tenure; Recovery of Possession/B. GROUNDS FOR POSSESSION/(C) Where Possession Order Reasonable and Suitable Alternative Accommodation Available/1374. Ground 15: dwelling house for occupation by persons with special needs.

**1374. Ground 15: dwelling house for occupation by persons with special needs.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so and suitable accommodation<sup>2</sup> is available, where the dwelling house<sup>3</sup> is one of a group of dwelling houses which it is the practice of the landlord<sup>4</sup> to let for occupation by persons with special needs and:

- 3003 (1) a social service or special facility is provided in close proximity to the group of dwelling houses in order to assist persons with those special needs;
- 3004 (2) there is no longer a person with those special needs residing in the dwelling house; and
- 3005 (3) the landlord requires the dwelling house for occupation, whether alone or with members of his family<sup>5</sup>, by a person who has those special needs<sup>6</sup>.

1 le under the Housing Act 1985 s 84(2)(c): see PARA 1354 ante at head (3) in the text.

2 For the meaning of 'suitable accommodation' see PARA 1355 ante.

3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'member of a person's family' see PARA 1319 note 5 ante.

6 Housing Act 1985 s 84(2)(c), Sch 2 Pt III, Ground 15. As to the court's extended discretion in such proceedings see PARA 1356 ante.

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### **1375. Ground 16: accommodation more extensive than necessary.**

The court may make an order for possession<sup>1</sup>, if it considers it reasonable to do so and suitable accommodation<sup>2</sup> is available, where the accommodation afforded by the dwelling house<sup>3</sup> is more extensive than is reasonably required by the tenant<sup>4</sup> and:

- 3006 (1) the tenancy vested in the tenant by way of succession to a periodic tenancy<sup>5</sup>, the tenant being qualified to succeed as a member of the family other than the spouse<sup>6</sup>; and
- 3007 (2) notice of the proceedings for possession was served<sup>7</sup> or, where no such notice was served, the proceedings for possession were begun, more than six months but less than 12 months after the date of the previous tenant's death<sup>8</sup>.

The matters to be taken into account by the court in so determining whether it is reasonable to make such an order include:

- 3008 (a) the age of the tenant;
- 3009 (b) the period during which the tenant has occupied the dwelling house as his only or principal home<sup>9</sup>; and
- 3010 (c) any financial or other support given by the tenant to the previous tenant<sup>10</sup>.

- 1 le under the Housing Act 1985 s 84(2)(c): see PARA 1354 ante at head (3) in the text.
- 2 For the meaning of 'suitable accommodation' see PARA 1355 ante.
- 3 For the meaning of 'dwelling house' see PARA 1300 note 2 ante.
- 4 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 5 le by virtue of the Housing Act 1985 s 89 (as amended): see PARA 1321 ante.
- 6 le by virtue of *ibid* s 87(b): see PARA 1319 ante at head (2) in the text.
- 7 le under *ibid* s 83 (as substituted and amended): see PARA 1352 ante.
- 8 *Ibid* s 84(2)(c), Sch 2 Pt III, Ground 16 (amended by the Housing Act 1996 s 147(3)).
- 9 For the meaning of 'only or principal home' see PARA 1300 note 19 ante.
- 10 Housing Act 1985 Sch 2 Pt III, Ground 16. As to the court's extended discretion in such proceedings see PARA 1356 ante. For guidance in balancing a sound case by a tenant for further implementation of his right to buy the property in question and, on the other hand, a good case for possession being reasonable on this ground see *Basildon District Council v Wahlen* [2006] EWCA Civ 326, [2006] 1 WLR 2744, [2006] All ER (D) 413 (Mar); *Kensington and Chelsea London Borough Council v Hislop* [2003] EWHC 2944 (Ch), [2004] 1 All ER 1036, [2003] All ER (D) 113 (Dec). The cases where it is not right to hear both claims at the same time will be rare: *Basildon District Council v Wahlen* *supra*.

## UPDATE

### 1375 Ground 16: accommodation more extensive than necessary

NOTE 8--See *Wandsworth LBC v Randall* [2007] EWCA Civ 1126, [2008] 3 All ER 393.

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## (3) DEMOTED TENANCIES

### (i) Tenancies which are Demoted Tenancies

#### 1376. Demoted tenancies; in general.

A periodic tenancy<sup>1</sup> of a dwelling house<sup>2</sup> is a demoted tenancy if each of the following conditions is satisfied<sup>3</sup>:

- 3011 (1) the landlord<sup>4</sup> is either a local housing authority<sup>5</sup> or a housing action trust<sup>6</sup>;
- 3012 (2) the tenant condition<sup>7</sup> is satisfied<sup>8</sup>;
- 3013 (3) the tenancy is created<sup>9</sup> by virtue of a demotion order<sup>10</sup>.

A demoted tenancy becomes<sup>11</sup> a secure tenancy<sup>12</sup> at the end of the period of one year (the demotion period) starting with the day the demotion order takes effect<sup>13</sup>. A tenancy ceases, however, to be a demoted tenancy if any of the following provisions applies:

- 3014 (a) either head (1) or (2) above ceases to be satisfied<sup>14</sup>;

- 3015 (b) the demotion order is quashed<sup>15</sup>;
- 3016 (c) the tenant dies and no one is entitled to succeed to the tenancy<sup>16</sup>.

If at any time before the end of the demotion period the landlord serves a notice of proceedings for possession of the dwelling house<sup>17</sup>, the tenancy continues as a demoted tenancy until the end of the demotion period or, if later, until any of the following occurs:

- 3017 (i) the notice of proceedings is withdrawn by the landlord<sup>18</sup>;
- 3018 (ii) the proceedings are determined in favour of the tenant<sup>19</sup>;
- 3019 (iii) the period of six months beginning with the date on which the notice is served ends and no proceedings for possession have been brought<sup>20</sup>.

A tenancy does not come to an end merely because it ceases to be a demoted tenancy<sup>21</sup>.

1 For the meanings of 'tenancy' and 'tenant' see PARA 1286 note 5 ante; and as to periodic tenancies see PARA 233 ante.

2 For the purposes of the Housing Act 1996 Pt V Ch 1A (ss 143A-143P) (as added and amended) (see the text and notes 3-21 infra; and PARA 1377 et seq post), a dwelling house may be a house or a part of a house, and land let together with a dwelling house must be treated as part of the dwelling house unless the land is agricultural land which would not be treated as part of a dwelling house for the purposes of the Housing Act 1985 Pt IV (ss 79-117) (as amended) (see PARA 1300 et seq ante): Housing Act 1996 s 143O(1), (2) (ss 143A-143B, 143O added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1).

3 Housing Act 1996 s 143A(1), (5) (as added: see note 2 supra).

4 For the meaning of 'landlord' see PARA 1286 note 5 ante. As to a change of landlord see PARA 1377 post.

5 For the meaning of 'local housing authority' see PARA 1311 note 4 ante (definition applied by the Housing Act 1996 s 230).

6 Ibid s 143A(2) (as added: see note 2 supra). For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

7 I.e. the tenant condition in the Housing Act 1985 s 81: see PARA 1300 ante.

8 Housing Act 1996 s 143A(3) (as added: see note 2 supra).

9 I.e. created by virtue of a demotion order under the Housing Act 1985 s 82A (as added): see PARA 1351 ante. As to the terms of the demoted tenancy when so created see PARA 1351 note 10 ante.

10 Housing Act 1996 s 143A(4) (as added: see note 2 supra).

11 I.e. subject to ibid s 143B(2)-(5) (as added): see the text and notes 14-21 infra.

12 As to secure tenancies see PARAS 1300-1301 ante.

13 Housing Act 1996 s 143B(1) (as added: see note 2 supra).

14 Ibid s 143B(2)(a) (as added: see note 2 supra).

15 Ibid s 143B(2)(b) (as added: see note 2 supra).

16 Ibid s 143B(2)(c) (as added: see note 2 supra). As to rights of succession see PARA 1378 post.

17 As to proceedings for possession see PARA 1382 et seq post.

18 Housing Act 1996 s 143B(3), (4)(a) (as added: see note 2 supra).

19 Ibid s 143B(3), (4)(b) (as added: see note 2 supra).

20 Ibid s 143B(3), (4)(c) (as added: see note 2 supra).

21 Ibid s 143B(5) (as added: see note 2 supra).

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 1377. Change of landlord.

A tenancy<sup>1</sup> continues to be a demoted tenancy<sup>2</sup> for the duration of the demotion period<sup>3</sup> if at the time the demoted tenancy is created<sup>4</sup> the interest of the landlord<sup>5</sup> belongs to a local housing authority<sup>6</sup> or a housing action trust<sup>7</sup>, and during the demotion period the interest of the landlord transfers to another person who is a local housing authority or a housing action trust<sup>8</sup>. If, however, at the time the demoted tenancy is created the interest of the landlord belongs to a local housing authority or a housing action trust, and during the demotion period the interest of the landlord transfers to a person who is not such a body, then:

3020 (1) if the new landlord is a registered social landlord<sup>9</sup> or a person who does not satisfy the landlord condition<sup>10</sup>, the tenancy becomes an assured shorthold tenancy<sup>11</sup>;

3021 (2) if the new landlord is not a registered social landlord and does satisfy the landlord condition the tenancy becomes a secure tenancy<sup>12</sup>.

1 For the meaning of 'tenancy' see PARA 1286 note 5 ante.

2 For the meaning of 'demoted tenancy' see PARA 1376 ante.

3 As to the demotion period see PARA 1376 the text and note 13 ante.

4 As to the creation of a demoted tenancy see PARA 1351 ante.

5 For the meaning of 'landlord' see PARA 1286 note 5 ante.

6 For the meaning of 'local housing authority' see PARA 1311 note 4 ante (definition applied by the Housing Act 1996 s 230).

7 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

8 Housing Act 1996 s 143C(1) (s 143C added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1).

9 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

10 For these purposes, the landlord condition is to be construed in accordance with the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante); Housing Act 1996 s 143C(5) (as added: see note 8 supra).

11 Ibid s 143C(2), (3) (as added: see note 8 supra). For the meaning of 'assured shorthold tenancy' see PARAS 1044, 1051 ante (definition applied by s 230).



12 Ibid s 143C(2), (4) (as added: see note 8 supra). As to secure tenancies see PARAS 1300-1301 ante.

## **UPDATE**

### **1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(ii) Rights of Succession and Assignment/1378. Succession to demoted tenancy.

## **(ii) Rights of Succession and Assignment**

### **1378. Succession to demoted tenancy.**

If the tenant<sup>1</sup> under a demoted tenancy<sup>2</sup> dies, and the tenant was a successor<sup>3</sup>, the tenancy ceases to be a demoted tenancy but does not become a secure tenancy<sup>4</sup>. In any other case where the tenant under a demoted tenancy dies, a person is qualified to succeed the tenant if:

- 3022 (1) he occupies the dwelling house<sup>5</sup> as his only or principal home<sup>6</sup> at the time of the tenant's death;
- 3023 (2) he is a member of the tenant's family<sup>7</sup>; and
- 3024 (3) he has resided with the tenant throughout the period of 12 months ending with the tenant's death<sup>8</sup>.

If only one person is qualified to succeed under heads (1) to (3) above the tenancy vests in him<sup>9</sup>. If, however, there is more than one such person, the tenancy vests in the person preferred in accordance with the following rules:

- 3025 (a) the tenant's spouse or civil partner or, if the tenant has neither spouse nor civil partner, a person living together with the tenant as a couple in an enduring family relationship<sup>10</sup> is to be preferred to another member of the tenant's family<sup>11</sup>;
- 3026 (b) if there are two or more other members of the tenant's family the person preferred may be agreed between them or, if there is no such agreement, selected by the landlord<sup>12</sup>.

If the demoted tenant dies and no person is qualified to succeed to the tenancy as mentioned in heads (1) to (3) above, the tenancy ceases to be a demoted tenancy if either of the following provisions applies:

- 3027 (i) the tenancy is vested or otherwise disposed of in the course of administration of the tenant's estate, unless the vesting or other disposal is in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>13</sup>, a property adjustment order after an overseas divorce, etc<sup>14</sup>, an order for financial relief against a parent<sup>15</sup> or a property adjustment order<sup>16</sup> in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>17</sup>; or

3028 (ii) it is known that when the tenancy is vested or otherwise disposed of in the course of the administration of the tenant's estate it will not be in pursuance of an order mentioned in head (i) above<sup>18</sup>.

A tenancy which so ceases to be a demoted tenancy cannot subsequently become a secure tenancy<sup>19</sup>.

1 For the meaning of 'tenant' see PARA 1286 note 5 ante.

2 For the meaning of 'demoted tenancy' see PARA 1376 ante.

3 A person is a successor to a secure tenancy which is terminated by a demotion order (see PARA 1351 ante) if any of the following provisions applies to him (Housing Act 1996 s 143J(1, (2)) (ss 143H-143J, 143P added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1):

- 41 (1) the tenancy vested in him (a) by virtue of the Housing Act 1985 s 89 (as amended) (succession to periodic secure tenancy on death of tenant: see PARA 1321 ante) or the Housing Act 1996 s 133 (as amended) (succession to introductory tenancy: see PARA 1291 ante); (b) under the will or intestacy of the preceding tenant (s 143J(3) (as so added));
- 42 (2) the tenancy arose by virtue of the Housing Act 1985 s 86 (periodic tenancy arising on termination of fixed term: see PARA 1321 ante) and the original fixed term was granted (a) to another person; or (b) to him jointly with another person (Housing Act 1996 s 143J(4) (as so added));
- 43 (3) he became the tenant on the tenancy being assigned to him unless (a) the tenancy was assigned (i) in proceedings under the Matrimonial Causes Act 1973 s 23A (as added) or s 24 (as amended or as prospectively substituted: see PARA 1290 note 7 ante) (property adjustment orders: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 498 et seq) or the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante) (property adjustment orders after overseas divorce etc: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 531); or (ii) in proceedings under the Civil Partnership Act 2004 Sch 5 Pt 2 or Sch 7 para 9(2) or (3) (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531) and (b) neither he nor the other party to the marriage was a successor (Housing Act 1996 s 143J(5) (as so added; amended by the Civil Partnership Act 2004 s 81, Sch 8 para 57)); or
- 44 (4) he became the tenant on assignment under the Housing Act 1985 s 92 (as amended) (assignment of secure tenancy by way of exchange: see PARA 1324 ante) if he himself was a successor to the tenancy which he assigned in exchange (Housing Act 1996 s 143J(6) (as so added).

A person is the successor to a demoted tenancy if the tenancy vested in him by virtue of s 143H(4) or (5) (as added and amended) (see the text and notes 9-12 infra): s 143J(7) (as so added). A person is the successor to a joint tenancy if he has become the sole tenant: s 143J(8) (as so added).

4 Ibid s 143H(1), (2) (as added: see note 2 supra).

5 For the meaning of 'dwelling house' see PARA 1376 note 2 ante.

6 As to occupation as his only or principal home cf para 1300 note 19 ante.

7 A person is a member of another's family if (1) he is the spouse or civil partner of that person; (2) he and that person live together as a couple in an enduring family relationship, but he does not fall within head (3) infra; (3) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece: s 143P(1) (as so added (see note 3 supra); amended by the Civil Partnership Act 2004 s 81, Sch 8 para 59). For the purposes of head (2) supra, it is immaterial that two persons living together in an enduring family relationship are of the same sex: Housing Act 1996 s 143P(2) (as so added). For the purposes of head (3) supra, (a) a relationship by marriage or civil partnership must be treated as a relationship by blood; (b) a relationship of the half-blood must be treated as a relationship of the whole blood; (c) a stepchild of a person must be treated as his child: s 143P(3) (as so added and amended).

8 Housing Act 1996 s 143H(1), (3) (as added: see note 3 supra).

- 9 Ibid s 143H(4) (as added: see note 3 supra).
- 10 Ie the person mentioned in ibid s 143P(1)(b) (as added) (see note 7 head (2) supra).
- 11 Ibid s 143H(5)(a) (as added (see note 3 supra); amended by the Civil Partnership Act 2004 Sch 8 para 55).
- 12 Housing Act 1996 s 143H(5)(b) (as added: see note 3 supra).
- 13 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 23A (as prospectively added) or s 24 (as amended or as prospectively substituted: see PARA 1290 note 7 ante).
- 14 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).
- 15 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.
- 16 Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.
- 17 Housing Act 1996 s 143I(1)-(3) (as added (see note 3 supra); amended by the Civil Partnership Act 2004 Sch 8 para 56).
- 18 Housing Act 1996 s 143I(1), (2), (4) (as added: see note 3 supra).
- 19 Ibid s 143I(5) (as added: see note 3 supra).

## UPDATE

### **1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(ii) Rights of Succession and Assignment/1379. Restriction on assignment.

### **1379. Restriction on assignment.**

A demoted tenancy<sup>1</sup> is not capable of being assigned except for assignment in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>2</sup>, a property adjustment order after an overseas divorce, etc<sup>3</sup>, an order for financial relief against a parent<sup>4</sup> or a property adjustment order<sup>5</sup> in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>6</sup>.

1 For the meaning of 'demoted tenancy' see PARA 1376 ante.

2 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 23A (as prospectively added) or s 24 (as amended or as prospectively substituted: see PARA 1290 note 7 ante).

3 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

4 le in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

5 le an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

6 Housing Act 1996 s 143K(1), (2) (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1; amended by the Civil Partnership Act 2004 s 81, Sch 8 para 58).

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(iii) Information and Repairing Rights/1380. Provision of information.

### (iii) Information and Repairing Rights

#### 1380. Provision of information.

If a local housing authority<sup>1</sup> or a housing action trust<sup>2</sup> is the landlord<sup>3</sup> of a demoted tenancy<sup>4</sup>, it must from time to time publish information about the demoted tenancy in such form as it thinks best suited to explain in simple terms and so far as it considers appropriate the effect of:

- 3029 (1) the express terms of the demoted tenancy<sup>5</sup>;
- 3030 (2) the statutory provisions relating to demoted tenancies<sup>6</sup>; and
- 3031 (3) the landlord's repairing obligations<sup>7</sup>.

The landlord must ensure that any such information is, so far as is reasonably practicable, kept up to date<sup>8</sup>. Further, the landlord must supply the tenant<sup>9</sup> with:

- 3032 (a) a copy of the information published under heads (1) to (3) above<sup>10</sup>;
- 3033 (b) a written statement of the terms of the tenancy, so far as they are neither expressed in the lease<sup>11</sup> or written tenancy agreement, if any, nor implied by law<sup>12</sup>.

The statement required by head (b) above must be supplied on the grant of the tenancy or as soon as practicable afterwards<sup>13</sup>.

The landlord's duty to prepare a policy and procedures relating to anti-social behaviour and its duties to publish a statement and provide a summary of that policy and those procedures<sup>14</sup> have already been discussed<sup>15</sup>.

1 For the meaning of 'local housing authority' see PARA 1311 note 4 ante (definition applied by the Housing Act 1996 s 230).

2 For the meaning of 'housing action trust' see PARA 1286 note 2 ante.

- 3 For the meaning of 'landlord' see PARA 1286 note 5 ante.
- 4 For the meaning of 'demoted tenancy' see PARA 1376 ante.
- 5 As to the terms of the tenancy when it was created see PARA 1351 note 10 ante.
- 6 le the provisions of the Housing Act 1996 Pt V Ch 1A (ss 143A-143P) (as added and amended): see PARA 1376 et seq ante, PARA 1381 et seq post.
- 7 Ibid s 143M(1), (2) (ss 143M, 143N added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 11). The obligations referred to in head (3) in the text are the provisions of the Landlord and Tenant Act 1985 ss 11-16 (as amended) (repairing obligations: see PARA 416 et seq ante): Housing Act 1996 s 143M(2)(c) (as so added).
- 8 Ibid s 143M(3) (as added: see note 7 supra).
- 9 For the meaning of 'tenant' see PARA 1286 note 5 ante.
- 10 Housing Act 1996 s 143M(4)(a) (as added: see note 7 supra).
- 11 For the meaning of 'lease' see PARA 1286 note 5 ante.
- 12 Housing Act 1996 s 143M(4)(b) (as added: see note 7 supra). The jurisdiction of the county court under Pt V Ch 1A (as added and amended) includes jurisdiction to entertain proceedings as to whether a statement supplied in pursuance of s 143M(4)(b) (as so added) is accurate; and for these purposes it is immaterial that no relief other than a declaration is sought: s 143N(2), (3) (as so added). As to the county court's jurisdiction see further PARA 1382 note 3 post.
- 13 Ibid s 143M(5) (as so added: see note 7 supra).
- 14 le the duties under ibid s 218A (as added): see PARA 1353 ante.
- 15 See PARA 1353 ante.

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(iii) Information and Repairing Rights/1381. Right to carry out repairs.

### 1381. Right to carry out repairs.

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by regulations<sup>3</sup> apply to demoted tenants<sup>4</sup> any provision made<sup>5</sup> in relation to the right of secure tenants<sup>6</sup> to carry out repairs<sup>7</sup>.

- 1 As to the Secretary of State see PARA 27 note 3 ante.
- 2 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.
- 3 As to the making of regulations under the Housing Act 1996 Pt V (ss 124-158) (as amended) see s 142 cited in PARA 1298 note 9 ante.

4 For the meaning of 'demoted tenancy' see PARA 1376 ante; and for the meaning of 'tenant' see PARA 1286 note 5 ante.

5 le made under the Housing Act 1985 s 96 (as substituted): see PARA 1329 ante.

6 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

7 Housing Act 1996 s 143L (added by the Anti-social Behaviour Act 2003, s 14(5), Sch 1, PARA 1). At the date at which this title states the law, the regulations made under the Housing Act 1985 s 96 (as substituted) (ie the Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994/133 (as amended): see PARA 1329 ante) had not been extended so as to apply to demoted tenants.

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(iv) Proceedings for Possession/1382. In general.

## (iv) Proceedings for Possession

### 1382. In general.

The landlord<sup>1</sup> may only bring a demoted tenancy<sup>2</sup> to an end by obtaining an order of the court<sup>3</sup> for possession of the dwelling house<sup>4</sup>. The court must make an order for possession unless it thinks that the procedure for bringing proceedings for possession<sup>5</sup> has not been followed<sup>6</sup>. If the court makes such an order, the tenancy comes to an end on the date on which the tenant is to give up possession in pursuance of the order<sup>7</sup>.

Proceedings for possession of a dwelling house let under a demoted tenancy must not be brought unless the landlord has served on the tenant<sup>8</sup> a notice of proceedings<sup>9</sup>. The notice must:

- 3034 (1) state that the court will be asked to make an order for the possession of the dwelling house<sup>10</sup>;
- 3035 (2) set out the reasons for the landlord's decision to apply for the order<sup>11</sup>;
- 3036 (3) specify the date after which proceedings for the possession of the dwelling house may be begun<sup>12</sup>;
- 3037 (4) inform the tenant of his right to request a review of the landlord's decision and of the time within which the request must be made<sup>13</sup>.

The notice must also inform the tenant that if he needs help or advice about the notice, or about what to do about the notice, he must take the notice immediately to a citizens' advice bureau, a housing aid centre, a law centre or a solicitor<sup>14</sup>.

A copy of the notice to the tenant so served must be attached to the particulars of claim<sup>15</sup>.

- 1 For the meaning of 'landlord' see PARA 1286 note 5 ante.
- 2 For the meaning of 'demoted tenancy' see PARA 1376 ante.
- 3 A county court has jurisdiction to determine questions arising under the Housing Act 1996 Pt V Ch 1A (ss 143A-143P) (as added and amended) and to entertain proceedings brought thereunder and to determine claims (for whatever amount) in connection with a demoted tenancy: s 143N(1) (ss 143D-143E, 143N added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1). If a person takes proceedings in the High Court which, by virtue of the Housing Act 1996 s 143N (as so added), he could have taken in the county court he is not entitled to recover any costs: s 143N(4) (as so added).
- 4 Housing Act 1996 s 143D(1) (as added: see note 3 supra). For the meaning of 'dwelling house' see PARA 1376 note 2 ante.
- 5 See the procedure under the Housing Act 1996 ss 143E, 143F (as added): see the text and notes 8-14 infra; and PARA 1383 post.
- 6 Ibid s 143D(2) (as added: see note 3 supra).
- 7 Ibid s 143D(3) (as added: see note 3 supra).
- 8 For the meaning of 'tenant' see PARA 1286 note 5 ante.
- 9 Housing Act 1996 s 143E(1) (as added: see note 3 supra).
- 10 Ibid s 143E(2)(a) (as added: see note 3 supra).
- 11 Ibid s 143E(2)(b) (as added: see note 3 supra).
- 12 Ibid s 143E(2)(c) (as added: see note 3 supra). The date so specified must not be earlier than the date on which the tenancy could, apart from Pt V Ch 1A (ss 143A-143P) (as added and amended), be brought to an end by notice to quit given by the landlord on the same date as the notice of proceedings: s 143E(3) (as so added). The court must not entertain proceedings begun on or before the date so specified: s 143E(4) (as so added).
- 13 Ibid s 143E(2)(d) (as added: see note 3 supra).
- 14 Ibid s 143E(5) (as added: see note 3 supra).
- 15 See *Practice Direction--Possession Claims* PD 55 para 2.7. As to the particulars of claim see CPR Pt 16; CPR 55.4; and PARA 660 ante; and as to the procedure on a claim for possession see generally para 656 et seq ante.

## UPDATE

### **1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1382 In general**

TEXT AND NOTES 4, 7--Housing Act 1996 s 143D(1) amended, s 143D(1A) added, s 143D(3) repealed: Housing and Regeneration Act 2008 s 299, Sch 11 para 13, Sch 16. For transitional provisions see Sch 11 para 14 (partly in force: SI 2009/1261). See also the Housing and Regeneration Act 2008 Sch 11 Pt 2 (replacement of certain terminated tenancies).

PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(iv) Proceedings for Possession/1383. Landlord's review of decision to seek possession.

### **1383. Landlord's review of decision to seek possession.**

Before the end of the period of 14 days beginning with the date of service of a notice for possession<sup>1</sup> of a dwelling house<sup>2</sup> let under a demoted tenancy<sup>3</sup>, the tenant<sup>4</sup> may request the landlord<sup>5</sup> to review its decision to seek an order for possession<sup>6</sup>. If such a request is made, the landlord must review the decision<sup>7</sup>.

The Secretary of State<sup>8</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>9</sup> may by regulations<sup>10</sup> make provision as to the procedure to be followed in connection with such a review<sup>11</sup>. Those regulations may include provision:

- 3038 (1) requiring the decision on review to be made by a person of appropriate seniority who was not involved in the original decision<sup>12</sup>;
- 3039 (2) as to the circumstances in which the tenant is entitled to an oral hearing, and whether and by whom he may be represented at the hearing<sup>13</sup>.

The landlord under the demoted tenancy must give the tenant not less than five clear days' notice of the date of the review<sup>14</sup>. Where the tenant so requests<sup>15</sup>, the review is to be by way of an oral hearing<sup>16</sup> and if the tenant makes such a request the landlord must, when giving the tenant notice of the date of the review, also inform the tenant of the time and place at which the review will be heard<sup>17</sup>.

Whether or not the review is to be by way of an oral hearing:

- 3040 (a) the tenant may make written representations to the landlord in connection with the review;
- 3041 (b) such representations must be received by the landlord not less than two clear days before the date of the review; and
- 3042 (c) the landlord must consider any such representations which are received by that date<sup>18</sup>.

The review must be carried out by a person who was not involved in the decision; and where the review is of a decision made by an officer of the landlord and is to be carried out by another officer, the officer reviewing the decision must occupy a more senior position within the organisation of the landlord<sup>19</sup>.

Where the review is to be by way of an oral hearing, the tenant must have the right to be heard and to be accompanied or to be represented by another person, whether or not that person is professionally qualified<sup>20</sup>. The tenant or his representative may call persons to give evidence at the hearing and put questions to any person who gives evidence at the hearing<sup>21</sup>. The procedure in connection with a review by way of an oral hearing is otherwise<sup>22</sup> to be such as the person carrying out the review determines<sup>23</sup>. Where notice has been given to the tenant<sup>24</sup> and neither the tenant nor his representative appears at the hearing, the person carrying out the review may, having regard to all the circumstances, either proceed with the hearing or give such directions with a view to the conduct of the review as he considers appropriate<sup>25</sup>. The tenant may request the landlord to postpone a hearing of which notice has been given<sup>26</sup> and the landlord may grant or refuse the request<sup>27</sup>. If the hearing is postponed the landlord must give the tenant reasonable notice of the date, time and place of the postponed hearing<sup>28</sup>.

A hearing may be adjourned by the person carrying out the review at any time, either on that person's own initiative or at the request of the tenant, his representative or the landlord<sup>29</sup>.



Where more than one person is carrying out the review by way of an oral hearing, the hearing must be adjourned on each occasion on which any of those persons is absent, unless the tenant or his representative agrees otherwise<sup>30</sup>. The landlord must give the tenant reasonable notice of the date, time and place of the adjourned hearing<sup>31</sup> and, if the person carrying out the review at the adjourned hearing is not the same person as the person who was carrying out the review at the earlier hearing, the review must proceed by way of a complete rehearing of the case unless the tenant, or his representative, agrees otherwise<sup>32</sup>.

The landlord must notify the tenant of the decision on the review and of the reasons for the decision<sup>33</sup>. The review must be carried out and notice so given before the date specified in the notice of proceedings as the date after which proceedings for possession of the dwelling house may be begun<sup>34</sup>.

- 1 As to service of a notice of possession see PARA 1382 ante.
- 2 For the meaning of 'dwelling house' see PARA 1376 note 2 ante.
- 3 For the meaning of 'demoted tenancy' see PARA 1376 ante.
- 4 For the meaning of 'tenant' see PARA 1286 note 5 ante.
- 5 For the meaning of 'landlord' see PARA 1286 note 5 ante.
- 6 Housing Act 1996 s 143F(1) (s 143F added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1).
- 7 Ibid s 143F(2) (as added: see note 6 supra).
- 8 As to the Secretary of State see PARA 27 note 3 ante.
- 9 As to the transfer of functions in relation to Wales see PARA 27 note 4 ante.
- 10 As to the making of regulations under the Housing Act 1996 Pt V (ss 124-158) (as amended) see s 142 cited in PARA 1298 note 9 ante.
- 11 Ibid s 143F(3) (as added: see note 6 supra). For the regulations made in the exercise of this power see the text and notes 14-32 infra.
- 12 Ibid s 143F(4)(a) (as added: see note 6 supra); and see the text and note 19 infra.
- 13 Ibid s 143F(4)(b) (as added: see note 6 supra); and see the text and notes 15-17, 20 infra.
- 14 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 3; Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 3.
- 15 Any such request must be made to the landlord before the end of the period mentioned in the Housing Act 1996 s 143F(1) (as added) (time permitted for requesting a review: see the text and notes 1-6 supra): Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 4(2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 4(2).
- 16 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 4(1); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 4(2).
- 17 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 4(3); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 4(3).
- 18 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 5; Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 5.
- 19 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 2(1), (2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 2(1), (2).
- 20 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 6(1); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 6(1).

21 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 6(2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 6(2).

22 le subject to the provisions of the relevant 2004 or 2005 Regulations.

23 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 6(3); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 6(3).

24 le as mentioned in the text to notes 14, 17 *supra*.

25 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 7(1), (2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 7(1), (2).

26 See note 24 *supra*.

27 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 8(1); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 8(1).

28 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 8(2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 8(2).

29 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 9(1); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 9(1).

30 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 9(2); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 9(2).

31 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 9(3); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 9(3).

32 Demoted Tenancies (Review of Decisions) (England) Regulations 2004, SI 2004/1679, reg 9(4); Demoted Tenancies (Review of Decisions) (Wales) Regulations 2005, SI 2005/1228, reg 9(4).

33 Housing Act 1996 s 143F(5) (as added: see note 6 *supra*).

34 *Ibid* s 143F(6) (as added: see note 6 *supra*).

## UPDATE

### **1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### **1383 Landlord's review of decision to seek possession**

NOTE 7--See *R (on the application of Gilboy) v Liverpool City Council* [2008] EWCA Civ 751, [2009] QB 699, [2008] 4 All ER 127 (review not a determination of any right or obligation; determination merely gives landlord right to apply to county court for order for possession).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/22. INTRODUCTORY, SECURE AND DEMOTED TENANCIES/(3) DEMOTED TENANCIES/(iv) Proceedings for Possession/1384. Effect of proceedings for possession.

### **1384. Effect of proceedings for possession.**

If the landlord<sup>1</sup> has begun proceedings for the possession of a dwelling house<sup>2</sup> let under a demoted tenancy<sup>3</sup> and:

- 3043 (1) the demotion period<sup>4</sup> ends; or
- 3044 (2) any of the circumstances in which a tenancy ceases to be a demoted tenancy<sup>5</sup> apply,

then if any of those circumstances<sup>6</sup> apply the tenancy ceases to be a demoted tenancy but the landlord, or the new landlord as the case may be, may continue the proceedings<sup>7</sup>. If the tenancy so ceases to be a demoted tenancy and becomes a secure tenancy<sup>8</sup>, the tenant is not entitled to exercise the right to buy<sup>9</sup> unless the proceedings are finally determined<sup>10</sup> and he is not required to give up possession of the dwelling house<sup>11</sup>.

1 For the meaning of 'landlord' see PARA 1286 note 5 ante.

2 For the meaning of 'dwelling house' see PARA 1376 note 2 ante.

3 For the meaning of 'demoted tenancy' see PARA 1376 ante.

4 As to the demotion period see PARA 1376 ante.

5 In the circumstances set out in the Housing Act 1996 s 143B(2)(a)-(c) (as added) (see PARA 1376 ante at heads (a)-(c) in the text.

6 See note 5 supra.

7 Housing Act 1996 s 143G(1), (2) (s 143G added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1).

8 For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

9 As to the right to buy see PARA 1795 et seq post.

10 The proceedings must be treated as finally determined if (1) they are withdrawn; (2) any appeal is abandoned; (3) the time for appealing expires without an appeal being brought: Housing Act 1996 s 143G(5) (as added: see note 7 supra).

11 Ibid s 143G(3), (4) (as added: see note 7 supra).

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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## (4) COUNTY COURT JURISDICTION

### 1385. Jurisdiction of the county court.

A county court has jurisdiction to determine any question arising under the statutory provisions relating to secure tenancies<sup>1</sup> and to entertain proceedings brought thereunder and claims, for whatever amount, in connection with a secure tenancy<sup>2</sup>. That jurisdiction includes jurisdiction to entertain proceedings on the following questions:

- 3045 (1) whether a consent required on an assignment by way of exchange<sup>3</sup> was withheld otherwise than on one or more of the specified grounds<sup>4</sup>;
- 3046 (2) whether a landlord's consent to subletting part of a dwelling house<sup>5</sup> or to carrying out improvements<sup>6</sup> was withheld or unreasonably withheld; or
- 3047 (3) whether a written statement of certain terms of the tenancy<sup>7</sup> is accurate, notwithstanding that no other relief is sought than a declaration<sup>8</sup>.

A county court also has jurisdiction:

- 3048 (a) to determine questions arising under the statutory provisions relating to introductory tenancies<sup>9</sup> and to entertain proceedings brought thereunder and claims, for whatever amount, in connection with an introductory tenancy<sup>10</sup>;
- 3049 (b) to determine questions arising under the statutory provisions relating to demoted tenancies<sup>11</sup> and to entertain proceedings brought thereunder and claims, for whatever amount, in connection with a demoted tenancy<sup>12</sup>.

The statutory rights of appeal from a county court to the High Court or the Court of Appeal have already been discussed<sup>13</sup>. No appeal lies on a question of fact in proceedings in which either the claimant or defendant is claiming the possession of any premises if, by virtue of the statutory provisions which restrict the making or giving of orders for the recovery of possession of dwelling houses let on secure tenancies<sup>14</sup>, the court can only grant possession if it is reasonable to do so<sup>15</sup>.

1    Ie the Housing Act 1985 Pt IV (ss 79-117) (as amended): see PARA 1300 et seq ante. For the meaning of 'secure tenancy' see PARAS 1300-1301 ante.

2    Ibid s 110(1). If a person takes proceedings in the High Court which, by virtue of s 100 (as prospectively amended) he could have taken in the county court, he is not entitled to recover any costs: s 110(3) (prospectively repealed by the Courts and Legal Services Act 1990 s 125(7), Sch 20, as from a day to be appointed).

3    Ie a consent required by the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.

4    Ie the grounds set out in ibid s 92(3), Sch 3 (as amended): see PARA 1325 ante.

5    Ie a consent required by ibid s 93(1)(b): see PARA 1326 ante at head (2) in the text.

6    Ie a consent required by ibid s 97(1): see PARA 1330 ante.

7    Ie a statement supplied in pursuance of ibid s 104(2)(b): see PARA 1339 ante at head (b) in the text.

8    Ibid s 110(2).

9    Ie the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended): see PARA 1286 et seq ante.

10   Ibid s 138(1). As to that jurisdiction see further PARAS 1295 note 14, 1297 note 3 ante. For the meaning of 'introductory tenancy' see PARA 1286 ante.

11   Ie ibid PtV Ch 1A (ss 143A-143P) (as added and amended): see PARA 1376 et seq ante.

12   Ibid s 143N(1) (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 1). As to that jurisdiction see further PARAS 1380 note 12, 1382 note 3 ante. For the meaning of 'demoted tenancy' see PARA 1376 ante.

13 See the County Courts Act 1984 s 77 (as amended); the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071 (as amended); and PARA 984 ante.

14 le by virtue of the Housing Act 1985 s 84(2)(a): see PARA 1354 ante at head (a) in the text.

15 See the County Courts Act 1984 s 77(6)(e) (as amended); and PARA 984 ante.

## UPDATE

### 1376-1385 Demoted tenancies; in general ... Jurisdiction of the county court

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

### 1385 Jurisdiction of the county court

NOTE 12--See *Manchester City Council v Pinnock* [2009] EWCA Civ 852, [2010] 1 WLR 713, [2009] All ER (D) 10 (Aug).

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## 23. ENLARGEMENT OF LONG TERMS

### 1386. In general.

Where a residue unexpired of not less than 200 years of a term which, as originally created, was for not less than 300 years, is subsisting in land<sup>1</sup>, whether being the whole land originally comprised in the term, or part only thereof:

3050 (1) without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term; and

3051 (2) without any rent, or with merely a peppercorn rent or other rent having no money value<sup>2</sup>, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released or has become barred by lapse of time<sup>3</sup>, or has in any other way ceased to be so payable<sup>4</sup>;

the term may be enlarged into a fee simple in the following manner, and subject to the following restrictions<sup>5</sup>.

The right so to enlarge a term:

3052 (a) applies to and includes every such term whenever created, whether or not having the freehold as the immediate reversion thereon; but does not apply to any term liable to be determined by re-entry for condition broken or any term created by sub-demise out of a superior term, itself capable of being enlarged into fee simple<sup>6</sup>;

3053 (b) extends to mortgage terms, where the right of redemption is barred<sup>7</sup>.

1 For the meaning of 'land' see PARA 17 note 1 ante.

2 A rent of three shillings (*Re Smith and Stott* (1883) 29 ChD 1009n) or apparently one shilling (*Blaiberg v Keeves* [1906] 2 Ch 175) was held to have been a rent having a money value; but not a rent of 'one silver penny, if lawfully demanded' (*Re Chapman and Hobbs* (1885) 29 ChD 1007, where importance was attached to the words 'if lawfully demanded'). For the meaning of 'rent' see PARA 551 note 3 ante.

3 The reference to rents being barred by lapse of time appears to be a mistake. So long as the term subsists, mere non-payment does not extinguish the rent; this can always be recovered with six years' arrears (*Grant v Ellis* (1841) 9 M & W 113; *Archbold v Scully* (1861) 9 HL Cas 360; and see LIMITATION PERIODS vol 68 (2008) PARA 1062); but a release may be presumed from non-payment for a length of time (see *Lefroy v Walsh* (1851) 1 ICLR 311; *Tennent v Neil* (1870) IR 5 CL 418, Ex Ch; *Blaiberg v Keeves* [1906] 2 Ch 175).

4 For these purposes, a rent not exceeding the yearly sum of £1 which has not been collected or paid for a continuous period of 20 years or upwards is deemed to have ceased to be payable: Law of Property Act 1925 s 153(4) (amended by the Statute Law (Repeals) Act 2004). Where a rent incident to a reversion expectant on such a term is deemed to have ceased to be so payable, no claim for such rent or for any arrears therefor is capable of being enforced: Law of Property Act 1925 s 153(5).

5 Ibid s 153(1). Except where otherwise expressly provided s 153 (as amended) applies to leases created before, on or after 1 January 1926; and 'lease' includes an underlease or other tenancy: s 154.

6 Ibid s 153(2). See also note 5 supra.

7 Ibid s 153(3). See also note 5 supra. Where a mortgagee acquires a title under the Limitation Act 1980, he may enlarge his term into a fee simple under the Law of Property Act 1925 s 88(3): see LIMITATION PERIODS vol 68 (2008) PARA 1099; MORTGAGE vol 77 (2010) PARA 447. For the meaning of 'mortgage' see PARA 621 note 3 ante.

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### **1387. By whom power to enlarge may be exercised.**

Each of the following persons, namely:

3054 (1) any person beneficially entitled in right of the term, whether subject to any incumbrance<sup>1</sup> or not, to possession<sup>2</sup> of any land<sup>3</sup> comprised in the term<sup>4</sup>;

3055 (2) any person being in receipt of income<sup>5</sup> as trustee, in right of the term, or having the term vested in him as a trustee of land, whether subject to any incumbrance or not;

3056 (3) any person in whom, as personal representative<sup>6</sup> of any deceased person, the term is vested, whether subject to any incumbrance or not;

has power to enlarge a long term<sup>7</sup>.

1 'Incumbrance' includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity or other capital or annual sum: Law of Property Act 1925 s 205(1)(vii).

2 For the meaning of 'possession' see PARA 485 note 2 ante.

3 For the meaning of 'land' see PARA 17 note 1 ante.

4 Ie and, in the case of a married woman without the concurrence of her husband, whether or not she is entitled for her separate use or as her separate property: see the Law of Property Act 1925 s 153(6) (amended by the Married Women (Restraint upon Anticipation) Act 1949 s 1, Sch 2).

5 'Income' includes rents and profits: Law of Property Act 1925 s 205(1)(xix).

6 'Personal representative' means the executor, original or by representation, or administrator for the time being of a deceased person: *ibid* s 205(1)(xviii).

7 *Ibid* s 153(6) (as amended (see note 4 *supra*); further amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(16); for transitional provisions and savings in see s 25(4), (5)). As to the terms capable of enlargement see PARA 1386 *ante*; as to the exercise of the power of enlargement see PARA 1388 *post*; and as to the application of the Law of Property Act 1925 s 153 (as amended) see PARA 1386 note 5 *ante*.

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### **1388. Exercise of power of enlargement.**

Any person having the right to enlarge a long term<sup>1</sup> has power, so far as regards the land<sup>2</sup> to which he is entitled, or in which he is interested in right of the term, in any such character, by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple<sup>3</sup>. Thereupon<sup>4</sup> the term becomes and is enlarged accordingly; and the person in whom the term was previously vested acquires and has in the land a fee simple instead of the term<sup>5</sup>.

The estate in fee simple so acquired by enlargement:

3057 (1) is subject to all the same trusts, powers, executory limitations over, rights and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged<sup>6</sup>;

3058 (2) includes, whether the term was originally created without impeachment for waste or not, the fee simple in all mines and minerals<sup>7</sup> which at the time of the enlargement have not been severed in right or in fact, or have not been severed or reserved by an inclosure Act<sup>8</sup> or award<sup>9</sup>.

Where, however:

3059 (a) any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land, or, in the case of settlements<sup>10</sup> coming into operation after 1 January 1926, so as to go along with that other land as far as the law permits<sup>11</sup>; and

3060 (b) at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, free from charges or powers of charging created by a settlement,

the estate in fee simple so acquired is, without prejudice to any conveyance<sup>12</sup> for value previously made by a person having a contingent or defeasible interest in the term, liable to be, and is to be, conveyed by means of a subsidiary vesting instrument<sup>13</sup> and settled in like manner as the other land, being freehold land, and, until so conveyed and settled, devolves beneficially as if it had been so conveyed and settled<sup>14</sup>.

- 1 As to the terms capable of enlargement see PARA 1386 ante; and as to the persons with power to enlarge long terms see PARA 1387 ante.
- 2 For the meaning of 'land' see PARA 17 note 1 ante.
- 3 Law of Property Act 1925 s 153(6). As to the application of s 153 (as amended) see PARA 1386 note 5 ante.
- 4 le by virtue of the deed and the Law of Property Act 1925.
- 5 Ibid s 153(7).
- 6 Ibid s 153(8).
- 7 'Mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same: ibid s 205(1)(ix) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4; for transitional provisions and savings see s 25(4), (5)).
- 8 As to the inclosure Acts generally see COMMONS vol 13 (2009) PARA 419 et seq.
- 9 Law of Property Act 1925 s 153(10).
- 10 le within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 675 et seq. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.
- 11 In as much as chattels real may now be entailed (see REAL PROPERTY vol 39(2) (Reissue) PARA 105), the words 'so far as the law permits' are no longer required in settlements of chattels real by reference to freeholds. As from 1 January 1997, it has no longer been possible to create any new entailed interests: see REAL PROPERTY vol 39(2) (Reissue) PARA 105.
- 12 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will: Law of Property Act 1925 s 205(1)(ii). For the meaning of 'mortgage' see PARA 621 note 3 ante.
- 13 le within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 691. See also note 10 supra.
- 14 Law of Property Act 1925 ss 153(9), 205(1)(xxvi).

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## **24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES**

### **(1) RIGHT TO ENFRANCHISEMENT OR EXTENSION**

#### **(i) In general**

#### **1389. Right to enfranchisement or extended lease.**

Part I of the Leasehold Reform Act 1967<sup>1</sup> has effect to confer on a tenant of a leasehold house<sup>2</sup> a right to acquire on fair terms<sup>3</sup> the freehold or<sup>4</sup> an extended lease of the house and premises<sup>5</sup> where:



3061 (1) his tenancy is a long tenancy<sup>6</sup> at a low rent<sup>7</sup> and:

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22. (a) if the tenancy was entered into before 1 April 1990 or on or after 1 April 1990 in pursuance of a contract made before that date, and the house and premises had a rateable value<sup>8</sup> at the date of commencement of the tenancy or else at any time before 1 April 1990, the rateable value of the house and premises was below the relevant limit on the appropriate day<sup>9</sup>; and

23. (b) if the tenancy does not fall within head (a) above, on the date the contract for the grant of the tenancy was made or, if there was no such contract, on the date that the tenancy was entered into, the amount calculated according to a formula based on the premium paid did not exceed £25,000<sup>10</sup>; and

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3062 (2) at the relevant time, that is say at the time when he gives notice of his desire to have the freehold or to have an extended lease, as the case may be, he has been tenant of the house under a long tenancy at a low rent for the last two years<sup>11</sup>,

and to confer the like right in the other cases<sup>12</sup> for which provision is made<sup>13</sup>.

The right to enfranchisement is extended to houses whose value or rent exceeds the applicable limit but the right to an extended lease remains governed by that limit<sup>14</sup>.

The right to enfranchisement has been held not to infringe the landlord's Convention rights to a fair hearing or to the peaceful enjoyment of his possessions<sup>15</sup>.

1    le the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see the text and notes 2-14 infra; and PARA 1390 et seq post.

2    For the meaning of 'house' see PARA 1390 post.

3    See PARA 1439 et seq post.

4    For these purposes, the word 'or' is used conjunctively; and a tenant is entitled, provided that notice of his desire to have the freehold is given not later than the original term date of the tenancy, to claim the freehold and an extended lease: *Mosley v Hickman* (1986) 52 P & CR 248 at 250, CA, per Fox LJ.

5    For the meaning of 'premises' see PARA 1391 post.

6    For the meanings of 'tenancy' and 'long tenancy' see PARA 1398 post.

7    For these purposes, the references to a long tenancy at a low rent do not include a tenancy excluded from the operation of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) by s 33A, Sch 4A (as added) (see PARA 1410 et seq post): s 1(1A) (added by the Housing and Planning Act 1986 s 18, Sch 4 paras 3, 11). For the meaning of 'low rent' see PARA 1403 post. It should be noted that although the basic condition of the right to enfranchise remains that the tenancy must be one at a low rent, any tenancy that fails to meet the original low rent test introduced by the Leasehold Reform Act 1967 as originally enacted, or which fails to meet the alternative test introduced in 1993, is deemed to be a tenancy at a low rent unless it is an excluded tenancy: see PARAS 1397, 1402 post. The practical effect is that in the vast majority of cases the low rent test is no longer a qualifying condition.

8    As to the rateable value of a house see PARAS 1392-1396 post; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

9    See the Leasehold Reform Act 1967 s 1(1)(a)(i) (as substituted and amended), s 1(5), (6) (as added); and PARAS 1392-1394 post. For the meaning of 'the appropriate day' see PARA 1392 note 4 post.

10   See *ibid* s 1(1)(a)(ii) (as substituted and amended); and PARA 1395 post.

11   *Ibid* s 1(1)(b) (amended by Commonhold and Leasehold Reform Act 2002 ss 138(1), 139(1), 180, Sch 14). Where notice was given under the Leasehold Reform Act 1967 s 8 (as amended) (see PARA 1439 post) or s 14 (now as amended) (see PARA 1469 post), or where an application was made under s 27 (now as amended) (see PARA 1465 post), before 26 July 2002 in relation to England or 1 January 2003 in relation to Wales (see the

Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2 para 5; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2, PARA 5) the tenant had to have occupied the house as his residence for the previous three years or for periods amounting to three years in the previous ten years: see the Leasehold Reform Act 1967 s 1(1)(b) (as amended by the Housing Act 1980 s 141, Sch 21 para 1(1)). For the current residence qualifications see PARA 1415 post.

12    le the other cases for which provision is made in the Leasehold Reform Act 1967 Pt I (as amended).

13    Ibid s 1(1).

14    See *ibid* ss 1A, 1AA (as added and amended); and PARAS 1396-1397, 1402 post.

15    See *James v United Kingdom* (1986) 8 EHRR 123, [1986] ECHR 8793/79, ECtHR. As to the relevant Convention rights see PARA 46 ante at heads (i), (iii) in the text.

## UPDATE

### 1389 Right to enfranchisement or extended lease

TEXT AND NOTES 7-14--Leasehold Reform Act 1967 ss 1(1)(a), (b), (1A), 1A further amended, s 1(1)(aa) added, s 1AA repealed: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### 1390. Meaning of 'house'.

'House' includes<sup>1</sup> any building designed or adapted for living in<sup>2</sup> and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and:

3063 (1) where a building is divided horizontally, the flats or other units into which it is so divided are not separate 'houses', though the building as a whole may be; and

3064 (2) where a building is divided vertically, the building as a whole is not a 'house', though any of the units into which it is divided may be<sup>3</sup>.

References to a house<sup>4</sup> do not, however, apply to a house which is not structurally detached<sup>5</sup> and of which a material part lies above or below a part of the structure not comprised in the house<sup>6</sup>.

Whether a building may reasonably be called a 'house' is a question of law and, even if a building may also reasonably be called something else, it is a house if it is within the statutory definition; if it is designed or adapted for living in, it requires exceptional circumstances to justify a court in holding that it is not a 'house'<sup>7</sup>. Three things must be looked at to find what is the house:

3065 (a) the lease itself;

3066 (b) the portion occupied as a residence; and

3067 (c) the physical condition of the structure<sup>8</sup>.

The following have been held to be a 'house' for these purposes; a four-floor Victorian house of which the ground floor had been sublet as a licensed betting office<sup>9</sup>; a two-storey building with a shop on the ground floor and living accommodation on the first floor<sup>10</sup>; a building comprising, on the ground floor, a shop connected to the shop next door through a hole in the party wall and, in the upper part, residential rooms, the shop and upper part being served by separate entrances in different streets<sup>11</sup>; a house run by the tenant as a private guest house in conjunction with the house next door, the two being linked by an internal opening at first floor level<sup>12</sup>; a semi-detached house enjoying the use of the ground floor front room of the house next door linked by an opening in the party wall<sup>13</sup>; a house divided horizontally into two maisonettes, which came into the same leasehold ownership and between which the owner opened a connecting door<sup>14</sup>; and a building divided horizontally into two flats, with two front doors on the ground floor<sup>15</sup>.

1     le for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 ante, PARA 1391 et seq post.

2     The true test is whether the premises are so designed or adapted viewed as at the moment when notice of the desire to acquire the freehold or an extended lease under ibid Pt I (as amended) is given: see *Mallett & Sons (Antiques) Ltd v Grosvenor West End Properties Ltd*, *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2006] EWCA Civ 594, [2006] 1 WLR 2848, [2006] All ER (D) 301 (Mar) (in the first claimant's case, the property had been adapted for commercial, rather than residential, use; in the second claimant's case, the property was too dilapidated for residential use; held that the judge had been correct in deciding that neither property was a 'house' for the statutory purposes).

3     Leasehold Reform Act 1967 s 2(1). As to what is included in the house and premises see PARA 1391 post.

4     le in ibid Pt I (ss 1-37) (as amended).

5     For these purposes, 'structurally detached' means detached from any other structure: *Parson v Viscount Gage (Trustee of Henry Smith's Charity)* [1974] 1 All ER 1162 at 1164, [1974] 1 WLR 435 at 439, HL, per Lord Wilberforce.

6     Leasehold Reform Act 1967 s 2(2). For these purposes, 'material part' refers to a material part of the house to be enfranchised, not to a material part of the building of which the house forms part or to a material part of the structure to which the house or the part of the house is attached; thus the materiality depends on the relationship between the part of the house in question and the house as a whole. A part of a 'house' does not become a 'material part' for the purposes of s 2(2) on account of its importance or significance or materiality to premises which form no part of the 'house'; nor will a part of a house become a 'material part' on account of some special use to which a particular occupant may put, or propose to put, the part: see *Malekshad v Howard De Walden Estates Ltd* [2002] UKHL 49, [2003] 1 AC 1013, [2003] 1 All ER 193, disapproving dictum of Stephenson LJ in *Parsons v Trustees of Henry Smith's Charity* [1973] 3 All ER 23 at 30, [1973] 1 WLR 845 at 854, CA, and *Duke of Westminster v Birrane* [1995] QB 262, [1995] 3 All ER 416, CA.

7     *Tandon v Trustees of Spurgeons Homes* [1982] AC 755, [1982] 1 All ER 1086, HL; *Lake v Bennett* [1970] 1 QB 663, [1970] 1 All ER 457, CA; *Sharpe v Duke Street Securities NV* (1987) 55 P & CR 331, [1987] 2 EGLR 106, CA.

8     *Peck v Anicar Properties Ltd* [1971] 1 All ER 517 at 519, CA, per Lord Denning MR.

9     *Lake v Bennett* [1970] 1 QB 663, [1970] 1 All ER 457, CA; and see *Harris v Swick Securities Ltd* [1969] 3 All ER 1131, [1969] 1 WLR 1604, CA (house divided horizontally into flats of which all but the one occupied by the tenant were sublet); cf *Baron v Phillips* (1978) 38 P & CR 91, 247 Estates Gazette 1079, CA.

10    *Tandon v Trustees of Spurgeons Homes* [1982] AC 755, [1982] 1 All ER 1086, HL.

11    *Peck v Anicar Properties Ltd* [1971] 1 All ER 517 at 519, CA.

12    *Wolf v Crutchley* [1971] 1 All ER 520, [1971] 1 WLR 99, CA.

13    *Gaidowski v Gonville and Caius College, Cambridge* [1975] 2 All ER 952, [1975] 1 WLR 1066, CA.

14    *Sharpe v Duke Street Securities NV* (1987) 55 P & CR 331, [1987] 2 EGLR 106.

15 *Malpas v St Ermin's Property Co Ltd* (1992) 64 P & CR 436, [1992] 1 EGLR 109, CA.

## UPDATE

### 1390 Meaning of 'house'

NOTE 9--A large Victorian building originally built as a house and retaining the inward and outward appearance of a house, but of which offices comprised nearly 90 per cent of the floor space, was not a 'house': *Prospect Estates Ltd v Grosvenor Estate Belgravia* [2008] EWCA Civ 1281, [2009] 1 WLR 1313, [2008] All ER (D) 202 (Nov).

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### 1391. Meaning of 'premises'.

Where, in relation to a house<sup>1</sup> let to a tenant, reference is made<sup>2</sup> to the house and premises, the reference to 'premises' is to be taken as referring to any garage, outhouse, garden, yard and appurtenances<sup>3</sup> which at the relevant time<sup>4</sup> are let to him with the house<sup>5</sup>.

In relation to the exercise by a tenant of any right to enfranchisement or extension<sup>6</sup> there are to be treated as included in the house and premises any other premises let with the house and premises but not at the relevant time subject to a tenancy vested in him, whether in consequence of an assignment of the term therein or otherwise, if:

- 3068 (1) the landlord at the relevant time has an interest in the other premises and, not later than two months after the relevant time, gives to the tenant written notice<sup>7</sup> objecting to the further severance of them from the house and premises; and
- 3069 (2) either the tenant agrees to their inclusion with the house and premises or the court is satisfied that it would be unreasonable to require the landlord to retain them without the house and premises<sup>8</sup>.

In relation to the exercise by a tenant of any right to enfranchisement or extension<sup>9</sup> there is to be treated as not included in the house and premises any part of them which lies above or below other premises, not consisting only of underlying mines or minerals, if:

- 3070 (a) the landlord at the relevant time has an interest in the other premises and, not later than two months after the relevant time, gives to the tenant written notice objecting to the further severance from them of that part of the house and premises; and
- 3071 (b) either the tenant agrees to the exclusion of that part of the house and premises or the court is satisfied that any hardship or inconvenience likely to result to the tenant from the exclusion, when account is taken of anything that can be done to mitigate its effects and of any undertaking of the landlord to take steps to mitigate them, is outweighed by the difficulties involved in the further severance from the other premises and any hardship or inconvenience likely to result from that severance to persons interested in those premises<sup>10</sup>.

The rights to enfranchisement and extension conferred on a tenant in relation to any house and premises do not, however, extend to underlying minerals comprised in the tenancy<sup>11</sup> if the landlord requires that the minerals be excepted, and if proper provision is made for the support of the house and premises as they have been enjoyed during the tenancy and in accordance with its terms<sup>12</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 le in the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARAS 1389-1390 ante, PARA 1392 et seq post.

3 For these purposes, 'appurtenances' is not to be construed strictly according to its original meaning of incorporeal rights, but includes land within the curtilage of the house: *Methuen-Campbell v Walters* [1979] QB 525, [1979] 1 All ER 606, CA. In the absence of any statutory definition, 'curtilage' bears its restricted and established meaning connoting a small area forming part and parcel with the house or building which it contains or to which it is attached: *Dyer v Dorset County Council* [1989] QB 346, 86 LGR 686, CA.

4 For these purposes, 'relevant time' means, in relation to a person's claim to acquire the freehold or an extended lease under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended), the time when he gives notice in accordance with that Act of his desire to have it: s 37(1)(d).

5 Ibid s 2(3) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

6 le any right conferred by the Leasehold Reform Act 1967 Pt I (as amended).

7 As to the relationship between this notice and the landlord's reply to the tenant's notice see PARA 1436 post.

8 Leasehold Reform Act 1967 s 2(4) (amended by the Commonhold and Leasehold Reform Act 2002 s 138(4), Sch 14). Where, by virtue of the Leasehold Reform Act 1967 s 2(4) (as so amended), a tenant of a house acquiring the freehold or an extended lease is required to include premises of which the tenancy is not vested in him, Pt I (as amended) applies for the purpose as if in the case of those premises a tenancy on identical terms were vested in him and the holder of the actual tenancy were a subtenant: s 2(7). As to subtenants see PARA 1513 et seq post.

9 See note 6 supra.

10 Leasehold Reform Act 1967 s 2(5). As to the notice see note 7 supra; and as to the court having jurisdiction see PARA 1529 post.

Where, by virtue of s 2(5) or s 2(6) (see the text and notes 11-12 infra), a tenant of a house acquiring the freehold or an extended lease is required to exclude property of which the tenancy is vested in him, then, unless the landlord and tenant otherwise agree or the court for the protection of either of them from hardship or inconvenience otherwise orders, the grant to the tenant operates as a surrender of the tenancy in that property and the provision to be made by the grant must be determined as if the surrender had taken place before the relevant time: s 2(7).

11 For the meaning of 'tenancy' see PARA 1398 post.

12 Leasehold Reform Act 1967 s 2(6). See also note 10 supra.

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## **(ii) Houses and Premises to which Right to Enfranchisement or Extension Applies**

### **1392. Value limits.**

The right to acquire the freehold of a leasehold house no longer depends upon the value of the house<sup>1</sup> and premises<sup>2</sup>.

The right to acquire an extended lease is, however, conferred upon the tenant of a leasehold house only if the combined value of the house and premises does not exceed the prescribed amount. If the tenancy was entered into before 1 April 1990 or on or after that date in pursuance of a contract made before that date, and the house and premises had a rateable value<sup>3</sup> at the date of commencement of the tenancy or else at any time before 1 April 1990, the prescribed amount is based on the rateable value on the appropriate day<sup>4</sup>. Otherwise the prescribed amount is ascertained by reference to a formula based on the premium paid for the tenancy<sup>5</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 See the Leasehold Reform Act 1967 s 1A(1) (as added); and PARA 1396 post; s 1AA(1) (as added); and PARA 1397 post. The practical effect of s 1A(1) (as added) is that since 1 November 1993 rateable value and other financial limits have been abolished as a qualifying condition to acquire the freehold by virtue of the Leasehold Reform Act 1967. For the meaning of 'premises' see PARA 1391 ante.

3 The Rent Act 1977 s 25(1), (2), (4) (see PARA 859 ante) applies to the ascertainment of the rateable value of a house and premises or any other property as it applies to the ascertainment of that of a dwelling house for the purposes of the Rent Act 1977: Leasehold Reform Act 1967 s 37(6) (amended by the Rent Act 1977 s 155(2), Sch 23 para 44). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

4 See the Leasehold Reform Act 1967 s 1(1)(a)(i) (as substituted and amended), s 1(5), (6) (as added); and PARAS 1394-1395 post. The Housing Act 1974 s 118, Sch 8 (as amended) (see PARA 1393 post) has effect to enable a tenant to have a rateable value of the house and premises reduced for purposes of the Leasehold Reform Act 1967 s 1 (as amended) in consequence of tenant's improvements: s 1(4A) (added by the Housing Act 1980 s 141, Sch 21 para 2).

Alterations in rateable values which had retrospective effect for rating purposes to 1 April 1973 were intended to have like retrospective effect for the purposes of the Leasehold Reform Act 1967: *Macfarquhar v Phillimore, Marks v Phillimore* (1986) 53 P & CR 44, 18 HLR 397, CA.

For these purposes, 'the appropriate day', in relation to any house and premises, means 23 March 1965, or such later day as, by virtue of the Rent Act 1977 s 25(3) (see PARA 859 ante), would be the appropriate day for the purposes of that Act in relation to a dwelling house consisting of that house: Leasehold Reform Act 1967 s 1(4) (amended by the Rent Act 1977 Sch 23 para 42). The appropriate day is to be determined by reference to the date when the house, as opposed to the house and premises, was first rated: *Dixon v Allgood* [1987] 3 All ER 1082, [1987] 1 WLR 1689, HL. Cf, however, *Neville v Cowdray Trust Ltd* [2006] EWCA Civ 709, [2006] 1 WLR 2097, [2006] All ER (D) 65 (May), cited in PARA 1404 note 7 post.

5 See the Leasehold Reform Act 1967 s 1(1)(a)(ii) (as substituted and amended); and PARA 1395 post.

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### **1393. Adjustment of rateable value.**

Where the tenant<sup>1</sup>, or any previous tenant, has made or contributed to the cost of an improvement on the premises<sup>2</sup> comprised in the tenancy<sup>3</sup>, and the improvement has been made by the execution of works amounting to structural alteration, extension or addition, then, if the tenant serves on the landlord<sup>4</sup> a notice in the prescribed form<sup>5</sup> requiring him to agree a

reduction, their rateable value<sup>6</sup> must be reduced by such amount, if any, as may be agreed or determined in accordance with the following provisions<sup>7</sup>.

The amount of any such reduction may at any time be agreed in writing between the landlord and the tenant<sup>8</sup>.

Where, at the expiration of a period of six weeks from the service of the tenant's notice any of the following matters has not been agreed in writing between the landlord and the tenant, that is to say:

- 3072 (1) whether the improvement specified in the notice is an improvement made by the execution of works amounting to structural alteration, extension or addition;
- 3073 (2) what works were involved in it;
- 3074 (3) whether the tenant or a previous tenant under the tenancy has made it or contributed to its cost; and
- 3075 (4) what proportion his contribution, if any, bears to the whole cost,

the county court may, on the application of the tenant, determine that matter<sup>9</sup>; and any such application must be made within six weeks from the expiration of that period or such longer time as the court may allow<sup>10</sup>.

Where, after the service of such a notice, it is agreed in writing between the landlord and the tenant or determined by the county court:

- 3076 (a) that the improvement specified in the notice is an improvement made by the execution of works amounting to structural alteration, extension or addition, and what works were involved in it; and
- 3077 (b) that the tenant or a previous tenant under the tenancy has made it or contributed to its cost and, in the latter case, what proportion his contribution bears to the whole cost,

then, if at the expiration of a period of two weeks from the agreement or determination it has not been agreed in writing between the landlord and the tenant whether any or what reduction is to be made under these provisions, and the tenant, within four weeks from the expiration of that period, makes an application to the valuation officer for a certificate, that question must be determined<sup>11</sup> in accordance with the certificate unless the landlord and the tenant otherwise agree in writing<sup>12</sup>.

An application for such a certificate must be in the prescribed form<sup>13</sup> and must state the name and address of the landlord<sup>14</sup>; and, on any such application, the valuation officer must certify:

- 3078 (i) whether or not the improvement has affected the rateable value on 1 April 1973<sup>15</sup> of the hereditament of which the premises consist or, as the case may be, in which they are wholly or partly comprised; and
- 3079 (ii) if it has, the amount by which the rateable value would have been less if the improvement had not been made<sup>16</sup>.

The valuation officer must send a copy of the certificate to the landlord<sup>17</sup>.

1 There is no statutory definition of 'tenant' for these purposes; but it is apprehended that 'tenant' is to be construed in accordance with the Leasehold Reform Act 1967 s 5(1) (see PARA 1432 note 1 post).

2 There is no statutory definition of 'premises' for these purposes; but it is apprehended that 'premises' is to be construed in accordance with *ibid* s 2 (as amended) (see PARA 1391 ante).

3 There is no statutory definition of 'tenancy' for these purposes; but it is apprehended that 'tenancy' is to be construed in accordance with *ibid* s 37(1)(f) (see PARA 1398 post).

4 There is no statutory definition of 'landlord' for these purposes; but it is apprehended that 'landlord' is to be construed in accordance with *ibid* s 5(1) (see PARA 1432 note 4 post).

5 For the prescribed form of notice see the Housing Act 1974 s 118, Sch 8 (as amended).

6 *Ie* for the purposes of the Leasehold Reform Act 1967 s 1 (as amended). As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

7 Housing Act 1974 Sch 8 para 1(1), (2) (amended by the Housing Act 1980 s 141, Sch 21 para 8(a)). In *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56, [1979] 1 All ER 365, CA, the installation of full central heating was held to amount to an improvement for these purposes.

Where a notice under the Housing Act 1974 Sch 8 para 1 (as so amended) is served on or after 21 December 1979, the tenant must bear the reasonable costs incurred by the landlord in investigating any matter specified in it: Sch 8 para 4 (added by the Housing Act 1980 Sch 21 para 8(d)).

8 Housing Act 1974 Sch 8 para 2(1).

9 *Ibid* Sch 8 para 2(2) (amended by the Housing Act 1980 s 152(3), Sch 21 para 8(b), Sch 26). On an application for judicial review a determination may be quashed if it discloses an error of law on the face of the record: see *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56, [1979] 1 All ER 365, CA.

10 Housing Act 1980 Sch 8 para 2(3); and see *Arieli v Duke of Westminster* [1984] 1 EGLR 81, (1983) 269 Estates Gazette 535, CA; *Johnston v Duke of Devonshire* [1984] 2 EGLR 112, (1984) 272 Estates Gazette 661, CA. The time limits are mandatory; and a tenant whose application is out of time may not initiate the procedure again by issuing a new notice: *Mayhew v The Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon* (1991) 63 P & CR 53, 23 HLR 479, CA; cf *Pollock v Brook-Shepherd* (1982) 45 P & CR 357, CA.

11 *Ie* in accordance with the Housing Act 1974 Sch 8 para 3(2): see the text and notes 15-16 *infra*.

12 *Ibid* Sch 8 para 3(1).

13 For the prescribed form of application see *ibid* Sch 8 (as amended).

14 *Ibid* Sch 8 para 3(3). Where at the time of such an application a proposal for an alteration in the valuation list relating to the hereditament is pending and the alteration would have effect from a date earlier than 2 April 1973, the valuation officer may not issue the certificate until the proposal is settled: Sch 8 para 3(5).

15 *Ie* as ascertained for the purposes of the Leasehold Reform Act 1967 s 1 (as amended).

16 Housing Act 1974 Sch 8 para 3(2) (amended by the Housing Act 1980 Sch 21 para 8(c)). Where the amount of such a reduction falls to be determined in accordance with such a certificate, it must be equal to the amount specified in pursuance of the Housing Act 1974 Sch 8 para 3(2)(b) (see head (ii) in the text), but proportionately reduced in any case where a proportion only of the cost was contributed by the tenant or a previous tenant under the tenancy: Sch 8 para 3(4).

17 *Ibid* Sch 8 para 3(3).

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### **1394. Tenancies entered into before 1 April 1990.**

If the tenancy<sup>1</sup> is a long tenancy<sup>2</sup> at a low rent<sup>3</sup> and was entered into before 1 April 1990 or on or after 1 April 1990 in pursuance of a contract made before that date, and the house<sup>4</sup> and



premises<sup>5</sup> had a rateable value<sup>6</sup> at the date of commencement of the tenancy or else at any time before 1 April 1990, the tenancy is one to which the right to acquire an extended lease<sup>7</sup> applies if the rateable value of the house and premises on the appropriate day<sup>8</sup> was not more than £200 or, if it is Greater London<sup>9</sup>, not more than £400<sup>10</sup>.

If, in relation to any house and premises:

- 3080 (1) the appropriate day for the above purposes falls before 1 April 1973; and
- 3081 (2) the rateable value of the house and premises on the appropriate day was more than £200 or, if it was then in Greater London, £400; and
- 3082 (3) the tenancy was created on or before 18 February 1966<sup>11</sup>,

the above provisions<sup>12</sup> have effect in relation to the house and premises as if for the reference to the appropriate day there were substituted a reference to 1 April 1973 and as if for the sums of £200 and £400 there were substituted respectively the sums of £750 and £1,500<sup>13</sup>.

If, in relation to any house and premises, the appropriate day for the above purposes falls on or after 1 April 1973, the above provisions<sup>14</sup> have effect in relation to the house and premises:

- 3083 (a) in a case where the tenancy was created on or before 18 February 1966, as if for the sums of £200 and £400 there were substituted respectively the sums of £750 and £1,500; and
- 3084 (b) in a case where the tenancy was created after 18 February 1966, as if for those sums of £200 and £400 there were substituted respectively the sums of £500 and £1,000<sup>15</sup>.

1 For the meaning of 'tenancy' see PARA 1398 post.

2 For the meaning of 'long tenancy' see PARA 1398 post.

3 For the meaning of 'low rent' see PARA 1403 post.

4 For the meaning of 'house' see PARA 1390 ante.

5 For the meaning of 'premises' see PARA 1391 ante.

6 As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

7 I.e. the right conferred by the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended); see PARA 1389 et seq ante, PARA 1395 et seq post. The rateable value limits remain relevant in cases of enfranchisement for determining the correct basis of valuation: see PARAS 1441-1443 post.

8 For the meaning of 'the appropriate day' see PARA 1392 note 4 ante.

9 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

10 Leasehold Reform Act 1967 s 1(1)(a)(i) (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 5; amended by the Housing Act 1996 s 114(a)).

11 A tenancy is to be treated as created before 18 February 1966 notwithstanding the fact that it was granted after that date, if it was granted following a surrender of an earlier long tenancy granted before that date so that the two are, for the purposes of the Leasehold Reform Act 1967 s 3(3) (now as amended: see PARA 1400 post), to be regarded as a single tenancy: *Bates v Pierrepont* (1978) 37 P & CR 420, CA.

12 I.e. the Leasehold Reform Act 1967 s 1(1)(a)(i) (as substituted and amended: see note 10 supra).

13 Ibid s 1(6) (added by the Housing Act 1974 s 118(1)).

14 See note 12 supra.

15 Leasehold Reform Act 1967 s 1(5) (added by the Housing Act 1974 s 118(1)).

## UPDATE

### 1394 Tenancies entered into before 1 April 1990

TEXT AND NOTES 10, 12--Leasehold Reform Act 1967 s 1(1)(a) further amended, s 1(1)(aa) added: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### 1395. Tenancies entered into on or after 1 April 1990.

If the tenancy<sup>1</sup> is a long tenancy<sup>2</sup> at a low rent<sup>3</sup> and is entered into on or after 1 April 1990, otherwise than, where the house<sup>4</sup> and premises<sup>5</sup> had a rateable value<sup>6</sup> at the commencement of the tenancy or else at any time before 1 April 1990, in pursuance of a contract made before that date, the tenancy is one to which the right to acquire an extended lease<sup>7</sup> applies if on the date the contract for the grant of the tenancy was made or, if there was no such contract, on the date the tenancy was entered into, R did not exceed £25,000 under the formula:

$$R = \frac{P \times I}{1 - (1 + I)^{-T}}$$

where P is the premium payable as a condition of the grant of the tenancy, and includes a payment of money's worth, or, where no premium is so payable, zero; I is 0.06; and T is the term, expressed in years, granted by the tenancy, disregarding any right to terminate the tenancy before the end of the term or to extend the tenancy<sup>8</sup>.

The Secretary of State<sup>9</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>10</sup> may by order replace the amount referred to above and the number in the definition of 'I' by such amount or number as is specified in the order<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 1398 post.

2 For the meaning of 'long tenancy' see PARA 1398 post.

3 For the meaning of 'low rent' see PARA 1403 post.

4 For the meaning of 'house' see PARA 1390 ante.

5 For the meaning of 'premises' see PARA 1391 ante.

6 As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

7 Ie the right conferred by the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1396 et seq post. The rateable value limits remain relevant in cases of enfranchisement for determining the correct basis of valuation: see PARAS 1441-1443 post.

8 Ibid s 1(1)(a)(ii) (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 5 (amended by SI 1990/701); amended by the Housing Act 1996 s 114(b)).

9 As to the Secretary of State see PARA 27 note 3 ante.

10 As to the transfer of functions of the Secretary of State under the Leasehold Reform Act 1967 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

11 Leasehold Reform Act 1967 s 1(7) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 6). Any such order must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Leasehold Reform Act 1967 s 1(7) (as so added). At the date at which this title states the law, no such order had been made.

## UPDATE

### 1395 Tenancies entered into on or after 1 April 1990

TEXT AND NOTE 8--Leasehold Reform Act 1967 s 1(1)(a) further amended, s 1(1)(aa) added: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(1) RIGHT TO ENFRANCHISEMENT OR EXTENSION/(ii) Houses and Premises to which Right to Enfranchisement or Extension Applies/1396. Houses where the value exceeds the applicable limit.

### 1396. Houses where the value exceeds the applicable limit.

Whether the tenant<sup>1</sup> of a house<sup>2</sup> is entitled to enfranchise no longer depends upon the value limits of the house<sup>3</sup>; but, where the applicable financial limit is exceeded, the tenant is liable to pay a price increased by such amount as is necessary to compensate the landlord for loss or damage caused to the landlord as the owner of other property by reason of the tenant's enfranchising<sup>4</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 Where the Leasehold Reform Act 1967 s 1(1) (as amended) (see PARAS 1389, 1392, 1394-1395 ante) would apply in the case of the tenant of a house but for the fact that the applicable financial limit specified in s 1(1)(a) (i) or (ii) (as substituted and amended) or, as the case may be s 1(5) or (6) (as added) (see PARA 1394 ante) is exceeded, Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1398 et seq post) has effect to confer on the tenant the same right to acquire the freehold of the house and premises as would be conferred by s 1(1) (as amended) if that limit were not exceeded: s 1A(1) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 63). The right to an extension of the lease, however, remains subject to the applicable financial limit.

4 See the Leasehold Reform Act 1967 s 9A (as added); and PARAS 1443-1447 post.

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PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(1) RIGHT TO ENFRANCHISEMENT OR EXTENSION/(ii) Houses and Premises to which Right to Enfranchisement or Extension Applies/1397. Houses where the rent exceeds the applicable limit.

### **1397. Houses where the rent exceeds the applicable limit.**

Where the statutory right to enfranchisement or extension<sup>1</sup> would apply in the case of the tenant<sup>2</sup> of a house<sup>3</sup> but for the fact that the tenancy<sup>4</sup> is not a tenancy at a low rent<sup>5</sup>, and the tenancy is not an excluded tenancy<sup>6</sup>, Part I of the Leasehold Reform Act 1967<sup>7</sup> has effect to confer on the tenant the same right to acquire the freehold of the house and premises<sup>8</sup> as would be conferred<sup>9</sup> if it were a tenancy at a low rent<sup>10</sup>. Part I of the 1967 Act does not, however, have a similar effect with regard to an extended lease<sup>11</sup>.

1    Ie the Leasehold Reform Act 1967 s 1(1) (as amended): see PARA 1389 ante.

2    For the meaning of 'tenant' see PARA 1432 note 1 post.

3    For the meaning of 'house' see PARA 1390 ante.

4    For the meaning of 'tenancy' see PARA 1398 post.

5    For the meaning of 'low rent' see PARA 1403 post.

6    A tenancy is an excluded tenancy for these purposes if (1) the house which the tenant occupies under the tenancy is in an area designated for the purposes of this provision as a rural area by order made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister; (2) the freehold of that house is owned together with adjoining land which is not occupied for residential purposes and has been owned together with such land since 1 April 1997 (the date on which the Housing Act 1996 s 106 came into force); and (3) the tenancy either (a) was granted on or before that date or (b) was granted after that date, but on or before the coming into force of the Commonhold and Leasehold Reform Act 2002 s 141 (ie 26 July 2002 in relation to England or 1 January 2003 in relation to Wales), for a term of years certain not exceeding 35 years: Leasehold Reform Act 1967 s 1AA(3) (s 1AA added by the Housing Act 1996 s 106, Sch 9 para 1; the Leasehold Reform Act 1967 s 1AA(3) amended by the Commonhold and Leasehold Reform Act 2002 s 141(1), (3)). See further the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2, PARA 5; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2, PARA 5. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

The power to make an order under head (1) supra is exercisable by statutory instrument subject, in the case of an order made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Leasehold Reform Act 1967 s 1AA(5) (as so added). For examples of the exercise of this power see the Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the South East) Order 1997, SI 1997/625; the Leasehold Reform and Housing (Excluded Tenancies) (Designated Rural Areas) (Wales) Order 1997, SI 1997/685; the Housing (Right to Acquire or Enfranchise) (Designated Rural Areas) Order 1999, SI 1999/1307.

7    Ie the Leasehold Reform Act 1997 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1398 et seq post.

8    For the meaning of 'premises' see PARA 1391 ante.

9    Ie by the Leasehold Reform Act 1967 s 1(1) (as amended): see PARA 1389 ante.

10   Ibid s 1AA(1) (as added: see note 6 supra); amended by the Commonhold and Leasehold Reform Act 2002 ss 141(1), (2)(a), 180, Sch 14).

11   As to the extension of leases see PARA 1469 et seq post.

## **UPDATE**

### **1397 Houses where the rent exceeds the applicable limit**

TEXT AND NOTES 1-10--Leasehold Reform Act 1967 s 1AA repealed: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### **(iii) Tenancies under which Right to Enfranchisement or Extension Arises**

#### **1398. Meaning of 'tenancy' and 'long tenancy'.**

'Tenancy' means<sup>1</sup> a tenancy at law or in equity, but does not include a tenancy at will<sup>2</sup>, nor any interest created by way of security and liable to termination by the exercise of any right of redemption or otherwise, nor any interest created by way of trust under a settlement<sup>3</sup>.

'Long tenancy' means<sup>4</sup> a tenancy granted for a term of years certain exceeding 21 years, whether or not the tenancy is, or may become, terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise<sup>5</sup>, and includes both a tenancy under a lease terminable after a death or marriage or the formation of a civil partnership<sup>6</sup> and a tenancy for a term fixed by law under a grant with a covenant or obligation for perpetual renewal<sup>7</sup> unless it was created by sub-demise from one which is not a long tenancy<sup>8</sup>. A tenancy granted so as to become terminable by notice after a death or marriage or the formation of a civil partnership is not, however, to be treated as a long tenancy if:

- 3085 (1) the notice is capable of being given at any time after the death or marriage of, or the formation of a civil partnership by, the tenant;
- 3086 (2) the length of the notice is not more than three months<sup>9</sup>; and
- 3087 (3) the terms of the tenancy preclude both its assignment otherwise than by way of exchange<sup>10</sup> and the subletting of the whole of the premises comprised in it<sup>11</sup>.

References to a long tenancy include any period during which the tenancy is or was continued under Part I<sup>12</sup> or Part II<sup>13</sup> of the Landlord and Tenant Act 1954 or under the Local Government and Housing Act 1989<sup>14</sup> or under the Leasehold Property (Temporary Provisions) Act 1951<sup>15</sup>.

A tenancy created by the grant of a lease of a dwelling house which is a house<sup>16</sup> in pursuance of Part V of the Housing Act 1985<sup>17</sup> is treated<sup>18</sup> as being a long tenancy notwithstanding that it is granted for a term of 21 years or less<sup>19</sup>.

1    le for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1400 et seq post.

2    As to tenancies at will see PARA 198 et seq ante.

3    Leasehold Reform Act 1967 s 37(1)(f). 'Demise' is to be construed accordingly: s 37(1)(f).

4    See note 1 supra.

5 The length of the term of a lease is to be reckoned from the date of its execution and delivery, and not from any earlier date from which the term as defined in the habendum may be measured: *Roberts v Church Comrs for England* [1972] 1 QB 278, [1971] 3 All ER 703, CA, applying *Shaw v Kay* (1847) 1 Exch 412; *Jervis v Tomkinson* (1856) 1 H & N 195; *Earl Cadogan v Guinness* [1936] Ch 515, [1936] 2 All ER 29. The tenant must at some point of time be, or have been, in a position to say that, subject to options to determine, rights of re-entry etc, he is entitled to remain tenant for the next 21 years, whether at law or in equity: *Roberts v Church Comrs for England* supra. 'Terminable' is used in a sense that is both transitive and intransitive, so that a tenancy limited to terminate if it ceases to be vested in a member of a housing association is a tenancy for a term of years certain terminable 'otherwise', and is within the definition of 'long tenancy': *Eton College v Bard* [1983] Ch 321, [1983] 2 All ER 961, CA.

6 Ie a tenancy taking effect under the Law of Property Act 1925 s 149(6) (as amended): see PARA 240 ante. See, however, the Leasehold Reform Act 1967 s 1B (as added and amended); and PARA 1401 post.

7 Ie under the Law of Property Act 1922 s 145, Sch 15 (as amended): see PARAS 540-541 ante.

8 Leasehold Reform Act 1967 s 3(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 64(2)(a); the Civil Partnership Act 2004 s 81, Sch 8 para 5(1), (2)).

9 For the proviso set out in head (2) in the text to apply to a tenancy, it is sufficient if, under the terms of the lease, it is possible to determine the tenancy by less than three months' notice after the death or marriage etc of the tenant; it is not necessary for the lease to provide when the notice period must end. This proviso forms an integral part of the mechanism to distinguish leases which are genuinely intended to be determinable on a death or marriage etc from devices to avoid the consequences of the 1967 Act: see *Skinns v Greenwood* [2002] EWCA Civ 424, [2002] HLR 906, [2002] All ER (D) 434 (Mar).

10 Ie otherwise than by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.

11 Leasehold Reform Act 1967 s 3(1) provisos (a)-(c) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 64(2)(b); the Civil Partnership Act 2004 s 81, Sch 8 para 5(1), (3)).

12 Ie the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante.

13 Ie ibid Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

14 Ie the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1237 et seq ante.

15 Leasehold Reform Act 1967 s 3(5) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 8). The Leasehold Property (Temporary Provisions) Act 1951 was repealed by the Statute Law (Repeals) Act 1975. A tenancy so continuing may be surrendered by operation of law by the grant of a new tenancy; and the right to enfranchisement or extension will be lost unless the new tenancy falls within the Leasehold Reform Act 1967 s 3(2) (as amended) (see PARA 1400 post), and is at a low rent: *Curtin v Greater London Council* (1970) 69 LGR 281, CA.

16 For the meaning of 'dwelling house which is a house' for these purposes see the Housing Act 1985 s 183(2); and PARA 1797 post.

17 Ie in pursuance of ibid Pt V (ss 118-188) (as amended) (right to buy: see PARA 1795 et seq post) or in pursuance of Pt V (as amended) as applied with modifications by the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996 s 16 (as amended): see PARAS 1804-1806 post).

18 See note 1 supra.

19 Housing Act 1985 s 174(a) (amended by the Statute Law (Repeals) Act 1998); Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 29.

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### 1399. Certain business tenancies.

References to a long tenancy for the statutory purposes<sup>1</sup> do not include a tenancy<sup>2</sup> to which Part II of the Landlord and Tenant Act 1954<sup>3</sup> (business tenancies) applies<sup>4</sup> unless:

- 3088 (1) it is granted for a term of years certain exceeding 35 years, whether or not it is, or may become, terminable before the end of that term by notice given by or to the tenant or by re-entry, forfeiture or otherwise;
- 3089 (2) it is for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, unless it is a tenancy by sub-demise from one which is not a tenancy which falls within any of head (1) above, this head or head (3) or head (4) below;
- 3090 (3) it is a tenancy under a lease terminable after a death or marriage or the formation of a civil partnership<sup>5</sup>; or
- 3091 (4) it is a tenancy which:
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24. (a) is or has been granted for a term of years certain not exceeding 35 years, but with a covenant or obligation for renewal without payment of a premium, but not for perpetual renewal, and
25. (b) is or has been once or more renewed so as to bring to more than 35 years the total of the terms granted, including any interval between the end of a tenancy and the grant of a renewal<sup>6</sup>.
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Where Part I of the Leasehold Reform Act 1967<sup>7</sup> applies as if there were a single tenancy of property comprised in two or more separate tenancies, then, if each of the separate tenancies falls within any of the above heads, the provisions set out above apply as if the single tenancy did so<sup>8</sup>.

1. I.e. the references in the Leasehold Reform Act 1967 s 1(1)(a), (b) (as amended): see PARAS 1389, 1392, 1394-1395 ante.

2. For the meaning of 'tenancy' see PARA 1398 ante.

3. I.e. the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

4. As to the tenancies to which *ibid* Pt II (as amended) applies see PARAS 706-708 ante.

5. I.e. a tenancy taking effect under the Law of Property Act 1925 s 149(6) (as amended): see PARA 240 ante. See, however, PARA 1401 post.

6. Leasehold Reform Act 1967 s 1(1ZC) (s 1(1ZC), (1ZD) added by the Commonhold and Leasehold Reform Act 2002 s 140, with effect from 1 July 2002 in relation to England and 1 January 2003 in relation to Wales; for transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 5; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2, PARA 5); the Leasehold Reform Act 1967 s 1(1ZC) (as so added) amended by the Civil Partnership Act 2004 s 81, Sch 8 para 3).

7. I.e. the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1400 et seq post.

8. *Ibid* s 1(1ZD) (as added: see note 6 supra).

ENFRANCHISEMENT OR EXTENSION/(iii) Tenancies under which Right to Enfranchisement or Extension Arises/1400. Tenancies granted by way of renewal; concurrent tenancies.

#### **1400. Tenancies granted by way of renewal; concurrent tenancies.**

Where the tenant of any property<sup>1</sup> under a long tenancy<sup>2</sup> at a low rent<sup>3</sup>, on the coming to an end of that tenancy, becomes or has become tenant of the property or part of it under another tenancy, whether by express grant or by implication of law, then the later tenancy is deemed<sup>4</sup> to be a long tenancy irrespective of its terms<sup>5</sup>.

Where the tenant of any property under a long tenancy, on the coming to an end of that tenancy, becomes or has become tenant of the property or part of it under another long tenancy, then in relation to the property or that part of it the statutory provisions relating to enfranchisement and extension<sup>6</sup> apply as if there had been a single tenancy granted for a term beginning at the same time as the term under the earlier tenancy and expiring at the same time as the term under the later tenancy<sup>7</sup>.

Where a tenancy is or has been granted for a term of years certain not exceeding 21 years, but with a covenant or obligation for renewal without payment of a premium, but not for perpetual renewal<sup>8</sup>, and the tenancy is or has been once or more renewed so as to bring to more than 21 years the total of the terms granted, including any interval between the end of a tenancy and the grant of a renewal, the statutory provisions relating to enfranchisement and extension apply as if the term originally granted had been one exceeding 21 years<sup>9</sup>.

Where at any time there are separate tenancies, with the same landlord and the same tenant, of two or more parts of a house<sup>10</sup>, or of a house or part of it and land or other premises<sup>11</sup> occupied therewith, then in relation to the property comprised in such of those tenancies as are long tenancies the statutory provisions relating to enfranchisement and extension apply as they would if at that time there were a single tenancy of that property and the tenancy were a long tenancy<sup>12</sup>.

1    Ie other than a lease excluded from the operation of the Leasehold Reform Act 1967 Pt I (ss 1-37 (as amended): see PARA 1389 et seq ante, PARA 1401 et seq post) by s 33A, Sch 4A (as added and amended) (see PARAS 1410-1413 post).

2    For the meaning of 'long tenancy' see PARAS 1398-1400 ante.

3    For the meaning of 'low rent' see PARA 1403 post.

4    Ie for the purposes of the Leasehold Reform Act 1967 Pt I (as amended).

5    Ibid s 3(2) (amended by the Housing and Planning Act 1986 s 18, Sch 4 paras 4, 11(1)). The later tenancy is deemed to be a long tenancy for the benefit not only of the original tenant but also anyone in whom the later tenancy becomes vested by assignment or otherwise: *Austin v Dick Richards Properties Ltd* [1975] 2 All ER 75, [1975] 1 WLR 1033, CA.

6    Ie the Leasehold Reform Act 1967 Pt I (as amended).

7    Ibid s 3(3) (amended by the Housing Act 1996 s 106, Sch 9 para 2(3); the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14). As to the interpretation of the Leasehold Reform Act 1967 s 3(3) (as originally enacted) where an earlier long tenancy is surrendered and a new long tenancy is granted in its place see *Bates v Pierrepont* (1978) 37 P & CR 420, CA.

8    Ie under the Law of Property Act 1922 s 145, Sch 15 (as amended): see PARAS 540-541 ante.

9    Leasehold Reform Act 1967 s 3(4).

10   For the meaning of 'house' see PARA 1390 ante.



11 For the meaning of 'premises' see PARA 1391 ante. For these purposes, 'premises' is not used in a wide sense so as to include another house but in a narrow sense to denote a garage or outbuilding or other such building ancillary to the house: *Wolf v Crutchley* [1971] 1 All ER 520, [1971] 1 WLR 99, CA.

12 Leasehold Reform Act 1967 s 3(6). For that purpose, references in Pt I (as amended) to the commencement of the term or to the term date have effect, if the separate tenancies commenced at different dates or have different term dates, as references to the commencement or term date, as the case may be, of the tenancy comprising the house, or the earliest commencement or earliest term date of the tenancies comprising it: s 3(6). Section 3(6) has effect subject to the operation of s 3(2)-(5) (as amended) (see the text and notes 1-11 supra; and PARA 1398 ante) in relation to any of the separate tenancies: s 3(6) proviso. 'Term date', in relation to a tenancy granted for a term of years certain, means the date of expiry of that term; and 'extended term date' and 'original term date' mean respectively the term date of a tenancy with and without an extension under Pt I (as amended): s 37(1)(g).

For the purposes of s 3(6), separate tenancies are deemed, in respect of enfranchisement and extension by subtenants, to be tenancies with the same landlord if the immediate landlord is the same: s 5(4), Sch 1 para 6(3). As to the exercise of the right to enfranchisement and extension by subtenants see PARA 1513 et seq post.

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#### **1401. Tenancies terminable after death, marriage or formation of civil partnership.**

Where a tenancy<sup>1</sup> granted so as to become terminable by notice after a death, a marriage or the formation of a civil partnership is otherwise a long tenancy<sup>2</sup> but was granted before 18 April 1980 or in pursuance of a contract entered into before that date, the tenancy is<sup>3</sup> a long tenancy<sup>4</sup> only so far as the statutory provisions relating to the right to enfranchise<sup>5</sup> have effect for conferring on any person a right to acquire the freehold of a house<sup>6</sup> and premises<sup>7</sup>. Such a tenancy is not, therefore, a long tenancy for the purposes of the right to an extension of the lease<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 Ie in accordance with the Leasehold Reform Act 1967 s 3(1) (as amended): see PARA 1398 ante.

3 Ie notwithstanding *ibid* s 3(1) (as amended).

4 Ie for the purposes of *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1402 et seq post.

5 Ie *ibid* Pt I (as amended).

6 For the meaning of 'house' see PARA 1390 ante.

7 Leasehold Reform Act 1967 s 1B (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 64(1); amended by the Civil Partnership Act 2004 s 81, Sch 8 para 4). For the meaning of 'premises' see PARA 1391 ante.

8 As to the extension of leases see PARA 1469 et seq post.

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Extension Arises/1402. Tenancies falling within the additional low rent test or of houses where the rent otherwise exceeds the applicable rent limit.

**1402. Tenancies falling within the additional low rent test or of houses where the rent otherwise exceeds the applicable rent limit.**

Where a tenancy<sup>1</sup> of any property is not a tenancy at a low rent<sup>2</sup> but is a tenancy falling within the additional 'low rent test'<sup>3</sup>, the tenancy is nevertheless treated as a tenancy at a low rent<sup>4</sup> so far as the statutory provisions relating to the right to enfranchise<sup>5</sup> have effect for conferring on any person a right to acquire the freehold of a house<sup>6</sup> and premises<sup>7</sup>.

Where the statutory right to enfranchisement or extension<sup>8</sup> would apply in the case of the tenant<sup>9</sup> of a house but for the fact that the tenancy is not a tenancy at a low rent, and the tenancy is not an excluded tenancy<sup>10</sup>, the tenant has the same right to acquire the freehold of the house and premises as he would have if it were a tenancy at a low rent<sup>11</sup>.

In neither of the above cases, however, does the tenant have the right to an extension of the lease<sup>12</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 Ie in accordance with the Leasehold Reform Act 1967 s 4(1) (as amended): see PARA 1403 post.

3 Ie the tenancy is a tenancy falling within ibid s 4A(1) (as added and amended): see PARA 1404 post.

4 Ie for the purposes of ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1403 et seq post.

5 Ie ibid Pt I (ss 1-37) (as amended).

6 For the meaning of 'house' see PARA 1390 ante.

7 Leasehold Reform Act 1967 s 1A(2) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 63). For the meaning of 'premises' see PARA 1391 ante.

8 Ie the Leasehold Reform Act 1967 s 1(1) (as amended): see PARA 1389 ante.

9 For the meaning of 'tenant' see PARA 1432 note 1 post.

10 For the meaning of 'excluded tenancy' for these purposes see PARA 1397 note 6 ante.

11 See the Leasehold Reform Act 1967 s 1AA (as added and amended); and PARA 1397 ante.

12 As to the extension of leases see PARA 1469 et seq post.

**UPDATE**

**1402 Tenancies falling within the additional low rent test or of houses where the rent otherwise exceeds the applicable rent limit**

TEXT AND NOTE 7--Leasehold Reform Act 1967 s 1A(2) repealed: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

ENFRANCHISEMENT OR EXTENSION/(iii) Tenancies under which Right to Enfranchisement or Extension Arises/1403. Meaning of 'low rent'.

### 1403. Meaning of 'low rent'.

A tenancy<sup>1</sup> of any property is<sup>2</sup> a tenancy at a low rent at any time when rent is not payable under the tenancy in respect of the property at a yearly rate:

- 3092 (1) if the tenancy was entered into before 1 April 1990 or on or after that date in pursuance of a contract made before that date, and the property had a rateable value<sup>3</sup> other than nil at the date of the commencement of the tenancy or else at any time before 1 April 1990, equal to or more than two-thirds of the rateable value of the property on the appropriate day<sup>4</sup> or, if later, the first day of the term;
- 3093 (2) if the tenancy does not fall within head (1) above, more than £1,000<sup>5</sup> if the property is in Greater London<sup>6</sup> and £250<sup>7</sup> if the property is elsewhere<sup>8</sup>.

For these purposes, 'rent' means rent reserved as such<sup>9</sup>; and there must be disregarded:

- 3094 (a) any part of the rent expressed to be payable in consideration of services to be provided, or of repairs, maintenance or insurance to be effected by the landlord<sup>10</sup>, or to be payable in respect of the cost thereof to the landlord or a superior landlord<sup>11</sup>;
- 3095 (b) any term of the tenancy providing for suspension or reduction of rent in the event of damage to property demised, or for any penal addition to the rent in the event of a contravention of, or non-compliance with, the terms of the tenancy or an agreement collateral thereto<sup>12</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante. As to the relevance of the low rent test see PARAS 1389, 1396, 1402 ante.

2 I.e. for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1404 et seq post.

3 As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

4 For these purposes, 'appropriate day' means 23 March 1965 or such later day as by virtue of the Rent Act 1977 s 25(3) (see PARA 859 ante) would be the appropriate day for the purpose of that Act in relation to a dwelling house consisting of the house in question if the reference in s 25(3)(a) to a rateable value were to a rateable value other than nil: Leasehold Reform Act 1967 s 4(1)(a) (amended by the Rent Act 1977 s 155, Sch 23 para 42; the Housing Act 1996 s 105(1)(c)). For the meaning of 'house' see PARA 1390 ante.

The appropriate day is to be determined by reference to the date when the house, as opposed to the house and premises, is first rated: *Dixon v Allgood* [1987] 3 All ER 1082, [1987] 1 WLR 1689, HL.

5 The Leasehold Reform Act 1967 s 1(7) (as added) (see PARA 1395 ante) applies to any amount referred to in s 4(1)(ii) (as added and amended) (see head (2) in the text) as it applies to the amount referred to in s 1(1) (a)(ii) (as substituted and amended) (see PARA 1395 ante): s 4(7) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 8).

6 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

7 See note 5 supra.

8 Leasehold Reform Act 1967 s 4(1) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 7(a), (b); the Housing Act 1996 s 105(1)(a), (b)). As to the additional 'low rent test' see PARA 1404 post; and as to tenancies granted between the end of August 1939 and the beginning of April 1963 see PARA 1405 post.

9 Leasehold Reform Act 1967 s 4(1)(b). As to the apportionment of rent see PARA 1408 post.

10 For the meaning of 'landlord' see PARA 1432 note 4 post.

11 Leasehold Reform Act 1967 s 4(1)(b).

12 Ibid s 4(1)(c).

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#### **1404. Additional 'low rent test'.**

A tenancy<sup>1</sup> of any property is subject to the alternative rent limits<sup>2</sup> if either no rent<sup>3</sup> was payable under it in respect of the property during the initial year<sup>4</sup> or the aggregate amount of rent so payable during that year did not exceed the following amount, namely:

3096 (1) where the tenancy was entered into before 1 April 1963, two-thirds of the letting value of the property<sup>5</sup>, on the same terms, on the date of the commencement of the tenancy;

3097 (2) where:

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26. (a) the tenancy was entered into either on or after 1 April 1963 but before 1 April 1990 or on or after 1 April 1990 in pursuance of a contract made before that date; and

27. (b) the property had a rateable value<sup>6</sup> other than nil at the date of commencement of the tenancy or else at any time before April 1990,

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3098 two-thirds of the rateable value of the property on the relevant date<sup>7</sup>; or

3099 (3) in any other case, £1,000<sup>8</sup> if the property is in Greater London<sup>9</sup> or £250<sup>10</sup> if it is elsewhere<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante. As to the relevance of the low rent test see PARAS 1389, 1396, 1402 ante.

2 It falls within the Leasehold Reform Act 1967 s 4A (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 65) for the purposes of the Leasehold Reform Act 1967 s 1A(2) (as added) (see PARA 1402 ante).

3 For these purposes, ibid s 4(1)(b) (meaning of 'rent': see PARA 1403 ante) applies as it applies for the purposes of s 4(1) (as amended): s 4A(2)(c) (as added: see note 2 supra).

4 For these purposes, 'the initial year', in relation to any tenancy, means the period of one year beginning with the date of the commencement of the tenancy: ibid s 4A(2)(a) (as added: see note 2 supra).

5 For these purposes, the reference to the letting value of any property is to be construed in like manner as the reference in similar terms which appears in ibid s 4(1) proviso (see PARA 1405 post): s 4A(2) (as added: see note 2 supra).

6 As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

7 For these purposes, 'the relevant date' means the date of the commencement of the tenancy or, if the property did not have a rateable value or had a rateable value of nil, on that date, the date on which it first had a rateable value other than nil: Leasehold Reform Act 1967 s 4A(2)(b) (substituted by the Housing Act 1996 s

105(2)(b)). Where at the date of commencement of the tenancy, the property consisted of two cottages which were later converted into one, it was held that the rateable value of the converted property was not nil at that date but was the aggregate of the rateable value of the two separate hereditaments; and that in establishing whether or not the tenant was entitled to purchase the freehold, the proportion which the annual rent bore to that aggregate value was to be considered, and not the proportion which it bore to the later, and higher, rateable value shown in the valuation list for the one converted dwelling, with the result that the tenant was not entitled to purchase the freehold of the single dwelling: *Neville v Cowdray Trust Ltd* [2006] EWCA Civ 709, [2006] 1 WLR 2097, [2006] All ER (D) 65 (May).

8 The Leasehold Reform Act 1967 s 1(7) (as added) (see PARA 1395 ante) applies to the amount so referred to as it applies to the amount referred to in s 1(1)(a)(ii) (as substituted and amended): s 4A(3) (as added: see note 2 supra).

9 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

10 See note 8 supra.

11 Leasehold Reform Act 1967 s 4A(1) (as added (see note 2 supra); amended by the Housing Act 1996 s 105(2)(a)). For these purposes the Leasehold Reform Act 1967 s 4(1)(c) (disregard of certain terms of the tenancy: see PARA 1392 ante at head (b) in the text) applies as it applies for the purposes of s 4(1) (as amended): s 4A(2)(c) (as added: see note 2 supra).

## UPDATE

### 1404 Additional 'low rent test'

TEXT AND NOTES--Leasehold Reform Act 1967 s 4A repealed: Housing and Regeneration Act 2008 s 300, Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(1) RIGHT TO ENFRANCHISEMENT OR EXTENSION/(iii) Tenancies under which Right to Enfranchisement or Extension Arises/1405. Tenancies granted between end of August 1939 and beginning of April 1963.

### 1405. Tenancies granted between end of August 1939 and beginning of April 1963.

A tenancy<sup>1</sup> granted between the end of August 1939 and the beginning of April 1963, otherwise than by way of building lease<sup>2</sup>, whether or not it is to be treated<sup>3</sup>, for other purposes as forming a single tenancy with a previous tenancy, is not regarded as a tenancy at a low rent<sup>4</sup> if at the commencement of the tenancy the rent payable under the tenancy exceeded two-thirds of the letting value of the property, on the same terms<sup>5</sup>.

Where, on a claim by the tenant of a house to exercise any right to enfranchisement or extension<sup>6</sup>, a question arises whether a tenancy so granted is or was at any time a tenancy at a low rent, it is presumed, until the contrary is shown, that the letting value was such<sup>7</sup> that the rent did not exceed two-thirds of it<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For these purposes, 'building lease' means a lease granted in pursuance or in consideration of an agreement for the erection or the substantial rebuilding or reconstruction of the whole or part of the house in question or a building comprising it: Leasehold Reform Act 1967 s 4(1)(d). For the meaning of 'house' see PARA 1390 ante.

3 le by virtue of *ibid* s 3(3) (as amended): see PARA 1400 ante.

4 For the meaning of 'low rent' see PARA 1403 ante.

5 Leasehold Reform Act 1967 s 4(1) proviso. In ascertaining the letting value the effect, if any, of the Rent Acts upon the amount of rent at which the property could be let must be taken into account: *Gidlow-Jackson v Middlegate Properties Ltd* [1974] QB 361, [1974] 1 All ER 830, CA.

6 le any right conferred by the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1406 et seq post.

7 le such that *ibid* s 4(1) proviso does not apply.

8 *Ibid* s 4(5). Any premium lawfully paid for the grant of the lease must also be taken into account: *Johnston v Duke of Westminster* [1986] AC 839, [1986] 2 All ER 613, HL; *Manson v Duke of Westminster* [1981] QB 323, [1981] 2 All ER 40, CA.

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#### **1406. House and premises as a whole to be taken into account.**

Where, on a claim by the tenant<sup>1</sup> of a house<sup>2</sup> to exercise a right to enfranchisement or extension<sup>3</sup>, a question arises<sup>4</sup> whether his tenancy<sup>5</sup> of the house is or was at any time a tenancy at a low rent<sup>6</sup>, the question must be determined by reference to the rent and rateable value<sup>7</sup> of the house and premises<sup>8</sup> as a whole; and, in relation to a time before the relevant time<sup>9</sup>, that question must be so determined whether or not the property then occupied with the house or any part of it was the same in all respects as that comprised in the house and premises for the purposes of the claim<sup>10</sup>. In a case, however, where the tenancy derives<sup>11</sup> from more than one separate tenancy, the statutory provisions relating to tenancies granted between the end of August 1939 and the beginning of April 1963<sup>12</sup> have effect if, but only if, they apply to one of the separate tenancies which comprises the house or part of it<sup>13</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 le any right conferred by the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1407 et seq post.

4 le under *ibid* s 1(1) (as amended): see PARA 1389 ante.

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 For the meaning of 'low rent' see PARA 1403 ante.

7 As to the ascertainment of the rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

8 For the meaning of 'premises' see PARA 1391 ante. For the purposes of the Leasehold Reform Act 1967 s 4(2) and s 4(3) (see PARA 1407 post), a house and premises are to be taken as not including any premises which are to be or may be included under s 2(4) (as amended) (see PARA 1391 ante) in giving effect to the tenant's claim, and as including any part which is to be or may be excluded under s 2(5) or (6) (see PARA 1391 ante): s 4(4).

9 For the meaning of 'relevant time' see PARA 1391 note 4 ante.

10 Leasehold Reform Act 1967 s 4(2). Section 4(2) does not, however, affect the principle that, in ascertaining the appropriate day under s 1(4) (as amended) (see PARA 1392 note 4 ante) or s 4(1)(a) (as amended) (see PARA 1403 note 4 ante) what matters is the date when the house, as opposed to the house and premises, is first rated: *Dixon v Allgood* [1987] 3 All ER 1082, [1987] 1 WLR 1689, HL.

11 Ie in accordance with the Leasehold Reform Act 1967 s 3(6): see PARA 1400 ante.

12 Ie *ibid* s 4(1) proviso: see PARA 1405 ante.

13 *Ibid* s 4(2).

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### **1407. Rent under antecedent long tenancy.**

Where, on a claim by the tenant<sup>1</sup> of a house<sup>2</sup> to exercise a right to enfranchisement or extension<sup>3</sup>, a question arises<sup>4</sup> whether a tenancy<sup>5</sup> is or was a long tenancy<sup>6</sup> by reason of a previous tenancy having been a long tenancy at a low rent<sup>7</sup>, the question whether the previous tenancy was one at a low rent must be determined<sup>8</sup> by reference to the rent and rateable value<sup>9</sup> of the house<sup>10</sup> and premises<sup>11</sup>, or the part included in the previous tenancy, exclusive of any other land or premises so included<sup>12</sup>. Where, however, an apportionment of rent or rateable value is required because the previous tenancy did not include the whole of the house and premises or included other property, the apportionment must be made as at the end of the previous tenancy except in so far as, in the case of rent, an apportionment falls to be made<sup>13</sup> at an earlier date<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie any right conferred by the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1408 et seq post.

4 Ie under *ibid* s 3(2) (as amended): see PARA 1400 ante.

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 For the meaning of 'long tenancy' see PARA 1398 ante.

7 For the meaning of 'low rent' see PARA 1403 ante.

8 Ie in accordance with the Leasehold Reform Act 1967 s 4(2) (see PARA 1406 ante) as if it were a question arising under s 1(1) (as amended) (see PARAS 1389, 1392, 1394-1395 ante).

9 As to the ascertainment of the rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

10 For the meaning of 'house' see PARA 1390 ante.

11 For the meaning of 'premises' see PARA 1391 ante.

12 Leasehold Reform Act 1967 s 4(3). See also s 4(4); and PARA 1406 note 8 ante.

13 Ie under *ibid* s 4(6): see PARA 1408 post.

14 Ibid s 4(3) proviso.

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#### **1408. Apportionment of rent.**

For the purpose of ascertaining whether a rent is a low rent<sup>1</sup>, any entire rent payable at any time in respect of both a house<sup>2</sup> and premises<sup>3</sup> or part thereof and of property not included in the house and premises must be apportioned as may be just according to the circumstances existing at the date of the severance giving rise to the apportionment<sup>4</sup>.

1 For the meaning of 'low rent' see PARA 1403 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Leasehold Reform Act 1967 s 4(6). References in s 4 (as amended) (see PARAS 1403-1407 ante) to the rent of a house and premises or of part of them are to be construed accordingly: s 4(6).

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#### **(iv) Tenancies under which Right to Enfranchisement or Extension does not Arise**

##### **1409. Business tenancies where statutory conditions not fulfilled.**

References to a long tenancy for the statutory purposes<sup>1</sup> do not include a tenancy<sup>2</sup> to which Part II of the Landlord and Tenant Act 1954<sup>3</sup> (business tenancies) applies<sup>4</sup> unless it falls within one of the statutory exceptions<sup>5</sup> already discussed<sup>6</sup>.

1 Ie the references in the Leasehold Reform Act 1967 s 1(1)(a), (b) (as amended): see PARAS 1389, 1392, 1394-1395 ante.

2 For the meaning of 'tenancy' see PARA 1398 ante.

3 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

4 As to the tenancies to which ibid Pt II (as amended) applies see PARAS 706-708 ante.

5 Ie one of the exceptions set out in the Leasehold Reform Act 1967 s 1(1ZC)(a)-(d) (as added): see PARA 1399 ante.



6 See *ibid* s 1(1ZC) (as added and amended); and PARA 1399 ante. Where the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) applies as if there were a single tenancy of property comprised in two or more separate tenancies, then, if each of the separate tenancies falls within any of the statutory exceptions referred to in note 5 *supra*, s 1(1ZC) (as added and amended) applies as if the single tenancy did so: see s 1(1ZD) (as added); and PARA 1399 ante.

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#### **1410. Shared ownership leases.**

A lease<sup>1</sup> granted in pursuance of the former statutory right to be granted a shared ownership lease<sup>2</sup> is excluded from the operation of the statutory provisions<sup>3</sup> relating to the right to enfranchisement and extension<sup>4</sup>.

1 For these purposes, 'lease' means a lease at law or in equity; and references to the grant of a lease are to be construed accordingly: Leasehold Reform Act 1967 s 33A, Sch 4A para 6 (added by the Housing and Planning Act 1986 s 18, Sch 4 paras 6, 11).

2 *Ie* under the Housing Act 1985 Pt V (ss 118-188) (as amended). As to the abolition of the statutory right to be granted a shared ownership lease see PARA 1795 post.

3 *Ie* the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1411 et seq post.

4 *Ibid* Sch 4A para 1 (added by the Housing and Planning Act 1986 Sch 4 paras 6, 11).

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#### **1411. Leases granted by certain public bodies.**

A lease<sup>1</sup> which was granted at a premium by:

- 3100 (1) a county, county borough<sup>2</sup>, district<sup>3</sup> or London borough council<sup>4</sup>, the Common Council of the City of London<sup>5</sup> or the Council of the Isles of Scilly<sup>6</sup>;
- 3101 (2) a joint authority established by Part IV of the Local Government Act 1985<sup>7</sup>;
- 3102 (3) the London Fire and Emergency Planning Authority<sup>8</sup>;
- 3103 (4) the Commission for the New Towns<sup>9</sup> or a development corporation established by an order made, or having effect as made, under the New Towns Act 1981<sup>10</sup>;
- 3104 (5) an urban development corporation<sup>11</sup>;
- 3105 (6) a housing action trust<sup>12</sup>,

and which complies with the specified conditions<sup>13</sup> is excluded from the operation of the statutory provisions relating to the right to enfranchisement and extension<sup>14</sup> at any time when

the interest of the landlord<sup>15</sup> belongs to such a body, to a registered social landlord<sup>16</sup> or to a person who acquired that interest in exercise of the former statutory right<sup>17</sup> to do so<sup>18</sup>.

The conditions so specified are that the lease:

- 3106 (a) provides for the tenant<sup>19</sup> to acquire the freehold for a consideration which is to be calculated in accordance with the lease and which is reasonable<sup>20</sup>, having regard to the premium or premiums paid by the tenant under the lease; and
- 3107 (b) states the landlord's opinion that the tenancy will be excluded<sup>21</sup> from the operation of the statutory provisions relating to the right to enfranchisement and extension at any time when the interest of the landlord belongs to a body mentioned in heads (1) to (6) above or to a registered social landlord<sup>22</sup>.

1 For the meaning of 'lease' for these purposes see PARA 1410 note 1 ante.

2 As to the counties in England and counties and county boroughs in Wales and their councils see LOCAL GOVERNMENT vol 69 (2009) PARAS 24 et seq, 37 et seq.

3 As to districts in England and their councils see LOCAL GOVERNMENT vol 69 (2009) PARA 17 et seq.

4 As to the London boroughs see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 30.

5 As to the Common Council of the City of London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 51 et seq.

6 As to the Council of the Isles of Scilly see LOCAL GOVERNMENT vol 69 (2009) PARA 36.

7 Is established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended): see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq.

8 As to the London Fire and Emergency Planning Authority see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 217.

9 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

10 As to new town development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

11 Is within the meaning of the Local Government, Planning and Land Act 1980 Pt XVI (ss 134-172) (as amended): see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1426 et seq.

12 Is a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

13 Is the conditions set out in the Leasehold Reform Act 1967 s 33A, Sch 4A para 2(3) (as added and amended): see heads (a)-(b) in the text.

14 Is *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1412 et seq post.

15 For the meaning of 'landlord' see PARA 1432 note 4 post.

16 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1996 Pt I (ss 1-64) (as amended): Leasehold Reform Act 1967 Sch 4A para 2(5) (added by the Commonhold and Leasehold Reform Act 2002 s 144(1), (2)(c)). As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

17 Is in exercise of the right conferred by the Housing Act 1988 Pt IV (ss 93-114) (repealed).

18 Leasehold Reform Act 1967 Sch 4A para 2(1), (2) (Sch 4A added by the Housing and Planning Act 1986 s 18, Sch 4 paras 6, 11; amended by the Housing Act 1988 s 140(1), Sch 17 para 17; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Local Government (Wales) Act 1994 ss 22(2), 152, Sch 8 para 1(2), Sch 18 Pt IV; the Greater London Authority Act 1999 s 328, Sch 29 Pt I para 9; the Commonhold and Leasehold Reform Act 2002 s 144(1), (2)(a)). A residuary body within the meaning of the Local Government Act 1985 was included among the bodies to which the Leasehold Reform Act 1967 Sch 4A para 2 (as added and amended) applies: Local Government Act 1985 s 57(1), Sch 13 para 14(aa) (added by the Housing and Planning Act 1986 s 18, Sch

4 para 9(1), (2)). The former Residuary Body for Wales (Corff Gweddilliol Cymru) was also so included: see the Local Government (Wales) Act 1994 Sch 13 para 24(c).

19 For the meaning of 'tenant' see PARA 1432 note 1 post.

20 If, in proceedings in which it falls to be determined whether a lease so complies with this condition, the question arises whether the consideration payable by the tenant on acquiring the freehold is reasonable, it is for the landlord to show that it is: Leasehold Reform Act 1967 Sch 4A para 2(4) (as added: see note 18 supra).

21 Ie by virtue of ibid Sch 4A para 2 (as added and amended).

22 Ibid Sch 4A para 2(3) (as added (see note 18 supra); amended by the Commonhold and Leasehold Reform Act 2002 s 144(1), (2)(b)).

## UPDATE

### 1411 Leases granted by certain public bodies

NOTE 18--Leasehold Reform Act 1967 Sch 4A para 2(2) further amended: Housing and Regeneration Act 2008 Sch 8 para 12.

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### 1412. Certain leases granted by housing associations.

A lease<sup>1</sup> granted by a housing association<sup>2</sup> and which complies with the specified conditions<sup>3</sup> is excluded from the operation of the statutory provisions relating to the right to enfranchisement and extension<sup>4</sup>, whether or not the interest of the landlord<sup>5</sup> still belongs to such an association<sup>6</sup>.

The conditions so specified are that the lease:

- 3108 (1) was granted for a term of 99 years or more and is not, and cannot become, terminable except in pursuance of a provision for re-entry or forfeiture;
- 3109 (2) was granted at a premium, calculated by reference to the value of the house<sup>7</sup> or the cost of providing it, of not less than 25%, or such other percentage as may be prescribed<sup>8</sup>, of the figure by reference to which it was calculated;
- 3110 (3) provides for the tenant<sup>9</sup> to acquire additional shares in the house on terms specified in the lease and complying with any such requirements as may be prescribed<sup>10</sup>;
- 3111 (4) does not restrict the tenant's powers to mortgage or charge his interest in the house;
- 3112 (5) if it enables the landlord to require payment for outstanding shares in the house, does so only in such circumstances as may be prescribed<sup>11</sup>;
- 3113 (6) provides for the tenant to acquire the landlord's interest on terms specified in the lease and complying with such requirements as may be prescribed<sup>12</sup>; and
- 3114 (7) states the landlord's opinion that the lease is excluded<sup>13</sup> from the operation of the statutory provisions relating to the right to enfranchisement and extension<sup>14</sup>.

In any proceedings the court may, if of the opinion that it is just and equitable to do so, treat a lease as satisfying the conditions in heads (1) to (7) above notwithstanding that the condition specified in head (7) above is not satisfied<sup>15</sup>.

The statutory provisions relating to the right to enfranchisement and extension<sup>16</sup> do not apply in the case of certain tenancies or subtenancies<sup>17</sup> where the landlord<sup>18</sup> is a housing association and the freehold is owned by a body of persons or trust established for charitable purposes only<sup>19</sup>.

1 For the meaning of 'lease' see PARA 1410 note 1 ante.

2 For these purposes, 'housing association' has the same meaning as in the Housing Associations Act 1985 (see HOUSING vol 22 (2006 Reissue) PARA 11): Leasehold Reform Act 1967 s 33A, Sch 4A para 3(4) (s 33A, Sch 4A added by the Housing and Planning Act 1986 s 18, Sch 4 paras 6, 11).

3 Ie the conditions set out in the Leasehold Reform Act 1967 Sch 4A para 3(2) (as added and amended): see heads (1)-(7) in the text.

4 Ie *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1413 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 post.

6 Leasehold Reform Act 1967 Sch 4A para 3(1) (as added: see note 2 supra).

7 For the meaning of 'house' see PARA 1390 ante.

8 The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister, may by regulations prescribe anything required to be prescribed for the purposes of the Leasehold Reform Act 1967 Sch 4A (as added): Sch 4A para 5(1) (as added: see note 2 supra). The regulations may (1) make different provision for different cases or descriptions of case, including different provision for different areas; and (2) contain such incidental, supplementary or transitional provisions as the Secretary of State or the Assembly considers appropriate, and must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see Sch 4A para 5(2) (as so added). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, which came into force on 11 December 1987: reg 1. The regulations do not, however, prescribe any percentage for these purposes.

9 For the meaning of 'tenant' see PARA 1432 note 1 post.

10 For the prescribed requirements see the Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 2, Sch 1 para 2; and PARA 864 ante.

11 For the prescribed circumstances see *ibid* Sch 1 para 3; and PARA 865 ante.

12 For the prescribed requirements see *ibid* Sch 1 para 4; and PARA 866 ante.

13 Ie by virtue of the Leasehold Reform Act 1967 Sch 4A para 3 (as added and amended).

14 *Ibid* Sch 4A para 3(2) (as added (see note 2 supra); amended by the Commonhold and Leasehold Reform Act 2002 ss 144(1), (3), 180, Sch 14).

15 Leasehold Reform Act 1967 Sch 4A para 3(3) (as added: see note 2 supra).

16 See note 4 supra.

17 Ie in the case of a tenancy or subtenancy to which the Housing Act 1985 s 172 applies. Section 172 applies (1) to a tenancy created by the grant of a lease in pursuance of Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post) of a dwelling house which is a house; (2) where the Leasehold Reform Act 1967 Pt I (as amended) applies as if there had been a single tenancy granted for a term beginning at the same time as the term under a tenancy falling within head (1) supra and expiring at the same time as the term under a later tenancy, to that later tenancy also; (3) to any subtenancy directly or indirectly derived out of a tenancy within heads (2)-(3) supra: Housing Act 1985 s 172(2)-(4).

18 For the meaning of 'landlord' for these purposes see PARA 1300 note 1 ante.

19 Housing Act 1985 s 172(1).

## UPDATE

### 1412 Certain leases granted by housing associations

TEXT AND NOTES 1-15--See Leasehold Reform Act 1967 Sch 4A paras 3A, 4A (added by Housing and Regeneration Act 2008 ss 301(1), 302(1)) (partly in force in relation to Wales; all in force in relation to England: SI 2008/3068, SI 2009/2096). As to designated protected areas for the purposes of the Leasehold Reform Act 1967 Sch 4A para 4A in the West Midlands, South East, North West, East of England, North East, South East, East Midlands and Yorkshire and the Humber, see the Housing (Right to Enfranchise) (Designated Protected Areas) (England) Order 2009, SI 2009/2098. See also the Housing (Shared Ownership Leases) (Exclusion from Leasehold Reform Act 1967) (England) Regulations 2009, SI 2009/2097.

NOTE 8--Leasehold Reform Act 1967 Sch 4A para 5 amended: Housing and Regeneration Act 2008 s 302(2) (partly in force in relation to Wales; all in force in relation to England: SI 2008/3068, SI 2009/2096).

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### 1413. Leases for the elderly.

A lease for the elderly<sup>1</sup> granted by a registered social landlord<sup>2</sup> and which complies with the specified conditions<sup>3</sup> is excluded from the operation of the statutory provisions relating to the right to enfranchisement and extension<sup>4</sup> at any time when the interest of the landlord<sup>5</sup> belongs to a registered social landlord<sup>6</sup>.

The conditions so specified are that the lease:

- 3115 (1) is granted at a premium which is calculated by reference to a percentage of the value of the house or of the cost of providing it;
- 3116 (2) complies, at the time when it is granted, with such requirements as may be prescribed<sup>7</sup>; and
- 3117 (3) states the landlord's opinion that it will be excluded<sup>8</sup> from the operation of the statutory provisions relating to the right to enfranchisement and extension at any time when the interest of the landlord belongs to a registered social landlord<sup>9</sup>.

The requirements so prescribed are that a lease for the elderly:

- 3118 (a) must contain a covenant by the landlord to provide the tenant with facilities which consist of or include access to the services of a warden and a system for calling him;
- 3119 (b) must contain an absolute covenant by the tenant not to underlet the whole or part of the demised premises;

- 3120 (c) must contain a covenant by the tenant not to assign or part with possession of the whole or part of the demised premises except:
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28. (i) subject to such conditions as the lease may specify, to a person of or over the age of 55 years at the date of the assignment; or
29. (ii) where the assignment is by an executor or administrator of a deceased tenant to that tenant's spouse if residing there at the date of the tenant's death, or to a person residing there with the tenant at that date who is of or over the age of 55 at the date of the assignment or, if the lease so provides and subject to such conditions as the lease may specify, by a mortgagee or chargee exercising his power of sale;
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- 3121 (d) may not provide for the tenant to acquire the interest of the landlord under an option to purchase<sup>10</sup>.

1 For these purposes, 'lease for the elderly' means a lease to a person of or over the age of 55 at the date of the grant of the lease: Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 3, Sch 2 para 1; Leasehold Reform Act 1967 s 33A, Sch 4A para 4(3) (s 33A, Sch 4A added by the Housing and Planning Act 1986 s 18, Sch 4 paras 6, 11). For the meaning of 'lease' see PARA 1410 note 1 ante.

2 For these purposes, 'registered social landlord' has the same meaning as in the Housing Act 1985 (see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq); Leasehold Reform Act 1967 Sch 4A para 4(3) (as added (see note 1 supra); definition substituted by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 1).

3 The conditions set out in the Leasehold Reform Act 1967 Sch 4A para 4(2) (as added and amended): see heads (1)-(3) in the text.

4 See *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1414 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 post.

6 Leasehold Reform Act 1967 Sch 4A para 4(1) (as added (see note 1 supra); Sch 4A para 4(1), (2) amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 1).

7 As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to prescribe matters by regulations see PARA 1412 note 8 ante; and as to the requirements so prescribed see heads (a)-(d) in the text.

8 See by virtue of the Leasehold Reform Act 1967 Sch 4A para 4 (as added and amended).

9 *Ibid* Sch 4A para 4(2) (as added and amended: see notes 1, 6 supra).

10 Housing Association Shared Ownership Leases (Exclusion from Leasehold Reform Act 1967 and Rent Act 1977) Regulations 1987, SI 1987/1940, reg 3, Sch 2 para 2.

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#### **1414. Tenancies where right to enfranchisement arises but right to extension is excluded.**

The right to extension of the lease<sup>1</sup> does not arise under:

- 3122 (1) certain tenancies of houses where the value exceeds the applicable limit<sup>2</sup>;
- 3123 (2) certain tenancies of houses where the rent exceeds the applicable limit<sup>3</sup>;
- 3124 (3) tenancies of houses falling within the additional 'low rent test'<sup>4</sup>;
- 3125 (4) long tenancies granted so as to become terminable by notice after a death, a marriage or the formation of a civil partnership and so granted before 18 April 1980 or in pursuance of a contract entered into before that date<sup>5</sup>.

The right to enfranchisement<sup>6</sup> may, however, arise under such tenancies<sup>7</sup>.

1 Let under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1415 et seq post.

2 See ibid s 1A(1) (as added); and PARA 1396 ante.

3 See ibid s 1AA (as added and amended); and PARA 1397 ante.

4 See ibid s 1A(2) (as added); and PARA 1402 ante. As to the additional 'low rent test' see PARA 1404 ante.

5 See ibid s 1B (as added and amended); and PARA 1401 ante.

6 See note 1 supra.

7 See PARAS 1396-1397, 1401-1402 ante.

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## **(v) Tenants Entitled to Exercise Right to Enfranchisement or Extension**

### **1415. Occupation of the house by the tenant as his residence.**

Where a flat forming part of a house<sup>1</sup> is let to a person who is a qualifying tenant of the flat for the purposes of the provisions of Part I of the Leasehold Reform, Housing and Urban Development Act 1993<sup>2</sup> conferring a collective right to enfranchisement<sup>3</sup> or an individual right to a new lease<sup>4</sup>, a tenant<sup>5</sup> of the house does not have any right to enfranchisement or the extension of his lease under Part I of the Leasehold Reform Act 1967<sup>6</sup> unless, at the relevant time<sup>7</sup>, he has been occupying the house, or any part of it, as his only or main residence, whether or not he has been using it for other purposes:

- 3126 (1) for the last two years; or
- 3127 (2) for periods amounting to two years in the last ten years<sup>8</sup>.

In certain circumstances business tenants may have a statutory right to enfranchisement or an extension of their leases under the 1967 Act<sup>9</sup>; but Part I of that Act does not have effect to confer any right on the tenant of a house under a business tenancy<sup>10</sup> unless, at the relevant time, the tenant has been occupying the house, or any part of it, as his only or main residence, whether or not he has been using it for other purposes:

- 3128 (a) for the last two years; or  
 3129 (b) for periods amounting to two years in the last ten years<sup>11</sup>.

No reference<sup>12</sup> to a person occupying property as his residence is to be taken to extend to any occupation of a company or other artificial person nor, where the tenant is a corporation sole, is the corporator, while in occupation, to be treated as occupying as tenant<sup>13</sup>.

There is now no general requirement, however, that the tenant must occupy the house as his residence in order to qualify for the rights under the 1967 Act<sup>14</sup>. It is thus open to a company to exercise those rights<sup>15</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 I.e. the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Chs I, II (ss 1-62) (as amended): see PARA 1532 et seq post.

3 See ibid Pt I Ch I (ss 1-38) (as amended); and PARA 1552 et seq post.

4 See ibid Pt I Ch II (ss 39-62) (as amended); and PARA 1671 et seq post.

5 For the meaning of 'tenant' see PARA 1432 note 1 post.

6 I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1416 et seq post.

7 For the meaning of 'the relevant time' see PARA 1391 note 4 ante.

8 Leasehold Reform Act 1967 s 1(1ZB) (added by the Commonhold and Leasehold Reform Act 2002 s 138(2)). On the proper construction of the expression 'where a flat forming part of a house is let to a person who is a qualifying tenant of the flat for the purposes of Chapter I or II of Part I of the Leasehold Reform, Housing and Urban Development Act 1993' in the Leasehold Reform Act 1967 s 1(1ZB) (as so added), the tenant of the flat is someone other than the tenant of the house; and it is consistent with the logical purpose of s 1 (as amended) to construe s 1(1ZB) (as so added) as resolving which of two people should have the right to seek enfranchisement; thus it does not apply to a company (which could not fulfil the residence requirement: see the text and notes 12-13 infra) and does not prevent a company from obtaining enfranchisement: see *Cadogan v Search Guarantees plc* [2004] EWCA Civ 969, [2005] 1 All ER 280, [2004] 1 WLR 2768. For the meaning of 'occupying as his residence' for the purposes of the Leasehold Reform Act 1967 s 1(2) (repealed: see the text and note 14 infra) see *Poland v Earl Cadogan* [1980] 3 All ER 544, (1980) 40 P & CR 321, CA. The criteria appear to have been more strict than under the Rent Acts. For the meaning of occupying a house as a 'main' residence under that provision see *Byrne v Rowbotham* (1969) 210 Estates Gazette 823, CA. A period of occupancy by the tenant under a tenancy which was not a long tenancy before he acquired the long tenancy itself was not to be taken into account: *Harris v Plentex Ltd* (1980) 40 P & CR 483. A person who occupied a part only of a house, and sublet the remainder, was occupying 'in part only' and was entitled to enfranchise: *Harris v Swick Securities Ltd* [1969] 3 All ER 1131, [1969] 1 WLR 1604, CA.

9 See the Leasehold Reform Act 1967 s 1(1ZC) (as added and amended); and PARA 1397 ante.

10 I.e. under a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46 (as amended) applies: see PARA 701 et seq ante.

11 Leasehold Reform Act 1967 s 1(1B) (added by the Commonhold and Leasehold Reform Act 2002 s 139(2)).

12 I.e. in the Leasehold Reform Act 1967 Pt I (as amended).

13 Ibid s 37(5) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

14 Prior to the coming into force of the amendments made by the Commonhold and Leasehold Reform Act 2002, the tenant had to have occupied the house as his residence for the previous three years or for periods amounting to three years in the previous ten years in order to qualify for the statutory rights to enfranchisement or extension of his lease: see the Leasehold Reform Act 1967 s 1(1)(b) (as amended by the Housing Act 1980 s 141, Sch 21 para 1(1)); and PARA 1389 note 11 ante. The Leasehold Reform Act 1967 s 1(2) (repealed) set out the manner in which references to the tenant occupying the house as his residence were to be construed. For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b).



(ii), Sch 1 Pt 3, Sch 2 para 5; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(ii), Sch 1 Pt 3, Sch 2 para 5.

15 See *Cadogan v Search Guarantees plc* [2004] EWCA Civ 969, [2005] 1 All ER 280, [2004] 1 WLR 2768, cited in note 8 *supra*.

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### **1416. Rights of trustees.**

A tenant<sup>1</sup> of a house<sup>2</sup> is to be treated<sup>3</sup> as having been a tenant of it at any earlier time if at that time:

- 3130 (1) the tenancy<sup>4</sup> was settled land<sup>5</sup> and he was sole tenant for life<sup>6</sup>; or
- 3131 (2) the tenancy was vested in trustees<sup>7</sup> and he, as a person beneficially interested, whether directly or derivatively, under the trusts was entitled or permitted to occupy the house by reason of that interest<sup>8</sup>.

Where a tenancy of a house is settled land<sup>9</sup>, a sole tenant for life<sup>10</sup> has the same rights to enfranchisement or extension<sup>11</sup> as if the tenancy of it belonged to him absolutely, but without prejudice to his position under the settlement as a trustee for all parties entitled under the settlement<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 *post*.

2 For the meaning of 'house' see PARA 1390 *ante*.

3 I.e. for the purposes of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 *et seq ante*, PARA 1418 *et seq post*.

4 For the meaning of 'tenancy' see PARA 1398 *ante*.

5 I.e. for the purposes of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 680. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

6 I.e. within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 761. See also note 5 *supra*.

7 For these purposes, references to trustees include persons holding on a trust under the Law of Property Act 1925 s 34 (as amended) or s 36 (as amended) (see REAL PROPERTY vol 39(2) (Reissue) PARA 190 *et seq*; SETTLEMENTS vol 42 (Reissue) PARA 899), in cases of joint ownership or ownership in common: Leasehold Reform Act 1967 s 6(1) (definition amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3).

8 Leasehold Reform Act 1967 s 6(1) (amended by the Commonhold and Leasehold Reform Act 2002, s 138(5)). Without prejudice to any powers exercisable under the Settled Land Act 1925 by tenants for life or statutory owners within the meaning of that Act (see SETTLEMENTS vol 42 (Reissue) PARA 766), where a tenancy of a house is vested in trustees, then, unless the instrument regulating the trusts, being made after 27 October 1967, contains an explicit direction to the contrary, the powers of the trustees under that instrument include power, with the like consent or on the like direction, if any, as may be required for the exercise of their powers,

or ordinary powers, of investment, to acquire and retain the freehold or an extended lease under the Leasehold Reform Act 1967 Pt I (as amended): s 6(4). See also note 5 supra.

9 See note 5 supra.

10 See note 6 supra.

11 Ie under the Leasehold Reform Act 1967 Pt I (as amended).

12 Ibid s 6(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14). The powers of a tenant for life under the Settled Land Act 1925 (see SETTLEMENTS vol 42 (Reissue) PARA 775 et seq) include power to accept an extended lease under the Leasehold Reform Act 1967 Pt I (as amended); and an extended lease so granted to a tenant for life or a statutory owner is treated as a subsidiary vesting deed in accordance with the Settled Land Act 1925 s 53(2) (see SETTLEMENTS vol 42 (Reissue) PARA 846): Leasehold Reform Act 1967 s 6(2)(a), (b). See also note 5 supra.

The purposes authorised for the application of capital money by the Settled Land Act 1925 s 73 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 808) and the purposes authorised by s 71 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 849-850) as purposes for which moneys may be raised by mortgage, include the payment of any expenses incurred by a tenant for life in or in connection with proceedings taken by him by virtue of the Leasehold Reform Act 1967 s 6(2) (as amended) or s 6(3) (prospectively repealed): s 6(5) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4; the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

Where a tenancy of a house is vested in trustees, other than a sole tenant for life, and a person beneficially interested, whether directly or derivatively, under the trusts is entitled or permitted by reason of his interest to occupy the house, the trustees have the like rights to enfranchisement and extension in respect of his occupation as that person would have if he were the tenant occupying in right of the tenancy: Leasehold Reform Act 1967 s 6(3) (prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed).

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### **1417. Rights of personal representatives.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> dies and, immediately before his death, he had under Part I of the Leasehold Reform Act 1967<sup>3</sup> the right to acquire the freehold or the right to an extended lease, the right is exercisable<sup>4</sup> by his personal representatives while the tenancy<sup>5</sup> is vested in them; and, accordingly, in such a case references in Part I of the Act to the tenant are, in so far as the context permits, to be to the personal representatives<sup>6</sup>. The personal representatives of a tenant may not, however, give notice of their desire to have the freehold or an extended lease by virtue of this provision later than two years after the grant of probate or letters of administration<sup>7</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1418 et seq post.

4 Ie subject to ibid s 6A(2) (as added): see the text and note 7 infra.

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 Leasehold Reform Act 1967 s 6A(1) (s 6A added by the Commonhold and Leasehold Reform Act 2002 s 142(1)).

7 Leasehold Reform Act 1967 s 6A(2) (as added: see note 6 supra).

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### **1418. Rights of members of family succeeding to tenancy on death.**

Where the tenant<sup>1</sup> of a house<sup>2</sup> dies<sup>3</sup> and on his death a member of his family<sup>4</sup> resident in the house becomes tenant of it under the same tenancy<sup>5</sup>, then, for the purposes of any claim by that member of the family to acquire the freehold or an extended lease<sup>6</sup>, he is treated as having been the tenant during any period when he was resident in the house, and it was his only or main place of residence<sup>7</sup>. For these purposes:

- 3132 (1) a member of a tenant's family on whom the tenancy devolves on the tenant's death by virtue of a testamentary disposition or the law of intestate succession is treated, on the tenancy vesting in him, as having become tenant on the death<sup>8</sup>; and
- 3133 (2) a member of a tenant's family who, on the tenant's death, acquires the tenancy by the appropriation of it in or towards satisfaction of any legacy, share in residue, debt or other share in or claim against the tenant's estate, or by the purchase of it on a sale made by the tenant's personal representatives in the administration of the estate, is treated as a person on whom the tenancy devolved by direct bequest<sup>9</sup>; and
- 3134 (3) a person's interest in a tenancy as personal representative of a deceased tenant must be disregarded<sup>10</sup>.

Where a tenancy of a house is settled land<sup>11</sup> and on the death of a tenant for life<sup>12</sup> a member of his family resident in the house becomes entitled to the tenancy in accordance with the settlement or by any appropriation by or purchase from the personal representatives in respect of the settled land, these provisions apply as if the tenancy had belonged to the tenant for life absolutely and the trusts of the settlement taking effect after his death had been trusts of his will<sup>13</sup>. Where in any other case<sup>14</sup> a tenancy of a house is held on trust and:

- 3135 (a) a person beneficially interested, whether directly or derivatively, under the trust is entitled or permitted by reason of his interest to occupy the house; and
- 3136 (b) on his death a member of his family resident in the house becomes tenant of the house in accordance with the terms of the trust or by any appropriation by or purchase from the trustees,

these provisions apply as if the deceased person had been tenant of it and as if after his death the trustees had held and dealt with the tenancy as his executors, the remaining trusts being trusts of his will<sup>15</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 The Leasehold Reform Act 1967 s 7 (as amended) has effect in relation to deaths occurring before 27 October 1967 as it has effect in relation to deaths occurring thereafter: s 7(9).

4 For these purposes, a person is a member of another's family if that person is (1) the other's spouse or civil partner; or (2) a son or daughter or son-in-law or daughter-in-law of the other, or of the other's spouse or civil partner; or (3) the father or mother of the other, or of the other's spouse or civil partner: Leasehold Reform Act 1967 s 7(7) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 6(1), (2)). In head (2) supra any reference to a person's son or daughter includes a reference to any stepson or stepdaughter, any illegitimate son or daughter of that person; and 'son-in-law' and 'daughter-in-law' are to be construed accordingly: Leasehold Reform Act 1967 s 7(7) (amended by the Children Act 1975 s 108(1)(b), Sch 4 Pt I).

In the Intestates' Estates Act 1952 s 5, Sch 2 (as amended) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 593), Sch 2 para 1(2) (see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARA 593 note 2) does not apply to a tenancy if (a) the surviving spouse or civil partner would in consequence of an appropriation in accordance with Sch 2 para 1 (as amended) become entitled, by virtue of the Leasehold Reform Act 1967 s 7 (as amended), to acquire the freehold or an extended lease under Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1424 et seq post) either immediately on the appropriation or before the tenancy can determine or be determined as mentioned in the Intestates' Estates Act 1952 Sch 2 para 1(2); or (b) the deceased spouse or civil partner, being entitled to acquire the freehold or an extended lease under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended), had given notice of his or her desire to have it, and the benefit of that notice is appropriated with the tenancy: s 7(8) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 6(1), (3)).

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 Ie under the Leasehold Reform Act 1967 Pt I (as amended).

7 Ibid s 7(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

8 Leasehold Reform Act 1967 s 7(2)(a). See also note 10 infra.

9 Ibid s 7(2)(b). See also note 10 infra.

10 Ibid s 7(2)(c). References, however, in s 7(2)(a), (b) (see the text and notes 8-9 supra) to a tenancy vesting in, or being acquired by, a member of a tenant's family apply also where, after the death of a member of the family, the tenancy vests in, or is acquired by, the personal representatives of that member: s 7(2)(c).

11 Ie for the purposes of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 680.

12 Ie within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 761.

13 Leasehold Reform Act 1967 s 7(3) (s 7(3), (4) amended by the Commonhold and Leasehold Reform Act 2002 s 138(6)). The Leasehold Reform Act 1967 s 7(3), (4) (as so amended) applies, with any necessary adaptations, where a person becomes entitled to a tenancy on the termination of a settlement or trust as it would apply if he had become entitled in accordance with the settlement or trust: s 7(5).

14 Ie in a case not falling within ibid s 7(3) (as amended): see the text and notes 11-13 supra.

15 Ibid s 7(4) (as amended (see note 13 supra); also amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

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## **(vi) Tenants not Entitled to Exercise Right to Enfranchisement or Extension**

### **1419. Tenant under tenancy superior to that of qualifying tenant.**

Where a house<sup>1</sup> is for the time being let under two or more tenancies<sup>2</sup>, a tenant under any of those tenancies which is superior to that held by any tenant<sup>3</sup> on whom Part I of the Leasehold Reform Act 1967<sup>4</sup> confers a right to enfranchisement or the extension of a lease does not have any such statutory right<sup>5</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'tenancy' see PARA 1398 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 post.

4 I.e. the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1420 et seq post.

5 Ibid s 1(1ZA) (added by the Commonhold and Leasehold Reform Act 2002 s 138(2)).

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#### **1420. Tenants not fulfilling special residence qualifications.**

In a special case where a tenant's statutory rights to enfranchisement or to the extension of a lease<sup>1</sup> depend on his having occupied the house<sup>2</sup> in question, or any part of it, as his only or main residence<sup>3</sup>, he has no such right if he is unable to fulfil the relevant residence qualification<sup>4</sup>. There is now no general requirement, however, that the tenant must occupy the house as his residence in order to qualify for the rights under the 1967 Act<sup>5</sup>.

1 I.e. rights under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1421 et seq post.

2 For the meaning of 'house' see PARA 1390 ante.

3 I.e. in cases to which the Leasehold Reform Act 1967 s 1(ZB) (as added) or s 1(1B) (as added) applies: see PARA 1415 ante.

4 See PARA 1415 ante.

5 See note 4 supra.

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#### **1421. Tenant where house let with other land or premises to which it is ancillary.**

The statutory provisions relating to enfranchisement and extension<sup>1</sup> do not confer on the tenant<sup>2</sup> of a house<sup>3</sup> any right by reference to his being a tenant of it at any time when it is let to him with other land or premises<sup>4</sup> to which it is ancillary<sup>5</sup>.

1   le the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1422 et seq post.

2   For the meaning of 'tenant' see PARA 1432 note 1 post.

3   For the meaning of 'house' see PARA 1390 ante.

4   For the meaning of 'premises' see PARA 1391 ante.

5   Leasehold Reform Act 1967 s 1(3)(a) (amended by the Commonhold and Leasehold Reform Act 2002 ss 138(3), 180, Sch 14).

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#### **1422. Tenant where house comprised in agricultural holding or farm business tenancy.**

The statutory provisions relating to enfranchisement and extension<sup>1</sup> do not confer on the tenant<sup>2</sup> of a house<sup>3</sup> any right by reference to his being a tenant of it at any time when it is comprised in:

3137 (1) an agricultural holding within the meaning of the Agricultural Holdings Act 1986<sup>4</sup> held under a tenancy in relation to which that Act applies<sup>5</sup>; or

3138 (2) the holding held under a farm business tenancy<sup>6</sup> within the meaning of the Agricultural Tenancies Act 1995<sup>7</sup>.

1   le the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1423 et seq post.

2   For the meaning of 'tenant' see PARA 1432 note 1 post.

3   For the meaning of 'house' see PARA 1390 ante.

4   As to such agricultural holdings see PARA 806 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 323.

5   This is so even where an agricultural holding has been divided since the grant of the lease and the claim is made for a part of the property which is not itself an agricultural holding: *Lester v Ridd* [1990] 2 QB 430, [1989] 1 All ER 1111, CA.

6   As to farm business tenancies see PARA 807 ante; and AGRICULTURAL LAND vol 1 (2008) PARA 302.

7   Leasehold Reform Act 1967 s 1(3)(b) (substituted by the Agricultural Tenancies Act 1995 s 40, Schedule para 22; amended by the Commonhold and Leasehold Reform Act 2002 s 138(3)).

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### **1423. Tenant whose immediate landlord is charitable housing trust.**

In certain circumstances<sup>1</sup>, the statutory provisions relating to enfranchisement and extension<sup>2</sup> do not confer on the tenant<sup>3</sup> of a house<sup>4</sup> any right by reference to his being a tenant of it at any time when the tenant's immediate landlord is a charitable housing trust<sup>5</sup> and the house forms part of the housing accommodation provided by the trust in the pursuit of its charitable purposes<sup>6</sup>.

<sup>1</sup> In the case of any right to which the Leasehold Reform Act 1967 s 1(3A) (as added and amended) applies. Section s 1(3A) (as added and amended) applies as follows: (1) where the tenancy was created after 1 November 1993, s 1(3A) (as added and amended) applies to any right to acquire the freehold of the house and premises; but (2) where the tenancy was created before that date, s 1(3A) (as added and amended) applies only to any such right exercisable by virtue of any one or more of the provisions of s 1A (as added) (see PARAS 1396, 1402 ante), s 1AA (as added and amended) (see PARA 1397 ante) and s 1B (as added) (see PARA 1401 ante): s 1(3A) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 67(3); amended by the Housing Act 1996 s 106, Sch 9 para 2(2)); Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5. For transitional provisions and savings see art 5(b), Sch 1 para 1; and the Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2, Schedule para 2.

<sup>2</sup> In the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1424 et seq post.

<sup>3</sup> For the meaning of 'tenant' see PARA 1432 note 1 post.

<sup>4</sup> For the meaning of 'house' see PARA 1390 ante.

<sup>5</sup> For these purposes, 'charitable housing trust' means a housing trust within the meaning of the Housing Act 1985 (see s 6; and HOUSING vol 22 (2006 Reissue) PARA 12) which is a charity within the meaning of the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 1): Leasehold Reform Act 1967 s 1(3A) (as added: see note 1 supra).

<sup>6</sup> Ibid s 1(3) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 67(1), (2); the Commonhold and Leasehold Reform Act 2002 s 138(3)). See also note 1 supra.

### **UPDATE**

### **1423 Tenant whose immediate landlord is charitable housing trust**

NOTE 1--Leasehold Reform Act 1967 s 1(3A) further amended: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### **(vii) Agreements Excluding or Modifying Tenant's Rights**

## 1424. Invalidity of agreements excluding or modifying rights.

Any agreement relating to a tenancy<sup>1</sup>, whether contained in the instrument creating the tenancy or not and whether made before the creation of the tenancy or not, is void<sup>2</sup> in so far as it purports to exclude or modify any right to acquire the freehold or an extended lease or right to compensation<sup>3</sup>, or provides for the termination or surrender of the tenancy in the event of a tenant<sup>4</sup> acquiring or claiming any such right or for the imposition of any penalty or disability on the tenant in that event<sup>5</sup>.

The above provisions do not, however, preclude a tenant from surrendering his tenancy; nor do they:

- 3139 (1) invalidate any agreement for a tenant to acquire an interest superior to his tenancy or an extended lease on terms different from those provided for<sup>6</sup>; or
- 3140 (2) where a tenant has given notice of his desire to have the freehold or an extended lease, invalidate any agreement between the landlord<sup>7</sup> and the tenant that that notice shall cease to be binding or any provision of such an agreement excluding or restricting for a period not exceeding 12 months the right to give further notice of either kind with respect to the house<sup>8</sup> or any part of it; or
- 3141 (3) where a tenant's right to compensation<sup>9</sup> has accrued, invalidate any agreement as to the amount of the compensation<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 Ie except as provided by the Leasehold Reform Act 1967 s 23 (as amended): see the text and notes 3-10 infra; and PARAS 1425-1426 post.

3 Ie under ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1425 et seq post.

4 For the meaning of 'tenant' see PARA 1432 note 1 post.

5 Leasehold Reform Act 1967 s 23(1). In *Jones v Wentworth Securities Ltd* [1980] AC 74, [1979] 1 All ER 286, HL, it was held that a term in a superior lease granted in reversion to a long tenancy which had the effect of substantially increasing the rent payable to the freeholder in the event of the superior tenant granting a new subtenancy, thereby (intentionally) increasing the price payable by the subtenant for the freehold on enfranchisement, did not infringe the provisions of the Leasehold Reform Act 1967 s 23(1). The device employed in that case, however, has been rendered ineffective by the Leasehold Reform Act 1979 s 1: see PARA 1441 note 10 post. In *Rennie and Rennie v Proma Ltd & Byng* (1989) 22 HLR 129, [1990] 1 EGLR 119, CA, it was held that an attempt to frustrate the right to enfranchise by vesting the house and premises in a single trustee who could not give a good receipt for the purchase money and, therefore, could not give good title was void under the Leasehold Reform Act 1967 s 23(1). The principle, that a landlord and tenant may not contract out of statutory rights given to a tenant for his protection, does not apply if, at a time when the landlord serves a defective notice under the Landlord and Tenant Act 1954 not referring to the tenant's possible rights under the 1967 Act, the tenant knows that he does not in fact have any rights under the 1967 Act and serves a counternotice assuming the validity of the landlord's notice: see *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Mayhew* [1997] 1 EGLR 88, [1997] 17 EG 163, CA cited in PARA 716 note 3 ante.

6 Ie by the Leasehold Reform Act 1967 Pt I (as amended).

7 For the meaning of 'landlord' see PARA 1432 note 4 post.

8 For the meaning of 'house' see PARA 1390 ante.

9 As to the tenant's right to compensation see PARA 1485 et seq post.

10 Leasehold Reform Act 1967 s 23(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 139(3)(b)).



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#### **1425. Variation or setting aside of certain agreements.**

Where:

3142 (1) a person, being entitled as tenant<sup>1</sup> of a house<sup>2</sup> to acquire the freehold or an extended lease<sup>3</sup>, enters into an agreement<sup>4</sup> without the prior approval of the court for the surrender of his tenancy<sup>5</sup>, or for the acquisition by him of an interest superior to his tenancy or of any extended lease; or

3143 (2) a tenancy having been extended<sup>6</sup>, the tenant, on the landlord<sup>7</sup> claiming possession for purposes of redevelopment, enters into an agreement<sup>8</sup> without the prior approval of the court for the surrender of the tenancy,

then, on the application of the tenant, the county court or any court in which proceedings are brought against him on the agreement may, if in the opinion of the court he is not adequately recompensed under the agreement for his statutory rights<sup>9</sup>, set aside or vary the agreement and give such other relief as appears to the court to be just, having regard to the situation and conduct of the parties<sup>10</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1426 et seq post.

4 The court may set aside an executory agreement only; and *ibid* s 23 (as amended) does not apply to an executed surrender or a surrender by operation of law: *Woodruff v Hambro* (1991) 62 P & CR 62, 23 HLR 295, CA.

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 See note 3 supra.

7 For the meaning of 'landlord' see PARA 1432 note 4 post.

8 See note 4 supra.

9 See note 3 supra.

10 Leasehold Reform Act 1967 s 23(3).

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#### **1426. New tenancy on terms approved by the court.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> is entitled<sup>3</sup> to acquire the freehold or an extended lease, or is entitled to the benefit of a previous tenant's notice of his desire to have the freehold or an extended lease, there may with the approval of the court be granted to him in satisfaction of that right a new tenancy<sup>4</sup> on such terms as may be approved by the court; and a tenancy may be so granted<sup>5</sup> by the landlord<sup>6</sup> and is binding on persons entitled to any interest in or charge on the landlord's estate, notwithstanding that it would not otherwise be authorised as against any such persons and notwithstanding any restriction imposed by statute or otherwise on the landlord's powers of leasing<sup>7</sup>.

Where, however, the existing tenancy is granted on or after 1 January 1968, whether or not it is to be treated<sup>8</sup> for other purposes as forming a single tenancy with a previous tenancy, and, the grant being subsequent to the creation of a charge on the landlord's estate, the existing tenancy is not binding on the persons interested in the charge, a tenancy so granted is not by virtue of these provisions binding on those persons<sup>9</sup>.

Where a tenancy is so granted, the terms of the new tenancy may exclude any right to acquire<sup>10</sup> the freehold<sup>11</sup>.

Where an instrument extending a tenancy at a low rent<sup>12</sup>, or granting a further tenancy at a low rent in substitution for, or in continuance of, such a tenancy, contains a statement to the effect that<sup>13</sup> the tenancy is being or has previously been extended in satisfaction of the right to an extended lease<sup>14</sup>, the statement is conclusive in favour of any person not being a party to the instrument, unless the statement appears from the instrument to be untrue<sup>15</sup>. Any person who:

3144 (1) includes or causes to be included in an instrument a statement to that effect<sup>16</sup>, knowing the statement to be untrue; or

3145 (2) executes, or with intent to deceive makes use of, any instrument knowing that it contains such a statement and that the statement is untrue,

is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the prescribed sum, or to both<sup>17</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1427 et seq post.

4 For the meaning of 'tenancy' see PARA 1398 ante.

5 Ie subject to the Charities Act 1993 s 36 (see CHARITIES vol 8 (2010) PARA 395), and the Leasehold Reform Act 1967 s 31 (as amended) (see PARA 1509 post).

6 For the meaning of 'landlord' see PARA 1432 note 4 post.

7 Leasehold Reform Act 1967 s 23(4) (amended by the Charities Act 1993 s 98(1), Sch 6 para 8).

8 Ie by virtue of the Leasehold Reform Act 1967 s 3(3) (as amended): see PARA 1400 ante.

9 Ibid s 23(4) proviso.

10 See note 3 supra.

11 Leasehold Reform Act 1967 s 23(5)(a). Section 9(1) (as amended) (see PARA 1441 post), s 9(1A) (as added and amended) (see PARA 1442 post), s 14(5) (see PARA 1481 post) and, except in so far as provision is made to the contrary by the terms of the new tenancy, s 16(1)-(6) (as amended) (see PARA 1483 post) and s 17(1)-(3) (as

amended) (see PARA 1485 post), together with Sch 2 (as amended) (see PARAS 1485, 1491 et seq post), and, so far as relevant s 23(1), (2) (as amended) (see PARA 1424 ante) and s 23(3) (see PARA 1425 ante) apply as if the new tenancy were granted by way of extension under Pt I (as amended): s 23(5)(b) (amended by the Housing and Planning Act 1986 s 23(2), (3)).

12 For the meaning of 'low rent' see PARA 1403 ante.

13 Ie by virtue of the Leasehold Reform Act 1967 s 23(4) (as amended): see the text and notes 1-9 supra.

14 Ie under ibid s 14 (as amended): see PARAS 1469, 1471-1472, 1482 post.

15 Ibid s 23(6).

16 Ie a statement to the effect mentioned in ibid s 23(6).

17 Ibid s 23(7) (amended by the Magistrates' Courts Act 1980 s 32(2)). The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1) (as substituted): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 141.

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## **(2) EXERCISE OF RIGHT TO ENFRANCHISEMENT OR EXTENSION**

### **(i) Tenant's Notice**

#### **1427. Notice to be given by tenant.**

Where a tenant of a house has a right<sup>1</sup> to acquire the freehold or, as the case may be, an extended lease, he must exercise that right by giving to the landlord written notice of his desire to have the freehold or, as the case may be, an extended lease<sup>2</sup>.

1 As to the circumstance in which a tenant has no such right see PARA 1410 et seq ante.

2 See the Leasehold Reform Act 1967 s 8(1) (right to acquire freehold: see PARA 1439 post) and s 14(1) (right to acquire extended lease: see PARA 1469 post). In *Re 51 Bennington Road, Aston* (1993) Times, 21 July the tenants of premises for the residue of 'the term or several terms of 500 years' were held entitled to purchase the freehold under the provisions of the Leasehold Reform Act 1967, notwithstanding ignorance of the identity of the reversioner and the exact terms of the lease. See also s 27 (as amended); and PARA 1465 post.

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#### **1428. Form and contents of tenant's notice.**

A tenant's notice<sup>1</sup> of his desire to have the freehold or an extended lease of a house<sup>2</sup> and premises<sup>3</sup> must be in the prescribed form<sup>4</sup>, and must contain the following particulars<sup>5</sup>:

- 3146 (1) the address of the house, and sufficient particulars of the house and premises to identify the property to which the claim extends<sup>6</sup>;
- 3147 (2) either:
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30. (a) such particulars of the tenancy<sup>7</sup> and, in the case of a tenancy entered into before 1 April 1990, or on or after 1 April 1990 in pursuance of a contract made before that date, and where the property had a rateable value<sup>8</sup> other than nil at the date of the commencement of the tenancy or else at any time before 1 April 1990<sup>9</sup>, such particulars of the rateable value of the house and premises as serve to identify the instrument creating the tenancy and show that the tenancy is and has at the material times been<sup>10</sup> a long tenancy<sup>11</sup> at a low rent<sup>12</sup> and that at the material time the rateable value was within the specified limits<sup>13</sup>; or
31. (b) where the tenant gives the notice by virtue of the provision conferring an additional right of enfranchisement only in the case of a house where the rent exceeds the applicable limit<sup>14</sup>, such particulars of the tenancy as serve to identify the instrument creating the tenancy and show that the tenancy is one in relation to which that provision has effect to confer a right to acquire the freehold of the house and premises<sup>15</sup>;
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- 3148 (3) the date on which the tenant acquired the tenancy<sup>16</sup>;
- 3149 (4) in the case of a tenancy other than one entered into before 1 April 1990, or on or after 1 April 1990 in pursuance of a contract made before that date, and where the house and premises had a rateable value at the date of commencement of the tenancy or else at any time before 1 April 1990<sup>17</sup>, the premium payable as a condition of the grant of the tenancy<sup>18</sup>.

The notice is not invalidated by any inaccuracy in the particulars so required or any misdescription of the property to which the claim extends; and, where the claim extends to property not properly included in the house and premises, or does not extend to property that ought to be so included, the notice may, with the leave of the court and on such terms as the court may see fit to impose, be amended so as to exclude or include that property<sup>19</sup>.

1. Under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1429 et seq post. For the meaning of 'tenant' see PARA 1432 note 1 post.

2. For the meaning of 'house' see PARA 1390 ante.

3. For the meaning of 'premises' see PARA 1391 ante.

4. For the prescribed form of tenant's notice see the Leasehold Reform (Notices) Regulations 1997, SI 1997/640, regs 2, 3(1), Schedule, Form 1 (substituted in relation to England by SI 2002/1715 and in relation to Wales by SI 2002/3187). A tenant may not claim in the alternative (*Byrnlea Property Investments Ltd v Ramsay* [1969] 2 QB 253, [1969] 2 All ER 311, CA); but failure to delete the inapplicable alternative in the prescribed form has been held not to vitiate the notice where the alternative which the tenant is claiming is clear on the face of the document (see *Lewis v Harries* (1971) 22 P & CR 905, CA). However, any omission of mandatory information may render a notice invalid: see *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 813, [2001] All ER (D) 454 (Jul).

5. Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 6(1).

6. Ibid Sch 3 para 6(1)(a).

7. For the meaning of 'tenancy' see PARA 1398 ante.

8. As to the ascertainment of rateable value see PARA 1392 note 3 ante; as to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

- 9 le in the case of a tenancy falling within the Leasehold Reform Act 1967 s 4(1)(i) (as amended): see PARA 1403 ante at head (1) in the text.
- 10 le apart from the operation of *ibid* s 4(1) proviso: see PARA 1405 ante.
- 11 For the meaning of 'long tenancy' see PARA 1398 ante.
- 12 For the meaning of 'low rent' see PARA 1403 ante.
- 13 Leasehold Reform Act 1967 Sch 3 para 6(1)(b) (amended by the Housing Act 1980 s 141, Sch 21 para 7; and by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 10(a), (b)). The specified limits referred to are those specified for the purposes of the Leasehold Reform Act 1967 s 1 (as amended) (see PARA 1392 et seq ante): Leasehold Reform Act 1967 Sch 3 para 6(1)(b) (as so amended).
- 14 le by virtue of *ibid* s 1AA (as added and amended): see PARA 1397 ante.
- 15 See *ibid* Sch 3 para 6(1A) (added by the Housing Act 1996 s 106, Sch 9 para 2(8)).
- 16 Leasehold Reform Act 1967 Sch 3 para 6(1)(c). Where the tenant gives notice by virtue of s 6 (as amended) (see PARA 1416 ante), s 6A (as added) (see PARA 1417 ante) or s 7 (as amended) (see PARA 1418 ante), Sch 3 para 6(1)(c) applies with the appropriate modifications of references to the tenant, so that the notice must show the particulars bringing the case within s 6 (as amended), s 6A (as added) or s 7 (as amended): Sch 3 para 6(2) (amended by the Commonhold and Leasehold Reform Act 2002 ss 142(2), 180, Sch 14).
- 17 le in the case of a tenancy falling within the Leasehold Reform Act 1967 s 1(1)(a)(ii) (as substituted and amended): see PARA 1395 ante.
- 18 *Ibid* Sch 3 para 6(1)(e) (added by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 10(a), (b)).
- 19 Leasehold Reform Act 1967 Sch 3 para 6(3). The validity of the notice must be decided solely by reference to the document itself: *Byrnlea Property Investments Ltd v Ramsay* [1969] 2 QB 253, [1969] 2 All ER 311, CA. An unimportant omission of fact as to residence has been held to be an inaccuracy which did not invalidate the notice (*Cresswell v Duke of Westminster* [1985] 2 EGLR 151, CA) as has the omission of a reference to a former lease that was within the knowledge of the landlord (*Earl Cadogan v Strauss* [2004] EWCA Civ 211, [2004] 2 P & CR 295, [2004] All ER (D) 131 (Feb)); but omission of any reference to a cottage occupied during the relevant period was not a mere inaccuracy, and the notice was held invalid (*Dymond v Arundel-Timms* (1991) 23 HLR 397, [1991] 1 EGLR 109, CA). See also *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] HLR 813, [2001] All ER (D) 454 (Jul) cited in note 4 supra. The Leasehold Reform Act 1967 Sch 3 para 6(3) distinguishes between 'any inaccuracy in the particulars' and 'any misdescription of the property', which are errors of a nature which will not invalidate a notice, and the exclusion or inclusion of property which ought, or ought not, to be included as part of the relevant house and premises, which are types of error which will invalidate a notice unless it is appropriately amended; and the court has a discretion as to whether or not to permit such amendment: see *Howard de Walden Estates Ltd v Malekshad* [2003] EWHC 3106 (Ch), [2004] 4 All ER 162, [2004] 1 WLR 862.

## UPDATE

### 1428 Form and contents of tenant's notice

NOTE 15--Leasehold Reform Act 1967 Sch 3 para 6(1A) repealed: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### 1429. Service of notices.

The general provisions of the Landlord and Tenant Act 1954 relating to service of notices<sup>1</sup> have effect for the purposes of the Leasehold Reform Act 1967<sup>2</sup>.

Where a person ('the claimant') gives notice as tenant<sup>3</sup> of a house<sup>4</sup> of his desire to have the freehold or an extended lease<sup>5</sup>:

- 3150 (1) the notice is to be regarded as served on the landlord<sup>6</sup> if it is served on any of the persons having an interest in the house and premises<sup>7</sup> superior to the claimant's tenancy<sup>8</sup>;
- 3151 (2) copies of the notice must be served by the claimant on any other persons known or believed by him to have such an interest<sup>9</sup>;
- 3152 (3) the notice must state whether copies are being served in accordance with head (2) above on anyone other than the recipient and, if so, on whom<sup>10</sup>;
- 3153 (4) unless he is a person having no such interest, a recipient of the notice or a copy of it, including a person receiving a copy under this head, must forthwith serve a copy on any person who is known or believed by him to have such an interest and is not stated in the recipient's copy of the notice or known by him to have received a copy<sup>11</sup>;
- 3154 (5) a recipient of the notice or a copy of it must, in any further copies served by him in accordance with head (4) above, supplement the statement under head (3) above by adding any further persons on whom he is serving copies or who are known by him to have received one<sup>12</sup>.

Any recipient of any such notice or a copy of it:

- 3155 (a) if he serves further copies of it on other persons in accordance with head (4) above, must notify the claimant of the persons added by him to the statement under head (3) above; and
- 3156 (b) if he knows who is, or believes himself to be, the person designated as the reversioner<sup>13</sup>, must give written notice to the claimant stating who is thought by him to be the reversioner, and must serve copies of it on all persons known or believed by him to have an interest superior to the claimant's tenancy<sup>14</sup>.

Any person who fails without reasonable cause to comply with any of the above provisions<sup>15</sup>, or is guilty of any unreasonable delay in doing so, is liable for any loss thereby occasioned to the claimant or to any person having an interest superior to the claimant's tenancy<sup>16</sup>.

Where the interest of a landlord is subject to a charge and the person entitled to the benefit of the charge is in possession or a receiver appointed by him or by the court is in receipt of the rents and profits, a notice by a tenant of his desire to have the freehold or an extended lease is duly given if served either on the landlord or on that person or any such receiver; but the landlord or that person, if not the recipient of the notice, must forthwith be sent the notice or a copy of it by the recipient<sup>17</sup>.

Where a tenant of a house gives notice of his desire to have the freehold or an extended lease and the interest of the person to whom the notice is given, or of any person receiving a copy of it<sup>18</sup>, is subject to a charge<sup>19</sup> to secure the payment of money, the recipient of the notice or copy must forthwith inform the person entitled to the benefit of the charge, unless the notice was served on him or a receiver appointed by virtue of the charge, that the notice has been given and must give him such further information as may from time to time be reasonably required from the recipient by him<sup>20</sup>.

Where a tenant of a house having a right to acquire the freehold is prevented from giving notice of his desire to have the freehold because the person to be served with the notice

cannot be found or his identity cannot be ascertained, the tenant may apply to the court for the house and premises to be vested in him<sup>21</sup>.

1     le the Landlord and Tenant Act 1954 s 66 (as amended): see PARA 702 ante. Section 66 (as amended) has effect as if any reference therein to the Landlord and Tenant Act 1954 were also to the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1430 et seq post): s 22(5) (amended by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 1974, SI 1974/1896, art 3(2)).

2     Leasehold Reform Act 1967 s 22(5) (as amended: see note 1 supra).

3     For the meaning of 'tenant' see PARA 1432 note 1 post.

4     For the meaning of 'house' see PARA 1390 ante.

5     le under the Leasehold Reform Act 1967 Pt I (as amended).

6     For the meaning of 'landlord' see PARA 1432 note 4 post.

7     For the meaning of 'premises' see PARA 1391 ante.

8     Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 8(1)(a). For these purposes, references to the relevant time are to be construed accordingly (Sch 3 para 8(1)(a)); and references to an interest superior to the claimant's tenancy mean the estate in fee simple and any tenancy superior to the claimant's tenancy, but they apply also to a tenancy reversionary on the claimant's tenancy (Sch 3 para 8(4)). For the meaning of 'tenancy' see PARA 1398 ante; and for the meaning of 'relevant time' see PARA 1391 note 4 ante.

9     Ibid Sch 3 para 8(1)(b).

10    Ibid Sch 3 para 8(1)(c).

11    Ibid Sch 3 para 8(1)(d).

12    Ibid Sch 3 para 8(1)(e).

13    le by ibid s 5(4), Sch 1 para 2: see PARA 1516 post.

14    Ibid Sch 3 para 8(2).

15    le ibid Sch 3 para 8(1) or (2): see the text and notes 1-14 supra.

16    Ibid Sch 3 para 8(3).

17    Ibid Sch 3 para 9(1). In the case of a debenture holders' charge within the meaning of s 12(5) (see PARA 1463 note 10 post), Sch 3 para 9(1) does not, however, authorise the service of a notice on, or require a notice or copy to be sent to, the persons entitled to the benefit of the charge, other than trustees for the debenture holders; but, where the notice is served on the landlord and there is no trustee for the debenture holders, he must forthwith send it or a copy of it to any receiver appointed by virtue of the charge: Sch 3 para 9(1) proviso.

18    le under ibid Sch 3 para 8.

19    For these purposes, a charge does not include a charge falling within ibid s 11 (as amended) (see PARAS 1460-1461 post) or a debenture holders' charge within the meaning of s 12(5) (see PARA 1463 note 10 post): Sch 3 para 9(3).

20    Ibid Sch 3 para 9(2).

21    See ibid s 27 (as amended); and PARA 1465 post.

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### 1430. Cases where tenant's notice is ineffective.

A claim to acquire the freehold or an extended lease<sup>1</sup> of any property is of no effect<sup>2</sup> if it is made after the tenant has given notice terminating the tenancy<sup>3</sup> of that property, not being a notice that has been superseded by the grant, express or implied, of a new tenancy, or if it is made during the subsistence of an agreement for a future tenancy to which the statutory provisions relating to security of tenure for business tenants<sup>4</sup> or for tenants of long residential tenancies<sup>5</sup> apply<sup>6</sup>.

The following provisions apply where a landlord's notice terminating the tenancy of any property has been given or served under the statutory provisions relating to business tenancies<sup>7</sup> or long residential tenancies<sup>8</sup>, whether or not that notice has effect to terminate the tenancy<sup>9</sup>. A claim to acquire the freehold or an extended lease of the property is of no effect if made after the relevant time<sup>10</sup>; but this does not apply where the landlord gives his written consent to the claim being made after the relevant time<sup>11</sup>. Where a tenant, having given notice of a desire to have the freehold, gives after the relevant time a further notice<sup>12</sup> of his inability or unwillingness to acquire the house<sup>13</sup> and premises<sup>14</sup> at the price he must pay, he may with that further notice give a notice of his desire to have an extended lease, if he then has a right to such a lease<sup>15</sup>.

A tenant's claim ceases to have effect where, after it is made, the court in special circumstances gives leave to bring proceedings to enforce a right of re-entry or forfeiture terminating the tenancy<sup>16</sup>; and a claim may also be rendered ineffective in special circumstances if it is made at a time when such proceedings are pending<sup>17</sup>.

A tenant who, in proceedings to enforce a right of re-entry or forfeiture or a right to damages in respect of a failure to comply with any terms of the tenancy, applies for relief<sup>18</sup> is not thereby precluded from making a claim to acquire the freehold or an extended lease; but, if he gives notice<sup>19</sup> under which he is relieved from any order for recovery of possession or for payment of damages, but the tenancy is cut short, any claim made by him to acquire the freehold or an extended lease of property comprised in the tenancy, with or without other property, is of no effect or, if already made, ceases to have effect<sup>20</sup>.

A notice of a person's desire to have the freehold or an extended lease of a house and premises:

- 3157 (1) is of no effect if at the relevant time<sup>21</sup> any person or body of persons who has or have been, or could be, authorised to acquire the whole or part of the house and premises compulsorily for any purpose has or have, with a view to its acquisition for that purpose, served notice to treat on the landlord<sup>22</sup> or on the tenant, or entered into a contract for the purchase of the interest of either of them, and the notice to treat or contract remains in force; and
- 3158 (2) ceases to have effect if, before the completion of the conveyance in pursuance of the tenant's notice, any such person or body of persons serves notice to treat;

but, where a tenant's notice ceases to have effect by reason of a notice to treat served on him or on the landlord, then on the occasion of the compulsory acquisition in question the compensation payable in respect of any interest in the house and premises, whether or not the one to which that notice to treat relates, must be determined on the basis of the value of the interest subject to and with the benefit of the rights and obligations arising from the tenant's notice and affecting that interest<sup>23</sup>.



A notice is of no effect where the landlord of any property is one of certain public authorities, and a Minister of the Crown certifies that the property will in ten years or less be required for relevant development<sup>24</sup>.

1 For these purposes, references to a claim to acquire the freehold or an extended lease are to be taken as references to a notice of a person's desire to acquire it under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1431 et seq post); and, except in so far as the contrary intention appears, as including a claim made by a tenant not entitled to acquire it and a claim made by a person who is not a tenant: s 22(1) (as amended), Sch 3 para 5(1)(a). For the meaning of 'tenant' see PARA 1432 note 1 post.

2 For these purposes, references to a claim being effective are to be taken as references to the freehold or an extended lease being acquired in pursuance of the claim: *ibid* Sch 3 para 5(1)(b).

3 For the meaning of 'tenancy' see PARA 1398 ante. A tenant's notice terminating the tenancy of any property is of no effect if given during the currency of a claim made in respect of the tenancy to acquire the freehold or an extended lease of that property: see *ibid* Sch 3 para 1(2); and PARA 1434 post. In Sch 3 para 1(1) (as amended: see note 6 infra) and Sch 3 para 1(2), references to a notice terminating a tenancy include a tenant's request for a new tenancy under the Landlord and Tenant Act 1954 s 26 (as amended) (see PARA 718 ante) and a tenant's notice under s 27(1) (as amended) (see PARA 719 ante) that he does not desire the tenancy to be continued: Leasehold Reform Act 1967 Sch 3 para 1(3).

4 *Ie* the Landlord and Tenant Act 1954 s 28: see PARA 713 ante.

5 *Ie* the Local Government and Housing Act 1989 s 186, Sch 10 para 17: see PARA 1241 ante.

6 Leasehold Reform Act 1967 Sch 3 para 1(1) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(1)).

7 *Ie* given under the Landlord and Tenant Act 1954 s 25 (as amended): see PARA 716 ante.

8 *Ie* given under *ibid* s 4 (see PARA 1212 ante) or served under the Local Government and Housing Act 1989 Sch 10 para 4(1) (see PARA 1249 ante).

9 Leasehold Reform Act 1967 Sch 3 para 2(1) (Sch 3 para 2(1)-(1E) substituted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, 2003/3096, art 28(1), Sch 5 paras 10, 11). As to the form and contents of a notice to be so given see the Leasehold Reform Act 1967 Sch 3 para 10 (as amended); and PARA 716 note 3 ante.

10 *Ibid* Sch 3 para 2(1A) (as substituted: see note 9 supra). For these purposes, but subject to Sch 3 para 2(1C) (as substituted), 'the relevant time' is the end of the period of two months beginning with the date on which the landlord's notice terminating the tenancy has been given or served: Sch 3 para 2(1B) (as so substituted). Where (1) a landlord's notice terminating the tenancy has been given under the Landlord and Tenant Act 1954 s 25 (as amended); and (2) the tenant applies to the court under s 24(1) (as amended) (see PARA 720 ante) for an order for the grant of a new tenancy before the end of the period of two months mentioned in the Leasehold Reform Act 1967 Sch 3 para 2(1B) (as so substituted), 'the relevant time' is the time when the application is made: Sch 3 para 2(1C) (as so substituted).

11 *Ibid* Sch 3 para 2(1D) (as substituted: see note 9 supra).

12 *Ie* under *ibid* s 9(3) (as amended): see PARA 1446 post.

13 For the meaning of 'house' see PARA 1390 ante.

14 For the meaning of 'premises' see PARA 1391 ante.

15 Leasehold Reform Act 1967 Sch 3 para 2(1E) (as substituted: see note 9 supra).

16 See *ibid* Sch 3 para 4(1); and PARA 1434 post.

17 See *ibid* Sch 3 para 4(2); and PARA 1434 post.

18 *Ie* under the Landlord and Tenant Act 1954 s 16: see PARA 1233 ante. The reference to s 16 includes a reference to s 16 as it applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended) (see PARA 1237 et seq ante): Leasehold Reform Act 1967 Sch 3 para 4(6)(a) (added by the Local Government and Housing Act 1989 Sch 11 para 13(4)).

19 Ie under the Landlord and Tenant Act 1954 s 16(2): see PARA 1233 ante. The reference to s 16(2) includes a reference to s 16(2) as it applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended): Leasehold Reform Act 1967 Sch 3 para 4(6)(a) (as added: see note 17 supra).

20 Ibid Sch 3 para 4(4). Schedule 3 para 4(4) applies in relation to proceedings relating to a superior tenancy with the substitution for the references to the Landlord and Tenant Act 1954 s 16 and s 16(2) of references to Sch 5 para 9 and Sch 5 para 9(2): Leasehold Reform Act 1967 Sch 3 para 4(5). The references to the Landlord and Tenant Act 1954 Sch 5 para 9 and Sch 5 para 9(2) include references to Sch 5 para 9 and Sch 5 para 9(2) as they apply in relation to the Local Government and Housing Act 1989 Sch 10 (as amended): Leasehold Reform Act 1967 Sch 3 para 4(6)(b) (added by the Local Government and Housing Act 1989 Sch 11 para 13(4)).

21 For the meaning of 'relevant time' for these purposes see PARA 1391 note 4 ante.

22 For the meaning of 'landlord' see PARA 1432 note 4 post.

23 Leasehold Reform Act 1967 s 5(6).

24 See ibid s 28(1)(a); and PARA 1487 post.

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### **1431. Notice given after previous notice or after tenancy has been extended.**

A tenant's<sup>1</sup> notice of his desire to have an extended lease<sup>2</sup> ceases to have effect if afterwards, being entitled to do so, he gives notice of his desire to have the freehold<sup>3</sup>.

Where a tenancy<sup>4</sup> of a house<sup>5</sup> and premises<sup>6</sup> has been extended<sup>7</sup>, there is no further right to an extended tenancy<sup>8</sup> except in certain exceptional circumstances<sup>9</sup>.

Where a tenant has given written notice of his desire to have the freehold<sup>10</sup>, and has then given written notice that he is unable or unwilling to acquire the house and premises at the price he must pay<sup>11</sup>, any further notice of his desire to have the freehold with respect to that house or any part of it is void if given within the following 12 months<sup>12</sup>.

A notice may also be void, in certain circumstances, if in the case of a prior notice there has been a lack of good faith, misrepresentation or concealment<sup>13</sup>.

A tenant's notice of his desire to have the freehold or an extended lease ceases to have effect if he assigns the tenancy without the benefit of the notice, or the tenancy of part of the house and premises becomes vested in any person without the tenancy of another part<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 post.

2 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1432 et seq post.

3 Ibid s 5(8).

4 For the meaning of 'tenancy' see PARA 1398 ante.

5 For the meaning of 'house' see PARA 1390 ante.

6 For the meaning of 'premises' see PARA 1391 ante.

7 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 et seq post.

- 8 See *ibid* s 16(1)(b); and PARA 1483 post.
- 9 See *ibid* s 16(2), (3) (as amended); and PARA 1483 post.
- 10 See *ibid* s 8(1); and PARA 1439 post.
- 11 See *ibid* s 9(3) (as amended); and PARA 1446 post.
- 12 See *ibid* s 9(3)(b) (as amended); and PARA 1446 post.
- 13 See *ibid* s 20(5), (6); and PARA 1438 post. As to agreements between the landlord and tenant as to notices see s 23 (as amended) and PARAS 1424-1426 ante.
- 14 See *ibid* s 5(2); and PARA 1432 post.

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## **(ii) Consequences of Tenant's Notice**

### **1432. Accrual and devolution of rights and obligations.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> has the right to acquire the freehold or an extended lease<sup>3</sup> and gives notice of his desire to have it, the rights and obligations of the landlord<sup>4</sup> and the tenant arising from the notice enure for the benefit of, and are enforceable against, them, their executors, administrators and assigns to the like extent, but no further, as rights and obligations arising under a contract for a sale or lease freely entered into between the landlord and tenant<sup>5</sup>.

A tenant's rights and obligations so arising are assignable<sup>6</sup> with, but not capable of subsisting apart from, the tenancy<sup>7</sup> of the entire house and premises<sup>8</sup>; and, if the tenancy is assigned without the benefit of the notice, or if the tenancy of one part of the house and premises is assigned to or vests in any person without the tenancy of another part, the notice accordingly ceases to have effect and the tenant is liable to make such compensation as may be just to the landlord in respect of the interference, if any, by the notice with the exercise by the landlord of his power to dispose of or deal with the house and premises or any neighbouring property<sup>9</sup>.

In the event of any default by the landlord or the tenant in carrying out the obligations arising from any such notice, the other of them has the like rights and remedies as in the case of a contract freely entered into<sup>10</sup>.

1 In relation to matters arising out of the tenant's notice, references in the Leasehold Reform Act 1967 Pt I (ss 1-37 (as amended): see PARA 1389 et seq ante, PARA 1433 et seq post) to the tenant include, in so far as the context permits, his executors, administrators and assigns: s 5(1).

2 For the meaning of 'house' see PARA 1390 ante.

3 *Ie* under the Leasehold Reform Act 1967 Pt I (as amended).

4 In relation to matters arising out of the tenant's notice, references in *ibid* Pt I (as amended) to the landlord include, in so far as the context permits, his executors, administrators and assigns: s 5(1).

5 *Ibid* s 5(1). The tenant's claim is not founded in contract for the purpose of the Limitation Act 1980, but is upon a specialty: *Collin v Duke of Westminster* [1985] QB 581, [1985] 1 All ER 463, CA.

No lease is registrable under the Land Charges Act 1972 or deemed to be an estate contract within the meaning of that Act by reason of the rights conferred on the tenant by the Leasehold Reform Act 1967 Pt I (as amended) to acquire the freehold or an extended lease of the property thereby demised; nor is any right of a tenant arising from a notice under the 1967 Act of his desire to have the freehold or to have an extended lease regarded for the purposes of the Land Registration Act 2002 as an interest falling within any of the paragraphs of Sch 1 or Sch 3; but any such notice is registrable under the Land Charges Act 1972 or may be the subject of a notice under the Land Registration Act 2002, as if it were an estate contract: Leasehold Reform Act 1967 s 5(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 8(1), (2)); Land Charges Act 1972 s 18(6). See further LAND CHARGES vol 26 (2004 Reissue) PARA 632; LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq.

6     le notwithstanding anything in the Leasehold Reform Act 1967 s 5(1): see the text and notes 1-5 supra.

7     For the meaning of 'tenancy' see PARA 1398 ante.

8     For the meaning of 'premises' see PARA 1391 ante.

9     Leasehold Reform Act 1967 s 5(2); and see *South v Chamberlayne* [2001] 3 EGLR 54, [2001] All ER (D) 12 (Sep).

10    Leasehold Reform Act 1967 s 5(3).

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### **1433. Discharge of pre-existing contractual obligations.**

Where any notice of a tenant's<sup>1</sup> desire to have the freehold or an extended lease of a house<sup>2</sup> and premises<sup>3</sup> given by a tenant entitled to acquire the freehold or an extended lease has effect, then, without prejudice to the general law as to frustration of contracts<sup>4</sup>, the landlord<sup>5</sup> and all other persons are discharged from the further performance, so far as relates to the disposal in any manner of the landlord's interest in the house and premises or any part thereof, of any contract previously entered into and not providing for the eventuality of such a notice, including any contract made in pursuance of the order of any court<sup>6</sup>.

In the case of a notice of the tenant's desire to have an extended lease, the above provisions do not, however, apply to discharge a person from performance of a contract unless the contract was entered into on the basis, common to both parties, that vacant possession of the house and premises or part thereof would or might be obtainable on the termination of the existing tenancy<sup>7</sup>.

1     For the meaning of 'tenant' see PARA 1432 note 1 ante.

2     For the meaning of 'house' see PARA 1390 ante.

3     For the meaning of 'premises' see PARA 1391 ante.

4     As to the doctrine of frustration see CONTRACT vol 9(1) (Reissue) PARA 888 et seq.

5     For the meaning of 'landlord' see PARA 1432 note 4 ante.

6     Leasehold Reform Act 1967 s 5(7).

7     Ibid s 5(7) proviso.

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**1434. Effect of tenant's notice on other notices, acts and proceedings between the parties.**

A tenant's<sup>1</sup> notice terminating the tenancy<sup>2</sup> of any property is of no effect if given during the currency of a claim<sup>3</sup> made in respect of the tenancy to acquire the freehold or an extended lease<sup>4</sup> of that property<sup>5</sup>.

A landlord's<sup>6</sup> notice terminating a tenancy of any property<sup>7</sup> is of no effect if given or served during the currency of a claim made in respect of the tenancy to acquire the freehold or an extended lease of that property, and ceases to have effect on the making of such a claim<sup>8</sup>. If, after the landlord has commenced proceedings under Part II of the Landlord and Tenant Act 1954<sup>9</sup>, the tenant subsequently makes a claim to acquire the freehold or an extended lease of the property<sup>10</sup> and the claim is effective<sup>11</sup>, no further steps are to be taken in the proceedings under Part II of the 1954 Act otherwise than for their dismissal and for the making of any consequential order<sup>12</sup>.

Where a tenant makes a claim to acquire the freehold or an extended lease of any property, then during the currency of the claim no proceedings to enforce any right of re-entry or forfeiture terminating the tenancy may be brought in any court without the leave of that court and leave may not be granted unless the court is satisfied that the claim was not made in good faith<sup>13</sup>; but, where leave is granted, the claim ceases to have effect<sup>14</sup>.

Where a claim is made to acquire the freehold or an extended lease of property comprised in a tenancy, the tenancy is deemed for purposes of the claim to be a subsisting tenancy notwithstanding that the claim is made when proceedings are pending to enforce a right of re-entry or forfeiture terminating the tenancy and notwithstanding any order made afterwards in those proceedings; and, if the claim is effective<sup>15</sup>, the court in which the proceedings were brought may set aside or vary any such order to such extent and on such terms as appear to it to be appropriate<sup>16</sup>. If, however, it appears to that court that the claim is not made in good faith, or there has been unreasonable delay in making it, and that apart from the claim effect should be given to the right of re-entry or forfeiture, the court must order that the tenancy shall not be so treated as subsisting nor the claim as valid<sup>17</sup>.

Where a court other than a county court so grants leave<sup>18</sup> or makes an order<sup>19</sup> on the ground that a claim was not made in good faith, the court may make any such order as the county court is authorised<sup>20</sup> to make<sup>21</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of references to a notice terminating a tenancy see PARA 1430 note 3 ante; and for the meaning of 'tenancy' see PARA 1398 ante.

3 For these purposes, references to the currency of a claim are to be taken as references to the period from the giving of a notice which has effect or would, if valid, have effect to the time when the notice is effective or ceases to have effect or, not being a valid notice, is set aside by the court, or is withdrawn, or would, if valid, cease to have effect; and those references include any period when the notice is suspended: Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 5(1)(c). The date when a notice ceases to have effect or is set aside or would, if valid, cease to have effect in consequence of an order of the court is taken to be the date when the order becomes final: Sch 3 para 5(2).

4 For the meaning of references to a claim to acquire the freehold or an extended lease see PARA 1430 note 1 ante.

5 Leasehold Reform Act 1967 Sch 3 para 1(2).

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 Ie under the Landlord and Tenant Act 1954 s 4 (see PARA 1212 ante) or s 25 (as amended) (see PARA 716 ante) or under the Local Government and Housing Act 1989 s 186(1), Sch 10 para 4(1) (see PARA 1249 ante).

8 Leasehold Reform Act 1967 Sch 3 para 2(2) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(2)(b)). Where any such landlord's notice ceases, by virtue of the Leasehold Reform Act 1967 Sch 3 para 2(2) (as so amended), to have effect on the making of a claim, but the claim is not effective, then, if within one month after the period of currency of that claim, or any subsequent claim made under Sch 3 para 2(1) proviso (as originally enacted) or under Sch 3 para 2(1D), (1E) (as substituted) (see PARA 1430 ante), a further landlord's notice terminating the tenancy is given under the Landlord and Tenant Act 1954 s 4 or s 25 (as amended), or served under the Local Government and Housing Act 1989 Sch 10 para 4(1), the earliest date which may be specified in that notice as the date of termination is (1) in the case of a notice given under the Landlord and Tenant Act 1954, the date of termination specified in the previous notice or the expiration of three months from the giving of the new notice, whichever is the later; (2) in the case of a notice served under the Local Government and Housing Act 1989 s 186, Sch 10 (as amended), the date of termination specified in the previous notice or the expiration of the period of four months beginning on the date of service of the new notice, whichever is the later: Leasehold Reform Act 1967 Sch 3 para 2(3) (amended by the Local Government and Housing Act 1989 Sch 11 para 13(2)(c)); Interpretation Act 1978 s 17(2).

Where, by virtue of the Leasehold Reform Act 1967 Sch 3 para 2(3) (as so amended), a landlord's notice specifies as the date of termination of a tenancy a date earlier than six months after the giving of the notice, then if the notice proposes a statutory tenancy, the Landlord and Tenant Act 1954 s 7(2) (as amended) (see PARA 1216 ante) applies in relation to the notice with the substitution, for references to the period of two months ending with the date of termination specified in the notice and the beginning of that period, of references to the period of three months beginning with the giving of the notice and the end of that period: Leasehold Reform Act 1967 Sch 3 para 2(4) (amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096, art 28(2), Sch 6).

9 Ie under the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

10 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1435 et seq post.

11 Ie ibid Sch 3 para 2 (as amended) (see the text and notes 6-8 supra; and PARA 1430 ante) does not render it ineffective.

12 See ibid Sch 3 para 2A (as added); and PARA 717 ante.

13 A claim is not made in good faith if it is not made honestly, or is made for an ulterior motive: *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48, [1971] 3 All ER 647, CA (claim made in order to avoid forfeiture after a conviction for keeping a brothel not made in good faith); *Liverpool Corpn v Huan* [1972] 1 QB 48, [1971] 3 All ER 651, CA (claim made for an extended lease after service of a forfeiture notice for breach of repairing covenants, the tenant having no prospect or intention of carrying out the necessary remedial works, not made in good faith).

14 Leasehold Reform Act 1967 Sch 3 para 4(1).

15 For the meaning of references to a claim being effective see PARA 1430 note 2 ante.

16 Leasehold Reform Act 1967 Sch 3 para 4(2).

17 Ibid Sch 3 para 4(2) proviso.

18 Ie under ibid Sch 3 para 4(1): see the text and notes 13-14 supra.

19 Ie under ibid Sch 3 para 4(2) proviso: see the text and note 17 supra.

20 Ie under ibid s 20(5) or (6): see PARA 1438 post.

21 Ibid Sch 3 para 4(3).

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### **1435. Continuation of tenancy.**

Where a tenant<sup>1</sup> makes a claim to acquire the freehold or an extended lease<sup>2</sup> of any property, then during the currency of the claim<sup>3</sup> and for three months thereafter the tenancy<sup>4</sup> in that property does not terminate either by effluxion of time or in pursuance of a notice to quit<sup>5</sup> given by the landlord<sup>6</sup> or by the termination of a superior tenancy; but, if the claim is not effective<sup>7</sup> and the tenancy would otherwise have so terminated before the end of those three months, the tenancy so terminates at the end of the three months<sup>8</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of references to a claim to acquire the freehold or an extended lease see PARA 1430 note 1 ante.

3 For the meaning of references to the currency of the claim see PARA 1434 note 3 ante.

4 For the meaning of 'tenancy' see PARA 1398 ante.

5 For these purposes, 'notice to quit' means a notice to terminate a tenancy, whether a periodical tenancy or a tenancy for a term of years certain, given in accordance with the provisions, whether express or implied, of that tenancy: Leasehold Reform Act 1967 s 37(1)(c).

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 For the meaning of references to a claim being effective see PARA 1430 note 2 ante.

8 Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 3(1). Schedule 3 para 3(1) is not, however, to be taken to prevent an earlier termination of the tenancy in any manner not there mentioned, nor to affect the power under the Law of Property Act 1925 s 146(4) (see PARA 627 ante) to grant a tenant relief against the termination of a superior tenancy, or any right of the tenant to relief under the Landlord and Tenant Act 1954 s 16(2) (see PARA 1233 ante) or under Sch 5 para 9 (see PARA 1234 ante): Leasehold Reform Act 1967 Sch 3 para 3(2). The reference in Sch 3 para 3(2) to the Landlord and Tenant Act 1954 s 16(2) and Sch 5 para 9 includes a reference to those provisions as they apply in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq ante): Leasehold Reform Act 1967 Sch 3 para 3(3) (added by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(3)).

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### **(iii) Landlord's Notice in Reply**

#### **1436. Notice in reply.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> gives the landlord<sup>3</sup> notice<sup>4</sup> of his desire to have the freehold or an extended lease, the landlord must within two months give the tenant a notice in reply in the prescribed form<sup>5</sup> stating whether or not the landlord admits the tenant's right to have the

freehold or an extended lease, subject to any question as to the correctness of the particulars given in the tenant's notice of the house and premises<sup>6</sup>; and, if the landlord does not admit the tenant's right, the notice must state the grounds on which it is not admitted<sup>7</sup>.

Where the landlord may object<sup>8</sup> to the inclusion of any part of the house and premises as described in the tenant's notice<sup>9</sup>, or may object to the exclusion of other property<sup>10</sup>, the notice of his objection must be given with or before his notice in reply, unless the right to give it later is reserved by the notice in reply<sup>11</sup>.

If, however, on the assumption, where it is not admitted, that the tenant has the right claimed, it is intended to apply to the court for possession of the house and premises<sup>12</sup>, the notice in reply must state that it is the intention to do so<sup>13</sup>.

Where a landlord's notice in reply admits the tenant's right to have the freehold or extended lease of a house and premises, the admission is binding upon the landlord, so far as it relates to the matters relevant to the existence of that right, unless the landlord shows that he was induced to make the admission by misrepresentation or the concealment of material facts; but the admission does not conclude any question whether the particulars of the house and premises in the tenant's notice are correct<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'landlord' see PARA 1432 note 4 ante.

4 Ie in accordance with the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1437 et seq post.

5 For the prescribed form of notice in reply see the Leasehold Reform (Notices) Regulations 1997, SI 1997/640, regs 2, 3(3), Schedule, Form 3 (substituted in relation to England by SI 2002/3209 and in relation to Wales by SI 2003/991).

6 For the meaning of 'premises' see PARA 1391 ante.

7 Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 7(1). As to service of notices see PARA 1429 ante.

8 Ie under ibid Pt I (as amended).

9 See ibid s 2(5), (6); and PARA 1391 ante.

10 See ibid s 2(4) (as amended); and PARA 1391 ante.

11 Ibid Sch 3 para 7(2).

12 Ie under ibid s 17 (see PARAS 1485-1486 post) or s 18 (as amended) (see PARAS 1488-1490 post).

13 Ibid Sch 3 para 7(3). In such a case Sch 3 para 7(2) (see the text and notes 8-11 supra) does not apply: Sch 3 para 7(3).

14 Ibid Sch 3 para 7(4) (amended by the Housing Act 1996 s 106, Sch 9 para 2(9); for savings see the Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2, Schedule para 2).

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**1437. No proceedings for two months.**

The tenant<sup>1</sup> may not institute proceedings in the court with a view to the enforcement of his right to have the freehold or an extended lease before the landlord<sup>2</sup> has given his notice in reply, or two months have elapsed without his doing so since the giving of the tenant's notice<sup>3</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'landlord' see PARA 1432 note 4 ante.

3 Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 7(5).

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**(iv) Misrepresentation or Concealment by Tenant****1438. In general.**

Where a person gives notice of his desire<sup>1</sup> to have the freehold or to have an extended lease of a house<sup>2</sup> and premises<sup>3</sup> and the notice is either set aside by the court or withdrawn, or ceases to have effect, or would, if valid, cease to have effect, then, if it is made to appear to the court:

3159 (1) that the notice was not given in good faith; or

3160 (2) that the person giving the notice attempted in any material respect to support it by misrepresentation or the concealment of material facts,

the court may on the application of the landlord<sup>4</sup> order that person to pay to the landlord such sum as appears sufficient as compensation for damage or loss sustained by the landlord as the result of the giving of the notice<sup>5</sup>.

In any case where the court has power, on the application of the landlord, so to order a person to make a payment to the landlord, the court, whether or not it makes such an order, may, on the application of the landlord, order that any further notice given<sup>6</sup> by that person of his desire to have the freehold or an extended lease of the same house or any part of it, with or without other property, shall be void if given within the five years beginning with the date of the order<sup>7</sup>.

1 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1439 et seq post.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 For the meaning of 'landlord' see PARA 1432 note 4 ante.

5 Leasehold Reform Act 1967 s 20(5).

6 See note 1 supra.

7 Leasehold Reform Act 1967 s 20(6).

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### **(3) ENFRANCHISEMENT**

#### **(i) Obligation to Enfranchise**

##### **1439. In general.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> has a right<sup>3</sup> to acquire the freehold, and gives to the landlord<sup>4</sup> written notice of his desire to have the freehold, the landlord is bound<sup>5</sup> to make to the tenant, and the tenant to accept, at the price<sup>6</sup> and on the conditions<sup>7</sup> so provided, a grant of the house and premises<sup>8</sup> for an estate in fee simple absolute, subject to the tenancy<sup>9</sup> and to tenant's incumbrances<sup>10</sup> but otherwise free of incumbrances<sup>11</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1440 et seq post.

4 For the meaning of 'landlord' see PARA 1432 note 4 ante.

5 Ie except as provided by the Leasehold Reform Act 1967 Pt I (as amended). As to the cases in which the landlord is not bound to enfranchise see PARA 1430 et seq ante, PARAS 1510-1511 post; and as to conditions, non-compliance with which may discharge either party from his obligation see PARA 1440 note 6 post.

6 As to the price see PARAS 1441-1446 post.

7 As to the conditions see PARA 1453 et seq post.

8 For the meaning of 'premises' see PARA 1391 ante.

9 For the meaning of 'tenancy' see PARA 1398 ante.

10 For these purposes, 'incumbrances' include rentcharges and, subject to the Leasehold Reform Act 1967 s 8(3), personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on that land or interest: ss 8(2), 37(1)(b). Burdens originating in tenure, and burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse are not, however, treated as incumbrances for these purposes, but any conveyance executed to give effect to s 8 (as amended) must be made subject thereto except as otherwise provided by s 11 (as amended) (see PARAS 1460-1461 post): s 8(3). 'Tenant's incumbrances' includes any interest directly or indirectly derived out of the tenancy, and any incumbrance on the tenancy or any such interest, whether or not the same matter is an incumbrance also on any interest reversionary on the tenancy: ss 8(2), 37(1)(b).

A charge on the landlord's estate to secure the payment of money or the performance of any other obligation is not, however, to be treated as a tenant's incumbrance by reason only of the grant of the tenancy being subsequent to the creation of the charge and not authorised as against the persons interested in the charge: see s 12(8); and PARA 1462 post.

11 Ibid s 8(1). As to the effect of the provision that the grant is to be otherwise free of incumbrances see PARAS 1450-1451 post. A claim arising from the obligation to enfranchise is a claim on a specialty and not in contract, and the limitation period is, therefore, 12 years: *Collin v Duke of Westminster* [1985] QB 581, [1985] 1 All ER 463, CA.

In *Re 51 Bennington Road, Aston* (1993) Times, 21 July the tenants of premises for the residue of 'the term or several terms of 500 years' were held entitled to purchase the freehold under the provisions of the Leasehold Reform Act 1967, notwithstanding ignorance of the identity of the reversioner and the exact terms of the lease.

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## **(ii) Procedure**

### **1440. In general.**

Where a tenant<sup>1</sup> having a right<sup>2</sup> to acquire the freehold gives the landlord<sup>3</sup> notice<sup>4</sup> of his desire to have it, the procedure for giving effect to the notice and the rights and obligations of all parties in relation to the investigation of title and other matters arising in giving effect to the notice are<sup>5</sup> such as may be prescribed by regulations; and, subject to or in the absence of provision made by any such regulations as regards any matter, the parties' rights and obligations are, as nearly as may be, the same as in the case of a contract of sale freely negotiated between the parties<sup>6</sup>.

In relation to a claim to acquire the freehold, any such regulations may include provision:

- 3161 (1) for a sum on account of the price payable for the house and premises and landlord's costs to be deposited with the landlord or with some person as his agent or as stakeholder, and for the return or forfeiture in any prescribed circumstances of the whole or part of the sum deposited;
- 3162 (2) for enabling or requiring the tenant in any prescribed circumstances, instead of continuing to pay rent under the tenancy, to pay sums representing interest on the price payable or, at his option, either to pay such sums or to pay or deposit the price payable or the balance of it;
- 3163 (3) for any matters incidental to or arising out of the matters mentioned above;

and in relation to any claim the regulations may provide for discharging the landlord or the tenant by reason of the other's default or delay from the obligations arising out of the claim<sup>7</sup>.

Where it is made to appear to the court that the landlord or the tenant has been guilty of any unreasonable delay or default in the performance of his obligations arising from a tenant's notice of his desire to have the freehold, then, without prejudice to any right to damages, the court may:

- 3164 (a) by order revoke or vary, and direct repayment of sums paid under, any provision made by a previous order as to payment of costs of proceedings in the court in relation to the matter, or, where costs have not been awarded, award costs; or
- 3165 (b) certify particulars of the delay or default to the Lands Tribunal with a view to enabling the tribunal to exercise a like discretion in relation to costs of proceedings before the tribunal<sup>8</sup>.

<sup>1</sup> For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1441 et seq post.

3 For the meaning of 'landlord' see PARA 1432 note 4 ante.

4 le in accordance with the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended).

5 le except as otherwise provided by the Leasehold Reform Act 1967.

6 Ibid s 22(2) (amended by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 1974, SI 1974/1896, art 3(2)). Any such regulations must be made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Leasehold Reform Act 1967 s 22(2) (as so amended). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, reg 2, Schedule Pt I (paras 1-13) (as amended) which came into force on 1 January 1968: reg 1(1). In any transactions undertaken to give effect to a tenant's notice of his desire to have a freehold the landlord and the tenant are, unless they otherwise agree, bound by the conditions laid down in Schedule Pt I (paras 1-13) (as amended) as if the conditions formed part of a contract between them: reg 2. The conditions so laid down relate to: the payment of a deposit (Schedule Pt I para 1); evidence of the tenant's right to enfranchise (Schedule Pt I paras 2, 2A (respectively amended and added in relation to England by SI 2003/1989 and in relation to Wales by SI 2004/699)); delivery of proof of the landlord's title (Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, Schedule Pt I para 3); requisitions (Sch Pt I para 4); particulars of rights of way and restrictions (Schedule Pt I para 5); completion (Schedule Pt I para 6); apportionment of rent and outgoings (Schedule Pt I para 7); election for interest in lieu of rent (Schedule Pt I para 8); preparation of the conveyance (Schedule Pt I para 9); failure to comply with obligations (Schedule Pt I para 10); cancellation of land charges etc (Schedule Pt I para 11); notices (Schedule Pt I para 12); and extension of time limits (Schedule Pt I para 13). Where as a result of non-compliance with the conditions so laid down the landlord and the tenant are discharged from the performance of the obligations arising in giving effect to the tenant's notice, such obligations arising between the tenant and persons other than the landlord having an interest superior to the tenancy are likewise discharged: reg 4.

In the case of a claim to acquire the freehold, the Leasehold Reform Act 1967 s 22(2) (as so amended) is not to be taken in any case as applying forms prescribed under the Law of Property Act 1925 s 46 (see SALE OF LAND vol 42 (Reissue) PARA 76) for contracts entered into by correspondence; but, without prejudice to the generality of the Leasehold Reform Act 1967 s 22(2) (as so amended), the Law of Property Act 1925 s 49 (as amended) (determination of questions between vendor and purchaser: see SALE OF LAND vol 42 (Reissue) PARA 220) applies: Leasehold Reform Act 1967 s 22(4).

A claim pursuant to the 1967 Act is based on the statutory obligation, and as such is a claim upon a specialty, not a claim in contract, with the result that, if any period of limitation applies, the period is 12 years pursuant to the Limitation Act 1980 s 8 (see LIMITATION PERIODS): *Collin v Duke of Westminster* [1985] QB 581, [1985] 1 All ER 463, CA.

7 Leasehold Reform Act 1967 s 22(3).

8 Ibid s 20(4). Where the court certifies particulars of delay or default to the Lands Tribunal under s 20(4)(b) (see head (b) in the text), the Lands Tribunal may make any order as to costs of proceedings before the Lands Tribunal which the court may make in relation to proceedings in the court: s 20(4A) (added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 paras 1, 4).

## UPDATE

### 1440 In general

TEXT AND NOTE 8--References to the Lands Tribunal are now to the Upper Tribunal: Leasehold Reform Act 1967 s 20(4)(b), (4A) (amended by SI 2009/1307).

ENFRANCHISEMENT/(iii) Purchase Price; Tenant's Right to Withdraw/1441. Houses within the lower range of values; in general.

### **(iii) Purchase Price; Tenant's Right to Withdraw**

#### **1441. Houses within the lower range of values; in general.**

Where:

- 3166 (1) the rateable value of a house<sup>1</sup> and premises<sup>2</sup> was £1,000 or below in Greater London<sup>3</sup> or £500 elsewhere on 31 March 1990<sup>4</sup>; or
- 3167 (2) the house and premises had no rateable value on that date and their valuation did not exceed £16,333<sup>5</sup>,

the price payable for a house and premises on a conveyance<sup>6</sup> is the amount which at the relevant time<sup>7</sup> the house and premises, if sold in the open market by a willing seller, with the tenant<sup>8</sup> and members of his family<sup>9</sup> not buying or seeking to buy, might be expected to realise on the following assumptions<sup>10</sup>:

- 3168 (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy<sup>11</sup>, but on the assumption that no right was conferred upon the tenant<sup>12</sup> to acquire the freehold, and, if the tenancy has not been extended<sup>13</sup>, on the assumption that, subject to the landlord's overriding rights of redevelopment<sup>14</sup>, it was to be so extended<sup>15</sup>;
- 3169 (b) on the assumption that, subject to head (a) above, the vendor was selling subject, in respect of certain rentcharges<sup>16</sup>, to the same annual charge as the conveyance to the tenant is to be subject to, but that the purchaser would otherwise be effectively exonerated until the termination of the tenancy from any liability or charge in respect of tenant's incumbrances<sup>17</sup>; and
- 3170 (c) on the assumption that, subject to heads (a) and (b) above, the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to the statutory provisions<sup>18</sup> relating to the rights to be conveyed to the tenant on enfranchisement<sup>19</sup>.

The price payable for the house and premises is subject to such deduction, if any, in respect of any defect in the title to be conveyed to the tenant as on a sale in the open market might be expected to be allowed between a willing seller and a willing buyer<sup>20</sup>. In relation to a house and premises in an area governed by a scheme of management<sup>21</sup>, in determining the price payable for the freehold the provisions of the scheme must be taken into account<sup>22</sup>.

In default of agreement the price payable for a house and premises must be determined by a leasehold valuation tribunal<sup>23</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 As to Greater London see LONDON GOVERNMENT vol 29(2) (Reissue) PARA 29.

4 For the purpose of determining whether the rateable value of the house and premises is above £1,000 in Greater London, or £500 elsewhere, the rateable value must be adjusted to take into account any tenant's improvements in accordance with the Housing Act 1974 s 118, Sch 8 (as amended) (see PARA 1393 ante):

Leasehold Reform Act 1967 s 9(1B) (added by the Housing Act 1974 s 118(4)). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante. A house held on a lease granted under the right to buy is, however, treated as coming within the higher range of rateable values whatever the circumstances (see PARA 1444 post) as is a house where the tenancy of the house and premises has been extended under the Leasehold Reform Act 1967 s 14 (as amended) (see PARA 1469 et seq post) and the notice under s 8(1) (see PARA 1439 ante) was given (whether by the tenant or a sub-tenant) after the original term date of the tenancy (see s 8(1C) (as added and amended); and PARA 1445 post).

5     le where the house and premises had no rateable value on 31 March 1990 and R did not exceed £16,333 under the formula in the Leasehold Reform Act 1967 s 1(1)(a) (as substituted and amended) (see PARA 1395 ante). Section 1(7) (as added) (see PARA 1395 ante) applies to that amount as it applies to the amount referred to in s 1(1)(a)(ii) (as substituted and amended): s 9(1A)(ii) (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 9). As to the houses which are treated as coming within the higher range of rateable values whatever the circumstances see note 4 supra.

6     le under the Leasehold Reform Act 1967 s 8 (as amended): see PARA 1439 ante, PARAS 1450-1451 post.

7     For the meaning of 'relevant time' see PARA 1391 note 4 ante.

8     For the meaning of 'tenant' see PARA 1432 note 1 ante.

9     For these purposes, the reference to members of the tenant's family is to be construed in accordance with the Leasehold Reform Act 1967 s 7(7) (as amended) (see PARA 1418 note 4 ante): s 9(1) (amended by the Housing Act 1969 s 82). The effect of the reference to the tenant and members of his family not buying or seeking to buy is to rule out the marriage value as an element in the purchase price of houses in the lower range. As to marriage value see s 9(1D), (1E) (as added); and PARA 1442 post.

10    The generally recognised approach to the ascertainment of price is to adopt three stages: (1) to capitalise the rent payable for the house and premises under the existing tenancy for the period of the unexpired term of that tenancy; (2) to estimate the rent that would be payable at the expiration of the original term in accordance with *ibid* s 15(2) (see PARA 1479 post); and (3) to capitalise the latter rent as if in perpetuity, deferred for the period of the unexpired term of the existing tenancy, not seeking to quantify any different rent that might become payable after 25 years from the original term date and not quantifying separately the value in reversion at the expiration of 50 years from that date: *Farr v Millersons Investments Ltd* (1971) 22 P & CR 1055, Lands Tribunal.

For the purpose of arriving at a rent at stage (2), it is necessary to estimate the value of the site of the house and premises, which may, according to circumstances, be done either (a) by taking a proportion of the value of the whole premises as they stand; or (b) by reference to the prices of sites sold for development or redevelopment for comparable uses; or (c) by reference to what the property as a whole would be worth if a new building were substituted for the existing building, and then taking a proportion of that value, or alternatively subtracting the proportion of the present-day cost of putting up that building: *Farr v Millersons Investments Ltd* supra. The site value thus ascertained is then decapitalised to produce the stage (2) rent: *Farr v Millersons Investments Ltd* supra. Unless there is evidence or some reason to the contrary, the rate at which the site value is decapitalised to arrive at the rent for the purpose of stage (2) and the rate at which it is then recapitalised to produce the capital sum at stage (3) should be the same: *Official Custodian for Charities v Goldridge* (1973) 26 P & CR 191, CA.

Where the term of the existing tenancy has very many years to run, separate calculations for stages (2) and (3) may be inappropriate, and the price may be calculated by capitalising the right to receive the current ground rent in perpetuity: *Jenkins v Bevan-Thomas* (1972) 23 P & CR 258, Lands Tribunal; *Barber v Trustees of Eltham United Charities* (1972) 221 Estates Gazette 1343, Lands Tribunal; *Janering v English Property Co Ltd and Nessdale Ltd* (1977) 33 P & CR 523, Lands Tribunal. In such a case, the rate of return should be assessed by reference to the land market rather than the money market: *Gallagher Estates Ltd v Walker* (1973) 28 P & CR 113, CA.

Where comparable transactions under the Leasehold Reform Act 1967 are to be used as a guide to value, allowance must be made for the tenant's anxiety to compromise with his landlord in those transactions: *DeLaforce v Evans and Evans* (1970) 22 P & CR 770, Lands Tribunal.

As to the effect upon the price payable of restrictive covenants to be included in the conveyance to be made to the tenant see *Peck v Trustees of Hornsey Parochial Charities* (1970) 22 P & CR 789, Lands Tribunal.

As against a tenant in possession claiming under the Leasehold Reform Act 1967 s 8 (as amended) (see PARA 1439 ante), the price payable on a conveyance for giving effect to s 8 (as amended) cannot be made less favourable by reference to a transaction since 15 February 1979 involving the creation or transfer of an interest superior to, whether or not preceding, his own, or an alteration since that date of the terms on which such an interest is held: Leasehold Reform Act 1979 s 1(1). For these purposes, references to a tenant claiming are to his giving notice under the Leasehold Reform Act 1967 s 8 (as amended) of his desire to have the freehold: Leasehold Reform Act 1979 s 1(2). Section 1(1) applies to any claim to enfranchise made on or after 4 April

1979 and also to a claim made before that date unless by then the price had been determined by agreement or otherwise: s 1(3).

11 For the meaning of 'tenancy' see PARA 1398 ante. The reference is to the existing tenancy: *Mosley v Hickman* (1986) 52 P & CR 248, 18 HLR 292, CA.

12 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1442 et seq post.

13 See note 12 supra.

14 Ie under ibid s 17: see PARAS 1485-1486 post.

15 This part of the assumption requires the freehold reversion to be valued as if the lease had been extended which results in the value being the letting value of the site excluding the buildings constructed on the site: see PARA 1479 post.

16 Ie rentcharges to which ibid s 11(2) applies: see PARA 1461 post.

17 For the meaning of 'tenant's incumbrances' see PARA 1439 note 10 ante.

18 Ie the Leasehold Reform Act 1967 s 10 (as amended): see PARAS 1452-1455, 1459 post.

19 Ibid s 9(1) (amended by Housing Act 1969 s 82; the Rentcharges Act 1977 s 17(2), Sch 2; the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

20 Leasehold Reform Act 1967 s 9(2).

21 Ie a scheme made under ibid s 19 (as amended): see PARA 1498 et seq post.

22 See ibid s 19(10) (as amended); and PARA 1503 post. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 70(12); and PARA 1736 note 24 post.

23 See the Leasehold Reform Act 1967 s 21(1)(a) (as amended); and PARA 1530 post.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(iii) Purchase Price; Tenant's Right to Withdraw/1442. Houses within the higher range of values; in general.

#### **1442. Houses within the higher range of values; in general.**

Where:

3171 (1) the rateable value of a house<sup>1</sup> and premises<sup>2</sup> was above £1,000 in Greater London<sup>3</sup> and £500 elsewhere on 31 March 1990<sup>4</sup>; or

3172 (2) the house and premises had no rateable value on that date and their valuation exceeded £16,333<sup>5</sup>,

the price payable for a house and premises on a conveyance<sup>6</sup> is the amount which at the relevant time<sup>7</sup> the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions<sup>8</sup>:

3173 (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy<sup>9</sup>, but on the assumption that no right was conferred upon the tenant<sup>10</sup> to acquire the freehold or an extended lease<sup>11</sup>;

3174 (b) on the assumption that at the end of the tenancy the tenant has a statutory right<sup>12</sup> to remain in possession of the house and premises;

- 3175 (c) on the assumption that the tenant has no liability to carry out any repairs, maintenance or redecorations under the terms of the tenancy or by statute<sup>13</sup>;
- 3176 (d) on the assumption that the price is to be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense<sup>14</sup>;
- 3177 (e) on the assumption that, subject to head (a) above, the vendor was selling subject, in respect of certain rentcharges<sup>15</sup>, to the same annual charge as the conveyance to the tenant is to be subject to, but that the purchaser would otherwise be effectively exonerated until the termination of the tenancy from any liability or charge in respect of the tenant's incumbrances<sup>16</sup>; and
- 3178 (f) on the assumption that, subject to heads (a) and (b) above, the vendor was selling with and subject to the rights and burdens with and subject to which the conveyance to the tenant is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to the statutory provisions<sup>17</sup> relating to the rights to be conveyed to the tenant on enfranchisement<sup>18</sup>.

Where, in determining the price payable for a house and premises in accordance with these provisions, there falls to be taken into account any marriage value arising by virtue of the coalescence of the freehold and leasehold interests, the share of the marriage value to which the tenant is to be regarded as being entitled is one half of it<sup>19</sup>; but where at the relevant time the unexpired term of the tenant's tenancy exceeds 80 years, the marriage value is to be taken to be nil<sup>20</sup>.

The price payable for the house and premises is subject to such deduction, if any, in respect of any defect in the title to be conveyed to the tenant as on a sale in the open market might be expected to be allowed between a willing seller and a willing buyer<sup>21</sup>. In relation to a house and premises in an area governed by a scheme of management<sup>22</sup>, in determining the price payable for the freehold the provisions of the scheme must be taken into account<sup>23</sup>.

In default of agreement the price payable for a house and premises must be determined by a leasehold valuation tribunal<sup>24</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 As to Greater London see LONDON GOVERNMENT VOL 29(2) (Reissue) PARA 29.

4 For the purpose of determining whether the rateable value of the house and premises is above £1,000 in Greater London, or £500 elsewhere, the rateable value must be adjusted to take into account any tenant's improvements in accordance with the Housing Act 1974 s 118, Sch 8 (as amended) (see PARA 1393 ante): Leasehold Reform Act 1967 s 9(1B) (added by the Housing Act 1974 s 118(4)). As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante. As to the houses which are treated as coming within the higher range of rateable values whatever the circumstances see PARA 1441 note 4 ante.

5 I.e. where the house and premises had no rateable value on 31 March 1990 and R exceeded £16,333 under the formula in the Leasehold Reform Act 1967 s 1(1)(a) (as substituted) (see PARA 1395 ante). Section 1(7) (as added) applies to that amount as it applies to the amount referred to in s 1(1)(a)(ii) (as substituted and amended): s 9(1A)(ii) (substituted by the References to Rating (Housing) Regulations 1990, SI 1990/434, Schedule para 9). As to the houses which are treated as coming within the higher range of rateable values whatever the circumstances see PARA 1441 note 4 ante.

6 I.e. under the Leasehold Reform Act 1967 s 8 (as amended): see PARA 1439 ante, PARAS 1450-1451 post.

7 For the meaning of 'relevant time' see PARA 1391 note 4 ante.



8 Under the Leasehold Reform Act 1967 s 9(1A) (as added) the tenant may be regarded as being in the market and the price may reflect the marriage value of the freehold to him: see the text and notes 19-20 *infra*; and cf para 1441 note 9 *ante*.

9 For the meaning of 'tenancy' see PARA 1398 *ante*. The reference is to the existing tenancy: *Mosley v Hickman* (1986) 52 P & CR 248, 18 HLR 292, CA.

10 For the meaning of 'tenant' see PARA 1432 note 1 *ante*.

11 *Ie* under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 *et seq ante*, PARA 1443 *et seq post*.

12 *Ie* a right to remain in possession of the house and premises (1) if the tenancy is such a tenancy as is mentioned in the Local Government and Housing Act 1989 s 186(2) or (3) (see PARA 1237 *ante*), or is a tenancy which is a long tenancy at a low rent for the purposes of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended) (see PARA 1196 *et seq ante*) in respect of which the landlord is not able to serve a notice under s 4 (see PARA 1212 *ante*) specifying a date of termination earlier than 15 January 1999, under the provisions of the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 *et seq ante*); and (2) in any other case under the provisions of the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended).

13 *Ie* under *ibid* Pt I (ss 1-22) (as amended).

14 The building of a new house on a bare site (whether a green field site or a site on which a previous building which was not a house has been demolished) is not an improvement for these purposes: *Rosen v Trustees of Campden Charities* [2002] Ch 69, [2001] 2 All ER 399, CA (performance of a building lease part of the original bargain between landlord and tenant and not an improvement). Works consisting of undoing work carried by a predecessor in title may be 'improvements' for these purposes: *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] UKHL 32, [2004] 1 AC 802, [2003] 3 All ER 975. Head (d) in the text does not require the value of the potential for improvement to be excluded from the valuation of the unimproved house: *Fattal v Keepers and Governors of the Free Grammar School of John Lyon* [2004] EWCA Civ 1530, [2005] 1 All ER 466, [2005] 1 WLR 803.

15 *Ie* rentcharges to which the Leasehold Reform Act 1967 s 11(2) applies: see PARA 1461 *post*.

16 For the meaning of 'tenant's incumbrances' see PARA 1439 note 10 *ante*.

17 *Ie* the Leasehold Reform Act 1967 s 10 (as amended): see PARAS 1452-1455, 1459 *post*.

18 *Ibid* s 9(1A) (added by the Housing Act 1974 s 118(4); amended by the Rentcharges Act 1977 s 17(2), Sch 2; the Housing and Planning Act 1986 s 23(1), (3); the Local Government and Housing Act 1989 s 194(1), Sch 11 para 9; the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 9; the Commonhold and Leasehold Reform Act 2002, s 180 Sch 14).

19 Leasehold Reform Act 1967 s 9(1D) (s 9(1D), (1E) added by the Commonhold and Leasehold Reform Act 2002 ss 145(1), (3), 146). For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2, PARA 5; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2, PARA 5).

20 Leasehold Reform Act 1967 s 9(1E) (as added: see note 19 *supra*).

21 *Ibid* s 9(2). The valuation of an unimproved house and premises includes the value of any potential for improvement: *Fattal v Keepers and Governors of the Free Grammar School of John Lyon* [2004] EWCA Civ 1530, [2005] 1 All ER 466, [2005] 1 WLR 803.

22 *Ie* a scheme made under the Leasehold Reform Act 1967 s 19 (as amended): see PARA 1498 *et seq post*.

23 See *ibid* s 19(10) (as amended); and PARA 1503 *post*. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 70(12); and PARA 1736 note 24 *post*; s 73(10); and PARA 1739 note 7 *post*.

24 See the Leasehold Reform Act 1967 s 21(1)(a) (as amended); and PARA 1530 *post*.

## UPDATE

### 1442 Houses within the higher range of values; in general

NOTE 19--Where provision is made for marriage value to be taken into account in the valuation of a property subject to leasehold enfranchisement, the freeholder is not entitled to an additional amount in respect of 'hope value': *Earl Cadogan v Pitts* [2008] UKHL 71, [2010] 1 AC 226, [2009] 3 All ER 365.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(iii) Purchase Price; Tenant's Right to Withdraw/1443. Price payable on enfranchisement of house whose value or rent exceeds the applicable limit, or where tenancy terminable after death, marriage etc.

**1443. Price payable on enfranchisement of house whose value or rent exceeds the applicable limit, or where tenancy terminable after death, marriage etc.**

The price payable for a house<sup>1</sup> and premises<sup>2</sup> where the right to acquire the freehold arises by virtue of any one or more of the following:

- 3179 (1) the house having a value or rent which exceeds the applicable limit<sup>3</sup>; or
- 3180 (2) the tenancy being terminable after a death, a marriage or the formation of a civil partnership<sup>4</sup>,

must be determined<sup>5</sup> in accordance with the statutory provisions relating to houses within the higher range of rateable values<sup>6</sup>; but in any such case the statutory provisions relating to the compensation payable where the right to acquire the freehold so arises<sup>7</sup> have effect for determining whether any additional amount is payable by way of compensation<sup>8</sup>.

In certain cases falling within head (1) above<sup>9</sup>, however, the assumption that at the end of the tenancy the tenant has a statutory right to remain in possession of the house and premises<sup>10</sup> does not apply<sup>11</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 I.e. by virtue of the provisions of the Leasehold Reform Act 1967 s 1A (as added) (see PARAS 1396, 1402 ante) or s 1AA (as added and amended) (see PARA 1397 ante).

4 I.e. by virtue of the provisions of *ibid* s 1B (as added and amended): see PARA 1401 ante.

5 I.e. notwithstanding *ibid* s 9(1) (as amended): see PARA 1441 ante.

6 I.e. in accordance with *ibid* s 9(1A) (as added and amended): see PARA 1442 ante.

7 I.e. *ibid* s 9A (as added and amended): see PARA 1447 post.

8 *Ibid* s 9(1C) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 66(1); amended by the Housing Act 1996 s 106, Sch 9 para 2(4); the Commonhold and Leasehold Reform Act 2002 s 147(1)).

9 I.e. in a case where the provision, or one of the provisions, by virtue of which the right to acquire the freehold arises is the Leasehold Reform Act 1967 s 1A(1) (as added): see PARA 1396 ante.

10 I.e. *ibid* s 9(1A) (as added and amended) applies with the omission of the assumption set out in s 9(1A)(b) (as added and amended): see PARA 1442 ante at head (b) in the text.

11 *Ibid* s 9(1C) (as added and amended: see note 8 supra).

**UPDATE****1443 Price payable on enfranchisement of house whose value or rent exceeds the applicable limit, or where tenancy terminable after death, marriage etc**

TEXT AND NOTES 8, 11--Leasehold Reform Act 1967 s 9(1C) further amended: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(iii) Purchase Price; Tenant's Right to Withdraw/1444. Price payable on enfranchisement of house where tenancy created by the grant of a lease in pursuance of the right to buy.

**1444. Price payable on enfranchisement of house where tenancy created by the grant of a lease in pursuance of the right to buy.**

Where, in the case of a tenancy or subtenancy<sup>1</sup> created by the grant of a lease in pursuance of the right to buy<sup>2</sup>, the tenant exercises his right to acquire the freehold under Part I of the Leasehold Reform Act 1967<sup>3</sup>, the price payable must be determined in accordance with the statutory provisions relating to houses within the higher range of rateable values<sup>4</sup>, notwithstanding that the specified circumstances<sup>5</sup> do not apply<sup>6</sup>. This does not, however, apply where the lease was granted in pursuance of the extended right to buy<sup>7</sup>.

1 The Housing Act 1985 s 175 (as amended) (see the text and notes 2-6 infra) applies: (1) to a tenancy created by the grant of a lease in pursuance of Pt V (ss 118-188) (as amended) (see PARA 1795 et seq post) of a dwelling house which is a house; (2) where the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) applies as if there had been a single tenancy granted for a term beginning at the same time as the term under a tenancy falling within head (1) supra and expiring at the same time as the term under a later tenancy, to that later tenancy also; (3) to any subtenancy directly or indirectly derived out of a tenancy falling within head (1) or head (2) supra; (4) to a tenancy granted in substitution for a tenancy or subtenancy falling within heads (1)-(3) supra in pursuance of Pt I (as amended): Housing Act 1985 s 175(2)-(5). For the meaning of 'dwelling house' and 'house' for these purposes see PARA 1796 post.

2 As to the right to buy under the Housing Act 1985 see PARA 1795 et seq post. The Housing Act 1985 s 175 (as amended) (see note 1 supra; and the text and notes 3-6 infra) also applies where the lease was granted in pursuance of the right to acquire under the Housing Act 1996 ss 16-18 (as amended) (see PARA 1804 et seq): see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Schs 1, 2.

3 Ie under the Leasehold Reform Act 1967 Pt I (as amended): see PARA 1389 et seq ante, PARA 1445 et seq post.

4 Ie in accordance with ibid s 9(1A) (as added and amended): see PARA 1442 ante.

5 Ie the circumstances specified in ibid s 9(1A) (as added and amended): see PARA 1442 ante.

6 Housing Act 1985 s 175(1) (amended by the References to Rating (Housing) Regulations 1990, SI 1990/434, reg 2, Schedule para 19).

7 See the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3, Schedule para 55. As to the extended right to buy see PARA 1798 post.

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#### **1445. Price payable on enfranchisement of house where lease has been extended.**

Where, in a case in which the price payable for a house<sup>1</sup> and premises<sup>2</sup> is to be determined in accordance with the statutory provisions applying to houses within the higher range of rateable values<sup>3</sup>, the tenancy<sup>4</sup> has been extended under Part I of the Leasehold Reform Act 1967<sup>5</sup>, then:

- 3181 (1) if the relevant time<sup>6</sup> is on or before the original term date, the statutory assumptions<sup>7</sup> apply as if the tenancy is to terminate on the original term date; and  
 3182 (2) if the relevant time is after the original term date, certain of the statutory assumptions<sup>8</sup> apply as if the tenancy had terminated on the original term date and the assumption that the tenant has a statutory right to remain in the house and premises<sup>9</sup> is modified<sup>10</sup>.

The price payable for a house and premises where the tenancy of the house and premises has been extended<sup>11</sup> and the notice of the desire to have the freehold<sup>12</sup> was given, whether by the tenant or a subtenant, after the original term date of the tenancy, must be determined<sup>13</sup> in accordance with the statutory provisions relating to houses within the higher range of rateable values<sup>14</sup>; but in any such case the special statutory provisions relating to the compensation payable<sup>15</sup> have effect for determining whether any additional amount is payable by way of compensation<sup>16</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 Ie in accordance with ibid s 9(1A) (as added and amended): see PARA 1442 ante.

4 For the meaning of 'tenancy' see PARA 1398 ante.

5 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1447 et seq post.

6 For the meaning of 'the relevant time' see PARA 1391 note 4 ante.

7 Ie the assumptions set out in the Leasehold Reform Act 1967 s 9(1A) (as added and amended): see PARA 1442 ante.

8 Ie the assumptions set out in ibid s 9(1A)(a), (c), (e) (as added and amended): see PARA 1442 ante at heads (a), (c), (e) in the text.

9 Ie the assumption set out in ibid s 9(1A)(b) (as added and amended): see PARA 1442 ante at head (b) in the text. That assumption is modified by omitting the words 'at the end of the tenancy'.

10 Ibid s 9(1AA) (added by the Commonhold and Leasehold Reform Act 2002 s 143(4)).

11 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 et seq post.

12 Ie the notice under ibid s 8(1): see PARA 1439 ante.

13 Ie notwithstanding ibid s 9(1) (as amended): see PARA 1441 ante.

14 Ie in accordance with ibid s 9(1A) (as added and amended): see PARA 1442 ante.

15 *Ibid* s 9A (as added and amended): see PARA 1447 post.

16 *Ibid* s 9(1C) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 66(1); amended by the Housing Act 1996 s 106, Sch 9 para 2(4); the Commonhold and Leasehold Reform Act 2002 s 147(1)).

## UPDATE

### **1445 Price payable on enfranchisement of house where lease has been extended**

TEXT AND NOTE 16--Leasehold Reform Act 1967 s 9(1C) further amended: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### **1446. Purchaser unable or unwilling to purchase at the price.**

On ascertaining<sup>1</sup> the amount payable, or likely to be payable, as the price for a house<sup>2</sup> and premises<sup>3</sup>, but not more than one month after the amount payable has been determined by agreement or otherwise, the tenant<sup>4</sup> may give written notice to the landlord<sup>5</sup> that he is unable or unwilling to acquire the house and premises at the price he must pay<sup>6</sup>.

Thereupon the notice of his desire to have the freehold<sup>7</sup> ceases to have effect, and he is liable to make such compensation as may be just to the landlord in respect of the interference, if any, by the notice with the exercise by the landlord of his power to dispose of or deal with the house and premises or any neighbouring property<sup>8</sup>; and any further notice of his desire to have the freehold with respect to the house or any part of it, with or without other property, is void if given within the following 12 months<sup>9</sup>.

Where a tenant, having given notice of a desire to have the freehold, gives after the relevant time<sup>10</sup> a further notice such as is described above of his inability or unwillingness to acquire the house and premises at the price he must pay, he may with that further notice give a notice of his desire to have an extended lease, if he then has a right to such a lease<sup>11</sup>.

1 *Ibid* in accordance with the Leasehold Reform Act 1967 s 9 (as amended): see PARA 1441 et seq ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 For the meaning of 'tenant' see PARA 1432 note 1 ante.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 Leasehold Reform Act 1967 s 9(3).

7 *Ibid* the notice under *ibid* s 8 (as amended): see PARA 1439 ante.

8 *Ibid* s 9(3)(a). As to proceedings for the recovery of compensation see PARA 1529 post.

9 Ibid s 9(3)(b) (amended by the Commonhold and Leasehold Reform Act 2002 s 139(3)(a)). The time within which such a notice was void was previously three years: see the Leasehold Reform Act 1967 s 9(3)(b) as amended by the Housing Act 1980 s 141, Sch 21 para 1(2).

10 For the meaning of 'the relevant time' see PARA 1391 note 4 ante.

11 See the Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 2(1E) (as added); and PARA 1430 ante.

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#### **(iv) Compensation payable by Tenant**

##### **1447. Compensation payable on enfranchisement of house in certain special cases.**

If, in a case where the right to acquire the freehold of a house<sup>1</sup> and premises<sup>2</sup> arises by virtue of any one or more of the following:

3183 (1) the house having a value or rent which exceeds the applicable limit<sup>3</sup>; or

3184 (2) the tenancy being terminable after a death, a marriage or the formation of a civil partnership<sup>4</sup>,

or where the tenancy<sup>5</sup> of the house and premises has been extended<sup>6</sup> and the notice of the desire to have the freehold<sup>7</sup> was given, whether by the tenant or a subtenant, after the original term date of the tenancy, the landlord<sup>8</sup> will suffer any loss or damage consisting of:

3185 (a) any diminution in value of any interest of the landlord in other property resulting from the acquisition of his interest in the house and premises; and

3186 (b) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property,

there is payable to him such amount as is reasonable to compensate him for that loss or damage<sup>9</sup>.

The kinds of loss falling within head (b) above include<sup>10</sup> loss of development value<sup>11</sup> in relation to the house and premises to the extent that it is referable as mentioned in head (b) above<sup>12</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 Ie by virtue of the provisions of the Leasehold Reform Act 1967 s 1A (as added) (see PARAS 1396, 1402 ante) or s 1AA (as added and amended) (see PARA 1397 ante).

4 Ie by virtue of the provisions of ibid s 1B (as added and amended): see PARA 1401 ante.

5 For the meaning of 'tenancy' see PARA 1398 ante.

6 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 et seq post.

7 le the notice under *ibid* s 8(1): see PARA 1439 ante.

8 For the meaning of 'landlord' see PARA 1432 note 1 ante.

9 Leasehold Reform Act 1967 s 9A(1), (2) (s 9A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 66(3); the Leasehold Reform Act 1967 s 9A(1) amended by the Housing Act 1996 s 106, Sch 9 para 2(5); the Commonhold and Leasehold Reform Act 2002 s 147(2)). In relation to any case falling within the Leasehold Reform Act 1967 s 9A(1) (as so added and amended): (1) any reference, however expressed, in s 8 (as amended) (see PARA 1439 ante, PARAS 1450-1451 post), s 9(3) (as amended) (see PARA 1446 ante) or s 9(5) (see PARA 1467 post), or in any of the provisions of s 10 et seq (as amended) (see PARA 1452 et seq post), to the price payable under s 9 (as amended) is to be construed as including a reference to any amount payable to the landlord under s 9A (as added and amended); and (2) for the purposes of determining any such separate price as is mentioned in s 5(4), Sch 1 para 7(1)(b) (as amended) (see PARA 1523 post), s 9A (as added and amended) accordingly applies, with any necessary modifications, to each of the superior interests in question: s 9A(5) (as so added).

10 le without prejudice to the generality of *ibid* s 9A(2)(b) (as added): see head (b) in the text.

11 For these purposes, 'development value', in relation to the house and premises, means any increase in the value of the landlord's interest in the house and premises which is attributable to the possibility of demolishing, reconstructing, or carrying out substantial works of reconstruction on, the whole or a substantial part of the house and premises: *ibid* s 9A(4) (as added: see note 9 supra).

12 *Ibid* s 9A(3) (as added: see note 9 supra).

## UPDATE

### **1447 Compensation payable on enfranchisement of house in certain special cases**

TEXT AND NOTE 9--Leasehold Reform Act 1967 s 9A(1) further amended: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### **1448. Compensation for postponement of termination in connection with ineffective claims.**

Where, on or after 15 January 1999:

3187 (1) a tenant<sup>1</sup> of any property makes a claim to acquire the freehold or an extended lease of it<sup>2</sup>; and

3188 (2) the claim is not made at least two years before the term date<sup>3</sup> of the tenancy in respect of which the claim is made ('the existing tenancy'),

the tenant is liable to pay compensation if the claim is not effective<sup>4</sup> and:

3189 (a) the making of the claim caused a notice served on the tenant specifying the date at which a long residential tenancy was to come to an end<sup>5</sup> to cease to have effect and the date on which the claim ceases to have effect<sup>6</sup> is later than four months before the termination date specified in the notice;

- 3190 (b) the making of the claim prevented the service of an effective notice specifying the date at which a long residential tenancy was to come to an end<sup>7</sup>, but did not cause a notice served under the relevant statutory provision<sup>8</sup> to cease to have effect, and the date on which the claim ceases to have effect is a date later than six months before the term date of the tenancy; or
- 3191 (c) the existing tenancy is continued by statute<sup>9</sup> by virtue of the claim<sup>10</sup>.

Such compensation becomes payable at the end of the appropriate period<sup>11</sup> and is the right of the person who is the tenant's immediate landlord at that time<sup>12</sup>. The amount which the tenant is liable to pay by way of compensation is equal to the difference between:

- 3192 (i) the rent for the appropriate period under the existing tenancy; and
- 3193 (ii) the rent which might reasonably be expected to be payable for that period were the property to which the existing tenancy relates let for a term equivalent to that period on the open market by a willing landlord on the following assumptions:
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32. (A) that no premium is payable in connection with the letting;
33. (B) that the letting confers no security of tenure; and
34. (C) that, except as otherwise provided by these provisions, the letting is on the same terms as the existing tenancy<sup>13</sup>.
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1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For these purposes, references to a claim to acquire the freehold or an extended lease are to be taken as references to a notice of a person's desire to acquire it under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1449 et seq post) and as including a claim made by a tenant not entitled to acquire it: s 27A(7)(a) (s 27A added by the Housing Act 1996 s 116, Sch 11 para 1(1)).

3 For the meaning of 'term date' see PARA 1400 note 12 ante.

4 For these purposes, a claim to acquire the freehold or an extended lease is not effective if it ceases to have effect for any reason other than: (1) the acquisition in pursuance of the claim of the interest to which it relates; or (2) the lapsing of the claim under any provision of the Leasehold Reform Act 1967 excluding the tenant's liability for costs: s 27A(5) (as added: see note 2 supra).

5 I.e a notice served under the Local Government and Housing Act 1989 Sch 10 para 4(1): see PARA 1249 ante.

6 For these purposes, references to the date on which a claim ceases to have effect are to be taken, in relation to a notice which is not a valid notice, as references to the date on which the notice is set aside by the court or withdrawn or would, if valid, cease to have effect, that date being taken, where the notice is set aside, or would (if valid) cease to have effect, in consequence of a court order, to be the date when the order becomes final: Leasehold Reform Act 1967 s 27A(7)(b) (as added: see note 2 supra). For the purposes of Pt I (as amended) an order of a court is to be treated as becoming final (1) if not appealed against, on the expiration of the time for bringing an appeal; or (2) if appealed against and not set aside in consequence of the appeal, at the time when the appeal and any further appeal is disposed of by the determination of it and the expiration of the time for bringing a further appeal (if any) or by its being abandoned or otherwise ceasing to have effect: s 37(7).

7 I.e the service of an effective notice under Local Government and Housing Act 1989 Sch 10 para 4(1): see PARA 1249 ante.

8 See note 5 supra.

9 I.e under the Leasehold Reform Act 1967 s 22(1) (as amended), Sch 3 para 3(1): see PARA 1435 ante.

10 Ibid s 27A(1), (2) (as added: see note 2 supra).

11 For these purposes, the appropriate period is (1) in a case falling within s 27A(2)(a) (as added) (see head (a) in the text), the period beginning with the termination date specified in the notice mentioned therein and



ending with the earliest date of termination which could have been specified in a notice under the Local Government and Housing Act 1989 Sch 10 para 4(1) served immediately after the date on which the claim ceases to have effect, or, if the existing tenancy is terminated before then, with the date of its termination; (2) in a case falling within the Leasehold Reform Act 1967 s 27A(2)(b) (as added) (see head (b) in the text), the period beginning with the later of six months from the date on which the claim is made and the term date of the existing tenancy and ending six months after the date on which the claim ceases to have effect, or, if the existing tenancy is terminated before then, with the date of its termination; and (3) in a case falling within s 27A(2)(c) (as added) (see head (c) in the text), the period for which the existing tenancy is continued under Sch 3 para 3(1): s 27A(6) (as added: see note 2 supra).

12 Ibid s 27A(3) (as added: see note 2 supra).

13 Ibid s 27A(4) (as added: see note 2 supra).

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#### **1449. Compensation for postponement of termination where change in immediate reversion.**

Where a tenant's<sup>1</sup> liability to pay compensation for postponement of the termination of a tenancy<sup>2</sup> relates to a period during which there has been a change in the interest immediately expectant on the determination of his tenancy<sup>3</sup>, such compensation<sup>4</sup> becomes payable at the end of the appropriate period<sup>5</sup> and there is a separate right to compensation in respect of each of the interests which, during that period, have been immediately expectant on the determination of the existing tenancy<sup>6</sup>. Such compensation is the right:

3194 (1) in the case of the interest which is immediately expectant on the determination of the existing tenancy at the end of the appropriate period, of the person in whom that interest is vested at that time; and

3195 (2) in the case of an interest which ceases during the appropriate period to be immediately expectant on the determination of the existing tenancy, of the person in whom the interest was vested immediately before it ceased to be so expectant<sup>7</sup>.

The amount which the tenant is liable to pay in respect of any interest is equal to the difference between:

3196 (a) the rent under the existing tenancy for the part of the appropriate period during which the interest was immediately expectant on the determination of that tenancy; and

3197 (b) the rent which might reasonably be expected to be payable for that part of that period were the property to which the existing tenancy relates let for a term equivalent to that part of that period on the open market by a willing landlord on the following assumptions:

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35. (i) that no premium is payable in connection with the letting;

36. (ii) that the letting confers no security of tenure; and

37. (iii) that, except as otherwise provided by these provisions, the letting is on the same terms as the existing tenancy<sup>8</sup>.

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- 1 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 2 le his liability under the Leasehold Reform Act 1967 s 27A (as added): see PARA 1448 ante.
- 3 For the meaning of 'tenancy' see PARA 1398 ante.
- 4 le compensation under the Leasehold Reform Act 1967 s 27A(2) (as added): see PARA 1448 ante.
- 5 Ibid s 27A(6) (as added) (meaning of 'the appropriate period': see PARA 1448 note 11 ante) applies for these purposes: see s 27B(1), (3) (s 27B added by the Housing Act 1996 s 116, Sch 11 para 1(1)).
- 6 Leasehold Reform Act 1967 s 27B(1) (as added: see note 5 supra), s 27A(3) (substituted for these purposes by s 27B(2) (as so added)).
- 7 Ibid s 27A(4) (substituted for these purposes by s 27B(2) (as added: see note 5 supra).
- 8 Ibid s 27A(4A) (substituted for these purposes by s 27B(2) (as added: see note 5 supra).

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## **(v) Conveyance**

### **1450. Conveyance free of incumbrances.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> gives to the landlord<sup>3</sup> written notice of his desire to have the freehold, the landlord is bound to make to the tenant, and the tenant to accept, a grant of the house and premises<sup>4</sup> for an estate in fee simple absolute, subject to the tenancy<sup>5</sup> and to tenant's incumbrances<sup>6</sup>, but otherwise free of incumbrances<sup>7</sup>.

A conveyance so executed<sup>8</sup>:

- 3198 (1) has effect<sup>9</sup> to overreach any incumbrance capable of being overreached<sup>10</sup> as if, where the interest conveyed is settled land, the conveyance was made under the powers of the Settled Land Act 1925<sup>11</sup> and as if the statutory requirements as to payment of the capital money<sup>12</sup> allowed any part of the purchase price paid or applied in accordance with the statutory provisions relating to rentcharges and mortgages<sup>13</sup> to be so paid or applied;
- 3199 (2) may not be made subject to any incumbrance capable of being overreached by the conveyance, but, where they are not capable of being overreached, and except as otherwise provided<sup>14</sup>, must be made subject<sup>15</sup> to rentcharges<sup>16</sup>.

- 1 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 2 For the meaning of 'house' see PARA 1390 ante.
- 3 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 4 For the meaning of 'premises' see PARA 1391 ante.
- 5 For the meaning of 'tenancy' see PARA 1398 ante. For these purposes, the reference is to the existing tenancy: *Mosley v Hickman* (1986) 52 P & CR 248, 18 HLR 292, CA.
- 6 For the meaning of 'tenant's incumbrances' and 'incumbrances' see PARA 1439 note 10 ante.

- 7 See the Leasehold Reform Act 1967 s 8(1); and PARA 1439 ante.
- 8 Ie a conveyance executed to give effect *ibid* s 8 (as amended).
- 9 Ie under the Law of Property Act 1925 s 2(1) (as amended): see REAL PROPERTY vol 39(2) (Reissue) PARAS 247-252.
- 10 Ie under *ibid* s 2 (as amended).
- 11 See SETTLEMENTS vol 42 (Reissue) PARA 874. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.
- 12 Ie the requirements of the Law of Property Act 1925 s 2(1) (as amended).
- 13 Ie the Leasehold Reform Act 1967 ss 11-13 (as amended): see PARAS 1460-1464 post.
- 14 Ie by *ibid* s 11 (as amended): see PARAS 1460-1461 post.
- 15 Ie subject to rentcharges redeemable under the Rentcharges Act 1977 ss 8-10 (as amended) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 900 et seq) and those falling within s 2(3)(c), (d) (estate rentcharges and rentcharges imposed under certain enactments: see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774).
- 16 Leasehold Reform Act 1967 s 8(4) (amended by the Rentcharges Act 1977 s 17(1), Sch 1 para 4(1)).

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#### **1451. Purchaser deemed to be purchaser for valuable consideration.**

Notwithstanding that, on a grant<sup>1</sup> to a tenant<sup>2</sup> of a house<sup>3</sup> and premises<sup>4</sup> no payment, or a nominal payment only, is required from the tenant for the price of the house and premises, the tenant is nevertheless deemed for all purposes to be a purchaser for valuable consideration in money or money's worth<sup>5</sup>.

- 1 Ie under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450 ante.
- 2 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 3 For the meaning of 'house' see PARA 1390 ante.
- 4 For the meaning of 'premises' see PARA 1391 ante.
- 5 Leasehold Reform Act 1967 s 8(5).

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#### **1452. Covenant for title and implied clauses.**

Except for the purpose of preserving or recognising any existing interest of the landlord<sup>1</sup> in tenant's incumbrances<sup>2</sup> or any existing right or interest of any other person, a conveyance<sup>3</sup> must not be framed so as to exclude or restrict the general words implied in conveyances<sup>4</sup>, or the implied all estate clause<sup>5</sup>, unless the tenant consents to the exclusion or restriction; but the landlord is not bound to convey to the tenant any better title than that which he has or could require to be vested in him<sup>6</sup>.

The landlord must not be required to enter into any covenant for title beyond those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994<sup>7</sup> in a case where a disposition is expressed to be made with limited title guarantee<sup>8</sup>; and in the absence of agreement to the contrary he is entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant for further assurance implied<sup>9</sup> by virtue of that Act<sup>10</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 For the meaning of 'tenant's incumbrances' see PARA 1439 note 10 ante; and for the meaning of 'tenant' see PARA 1432 note 1 ante.

3 I.e. a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450 ante.

4 I.e. by the Law of Property Act 1925 s 62: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.

5 I.e. the clause implied under ibid s 63: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 240.

6 Leasehold Reform Act 1967 s 10(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), (2), Sch 1 para 5(1), Sch 2).

7 I.e. under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

8 As to dispositions made with limited title guarantee see SALE OF LAND vol 42 (Reissue) PARA 351.

9 I.e. the covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 s 2(1)(b): see SALE OF LAND vol 42 (Reissue) PARA 350.

10 Leasehold Reform Act 1967 s 10(1A) (added by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 5(1)).

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### **1453. Rights of support, light, air etc.**

As regards rights of any of the following descriptions, that is to say:

- 3200 (1) rights of support for any building or part of a building;
- 3201 (2) rights to the access of light and air to any building or part of a building;
- 3202 (3) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;
- 3203 (4) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions,

a conveyance<sup>1</sup> has effect<sup>2</sup>:

3204 (a) to grant with the house<sup>3</sup> and premises<sup>4</sup> all such easements and rights over other property, so far as the landlord<sup>5</sup> is capable of granting them, as are necessary to secure to the tenant<sup>6</sup> as nearly as may be the same rights as at the relevant time<sup>7</sup> were available to him under or by virtue of the tenancy<sup>8</sup> or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made on the severance of the house and premises or any part thereof from other property then comprised in the same tenancy; and

3205 (b) to make the house and premises subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any such grant, reservation or agreement as is mentioned in head (a) above<sup>9</sup>.

1 le a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2 le by virtue of ibid s 10(2) but without prejudice to any larger operation it may have apart therefrom.

3 For the meaning of 'house' see PARA 1390 ante.

4 For the meaning of 'premises' see PARA 1391 ante.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 For the meaning of 'tenant' see PARA 1432 note 1 ante.

7 For the meaning of 'relevant time' see PARA 1391 note 4 ante.

8 For the meaning of 'tenancy' see PARA 1398 ante.

9 Leasehold Reform Act 1967 s 10(2). In relation to (1) a house and premises in an area for which a scheme of management has been registered under s 19 (as amended) (see PARA 1498 et seq post); and (2) any acquisition such as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) (as substituted) (see PARA 1734 post) where a scheme is registered in the appropriate local land charges register, the Leasehold Reform Act 1967 s 10 (as amended) has effect subject to the provisions of the scheme: see s 19(10)(b); and PARA 1503 post; the Leasehold Reform, Housing and Urban Development Act 1993 s 70(12); and PARA 1736 note 24 post.

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#### **1454. Rights of way.**

As regards rights of way, a conveyance<sup>1</sup> must include:

3206 (1) such provisions, if any, as the tenant<sup>2</sup> may require for the purpose of securing to him rights of way over property not conveyed, so far as the landlord<sup>3</sup> is capable of granting them, being rights of way which are necessary for the reasonable enjoyment of the house<sup>4</sup> and premises<sup>5</sup>, as they have been enjoyed during the tenancy<sup>6</sup> and in accordance with its provisions; and

3207 (2) such provisions, if any, as the landlord may require for the purpose of making the property conveyed subject to rights of way necessary for the reasonable enjoyment of other property, being property in which at the relevant time<sup>7</sup> the landlord has an interest, or to rights of way granted or agreed to be granted before the relevant time by the landlord or by the person then entitled to the reversion on the tenancy<sup>8</sup>.

Neither the landlord nor the tenant is entitled<sup>9</sup> to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view:

3208 (a) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

3209 (b) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses<sup>10</sup>.

1    Ie a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2    For the meaning of 'tenant' see PARA 1432 note 1 ante.

3    For the meaning of 'landlord' see PARA 1432 note 4 ante.

4    For the meaning of 'house' see PARA 1390 ante.

5    For the meaning of 'premises' see PARA 1391 ante.

6    For the meaning of 'tenancy' see PARA 1398 ante.

7    For the meaning of 'relevant time' see PARA 1391 note 4 ante.

8    Leasehold Reform Act 1967 s 10(3). As to the rights of neighbouring owners after enfranchisement see *Kent v Kavanagh* [2006] EWCA Civ 162, [2006] 2 All ER 645, [2006] 10 EG 155 (CS).

9    Ie under the Leasehold Reform Act 1967 s 10(3): see the text and notes 1-8 supra.

10   Ibid s 10(5). As to the effect of s 10 (as amended) in relation to a house and premises in an area for which a scheme of management has been registered under s 19 (as amended) see PARA 1453 note 9 ante. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 70(12); and PARA 1736 note 24 post.

## UPDATE

### 1454 Rights of way

NOTE 8--*Kent*, cited, reported at [2007] Ch 1.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(v) Conveyance/1455. Restrictive covenants.

### 1455. Restrictive covenants.

As regards restrictive covenants, that is to say any covenant or agreement restrictive of the user of any land or premises<sup>1</sup>, a conveyance<sup>2</sup> must include:

- 3210 (1) such provisions, if any, as the landlord<sup>3</sup> may require to secure that the tenant<sup>4</sup> is bound by, or to indemnify the landlord against breaches of, restrictive covenants which affect the house<sup>5</sup> and premises otherwise than by virtue of the tenancy<sup>6</sup> or any agreement collateral thereto and are enforceable for the benefit of other property; and
- 3211 (2) such provisions, if any, as the landlord or the tenant may require to secure the continuance, with suitable adaptations, of restrictions arising by virtue of the tenancy or any agreement collateral thereto, being either:
- 195 38. (a) restrictions affecting the house and premises which are capable of benefiting other property and, if enforceable only by the landlord, are such as materially to enhance the value of the other property; or
39. (b) restrictions affecting other property which are such as materially to enhance the value of the house and premises;
- 196 3212 (3) such further provisions, if any, as the landlord may require to restrict the use of the house and premises in any way which will not interfere with the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy but will materially enhance the value of other property in which the landlord has an interest<sup>7</sup>.

Neither the landlord nor the tenant is entitled<sup>8</sup> to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view:

- 3213 (i) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and
- 3214 (ii) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses<sup>9</sup>.

Where the landlord is so required to enter into a restrictive covenant, the person entering into the covenant as landlord is entitled to limit his personal liability to breaches of the covenant for which he is responsible<sup>10</sup>.

1 'User' is to be construed widely for these purposes and is capable of including building and development: *Langevad v Chiswick Quay Freeholds Ltd* (1998) 80 P & CR 26, [1999] 1 EGLR 61, CA. For the meaning of 'premises' see PARA 1391 ante.

2 I.e. a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

3 For the meaning of 'landlord' see PARA 1432 note 4 ante.

4 For the meaning of 'tenant' see PARA 1432 note 1 ante.

5 For the meaning of 'house' see PARA 1390 ante.

6 For the meaning of 'tenancy' see PARA 1398 ante.

7 Leasehold Reform Act 1967 s 10(4).

8 I.e. under *ibid* s 10(4): see the text and notes 1-7 *supra*.

9 *Ibid* s 10(5). As to the application of s 10 (as amended) in relation to a house and premises in an area for which a scheme of management has been registered under s 19 (as amended) see PARA 1453 note 9 ante. See also the Leasehold Reform, Housing and Urban Development Act 1993 s 70(12); and PARA 1736 note 24 post.

In *Peck v Trustees of Hornsey Parochial Charities* (1970) 22 P & CR 789, Lands Tribunal, covenants restricting the user of the house and premises to that of a private dwelling house only, and prohibiting the making of alterations to the premises, were held to fall within the Leasehold Reform Act 1967 s 10(4), (5), subject to the proviso that the landlord could not unreasonably withhold his consent to a change of use or an alteration, nor demand a fine or premium as a condition of giving that consent.

10 Ibid s 10(6).

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### **1456. Reservation of future right to develop.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> acquires the freehold<sup>4</sup>, the landlord<sup>5</sup> being:

- 3215 (1) a local authority<sup>6</sup>; or
- 3216 (2) the Commission for the New Towns or a development corporation<sup>7</sup>;
- 3217 (3) any university body<sup>8</sup>; or
- 3218 (4) a housing action trust<sup>9</sup>,

there must be included in the conveyance<sup>10</sup>, if so required by the landlord, such covenants on the part of the tenant restricting the carrying out of development or clearing of land as are necessary to reserve the land for possible development by the landlord<sup>11</sup>.

Where a covenant is entered into to give effect to the above provisions, it must be expressed to be so entered into<sup>12</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1457 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 Leasehold Reform Act 1967 s 29(1). For these purposes, 'local authority' means a local authority as defined in s 28(5)(a) (as amended) (see PARA 1487 note 2 post): s 29(5).

7 Ibid s 29(1)-(4) has effect in relation to the Commission for the New Towns (now part of English Partnerships: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq) and to any development corporation within the meaning of the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq) as if any reference therein or in the Leasehold Reform Act 1967 Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to that Commission or corporation: s 29(6)(a); Interpretation Act 1978 s 17(2)(a).

8 The Leasehold Reform Act 1967 s 29(1)-(4) has effect in relation to any university body as defined in s 28(5)(c) (see PARA 1487 note 7 post) as if any reference therein or in Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to that university body; but a university body may not require a covenant to be entered into under s 29 (as amended) unless it has first obtained the consent of the Secretary of State or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister: s 29(6)(b). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.



Where the landlord is a university body, the possible development for which land may be reserved by a covenant entered into to give effect to s 29(1) or s 29(2) (see PARA 1477 post) includes development by a related university body, within the meaning of s 28(6)(b) (see PARA 1487 note 13 post): s 29(6B) (added by the Housing Act 1980 s 141, Sch 21 para 5).

9 The Leasehold Reform Act 1967 s 29(1)-(4) has effect in relation to a housing action trust (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq) as if any reference therein or in Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to the trust: s 29(6C) (added by the Housing Act 1988 s 140(1), Sch 17 para 16).

10 le under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

11 Ibid s 29(1). Section 29 (as amended) applies, and applies only, where the authority entitled to require the covenant thereunder is the estate owner in respect of the fee simple and there is no tenancy carrying an expectation of possession of 30 years or more: s 5(4), Sch 1 para 6(2).

Where a tenant of a house and premises acquires the freehold, the landlord being a local authority, and afterwards the local authority or any other person acquires compulsorily any interest in the property, then, for the purpose of assessing compensation in accordance with the Land Compensation Act 1961 (see COMPULSORY ACQUISITION OF LAND), no account is to be taken of any increase in the value of that interest which is attributable to the carrying out of development in contravention of a covenant entered into to give effect to the Leasehold Reform Act 1967 s 29(1) or (2), or to any prospect of carrying out any such development, and any compensation payable to a tenant under s 17 (see PARAS 1485-1486 post) must be assessed without regard to any increase in the value of his interest which would be disregarded under this provision on a compulsory purchase of that interest: s 29(4).

Schedule 4 Pt II (paras 4-5) (as amended) has effect to enable property to be reacquired compulsorily where it is subject to a covenant entered into to give effect to s 29(1) with the Commission for the New Towns or a university body: s 29(7) (amended by the Development of Rural Wales Act 1976 Sch 7 para 5(1), (3); the Government of Wales Act 1998 s 152, Sch 18 Pt IV). The Acquisition of Land Act 1981 (see generally COMPULSORY ACQUISITION OF LAND) applies to such a compulsory purchase: see the Leasehold Reform Act 1967 Sch 4 para 5(2) (substituted by the Acquisition of Land Act 1981 s 34, Sch 4 para 16(3)).

12 Leasehold Reform Act 1967 s 29(3). Schedule 4 Pt I (paras 1-3) (as amended) (see PARA 1458 post) has effect with respect to the operation and enforcement of any covenant so entered into: s 29(3).

## UPDATE

### 1456 Reservation of future right to develop

NOTES 7, 11--1967 Act s 29(6)(a), (7) further amended: Housing and Regeneration Act 2008 Sch 8 para 7.

NOTE 8--Omit words 'but a university ... relevant Welsh minister' and 'includes development by ... of s 28(6)(b)': 1967 Act s 29(6), (6B) (amended by the Education and Inspections Act 2006 s 177, Sch 18 Pt 2).

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### 1457. Reservation of right of pre-emption in new town etc.

Where a tenant<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> acquires the freehold<sup>4</sup>, the landlord<sup>5</sup> being:

- 3219 (1) the Commission for the New Towns<sup>6</sup>;
- 3220 (2) a development corporation<sup>7</sup>; or
- 3221 (3) the council of any former overspill area<sup>8</sup>,

there must, if so required by the landlord, be included in the conveyance<sup>9</sup> the following covenants on the part of the tenant, that is to say:

- 3222 (a) a covenant that no tenancy<sup>10</sup> of the property comprised in the conveyance or any part of that property shall be granted except with the consent in writing of the landlord; and
- 3223 (b) such covenant as appears to the landlord to be requisite for securing that, in the event of any proposal to sell that property or any part of it, the landlord will have a right of pre-emption at the specified<sup>11</sup> price<sup>12</sup>.

Where a covenant is entered into to give effect to the above provisions, it must be expressed to be so entered into<sup>13</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1459 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

7 Ie any development corporation within the meaning of the New Towns Act 1981: see TOWN AND COUNTRY PLANNING vol 46 (Reissue) PARA 1322 et seq.

8 Ie in the council of any receiving district for the purposes of the Town Development Act 1952 (repealed) in respect of housing provided by that council by virtue of s 5 (repealed).

9 Ie under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

10 For the meaning of 'tenancy' see PARA 1398 ante.

11 Ie the price mentioned in the Leasehold Reform Act 1967 s 30(4). The price so referred to, in relation to an interest in any property, is a sum equal to, and in default of agreement to be determined in the like manner as, the compensation which would be payable for that interest if acquired by the execution, on such date as may be determined in accordance with the covenant, of a vesting declaration under Sch 4 (as amended): s 30(4).

12 Ibid s 30(1), (7) (amended by the Development of Rural Wales Act 1976 s 27, Sch 7 para 5(1), (4); the Housing (Consequential Provisions) Act 1985 s 3, Sch 1 Pt I; the Government of Wales Act 1998 s 152, Sch 18 Pt IV). The Leasehold Reform Act 1967 s 30 (as amended) applies, and applies only, where the authority entitled to require the covenant under s 30 (as amended) is the estate owner in respect of the fee simple and there is no tenancy carrying an expectation of possession of 30 years or more: s 5(4), Sch 1 para 6(2).

13 Ibid s 30(3). Schedule 4 Pt I (paras 1-3) (as amended) (see PARA 1458 post) has effect, with respect to the operation and enforcement of any covenant so entered into, as it applies in the case of a covenant entered into with the same body to give effect to s 29(1) (see PARA 1456 ante): s 30(3).

## UPDATE

### 1457 Reservation of right of pre-emption in new town etc

TEXT AND NOTE 12--Leasehold Reform Act 1967 s 30(7) further amended: Housing and Regeneration Act 2008 Sch 8 para 8.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(v) Conveyance/1458. Enforcement of relevant covenants regarding reservation of future right to develop or right of pre-emption.

**1458. Enforcement of relevant covenants regarding reservation of future right to develop or right of pre-emption.**

A covenant entered into in accordance with the provisions relating to reservation of the future right to develop<sup>1</sup> or the right of pre-emption<sup>2</sup> ('a relevant covenant') is not enforceable by any means other than those provided by the provisions set out below<sup>3</sup>.

A relevant covenant affecting land other than registered land may be registered under the Land Charges Act 1925<sup>4</sup>, if it would not otherwise be so registrable as a restrictive covenant or as an estate contract, and is binding<sup>5</sup> upon every successor of the covenantor<sup>6</sup>, if it would not otherwise be binding upon every such successor<sup>7</sup>.

Where a relevant covenant affects registered land, the covenant may be the subject of a notice in the register of title kept under the Land Registration Act 2002<sup>8</sup>, if it would not otherwise be capable of being the subject of such a notice; and where a notice in respect of the covenant has been entered in that register, it is binding upon every successor of the covenantor, if it would not otherwise be binding upon every such successor<sup>9</sup>.

The statutory power of the Lands Tribunal to discharge or modify restrictive covenants affecting land<sup>10</sup> does not have effect in relation to any relevant covenant<sup>11</sup>; and the rule against perpetuities and any enactment relating to that rule does not apply to any right conferred by, or exercisable in relation to, a relevant covenant, if it would otherwise apply to any such right<sup>12</sup>.

Where it appears to a local authority<sup>13</sup> that a relevant covenant entered into on a disposition by that authority has been broken, the authority may serve written notice on any one or more of the following persons, that is to say:

- 3224 (1) any person for the time being entitled to the interest disposed of either in the whole or in part of the land comprised in the disposition ('the land under covenant'); and
- 3225 (2) any person entitled to an interest consisting of a tenancy<sup>14</sup>, whether of the whole or of part of the land under covenant, which has been created, directly or indirectly, out of the interest disposed of<sup>15</sup>.

A notice so served on any person must specify the covenant and the matters in respect of which it is alleged by the authority that the covenant has been broken and must state that, after the end of such period, not being less than six weeks from the date of service of the notice, as may be specified in the notice, the authority proposes to execute a vesting declaration<sup>16</sup> in respect of that person's interest in the land under covenant unless before the end of that period he serves a counter-notice<sup>17</sup> on the authority<sup>18</sup>.

Any person on whom a notice is served under heads (1) and (2) above may, before the end of the period specified in the notice<sup>19</sup>, serve on the authority a counter-notice in writing objecting to the notice on such one or more of the following grounds as may be specified in the counter-notice, that is to say:

- 3226 (a) that the relevant covenant specified in the notice served on him has not been broken as alleged in that notice;
- 3227 (b) that, if that covenant has been so broken, the breach does not relate to any part of the land under covenant in which the person serving the counter-notice has an interest;
- 3228 (c) that in the circumstances he ought to be relieved against the execution of a vesting declaration<sup>20</sup> in respect of his interest<sup>21</sup>.

Where a person has so served a counter-notice and that counter-notice has not been withdrawn, the authority must not execute a vesting declaration<sup>22</sup> in respect of his interest except with the leave of the court; and on any application for such leave:

- 3229 (i) where the grounds of objection specified in the counter-notice consist of or include that which is specified in head (a) or head (b) above, the court may not grant leave unless satisfied that the objection on that ground is not well-founded; and
- 3230 (ii) without prejudice to head (i) above, where the grounds of objection specified in the counter-notice consist of or include that which is specified in head (c) above, the court, if having regard to the conduct of the parties and to all the other circumstances it appears to the court to be just and equitable to do so, may refuse to grant leave, either unconditionally or on such terms as to costs, damages or otherwise as the court thinks fit<sup>23</sup>.

Where a local authority has served on any person a notice under the above provisions in respect of such an interest as is mentioned in head (1) or head (2) above, then the authority may<sup>24</sup> execute a vesting declaration in respect of that interest:

- 3231 (A) at any time within the six months following the end of the period specified in the notice<sup>25</sup>, if no counter-notice is served<sup>26</sup> before the end of that period; or
- 3232 (B) if such a counter-notice is so served but is withdrawn, at any time within the six months following the withdrawal of the counter-notice; or
- 3233 (C) if such a counter-notice is so served and is not withdrawn, at any time within the six months following the time when the order giving leave<sup>27</sup> becomes final<sup>28</sup>.

A vesting declaration under these provisions in respect of an interest in land must be in such form as may be prescribed<sup>29</sup>; and where such a vesting declaration is executed the interest to which it relates vests in the authority on such date as is specified in that behalf in the declaration<sup>30</sup>. Any reference in the Land Compensation Act 1961 to the compulsory acquisition of land, or of an interest in land, is to be construed as including a reference to the execution of a vesting declaration under these provisions in respect of an interest in land; and that Act applies in relation to the execution of such a declaration as if the authority, having been duly authorised to acquire that interest compulsorily in accordance with the Acquisition of Land Act 1981, had served notice to treat in respect of that interest on the date of execution of the declaration<sup>31</sup>. In assessing compensation in accordance with the Land Compensation Act 1961 in respect of an interest in land vested in a local authority by such a vesting declaration, nothing is to be included for damage sustained by reason that the land in which the interest subsists is severed from other land held therewith, or for disturbance or any other matter not directly based on the value of land or of an interest in land; and in a case where immediately before the execution of the declaration the interest is subject to a right of pre-emption<sup>32</sup> no account is to be taken of any diminution of the value of the interest which is attributable to that right<sup>33</sup>.

- 1    le in accordance with the Leasehold Reform Act 1967 s 29 (as amended): see PARA 1456 ante.
- 2    le in accordance with *ibid* s 30 (as amended): see PARA 1457 ante.
- 3    *Ibid* ss 29(3), 30(3), Sch 4 para 1(1).
- 4    le under the Land Charges Act 1972 s 2(4) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 631.
- 5    le subject to *ibid* s 2(5) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 635.
- 6    For these purposes, 'successor of the covenantor', in relation to the covenants entered into on any disposition, means a person, other than the covenantor, who is for the time being entitled (1) to the interest disposed of, either in the whole or in part of the property comprised in the disposition; or (2) to an interest consisting of a tenancy (whether of the whole or of part of that property) which has been created (directly or indirectly) out of the interest disposed of: Leasehold Reform Act 1967 Sch 4 para 1(4). Where any such interest as is mentioned in head (1) or head (2) *supra* is acquired (whether compulsorily or by agreement) by an authority possessing compulsory purchase powers within the meaning of the Town and Country Planning Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 933 note 2) (including any government department), nothing in the enactment which authorises that acquisition, or in any other enactment conferring powers on that authority, is to be construed as relieving that authority from the obligation to comply with any relevant covenant to which that interest remains subject; but the rights of the covenantee must, for the purposes of any such acquisition, be treated as an interest in the land affected, and as capable of being, and liable to be, extinguished by being compulsorily acquired in like manner and subject to the like conditions as other interests of the covenantee would be: Leasehold Reform Act 1967 Sch 4 para 1(7) (amended by the Planning (Consequential Provisions) Act 1990, s 4, Sch 2, PARA 17(2)).
- 7    Leasehold Reform Act 1967 Sch 4 para 1(2); Interpretation Act 1978 s 17(2)(a).
- 8    As to the register of title see LAND REGISTRATION vol 26 (2004 Reissue) PARA 811 *et seq.*
- 9    Leasehold Reform Act 1967 Sch 4 para 1(3) (amended by the Registration Act 2002 s 133, Sch 11 para 8(1), (3)).
- 10   le the Law of Property Act 1925 s 84 (as amended): see EQUITY vol 16(2) (Reissue) PARA 630 *et seq.*
- 11   Leasehold Reform Act 1967 Sch 4 para 1(5).
- 12   *Ibid* Sch 4 para 1(6). As to the rule against perpetuities see generally PERPETUITIES AND ACCUMULATIONS.
- 13   For the meaning of 'local authority' for these purposes see PARA 1456 note 6 ante; and as to the other bodies to which these powers apply see *ibid* ss 29(6), 30(7) (as amended); and PARAS 1456-1457 ante.
- 14   For the meaning of 'tenancy' see PARA 1398 ante.
- 15   Leasehold Reform Act 1967 Sch 4 para 2(1).
- 16   le under *ibid* Sch 4 para 3 (as amended): see the text and notes 24-33 *infra*.
- 17   le under *ibid* Sch 4 para 2(3): see the text and notes 19-21 *infra*.
- 18   *Ibid* Sch 4 para 2(2).
- 19   le in accordance with *ibid* Sch 4 para 2(2)(b).
- 20   See note 16 *supra*.
- 21   Leasehold Reform Act 1967 Sch 4 para 2(3).
- 22   See note 16 *supra*.
- 23   Leasehold Reform Act 1967 Sch 4 para 2(4).
- 24   le subject to *ibid* Sch 4 para 2(4) and to the provisions of any order made under it.
- 25   See note 19 *supra*.
- 26   See note 17 *supra*.

- 27    le under the Leasehold Reform Act 1967 Sch 4 para 2(4): see the text and notes 22-23 *supra*.
- 28    Ibid Sch 4 para 3(1). As to when an order of the court becomes final see PARA 1448 note 6 *ante*.
- 29    Leasehold Reform Act 1967 Sch 4 para 3(2). The form is to be prescribed by regulations made by statutory instrument by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister: see Sch 4 para 3(2). As to the Secretary of State see PARA 27 note 3 *ante*; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 *ante*. At the date at which this title states the law, no form had been prescribed for these purposes.
- 30    Ibid Sch 4 para 3(3).
- 31    Ibid Sch 4 para 3(4) (amended by the Acquisition of Land Act 1981 s 34, Sch 4 para 1).
- 32    le under a covenant entered into in accordance with the Leasehold Reform Act 1967 s 30(1)(b): see PARA 1457 *ante*.
- 33    Ibid Sch 4 para 3(5).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(v) Conveyance/1459. Acknowledgment as regards documents.

### **1459. Acknowledgment as regards documents.**

The landlord<sup>1</sup> may be required to give to the tenant<sup>2</sup> an acknowledgment<sup>3</sup> as regards any documents of which the landlord retains possession, but not an undertaking for the safe custody of any such documents<sup>4</sup>.

- 1    For the meaning of 'landlord' see PARA 1432 note 4 *ante*.
- 2    For the meaning of 'tenant' see PARA 1432 note 1 *ante*.
- 3    le within the meaning of the Law of Property Act 1925 s 64: see SALE OF LAND vol 42 (Reissue) PARAS 132, 299.
- 4    Leasehold Reform Act 1967 s 10(6).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(vi) Rentcharges/1460. Exoneration from or apportionment of rentcharge.

## **(vi) Rentcharges**

### **1460. Exoneration from or apportionment of rentcharge.**

Where a house<sup>1</sup> and premises<sup>2</sup> are to be conveyed<sup>3</sup> to a tenant<sup>4</sup>, the landlord<sup>5</sup> is not precluded<sup>6</sup> from releasing, or procuring the release of, the house and premises from any rentcharge; and the conveyance may, with the tenant's agreement, which must not be unreasonably withheld, provide<sup>7</sup> that a rentcharge shall be charged exclusively on other land affected by it in

exoneration of the house and premises, or be apportioned between other land affected by it and the house and premises<sup>8</sup>.

- 1 For the meaning of 'house' see PARA 1390 ante.
- 2 For the meaning of 'premises' see PARA 1391 ante.
- 3 le in pursuance of the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.
- 4 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 5 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 6 le by the Leasehold Reform Act 1967 s 8(4)(b) (as amended): see PARA 1450 ante at head (2) in the text.
- 7 le in accordance with the Law of Property Act 1925 s 190(1): see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 850.
- 8 Leasehold Reform Act 1967 s 11(1) (amended by the Rentcharges Act 1977 s 17(1), (2), Sch 1 para 4(2) (a), Sch 2).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(vi) Rentcharges/1461. Discharge from rentcharge to extent necessary to secure that annual charges do not exceed annual rent.

**1461. Discharge from rentcharge to extent necessary to secure that annual charges do not exceed annual rent.**

Where a conveyance of a house<sup>1</sup> and premises<sup>2</sup> to a tenant<sup>3</sup> might<sup>4</sup> otherwise be made subject, in respect of rentcharges<sup>5</sup> which during the continuance of the tenancy are, or but for the termination of the tenancy before their commencement would have been, recoverable from the landlord<sup>6</sup> without his having a right to be indemnified by the tenant, to an annual charge exceeding the annual rent<sup>7</sup> payable under the tenancy<sup>8</sup> at the relevant time<sup>9</sup>, the landlord is bound on or before the execution of the conveyance to secure that the house and premises are discharged from the whole or part of any rents in question to the extent necessary to secure that the annual charge does not exceed the annual rent payable under the tenancy<sup>10</sup>.

Where for the purpose of complying with the above provisions the house and premises are to be discharged from a rent by redemption of it, with or without prior apportionment, and for any specified reason<sup>11</sup> difficulty arises in paying the redemption price, the tenant may, and if so required by the landlord must, before execution of the conveyance pay into court on account of the price for the house and premises an amount not exceeding the appropriate amount to secure redemption<sup>12</sup> of the rent; and, if the amount so paid by the tenant is less than that appropriate amount, the landlord must pay into court the balance<sup>13</sup>.

If a tenant of a house and premises wishes to pay money into court<sup>14</sup> he must file<sup>15</sup> in the office of the appropriate court<sup>16</sup> an application notice containing or accompanied by evidence stating:

- 3234 (1) the reasons for the payment into court;
- 3235 (2) the house and premises to which the payment relates;
- 3236 (3) the name and address of the landlord; and
- 3237 (4) so far as they are known to the tenant, the name and address of every person who is or may be interested in or entitled to the money<sup>17</sup>.

On the filing of the witness statement<sup>18</sup> the tenant must pay the money into court and the court will send notice of the payment to the landlord and every person whose name and address are given in the witness statement<sup>19</sup>. Any subsequent payment into court by the landlord<sup>20</sup> must be made to the credit of the same account as the payment into court by the tenant<sup>21</sup>.

Where payment is so made into court, the house and premises are, on execution of the conveyance, discharged from the rent; and any claim to the redemption money lies against the fund in court and not otherwise<sup>22</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 Ie in accordance with the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

5 Ie rentcharges redeemable under the Rentcharges Act 1977 ss 8-10 (as amended): see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 900 et seq.

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 For these purposes, the annual rent must be calculated in accordance with the Leasehold Reform Act 1967 s 4(1)(b), (c), (6) (see PARAS 1403, 1408 ante): s 11(2).

8 For the meaning of 'tenancy' see PARA 1398 ante.

9 For the meaning of 'relevant time' see PARA 1391 note 4 ante.

10 Leasehold Reform Act 1967 s 11(2), (8) (amended by the Rentcharges Act 1977 s 17(1), Sch 1 para 4(2) (e)). For these purposes, the house and premises are treated as discharged from a rent to the extent to which (1) the rent is charged on or apportioned to other land so as to confer on the tenant in respect of the house and premises the remedies against the other land provided for by the Law of Property Act 1925 s 190(2) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 850); or (2) the landlord is otherwise entitled to be exonerated from or indemnified against liability for the rent in respect of the house and premises and the tenant will, in so far as the landlord's right is not a right against the tenant himself or his land, become entitled on the conveyance to the like exoneration or indemnity: Leasehold Reform Act 1967 s 11(3).

11 Ie any reason mentioned in *ibid* s 13(2): see PARA 1464 post.

12 For these purposes, 'the appropriate amount to secure redemption' of a rent is, subject to *ibid* s 11(7) (as amended), the amount of redemption money agreed to be paid or, in default of agreement, the amount specified as the redemption price in instructions for redemption under the Rentcharges Act 1977 s 9(4) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 901): Leasehold Reform Act 1967 s 11(6) (amended by the Rentcharges Act 1977 Sch 1 para 4(2)(c)).

Where a rent affects other property as well as the house and premises, and the other property is not exonerated or indemnified by means of a charge on the house and premises, then (1) 'the appropriate amount to secure redemption' of the rent for these purposes, if no amount has been agreed or specified as mentioned in the Leasehold Reform Act 1967 s 11(6) (as so amended), is such sum as, on an application under the Rentcharges Act 1977 s 4 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 844-845), for the apportionment of the rent, may, pending the apportionment, be approved by the apportioning authority as suitable provision, with a reasonable margin, for the redemption money of the part likely to be apportioned to the house and premises; and (2) the apportionment, when made, is deemed to have had effect from the date of the payment into court, and, if in respect of any property affected by the rent there has been any overpayment or underpayment, the amount must be made good by abatement of or addition to the next payment after the apportionment and, if necessary, later payments: Leasehold Reform Act 1967 s 11(7) (amended by the Rentcharges Act 1977 Sch 1 para 4(2)(d)).

13 Leasehold Reform Act 1967 s 11(4) (amended by the Rentcharges Act 1977 Sch 1 para 4(2)(b)). As to the court having jurisdiction see PARA 1529 post; as to payment into court generally see CIVIL PROCEDURE vol 11 (2009) PARA 742 et seq; and as to the procedure for making a payment into court under the Leasehold Reform Act 1967 s 11(4) (as amended) see the text and notes 14-21 *infra*.

14 Ie under the Leasehold Reform Act 1967 s 11(4) (as amended) (see the text and notes 11-13 *supra*), or s 13(1) or (3) (see PARA 1464 post).



15 For the meaning of 'filing' see PARA 660 note 20 ante.

16 The appropriate court for these purposes is the county court for the district in which the property is situated or, if the payment into court is made by reason of a notice under the Leasehold Reform Act 1967 s 13(3), any other county court as specified in the notice: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 13.1, 13.2(4).

17 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 13.1, 13.2(1).

18 As to witness statements see generally CIVIL PROCEDURE vol 11 (2009) PARA 981 et seq.

19 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 13.1, 13.2(2).

20 Ie under the Leasehold Reform Act 1967 s 11(4) (as amended): see the text and notes 11-13 supra.

21 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 13.1, 13.2(4). Paragraphs 13.2(1), (2) (see the text and notes 15-19 supra) will apply to the landlord as if he were a tenant: para 13.2(4).

22 Leasehold Reform Act 1967 s 11(5).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(vii) Mortgages on Landlord's Estate/1462. Discharge of mortgages etc.

## **(vii) Mortgages on Landlord's Estate**

### **1462. Discharge of mortgages etc.**

A conveyance of the freehold<sup>1</sup> is effective<sup>2</sup>, as regards any charge on the landlord's<sup>3</sup> estate, however created or arising, to secure the payment of money or the performance of any other obligation by the landlord or any other person, not being a charge subject to which the conveyance is required to be made or which would otherwise be overreached, to discharge the house<sup>4</sup> and premises<sup>5</sup> from the charge and from the operation of any order made by a court for the enforcement of the charge, and to extinguish any term of years created for the purposes of the charge; and it does so without the persons entitled to or interested in the charge or in any such order or term of years becoming parties to or executing the conveyance<sup>6</sup>.

Where the house and premises are so discharged from a charge, without the obligations secured by the charge being satisfied by the receipt of the whole or part of the price, the discharge of the house and premises does not prejudice any right or remedy for the enforcement of those obligations against other property comprised in the same or any other security, nor prejudice any personal liability as principal or otherwise of the landlord or any other person<sup>7</sup>.

1 Ie a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2 Ie subject to the provisions of *ibid* s 12: see the text and notes 3-7 *infra*; and PARA 1463 post.

3 For the meaning of 'landlord' see PARA 1432 note 4 ante.

4 For the meaning of 'house' see PARA 1390 ante.

5 For the meaning of 'premises' see PARA 1391 ante.

6 Leasehold Reform Act 1967 s 12(1). Section 12(1) is not to be taken to prevent a person from joining in the conveyance for the purpose of discharging the house and premises from any charge without payment or for a less payment than that to which he would otherwise be entitled and, if he does so, the persons to whom the price ought to be paid must be determined accordingly (s 12(7)); and nothing in s 12 applies in relation to any charge falling within s 11 (as amended) (see PARAS 1460-1461 ante) (s 12(9)).

A charge on the landlord's estate to secure the payment of money or the performance of any other obligation is not to be treated for the purposes of Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1463 et seq post) as a tenant's incumbrance by reason only of the grant of the tenancy being subsequent to the creation of the charge and not authorised as against the persons interested in the charge; and s 12 applies as if the persons so interested at the time of the grant had duly concurred in the grant of the freehold for the purpose, but only for the purpose, of validating it despite the charge on the grantor's estate: s 12(8). For the meaning of 'tenant's incumbrance' see PARA 1439 note 10 ante.

Where, however, a tenancy is granted on or after 1 January 1968, whether or not it is, by virtue of s 3(3) (as amended) (see PARA 1400 ante), to be treated for other purposes as forming a single tenancy with a previous tenancy, and the tenancy has not by the time of the conveyance of the house and premises to the tenant become binding on the persons interested in the charge, the conveyance does not, by virtue of s 12, discharge the house and premises from the charge except so far as it is satisfied by the application or payment into court of the price payable for the house and premises: s 12(8) proviso. For the meaning of 'tenant' see PARA 1432 note 1 ante. As to payment into court see PARA 1464 post.

7 Ibid s 12(6).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(vii) Mortgages on Landlord's Estate/1463. Application of purchase money.

### **1463. Application of purchase money.**

Where the conveyance<sup>1</sup> will be effective to discharge the house<sup>2</sup> and premises<sup>3</sup> from a charge<sup>4</sup> to secure the payment of money, it is the duty<sup>5</sup> of the tenant<sup>6</sup> to apply the price payable<sup>7</sup> for the house and premises, in the first instance, in or towards the redemption of any such charge and, if there are more than one, then according to their priorities; and, if any amount so payable to the person entitled to the benefit of a charge is not so paid, nor paid into court<sup>8</sup>, then, for the amount in question, the house and premises remain subject to the charge<sup>9</sup>.

The above provisions do not, however, apply to any debenture holders' charge<sup>10</sup>; but they do apply to a charge in favour of trustees for debenture holders which at the date of the conveyance to the tenant is, as regards the house and premises, a specific and not a floating charge<sup>11</sup>.

For the purpose of determining the amount so payable in respect of any charge<sup>12</sup>, a person entitled to the benefit of such a charge is not permitted to exercise any right to consolidate that charge with a separate charge on other property; and, if the landlord or the tenant is himself entitled to the benefit of such a charge, it ranks for payment as it would if another person were entitled to it, and the tenant is entitled to retain the appropriate amount in respect of any such charge of his<sup>13</sup>.

For the purpose of discharging the house and premises from such a charge, a person may be required to accept three months' or any longer notice of the intention to pay the whole or part of the principal secured by the charge, together with interest to the date of payment, notwithstanding that the terms of the security make other provision or no provision as to the time and manner of payment; but he is entitled, if he so requires, to receive such additional payment as is reasonable in the circumstances in respect of the costs of reinvestment or other

incidental costs and expenses and in respect of any reduction in the rate of interest obtainable on reinvestment<sup>14</sup>.

1     le a conveyance executed to give effect to the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2     For the meaning of 'house' see PARA 1390 ante.

3     For the meaning of 'premises' see PARA 1391 ante.

4     le in accordance with the Leasehold Reform Act 1967 s 12(1): see PARA 1462 ante.

5     le except as otherwise provided by ibid s 12: see the text and notes 7-14 infra; and PARA 1462 ante.

6     For the meaning of 'tenant' see PARA 1432 note 1 ante.

7     For these purposes, the price payable for the house and premises is to be treated as reduced by any amount to be paid out of it before execution of the conveyance for the redemption of a rent in accordance with the Leasehold Reform Act 1967 s 11(4) (as amended) (see PARA 1461 ante): s 12(9).

8     le in accordance with ibid s 13: see PARA 1464 post.

9     Ibid s 12(2). To that extent s 12(1) (see PARA 1462 ante) does not apply: s 12(2). Section 12(2) is not to be taken to prevent a person from joining in the conveyance for the purpose of discharging the house and premises from any charge without payment or for a less payment than that to which he would otherwise be entitled; and, if he does so, the persons to whom the price ought to be paid must be determined accordingly (s 12(7)); and nothing in s 12 applies in relation to any charge falling within s 11 (as amended) (see PARAS 1460-1461 ante) (s 12(9)).

10    For these purposes, 'debenture holders' charge' means any charge, whether a floating charge or not, in favour of the holders of a series of debentures issued by a company or other body of persons, or in favour of trustees for such debenture holders: ibid s 12(5). Any such charge must be disregarded in determining priorities for the purposes of s 12(2): s 12(5).

11    Ibid s 12(5) proviso.

12    le any charge under ibid s 12(2): see the text and notes 1-9 supra.

13    Ibid s 12(3).

14    Ibid s 12(4).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(3) ENFRANCHISEMENT/(vii) Mortgages on Landlord's Estate/1464. Payment into court in cases of difficulty.

#### **1464. Payment into court in cases of difficulty.**

Where a house<sup>1</sup> and premises<sup>2</sup> are on a conveyance to the tenant<sup>3</sup> to be discharged of any charge<sup>4</sup> and a person is or may be entitled<sup>5</sup> in respect of the charge to receive the whole or any part of the price payable for the house and premises, then, if:

3238 (1) for any reason difficulty arises in ascertaining how much is payable in respect of the charge; or

3239 (2) for any specified reason<sup>6</sup> difficulty arises in making a payment in respect of the charge,

the tenant may pay into court on account of the price for the house and premises the amount, if known, of the payment to be made in respect of the charge or, if that amount is not known, the whole of the price or such less amount as the tenant thinks right in order to provide for that payment<sup>7</sup>.

Payment may be made into court in accordance with head (2) above where the difficulty arises for any of the following reasons:

- 3240 (a) because a person who is or may be entitled to receive payment cannot be found or ascertained;
- 3241 (b) because any such person refuses or fails to make out a title, or to accept payment and give a proper discharge, or to take any steps reasonably required by him to enable the sum payable to be ascertained and paid; or
- 3242 (c) because a tender of the sum payable cannot, by reason of complications in the title to it or the want of two or more trustees or for other reasons, be effected, or not without incurring or involving unreasonable cost or delay<sup>8</sup>.

The price payable for a house and premises<sup>9</sup> must be paid<sup>10</sup> by the tenant into court if, before execution of the conveyance, written notice is given to him:

- 3243 (i) that the landlord<sup>11</sup> or a person entitled to the benefit of a charge on the house and premises so requires for the purpose of protecting the rights of persons so entitled, or for reasons related to any application made or to be made under the statutory provisions relating to transitional relief in respect of mortgages<sup>12</sup>, or to the bankruptcy or winding up of the landlord; or
- 3244 (ii) that steps have been taken to enforce any charge on the landlord's interest in the house and premises by the bringing of proceedings in any court, or by the appointment of a receiver, or otherwise<sup>13</sup>.

For the purpose of computing the amount so payable into court, the price payable for the house and premises is to be treated as reduced by any amount to be paid out of it for the redemption of a rent<sup>14</sup> before the execution of the conveyance<sup>15</sup>.

1 For the meaning of 'house' see PARA 1390 ante.

2 For the meaning of 'premises' see PARA 1391 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 Ie under the Leasehold Reform Act 1967 s 12(1): see PARA 1462 ante.

5 Ie in accordance with ibid s 12(2): see PARA 1463 ante.

6 Ie any reason specified in ibid s 13(2): see heads (a)-(c) in the text.

7 Ibid s 13(1). As to payment into court under s 13(1) or (3) see PARA 1461 the text and notes 14-19 ante; and as to payment into court generally see CIVIL PROCEDURE vol 11 (2009) PARA 742 et seq.

8 Ibid s 13(2).

9 Ie on a conveyance under ibid s 8 (as amended): see PARAS 1439, 1450-1451 ante.

10 Ie without prejudice to ibid s 13(1)(a): see head (1) in the text.

11 For the meaning of 'landlord' see PARA 1432 note 4 ante.

12 Ie under the Leasehold Reform Act 1967 s 36. Where at 27 October 1967 a house was held on a long tenancy not having more than 20 years unexpired, or on a long tenancy capable of being determined within 20

years by notice given by the landlord, and the estate of the immediate or a superior landlord was charged to secure payment of any sum, otherwise than by way of rentcharge, whether or not the landlord was personally liable as principal or otherwise for the payment of that sum, the court might, either on the application of the landlord or of the person entitled to the benefit of the charge, make such order authorised by s 36 as it thought proper for the purpose of avoiding or mitigating any financial hardship that might otherwise be caused by the rights conferred on tenants by Pt I (ss 1-37) (now as amended): see s 36(1)-(4). As to suspension of proceedings for the enforcement or recovery of a charge see s 36(5).

13 Ibid s 13(3). Where payment is to be made into court by reason only of a notice under s 13(3), and the notice is given with reference to proceedings in a court specified in the notice other than the county court, payment must be made into the court so specified: s 13(3).

14 Ibid in accordance with ibid s 11(4) (as amended): see PARA 1461 ante.

15 Ibid s 13(4).

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## **(viii) Supplementary Provisions**

### **1465. Enfranchisement where landlord cannot be found or his identity ascertained.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> having a right<sup>3</sup> to acquire the freehold is prevented from giving notice of his desire to have the freehold because the person to be served with the notice cannot be found, or his identity cannot be ascertained, then, on an application made by the tenant<sup>4</sup>, the court may make<sup>5</sup> such order as it thinks fit with a view to the house and premises<sup>6</sup> being vested in him, his executors, administrators or assigns for the like estate and on the like terms, so far as the circumstances permit, as if he had at the date of his application given notice of his desire to have the freehold<sup>7</sup>.

Before making any such order, the court may require the applicant to take such further steps by way of advertisement or otherwise as the court thinks proper for the purpose of tracing the landlord; and, if after an application is made to the court and before the house and premises are vested in pursuance of the application the landlord<sup>8</sup> is traced, no further proceedings may be taken with a view to the house and premises being so vested<sup>9</sup>. The rights and obligations of all parties must then be determined as if the applicant had, at the date of the application, duly given notice of his desire to have the freehold<sup>10</sup>, and the court may give such directions<sup>11</sup> as it thinks fit as to the steps to be taken for giving effect to those rights and obligations<sup>12</sup>.

Where a house and premises are to be vested in a person in pursuance of such an application, then, on his paying into court the appropriate sum<sup>13</sup>, there must be executed by such person as the court may designate a conveyance in a form approved by the court and containing such provisions as may be so approved for the purpose of giving effect so far as possible to the requirements relating to the rights to be conveyed to a tenant on enfranchisement<sup>14</sup>; and that conveyance is effective to vest in the person to whom the conveyance is made the property expressed to be conveyed, subject as and in the manner in which it is expressed to be conveyed<sup>15</sup>. A conveyance so executed is of full effect<sup>16</sup> notwithstanding any interest of the Crown in the property expressed to be conveyed<sup>17</sup>.

For the purpose of any conveyance to be so executed, any question as to the property to be conveyed and the rights with or subject to which it is to be conveyed is to be determined by the court; but it must be assumed, unless the contrary is shown, that the landlord has no

interest in property other than the property to be conveyed and, for the purpose of excepting them from the conveyance, any underlying minerals<sup>18</sup>.

Where a house and premises are so vested in a person, the payment into court of the appropriate sum is to be taken to have satisfied any claims against the tenant, his executors, administrators or assigns in respect of the price payable for the acquisition of the freehold in the house and premises<sup>19</sup>.

Any such application may be withdrawn at any time before execution<sup>20</sup> of a conveyance<sup>21</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1466 et seq post.

4 Any such application made to the High Court is to be assigned to the Chancery Division: see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 13.1, 13.6.

5 Ie subject to and in accordance with ibid s 27 (as amended): see the text and notes 6-21 infra.

6 For the meaning of 'premises' see PARA 1391 ante.

7 Leasehold Reform Act 1967 s 27(1) (s 27(1)-(4), (6)-(7) amended by the Commonhold and Leasehold Reform Act 2002 s 148).

8 For the meaning of 'landlord' see PARA 1432 note 4 ante.

9 Leasehold Reform Act 1967 s 27(2) (as amended: see note 7 supra).

10 Ibid s 27(2)(a).

11 Ie including directions modifying or dispensing with any of the requirements of the Leasehold Reform Act 1967 or of regulations made thereunder.

12 Ibid s 27(2)(b) (as amended: see note 7 supra).

13 The appropriate sum which, in accordance with ibid s 27(3) (as amended), is to be paid into court is the aggregate of (1) such amount as may be determined by (or on appeal from) a leasehold valuation tribunal to be the price payable in accordance with s 9 (as amended) (see PARA 1441 et seq ante); and (2) the amount or estimated amount (as so determined) of any pecuniary rent payable for the house and premises up to the date of the conveyance which remains unpaid: s 27(5) (substituted by the Commonhold and Leasehold Reform Act 2002 s 149(1); for transitional provisions see the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003, SI 2003/1986, arts 1(2), 2(c)(i), Sch 2, PARA 1 in relation to England and the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (Wales) Order 2004, SI 2004/669, art 2(c)(i), Sch 2 para 1 in relation to Wales). As to the determination of the appropriate sum under the Leasehold Reform Act 1967 s 27(5) (as originally enacted) see eg *Re Frost's Application* [1970] 2 All ER 538n, [1970] 1 WLR 1145; *Re Robertson's Application* [1969] 1 All ER 257n, [1969] 1 WLR 109; *Re Howell's Application* [1972] Ch 509, [1972] 3 All ER 662.

14 Ie the requirements contained in the Leasehold Reform Act 1967 s 10 (as amended): see PARAS 1452-1459 ante.

15 Ibid s 27(3) (as amended: see note 7 supra).

16 Ie has effect as provided by ibid s 27(3) (as amended).

17 Ibid s 27(8).

18 Ibid s 27(4) (as amended: see note 7 supra. As to underlying minerals see also s 2(6); and PARA 1391 ante. For observations on the effect of these provisions and the procedure to be followed see *Re Robertson's Application* [1969] 1 All ER 257n, [1969] 1 WLR 109; but as to the caution to be exercised in the use of pre-CPR authorities see CIVIL PROCEDURE vol 11 (2009) PARA 33.

19 Leasehold Reform Act 1967 s 27(6) (as amended: see note 7 supra).

20     le under *ibid* s 27(3) (as amended): see the text and notes 13-15 *supra*.

21     *Ibid* s 27(7). After the application is withdrawn s 27(2)(a) (see the text and note 10 *supra*) does not apply: s 27(7). Where, however, any step is taken, whether by the landlord or the tenant, for the purpose of giving effect to s 27(2)(a) in the case of any application, the application may not afterwards be withdrawn except with the landlord's consent or by leave of the court; and the court may not so give leave unless it appears to the court just to do so by reason of matters coming to the applicant's knowledge in consequence of the landlord being traced: s 27(7) (as amended: see note 7 *supra*).

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### **1466. Costs.**

Where a person gives notice<sup>1</sup> of his desire to have the freehold of a house<sup>2</sup> and premises<sup>3</sup>, then, unless the notice lapses under any statutory provision excluding his liability<sup>4</sup>, there must be borne by him, so far as they are incurred in pursuance of the notice, the reasonable costs of or incidental to any of the following matters:

- 3245 (1) any investigation by the landlord<sup>5</sup> of that person's right to acquire the freehold;
- 3246 (2) any conveyance or assurance of the house and premises or any part thereof or of any outstanding estate or interest therein;
- 3247 (3) deducing, evidencing and verifying the title to the house and premises or any estate or interest therein;
- 3248 (4) making out and furnishing such abstracts and copies as the person giving the notice may require; and
- 3249 (5) any valuation of the house and premises<sup>6</sup>.

The above provisions do not, however, apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void<sup>7</sup>; nor do they require a person to bear the costs of another person in connection with an application to a leasehold valuation tribunal<sup>8</sup>.

1     le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 *et seq ante*, PARA 1467 *et seq post*.

2     For the meaning of 'house' see PARA 1390 *ante*.

3     For the meaning of 'premises' see PARA 1391 *ante*.

4     See eg the Leasehold Reform Act 1967 s 18(6); and PARA 1490 *post*; s 19(14); and PARA 1500 *post*.

5     For the meaning of 'landlord' see PARA 1432 note 4 *ante*.

6     Leasehold Reform Act 1967 s 9(4). Where a tenant's notice ceases to have effect by virtue of the Leasehold Reform Act 1967 s 32A(4) (as added) (see PARA 1511 *post*), s 9(4) does not apply to require the tenant to make any payment to the landlord in respect of costs incurred by reason of the notice: s 32A(5)(a) (added by the Leasehold Reform, Housing and Urban Development Act 1993 s 68)).

7     Leasehold Reform Act 1967 s 9(4). As to the avoidance of certain stipulations made on the sale of land see the Law of Property Act 1925 s 48; and SALE OF LAND vol 42 (Reissue) PARA 130.

8 Leasehold Reform Act 1967 s 9(4A) (added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 paras 1, 2).

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### **1467. Landlord's lien as vendor.**

The landlord's<sup>1</sup> lien, as vendor, on the house<sup>2</sup> and premises<sup>3</sup> for the price payable extends:

- 3250 (1) to any sums payable by way of rent or recoverable as rent in respect of the house and premises up to the date of the conveyance; and
- 3251 (2) to any costs for which the tenant<sup>4</sup> is liable<sup>5</sup>; and
- 3252 (3) to any other sums due and payable by him to the landlord under or in respect of the tenancy<sup>6</sup> or any agreement collateral thereto<sup>7</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 For the meaning of 'tenant' see PARA 1432 note 1 ante.

5 ie under the Leasehold Reform Act 1967 s 9(4): see PARA 1466 ante.

6 For the meaning of 'tenancy' see PARA 1398 ante.

7 Leasehold Reform Act 1967 s 9(5).

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### **1468. Application of price or compensation received by landlord.**

Any sum received by the landlord<sup>1</sup> by way of the price payable<sup>2</sup> for a house<sup>3</sup> and premises<sup>4</sup>, or by way of compensation under any provision<sup>5</sup> providing for compensation to be recovered by or awarded to a landlord<sup>6</sup>:

- 3253 (1) where the landlord's interest is subject to a trust of land, must be dealt with as if it were proceeds of sale arising under the trust; and
- 3254 (2) where the landlord is a university or college to which the Universities and College Estates Act 1925<sup>7</sup> applies, must be dealt with as if it were an amount payable as consideration on a sale effected under that Act<sup>8</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.



- 2 le under the Leasehold Reform Act 1967 s 9 (as amended): see PARA 1441 et seq ante.
- 3 For the meaning of 'house' see PARA 1390 ante.
- 4 For the meaning of 'premises' see PARA 1391 ante.
- 5 le any provision of the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1469 et seq post.
- 6 See eg ibid s 5(2); and PARA 1432 ante; s 9(3)(a); and PARA 1446 ante.
- 7 As to the Universities and College Estates Act 1925 see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.
- 8 Leasehold Reform Act 1967 s 24(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 10(b); for transitional provisions and savings see s 25(4), (5)). As to the modes of investing or applying capital money under the Universities and College Estates Act 1925 see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(4) EXTENSION OF LEASE/(i) Obligation to Grant Extended Lease/1469. In general.

## **(4) EXTENSION OF LEASE**

### **(i) Obligation to Grant Extended Lease**

#### **1469. In general.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> has a right<sup>3</sup> to an extended lease and gives to the landlord<sup>4</sup> written notice of his desire to have it, the landlord is bound<sup>5</sup> to grant to the tenant, and the tenant to accept, in substitution for the existing tenancy<sup>6</sup>, a new tenancy of the house and premises<sup>7</sup> for a term expiring 50 years after the term date<sup>8</sup> of the existing tenancy<sup>9</sup>.

- 1 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 2 For the meaning of 'house' see PARA 1390 ante.
- 3 le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1470 et seq post. As to the cases in which the landlord will not be bound to grant a new tenancy see PARA 1410 et seq ante; and as to the conditions non-compliance with which may discharge either party from his obligation see PARA 1470 note 6 post.
- 4 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 5 le except as provided by the Leasehold Reform Act 1967 Pt I (as amended).
- 6 For the meaning of 'tenancy' see PARA 1398 ante.
- 7 For the meaning of 'premises' see PARA 1391 ante.
- 8 For the meaning of 'term date' see PARA 1400 note 12 ante. A tenancy to which the Landlord and Tenant Act 1954 s 19(2) (see PARA 1202 ante) or the Local Government and Housing Act 1989 s 186, Sch 10 para 16(2) (see PARA 1245 ante) applies, is treated for the purposes of the Leasehold Reform Act 1967 Pt I (as amended) as granted to expire at the date which is the term date for the purposes of the Landlord and Tenant Act 1954 or, as the case may be, the Local Government and Housing Act 1989 Sch 10 (as amended), that is say the first date after the commencement of the Landlord and Tenant Act 1954 or, as the case may be, the coming into force of the Local Government and Housing Act 1989 Sch 10 (as amended) on which, apart from the Landlord and Tenant Act 1954 or, as the case may be, the Local Government and Housing Act 1989 Sch 10 (as

amended), the tenancy could have been brought to an end by notice to quit given by the landlord: Leasehold Reform Act 1967 s 37(2) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 12).

Subject to the Leasehold Reform Act 1967 s 37(2) (as so amended):

- 45 (1) where under s 3(2) (as amended) (see PARA 1400 ante) a tenancy created or arising as a tenancy from year to year or other periodical tenancy is to be treated as a long tenancy, the term date of that tenancy is to be taken to be the date, if any, at which the tenancy is to terminate by virtue of a notice to quit given by the landlord before the relevant time, or else the earliest date at which it could at that time, in accordance with its terms and apart from any enactment, be brought to an end by a notice to quit given by the landlord (s 37(3));
- 46 (2) in the case of a tenancy granted to continue as a periodical tenancy after the expiration of a term of years certain, or to continue as a periodical tenancy if not terminated at the expiration of such a term, any question whether the tenancy is at any time to be treated for the purposes of Pt I (as amended) as a long tenancy, and, if so, with what term date, must be determined as it would be if there had been two tenancies, as follows: (a) one granted to expire at the earliest time, at or after the expiry of that term of years, at which the tenancy could, in accordance with its terms and apart from any enactment, be brought to an end by notice to quit given by the landlord; and (b) the other granted to commence at the expiration of the first, not being one to which s 37(2) (as so amended) applies (s 37(4) (amended by the Housing Act 1996 s 106, Sch 9 para 2(7); the Commonhold and Leasehold Reform Act 2002, s 180, Sch 14)).

For the meaning of 'notice to quit' see PARA 1435 note 5 ante; and for the meaning of 'relevant time' see PARA 1391 note 4 ante. As to the position where a house is held under separate tenancies having different term dates see the Leasehold Reform Act 1967 s 3(6); and PARA 1400 ante.

9 Ibid s 14(1). As to the limitation of the landlord's covenant for title see PARA 1473 post.

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## **(ii) Procedure**

### **1470. In general.**

Where a tenant<sup>1</sup> having a right<sup>2</sup> to acquire an extended lease gives the landlord<sup>3</sup> notice<sup>4</sup> of his desire to have it, the procedure for giving effect to the notice, and the rights and obligations of all parties in relation to the investigation of title and other matters arising in giving effect to the notice, are<sup>5</sup> such as may be prescribed by regulations; and, subject to or in the absence of provision made by any such regulations as regards any matter, the parties' rights and obligations are, as regards any matter, as nearly as may be the same as in the case of a contract of sale or leasing freely negotiated between the parties<sup>6</sup>.

In relation to any claim the regulations may provide for discharging the landlord or the tenant by reason of the other's default or delay from the obligations arising out of the claim<sup>7</sup>.

Where it is made to appear to the court that the landlord or the tenant has been guilty of any unreasonable delay or default in the performance of his obligations arising from a tenant's notice of his desire to have an extended lease, then, without prejudice to any right to damages, the court may:

- 3255 (1) by order revoke or vary, and direct repayment of sums paid under, any provision made by a previous order as to payment of the costs of proceedings in the court in relation to the matter, or, where costs have not been awarded, award costs; or

3256 (2) certify particulars of the delay or default to the Lands Tribunal with a view to enabling the tribunal to exercise a like discretion in relation to costs of proceedings before the tribunal<sup>8</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended); see PARA 1389 et seq ante, PARA 1471 et seq post.

3 For the meaning of 'landlord' see PARA 1432 note 4 ante.

4 Ie in accordance with the Leasehold Reform Act 1967 Pt I (as amended).

5 Ie except as otherwise provided by the Leasehold Reform Act 1967.

6 Ibid s 22(2) (amended by the Transfer of Functions (Lord Chancellor and Secretary of State) Order 1974, SI 1974/1896, art 3(2)). Any such regulations must be made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister, by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see the Leasehold Reform Act 1967 s 22(2) (as so amended). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, reg 3, Schedule Pt 2 (paras 1-8) (as amended) which came into force on 1 January 1968: reg 1(1). In any transactions undertaken to give effect to a tenant's notice of his desire to have an extended lease the landlord and the tenant are, unless they otherwise agree, bound by the conditions laid down in Schedule Pt 2 (paras 1-8) (as amended) as if the conditions formed part of a contract between them: reg 3. The conditions so laid down relate to: evidence of the tenant's right to have an extended lease (Schedule Pt 2 paras 1, 1A (respectively amended and added by SI 2003/1989 in relation to England and SI 2004/699 in relation to Wales); the terms of the new tenancy (Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, Schedule Pt 2 para 2); preparation of the lease (Schedule Pt 2 para 3); completion (Schedule Pt 2 para 4); failure to comply with obligations (Schedule Pt 2 para 5); cancellation of land charges etc (Schedule Pt 2 para 6); notices (Schedule Pt 2 para 7); and extension of time limits (Schedule Pt 2 para 8). Where as a result of non-compliance with the conditions so laid down the landlord and the tenant are discharged from the performance of the obligations arising in giving effect to the tenant's notice, the obligations arising between the tenant and persons other than the landlord having an interest superior to the tenancy are likewise discharged: reg 4.

7 Leasehold Reform Act 1967 s 22(3).

8 Ibid s 20(4). Where the court certifies particulars of delay or default to the Lands Tribunal under s 20(4)(b) (see head (2) in the text), the Lands Tribunal may make any order as to costs of proceedings before the tribunal which the court may make in relation to proceedings in the court: s 20(4A) (added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 paras 1, 4).

## UPDATE

### 1470 In general

TEXT AND NOTE 8--References to the Lands Tribunal are now to the Upper Tribunal: Leasehold Reform Act 1967 s 20(4)(b), (4A) (amended by SI 2009/1307).

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### 1471. Costs to be borne by tenant.

Where a person gives notice of his desire<sup>1</sup> to have an extended lease of a house<sup>2</sup> and premises<sup>3</sup>, then, unless the notice lapses under any statutory provision<sup>4</sup> excluding his liability<sup>5</sup>, there must be borne by him, so far as they are incurred in pursuance of the notice, the reasonable costs of or incidental to the following matters:

- 3257 (1) any investigation by the landlord<sup>6</sup> of that person's right to an extended lease;
- 3258 (2) any lease granting the new tenancy<sup>7</sup>;
- 3259 (3) any valuation of the house and premises obtained by the landlord before the grant of the new tenancy for the purpose of fixing the rent payable<sup>8</sup> under the new tenancy<sup>9</sup>;

but this provision does not require a person to bear the costs of another person in connection with an application to a leasehold valuation tribunal<sup>10</sup>.

1    le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1472 et seq post.

2    For the meaning of 'house' see PARA 1390 ante.

3    For the meaning of 'premises' see PARA 1391 ante.

4    le any provision of the Leasehold Reform Act 1967.

5    See eg ibid s 17(4); and PARA 1486 post; s 18(6); and PARA 1490 post.

6    For the meaning of 'landlord' see PARA 1432 note 4 ante.

7    For the meaning of 'tenancy' see PARA 1398 ante.

8    le in accordance with the Leasehold Reform Act 1967 s 15 (as amended): see PARAS 1479-1480 post.

9    Ibid s 14(2). Any liability of the tenant for costs under s 14(2) does not count as chargeable consideration for the purposes of stamp duty land tax: see the Finance Act 2003 s 120, Sch 17A para 10(f) (as added); and PARA 124 ante.

10   Leasehold Reform Act 1967 s 14(2A) (added by the Commonhold and Leasehold Reform Act 2002, s 176, Sch 13 paras 1, 3).

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#### **1472. Tender of sums due to landlord as a condition of the grant.**

A tenant<sup>1</sup> is not entitled to require the execution of a lease granting a new tenancy<sup>2</sup> otherwise than on tender of the amount, so far as ascertained:

- 3260 (1) of any sums payable by way of rent or recoverable as rent in respect of the house<sup>3</sup> and premises<sup>4</sup> up to the date of tender; and
- 3261 (2) of any sums in respect of costs for which at that date the tenant is liable<sup>5</sup>; and
- 3262 (3) of any other sums due and payable by him to the landlord<sup>6</sup> under or in respect of the existing tenancy or any agreement collateral thereto;

and, if the amount of any such sums is not or may not be fully ascertained, on offering reasonable security for the payment of such amount as may afterwards be found to be payable in respect of them<sup>7</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 le under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471 ante, PARAS 1481-1482 post. For the meaning of 'tenancy' see PARA 1398 ante.

3 For the meaning of 'house' see PARA 1390 ante.

4 For the meaning of 'premises' see PARA 1391 ante.

5 le under the Leasehold Reform Act 1967 s 14(2): see PARA 1471 ante.

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 Leasehold Reform Act 1967 s 14(3). As to the treatment of certain back-dated payments in lieu of rent under the new tenancy being treated as falling within s 14(3)(a) (see head (1) in the text) see s 15(6); and PARA 1480 post.

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### **1473. Landlord's covenant as to title.**

In granting the new tenancy<sup>1</sup>, the landlord<sup>2</sup> must not be bound to enter into any covenant for title beyond:

3263 (1) those implied from the grant; and

3264 (2) those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994<sup>3</sup> in a case where a disposition is expressed to be made with limited title guarantee<sup>4</sup>, but not including, in the case of a subtenancy, the covenant regarding compliance with the terms of the lease<sup>5</sup>;

and in the absence of agreement to the contrary he is entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant for further assurance implied<sup>6</sup> by virtue of that Act<sup>7</sup>.

A person entering into any covenant required of him as landlord, under the above provisions or otherwise, is entitled to limit his personal liability to breaches of that covenant for which he is responsible<sup>8</sup>; but nothing in these provisions affects the rights or obligations of the landlord under the statutory provisions<sup>9</sup> which apply where the tenant or occupier of any premises is convicted of permitting the whole or part of them to be used as a brothel<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'landlord' see PARA 1432 note 4 ante.

3 le under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

4 As to dispositions made with limited title guarantee see SALE OF LAND vol 42 (Reissue) PARA 351.

5 le the covenant in the Law of Property (Miscellaneous Provisions) Act 1994 s 4(1)(b): see SALE OF LAND vol 42 (Reissue) PARAS 99, 350.

6 le the covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 s 2(1)(b): see SALE OF LAND vol 42 (Reissue) PARA 350.

7 Leasehold Reform Act 1967 s 15(9) (s 15(9), (9A) substituted by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 5(2)).

8 Leasehold Reform Act 1967 s 15(9A) (as substituted: see note 7 supra).

9 le under the Sexual Offences Act 1956 s 35, Sch 1 (as amended): see PARA 22 ante.

10 Leasehold Reform Act 1967 s 15(10).

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### **(iii) Terms of New Tenancy; Rent Payable**

#### **A. TERMS OF NEW TENANCY**

##### **1474. New tenancy on same terms as existing tenancy.**

The new tenancy<sup>1</sup> must be<sup>2</sup> a tenancy on the same terms as the existing tenancy as those terms apply at the relevant time<sup>3</sup>, but with such modifications as may be required or appropriate to take account of:

- 3265 (1) the omission from the new tenancy of property comprised in the existing tenancy; or
- 3266 (2) alterations made to the property demised since the grant of the existing tenancy; or
- 3267 (3) in a case where the existing tenancy derives<sup>4</sup> from more than one separate tenancies, their combined effect and the differences, if any, in their terms<sup>5</sup>.

Provision must also be made<sup>6</sup> by the terms of the new tenancy or by an instrument collateral thereto for the continuance with any suitable adaptations of any agreement collateral to the existing tenancy<sup>7</sup>.

There must, however, be excluded<sup>8</sup> any term of the existing tenancy, or of any agreement collateral thereto, in so far as that term provides for or relates to the renewal of the tenancy, or confers any option to purchase or right of pre-emption in relation to the house<sup>9</sup> and premises<sup>10</sup>, or provides for the termination of the tenancy before the term date<sup>11</sup> otherwise than in the event of a breach of its terms; and there must be made in the terms of the new tenancy or any instrument collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term<sup>12</sup>.

The above provisions<sup>13</sup> have effect subject to any agreement between the landlord<sup>14</sup> and the tenant<sup>15</sup> as to the terms of the new tenancy or any agreement collateral thereto; and either of them may require that for the purposes of the new tenancy there shall be excluded or modified any term of the existing tenancy or an agreement collateral thereto which it would be unreasonable in the circumstances to include unchanged in the new tenancy in view of the

date at which the existing tenancy commenced and of changes since that date which affect the suitability at the relevant time of the provisions of that tenancy<sup>16</sup>.

1    le the new tenancy to be granted under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472 ante, PARAS 1481-1482 post. For the meaning of 'tenancy' see PARA 1398 ante.

2    le subject to *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1475 et seq post. As to the exceptions see s 15(5), (7), (8); and PARAS 1475-1476 post; ss 29, 30 (as amended) and PARAS 1477-1478 post.

3    For the meaning of 'relevant time' see PARA 1391 note 4 ante.

4    le in accordance with the Leasehold Reform Act 1967 s 3(6): see PARA 1400 ante.

5    *Ibid* s 15(1).

6    le subject to *ibid* s 15(5): see the text and notes 8-12 *infra*.

7    *Ibid* s 15(4).

8    le for the purposes of *ibid* s 15(1), (4): see the text and notes 1-7 *supra*.

9    For the meaning of 'house' see PARA 1390 ante.

10   For the meaning of 'premises' see PARA 1391 ante.

11   For the meaning of 'term date' see PARA 1400 note 12 ante.

12   Leasehold Reform Act 1967 s 15(5).

13   le *ibid* s 15(1)-(6): see the text and notes 1-12 *supra*; and PARAS 1479-1480 post.

14   For the meaning of 'landlord' see PARA 1432 note 4 ante.

15   For the meaning of 'tenant' see PARA 1432 note 1 ante.

16   Leasehold Reform Act 1967 s 15(7). Nothing in s 15 (as amended) affects the landlord's rights or obligations under the Sexual Offences Act 1956 s 35, Sch 1 (as amended) (see PARA 22 ante); Leasehold Reform Act 1967 s 15(10).

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### **1475. Reservation of right to resume possession for redevelopment.**

The new tenancy<sup>1</sup> must reserve to the landlord<sup>2</sup> his overriding right<sup>3</sup> to resume possession on the ground that for purposes of redevelopment he proposes to demolish or reconstruct the whole or a substantial part of the house<sup>4</sup> and premises<sup>5</sup>.

1    le the new tenancy to be granted under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472 ante, PARAS 1481-1482 post. For the meaning of 'tenancy' see PARA 1398 ante.

2    For the meaning of 'landlord' see PARA 1432 note 4 ante.

3    le the overriding right arising under the Leasehold Reform Act 1967 s 17: see PARAS 1485-1486 post.

4    For the meaning of 'house' see PARA 1390 ante.

5 Leasehold Reform Act 1967 s 15(8). As to the special position of certain local authorities and public bodies see PARAS 1477-1478 post. For the meaning of 'premises' see PARA 1391 ante.

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### **1476. Provisions as to sub-demise.**

The new tenancy<sup>1</sup> must contain a provision<sup>2</sup> to the effect that, where a tenancy has been extended under the relevant statutory provisions<sup>3</sup>, no long tenancy<sup>4</sup> created immediately or derivatively by way of sub-demise under the tenancy may confer on the subtenant, as against the tenant's landlord<sup>5</sup>, any right<sup>6</sup> to acquire the freehold or an extended lease<sup>7</sup>.

1 Ie the new tenancy to be granted under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472 ante, PARAS 1481-1482 post. For the meaning of 'tenancy' see PARA 1398 ante.

2 Ie in accordance with ibid s 16(4) (as amended): see PARA 1483 post.

3 Ie ibid s 14 (as amended).

4 For the meaning of 'long tenancy' see PARA 1398 ante.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 Ie any right under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1477 et seq post.

7 Ibid s 15(8). A similar provision must be made in an instrument granting a tenancy which is subsequent to an extended tenancy, so that both tenancies are to be treated as a single long tenancy under s 3(3) (see PARA 1400 ante): see s 16(5); and PARA 1483 note 19 post. As to the information to be given to a prospective subtenant, and the effect of an instrument containing a statement that a tenancy has been extended see s 16(6), (7), and PARAS 1483-1484 post.

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### **1477. Reservation of future right to develop.**

Where a tenant<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> acquires an extended lease<sup>4</sup>, the landlord<sup>5</sup> being:

- 3268 (1) a local authority<sup>6</sup>; or
- 3269 (2) the Commission for the New Towns or a development corporation<sup>7</sup>; or
- 3270 (3) any university body<sup>8</sup>; or
- 3271 (4) a housing action trust<sup>9</sup>,



such covenants on the part of the tenant restricting the carrying out of development or clearing of land as are necessary to reserve the land for possible development by the relevant landlord<sup>10</sup> must, if so required by the landlord, be included in the instrument extending the lease<sup>11</sup> and, if so included, then in the terms of any subsequent tenancy<sup>12</sup> at a low rent<sup>13</sup> which is to be treated<sup>14</sup>, with or without any intervening tenancies, as a single tenancy with that under the extended lease<sup>15</sup>.

Where a covenant is entered into to give effect to the above provisions, it must be expressed to be so entered into<sup>16</sup>. The operation and enforcement of covenants so entered into has already been discussed in the context of the right to enfranchisement<sup>17</sup>.

The above provisions apply<sup>18</sup>, with the necessary adaptations, where a new tenancy is granted in satisfaction of the right to an extended lease<sup>19</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1478 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 Leasehold Reform Act 1967 s 29(2). For these purposes, 'local authority' means a local authority as defined in s 28(5)(a) (as amended) (see PARA 1487 note 2 post): s 29(5).

7 Ibid s 29(2)-(4) has effect in relation to the Commission for the New Towns (now part of English Partnerships: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq) and to any development corporation within the meaning of the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq) as if any reference therein or in the Leasehold Reform Act 1967 Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to that Commission or corporation: s 29(6)(a); Interpretation Act 1978 s 17(2)(a).

8 The Leasehold Reform Act 1967 s 29(2)-(4) has effect in relation to any university body as defined in s 28(5)(c) (see PARA 1487 note 7 post) as if any reference therein or in Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to that university body; but a university body may not require a covenant to be entered into under s 29 (as amended) unless it has first obtained the consent of the Secretary of State or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister: s 29(6)(b). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

Where the landlord is a university body, the possible development for which land may be reserved by a covenant entered into to give effect to s 29(2) includes development by a related university body, within the meaning of s 28(6)(b) (see PARA 1487 note 13 post): s 29(6B) (added by the Housing Act 1980 s 141, Sch 21 para 5).

9 The Leasehold Reform Act 1967 s 29(2)-(4) has effect in relation to a housing action trust (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq) as if any reference therein or in Sch 4 Pt I (paras 1-3) (as amended) to a local authority were a reference to the trust: s 29(6C) (added by the Housing Act 1988 s 140(1), Sch 17 para 16).

10 Ie such covenants as are mentioned in the Leasehold Reform Act 1967 s 29(1): see PARA 1456 ante.

11 Ie under ibid s 14 (as amended): see PARAS 1469, 1471-1472 ante, PARAS 1481-1482 post.

12 For the meaning of 'tenancy' see PARA 1398 ante.

13 For the meaning of 'low rent' see PARA 1403 ante.

14 Ie by virtue of the Leasehold Reform Act 1967 s 3(3): see PARA 1400 ante.

15 Ibid s 29(2). Section 29 (as amended) applies, and applies only, where the authority entitled to require the covenant thereunder is the estate owner in respect of the fee simple and there is no tenancy carrying an expectation of possession of 30 years or more: s 5(4), Sch 1 para 6(2).

Where a tenant of a house and premises acquires an extended lease, the landlord being a local authority, and afterwards the local authority or any other person acquires compulsorily any interest in the property, then, for the purpose of assessing compensation in accordance with the Land Compensation Act 1961 (see COMPULSORY ACQUISITION OF LAND), no account is to be taken of any increase in the value of that interest which is attributable to the carrying out of development in contravention of a covenant entered into to give effect to the Leasehold Reform Act 1967 s 29(1) or (2), or to any prospect of carrying out any such development, and any compensation payable to a tenant under s 17 (see PARAS 1485-1486 post) must be assessed without regard to any increase in the value of his interest which would be disregarded under this provision on a compulsory purchase of that interest: s 29(4).

16 Ibid s 29(3).

17 See PARA 1458 ante.

18 Ie as they apply where a lease is extended in accordance with the Leasehold Reform Act 1967 Pt I (as amended).

19 Ibid s 29(8).

## UPDATE

### 1477 Reservation of future right to develop

NOTE 7--1967 Act s 29(6)(a) amended: Housing and Regeneration Act 2008 Sch 8 para 7(2).

NOTE 8--Omit words 'but a university ... relevant Welsh minister' and 'includes development by ... of s 28(6)(b)': 1967 Act s 29(6), (6B) (amended by the Education and Inspections Act 2006 s 177, Sch 18 Pt 2).

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### 1478. Reservation of right of pre-emption.

Where a tenant<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> acquires an extended lease<sup>4</sup>, the landlord<sup>5</sup> being:

- 3272 (1) the Commission for the New Towns<sup>6</sup>;
- 3273 (2) a development corporation<sup>7</sup>; or
- 3274 (3) the council of any former overspill area<sup>8</sup>,

there must, if so required by the landlord, be included in the instrument extending the lease<sup>9</sup> the following covenants on the part of the tenant, that is to say:

- 3275 (a) a covenant that no tenancy<sup>10</sup> of the property comprised in the instrument creating the lease or any part of that property shall be granted except with the consent in writing of the landlord; and

3276 (b) such covenant as appears to the landlord to be requisite for securing that, in the event of any proposal to sell that property or any part of it, the landlord will have a right of pre-emption at the specified<sup>11</sup> price,

and, if so included, then in the terms of any subsequent tenancy at a low rent<sup>12</sup> which is to be treated<sup>13</sup>, with or without intervening tenancies, as a single tenancy with that under the extended lease<sup>14</sup>.

Where a covenant is entered into to give effect to the above provisions, it must be expressed to be so entered into<sup>15</sup>. The operation and enforcement of covenants so entered into has already been discussed in the context of the right to enfranchisement<sup>16</sup>.

The above provisions apply<sup>17</sup>, with the necessary adaptations, where a new tenancy is granted in satisfaction of the right to an extended lease<sup>18</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1479 et seq post.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

7 Ie any development corporation within the meaning of the New Towns Act 1981: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq.

8 Ie in the council of any receiving district for the purposes of the Town Development Act 1952 (repealed) in respect of housing provided by that council by virtue of s 5 (repealed).

9 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1322 ante, PARAS 1481-417 post.

10 For the meaning of 'tenancy' see PARA 1398 ante.

11 Ie the price mentioned in the Leasehold Reform Act 1967 s 30(4). The price so referred to, in relation to an interest in any property, is a sum equal to, and in default of agreement to be determined in the like manner as, the compensation which would be payable for that interest if acquired by the execution, on such date as may be determined in accordance with the covenant, of a vesting declaration under Sch 4 (as amended): s 30(4).

12 For the meaning of 'low rent' see PARA 1403 ante.

13 Ie by virtue of the Leasehold Reform Act 1967 s 3(3): see PARA 1400 ante.

14 Ibid s 30(1), (2), (7) (amended by the Development of Rural Wales Act 1976 s 27, Sch 7 para 5(1), (4); the Housing (Consequential Provisions) Act 1985 s 3, Sch 1 Pt I; the Government of Wales Act 1998 s 152, Sch 18 Pt IV). The Leasehold Reform Act 1967 s 30 (as amended) applies, and applies only, where the authority entitled to require the covenant under s 30 (as amended) is the estate owner in respect of the fee simple and there is no tenancy carrying an expectation of possession of 30 years or more: s 5(4), Sch 1 para 6(2).

The Landlord and Tenant Act 1927 s 19 (as amended) (see PARAS 470, 486, 489, 498 ante) does not have effect in relation to any covenant entered into to give effect to the Leasehold Reform Act 1967 s 30(2): s 30(5).

15 Ibid s 30(3). Schedule 4 Pt I (paras 1-3) (as amended) (see PARA 1458 ante) has effect, with respect to the operation and enforcement of any covenant so entered into, as it applies in the case of a covenant entered into with the same body to give effect to s 29(2) (see PARA 1477 ante): s 30(3).

16 See PARA 1458 ante.

17 le as they apply where a lease is extended in accordance with *ibid* Pt I (as amended).

18 *Ibid* s 30(6).

## **UPDATE**

### **1478 Reservation of right of pre-emption**

TEXT AND NOTE 14--Leasehold Reform Act 1967 s 30(7) further amended: Housing and Regeneration Act 2008 Sch 8 para 8.

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## ***B. RENT PAYABLE***

### **1479. Rent payable under the new tenancy.**

The new tenancy<sup>1</sup> to be granted<sup>2</sup> must provide that as from the original term date<sup>3</sup> the rent payable for the house<sup>4</sup> and premises<sup>5</sup> shall be a rent ascertained or to be ascertained as follows:

- 3277 (1) the rent must be a ground rent in the sense that it must represent the letting value of the site<sup>6</sup>, without including anything for the value of buildings on the site, for the uses to which the house and premises have been put since the commencement of the existing tenancy, other than uses which by the terms of the new tenancy are not permitted or are permitted only with the landlord's<sup>7</sup> consent;
- 3278 (2) the letting value for this purpose must be in the first instance the letting value at the date from which the rent based on it is to commence, but as from the expiration of 25 years from the original term date the letting value at the expiration of those 25 years must be substituted, if the landlord so requires, and a revised rent becomes payable accordingly;
- 3279 (3) the letting value at either of the times mentioned must be determined not earlier than 12 months before that time, the reasonable cost of obtaining a valuation for the purpose being borne by the tenant<sup>8</sup>; and there must be no revision of the rent as provided by head (2) above unless in the last of the 25 years there mentioned the landlord gives the tenant written notice claiming a revision<sup>9</sup>.

Where, during the continuance of the new tenancy, the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance, the rent so payable must be in addition to any sums payable, whether as rent or otherwise, in consideration of those matters or in respect of the cost thereof to the landlord<sup>10</sup>. If the terms of the existing tenancy include no provision for the making of any such payments by the tenant, or provision only for the payment of a fixed amount, the terms of the new tenancy must make, as from the time when rent becomes so payable, such provision as may be just for the making by the tenant of payments related to the cost from time to time to the landlord, and for the tenant's liability to make those payments to be enforceable by distress, re-entry or otherwise in like manner as the liability for the rent<sup>10</sup>.

- 1 For the meaning of 'tenancy' see PARA 1398 ante.
- 2 le under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472 ante, PARAS 1481-1482 post.
- 3 For the meaning of 'original term date' see PARA 1400 note 12 ante.
- 4 For the meaning of 'house' see PARA 1390 ante.
- 5 For the meaning of 'premises' see PARA 1391 ante.
- 6 The letting value must be related to the market of land prices and house prices rather than the market of house rents, and should therefore be determined by applying an appropriate rate of return to a calculated site value: *Carthew v Estates Governors of Alleyn's College* (1974) 28 P & CR 489, Lands Tribunal. As to the calculation of the site value and rates of return see also the cases cited in PARAS 1441-1446 ante.
- 7 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 8 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 9 Leasehold Reform Act 1967 s 15(2). Section 15(2), (3) has effect subject to any agreement between the landlord and tenant as to the terms of the new tenancy or any agreement collateral thereto: see s 15(7); and PARA 1474 ante.  
As to the determination of the amount of the rent to be payable in default of agreement, whether originally or on a revision, by a leasehold valuation tribunal see PARA 1530 et seq post.
- 10 Ibid s 15(3). See also note 9 supra.

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### **1480. Back-dated payment in respect of rent.**

Where the new tenancy<sup>1</sup> is granted after the original term date<sup>2</sup>, the terms of the new tenancy must provide that rent is to be payable at the rate ascertained in accordance with the statutory provisions<sup>3</sup> with effect from the date of the grant of the new tenancy<sup>4</sup>; but, on the grant of the new tenancy, there is payable by the tenant<sup>5</sup> to the landlord<sup>6</sup> as an addition to the rent payable under the existing tenancy any amount by which for the period since the relevant time<sup>7</sup> or the original term date, whichever is the later, the sums payable to the landlord in respect of the house<sup>8</sup> and premises<sup>9</sup>, after making any necessary apportionment, for rent and payments in respect of services, repairs, maintenance or insurance<sup>10</sup> fall short in total of the sums that would have been payable for rent and those other matters under the new tenancy<sup>11</sup>.

- 1 le the new tenancy to be granted under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 ante. For the meaning of 'tenancy' see PARA 1398 ante.
- 2 For the meaning of 'original term date' see PARA 1400 note 12 ante.
- 3 le the Leasehold Reform Act 1967 s 15(2), (3): see PARA 1479 ante.
- 4 le in substitution for the original term date.
- 5 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

- 7 For the meaning of 'relevant time' see PARA 1391 note 4 ante.
- 8 For the meaning of 'house' see PARA 1390 ante.
- 9 For the meaning of 'premises' see PARA 1391 ante.
- 10 I.e. the matters referred to in the Leasehold Reform Act 1967 s 15(3): see PARA 1479 ante.
- 11 Ibid s 15(6). Section 14(3)(a) (tender of sums due to the landlord as a condition of the grant of the new tenancy: see PARA 1472 ante) applies accordingly: s 15(6).

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#### **(iv) Effect of Extended Lease on Existing Mortgages**

##### **1481. Charges on landlord's estate.**

The obligation to grant an extended lease<sup>1</sup> has effect notwithstanding that the grant of the existing tenancy<sup>2</sup> was subsequent to the creation of a charge on the landlord's<sup>3</sup> estate and not authorised as against the persons interested in the charge; and a lease executed to give effect to that obligation is deemed to be authorised as against the persons interested in any charge on the landlord's estate, however created or arising, and is binding on them<sup>4</sup>.

Where, however, the existing tenancy is granted on or after 1 January 1968, whether or not it is to be treated<sup>5</sup> for other purposes as forming a single tenancy with a previous tenancy, and, the grant being subsequent to the creation of the charge on the landlord's estate, the existing tenancy is not binding on the persons interested in the charge, a lease executed to give effect to the obligation to grant an extended lease is not binding on those persons<sup>6</sup>.

A landlord granting an extended lease is bound to take such steps as may be necessary to secure that it is not liable<sup>7</sup> to be defeated by persons interested in a charge on his estate; but a landlord is not obliged, in order to grant an extended lease, to acquire a better title than he has or could require to be vested in him<sup>8</sup>.

Where a lease is executed to give effect to the obligation to grant an extended lease and any person having a charge on the landlord's estate is by reason thereof entitled to possession of the documents of title relating to that estate, the landlord must within one month after execution of the lease deliver to that person a counterpart of it duly executed by the tenant; and the instrument creating or evidencing the charge applies in the event of the landlord failing so to deliver a counterpart as if the obligation to do so were included in the terms of the charge as set out in that instrument<sup>9</sup>.

- 1 I.e. the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472 ante; the text and notes 2-9 infra; and PARA 1482 post.
- 2 For the meaning of 'tenancy' see PARA 1398 ante.
- 3 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 4 Leasehold Reform Act 1967 s 14(4). As to transitional relief in respect of mortgages on the landlord's estate see PARA 1464 note 12 ante.
- 5 I.e. by virtue of ibid s 3(3): see PARA 1400 ante.

6 Ibid s 14(4) proviso. Where a claim for an extended lease is made by a subtenant and, by reason of s 14(4) proviso, it is necessary to make any payment to discharge the house and premises from a charge affecting the interest of any landlord, the reversioner, if he is not the landlord liable or primarily liable in respect of the charge, is not required to make that payment otherwise than out of money made available for the purpose by that landlord; and it is the duty of that landlord to provide for the charge being discharged: s 5(4), Sch 1 para 12(2). As to claims by subtenants see PARA 1513 et seq post. For the meaning of 'the reversioner' see PARA 1516 post; for the meaning of 'house' see PARA 1390 ante; and for the meaning of 'premises' see PARA 1391 ante.

7 Ie in accordance with ibid s 14(4) proviso.

8 Ibid s 14(7).

9 Ibid s 14(5).

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### **1482. Charges on existing tenancy.**

Where under a lease executed to give effect to the obligation to grant an extended lease<sup>1</sup> the new tenancy<sup>2</sup> takes effect subject to a subsisting charge on the existing tenancy, and at the time of its execution the person having the charge is by reason thereof entitled to possession of the documents of title relating to the existing tenancy, he is similarly entitled to possession of the documents of title relating to the new tenancy; and the tenant<sup>3</sup> must within one month of the execution of the lease deliver it to him<sup>4</sup>. The instrument creating or evidencing the charge applies in the event of the tenant failing so to deliver the lease as if the obligation to do so were included in the terms of the charge as set out in that instrument<sup>5</sup>.

1 Ie where the lease is executed to give effect to the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 ante.

2 For the meaning of 'tenancy' see PARA 1398 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 Leasehold Reform Act 1967 s 14(6).

5 Ibid s 14(6).

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## **(v) Exclusion of Further Rights after Extension**

### **1483. Exclusion of further rights.**

Where a tenancy<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> has been extended<sup>4</sup>, then, as regards any property comprised in the extended tenancy:

- 3280 (1) there is no further right to an extension<sup>5</sup> of the tenancy<sup>6</sup>; and  
 3281 (2) neither the specified statutory provision relating to the protection of residential tenants on termination of long tenancies at low rents<sup>7</sup> nor the statutory provisions relating to business tenancies<sup>8</sup> apply to the tenancy<sup>9</sup>; and  
 3282 (3) after the extended term date<sup>10</sup> neither the specified statutory provision relating to the protection of residential tenants on termination of long tenancies at low rents<sup>11</sup> nor the statutory provisions relating to business tenancies<sup>12</sup> apply to any subtenancy directly or indirectly derived out of the tenancy, nor is a person entitled by virtue of any subtenancy to retain<sup>13</sup> possession<sup>14</sup>.

Where, however, a tenancy of a house and premises has been extended and any part, other than the house, of the property then comprised in that tenancy is afterwards, while so comprised, held with another house not so comprised, head (1) above does not apply to exclude any right of a tenant of the other house to acquire an extended lease of that part as being at the relevant time<sup>15</sup> comprised in his house and premises, unless the landlord<sup>16</sup> duly objects<sup>17</sup>.

Where a tenancy has been extended, no long tenancy<sup>18</sup> created immediately or derivatively by way of sub-demise under the tenancy confers on the subtenant, as against the tenant's landlord, any right to acquire an extended lease<sup>19</sup>.

A person granting a subtenancy to which head (3) above will apply, or negotiating with a view to the grant of such a subtenancy by him or by a person for whom he is acting as agent, must inform the other party that the subtenancy is to be derived out of a tenancy which has been extended, or one treated<sup>20</sup> as so extended, unless either he knows that the other party is aware of it or he himself is unaware of it<sup>21</sup>.

The Rent Act 1977 does not apply to a tenancy which has been extended; but, if on 3 October 1980 a rent was registered<sup>22</sup> for a dwelling house which is the subject of an extended tenancy, the tenant is not obliged to pay more than the registered rent under the extended tenancy until the next rental period<sup>23</sup> after the landlord has served on him a notice in writing that the registered rent no longer applies<sup>24</sup>.

Schedule 10 to the Local Government and Housing Act 1989<sup>25</sup> applies to every tenancy extended under Part I of the Leasehold Reform Act 1967<sup>26</sup>, whether or not it is for the purposes of that Schedule a long tenancy at a low rent<sup>27</sup> as respects which the qualifying condition<sup>28</sup> is fulfilled<sup>29</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.

5 Ie under ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1484 et seq post.

6 Ibid s 16(1)(b); and see PARA 1431 ante.

7 Ie the Landlord and Tenant Act 1954 s 1 (as amended): see PARA 1196 et seq ante.

8 Ie ibid Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

9 Leasehold Reform Act 1967 s 16(1)(c).

10 For the meaning of 'extended term date' see PARA 1400 note 12 ante.

11 See note 7 supra.



12 See note 8 *supra*.

13 *Ie* retain possession under the Rent Act 1977 Pt VII (ss 98-107) (as amended): see PARA 942 *et seq ante* or any enactment applying or extending Pt VII (as amended) or under the Rent Agriculture Act 1976 (see PARA 1134 *et seq ante*).

14 Leasehold Reform Act 1967 s 16(1)(d) (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent (Agriculture) Act 1976 s 40(2), Sch 8 para 17; the Rent Act 1977 s 155(2), Sch 23 para 43). The Leasehold Reform Act 1967 s 16(1)(a) (repealed) provided that the right to acquire the freehold by virtue of the tenancy was not exercisable unless notice of the tenant's desire to do so was given not later than the original term date; but the repeal of that provision by the Commonhold and Leasehold Reform Act 2002 s 143(1)(a) has effect whether the tenancy in question was extended before, or is extended after, the coming into force of s 143(1)(a) (ie 26 July 2002 in England and 1 January 2003 in Wales): see s 143(3). See also the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2 para 5 in relation to England and the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2 para 5 in relation to Wales.

15 For the meaning of 'relevant time' see PARA 1391 note 4 *ante*.

16 For the meaning of 'landlord' see PARA 1432 note 4 *ante*.

17 Leasehold Reform Act 1967 s 16(2) (s 16(2), (3) amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14). If, in a case falling within the Leasehold Reform Act 1967 s 16(2) (as so amended), a tenant of the other house gives notice of his desire to have an extended lease under Pt I (as amended), the landlord may, not later than two months afterwards, give the tenant written notice objecting to the inclusion in his house and premises of the part in question; and, if the landlord does so, that part is treated as not so included and Pt I (as amended) applies as it applies where property is treated as excluded from a house and premises under s 2(4) (as amended) (see PARA 1391 *ante*): s 16(3) (as so amended).

18 For the meaning of 'long tenancy' see PARA 1398 *ante*.

19 Leasehold Reform Act 1967 s 16(4) (amended by the Commonhold and Leasehold Reform Act 2002 ss 143(1)(b), 180, Sch 14). Where a tenancy has been extended under the Leasehold Reform Act 1967 s 14 (as amended) and that tenancy and any subsequent tenancy at a low rent of property comprised in it, with or without intervening tenancies, are to be treated under s 3(3) (see PARA 1400 *ante*) as a single tenancy of that property, the single tenancy is to be treated for the purposes of s 16 (as amended) as one which has been extended under s 14 (as amended), and the instrument granting any such subsequent tenancy must make provision in accordance with s 16(4) (as so amended): s 16(5). For the meaning of 'low rent' see PARA 1403 *ante*. See also s 15(8); and PARAS 1475-1476 *ante*. As to the effect of s 16(4) (as so amended) upon a subtenant claiming an extended lease see s 5(4), Sch 1 para 10(4); and PARA 1527 *post*.

20 *Ie* for the purposes of *ibid* s 16 (as amended).

21 *Ibid* s 16(6).

22 *Ie* under the Rent Act 1977 Pt IV (ss 62-75) (as amended): see PARA 909 *et seq ante*.

23 *Ie* within the meaning of the Rent Act 1977: see PARA 853 note 3 *ante*.

24 Leasehold Reform Act 1967 s 16(1A) (added by the Housing Act 1980 s 141, Sch 21 para 4).

25 *Ie* the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1237 *et seq ante*.

26 *Ie* extended under the Leasehold Reform Act 1967 s 14 (as amended).

27 For the meanings of 'long tenancy' and 'low rent' for the purposes of the Local Government and Housing Act 1989 Sch 10 (as amended) see PARAS 1245-1246 *ante*.

28 As to the qualifying condition for the purposes of *ibid* Sch 10 (as amended) see PARA 1244 *ante*.

29 Leasehold Reform Act 1967 s 16(1B) (substituted by the Commonhold and Leasehold Reform Act 2002 s 143(2)). This applies whether the tenancy in question was extended before, or is extended after, after the coming into force of s 143(2): see s 143(3). The Local Government and Housing Act 1989 Sch 10 (as amended) was previously excluded in relation to a tenancy extended under the Leasehold Reform Act 1967 s 14 (as amended): see s 16(1B) (as originally added by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 10). For transitional provisions see note 14 *supra*.

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#### **1484. Effect of statement that tenancy has been extended.**

Where an instrument extending a tenancy<sup>1</sup> at a low rent<sup>2</sup>, or granting a further tenancy at a low rent in substitution for or in continuance of such a tenancy, contains a statement to the effect that the tenancy is being or has been previously extended<sup>3</sup>, the statement is conclusive<sup>4</sup> in favour of any person not being a party to the instrument, unless the statement appears from the instrument to be untrue<sup>5</sup>.

Any person who:

- 3283 (1) includes or causes to be included in an instrument a statement to that effect knowing the statement to be untrue; or
- 3284 (2) executes, or with intent to deceive makes use of, any instrument, knowing that it contains such a statement and that the statement is untrue,

is liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding the prescribed sum, or to both<sup>6</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'low rent' see PARA 1403 ante.

3 I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1485 et seq post.

4 I.e. for the purposes of ibid s 16 (as amended): see the text and notes 1-3 supra, 5-6 infra; and PARA 1483 ante.

5 Ibid s 16(7).

6 Ibid s 16(8) (amended by the Magistrates' Courts Act 1980 s 32(2)). For the meaning of 'the prescribed sum' see PARA 1426 note 17 ante.

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## **(5) LANDLORDS WITH SPECIAL RIGHTS**

### **(i) Redevelopment Rights**

#### **1485. Application for possession for redevelopment after extension of the tenancy.**

Where a tenancy<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> has been extended<sup>4</sup>, the landlord<sup>5</sup> may, at any time not earlier than 12 months before the original term date<sup>6</sup> of the tenancy, apply to the court<sup>7</sup> for an order that he may resume possession of the property on the ground that for purposes of redevelopment he proposes to demolish or reconstruct the whole or a substantial part of the house and premises<sup>8</sup>.

If, on such an application, the court is satisfied that the landlord has established that ground, the court must<sup>9</sup> by order declare that the landlord is entitled, as against the tenant<sup>10</sup>, to obtain possession of the house and premises and the tenant is entitled to be paid compensation by the landlord for the loss of the house and premises<sup>11</sup>.

Where a landlord makes such an application, then:

3285 (1) if the tenant afterwards gives notice of his desire to have the freehold of the house and premises<sup>12</sup>, that notice is of no effect if it is not given before the date of the order fixing the date for the termination of the tenancy<sup>13</sup>, or if the tenant's notice of his desire to have an extended lease was given within 12 months before the making of the landlord's application; and

3286 (2) if a notice given by the tenant, before or after the making of the landlord's application, of his desire to have the freehold has effect, no order or further order may be made on the landlord's application except as regards costs, but without prejudice to the making of a further application by the landlord if the tenant's notice lapses without effect being given to it<sup>14</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 ante.

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 For the meaning of 'original term date' see PARA 1400 note 12 ante.

7 The claim must be made in accordance with CPR Pt 55 (possession claims: see PARA 656 et seq ante): *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 13.4.

8 Leasehold Reform Act 1967 s 17(1). In such a claim the defendant must: (1) immediately after being served with the claim form, serve on every person in occupation of the property or part of it under an immediate or derivative subtenancy, a notice informing him of the claim and of his right under the Leasehold Reform Act 1967 Sch 2 para 3(4) (see PARA 1494 post) to take part in the hearing of the claim with the permission of the court; and (2) within 14 days after being served with the claim form, file a defence stating the ground, if any, on which he intends to oppose the claim and giving particulars of every such subtenancy: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 13.5.

Where a tenant's notice of his desire to have the freehold or an extended lease of a house and premises under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante, PARA 1486 et seq post) is given after the service of a landlord's notice terminating the tenancy under the Landlord and Tenant Act 1954 s 4 (see PARA 1212 ante) or s 25 (as amended) (see PARA 716 ante) or the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1) (see PARA 1249 ante), and the landlord's notice does not comply with the Leasehold Reform Act 1967 s 22(2), Sch 3 para 10(2) (as amended) (see PARA 716 note 3 ante), no application made under s 17 or s 18 (as amended) (see PARAS 1488-1489 post) with respect to the house and premises by the landlord giving the notice may be entertained by the court, other than an application under s 17 after the grant of an extended lease: Sch 3 para 10(4) (amended by the Local Government and Housing Act 1989 s 194(1), Sch 11 para 13(5)(b)).

9 ie subject to the provisions of the Leasehold Reform Act 1967 s 17.

10 For the meaning of 'tenant' see PARA 1432 note 1 ante.

11 Leasehold Reform Act 1967 s 17(2). Where an order is so made, the tenancy determines and compensation becomes payable in accordance with Sch 2 (as amended) (see PARAS 1491-1493 post); and the provisions of Sch 2 (as amended) have effect as regards the measure of compensation under any such order (see PARA 1492 post) and the effects of the order where there are subtenancies (see PARAS 1494-1495 post), and as regards other matters relating to applications and orders under s 17: s 17(3).

Schedule 2 (as amended) has effect where a tenant of a house and premises is entitled to be paid compensation under s 17 or s 18 (as amended) (see PARAS 1488-1490 post), or would be so entitled on the landlord obtaining an order for possession, or where an application for such an order is dismissed or withdrawn: Sch 2 para 1(1). For the meaning of 'order for possession' see PARA 1491 note 1 post.

12 Ie under ibid Pt I (as amended).

13 Ie in accordance with ibid Sch 2 (as amended): see PARA 1491 post.

14 Ibid s 17(6).

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#### **1486. Application for possession for redevelopment before extension of the tenancy.**

Where the tenancy<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> has not been extended<sup>4</sup> but the tenant<sup>5</sup> has a right to an extended lease and gives notice of his desire to have one, the statutory provisions relating to repossession on the ground of redevelopment following the extension of a lease<sup>6</sup> apply as if the lease had been extended; and

3287 (1) on the making by the landlord<sup>7</sup> of an application to the court under those provisions, the notice is suspended until the time when an order allowing the application<sup>8</sup> or an order dismissing it becomes final<sup>9</sup> or the application is withdrawn; and

3288 (2) on an order allowing such an application becoming final, the tenant's notice ceases to have effect, but the tenant is not required to make any payment to the landlord in respect of costs<sup>10</sup> incurred by reason of the notice<sup>11</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 ante.

5 For the meaning of 'tenant' see PARA 1432 note 1 ante.

6 Ie the Leasehold Reform Act 1967 s 17(1)-(3): see PARA 1485 ante.

7 For the meaning of 'landlord' see PARA 1432 note 4 ante.

8 Ie under the Leasehold Reform Act 1967 s 17(2): see PARA 1485 ante.

9 As to when an order of a court is to be treated as becoming final for these purposes see PARA 1448 note 6 ante.

10 Ie the Leasehold Reform Act 1967 s 14(2) (see PARA 1471 ante) does not apply.

11 Ibid s 17(4). For these purposes, the reference in s 17(1) (see PARA 1485 ante) to the original term date has effect as a reference to the term date or, in a case where before the relevant time the landlord had given notice to quit terminating the tenancy at a date earlier than the term date, as a reference to the date specified in the notice to quit: s 17(5). For the meanings of 'original term date' and 'term date' see PARA 1400 note 12 ante; for the meaning of 'relevant time' see PARA 1391 note 4 ante; and for the meaning of 'notice to quit' see PARA 1435 note 5 ante. See also PARA 1485 note 8 ante.

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### **1487. Retention or resumption of land required for public purposes.**

Where the landlord<sup>1</sup> of any property is:

- 3289 (1) any local authority<sup>2</sup>;
- 3290 (2) the Broads Authority<sup>3</sup>;
- 3291 (3) any National Park authority<sup>4</sup>;
- 3292 (4) the Commission for the New Towns<sup>5</sup> or any development corporation<sup>6</sup>;
- 3293 (5) any university body<sup>7</sup>;
- 3294 (6) any specified health service body<sup>8</sup>;
- 3295 (7) any body corporate established by or under any enactment for the purpose of carrying on under national ownership any industry or part of an industry or undertaking;
- 3296 (8) the Environment Agency<sup>9</sup>;
- 3297 (9) any body not included in heads (1) to (8) above which is a harbour authority<sup>10</sup> but in respect only of the body's functions as harbour authority;
- 3298 (10) a housing action trust<sup>11</sup>,

and a Minister of the Crown or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>12</sup> certifies that the property will in ten years or less be required for relevant development<sup>13</sup>, then a notice of a person's desire to have the freehold or an extended lease<sup>14</sup> of a house<sup>15</sup> comprised in the property is of no effect<sup>16</sup>.

If the tenancy<sup>17</sup> of any such house has not been extended<sup>18</sup>, but the tenant<sup>19</sup>, being entitled to acquire the freehold or an extended lease, either:

- 3299 (a) before a copy of the certificate has been served upon him, gives notice of his desire to have the freehold or an extended lease; or
- 3300 (b) not later than two months after a copy of the certificate is served on him, gives the landlord written notice, in the prescribed form<sup>20</sup>, claiming to be so entitled,

the statutory provisions conferring upon a landlord an overriding right for the purposes of redevelopment<sup>21</sup> apply as if the tenancy had been extended<sup>22</sup>.

A minister or the Assembly may not so give a certificate with respect to any house unless the landlord has given to the tenant of the house a written notice stating:

- 3301 (i) that the question of giving such a certificate is under his or its consideration; and

3302 (ii) that, if within 21 days of the giving of the notice the tenant makes to that minister or to the Assembly written representations with respect to that question, they will be considered before the question is determined;

and, if the tenant makes any such representations within those 21 days, the minister or Assembly must consider them before determining whether to give the certificate<sup>23</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 For these purposes, 'local authority' means the Mayor and commonalty and citizens of the City of London, any county council, borough council or district council, any joint authority established by the Local Government Act 1985 Pt IV (ss 23-42) (as amended) (see LOCAL GOVERNMENT vol 69 (2009) PARA 47 et seq), the London Fire and Emergency Planning Authority, any joint board in which all the constituent authorities are local authorities, any police authority established under the Police Act 1996 s 3 and the Metropolitan Police Authority: Leasehold Reform Act 1967 s 28(5)(a) (amended by the Local Government Act 1985 ss 84, 102(2), Schs 14, 17; the Education Reform Act 1988 s 237(2), Sch 13 Pt I; the Police and Magistrates' Courts Act 1994 s 43, Sch 4 Pt II para 48; the Police Act 1996 s 103, Sch 7 para 1(2)(d); the Police Act 1997 s 134(2), Sch 10; the Greater London Authority Act 1999 ss 328, 423, Sch 29 para 8, Sch 34 Pt VII).

3 As to the Broads Authority see WATER AND WATERWAYS vol 101 (2009) PARA 734.

4 As to National Park authorities see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 526.

5 As to the Commission for the New Towns (now part of English Partnerships) see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq.

6 Ie within the meaning of the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq): Leasehold Reform Act 1967 s 28(5)(b); Interpretation Act 1978 s 17(2)(a).

7 For these purposes, 'university body' means any university, university college, or college of a university; and 'college of a university' includes, in the case of a university organised on a collegiate basis, a constituent college or other society recognised by the university and, in the case of London University, a college incorporated in the university or a school of the university: Leasehold Reform Act 1967 s 28(5)(c).

8 Ie any Strategic Health Authority, any Health Authority, any Special Health Authority, any Primary Care Trust, any National Health Service trust and any NHS foundation trust: see *ibid* s 28(5)(d) (substituted by the National Health Service Reorganisation Act 1973 ss 57, 58, Sch 4 para (iii); amended by the Health Authorities Act 1995 s 2(1), Sch 1 para 94(a); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 11, 12(a); and by the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1 para 7(a); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 4(a)).

9 As to the Environment Agency see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 45 (2010) PARA 68 et seq.

10 For these purposes, 'harbour authority' means a harbour authority within the meaning of the Harbours Act 1964 (see PORTS AND HARBOURS vol 36(1) (2007 Reissue) PARA 619): Leasehold Reform Act 1967 s 28(5)(f) (amended by the Water Act 1989 s 190(1), (3), Sch 25 para 35, Sch 27 Pt I).

11 Ie a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 319 et seq.

12 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

13 For these purposes, 'relevant development', in relation to any body to which the Leasehold Reform Act 1967 s 28 (as amended) applies, means development for purposes, other than investment purposes, of that body, but in relation to a local authority includes any development to be undertaken, whether or not by that authority, in order to secure (1) the development or redevelopment of an area defined by a development plan under the Planning and Compulsory Purchase Act 2004 (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 91 et seq) as an area of comprehensive development; or (2) the treatment as a whole, by development, redevelopment or improvement, or partly by one and partly by another method, of any area in which the property is situated: Leasehold Reform Act 1967 s 28(6) (amended by the Planning (Consequential Provisions) Act 1990 ss 4, 5, Sch 2 para 17(1), Sch 3); the Planning and Compulsory Purchase Act 2004 s 118(2), Sch 7 para 3).

However (a) the purposes of a county council or council are to be taken to include the purposes of a police authority which is a committee of the council; and (b) the purposes of a university body are to be taken to include the purposes of any related university body, a university and the colleges of that university within the meaning of the Leasehold Reform Act 1967 s 28(5)(c) (see note 7 supra) being related to one another for these purposes; and (c) in the case of the health service bodies referred to in note 8 supra, the purposes of the National Health Service Act 1977 are to be substituted for the purposes of that body: Leasehold Reform Act 1967 s 28(6) (amended by the Local Government Act 1972 s 272(1), Sch 30; the National Health Service Reorganisation Act 1973 ss 57, 58, Sch 4 para 111; the National Health Service Act 1977 s 129, Sch 15 para 42; the Health Authorities Act 1995 s 2(1), Sch 1 para 94(b); the Health and Social Care (Community Health and Standards) Act 2003 s 34, Sch 4 paras 11, 12(b); and by the Health Act 1999 (Supplementary, Consequential etc Provisions) Order 2000, SI 2000/90, art 3(1), Sch 1, PARA 7(b); and the National Health Service Reform and Health Care Professions Act 2002 (Supplementary, Consequential etc Provisions) Regulations 2002, SI 2002/2469, reg 4, Sch 1 Pt 1 para 4(b)).

14    Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1488 et seq post.

15    For the meaning of 'house' see PARA 1390 ante.

16    Leasehold Reform Act 1967 s 28(1)(a), (5)(a)-(g) (s 28(5)(a), (bc), (d), (f) amended as set out in notes 2, 8, 10 supra; s 28(5)(aa) added by the Norfolk and Suffolk Broads Act 1988 s 21, Sch 6 para 6; the Leasehold Reform Act 1967 s 28(5)(ab) added by the Environment Act 1995 s 78, Sch 10 para 7; the Leasehold Reform Act 1967 s 28(5)(ee) added by the Water Act 1989 s 190, Sch 25 para 35 and amended by the Environment Act 1995 (Consequential Amendments) Regulations 1996, SI 1996/593, reg 2, Sch 1; the Leasehold Reform Act 1967 s 28(5)(g) added by the Housing Act 1988, s 140, Sch 17 Pt I).

If it appears to the Secretary of State or, in relation to Wales, to the Assembly or the relevant Welsh minister that the Leasehold Reform Act 1967 s 28 (as amended) should apply to any body or description of bodies having functions of a public nature but not included in heads (1)-(10) in the text, he or the Assembly or minister may by order direct that s 28 (as amended) shall apply to that body or description of bodies: see s 28(7). As to the Secretary of State see PARA 27 note 3 ante. The power so to make orders includes power to vary or revoke any order made for the purposes of the Leasehold Reform Act 1967 s 28(7) and is exercisable by statutory instrument of which, if it is made by the Secretary of State, a draft must be laid before Parliament: see s 28(8).

17    For the meaning of 'tenancy' see PARA 1398 ante.

18    See note 14 supra.

19    For the meaning of 'tenant' see PARA 1432 note 1 ante.

20    For the prescribed form of notice see the Leasehold Reform (Notices) Regulations 1997, SI 1997/640, regs 2, 3(2), Schedule, Form 2 (substituted in relation to England by SI 2002/1715; and in relation to Wales by SI 2002/3187).

21    Ie the Leasehold Reform Act 1967 s 17: see PARAS 1485-1486 ante.

22    Ibid s 28(1)(b). For the purposes of any application by the landlord under s 17 in relation to property comprised in the certificate, whether the application is made by virtue of s 28(1)(b) or otherwise, the certificate is conclusive that the ground specified in s 17(1) (see PARA 1485 ante) is established: s 28(1)(c).

Where, by virtue of s 28(1)(b), a tenancy of any property is to be treated as having been extended, then as regards that property the tenancy does not terminate either by effluxion of time or in pursuance of any notice given by the landlord or the tenant or by the termination of a superior tenancy: s 28(2).

In the case of a tenancy to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante) applies, the Leasehold Reform Act 1967 s 28(1), (2) has effect where a certificate is given under the Landlord and Tenant Act 1954 s 57 (as amended) (see PARA 769 ante) as it has effect where a certificate is given under the Leasehold Reform Act 1967 s 28 (as amended); but, where by virtue of s 28(1)(b) a tenancy is to be treated as having been extended, no compensation is payable under the Landlord and Tenant Act 1954 s 59 (as amended) (see PARA 774 ante) in respect of the tenancy or any immediate or derivative subtenancy: Leasehold Reform Act 1967 s 28(3).

23    Ibid s 28(4).

## UPDATE

### 1487 Retention or resumption of land required for public purposes

NOTE 2--Leasehold Reform Act 1967 s 28(5)(a) further amended: Local Government and Public Involvement in Health Act 2007 Sch 13 para 27; Local Democracy, Economic Development and Construction Act 2009 Sch 6 para 5.

NOTE 6--Leasehold Reform Act 1967 s 28(5)(b) amended: Housing and Regeneration Act 2008 Sch 8 para 6.

NOTE 8--Leasehold Reform Act 1967 s 28(5)(d) further amended: References to Health Authorities Order 2007, SI 2007/961.

NOTE 13--Leasehold Reform Act 1967 s 28(6) further amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 32; References to Health Authorities Order 2007, SI 2007/961.

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## **(ii) Residential Rights**

### **1488. Application for possession for the purpose of residence.**

Where the tenancy<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup> has not been extended<sup>4</sup> but the tenant<sup>5</sup> has a right to acquire the freehold or an extended lease and has given notice of his desire to have it, the landlord<sup>6</sup> may, at any time before effect is given to the notice, apply to the court<sup>7</sup> for an order that he may resume possession of the property on the ground that it or part of it is or will be reasonably required by him for occupation<sup>8</sup> as the only or main residence of the landlord or of a person who is at the time of the application an adult member of the landlord's family<sup>9</sup>.

A landlord is not, however, entitled so to apply to the court if his interest in the house and premises, or an interest which has merged in that interest but would otherwise have had a duration extending at least five years longer than that of the tenancy, was purchased or created after 18 February 1966<sup>10</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 For the meaning of 'premises' see PARA 1391 ante.

4 Ie under the Leasehold Reform Act 1967 s 14 (as amended): see PARA 1469 ante.

5 For the meaning of 'tenant' see PARA 1432 note 1 ante.

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 The claim must be made in accordance with CPR Pt 55 (possession claims: see PARA 656 et seq ante): *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 13.4.

8 The requirement for occupation by the landlord or a member of his family must be a requirement arising at the date when the contractual tenancy is limited to expire: *Gurvidi v Mangat* (1972) 116 Sol Jo 255, CA.

9 Leasehold Reform Act 1967 s 18(1). For these purposes, a person is an adult member of another's family if that person is (1) the other's spouse or civil partner; (2) a son or daughter or a son-in-law or daughter-in-law of the other, or of the other's spouse or civil partner, who has attained the age of 18; or (3) the father or mother of



the other, or of the other's spouse or civil partner; and in head (2) supra any reference to a person's son or daughter includes a reference to any stepson or stepdaughter, and any illegitimate son or daughter of that person, and 'son-in-law' and 'daughter-in-law' are to be construed accordingly: s 18(3) (amended by the Children Act 1975 s 108(1)(b), Sch 4 Pt I; the Civil Partnership Act 2004 s 81, Sch 8 para 7).

Where the landlord's interest is held on trust, the Leasehold Reform Act 1967 s 18(1) applies as if the reference to occupation as the residence of the landlord were a reference to the like occupation of a person having an interest under the trust, whether or not also a trustee, and the reference to a member of the landlord's family were a reference to the like member of such a person's family: s 18(3).

In such a claim the defendant must: (a) immediately after being served with the claim form, serve on every person in occupation of the property or part of it under an immediate or derivative subtenancy, a notice informing him of the claim and of his right under the Leasehold Reform Act 1967 Sch 2 para 3(4) (see PARA 1494 post) to take part in the hearing of the claim with the permission of the court; and (b) within 14 days after being served with the claim form, file a defence stating the ground, if any, on which he intends to oppose the claim and giving particulars of every such subtenancy: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 13.5.

10 Leasehold Reform Act 1967 s 18(2). For these purposes, the duration of any interest in the house and premises, including the tenancy, is to be taken to be the period until it is due to expire or, if capable of earlier determination by notice given by a person as landlord, the date or earliest date which has been or could be specified in such a notice: s 18(2). See also PARA 1485 note 8 ante.

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### **1489. Making of court order.**

If, on an application made for the purpose of exercising overriding residential rights<sup>1</sup>, the court is satisfied that the landlord<sup>2</sup> has established the requisite ground<sup>3</sup> and is not disentitled to apply<sup>4</sup>, the court must declare by order that the landlord is entitled as against the tenant<sup>5</sup> to obtain possession of the house<sup>6</sup> and premises<sup>7</sup>, and the tenant is entitled to be paid compensation by the landlord for the loss of the house and premises<sup>8</sup>.

The court may not, however, so make an order if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by making the order than refusing to make it<sup>9</sup>.

1    le an application under the Leasehold Reform Act 1967 s 18(1): see PARA 1488 ante.

2    For the meaning of 'landlord' see PARA 1432 note 4 ante.

3    le the ground mentioned in the Leasehold Reform Act 1967 s 18(1).

4    le disentitled by *ibid* s 18(2): see PARA 1488 ante.

5    For the meaning of 'tenant' see PARA 1432 note 1 ante.

6    For the meaning of 'house' see PARA 1390 ante.

7    For the meaning of 'premises' see PARA 1391 ante.

8    Leasehold Reform Act 1967 s 18(4). Where an order is made under s 18(4), the tenancy determines and the compensation becomes payable in accordance with Sch 2 (as amended) (see PARAS 1491-1493 post); and the provisions of Sch 2 (as amended) have effect as regards the measure of compensation under any such order (see PARA 1492 post) and the effects of the order where there are subtenancies (see PARAS 1494-1495 post), and as regards other matters relating to applications and orders under s 18 (as amended): s 18(5). See also PARA 1485 note 8 ante.

As to the application of Sch 2 (as amended) see PARA 1485 note 11 ante.

9 Ibid s 18(4) proviso. As to 'greater hardship' in the context of possession proceedings under the Rent Act 1977 see PARA 958 ante.

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### **1490. Effect upon tenant's notice of landlord's application.**

Where a landlord<sup>1</sup> makes an application to the court to exercise overriding residential rights<sup>2</sup>:

- 3303 (1) any notice previously given by the tenant<sup>3</sup> of his desire to have the freehold or an extended lease<sup>4</sup> of the house<sup>5</sup> and premises<sup>6</sup> is suspended until the time when an order allowing the application<sup>7</sup> or an order dismissing the application becomes final<sup>8</sup> or the application is withdrawn; and
- 3304 (2) on an order allowing such an application becoming final, the tenant's notice ceases to have effect, but the tenant is not required to make any payment to the landlord in respect of costs incurred<sup>9</sup> by reason of the notice;

and a notice of the tenant's desire to have the freehold is of no effect if given after the making of the application and before the time referred to in head (1) above or after an order allowing the application has become final<sup>10</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 Ie under the Leasehold Reform Act 1967 s 18(1): see PARA 1488 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1491 et seq post.

5 For the meaning of 'house' see PARA 1390 ante.

6 For the meaning of 'premises' see PARA 1391 ante.

7 Ie an order under the Leasehold Reform Act 1967 s 18(4): see PARA 1489 ante.

8 As to when an order of the court is treated as becoming final see PARA 1448 note 6 ante.

9 Ie the Leasehold Reform Act 1967 s 9(4) (see PARA 1466 ante) or, as the case may be s 14(2) (see PARA 1471 ante) does not apply.

10 Ibid s 18(6). See also PARA 1485 note 8 ante.

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### **(iii) Determination of Tenancy; Payment of Compensation on Exercise of Overriding Rights**

#### **1491. Determination of tenancy and date of payment of compensation.**

Where an order for possession<sup>1</sup> is made, the tenancy<sup>2</sup> determines; and the compensation payable to the tenant<sup>3</sup> by virtue of the order becomes payable on such date as may, when the amount of that compensation is known, be fixed by order of the court made on the application either of the landlord<sup>4</sup> or of the tenant<sup>5</sup>.

Such an order of the court may not fix a date earlier than the original term date<sup>6</sup> of the tenancy, nor may it fix a date less than four months or more than 12 months after the date of the order unless the court sees special reason for doing so; and, where residential rights are exercised<sup>7</sup>, an application to a leasehold valuation tribunal to determine the amount of the compensation payable to the tenant may not be made more than 12 months before the original term date<sup>8</sup>. In fixing the date, the court must have regard to the conduct of the parties and, in a case under the statutory provisions relating to redevelopment<sup>9</sup>, to the extent to which the landlord has made reasonable preparations for proceeding with the redevelopment, including the obtaining of, or preparations relating to the obtaining of, any requisite permission or consent, whether from any authority whose permission or consent is required under any enactment or from the owner of an interest in any property<sup>10</sup>.

Where an order has been so made, the court making the order or another county court has jurisdiction to hear and determine any proceedings brought by virtue of the order to recover possession of the property or to recover the compensation, notwithstanding that by reason of the value of the property or the amount of the compensation the proceedings are not otherwise within the jurisdiction conferred on county courts<sup>11</sup>.

1 For these purposes, 'order for possession' means an order under the Leasehold Reform Act 1967 s 17(2) (see PARA 1485 ante) or s 18(4) (see PARA 1489 ante): ss 17(3), 18(5), Sch 2 para 1(1)(b).

2 For the meaning of 'tenancy' see PARA 1398 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 For the meaning of 'landlord' see PARA 1432 note 4 ante.

5 Leasehold Reform Act 1967 Sch 2 para 2(1). As to the application of Schedule 2 (as amended) see PARA 1485 note 11 ante.

6 For the meaning of 'original term date' see PARA 1400 note 12 ante. Where the tenancy has not been extended under *ibid* s 14 (as amended) (see PARA 1469 ante), references in Sch 2 (as amended) to the original term date are to be construed as references to the term date or, in a case where before the relevant time the landlord had given notice to quit terminating the tenancy at a date earlier than the term date, as references to the date specified in the notice to quit: Sch 2 para 1(2). For the meaning of 'relevant time' see PARA 1391 note 4 ante; and for the meaning of 'notice to quit' see PARA 1435 note 5 ante.

7 *Ie* under *ibid* s 18 (as amended): see PARAS 1488-1490 ante.

8 *Ibid* Sch 2 para 2(2) (amended by the Housing Act 1980 s 142(3), Sch 22 para 11). As to the jurisdiction of leasehold valuation tribunals see PARA 1530 post.

9 *Ie* under the Leasehold Reform Act 1967 s 17: see PARAS 1485-1486 ante.

10 *Ibid* Sch 2 para 2(3).

11 *Ibid* Sch 2 para 4.

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#### **1492. Amount of compensation.**

The amount payable to a tenant<sup>1</sup>, by virtue of an order for possession<sup>2</sup>, by way of compensation for the loss of the house<sup>3</sup> and premises<sup>4</sup> is the amount which, if the statutory provisions relating to redevelopment<sup>5</sup> and residential rights<sup>6</sup> had not been passed, the house and premises, if sold in the open market by a willing seller, might at the date when the order for possession becomes final<sup>7</sup> be expected to realise, on the assumption that the vendor was selling the tenancy<sup>8</sup> and was selling subject to:

- 3305 (1) the rights of any person who will on the termination of the tenancy be entitled to retain possession as against the landlord<sup>9</sup>, but otherwise with vacant possession;
- 3306 (2) any subsisting incumbrances<sup>10</sup> which will not terminate with the tenancy and for which during the continuance of the tenancy the tenant is liable, without having a right to be indemnified by the landlord, but otherwise free of incumbrances; and
- 3307 (3) any restriction which would be required, in addition to any imposed by the terms of the tenancy, to limit the uses of the house and premises to those to which they have been put since the commencement of the tenancy and to preclude the erection of any new dwelling house or any other building not ancillary to the house as a dwelling house;

but there must be left out of account any value attaching to the right<sup>11</sup> to acquire the freehold<sup>12</sup>.

The compensation payable in respect of a tenancy which has not been extended<sup>13</sup> must be computed as if the tenancy was to be so extended<sup>14</sup>.

1 For the meaning of 'tenant' see PARA 1432 note 1 ante.

2 For the meaning of 'order for possession' see PARA 1491 note 1 ante.

3 For the meaning of 'house' see PARA 1390 ante.

4 For the meaning of 'premises' see PARA 1391 ante.

5 I.e. the Leasehold Reform Act 1967 s 17: see PARAS 1485-1486 ante.

6 I.e. ibid s 18 (as amended): see PARAS 1488-1490 ante.

7 As to when an order of the court is treated as becoming final see PARA 1448 note 6 ante.

8 For the meaning of 'tenancy' see PARA 1398 ante.

9 For the meaning of 'landlord' see PARA 1432 note 4 ante.

10 For the meaning of 'incumbrances' see PARA 1439 note 10 ante.

11 I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1493 et seq post.

12 Ibid ss 17(3), 18(5), Sch 2 para 5(1). As to the application of Sch 2 (as amended) see PARA 1485 note 11 ante; as to the determination, in default of agreement, by a leasehold valuation tribunal of the amount of any compensation payable to a tenant see PARA 1530 et seq post; and as to the validity of agreements as to the amount of compensation when a tenant's right to compensation has accrued see PARA 1424 ante.

The Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) (see PARA 789 et seq ante), does not apply on the termination of the tenancy or any subtenancy in accordance with the Leasehold Reform Act 1967 Sch 2 (as amended): Sch 2 para 6(1).

As to the assessment of compensation in the case of an order for possession on the ground of redevelopment see s 29(4); and PARAS 1456, 1477 ante.

13 le under ibid s 14 (as amended): see PARA 1469 ante.

14 Ibid Sch 2 para 5(2).

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### **1493. Payment and application of compensation.**

The landlord<sup>1</sup> is not to be concerned with the application of the amount payable to the tenant<sup>2</sup> by way of compensation under an order for possession<sup>3</sup>; but, subject to any statutory requirements as to the payment of capital money arising under a settlement or trust of land and to any order for payment into court<sup>4</sup>, the written receipt of the tenant is a complete discharge for the amount payable<sup>5</sup>.

The landlord is entitled to deduct from the amount so payable to the tenant:

- 3308 (1) the amount of any sum payable by way of rent or recoverable as rent in respect of the house<sup>6</sup> and premises<sup>7</sup> up to the termination of the tenancy<sup>8</sup>; and
- 3309 (2) the amount of any other sums due and payable by the tenant to the landlord under or in respect of the tenancy or any agreement collateral thereto<sup>9</sup>.

Where the tenancy is subject to a trust of land and compensation is paid in respect of it<sup>10</sup>, the sum received must be dealt with as if it were proceeds of sale arising under the trust<sup>11</sup>.

Where a subtenancy terminating with the tenancy<sup>12</sup> is one to which Part II of the Landlord and Tenant Act 1954<sup>13</sup> applies, the compensation payable to the tenant must be divided between him and the subtenant in such proportions as may be just, regard being had to their respective interests in the house and premises and to any loss arising from the termination of those interests and not incurred by imprudence<sup>14</sup>. Where the amount of the compensation payable to the tenant is agreed between him and the landlord without the consent of a subtenant so entitled to share in the compensation and is shown by the subtenant to be less than might reasonably have been obtained by the tenant, the subtenant is entitled to recover from the tenant such increased share as may be just<sup>15</sup>.

The court may by order direct that the whole or part of the compensation payable to the tenant shall be paid into court, if the court thinks it expedient to do so for the purposes of ensuring that the sum paid is available for meeting charges on the tenant's interest in the house and premises, or for the purpose of division, or for any other purpose<sup>16</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

- 2 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 3 For the meaning of 'order for possession' for these purposes see PARA 1491 note 1 ante.
- 4 Ie under the Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 2(4): see the text and note 16 infra.
- 5 Ibid Sch 2 para 7(1) (Sch 2 para 7(1), (3) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 10(c); for transitional provisions and savings see s 25(4), (5)).
- 6 For the meaning of 'house' see PARA 1390 ante.
- 7 For the meaning of 'premises' see PARA 1391 ante.
- 8 For the meaning of 'tenancy' see PARA 1398 ante.
- 9 Leasehold Reform Act 1967 Sch 2 para 7(2).
- 10 Ie under ibid s 17 or s 18 (as amended), whether possession is obtained thereunder or without any application for possession. For these purposes, 'application for possession' means a landlord's application under s 17(1) (see PARA 1485 ante) or s 18(1) (see PARA 1488 ante): Sch 2 para 1(1)(a).
- 11 Ibid Sch 2 para 7(3) (as amended: see note 5 supra). As to compensation in respect of ecclesiastical property see PARA 1509 post; and as to the treatment of compensation paid by a mortgagee see PARA 1507 post.  
The purposes authorised for the application of capital money by the Settled Land Act 1925 s 73 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 808) and the purposes authorised by s 71 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 849-850) as purposes for which money may be raised by mortgage, include the payment of compensation in accordance with the Leasehold Reform Act 1967 s 17 or s 18 (as amended), whether possession is obtained thereunder or without any application for possession: Sch 2 para 9(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.  
The purposes authorised for the application of capital money by the Universities and College Estates Act 1925 s 26 (as amended), and the purposes authorised by s 31 (as amended) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1379) as purposes for which moneys may be raised by mortgage, include the payment of compensation in accordance with the Leasehold Reform Act 1967 s 17, whether possession is obtained under s 17 or without any application for possession: Sch 2 para 9(2).
- 12 Ie in accordance with ibid Sch 2 para 3 (as amended): see PARA 1494 post.
- 13 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.
- 14 Leasehold Reform Act 1967 Sch 2 para 6(2).
- 15 Ibid Sch 2 para 6(3). As to proceedings for recovery by the subtenant see PARA 1529 post.
- 16 Ibid Sch 2 para 2(4).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(5) LANDLORDS WITH SPECIAL RIGHTS/(iv) Effect of Proceedings on Subtenancies and Other Matters/1494. Determination of subtenancies.

## **(iv) Effect of Proceedings on Subtenancies and Other Matters**

### **1494. Determination of subtenancies.**

On the termination of a tenancy<sup>1</sup> under an order for possession<sup>2</sup> any immediate or derivative subtenancy also immediately terminates; and the tenant<sup>3</sup> is bound to give up possession of the

house<sup>4</sup> and premises<sup>5</sup> to the landlord<sup>6</sup> except in so far as he is precluded from doing so by the rights of other persons to retain possession under or by virtue of any enactment<sup>7</sup>.

Where a subtenancy of property comprised in the tenancy has been created after the date of the application for possession<sup>8</sup>, or any earlier date when, in a case where possession is being resumed for public purposes<sup>9</sup>, a copy of the Minister's certificate was served on the tenant, then no person is entitled<sup>10</sup> in respect of that subtenancy to retain possession of that property after the termination of the tenancy under the order for possession<sup>11</sup>.

In exercising its jurisdiction<sup>12</sup>, the court must assume that the landlord, having obtained an order for possession, will not be precluded from obtaining possession by the right of any person to retain possession by virtue of any statutory security of tenure<sup>13</sup> or otherwise<sup>14</sup>.

A person in occupation of the house and premises or part of them under a subtenancy liable so to terminate<sup>15</sup> may, with the leave of the court, appear and be heard on any application for possession or application<sup>16</sup> to fix the date for termination<sup>17</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'order for possession' for these purposes see PARA 1491 note 1 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 For the meaning of 'house' see PARA 1390 ante.

5 For the meaning of 'premises' see PARA 1391 ante.

6 For the meaning of 'landlord' see PARA 1432 note 4 ante.

7 Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 3(1). Where the landlord requires the tenant to take proceedings to evict the subtenants so as to be able to hand over the properties with vacant possession, the tenant will have a continuing right to possession for that purpose: see *Alamo Housing Co-operative Ltd v Meredith* [2003] EWCA Civ 495, [2004] LGR 81, [2003] All ER (D) 70 (Apr).

8 For the meaning of 'application for possession' see PARA 1493 note 10 ante.

9 Ie an application relying on the Leasehold Reform Act 1967 s 28(1): see PARA 1487 ante.

10 Ie under the Rent Act 1977 s 137(2), or any enactment, including s 137(5) (as amended), applying or extending it (see PARAS 976-977 ante) or under the Rent (Agriculture) Act 1976 s 9(2), as extended by s 9(5) (as amended) (see PARA 1167 ante).

11 Leasehold Reform Act 1967 Sch 2 para 3(2) (amended by the Rent Act 1968 s 117(2), Sch 15; the Rent (Agriculture) Act 1976 s 40(2), Sch 8 para 18(a); the Rent Act 1977 s 137(2)).

12 Ie under the Leasehold Reform Act 1967 s 17 (see PARAS 1485-1486 ante) or s 18 (as amended) (see PARAS 1488-1490 ante) or Sch 2 (as amended) (see PARA 1491 et seq ante, PARAS 1495-1497 post).

13 Ie under the Rent Act 1977 Pt VII (ss 98-107) (as amended) (see PARA 942 et seq ante), or any enactment applying or extending Pt VII (as amended) or under the Rent (Agriculture) Act 1976 (see PARA 1134 et seq ante).

14 Leasehold Reform Act 1967 Sch 2 para 3(3) (amended by the Rent Act 1968 Sch 15; the Rent (Agriculture) Act 1976 Sch 8 para 18(b); the Rent Act 1977 s 155(2), Sch 23 para 45).

15 Ie under the Leasehold Reform Act 1967 Sch 2 para 3(1): see the text and notes 1-7 supra.

16 Ie any application under *ibid* Sch 2 para 2 (as amended): see PARA 1491 ante.

17 *Ibid* Sch 2 para 3(4).

PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(5) LANDLORDS WITH SPECIAL RIGHTS/(iv) Effect of Proceedings on Subtenancies and Other Matters/1495. Business tenancies.

### **1495. Business tenancies.**

A request for a new tenancy<sup>1</sup> made under the provisions entitling tenants of business premises to security of tenure<sup>2</sup> in respect of the tenancy or any subtenancy is of no effect if made after the application for possession<sup>3</sup>, or ceases to have effect on the making of that application<sup>4</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 ie under the Landlord and Tenant Act 1954 s 26 (as amended): see PARA 718 ante.

3 For the meaning of 'application for possession' for these purposes see PARA 1493 note 10 ante.

4 Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 6(1).

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### **(v) Court's Additional Powers on Hearing of Landlord's Application**

#### **1496. Costs in the event of delay or default.**

Where a landlord<sup>1</sup> makes an application for possession<sup>2</sup>, and it is made to appear to the court that in relation to matters arising out of that application, including the giving up of possession of the house<sup>3</sup> and premises<sup>4</sup> or the payment of compensation, the landlord or the tenant<sup>5</sup> has been guilty of any unreasonable delay or default, the court may:

3310 (1) by order revoke or vary, and direct repayment of sums paid under, any provision made by a previous order as to payment of the costs of proceedings taken in the court on or with reference to the application, or, where costs have not been awarded, award costs;

3311 (2) certify particulars of the delay or default to the Lands Tribunal with a view to enabling the tribunal to exercise a like discretion in relation to costs of proceedings before the tribunal<sup>6</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 For the meaning of 'application for possession' for these purposes see PARA 1493 note 10 ante.

3 For the meaning of 'house' see PARA 1390 ante.

4 For the meaning of 'premises' see PARA 1391 ante.

5 For the meaning of 'tenant' see PARA 1432 note 1 ante.

6 Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 8(1). Where the court certifies particulars of delay or default to the Lands Tribunal under Sch 2 para 8(1)(b) (see head (2) in the text), the tribunal may make any



order as to costs of proceedings before the tribunal which the court may make in relation to proceedings in the court: Sch 2 para 8(1A) (added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 paras 1, 6).

## **UPDATE**

### **1496 Costs in the event of delay or default**

TEXT AND NOTE 6--References to the Lands Tribunal are now to the Upper Tribunal: Leasehold Reform Act 1967 Sch 2 para 8(1)(b), (1A) (amended by SI 2009/1307).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(5) LANDLORDS WITH SPECIAL RIGHTS/(v) Court's Additional Powers on Hearing of Landlord's Application/1497. Lack of good faith, misrepresentation or concealment.

### **1497. Lack of good faith, misrepresentation or concealment.**

Where an application for possession<sup>1</sup> is dismissed or withdrawn, and it is made to appear to the court that:

- 3312 (1) the application was not made in good faith; or
- 3313 (2) the landlord<sup>2</sup> had attempted in any material respect to support by misrepresentation or the concealment of material facts a request to the tenant<sup>3</sup> to deliver up possession without an application for possession,

the court may order that no further application for possession of the house<sup>4</sup> and premises<sup>5</sup> made by the landlord shall be entertained if it is made within the five years beginning with the date of the order<sup>6</sup>.

1 For the meaning of 'application for possession' for these purposes see PARA 1493 note 10 ante.

2 For the meaning of 'landlord' see PARA 1432 note 4 ante.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 For the meaning of 'house' see PARA 1390 ante.

5 For the meaning of 'premises' see PARA 1391 ante.

6 Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 para 8(3).

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## **(6) MANAGEMENT SCHEMES**

### **1498. Application for a management scheme.**

Where, in the case of any area occupied directly or indirectly under tenancies<sup>1</sup> held from one landlord<sup>2</sup>, apart from property occupied by the landlord or his licensees or for the time being unoccupied, the Minister<sup>3</sup> on an application made within the two years beginning with 1 January 1968 granted a certificate that, in order to maintain adequate standards of appearance and amenity and regulate redevelopment in the area in the event of tenants<sup>4</sup> acquiring<sup>5</sup> the landlord's interest in their house<sup>6</sup> and premises<sup>7</sup>, it was in the Minister's opinion likely to be in the general interest that the landlord should retain powers of management in respect of the house and premises or have rights against the house and premises in respect of the benefits arising from the exercise elsewhere of his powers of management, the High Court might, on an application by the landlord made within one year of the giving of the certificate, approve a scheme giving the landlord such powers and rights<sup>8</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'landlord' see PARA 1432 note 4 ante.

3 For these purposes, 'the Minister' means the Secretary of State: Leasehold Reform Act 1967 s 19(1); Secretary of State for the Environment Order 1970, SI 1970/1681, art 2(1). As to the Secretary of State see PARA 27 note 3 ante.

4 For the meaning of 'tenant' see PARA 1432 note 1 ante.

5 Under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1499 et seq post.

6 For the meaning of 'house' see PARA 1390 ante.

7 For the meaning of 'premises' see PARA 1391 ante.

8 Leasehold Reform Act 1967 s 19(1). In any case where, by virtue only of the amendments of the Leasehold Reform Act 1967 s 1 effected by the Housing Act 1974 s 118(1) (see PARAS 1392-1395 ante), the right specified in the Leasehold Reform Act 1967 s 1(1) (as amended) is conferred on a tenant s 19 (as amended) has effect in relation to the house and premises to which the tenant's right applies as if for the reference in s 19(1) to an application made within two years beginning with 1 January 1968 there were substituted a reference to an application made within two years beginning with 31 July 1974: Housing Act 1974 s 118(2).

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#### **1499. Matters to be considered.**

The Minister<sup>1</sup>, in considering whether to grant a certificate authorising a scheme<sup>2</sup> for any area, and the High Court, in considering whether to approve a scheme<sup>3</sup>, had to have regard primarily to the benefit likely to result from the scheme to the area as a whole, including houses<sup>4</sup> likely to be acquired<sup>5</sup> from the landlord<sup>6</sup>, and the extent to which it was reasonable to impose, for the benefit of the area, obligations on tenants<sup>7</sup> so acquiring their freeholds; but regard might also be had to the past development and present character of the area and to architectural or historical considerations, to neighbouring areas and to the circumstances generally<sup>8</sup>.

1 For the meaning of 'the Minister' see PARA 1498 note 3 ante.

2 As to the grant of a certificate by the Minister see PARA 1500 post.

3 As to the approval of a scheme by the High Court see PARA 1501 post.

- 4 For the meaning of 'house' see PARA 1390 ante.
- 5 le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1500 et seq post.
- 6 For the meaning of 'landlord' see PARA 1432 note 4 ante.
- 7 For the meaning of 'tenant' see PARA 1432 note 1 ante.
- 8 Leasehold Reform Act 1967 s 19(3).

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### **1500. Grant of certificate by Minister.**

A certificate for a management scheme might not be given nor a scheme approved<sup>1</sup> for any area except on the landlord's<sup>2</sup> application<sup>3</sup>.

Where, on a joint application made by two or more persons as landlords of neighbouring areas, it appeared to the Minister<sup>4</sup>:

- 3314 (1) that a certificate could be given as regards those areas, treated as a unit, if the interests of those persons were held by a single person; and
- 3315 (2) that the applicants were willing to be bound by any scheme to co-operate in the management of their property in those areas and in the administration of the scheme,

the Minister might give a certificate for those areas as a whole<sup>5</sup>.

Where it appeared to the Minister:

- 3316 (a) that a certificate could be given for any area or areas on the application of the landlord or landlords; and
- 3317 (b) that any body of persons was so constituted as to be capable of representing the persons occupying or interested in property in the area or areas, other than the landlord or landlords, or such of them as were or might become entitled to acquire their landlord's interest<sup>6</sup>, and was otherwise suitable,

then, on an application made by that body either alone or jointly with the landlord or landlords, a certificate might be granted accordingly<sup>7</sup>.

The Minister might not give a certificate unless he was satisfied that the applicant had, by advertisement or otherwise as might be required by the Minister, given adequate notice to persons interested, informing them of the application for a certificate and its purpose and inviting them to make representations to the Minister for or against the application within a time which appeared to the Minister to be reasonable; and, before giving a certificate, the Minister had to consider any representations so made within that time<sup>8</sup>. If from those representations it appeared to him that there was among the persons making them substantial opposition to the application, he had to afford to those opposing the application, and on the same occasion to the applicant and such, if any, as the Minister thought fit of those in favour of

the application, an opportunity to appear before, and be heard by, a person appointed by the Minister for the purpose, and had to consider the report of that person<sup>8</sup>.

1    le under the Leasehold Reform Act 1967 s 19 (as amended): see PARAS 1498-1499 ante, PARA 1501 et seq post.

2    For the meaning of 'landlord' see PARA 1432 note 4 ante.

3    Leasehold Reform Act 1967 s 19(11).

4    For the meaning of 'the Minister' see PARA 1498 note 3 ante.

5    Leasehold Reform Act 1967 s 19(12). Where a certificate was so given s 19 (as amended) applied accordingly, but so that any scheme made by virtue of the certificate had to be made subject to conditions, enforceable in such manner as might be provided by the scheme, for securing that the landlords and their successors so co-operated: s 19(12).

6    le under ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1501 et seq post.

7    Ibid s 19(13). Where a certificate was so granted, whether to a representative body alone or to a representative body jointly with the landlord or landlords (1) an application for a scheme in pursuance of the certificate might be made by the representative body alone or by the landlord or landlords alone or by both jointly and, by leave of the High Court, might be proceeded with by the representative body or by the landlord or landlords though not the applicant or applicants; and (2) without prejudice to s 19(7)(b) (see PARA 1502 post), the scheme might, with the consent of the landlord or landlords or on such terms as to compensation or otherwise as appeared to the High Court to be just, confer on the representative body any such rights or powers under the scheme as might be conferred on the landlord or landlords for the time being, or enable the representative body to participate in the administration of the scheme or in the management by the landlord or landlords of his or their property in the area or areas: s 19(13).

As to the holding in suspense, in certain circumstances, of tenants' notices claiming enfranchisement or extension if they were given while an application for a certificate or an application to the High Court was pending see s 19(14), (15).

8    Ibid s 19(2).

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### **1501. Approval of scheme by the High Court.**

If, having regard to the matters which the High Court was required to take into consideration<sup>1</sup>, to the provision which it was practicable to make by a scheme, and to any change of circumstances since the giving of the certificate, the court thought it proper to do so, it could by order:

- 3318 (1)   exclude from the scheme any part of the area certified<sup>2</sup>; or
- 3319 (2)   declare that no scheme could be approved for the area;

and, before submitting for approval a scheme for an area so certified, a person might, if he saw fit, apply to the High Court for general directions as to the matters proper to be included in the scheme and for a decision whether an order should be made under head (1) or head (2) above<sup>3</sup>.

On the submission of a scheme to the High Court, the court had<sup>4</sup> to approve the scheme, either as originally submitted, or with any modifications proposed or agreed to by the applicant for the scheme, if the scheme, with those modifications, if any, appeared to the court to be fair

and practicable and not to give the landlord a degree of control out of proportion to that previously exercised by him or to that required for the purposes of the scheme. The High Court could not dismiss an application for the approval of a scheme unless the court made an order under head (2) above or in the court's opinion the applicant was unwilling to agree to a suitable scheme or was not proceeding in the matter with due dispatch<sup>5</sup>.

1    Ie the matters mentioned in the Leasehold Reform Act 1967 s 19(3): see PARA 1499 ante.

2    Ie certified under ibid s 19(1): see PARA 1498 ante.

3    Ibid s 19(4). As to matters which might be included in or excluded from a scheme see *Re Calthorpe Estate, Edgbaston, Birmingham, Anstruther-Gough-Calthorpe v Grey* (1973) 26 P & CR 120; and as to the circumstances in which an application could be made by an approved representative body, acting either alone or jointly with the landlord or landlords, see PARA 1500 ante.

4    Ie subject to the Leasehold Reform Act 1967 s 19(3) (see PARA 1499 ante) and s 19(4) (see the text and notes 1-3 supra).

5    Ibid s 19(5). The powers given to a landlord under a scheme might be more extensive than those enjoyed by him under the pre-existing long tenancies, provided they were not out of proportion to those previously exercised by him: *Re Dulwich College Estate's Application* (1973) 231 Estates Gazette 845. A scheme might be fair even though it was possible to improve upon it: *Re Dulwich College Estate's Application* supra; and see *Eton College v Nassar* [1991] 2 EGLR 271.

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## **1502. Approved schemes.**

An approved management scheme<sup>1</sup> may make different provision for different parts of the area and must include provision for terminating or varying all or any of the provisions of the scheme, or excluding part of the area, if a change of circumstances makes it appropriate, or for enabling it to be done by or with the approval of the High Court<sup>2</sup>. This reference to the High Court now has effect, however, as if it were a reference to a leasehold valuation tribunal<sup>3</sup>.

Except as provided by the scheme, the operation of a scheme is not affected by any disposition or devolution of the landlord's<sup>4</sup> interest in the property within the area or part of that property; but the scheme:

- 3320 (1) must include provision for identifying the person who is for the purposes of the scheme to be treated as the landlord for the time being<sup>5</sup>; and
- 3321 (2) may include provision for transferring, or allowing the landlord for the time being to transfer, all or any of the powers and rights conferred by the scheme on the landlord for the time being to a local authority or other body, including a body constituted for the purpose<sup>6</sup>.

A scheme may provide<sup>7</sup> for all or any of the following matters:

- 3322 (a) regulating the redevelopment, use or appearance of property of which tenants<sup>8</sup> have acquired the landlord's interest<sup>9</sup>;
- 3323 (b) empowering the landlord for the time being to carry out work for the maintenance or repair of any such property or carry out work to remedy a failure in respect of any such property to comply with the scheme, or for making the

operation of any provisions of the scheme conditional on his doing so or on the provision or maintenance by him of services, facilities or amenities of any description; and

3324 (c) imposing on persons from time to time occupying or interested in any such property obligations in respect of maintenance or repair<sup>10</sup> of the property or of property used or enjoyed by them in common with others, or in respect of cost incurred by the landlord for the time being on any matter referred to in this head or in head (b) above; and

3325 (d) the inspection from time to time of any such property on behalf of the landlord for the time being, and for the recovery by him of sums due to him under the scheme in respect of any such property by means of a charge on the property;

and, for the enforcement of any charge imposed under the scheme, the landlord for the time being has the same powers and remedies<sup>11</sup> as if he were a mortgagee by deed having powers of sale and leasing and of appointing a receiver<sup>12</sup>.

The permissible contents of a scheme are not limited to the particular matters specified above, but may include other matters falling within the scope of the general provisions relating to schemes<sup>13</sup>.

A scheme may extend to property in which the landlord's interest is disposed of otherwise than under the statutory provisions<sup>14</sup>, whether residential property or not, so as to make that property, or allow it to be made, subject to any such provision as is or might be made by the scheme for property in which tenants acquire the landlord's interest<sup>15</sup>.

1     I.e. a scheme under the Leasehold Reform Act 1967 s 19 (as amended): see PARAS 1498-1501 ante, PARA 1503 post.

2     Ibid s 19(6).

3     See PARA 1504 post.

4     For the meaning of 'landlord' see PARA 1432 note 4 ante.

5     For the purposes of the Leasehold Reform Act 1967 s 19(8)-(13) (as amended), references to the landlord for the time being have effect, in relation to powers and rights transferred to a local authority or other body as contemplated by s 19(7)(b) (see head (2) in the text), as references to that authority or body: s 19(7).

6     Ibid s 19(7).

7     I.e. without prejudice to any other provisions of ibid s 19 (as amended).

8     For the meaning of 'tenant' see PARA 1432 note 1 ante.

9     I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1503 et seq post.

10    The power to impose obligations to repair does not extend to internal repairs: *Re Sherwood Close (Barnes) Management Co Ltd* [1972] Ch 208, [1971] 3 All ER 1293.

11    I.e. powers and remedies under the Law of Property Act 1925 and otherwise: see generally MORTGAGE vol 77 (2010) PARA 101 et seq.

12    Leasehold Reform Act 1967 s 19(8).

13    See *Re Sherwood Close (Barnes) Management Co Ltd* [1972] Ch 208, [1971] 3 All ER 1293 (power to enforce full fire insurance permissible, but not provision that any future freeholder should become a member of the management company); *Re Abbots Park Estate* [1972] 2 All ER 177, [1972] 1 WLR 598 (obligation to join tenants' association permissible). As to the possible detailed contents of a scheme see also *Re Copse Hill Estate, Wimbledon* (1971) 219 Estates Gazette 1604; *Re Dulwich College Estate's Application* (1973) 231 Estates Gazette 845; and see PARA 1501 note 5 ante.

As to the test to be applied by an arbitrator in deciding whether the managers of a scheme have unreasonably withheld consent to a proposed building see *Estates Governors of Alleyn's College of God's Gift at Dulwich v Williams* [1994] 1 EGLR 112, [1994] 23 EG 127.

14 See note 9 supra.

15 Leasehold Reform Act 1967 s 19(9). The power to extend the scheme applies to properties which the trustees have disposed of voluntarily, and there is no reason why it should not also apply to property disposed of by the trustees under the collective enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993 (see PARA 1552 et seq post): see *Re Estate Trustees of Dulwich Estate's Appeal* (1998) 76 P & CR 484, Lands Tribunal.

## UPDATE

### 1502 Approved schemes

NOTE 13--*Estates Governors of Alleyn's College of God's Gift at Dulwich*, cited, applied in *Dulwich Estate v Baptiste* [2007] All ER (D) 194 (Feb).

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### 1503. Registration and enforcement of scheme.

A certificate given or scheme approved<sup>1</sup> is<sup>2</sup> a local land charge<sup>3</sup>; and, where a scheme is registered in the appropriate local land charges register:

3326 (1) the provisions of the scheme relating to property of any description, so far as they respectively affect the persons from time to time occupying or interested in that property, are enforceable by the landlord for the time being<sup>4</sup> against them, as if each had covenanted with the landlord for the time being to be bound by the scheme; and

3327 (2) in relation to a house<sup>5</sup> and premises<sup>6</sup> in an area governed by a scheme, the rights to be conveyed to a tenant on enfranchisement<sup>7</sup> have effect subject to the provisions of the scheme, and the price payable<sup>8</sup> must be adjusted accordingly<sup>9</sup>.

1 ie under the Leasehold Reform Act 1967 s 19 (as amended): see PARAS 1498-1502 ante.

2 ie notwithstanding the provisions of the Local Land Charges Act 1975 s 2(a) or (b): see LAND CHARGES vol 26 (2004 Reissue) PARA 673.

3 Leasehold Reform Act 1967 s 19(10) (amended by the Local Land Charges Act 1975 s 17(2), Sch 1). For the purposes of the Local Land Charges Act 1975, the landlord for the area to which the scheme relates is to be treated as the originating authority as respects that charge: Leasehold Reform Act 1967 s 19(10) (as so amended). The Local Land Charges Act 1975 s 10 (as amended) (see LAND CHARGES vol 26 (2004 Reissue) PARA 694) does not apply in relation to schemes which, by virtue of the Leasehold Reform Act 1967 s 19 (as amended), are local land charges: s 19(10A) (added by the Local Land Charges Act 1975 Sch 1).

4 For the meaning of references to the landlord for the time being see PARA 1502 note 5 ante.

5 For the meaning of 'house' see PARA 1390 ante.

6 For the meaning of 'premises' see PARA 1391 ante.

7 ie the rights conferred by the Leasehold Reform Act 1967 s 10 (as amended): see PARAS 1452-1455 ante.

8 le under *ibid* s 9 (as amended): see PARA 1441 et seq ante.

9 *Ibid* s 19(10).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/24. ENFRANCHISEMENT ETC; PRIVATE SECTOR HOUSES/(6) MANAGEMENT SCHEMES/1504. Variation of existing schemes.

#### **1504. Variation of existing schemes.**

Where a management scheme<sup>1</sup> includes provision<sup>2</sup> for enabling the termination or variation of the scheme, or the exclusion of part of the area from the scheme, by or with the approval of the High Court, that provision has effect:

3328 (1) as if any reference to the High Court were a reference to a leasehold valuation tribunal; and

3329 (2) with such modifications, if any, as are necessary in consequence of head (1) above<sup>3</sup>.

Such a scheme may be varied by or with the approval of a leasehold valuation tribunal for the purpose of, or in connection with, extending the scheme to property in which the landlord's interest may<sup>4</sup> be acquired under the statutory provision conferring an additional right to enfranchisement only<sup>5</sup> in the case of houses where the rent exceeds the applicable limit<sup>6</sup>.

Where any such scheme has been so varied, the statutory provisions relating to management schemes<sup>7</sup> apply as if the variation had been effected under provisions included in the scheme<sup>8</sup>, and accordingly the scheme may be further varied under provisions so included<sup>9</sup>.

1 le a scheme under the Leasehold Reform Act 1967 s 19 (as amended): see PARAS 1498-1503 ante.

2 le in pursuance of *ibid* s 19(6): see PARA 1502 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 s 75(1).

4 le may be acquired as mentioned in *ibid* s 69(1)(a) (as substituted): see PARA 1734 post.

5 le under the Leasehold Reform Act 1967 s 1AA (as added and amended): see PARA 1397 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 75(2). Alternatively, where the landlord's interest was acquired as referred to in note 4 supra, a new scheme might be made under Pt I Ch IV (ss 69-75) (as amended): see PARA 1505 post.

It has been held that s 75(2) also applies to properties falling within s 69(1)(b) (as substituted and now as amended) (see PARA 1734 post): see *Re Estate Trustees of Dulwich Estate's Appeal* (1998) 76 P & CR 484, Lands Tribunal.

7 le the Leasehold Reform Act 1967 s 19 (as amended).

8 le in pursuance of *ibid* s 19(6).

9 Leasehold Reform, Housing and Urban Development Act 1993 s 75(3).



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### **1505. Estate management schemes under the Leasehold Reform, Housing and Urban Development Act 1993.**

The relevant provisions of Part I of the Leasehold Reform, Housing and Urban Development Act 1993<sup>1</sup> set out a procedure for the making and approval of an estate management scheme for an area occupied directly or indirectly under leases held from one landlord, apart from property occupied by him or his licensees or for the time being unoccupied and which is designed to secure that in the event of tenants acquiring the landlord's interest in a house or premises in specified circumstances<sup>2</sup>, the landlord will retain powers of management in respect of the house or premises and have rights against the house or premises in respect of the benefits arising from the exercise elsewhere of his powers of management<sup>3</sup>. The specified circumstances include circumstances where the landlord's interest in a house and premises is acquired by a tenant under the statutory provision conferring an additional right to enfranchisement only<sup>4</sup> in the case of houses where the rent exceeds the applicable limit<sup>5</sup>. Applications for the approval of such schemes were, however, to be made<sup>6</sup> within the period of two years beginning with 1 April 1997<sup>7</sup>.

Estate management schemes under the 1993 Act are discussed in detail in a later part of this title<sup>8</sup>.

1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch IV (ss 69-75) (as amended): see PARA 1734 et seq post.

2    Ie in the circumstances set out in *ibid* s 69(1)(a), (b) (as substituted and amended): see PARA 1734 post.

3    See *ibid* s 69(1) (as amended); and PARA 1734 post.

4    Ie under the Leasehold Reform Act 1967 s 1AA (as added and amended): see PARA 1397 ante.

5    See the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) (as substituted); and PARA 1734 post.

6    Ie subject to *ibid* s 72: see PARA 1738 post.

7    Ie the date of the coming into force of the Housing Act 1996 s 118: see the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (as amended); the Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2, Schedule, PARA 3; and PARA 1736 post. The original time limit was two years beginning with 1 November 1993: see the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (as originally enacted); the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5(a).

8    See PARA 1734 et seq post.

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### **1506. Charges under estate management schemes.**

The following provisions apply where an estate management scheme<sup>1</sup> or a corresponding scheme in relation to areas occupied under leases from the Crown<sup>2</sup> includes provision imposing on persons occupying or interested in property an obligation to make payments ('estate charges')<sup>3</sup>.

A variable estate charge<sup>4</sup> is payable only to the extent that the amount of the charge is reasonable<sup>5</sup>.

Any person on whom an obligation to pay an estate charge is imposed by the scheme may apply to a leasehold valuation tribunal<sup>6</sup> for an order varying the scheme in such manner as is specified in the application on the grounds that:

- 3330 (1) any estate charge specified in the scheme is unreasonable; or
- 3331 (2) any formula specified in the scheme in accordance with which any estate charge is calculated is unreasonable<sup>7</sup>.

If the grounds on which the application was made are established to the satisfaction of the tribunal, it may make an order varying the scheme in such manner as is specified in the order<sup>8</sup>. The variation specified in the order may be either the variation specified in the application or such other variation as the tribunal thinks fit<sup>9</sup>.

An application may be made to a leasehold valuation tribunal<sup>10</sup> for a determination whether an estate charge is payable by a person and, if it is, as to:

- 3332 (a) the person by whom it is payable;
- 3333 (b) the person to whom it is payable;
- 3334 (c) the amount which is payable;
- 3335 (d) the date at or by which it is payable; and
- 3336 (e) the manner in which it is payable<sup>11</sup>;

and this applies whether or not any payment has been made<sup>12</sup>. No such application may, however, be made in respect of a matter which:

- 3337 (i) has been agreed or admitted by the person concerned<sup>13</sup>;
- 3338 (ii) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement<sup>14</sup> to which that person is a party;
- 3339 (iii) has been the subject of determination by a court; or
- 3340 (iv) has been the subject of determination by an arbitral tribunal<sup>15</sup> pursuant to a post-dispute arbitration agreement<sup>16</sup>.

An agreement other than a post-dispute arbitration agreement is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question which may be the subject matter of such an application<sup>17</sup>.

1    Ie a scheme under (1) the Leasehold Reform Act 1967 s 19 (as amended) (estate management schemes in connection with enfranchisement under that Act: see PARA 1498 et seq ante); or (2) the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch IV (ss 69-75) (as amended) (estate management schemes in connection with enfranchisement under the Leasehold Reform Act 1967 or the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1734 et seq post).

2    Ie a scheme under *ibid* s 94(6): see PARA 1534 post.

3    Commonhold and Leasehold Reform Act 2002 s 159(1).

4    'Variable estate charge' means an estate charge which is neither (1) specified in the scheme; nor (2) calculated in accordance with a formula specified in the scheme: *ibid* s 159(2).

5 Ibid s 159(2).

6 The application must be accompanied by a copy of the estate management scheme: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(3), Sch 1 para 2(d), Sch 2 para 2(3) (reg 3(3) amended by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(3), Sch 1 para 2(d), Sch 2 para 2(3) (reg 3(3) amended by SI 2005/1356). As to the other particulars to be included, and the procedure on such an application, see PARA 59 et seq ante.

7 Commonhold and Leasehold Reform Act 2002 s 159(3).

8 Ibid s 159(4). As to enforcement of the order, and appeals, see PARAS 70, 72 ante.

9 Ibid s 159(5).

10 The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of ibid s 159(6) (see heads (a)-(e) in the text) is in addition to any jurisdiction of a court in respect of the matter: s 159(8). See, however, s 159(9)(c) (set out at head (iii) in the text). See also note 6 supra.

11 Ibid s 159(6).

12 Ibid s 159(7).

13 But the person is not to be taken to have agreed or admitted any matter by reason only of having made any payment: ibid s 159(10).

14 'Post-dispute arbitration agreement', in relation to any matter, means an arbitration agreement made after a dispute about the matter has arisen; and 'arbitration agreement' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1213); Commonhold and Leasehold Reform Act 2002 s 159(12).

15 'Arbitral tribunal' has the same meaning as in the Arbitration Act 1996 Pt I (ss 1-84) (see ARBITRATION vol 2 (2008) PARA 1226 et seq); Commonhold and Leasehold Reform Act 2002 s 159(12).

16 Ibid s 159(9).

17 Ibid s 159(11).

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## **(7) OTHER SPECIAL CLASSES OF LANDLORD**

### **1507. Mortgagee in possession of landlord's interest.**

Where a landlord's<sup>1</sup> interest is subject to a mortgage<sup>2</sup> and the mortgagee is in possession, all such proceedings arising out of a person's notice of his desire to have the freehold or an extended lease<sup>3</sup> as would otherwise be taken by or in relation to the landlord, must<sup>4</sup>, as regards his interest, be conducted by and through the mortgagee as if he were the landlord; and any conveyance<sup>5</sup> or lease<sup>6</sup> to be executed, must, if it requires execution by the landlord, either be executed by the landlord by the direction of the mortgagee or be executed by the mortgagee in the name and on the behalf of the landlord<sup>7</sup>.

Where a landlord's interest is subject to a mortgage and the mortgagee is in possession, any application to resume possession of the property for the purposes of redevelopment<sup>8</sup> must<sup>9</sup> be made by the mortgagee as if he were the landlord<sup>10</sup>.

Any compensation paid by a mortgagee under the statutory provisions relating to the landlord's redevelopment rights<sup>11</sup>, whether possession is obtained with or without an application thereunder, is to be treated as if it were secured by the mortgage, with the like priority and with interest at the same rate as the mortgage money, but so that, without prejudice to the recovery of interest, the amount is not recoverable from the mortgagor personally<sup>12</sup>.

Where a mortgagee is<sup>13</sup> acting as landlord and any case arises in which compensation may be recovered by or awarded to a landlord<sup>14</sup>, compensation may be recovered by or awarded to the mortgagee accordingly, and is to be dealt with as if it were proceeds of sale of property subject to the mortgage<sup>15</sup>.

Where a landlord's interest is subject to a mortgage, and a receiver appointed by the mortgagee<sup>16</sup> or by the court<sup>17</sup> is in receipt of the rents and profits:

3341 (1) the landlord may not make any application for possession under his overriding redevelopment or residential rights<sup>18</sup> without the consent of the mortgagee; and

3342 (2) the mortgagee may by written notice given to the landlord require that the above provisions shall apply, either generally or so far as relates to the overriding redevelopment rights, as if he were a mortgagee in possession<sup>19</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 For these purposes, 'mortgage' includes any charge or lien; and 'mortgagor' and 'mortgagee' are to be construed accordingly: Leasehold Reform Act 1967 s 25(6).

3 Ie under ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1508 et seq post.

4 Ie subject to the provisions of ibid s 25.

5 Ie any conveyance to be executed under ibid s 8 (as amended): see PARAS 1439, 1450-1451 ante.

6 Ie any lease to be executed under ibid s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.

7 Ibid s 25(1). Section 25(1) does not, however, affect the operation in relation to the mortgage of s 12 (see PARAS 1462-1463 ante) and s 13 (see PARA 1464 ante): s 25(1).

8 Ie under ibid s 17: see PARAS 1485-1486 ante.

9 Ie without prejudice to ibid s 25(1): see the text and notes 1-7 supra.

10 Ibid s 25(2). Section 17 and Sch 2 (as amended) (see PARA 1491 et seq ante) apply accordingly: s 25(2).

11 Ie in accordance with ibid s 17.

12 Ibid s 25(3).

13 Ie by virtue of ibid s 25.

14 Ie under ibid s 5(2) (see PARA 1432 ante) or s 9(3)(a) (see PARA 1446 ante).

15 Ibid s 25(4).

16 As to receivers appointed out of court see MORTGAGE vol 77 (2010) PARA 475 et seq.

17 As to receivers appointed by the court see MORTGAGE vol 77 (2010) PARA 560 et seq.

18 Ie under the Leasehold Reform Act 1967 s 17 (see PARAS 1485-1486 ante) or s 18 (as amended) (see PARAS 1488-1490 ante).

19 Ibid s 25(5).

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**1508. Person to act where landlord is custodian trustee or lacks capacity.**

Where the interest of a landlord<sup>1</sup> in any property is vested in a person as custodian trustee<sup>2</sup>, the managing trustees or committee of management are or is deemed to be the landlord for the purposes of the statutory provisions relating to enfranchisement or extension of long tenancies<sup>3</sup> and the interest is deemed to be vested in the trustees or, as the case may be, the committee, except as regards the execution of any instrument disposing of or affecting that interest<sup>4</sup>.

Where a landlord lacks capacity within the meaning of the Mental Capacity Act 2005<sup>5</sup> to exercise his functions as a landlord, then as from a day to be appointed<sup>6</sup> those functions are to be exercised:

- 3343 (1) by a donee of an enduring power of attorney or lasting power of attorney<sup>7</sup> or a deputy appointed for him by the Court of Protection, with power to exercise those functions; or
- 3344 (2) if no donee or deputy has that power, by a person authorised in that respect by that court<sup>8</sup>.

Until that appointed day, the following provisions have effect. Where a landlord is incapable by reason of mental disorder<sup>9</sup> of managing and administering his property and affairs, his receiver<sup>10</sup> or, if no such receiver is acting for him, any person authorised in that behalf must, under an order of the authority having jurisdiction<sup>11</sup>, take his place as landlord for purposes of the statutory provisions relating to enfranchisement or extension of long tenancies<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 1432 note 4 ante.

2 As to custodian trustees see TRUSTS vol 48 (2007 Reissue) PARA 792 et seq.

3 I.e. the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1508 et seq post.

4 Ibid s 26(1).

5 See the Mental Capacity Act 2005 s 2; and MENTAL HEALTH.

6 I.e. as from a day to be appointed under ibid s 68(1). At the date at which this title states the law, no such day had been appointed.

7 I.e. within the meaning of the Mental Capacity Act 2005: see ss 9-14; and MENTAL HEALTH.

8 Leasehold Reform Act 1967 s 26(2) (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 13(1), as from a day to be appointed: see note 6 supra). For transitional provisions see Sch 6 para 13(2).

9 I.e. within the meaning of the Mental Health Act 1983: see s 1; and MENTAL HEALTH.

10 I.e. appointed under ibid Pt VII (ss 93-113) (as amended and prospectively repealed) (see MENTAL HEALTH) or under the Mental Health Act 1959 Pt VIII (ss 100-121) (repealed).

11 I.e. under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended and prospectively repealed): see MENTAL HEALTH.

<sup>12</sup> Leasehold Reform Act 1967 s 26(2) (as originally enacted and amended by the Mental Health Act 1983 s 148, Sch 4 para 22).

## UPDATE

### 1508 Person to act where landlord is custodian trustee or lacks capacity

TEXT AND NOTE 6--Day now appointed: SI 2007/1897.

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### 1509. Ecclesiastical landlords.

The following provisions have effect as regards the operation of the statutory provisions relating to enfranchisement or extension<sup>1</sup> on tenancies<sup>2</sup>, including subtenancies, of ecclesiastical property<sup>3</sup>.

In relation to an interest of an ecclesiastical landlord<sup>4</sup>, the consent of the Church Commissioners<sup>5</sup> is required to sanction:

- 3345 (1) the provisions to be contained in a conveyance to a tenant on enfranchisement<sup>6</sup>, or in a lease granting a new tenancy<sup>7</sup>, and the price or rent payable, except as regards matters determined by the court, a leasehold valuation tribunal or the Lands Tribunal;
- 3346 (2) any exercise of the ecclesiastical landlord's rights in connection with the statutory provisions relating to redevelopment<sup>8</sup>, except as aforesaid, and any agreement for the payment of compensation to a tenant in accordance therewith without an application to the court thereunder; and
- 3347 (3) any grant of a tenancy in satisfaction of the right to an extended lease<sup>9</sup>;

and the Church Commissioners are entitled to appear and be heard in any proceedings to which an ecclesiastical landlord is a party or in which he is entitled to appear and be heard<sup>10</sup>.

Where the ecclesiastical property forms part of the endowment of a cathedral church, any sum received by the capitular body by way of the price payable for the property<sup>11</sup>, or by way of compensation<sup>12</sup>, is to be treated as part of that endowment<sup>13</sup>.

In the case of ecclesiastical property belonging to a diocesan board of finance:

- 3348 (a) no consent or concurrence other than that of the Church Commissioners<sup>14</sup> is required to a disposition under the statutory provisions relating to enfranchisement or extension of the interest of the diocesan board of finance, including a grant of a tenancy in satisfaction of the right to an extended lease<sup>15</sup>;
- 3349 (b) any sum receivable by the diocesan board of finance by way of price payable for the property<sup>16</sup> or of any compensation<sup>17</sup> must be paid to the Church Commissioners to be applied for the purposes for which the proceeds of a sale by agreement of the property would be applicable under any enactment or Measure authorising such a sale or disposing of the proceeds of such a sale, and any sum required for the payment of compensation may be paid by the Church Commissioners on behalf of the incumbent out of any moneys in their hands<sup>18</sup>.

1    Ie the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1510 et seq post.

2    For the meaning of 'tenancy' see PARA 1398 ante.

3    Leasehold Reform Act 1967 s 31(1). For these purposes, 'ecclesiastical property' means property belonging to a capitular body, within the meaning of the Cathedrals Measure 1963 (ie in the case of a dean and chapter cathedral, the dean and chapter, and, in the case of a parish church cathedral, the cathedral chapter: see s 52(1); and ECCLESIASTICAL LAW vol 14 para 636) or belonging to a diocesan board of finance as diocesan glebe land: Leasehold Reform Act 1967 s 31(1) (amended by the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 s 10). By virtue of the Cathedrals Measure 1999 ss 36(2), (6), 38(1)-(3), however, references in the Leasehold Reform Act 1967 s 31 (as amended) to a capitular body are, except in relation to Westminster Abbey, St George's Chapel, Windsor or the cathedral church of Christ in Oxford, and subject to transitional provision in relation to cathedrals existing on 30 June 1999, to be construed as references to the corporate body of the cathedral. 'Diocesan board of finance' and 'diocesan glebe land' have the same meaning as in the Endowments and Glebe Measure 1976: Leasehold Reform Act 1967 s 31(5) (substituted by the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 s 10).

4    For these purposes, 'ecclesiastical landlord' means the capitular body (see note 3 supra) or diocesan board of finance having an interest as landlord in ecclesiastical property: Leasehold Reform Act 1967 s 31(1) (as amended: see note 3 supra). For the meaning of 'landlord' see PARA 1432 note 4 ante.

5    As to the Church Commissioners see ECCLESIASTICAL LAW vol 14 para 361 et seq.

6    Ie in accordance with the Leasehold Reform Act 1967 s 10 (as amended): see PARA 1452 et seq ante. For the meaning of 'tenant' see PARA 1432 note 1 ante.

7    Ie under ibid s 14 (as amended): see PARA 1469 ante.

8    Ie under ibid s 17: see PARAS 1485-1486 ante.

9    Ie under ibid Pt I (as amended).

10   Ibid s 31(2) (amended by the Housing Act 1980 s 142, Sch 22 para 9). The proceedings referred to in the text are proceedings under the Leasehold Reform Act 1967 Pt I (as amended).

11   Ie under the Leasehold Reform Act 1967 s 9 (as amended): see PARA 1441 et seq ante.

12   Ie under any provision of ibid Pt I (as amended) providing for compensation to be recovered by or awarded to a landlord. See eg s 5(2); and PARA 1432 ante; s 9(3)(a); and PARA 1446 ante.

13   Ibid s 31(3). The powers conferred by the Cathedrals Measure 1963 ss 21, 23 (repealed subject to transitional provisions: see now the Cathedrals Measure 1999 ss 15, 16 (as amended)) (see ECCLESIASTICAL LAW vol 14 paras 629-630) in relation to the investment in the acquisition of land of moneys forming part of the endowment of a cathedral church extend to the application of any such moneys in the payment of compensation in accordance with the Leasehold Reform Act 1967 s 17, whether possession is obtained under s 17 or without an application thereunder: s 31(3).

14   Ie under ibid s 31(2) (as amended): see the text and notes 4-10 supra.

15   Ibid s 31(4)(a) (amended by the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 s 10).

16   See note 11 supra.

17   Ie any such compensation as is mentioned in the Leasehold Reform Act 1967 s 31(3): see the text and notes 11-13 supra.

18   Ibid s 31(4)(c) (amended by the Church of England (Legal Aid and Miscellaneous Provisions) Measure 1988 s 10).

## UPDATE

### 1509 Ecclesiastical landlords

TEXT AND NOTES 10--Reference to the Lands Tribunal is now to the Upper Tribunal: Leasehold Reform Act 1967 Act s 31(2) (amended by SI 2009/1307). Leasehold Reform Act 1967 s 31(2) further amended: Church of England (Miscellaneous Provisions) Measure 2006 Sch 5 para 15.

TEXT AND NOTE 18--Leasehold Reform Act 1967 Act s 31(4)(c) further amended: Church of England (Miscellaneous Provisions) Measure 2006 Sch 5 para 15.

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### **1510. The National Trust.**

A person is not entitled under the statutory provisions relating to enfranchisement or extension<sup>1</sup> to acquire the freehold of property if an interest in the property is vested inalienably<sup>2</sup> in the National Trust for Places of Historic Interest or Natural Beauty<sup>3</sup>.

1    le the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended); see PARA 1389 et seq ante, PARA 1511 et seq post.

2    le under the National Trust Act 1907 s 21: see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 979. The Leasehold Reform Act 1967 Pt I (as amended) does not prejudice the operation of the National Trust Act 1907 s 21: Leasehold Reform Act 1967 s 32.

3    Ibid s 32.

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### **1511. Property transferred for public benefit etc.**

A notice of a person's desire<sup>1</sup> to have the freehold of a house<sup>2</sup> and premises<sup>3</sup> is of no effect if at the relevant time the whole or any part of the house and premises is qualifying property and either:

- 3350 (1) the tenancy<sup>4</sup> was created on or after 1 November 1993<sup>5</sup>; or
- 3351 (2) where the tenancy was created before that date, the tenant<sup>6</sup> would not be entitled to have the freehold if either or both of the statutory provisions relating to the enfranchisement of houses whose value or rent exceeds the applicable limit and tenancies terminable after a death, a marriage or the formation of a civil partnership<sup>7</sup> were not in force or if the statutory provision conferring an additional right to enfranchisement only in the case of houses where the rent exceeds the applicable limit<sup>8</sup> were not in force<sup>9</sup>.

For these purposes, the whole or any part of the house and premises is qualifying property if:



- 3352 (a) it has been designated under the Inheritance Tax Act 1984<sup>10</sup>, whether with or without any other property, and no chargeable event<sup>11</sup> has subsequently occurred with respect to it; or
- 3353 (b) an application to the Board<sup>12</sup> for it to be so designated is pending<sup>13</sup>; or
- 3354 (c) it is the property of a body not established or conducted for profit and a direction has been given<sup>14</sup> in relation to it, whether with or without any other property<sup>15</sup>.

A notice of a person's desire to have the freehold of a house and premises ceases to have effect if:

- 3355 (i) before completion of the conveyance in pursuance of the tenant's notice, the whole or any part of the house and premises becomes qualifying property; and
- 3356 (ii) the condition set out in head (1) above or, as the case may be, head (2) above is satisfied<sup>16</sup>.

Where it is claimed that either of the above exclusions<sup>17</sup> applies in relation to a tenant's notice, the person making the claim must, at the time of making it, furnish the tenant with evidence in support of it; and, if he fails to do so, he is liable for any costs which are reasonably incurred by the tenant in consequence of the failure<sup>18</sup>.

1    Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1512 et seq post.

2    For the meaning of 'house' see PARA 1390 ante.

3    For the meaning of 'premises' see PARA 1391 ante.

4    For the meaning of 'tenancy' see PARA 1398 ante.

5    Ie the date on which the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch III (ss 63-68) came into force: see the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5.

6    For the meaning of 'tenant' see PARA 1432 note 1 ante.

7    Ie either or both of the Leasehold Reform Act 1967 s 1A (as added) (see PARAS 1396, 1402 ante) or s 1B (as added and amended) (see PARA 1401 ante).

8    Ie *ibid* s 1AA (as added and amended): see PARA 1397 ante.

9    Ibid s 32A(1) (s 32A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 68; the Leasehold Reform Act 1967 s 32A(1) amended by the Housing Act 1996, s 106, Sch 9, PARA 2(7)). For transitional provisions and savings see the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, art 5(b), Sch 1 para 1; the Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2, Schedule para 2.

10   Ie under the Inheritance Tax Act 1984 s 31(1)(b), (c) or s 31(1)(d) (as added) (designation and undertakings relating to conditionally exempt transfers): see INHERITANCE TAXATION vol 24 (Reissue) PARA 536. The Leasehold Reform Act 1967 s 32A(2)(a), (b) (as added: see note 15 *infra*) applies to designations under the Finance Act 1975 s 34(1)(a), (b) or (c) (repealed) or the Finance Act 1976 s 77(1)(b), (c) or (d) (repealed) as it applies to designation under the Inheritance Tax Act 1984 s 31(1)(b), (c) or s 31(1)(d) (as added): Leasehold Reform Act 1967 s 32A(7)(a) (as added: see note 9 *supra*).

11   For these purposes, 'chargeable event' means (1) any event which in accordance with any provision of the Inheritance Tax Act 1984 Pt II Ch II (ss 30-35) (as amended) (see INHERITANCE TAXATION vol 24 (Reissue) PARA 535 et seq) is a chargeable event, including any such provision as applied by s 78(3) (as amended) (conditionally exempt occasions: see INHERITANCE TAXATION vol 24 (Reissue) PARA 546); or (2) any event which would have been a chargeable event in the circumstances mentioned in s 79(3) (as amended) (exemption from

ten-yearly charge: see INHERITANCE TAXATION vol 24 (Reissue) PARA 547); Leasehold Reform Act 1967 s 32A(8) (as added: see note 9 supra).

12 For these purposes, 'the Board' means the Commissioners for Her Majesty's Revenue and Customs: see ibid s 32A(8) (as added (see note 9 supra); amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).

13 For these purposes, an application is pending as from the time when it is made to the Board until such time as it is either granted or refused by the Board or withdrawn by the applicant; and an application is not to be regarded as made unless and until the applicant has submitted to the Board all such information in support of the application as is required by the Board: ibid s 32A(3) (as added: see note 9 supra).

14 Ie under the Inheritance Tax Act 1984 s 26 (repealed) (gifts for public benefit): see INHERITANCE TAXATION vol 24 (Reissue) PARA 524. The Leasehold Reform Act 1967 s 32A(2)(c), (d) (as added: see note 14 infra) applies to a direction under the Finance Act 1975 Sch 6 para 13 (repealed) as it applies to a direction under the Inheritance Tax Act 1984 s 26 (repealed): Leasehold Reform Act 1967 s 32A(7)(b) (as added: see note 9 supra).

15 Ibid s 32A(2)(a)-(c) (as added: see note 9 supra). Any part of the house and premises was also qualifying property if an application for a direction to be given under the Inheritance Tax Act 1984 s 26 (repealed) in relation to it was pending: see the Leasehold Reform Act 1967 s 32A(2)(d) (as so added).

16 Ibid s 32A(4) (as added: see note 9 supra). Where a tenant's notice ceases to have effect by virtue of s 32A(4) (as so added), then (1) s 9(4) (see PARA 1466 ante) does not apply to require the tenant to make any payment to the landlord in respect of costs incurred by reason of the notice; and (2) the person who applied or is applying for designation or who applied for a direction is liable to the tenant for all reasonable costs incurred by the tenant in connection with his claim to acquire the freehold of the house and premises: see s 32A(5) (as so added).

17 Ie ibid s 32A(1) (as added and amended) or s 32A(4) (as added): see the text and notes 1-9, 16 supra.

18 Ibid s 32A(6) (as added: see note 9 supra).

## UPDATE

### 1511 Property transferred for public benefit etc

TEXT AND NOTE 9--Leasehold Reform Act 1967 s 32A(1) further amended: Housing and Regeneration Act 2008 Sch 16 (in force in relation to England: SI 2009/2096). For transitional provisions and savings see SI 2009/2096 art 3.

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### 1512. Crown land.

In the case of a tenancy from the Crown<sup>1</sup>, the statutory provisions relating to enfranchisement or extension<sup>2</sup> apply in favour of the tenant<sup>3</sup> as in the case of any other tenancy if there has ceased to be a Crown interest in the land<sup>4</sup>. As against a landlord<sup>5</sup> holding a tenancy from the Crown those provisions apply also if either:

3357 (1) his subtenant is seeking an extended lease and the landlord, or a superior landlord holding a tenancy from the Crown, has a sufficient interest to grant it and is entitled to do so without the concurrence of the appropriate authority; or

3358 (2) the appropriate authority notifies the landlord that as regards any Crown interest affected the authority will grant or concur in granting the freehold or extended lease<sup>6</sup>.

The restriction imposed<sup>7</sup> on the term for which a lease may be granted by the Crown Estate Commissioners does not apply where the lease is granted by way of extension of a long tenancy<sup>8</sup> at a low rent<sup>9</sup> and it appears to the Commissioners that, if the tenancy were not a tenancy from the Crown, there would be a statutory right<sup>10</sup> to an extended lease<sup>11</sup>.

Where, in the case of land belonging to Her Majesty in right of the Duchy of Lancaster or to the Duchy of Cornwall, it appears to the appropriate authority that a tenant under a long lease at a low rent would, if the tenancy were not a tenancy from the Crown, be entitled to an extended lease<sup>12</sup>, a lease corresponding to that to which the tenant would be so entitled may be granted to take effect wholly or partly out of the Crown interest by the same person and with the same formalities as in the case of any other lease of such land<sup>13</sup>.

1 For these purposes, 'tenancy from the Crown' means a tenancy of land in which there is, or has during the subsistence of the tenancy been, a Crown interest superior to the tenancy; and 'Crown interest' and 'the appropriate authority' in relation to a Crown interest mean respectively: (1) an interest comprised in the Crown Estate, and the Crown Estate Commissioners; (2) an interest belonging to Her Majesty in right of the Duchy of Lancaster, and the Chancellor of the Duchy; (3) an interest belonging to the Duchy of Cornwall, and such person as the Duke of Cornwall or the possessor for the time being of the Duchy appoints; (4) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, and the Minister in charge of that department: Leasehold Reform Act 1967 s 33(2). For the meaning of 'tenancy' see PARA 1398 ante. As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

2 *Ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1513 et seq post.

3 For the meaning of 'tenant' see PARA 1432 note 1 ante.

4 Leasehold Reform Act 1967 s 33(1).

5 For the meaning of 'landlord' see PARA 1432 note 4 ante.

6 Leasehold Reform Act 1967 s 33(1)(a), (b).

7 *Ie* imposed by the Crown Estate Act 1961 s 3(2) (as amended): see CROWN PROPERTY vol 12(1) (Reissue) PARA 290.

8 For the meaning of 'long tenancy' see PARA 1398 ante.

9 For the meaning of 'low rent' see PARA 1403 ante.

10 *Ie* under the Leasehold Reform Act 1967 Pt I (as amended).

11 *Ibid* s 33(3).

12 See note 10 *supra*.

13 Leasehold Reform Act 1967 s 33(4). In the case of land belonging to the Duchy of Cornwall, the purposes authorised by the Duchy of Cornwall Management Act 1863 s 8 for the advancement of parts of such gross sums as are therein mentioned include the payment to tenants of sums corresponding to those which, if the tenancies were not tenancies from the Crown, would be payable by way of compensation under the Leasehold Reform Act 1967 s 17 (see PARAS 1485-1486 ante): s 33(5).

## UPDATE

### 1512 Crown land

NOTE 1--See also Leasehold Reform Act 1967 s 33(2A) (added by Housing and Regeneration Act 2008 Sch 8 para 9).

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## **(8) EXERCISE OF RIGHTS TO ENFRANCHISEMENT OR EXTENSION BY SUBTENANTS**

### **(i) In general**

#### **1513. Entitlement of subtenants to claim enfranchisement or extension.**

The following provisions<sup>1</sup> have effect<sup>2</sup> where a person gives notices of his desire to have the freehold or an extended lease of a house<sup>3</sup> and premises<sup>4</sup>, and either he does so in respect of a subtenancy or there is a tenancy<sup>5</sup> reversionary on his tenancy; but any such notice given in respect of a tenancy granted by way of sub-demise out of a superior tenancy other than a long tenancy<sup>6</sup> at a low rent<sup>7</sup> is of no effect if the grant was made in breach of the terms of the superior tenancy and there has been no waiver of the breach by the superior landlord<sup>8</sup>.

Where a tenancy has been extended<sup>9</sup>, no long tenancy created immediately or derivatively by way of sub-demise under the tenancy confers upon the subtenant, as against the tenant's<sup>10</sup> landlord, any right to acquire the freehold or an extended lease<sup>11</sup>.

On enfranchisement a subtenant has the like right to have conveyed to him an estate in fee simple absolute subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances<sup>12</sup>.

<sup>1</sup> I.e. the provisions of the Leasehold Reform Act 1967 s 5(4), Sch 1 (as amended): see the text and notes 2-8 infra; and PARA 1514 et seq post.

<sup>2</sup> I.e. in relation to the operation of *ibid* Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1514 et seq post.

<sup>3</sup> For the meaning of 'house' see PARA 1390 ante.

<sup>4</sup> For the meaning of 'premises' see PARA 1391 ante.

<sup>5</sup> For the meaning of 'tenancy' see PARA 1398 ante.

<sup>6</sup> For the meaning of 'long tenancy' see PARA 1398 ante.

<sup>7</sup> For the meaning of 'low rent' see PARA 1403 ante.

<sup>8</sup> Leasehold Reform Act 1967 s 5(4).

<sup>9</sup> I.e. under *ibid* s 14 (as amended): see PARA 1469 ante.

<sup>10</sup> For the meaning of 'tenant' see PARA 1432 note 1 ante.

<sup>11</sup> See the Leasehold Reform Act 1967 s 16(4); and PARA 1483 ante. As to the circumstances in which the tenant who holds an extended tenancy is obliged to inform the prospective subtenant that the subtenancy is to be derived out of a tenancy extended under s 14 (as amended) see s 16(6); and PARA 1483 ante.

<sup>12</sup> See *ibid* s 8(1); and PARA 1450 ante. A subtenant who has previously purchased the freehold, subject to an intermediate lease, is not entitled to enfranchise under the Leasehold Reform Act 1967 in order to acquire the intermediate lease, because his only right is to acquire the freehold, and this he already has: *Gratton-Storey v Lewis* (1987) 55 P & CR 326, 19 HLR 546, CA.

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#### **1514. Claims to enfranchisement or extension.**

Where a person ('the claimant') gives notice of his desire to have the freehold or an extended lease<sup>1</sup> of a house<sup>2</sup> and premises<sup>3</sup>, and he does so in respect of a subtenancy ('the tenancy in possession'), then, except as otherwise provided<sup>4</sup>:

- 3359 (1) the rights and obligations of the landlord<sup>5</sup> are, so far as their interests are affected, rights and obligations respectively of the estate owner in respect of the fee simple and of each of the persons in whom is vested a concurrent tenancy superior to the tenancy in possession<sup>6</sup>; and
- 3360 (2) the proceedings arising out of the notice, whether for resisting or giving effect to the claim to acquire the freehold or extended lease, must be conducted on behalf of all the persons referred to in head (1) above, by and through that one of them who is identified<sup>7</sup> as 'the reversioner'<sup>8</sup>.

1    Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1515 et seq post.

2    For the meaning of 'house' see PARA 1390 ante.

3    For the meaning of 'premises' see PARA 1391 ante.

4    Ie by the Leasehold Reform Act 1967 s 5(4), Sch 1 (as amended): see PARA 1513 ante; the text and notes 5-8 infra; and PARA 1515 et seq post.

5    See note 1 supra.

6    Leasehold Reform Act 1967 Sch 1 para 1(1)(a). References to the landlord apply accordingly (Sch 1 para 1(1)(a)); and references to superior interests mean the estate in fee simple and any tenancy superior, or treated by Sch 1 para 1(2) (see PARA 1515 post) as superior, to the inferior interest in question: Sch 1 para 1(3).

7    Ie by ibid Sch 1 (as amended): see PARA 1516 post.

8    Ibid Sch 1 para 1(1)(b).

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#### **1515. Tenancies reversionary on tenant's tenancy.**

Where there is a tenancy<sup>1</sup> reversionary on a tenancy in respect of which a person gives notice of his desire to have the freehold or an extended lease<sup>2</sup>, then, except in so far as special provision is made for such a reversionary tenancy, the statutory provisions relating to

subtenancies<sup>3</sup> apply as if the reversionary tenancy were a concurrent tenancy intermediate between the tenancy in possession<sup>4</sup> and any interest superior<sup>5</sup> to it<sup>6</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 See under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1516 et seq post.

3 See ibid s 5(4), Sch 1 (as amended): see PARAS 1513-1514 ante; the text and notes 4-6 infra; and PARA 1516 et seq post.

4 For the meaning of 'the tenancy in possession' see PARA 1514 ante.

5 For the meaning of references to superior interests see PARA 1514 note 6 ante.

6 Leasehold Reform Act 1967 Sch 1 para 1(2).

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### **1516. Meaning of 'the reversioner'.**

'The reversioner' is:

3361 (1) if any person has a tenancy<sup>1</sup> of the house<sup>2</sup> carrying an expectation of possession of 30 years or more, that person or, if there is more than one, that one of them to whose tenancy the other tenancies are superior;

3362 (2) if there is no such tenancy, the estate owner in respect of the fee simple of the house<sup>3</sup>.

For these purposes, the expectation of possession carried by a tenancy is the expectation which it carries at the relevant time<sup>4</sup> of possession after the tenancy in possession<sup>5</sup> on the basis that:

3363 (a) the tenancy in possession terminates at the relevant time if its term date<sup>6</sup> fell before then, or else terminates at its term date or, in the case of a tenancy which has been extended, its original term date<sup>7</sup>; and

3364 (b) a tenancy other than the tenancy in possession terminates at its term date<sup>8</sup>.

In a case, however, where before the relevant time the claimant's<sup>9</sup> immediate landlord had given notice to quit<sup>10</sup> terminating the tenancy in possession earlier than the term date, the date specified in the notice to quit must be substituted for the date in head (a) above<sup>11</sup>.

If it appears to the court, on an application made by any of the persons having an interest superior to the tenancy in possession:

3365 (i) that the respective interests of those persons, the absence or incapacity of the person designated<sup>12</sup> as the reversioner or other special circumstances require

- that one of the other landlords<sup>13</sup> should act as the reversioner instead of that person; or
- 3366 (ii) that the person designated is unwilling to act as the reversioner, and that one of the other landlords could appropriately replace him and is willing to do so; or
- 3367 (iii) that by reason of complications in the title the provisions identifying the reversioner<sup>14</sup> are inapplicable,

the court may, on such terms and conditions as it thinks fit, appoint such person as it thinks fit to be the reversioner<sup>15</sup>.

On the application of any of the other landlords or of the claimant, the court may also remove the reversioner and appoint another person in his place, if it appears to the court proper to do so by reason of any delay or default, actual or apprehended, on the part of the reversioner<sup>16</sup>.

1 For the meaning of 'tenancy' see PARA 1398 ante.

2 For the meaning of 'house' see PARA 1390 ante.

3 Leasehold Reform Act 1967 s 5(4), Sch 1 para 2. For the meaning of references to superior interests see PARA 1514 note 6 ante.

4 For the meaning of 'relevant time' see PARA 1391 note 4 ante.

5 For the meaning of 'the tenancy in possession' see PARA 1514 ante.

6 For the meaning of 'term date' see PARA 1400 note 12 ante.

7 For the meaning of 'original term date' see PARA 1400 note 12 ante.

8 Leasehold Reform Act 1967 Sch 1 para 13(1).

9 For the meaning of 'the claimant' see PARA 1514 ante.

10 For the meaning of 'notice to quit' see PARA 1435 note 5 ante.

11 Leasehold Reform Act 1967 Sch 1 para 13(2).

12 *Ie* by *ibid* Sch 1 para 2: see the text and notes 1-3 *supra*.

13 For these purposes, 'other landlords' means the persons for whom the reversioner is by *ibid* Sch 1 para 1 (see PARA 1514 ante) authorised to act: Sch 1 para 1(3).

14 *Ie* *ibid* Sch 1 para 2.

15 *Ibid* Sch 1 para 3(1).

16 *Ibid* Sch 1 para 3(2).

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### **1517. Reversioner's authority.**

The reversioner<sup>1</sup> may<sup>2</sup> on behalf and in the name of the other landlords<sup>3</sup>:

- 3368 (1) execute any conveyance to fulfil the obligation to enfranchise<sup>4</sup> or any lease to fulfil the obligation to grant<sup>5</sup> an extended lease<sup>6</sup>; and
- 3369 (2) take or defend any legal proceedings<sup>7</sup> in respect of matters arising out of the claimant's<sup>8</sup> notice<sup>9</sup>.

In relation to all matters within the authority given to him<sup>10</sup> the reversioner's acts are binding<sup>11</sup> on the other landlords and on their interests in the house<sup>12</sup> and premises<sup>13</sup> or any other property; but in the event of dispute either the reversioner or any of the other landlords may apply to the court for directions as to the manner in which he should act on the matter in dispute<sup>14</sup>.

1 For the meaning of 'the reversioner' see PARA 1516 ante.

2 Ie without prejudice to the generality of the Leasehold Reform Act 1967 s 5(4), Sch 1 para 1: see PARA 1514 ante.

3 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

4 Ie under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

5 Ie under ibid s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.

6 Ibid Sch 1 para 4(1)(a). Schedule 1 para 4(1)(a) does not, however, apply to the execution of a conveyance or lease on behalf of the person to whom a Crown interest belongs: Sch 1 para 14(1) proviso.

7 Ie under ibid Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante, PARA 1518 et seq post.

8 For the meaning of 'the claimant' see PARA 1514 ante.

9 Leasehold Reform Act 1967 Sch 1 para 4(1)(b). The authority given to the reversioner by Sch 1 (as amended) does not, however, extend to the bringing of proceedings under s 17 (see PARAS 1485-1486 ante) or s 18 (as amended) (see PARAS 1488-1490 ante) on behalf of any of the other landlords or preclude any of the other landlords from bringing such proceedings thereunder on his own behalf; and, without prejudice to the operation of Sch 1 para 1(2) (see PARA 1515 ante), a person entitled to a tenancy reversionary on the tenancy in possession may make an application under s 17, by virtue of s 17(4) (see PARA 1486 ante), or s 18 (as amended) as a landlord: Sch 1 para 6(1). For the meaning of 'the tenancy in possession' see PARA 1514 ante.

10 Ie by ibid Sch 1 (as amended).

11 Ie subject to ibid Sch 1 para 5 (as amended) (see PARA 1521 post) and Sch 1 para 6 (see note 9 supra; and PARAS 1400, 1456, 1477 ante).

12 For the meaning of 'house' see PARA 1390 ante.

13 For the meaning of 'premises' see PARA 1391 ante.

14 Leasehold Reform Act 1967 Sch 1 para 4(2).

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### **1518. Where one of the other landlords cannot be found or his identity ascertained.**

If any of the other landlords<sup>1</sup> cannot be found, or his identity cannot be ascertained, the reversioner<sup>2</sup> must apply to the court for directions; and the court may make such order in the



matter as it thinks proper with a view to giving effect to the rights of the claimant<sup>3</sup> and protecting the interests of other persons<sup>4</sup>. Subject to the court's directions, however, the following provisions apply:

- 3370 (1) the reversioner must proceed as in other cases;
- 3371 (2) a conveyance or lease executed by the reversioner on behalf of that landlord by such description as will identify the interest intended to be conveyed or bound is of the same effect as if executed in his name;
- 3372 (3) if the freehold is to be conveyed to the claimant, any sum paid as the price for that landlord's interest must be paid into court<sup>5</sup>.

1 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

2 For the meaning of 'the reversioner' see PARA 1516 ante.

3 For the meaning of 'the claimant' see PARA 1514 ante.

4 Leasehold Reform Act 1967 s 5(4), Sch 1 para 4(3).

5 Ibid Sch 1 para 4(3)(a)-(c). A conveyance or lease executed in pursuance of Sch 1 para 4(3) is effective notwithstanding that the interest intended to be conveyed or bound is a Crown interest or a tenancy from the Crown: Sch 1 para 14(2).

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### **1519. Reversioner's protection.**

If the reversioner<sup>1</sup> acts in good faith and with reasonable care and diligence, he is not liable to any of the other landlords<sup>2</sup> for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority given<sup>3</sup> to him<sup>4</sup>.

1 For the meaning of 'the reversioner' see PARA 1516 ante.

2 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

3 Ie by the Leasehold Reform Act 1967 s 5(4), Sch 1 (as amended): see PARA 1514 et seq ante, PARA 1520 et seq post.

4 Ibid Sch 1 para 4(4).

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### **1520. Matters relating to title and price in which other landlords may act.**

Any of the other landlords<sup>1</sup> is entitled<sup>2</sup>, if he so desires, to be separately represented in any legal proceedings in which his title to any property comes in question, or in any legal proceedings relating to the price payable<sup>3</sup> for the house<sup>4</sup> and premises<sup>5</sup>.

For the purpose of deducing, evidencing or verifying his title to any property, any of the other landlords, on giving written notice to the reversioner<sup>6</sup> and to the claimant<sup>7</sup>, may deal directly with the claimant if he objects to disclosing his title to the reversioner; and he must deal directly with the claimant if the claimant by written notice given to him and to the reversioner so requires<sup>8</sup>.

For the purpose of agreeing the price payable for his interest<sup>9</sup>, any of the other landlords, on giving written notice to the reversioner and to the claimant, may deal directly with the claimant; and, whether he does that or not, he may require the reversioner to apply to a leasehold valuation tribunal for the price to be determined by such a tribunal<sup>10</sup>.

Any of the other landlords is entitled to require that the price payable for his interest, or so much of it as is payable to him, shall be paid by the claimant to him or to a person authorised by him to receive it, instead of to the reversioner; but, if, after being given proper notice of the time and place fixed for completion with the claimant, neither he nor a person so authorised attends to receive payment, and he has not made, and notified the reversioner of, other arrangements with the claimant to receive payment, the reversioner is authorised to receive it for him and the reversioner's written receipt for the amount payable is a complete discharge to the claimant<sup>11</sup>.

1 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

2 Ie notwithstanding the Leasehold Reform Act 1967 s 5(4), Sch 1 para 4(2): see PARA 1517 ante.

3 Ie under ibid s 9 (as amended): see PARA 1441 et seq ante.

4 For the meaning of 'house' see PARA 1390 ante.

5 Leasehold Reform Act 1967 Sch 1 para 5(1). For the meaning of 'premises' see PARA 1391 ante.

6 For the meaning of 'the reversioner' see PARA 1516 ante.

7 For the meaning of 'the claimant' see PARA 1514 ante.

8 Leasehold Reform Act 1967 Sch 1 para 5(2).

9 See note 3 supra.

10 Leasehold Reform Act 1967 Sch 1 para 5(3) (amended by the Housing Act 1980 s 142(3), Sch 22 para 10). As to the jurisdiction of leasehold valuation tribunals see PARA 1530 post.

11 Leasehold Reform Act 1967 Sch 1 para 5(4).

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## **1521. Landlords' duty to assist the reversioner.**

It is the duty of each of the other landlords<sup>1</sup>:

3373 (1) to give<sup>2</sup> the reversioner<sup>3</sup> all such information and assistance as he may reasonably require; and

3374 (2) after being given proper notice of the time and place fixed for completion with the claimant<sup>4</sup>, if the claimant is acquiring the freehold, to ensure that all deeds and other documents that ought on his part to be delivered to the claimant on completion are available for the purpose<sup>5</sup>;

and, if any of the other landlords fails to do so, he must indemnify the reversioner against any liability incurred by the reversioner in consequence of the failure<sup>6</sup>.

Each of the other landlords must make such contribution as may be just to the costs and expenses incurred by the reversioner and not recoverable or not recovered from the claimant<sup>7</sup>.

1 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

2 le subject to the Leasehold Reform Act 1967 s 5(4), Sch 1 para 5(2), (3) (as amended): see PARA 1520 ante.

3 For the meaning of 'the reversioner' see PARA 1516 ante.

4 For the meaning of 'the claimant' see PARA 1514 ante.

5 le including, in the case of registered land, the land certificate and any other documents necessary to perfect the claimant's title: Leasehold Reform Act 1967 Sch 1 para 5(5)(b). However, land certificates are no longer issued although official copies of the register and of the title plan are available as is a 'title information document' explaining why the official copy has been issued and how to obtain further copies: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1129.

6 Leasehold Reform Act 1967 Sch 1 para 5(5).

7 Ibid Sch 1 para 5(6). As to the costs and expenses recoverable see s 9(4), s 9(4A) (as added); and PARA 1466 ante; s 14(2), s 14(2A) (as added); and PARA 1471 ante.

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## **(ii) Enfranchisement**

### **1522. Conveyance.**

Where a conveyance is executed to give effect to the obligation to enfranchise<sup>1</sup>, the statutory provisions relating to the rights to be conveyed to the tenant on enfranchisement<sup>2</sup> have effect in relation to rights and restrictions arising by virtue of any tenancy<sup>3</sup> superior to the tenancy in possession<sup>4</sup>, or by virtue of an agreement collateral to such a tenancy, so far as they are directly or indirectly to the benefit of or enforceable against the claimant<sup>5</sup> during the tenancy in possession, as if they arose by virtue of that tenancy<sup>6</sup>.

1 le under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2 le the rights contained in ibid s 10 (as amended): see PARAS 1452-1455, 1459 ante. See further note 6 infra.

3 For the meaning of 'tenancy' see PARA 1398 ante.

4 For the meaning of 'tenancy in possession' see PARA 1514 ante.

5 For the meaning of 'the claimant' see PARA 1514 ante.

6 Leasehold Reform Act 1967 s 5(4), Sch 1 para 7(1)(a). The reference in s 10(1A) (as added) (see PARA 1452 ante) to the covenants for title implied under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended) (see SALE OF LAND vol 42 (Reissue) PARA 349 et seq) is to be read as excluding the covenant in s 4(1)(b) (compliance with terms of lease: see SALE OF LAND vol 42 (Reissue) PARAS 99, 350): Leasehold Reform Act 1967 Sch 1 para 7(1)(a) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 5(3)).

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### **1523. Separate price payable.**

Where a conveyance is executed to give effect to the obligation to enfranchise<sup>1</sup>, a separate price is payable<sup>2</sup> for each of the interests superior to the tenancy in possession<sup>3</sup>; and the statutory provisions relating to the price<sup>4</sup> apply to the computation of that price with such modifications as are appropriate to relate it to a sale of the interest in question subject to any tenancies intermediate between that interest and the tenancy in possession, together with tenant's incumbrances<sup>5</sup> relative to those tenancies<sup>6</sup>.

The price payable for a minor superior tenancy<sup>7</sup> must, however, be calculated, except where it has been determined by agreement or otherwise before 3 October 1980, by applying the following formula:

$$P = \pounds \frac{R}{Y} - \frac{R}{Y(1+Y)^n}$$

where P equals the price payable, R equals the profit rent, Y equals the yield<sup>8</sup> and n equals the period, expressed in years<sup>9</sup>, which the minor superior tenancy would have to run if it were not extinguished by enfranchisement<sup>10</sup>.

Nothing in the statutory provisions relating to enfranchisement and extension by subtenants<sup>11</sup> is to be taken to entitle the claimant<sup>12</sup> to give notice<sup>13</sup> of his inability or unwillingness to acquire particular interests superior to the tenancy in possession; but any such notice extends to all those interests<sup>14</sup>.

1 Ie under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2 Ie in accordance with ibid s 9 (as amended): see PARA 1441 et seq ante.

3 For the meaning of 'tenancy in possession' see PARA 1514 ante; and for the meaning of 'tenancy' see PARA 1398 ante.

4 Ie the Leasehold Reform Act 1967 s 9 (as amended).

5 For the meaning of 'tenant's incumbrances' see PARA 1439 note 10 ante.

6 Leasehold Reform Act 1967 s 5(4), Sch 1 para 7(1)(b) (amended by the Housing Act 1980 ss 141, 152(3), Sch 21 para 6, Sch 26).

7 For these purposes, 'a minor superior tenancy' means a superior tenancy having an expectation of possession of not more than one month and in respect of which the profit rent is not more than £5 per year: Leasehold Reform Act 1967 Sch 1 para 7A(2) (Sch 1 para 7A added by the Housing Act 1980 Sch 21 para 6).

'Profit rent' means an amount equal to that of the rent payable under the tenancy on which the minor superior tenancy is in immediate reversion, less that of the rent payable under the minor superior tenancy: Leasehold Reform Act 1967 Sch 1 para 7A(3) (as so added). Where, however, the minor superior tenancy or that on which it is in immediate reversion comprises property other than the house and premises, the reference in Sch 1 para 7A(3) (as so added) to the rent payable under it means so much of that rent as is apportioned to the house and premises: Sch 1 para 7A(4) (as so added). For the meaning of 'house' see PARA 1390 ante; and for the meaning of 'premises' see PARA 1391 ante.

8 I.e. the yield, expressed as a decimal fraction, from 2.5% Consolidated Stock. In calculating the yield from 2.5% Consolidated Stock, the price of that stock is to be taken to be the middle market price at the close of business on the last trading day in the week before the tenant gives notice in accordance with the Leasehold Reform Act 1967 of his desire to have the freehold: Sch 1 para 7A(6) (as added: see note 7 supra).

9 I.e. taking any part of a year as a whole year.

10 Leasehold Reform Act 1967 Sch 1 para 7A(1), (5) (as added: see note 7 supra).

11 I.e. *ibid* Sch 1 (as amended): see PARA 1514 et seq ante, PARA 1524 et seq post.

12 For the meaning of 'the claimant' see PARA 1514 ante.

13 I.e. under the Leasehold Reform Act 1967 s 9(3) (as amended): see PARA 1446 ante.

14 *Ibid* Sch 1 para 9.

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## **1524. Rentcharges and mortgages on the landlord's estate.**

Where a conveyance is executed to give effect to the obligation to enfranchise<sup>1</sup>:

3375 (1) so much of the statutory provisions relating to rentcharges<sup>2</sup> as relates to the application of the purchase price for redemption of rentcharges applies only to the price payable for the estate in fee simple<sup>3</sup>; and

3376 (2) so much of the statutory provisions relating to the discharge of mortgages on the landlord's estate<sup>4</sup> as relates to the application of the price payable in or towards redemption of charges applies separately to the price payable for each interest together with the relative charges<sup>5</sup>.

Where it is necessary<sup>6</sup> to make, otherwise than out of the price payable for the house<sup>7</sup> and premises<sup>8</sup>, any payment for the redemption of a rentcharge, the reversioner<sup>9</sup>, if he is not the landlord liable or primarily liable in respect of the rentcharge, is not required to make that payment otherwise than out of money made available for the purpose by that landlord, and it is the duty of that landlord to provide for the redemption; and similarly where<sup>10</sup> it is necessary to discharge the house and premises from a charge affecting the interest of any landlord<sup>11</sup>.

1 I.e. under the Leasehold Reform Act 1967 s 8 (as amended): see PARAS 1439, 1450-1451 ante.

2 I.e. *ibid* s 11 (as amended): see PARAS 1460-1461 ante.

- 3 Ibid s 5(4), Sch 1 para 7(1)(c) (amended by the Rentcharges Act 1977 s 17(2), Sch 2).
- 4 Ie the Leasehold Reform Act 1967 s 12 (see PARAS 1462-1463 ante) and s 13 (see PARA 1464 ante).
- 5 Ibid Sch 1 para 7(1)(d).
- 6 Ie by reason of ibid s 11(2): see PARA 1461 ante.
- 7 For the meaning of 'house' see PARA 1390 ante.
- 8 For the meaning of 'premises' see PARA 1391 ante.
- 9 For the meaning of 'the reversioner' see PARA 1516 ante.
- 10 Ie by reason of the Leasehold Reform Act 1967 s 12(8) proviso: see PARA 1462 ante.
- 11 Ibid Sch 1 para 7(2) (amended by the Rentcharges Act 1977 Sch 2).

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### **(iii) Extension**

#### **1525. Identity of grantor of new lease.**

Where a lease is executed to give effect to the statutory provisions relating to extension of leases<sup>1</sup>, the new tenancy<sup>2</sup> must be granted<sup>3</sup> by the landlord having an interest sufficient in point of duration which is not superior to another such interest<sup>4</sup>.

The lease has effect<sup>5</sup> for the creation of the new tenancy, and for the operation of the rights and obligations conferred and imposed by it, as if there had been a surrender and regrant of any subsisting tenancy intermediate between the interest of the landlord granting the new tenancy and the tenancy in possession<sup>6</sup>; and the covenants and other provisions of the lease must be framed and take effect accordingly<sup>7</sup>.

If there is no one landlord having such an interest<sup>8</sup> in the whole of the house<sup>9</sup> and premises<sup>10</sup>, those having the appropriate interests in separate parts thereof must instead grant the tenancy; and, where it is necessary<sup>11</sup> for more than one landlord to join in granting the new tenancy, the lease has effect in accordance with the above provisions<sup>12</sup>, but as if the landlords in question had been jointly entitled to their interests and had become separately entitled by assignments taking effect immediately after the lease<sup>13</sup>.

- 1 Ie the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.
- 2 For the meaning of 'tenancy' see PARA 1398 ante.
- 3 Ie except as provided by the Leasehold Reform Act 1967 s 5(4), Sch 1 para 11: see PARA 1526 post.
- 4 Ibid Sch 1 para 10(1).
- 5 Ie subject to ibid Sch 1 para 11.
- 6 For the meaning of 'the tenancy in possession' see PARA 1514 ante.
- 7 Leasehold Reform Act 1967 Sch 1 para 10(2).

- 8    le such an interest as is referred to in *ibid* Sch 1 para 10(1): see the text and notes 1-4 *supra*.
- 9    For the meaning of 'house' see PARA 1390 *ante*.
- 10   For the meaning of 'premises' see PARA 1391 *ante*.
- 11   le in accordance with the Leasehold Reform Act 1967 Sch 1 para 10(3).
- 12   le in accordance with *ibid* Sch 1 para 10(2): see the text and notes 5-7 *supra*.
- 13   *Ibid* Sch 1 para 10(3).

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### **1526. Identity of grantor; special cases.**

Where a tenancy<sup>1</sup> in the house<sup>2</sup> and premises<sup>3</sup> superior to the tenancy in possession<sup>4</sup> is vested in the claimant<sup>5</sup> or a trustee for him, the lease<sup>6</sup> must include an actual surrender of the superior tenancy without a regrant<sup>7</sup>.

Where the effect of the lease would otherwise be, as regards any tenancy superior to the new tenancy:

- 3377 (1)   that the rent payable under that superior tenancy<sup>8</sup> would be equal to or more than the rent payable under the tenancy on which it would be in immediate reversion, regard being had to the operation of this provision in relation to any other tenancy; or
- 3378 (2)   that the difference between those rents would not be more than £4 a year,

the person entitled to that superior tenancy may by written notice given to his immediate landlord and, if neither of them is the reversioner<sup>9</sup>, to the reversioner, require that the lease shall include an actual surrender by him of his tenancy without a regrant<sup>10</sup>.

Any person entitled to a tenancy superior to the new tenancy may by the like notice require that the lease shall confer on him the right to surrender his tenancy if, by reason of any revision of the rent payable under the claimant's new tenancy, together with any consequent surrender of tenancies intermediate between the superior tenancy and the new tenancy, the rent payable under the superior tenancy will not thereafter be less by more than £4 a year than the rent payable under the tenancy on which it will be in immediate reversion<sup>11</sup>.

- 1    For the meaning of 'tenancy' see PARA 1398 *ante*.
- 2    For the meaning of 'house' see PARA 1390 *ante*.
- 3    For the meaning of 'premises' see PARA 1391 *ante*.
- 4    For the meaning of 'the tenancy in possession' see PARA 1514 *ante*.
- 5    For the meaning of 'the claimant' see PARA 1514 *ante*.
- 6    le the lease under the Leasehold Reform Act 1967 s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 *ante*.

7 Ibid s 5(4), Sch 1 para 11(1). The lease must accordingly be disregarded for the purposes of Sch 1 para 10 (see PARA 1525 ante): Sch 1 para 11(1).

8 For these purposes, references to the rent payable under a tenancy mean, in relation to a tenancy comprising property other than the house and premises, so much of that rent as is apportionable to the house and premises; and any surrender or provision for a surrender of such a tenancy in accordance with ibid Sch 1 para 11 must be limited to the house and premises: Sch 1 para 11(5).

9 For the meaning of 'the reversioner' see PARA 1516 ante.

10 Leasehold Reform Act 1967 Sch 1 para 11(2). Where a landlord required apart from Sch 1 para 11(4), or by virtue of Sch 1 para 11(4) as it operates in relation to another landlord, to grant the new tenancy would do so by virtue of a tenancy in respect of which he claims, by the like notice, to have the benefit of Sch 1 para 11(2) or (3), he must, for the purposes of Sch 1 para 10 (see PARA 1525 ante), be replaced, subject to any further operation of Sch 1 para 11(4), by the next superior landlord: Sch 1 para 11(4).

11 Ibid Sch 1 para 11(3). See also note 10 supra.

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### **1527. Rent, service charges and other matters.**

The lease must give effect:

3379 (1) to the statutory provisions relating to the rent payable under the new tenancy<sup>1</sup> on the basis that the references there to the landlord include the landlord granting the new tenancy, the immediate landlord of whom the new tenancy will be held and any intermediate landlord; and

3380 (2) to the statutory provisions relating to service charges and other similar matters<sup>2</sup> on the basis that account is to be taken of obligations imposed on any of those landlords by virtue of the new tenancy or any superior tenancy;

and the statutory provision which, after extension, bars the entitlement to enfranchisement or extension of the owner of any long tenancy<sup>3</sup> created immediately or derivatively by way of sub-demise out of the new tenancy<sup>4</sup> applies on the basis that the reference there to the tenant's landlord includes the immediate landlord of whom the new tenancy will be held and all superior landlords, including any superior to the landlord granting the new tenancy<sup>5</sup>.

No provision of any tenancy prohibiting, restricting or otherwise relating to a sub-demise by the tenant has effect with reference to any lease executed to give effect to the obligation<sup>6</sup> to grant an extended lease<sup>7</sup>.

1 Ie the Leasehold Reform Act 1967 s 15(2): see PARA 1479 ante.

2 Ie ibid s 15(3): see PARA 1479 ante.

3 For the meaning of 'long tenancy' see PARA 1398 ante.

4 Ie the Leasehold Reform Act 1967 s 16(4): see PARA 1483 ante.

5 Ibid s 5(4), Sch 1 para 10(4).



6 le under *ibid* s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.

7 *Ibid* Sch 1 para 12(1). As to where it is necessary to make any payment to discharge the house and premises from a charge affecting the interest of any landlord see PARA 1481 note 6 ante.

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## **(iv) Crown Land**

### **1528. Crown land.**

The statutory provisions relating to enfranchisement and extension by subtenants<sup>1</sup> apply notwithstanding that the tenancy in possession<sup>2</sup> is a tenancy from the Crown<sup>3</sup>; and, where the appropriate authority gives notice<sup>4</sup> that as regards a Crown interest the authority will grant or concur in granting the freehold or an extended lease, then, in relation to the Crown interest and the person to whom it belongs, those provisions have effect as they have effect in relation to other landlords<sup>5</sup> and their interests, but with the appropriate authority having power to act as reversioner<sup>6</sup> or otherwise for the purposes of those provisions on behalf of that person<sup>7</sup>.

1 le the Leasehold Reform Act 1967 s 5(4), Sch 1 (as amended): see PARA 1513 et seq ante.

2 For the meaning of 'the tenancy in possession' see PARA 1514 ante.

3 le within the meaning of the Leasehold Reform Act 1967 s 33: see PARA 1512 note 1 ante.

4 le under *ibid* s 33(1)(b): see PARA 1512 ante at head (2) in the text.

5 For the meaning of 'other landlords' see PARA 1516 note 13 ante.

6 For the meaning of 'the reversioner' see PARA 1516 ante.

7 Leasehold Reform Act 1967 Sch 1 para 14(1). See also PARAS 1517 note 6, 1518 note 5 ante.

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## **(9) SETTLEMENT OF DISPUTED QUESTIONS**

### **(i) County Court**

#### **1529. Jurisdiction of the county court.**

Any jurisdiction expressed to be conferred on the court by the statutory provisions relating to enfranchisement or extension<sup>1</sup> must be exercised<sup>2</sup> by the county court, unless the contrary intention appears<sup>3</sup>.

There must also be brought<sup>4</sup> in the county court any proceedings of the following descriptions:

- 3381 (1) proceedings for determining whether a person is entitled to acquire the freehold or an extended lease of a house<sup>5</sup> and premises<sup>6</sup>, or to what property his right extends<sup>7</sup>;
- 3382 (2) proceedings for determining what provisions ought to be contained in a conveyance<sup>8</sup>, or in a lease<sup>9</sup> granting a new tenancy<sup>10</sup>;
- 3383 (3) any other proceedings relating to the performance or discharge of obligations arising out of a tenant's notice of his desire to have the freehold or an extended lease, including proceedings for the recovery of damages or compensation in the event of the obligations not being performed<sup>11</sup>;
- 3384 (4) any proceedings for determining the amount of a subtenant's share<sup>12</sup> in compensation payable to a tenant following the exercise by the landlord of overriding rights in respect of redevelopment<sup>13</sup> or residence<sup>14</sup> or for establishing or giving effect to his right to have it<sup>15</sup>.

Where, in connection with any acquisition by a tenant of the freehold or an extended lease, it is necessary to apportion between the house and premises, or part of them, and other property the rent payable under his tenancy or any superior or reversionary tenancy, the apportionment must be made<sup>16</sup> by the county court<sup>17</sup>.

The ascertainment and adjustment of the rateable value of a house and premises is also expressly referred to the county court<sup>18</sup>.

1    Ie the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante.

2    Ie subject to the County Courts Act 1984 s 41 (as amended) (transfer to the High Court by order of the High Court): see CIVIL PROCEDURE vol 11 (2009) PARA 69.

3    Leasehold Reform Act 1967 s 20(1); Interpretation Act 1978 s 17(2)(a). As to the jurisdiction of the High Court in certain specific cases see the Leasehold Reform Act 1967 s 19 (as amended); and PARA 1498 et seq ante; s 27 (as amended); and PARA 1465 ante.

4    Ie except as provided by ibid s 20 (as amended) and by s 21 (as amended: see PARA 1530 post).

5    For the meaning of 'house' see PARA 1390 ante.

6    For the meaning of 'premises' see PARA 1391 ante.

7    Leasehold Reform Act 1967 s 20(2)(a).

8    Ie in accordance with ibid s 10 (as amended) (see PARA 1452 ante) or s 29(1) (see PARA 1456 ante).

9    Ie in accordance with ibid s 14 (as amended): see PARAS 1469, 1471-1472, 1481-1482 ante.

10   Ibid s 20(2)(b). For the meaning of 'tenancy' see PARA 1398 ante.

11   Ibid s 20(2)(c). Section 20(2)(c) does not, however, prevent the bringing of proceedings in a court other than a county court where the claim is for damages or pecuniary compensation only: s 20(7).

12   Ie under ibid ss 17(3), 18(5), Sch 2 (as amended): see PARA 1491 et seq ante.

13   Ie under ibid s 17: see PARAS 1485-1486 ante.

14   Ie under ibid s 18 (as amended): see PARAS 1488-1490 ante.

15   Ibid s 20(2)(d).

16   Ie subject to the County Courts Act 1984 s 41 (as amended) and the Leasehold Reform Act 1967 s 21 (as amended).

17 *Ibid* s 20(3); Interpretation Act 1967 s 17(2)(a).

18 See the Leasehold Reform Act 1967 s 37(6) (as amended); and PARAS 1392-1393 ante. As to the abolition of domestic rates see PARA 521 ante; and as to the certification of a rateable value in certain cases see PARA 523 ante.

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## **(ii) Leasehold Valuation Tribunals**

### **1530. Jurisdiction of leasehold valuation tribunals.**

The following matters must, in default of agreement, be determined by a leasehold valuation tribunal<sup>1</sup>, namely:

- 3385 (1) the price payable<sup>2</sup> for a house<sup>3</sup> and premises<sup>4</sup>;
- 3386 (2) the amount of the rent to be payable<sup>5</sup>, whether originally or on a revision, for a house and premises;
- 3387 (3) the amount of any costs of enfranchisement or extension payable by the tenant<sup>6</sup>;
- 3388 (4) the amount of any compensation payable to a tenant for the loss of a house and premises<sup>7</sup>;
- 3389 (5) the amount of the appropriate sum to be paid into court by the tenant for the execution of a conveyance where the landlord cannot be found<sup>8</sup>; and
- 3390 (6) the amount of any compensation payable<sup>9</sup> for the postponement of termination in the case of an ineffective claim<sup>10</sup>.

A leasehold valuation tribunal also has jurisdiction<sup>11</sup>, either by agreement or in a case where an application is made a tribunal under heads (1) to (6) above with reference to the same transaction:

- 3391 (a) to determine what provisions ought to be contained in a conveyance<sup>12</sup>, or in a lease<sup>13</sup> granting a new tenancy<sup>14</sup>; or
- 3392 (b) to apportion between the house and premises, or part of them, and other property the rent payable under any tenancy; or
- 3393 (c) to determine the amount of a subtenant's share<sup>15</sup> in compensation payable to a tenant for the loss of a house and premises on the ground of the landlord's redevelopment<sup>16</sup> or residential<sup>17</sup> rights<sup>18</sup>.

As well as the general particulars to be included with an application to a leasehold valuation tribunal<sup>19</sup>, the following documents and particulars must be included with an application under the above provisions:

- 3394 (i) a copy of any notice served in relation to the enfranchisement;
- 3395 (ii) the name and address of the freeholder and any intermediate landlord;
- 3396 (iii) the name and address of any person having a mortgage or other charge over an interest in the premises the subject of the application held by the freeholder or other landlord;

- 3397 (iv) where an application is made under heads (a) to (c) above, the name and address of the subtenant, and a copy of any agreement for the subtenancy; and  
 3398 (v) a copy of the lease<sup>20</sup>.

The tribunal may, however, dispense with or relax any of the requirements of heads (i) to (v) above if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application<sup>21</sup>.

1 For these purposes, a matter is to be treated as determined by (or on appeal from) a leasehold valuation tribunal (1) if the decision on the matter is not appealed against, at the end of the period for bringing an appeal; or (2) if that decision is appealed against, at the time when the appeal is disposed of: Leasehold Reform Act 1967 s 21(2A) (s 21(2A), (2B) added by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13 paras 1, 5). An appeal is disposed of (a) if it is determined and the period for bringing any further appeal has ended; or (b) if it is abandoned or otherwise ceases to have effect: Leasehold Reform Act 1967 s 21(2B) (as so added).

As to the composition of, and the procedure before, a leasehold valuation tribunal see PARA 59 et seq ante.

2 Ie under the Leasehold Reform Act 1967 s 9 (as amended): see PARA 1441 et seq ante.

3 For the meaning of 'house' see PARA 1390 ante.

4 For the meaning of 'premises' see PARA 1391 ante. No application may be made to a leasehold valuation tribunal under head (1) in the text to determine the price for a house and premises unless either (1) the landlord has informed the tenant of the price he is asking; or (2) two months have elapsed without his doing so since the tenant gave notice of his desire to have the freehold under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended) (see PARA 1389 et seq ante): s 21(1B) (added the Housing Act 1980 s 142(3), Sch 22 Pt II para 8(2)). For the meanings of 'tenant' and 'landlord' see PARA 1432 notes 1, 4 ante.

Valuation is a question of fact; there is a right of appeal to the Lands Tribunal (see PARA 72 ante) but in the absence of any error of law there can be no further appeal to a senior court: see eg *South v Trustees of the Phillimore Kensington Estate* [2001] EWCA Civ 991, [2001] All ER (D) 166 (Jun).

5 Ie in accordance with the Leasehold Reform Act 1967 s 15(2): see PARA 1479 ante.

6 Ie under ibid s 9(4) (see PARA 1466 ante) or s 14(2) (see PARA 1471 ante).

7 Ie under ibid s 17 (see PARAS 1485-1486 ante) or s 18 (as amended) (see PARAS 1488-1490 ante).

8 Ie under ibid s 27(5) (as substituted): see PARA 1465 ante.

9 Ie under ibid s 27A (as added): see PARAS 1448-1449 ante.

10 Ibid s 21(1) (amended by the Housing Act 1980 s 142(3), Sch 22 para 8(1); the Housing Act 1996 ss 115, 116, Sch 11 para 1(2); the Commonhold and Leasehold Reform Act 2002 s 149(2)).

11 Ie notwithstanding the Leasehold Reform Act 1967 s 20(2) or (3): see PARA 1529 ante.

12 Ie in accordance with ibid s 10 (as amended) (see PARA 1452 ante) or s 29(1) (see PARA 1456 ante).

13 Ie under ibid s 14 (as amended): see PARAS 1469, 1471, 1481-1482 ante.

14 For the meaning of 'tenancy' see PARA 1398 ante.

15 Ie under the Leasehold Reform Act 1967 ss 17(3), 18(5), Sch 2 (as amended): see PARA 1485 et seq ante.

16 Ie under ibid s 17.

17 Ie under ibid s 18 (as amended).

18 Ibid s 21(2) (amended by the Housing Act 1980 Sch 22 para 8(3)).

19 See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(1); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(1); and PARA 60 ante.

20 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(a), Sch 2 para 1(1)-(4), (6) (Sch 2 para 1(6) added by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(a), Sch 2 para 1(1)-(4), (6) (Sch 2 para 1(6) added by SI 2005/1356).

21 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

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### **1531. Jurisdiction of leasehold valuation tribunals in relation to enfranchisement etc of Crown land.**

Where:

3399 (1) any tenant under a lease from the Crown<sup>1</sup> is proceeding with a view to acquiring the freehold or an extended lease of a house and premises in circumstances in which, but for the existence of any Crown interest in the land subject to the lease, he would be entitled to acquire the freehold or such an extended lease<sup>2</sup>; and

3400 (2) any question arises in connection with the acquisition of the freehold or an extended lease of the house and premises which is such that, if the tenant were so proceeding in pursuance of a claim<sup>3</sup>, a leasehold valuation tribunal would have jurisdiction to determine it in proceedings<sup>4</sup>; and

3401 (3) it is agreed between the appropriate authority and the tenant and all other persons, if any, whose interests would fall to be represented in proceedings so brought for the determination of that question by such a tribunal, that that question should be determined by such a tribunal,

a leasehold valuation tribunal has jurisdiction to determine that question<sup>5</sup>.

1 For these purposes, 'lease from the Crown' means a lease of land in which there is, or has during the subsistence of the lease been, a Crown interest superior to the lease; and 'Crown interest' and 'the appropriate authority' in relation to a Crown interest mean respectively (1) an interest comprised in the Crown Estate, and the Crown Estate Commissioners; (2) an interest belonging to Her Majesty in right of the Duchy of Lancaster, and the Chancellor of the Duchy; (3) an interest belonging to the Duchy of Cornwall, and such person as the Duke of Cornwall or the possessor for the time being of the Duchy appoints; (4) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, and the Minister in charge of that department: Leasehold Reform, Housing and Urban Development Act 1993 s 88(6).

2 I.e. under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante.

3 I.e. a claim made under ibid Pt I (as amended).

4 I.e. proceedings under ibid Pt I (as amended).

5 Leasehold Reform, Housing and Urban Development Act 1993 s 88(1), (2) (amended by the Commonhold and Leasehold Reform Act 2002 ss 176, 180, Sch 13, PARAS 12, 14, Sch 14). The same documents and particulars must be submitted with the application to the tribunal as must be submitted with an application under the Leasehold Reform Act 1967 s 21 (as amended) (see PARA 1530 ante): see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(i), Sch 2 para 1(1)-(4),

(6) (Sch 2 para 1(6) added by SI 2004/3098); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(i), Sch 2 para 1(1)-(4), (6) (Sch 2 para 1(6) added by SI 2005/1356). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1530 the text and note 21 ante.

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## **25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS**

### **(1) TENANTS' STATUTORY RIGHTS; IN GENERAL**

#### **1532. Tenants' rights.**

The Leasehold Reform, Housing and Urban Development Act 1993 confers:

- 3402 (1) the right to collective enfranchisement in the case of tenants of flats<sup>1</sup>; and
- 3403 (2) the individual right of a tenant of a flat to acquire a new lease<sup>2</sup>.

The Housing Act 1996 made a number of amendments to the 1993 Act, for example in relation to the right to collective enfranchisement in cases where there are multiple freeholds<sup>3</sup>. Extensive amendments to the relevant provisions of the 1993 Act have been made by the Commonhold and Leasehold Reform Act 2002<sup>4</sup>, in particular by:

- 3404 (a) removing the former conditions that the qualifying tenancy was to be either on a low rent<sup>5</sup> or for a particularly long term<sup>6</sup>;
- 3405 (b) removing the former residence condition<sup>7</sup>; and
- 3406 (c) prospectively replacing the 'nominee purchaser' with the 'RTE company' as a means of conducting the proceedings for enfranchisement and acquiring the freehold<sup>8</sup>.

The amendments described in heads (a) and (b) above were brought into force with effect from 26 July 2002 in relation to England<sup>9</sup> and 1 January 2003 in relation to Wales<sup>10</sup>, subject to transitional provisions<sup>11</sup>. At the date at which this title states the law, however, the amendments described in head (c) above were not in force.

1 See the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended); and PARA 1552 et seq post. Part I (ss 1-103) (as amended) (see PARAS 81, 411 et seq, 1396-1402, 1404, 1415, 1443, 1447, 1504, 1511, 1531 ante, PARA 1533 et seq post) applies to the Isles of Scilly subject to such exceptions, adaptations and modifications as the Secretary of State may by order direct: s 103. As to the making of orders generally see PARA 1537 post; and as to the Secretary of State see PARA 27 note 3 ante. At the date at which this title states the law, no such order had been made.

2 See *ibid* Pt I Ch II (ss 39-62) (as amended); and PARA 1671 et seq post.

3 See the Housing Act 1996 s 107, Sch 10 para 15; and PARAS 1562-1563 post.

4 See the Commonhold and Leasehold Reform Act 2002 Pt 2 Chs 3, 4 (ss 114-136); and PARA 1533 et seq post.

5 See the Leasehold Reform, Housing and Urban Development Act 1993 s 8 (repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14); and PARA 1557 note 4 post.

6 See the Leasehold Reform, Housing and Urban Development Act 1993 s 8A (added by the Housing Act 1996 s 106, Sch 9 para 3(3); repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14); and PARA 1557 note 4 post.

7 See the Leasehold Reform, Housing and Urban Development Act 1993 s 6 (repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14); and PARA 1557 note 4 post.

8 See PARA 1581 et seq post.

9 See the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(ii), Sch 1 Pt 1, Sch 2 paras 1, 4.

10 See the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(ii), Sch 1 Pt 1, Sch 2 paras 1, 4.

11 See notes 9-10 supra.

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### **1533. Powers of trustees in relation to tenants' rights.**

Where trustees are a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> for the purposes of the statutory rights to collective enfranchisement or the individual right to a new lease<sup>3</sup>, their powers under the instrument regulating the trusts include power to participate in<sup>4</sup> the exercise of the right to collective enfranchisement<sup>5</sup> or, as the case may be, to exercise the right<sup>6</sup> to a new lease<sup>7</sup>. This does not, however apply where the instrument regulating the trusts:

- 3407 (1) is made on or after 1 October 1996<sup>8</sup>; and
- 3408 (2) contains an explicit direction to the contrary<sup>9</sup>.

The powers conferred by the above provision are to be exercisable with the like consent or on the like direction, if any, as may be required for the exercise of the trustees' powers, or ordinary powers, of investment<sup>10</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 post.

2 For these purposes, 'flat' means a separate set of premises (whether or not on the same floor) (1) which forms part of a building; and (2) which is constructed or adapted for use for the purposes of a dwelling; and (3) either the whole or a material part of which lies above or below some other part of the building; and 'dwelling' means any building or part of a building occupied or intended to be occupied as a separate dwelling: Leasehold Reform, Housing and Urban Development Act 1993 s 101(1). A storeroom on the sixth floor of a block of flats which was let to the tenant on a separate lease was held not to be part of his 'flat' on the second floor within the meaning of s 101(1) since there was no natural or physical relationship between the storeroom and the flat: see *Cadogan v McGirk* [1996] 4 All ER 643, [1996] 2 EGLR 75, CA. See also see *Majorstake Ltd v Curtis* [2006] EWCA Civ 1171, [2006] 33 LS Gaz R 25, [2006] All ER (D) 47 (Aug), cited in PARA 1692 note 7 post.

3 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).

4 Ie (1) to participate in; or, (2) as from a day to be appointed (see note 7 infra), to become a member (and participating member) of an RTE company for the purpose of, the exercise of the rights referred to in the text. As to RTE companies see PARA 1581 et seq post.

5 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended): see PARA 1552 et seq post.

6 le under ibid Pt I Ch II (as amended): see PARA 1671 et seq post.

7 Ibid s 93A(1) (s 93A added by the Housing Act 1996 s 113; the Leasehold Reform, Housing and Urban Development Act 1993 s 93A(1) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 33(1), (2), as from a day to be appointed under s 181(1), so as to substitute for the wording set out in note 4 head (1) supra the wording set out in note 4 head (2) supra; at the date at which this title states the law, no such day had been appointed.

8 le the day on which the Housing Act 1996 s 113 came into force: see the Housing Act 1996 (Commencement No 2 and Savings) Order 1996, SI 1996/2212, art 2(2); for savings see art 2(2), Schedule para 4.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 93A(2) (as added: see note 7 supra).

10 Ibid s 93A(3) (as added: see note 7 supra). The following purposes, namely (1) those authorised for the application of capital money by the Settled Land Act 1925 s 73 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARA 808); and (2) the purposes authorised by s 71 (as amended) (see SETTLEMENTS vol 42 (Reissue) PARAS 849-850), as purposes for which moneys may be raised by mortgage, include the payment of any expenses incurred by a tenant for life or statutory owners as the case may be, in or in connection with (a) participation in; or (b) as from a day to be appointed, becoming a member (or participating member) of an RTE company for the purpose of, the exercise of the right to collective enfranchisement under Pt I Ch I (as amended) or in connection with the exercise of the right to a new lease under Pt I Ch II (as amended): s 93A(4) (as added (see note 7 supra); amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4; prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 33(1), (3), as from a day to be appointed (see note 7 supra)).

Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

## UPDATE

### 1533 Powers of trustees in relation to tenants' rights

NOTE 2--*Majorstake*, cited, reversed: [2008] UKHL 10, [2008] 2 All ER 303.

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### 1534. Crown land.

The statutory provisions relating to collective enfranchisement<sup>1</sup> and the right to a new lease<sup>2</sup> apply<sup>3</sup> to a lease from the Crown<sup>4</sup> if, and only if, there has ceased to be a Crown interest in the land subject to it<sup>5</sup>.

The statutory provisions relating to the right to a new lease<sup>6</sup>, however, apply as against a landlord<sup>7</sup> under a lease from the Crown if:

- 3409 (1) a subtenant is seeking a new lease under those provisions and the landlord, or a superior landlord under a lease from the Crown, is entitled to grant such a new lease without the concurrence of the appropriate authority; or
- 3410 (2) the appropriate authority notifies the landlord that, as regards any Crown interest affected, it will grant or concur in granting such a new lease<sup>8</sup>.



The general restriction<sup>9</sup> on the term for which a lease may be granted by the Crown Estate Commissioners does not apply where:

- 3411 (a) the lease is granted by way of renewal of a long lease<sup>10</sup>; and
- 3412 (b) it appears to the Crown Estate Commissioners that, but for the existence of any Crown interest, there would be a right<sup>11</sup> to acquire a new lease<sup>12</sup>.

Where, in the case of land belonging to Her Majesty in right of the Duchy of Lancaster or to the Duchy of Cornwall, it appears to the appropriate authority that a tenant under a long lease would, but for the existence of any Crown interest, be entitled to acquire a new lease<sup>13</sup>, then a lease corresponding to that to which the tenant would be so entitled may be granted to take effect wholly or partly out of the Crown interest by the same person and with the same formalities as in the case of any other lease of such land<sup>14</sup>.

The appropriate authority in relation to any area occupied under leases from the Crown may make an application for the approval<sup>15</sup> of a scheme for that area which is designed to secure that, in the event of tenants under those leases acquiring freehold interests<sup>16</sup> in the specified circumstances<sup>17</sup>, the authority will:

- 3413 (i) retain powers of management in respect of the premises in which any such freehold interests are acquired; and
- 3414 (ii) have rights against any such premises in respect of the benefits arising from the exercise elsewhere of the authority's powers of management<sup>18</sup>.

Where:

- 3415 (A) any tenants under leases from the Crown are proceeding with a view to acquiring the freehold of any premises in circumstances in which, but for the existence of any Crown interest, they would be entitled to acquire the freehold<sup>19</sup> or any tenant under a lease from the Crown is proceeding with a view to acquiring a new lease of his flat in circumstances in which, but for the existence of any Crown interest, he would be entitled to acquire such a lease<sup>20</sup>; and
- 3416 (B) any question arises in connection with the acquisition of the freehold of those premises or any such new lease which is such that, if the tenants or tenant were proceeding as mentioned in head (A) above in pursuance of a claim<sup>21</sup>, a leasehold valuation tribunal would have jurisdiction to determine it in proceedings<sup>22</sup>; and
- 3417 (c) it is agreed between the appropriate authority and the tenants or tenant and all other persons, if any, whose interests would fall to be represented in proceedings so brought for the determination of that question by a leasehold valuation tribunal, that that question should be determined by such a tribunal,

a leasehold valuation tribunal has jurisdiction to determine that question<sup>23</sup>.

1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

2    Ie ibid Pt I Ch II (ss 39-62) (as amended): para 1671 et seq post.

3    Ie subject to ibid s 94(2) (as substituted): see the text and notes 6-8 infra.

4    For these purposes, 'lease from the Crown' means a lease of land in which there is, or has during the subsistence of the lease been, a Crown interest superior to the lease; and 'Crown interest' and 'the appropriate

authority' in relation to a Crown interest mean respectively (1) an interest comprised in the Crown Estate, and the Crown Estate Commissioners; (2) an interest belonging to Her Majesty in right of the Duchy of Lancaster, and the Chancellor of the Duchy; (3) an interest belonging to the Duchy of Cornwall, and such person as the Duke of Cornwall or the possessor for the time being of the Duchy appoints; (4) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, and the Minister in charge of that department: *ibid* s 94(11). As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

5 *Ibid* s 94(1).

6 *Ie* *ibid* Pt I Ch II (as amended).

7 For the meaning of 'landlord' see PARA 1535 note 3 post; and as to special categories of landlord see PARA 1545 et seq post.

8 *Ibid* s 94(2) (substituted by the Commonhold and Leasehold Reform Act 2002 s 133).

9 *Ie* the restriction imposed by the Crown Estate Act 1961 s 3(2) (as amended): see CROWN PROPERTY vol 12(1) (Reissue) PARA 290.

10 For these purposes, 'long lease' is to be construed in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 7 (as amended) (see PARA 1558 post): s 94(12) (substituted by the Housing Act 1996 s 106, Sch 9 para 5(4); the Leasehold Reform, Housing and Urban Development Act 1993 s 94(3), (4), (10), (12) amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

11 *Ie* under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

12 *Ibid* s 94(3) (as amended: see note 10 supra).

13 See note 11 supra.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 94(4) (as amended: see note 10 supra). In the case of land belonging to the Duchy of Cornwall, the purposes authorised by the Duchy of Cornwall Management Act 1863 s 8 for the advancement of parts of such gross sums as are there mentioned include the payment to tenants under leases from the Crown of sums corresponding to those which, but for the existence of any Crown interest, would be payable by way of compensation under the Leasehold Reform, Housing and Urban Development Act 1993 s 61 (see PARA 1725 et seq post): s 94(5).

15 *Ie* under *ibid* s 70 (as amended): see PARA 1736 post.

16 For the meaning of 'interest' see PARA 408 note 16 ante.

17 *Ie* in such circumstances as are mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 94(7). The circumstances so specified are circumstances in which, but for the existence of any Crown interest, the tenants acquiring any such freehold interests would be entitled to acquire them as mentioned in s 69(1)(a) or (b) (as substituted and amended) (see PARA 1734 post at heads (1)-(2) in the text): s 94(7).

18 *Ibid* s 94(6). Subject to any necessary modifications: (1) s 69(2)-(7) (see PARA 1735 post) applies in relation to any such scheme as is mentioned in s 94(6) as it applies in relation to an estate management scheme; and (2) s 70 (as amended) (see PARA 1736 post) applies in relation to the approval of such a scheme as it applies in relation to the approval of a scheme as an estate management scheme: s 94(8).

19 *Ie* under *ibid* Pt I Ch I (as amended).

20 *Ie* under *ibid* Pt I Ch II (as amended).

21 *Ie* a claim made under *ibid* Pt I Ch I (as amended) or, as the case may be, Pt I Ch II (as amended).

22 *Ie* under *ibid* Pt I Ch I (as amended) or, as the case may be, Pt I Ch II (as amended).

23 *Ibid* s 94(9), (10) (as amended: see note 10 supra). As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1695 post at heads (a)-(d) in the text must be included with an application under the above provisions: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(k); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(k). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined

and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1695 the text and note 11 post.

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### **1535. National Trust property.**

There is no right<sup>1</sup> to acquire any interest<sup>2</sup> in or new lease<sup>3</sup> of any property if an interest in the property is vested<sup>4</sup> inalienably in the National Trust for Places of Historic Interest or Natural Beauty<sup>5</sup>.

1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).

2    For the meaning of 'interest' see PARA 408 note 16 ante.

3    For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-103) (as amended) 'lease' and 'tenancy' have the same meaning, and both expressions include (where the context so permits) (1) a sublease or subtenancy; and (2) an agreement for a lease or tenancy (or for a sublease or subtenancy), but do not include a tenancy at will or at sufferance; and the expressions 'landlord' and 'tenant', and references to letting, to the grant of a lease or to covenants or the terms of a lease, are to be construed accordingly: s 101(1), (2).

4    Ie under the National Trust Act 1907 s 21: see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 979. The Leasehold Reform, Housing and Urban Development Act 1993 Pt I Chs I, II (as amended) do not prejudice the operation of the National Trust Act 1907 s 21: Leasehold Reform, Housing and Urban Development Act 1993 s 95.

5    Ibid s 95.

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### **1536. Property within cathedral precinct.**

There is no right<sup>1</sup> to acquire any interest<sup>2</sup> in or lease<sup>3</sup> of any property which is<sup>4</sup> within the precinct of a cathedral church<sup>5</sup>.

1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).

2    For the meaning of 'interest' see PARA 408 note 16 ante.

3    For the meaning of 'lease' see PARA 1535 note 3 ante.

4    Ie for the purposes of the Care of Cathedrals Measure 1990: see ECCLESIASTICAL LAW.

5    Leasehold Reform, Housing and Urban Development Act 1993 s 96.

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### **1537. Orders and regulations.**

Any power of the Secretary of State<sup>1</sup> or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> to make orders or regulations under Part I of the Leasehold Reform, Housing and Urban Development Act 1993<sup>3</sup>:

- 3418 (1) may be so exercised as to make different provision for different cases or descriptions of cases, including different provision for different areas; and  
 3419 (2) includes power to make such procedural, incidental, supplementary and transitional provision as may appear to the Secretary of State or the Assembly or minister to be necessary or expedient<sup>4</sup>.

Any such power to make orders or regulations is exercisable by statutory instrument<sup>5</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions of the Secretary of State under the Leasehold Reform, Housing and Urban Development Act 1993 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-103) (as amended): see PARAS 81, 411 et seq, 1396-1402, 1404, 1415, 1443-1447, 1504, 1511, 1531, 1532 et seq ante, PARA 1538 et seq post.

4 Ibid s 100(1).

5 Ibid s 100(2). Except in the case of regulations making only such provision as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 99(6) (see PARA 1541 post) a statutory instrument so made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament: see s 100(2).

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## **(2) AGREEMENTS EXCLUDING OR MODIFYING TENANTS' RIGHTS**

### **1538. Agreements invalidated by statute.**

Any agreement relating to a lease<sup>1</sup>, whether contained in the instrument creating the lease or not and whether made before the creation of the lease or not, is void<sup>2</sup> in so far as it:

- 3420 (1) purports to exclude or modify:  
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40. (a) any entitlement to participate in the making of a claim to exercise the right to collective enfranchisement<sup>3</sup> or, as from a day to be appointed<sup>4</sup>, any entitlement to

be, or do any thing as, a member of an RTE company<sup>5</sup> for the purpose of the exercise of that right;

41. (b) any right to acquire a new lease<sup>6</sup>; or

42. (c) any right to compensation where a new lease is terminated on specified grounds<sup>7</sup>; or

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3421 (2) provides for the termination or surrender of the lease in the event of the tenant<sup>8</sup> becoming a participating tenant<sup>9</sup> or giving a notice exercising his right to acquire a new lease<sup>10</sup> or, as from a day to be appointed<sup>11</sup>, in the event of the tenant doing any thing as a member of an RTE company<sup>12</sup> or of such an RTE company doing any thing or in the event of a tenant giving such a notice; or

3422 (3) provides for the imposition of any penalty or disability on the tenant in that event or, as from a day to be appointed<sup>13</sup>, in the event of a tenant becoming, or doing any thing as, a member of such an RTE company or of such an RTE company doing any thing<sup>14</sup>.

Heads (1) to (3) above are not to be taken to preclude a tenant from surrendering his lease<sup>15</sup>. Nor do they invalidate any agreement for the acquisition on behalf of a tenant of an interest superior to his lease, or for the acquisition by a tenant of a new lease, on terms different from those provided<sup>16</sup> by the statutory provisions<sup>17</sup>.

Where a tenant has become a participating tenant<sup>18</sup> or has given a notice exercising his right to acquire a new lease<sup>19</sup>, heads (1) to (3) above do not invalidate any agreement that the notice given<sup>20</sup> shall cease to have effect or any provision of such an agreement excluding or restricting for a period not exceeding three years any such entitlement or right as is mentioned in head (1)(a) or head (1)(b) above<sup>21</sup>. Further, where a tenant's right to compensation<sup>22</sup> has accrued, heads (1) to (3) above do not invalidate any agreement as to the amount of the compensation<sup>23</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 Ie except as provided by the Leasehold Reform, Housing and Urban Development Act 1993 s 93 (as amended): see the text and notes 2-22 infra; and PARA 1539 post.

3 Ie under *ibid* Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARA 1581 et seq post.

6 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq post.

7 Ie under *ibid* s 61 (landlord's right to terminate new lease on grounds of redevelopment): see PARA 1725 post.

8 For the meaning of 'tenant' see PARA 1535 note 3 ante.

9 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended).

10 Ie under *ibid* s 42 (as amended): see PARA 1677 post.

11 See note 4 supra.

12 Ie an RTE company within the meaning of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended): see PARA 1581 et seq post.

13 See note 4 supra.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 93(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 32(1), (2), as from a day to be appointed (see note 4 supra)).

15 Leasehold Reform, Housing and Urban Development Act 1993 s 93(2). As to the court's powers to set aside or vary an agreement to surrender a lease, or to grant other relief, see PARA 1539 post.

16 le provided by *ibid* Pt I Chs I, II (as amended).

17 *Ibid* s 93(2)(a).

18 See note 9 supra.

19 See note 10 supra.

20 le the notice given under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 post) or, as the case may be s 42 (as amended).

21 *Ibid* s 93(2)(b) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 4 supra)).

22 See note 7 supra.

23 Leasehold Reform, Housing and Urban Development Act 1993 s 93(2)(c).

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### **1539. Court's powers to set aside or vary agreements and to exclude or modify tenant's statutory rights.**

Where a tenant<sup>1</sup> having the right to acquire a new lease<sup>2</sup>:

3423 (1) has entered into an agreement for the surrender of his lease without the prior approval of the court<sup>3</sup>; or

3424 (2) has entered into an agreement for the grant of a new lease without any of the terms of acquisition<sup>4</sup> having been determined<sup>5</sup> by a leasehold valuation tribunal;

or where a tenant has been granted a new lease<sup>6</sup> and, on his landlord<sup>7</sup> claiming possession for the purposes of redevelopment, enters into an agreement without the prior approval of the court for the surrender of the lease, then on the application of the tenant a county court, or any court in which proceedings are brought on the agreement, may, if in its opinion the tenant is not adequately recompensed under the agreement for his statutory rights<sup>8</sup>, set aside or vary the agreement and give such other relief as appears to it to be just having regard to the situation and conduct of the parties<sup>9</sup>.

Where a tenant has the right to acquire a new lease<sup>10</sup>, there may with the approval of the court be granted to him in satisfaction of that right a new lease on such terms as may be approved by the court, which may include terms excluding or modifying:

3425 (a) any entitlement to participate in the making of a claim to exercise the right to collective enfranchisement<sup>11</sup> or, as from a day to be appointed<sup>12</sup>, any entitlement

to be, or do any thing as, a member of an RTE company<sup>13</sup> for the purpose of the exercise of that right; or  
 3426 (b) any right to acquire<sup>14</sup> a further lease<sup>15</sup>.

A lease may<sup>16</sup> be so granted, and is, if so granted, binding on persons entitled to any interest in or charge on the landlord's estate despite the fact that it would not otherwise be authorised against any such persons and despite any statutory or other restrictions on the landlord's powers of leasing<sup>17</sup>.

1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq post.

3 For the purposes of ibid Pt I (ss 1-103) (as amended), 'the court' (unless the context otherwise requires) means, by virtue of s 90(1) (see PARA 1742 post), a county court: s 101(1).

4 Ie within the meaning of ibid Pt I Ch II (as amended): see PARA 1695 note 6 post.

5 See note 2 supra.

6 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended) or by virtue of s 93(4) (as amended) (see the text and notes 10-15 infra).

7 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq post.

8 Ie his rights under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

9 Ibid s 93(3).

10 See note 2 supra.

11 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

12 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

13 As to RTE companies see PARA 1581 et seq post.

14 See note 2 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 93(4) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 32(1), (3), as from a day to be appointed (see note 12 supra)). Where a lease is granted by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 93(4) (as originally enacted or as amended), then, except in so far as provision is made to the contrary by the terms of the lease, the following provisions apply in relation to the lease as they apply in relation to a lease granted under s 56 (see PARA 1703 post), namely (1) s 58(3), (5), (6) (see PARA 1721 post); (2) s 59(2)-(5) (see PARA 1723 post); and (3) s 61 (see PARA 1725 et seq post) and s 61(4), Sch 14 (as amended) (see PARA 1725 et seq post); and s 56(5)-(7) (see PARA 1703 post) applies in relation to the lease as it applies in relation to a lease granted under s 56: s 93(8). See also Sch 11 para 10(1), cited in PARA 1703 note 11 post.

16 Ie subject to the provisions specified in ibid s 93(6) and to s 93(7). The provisions so referred to are (1) the Charities Act 1993 s 36 (restrictions on disposition of charity land: see CHARITIES vol 8 (2010) PARA 395); and (2) the Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(2)(c) (see PARA 1551 post): s 93(6).

Where the existing lease of the tenant is granted on or after 1 November 1993 and, the grant being subsequent to the creation of a charge on the landlord's estate, the existing lease is not binding on the persons interested in the charge, a lease granted by virtue of s 93(4) (as originally enacted or as amended) is not binding on those persons: s 93(7); Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and

Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5. For the meaning of 'landlord' see PARA 1535 note 3 ante.

17 Leasehold Reform, Housing and Urban Development Act 1993 s 93(5).

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### **(3) PROCEDURE**

#### **1540. Power to prescribe procedure.**

Where a claim to exercise the right to collective enfranchisement<sup>1</sup> is made by the giving of a notice<sup>2</sup>, or a claim to exercise the right to acquire a new lease<sup>3</sup> is made by the giving of a notice<sup>4</sup>, then, except as otherwise provided:

- 3427 (1) the procedure for giving effect to the notice; and
- 3428 (2) the rights and obligations of all parties in relation to the investigation of title and other matters arising in giving effect to the notice,

are<sup>5</sup> such as may be prescribed by regulations made by the Secretary of State<sup>6</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>7</sup> and, subject to or in the absence of provision made by any such regulations, are as nearly as may be the same as in the case of a contract of sale or leasing freely negotiated between the parties<sup>8</sup>.

Such regulations may in particular make provision:

- 3429 (a) for a person to be discharged from performing any obligations arising out of such a notice<sup>9</sup> by reason of the default or delay of some other person;
- 3430 (b) for the payment of a deposit by a nominee purchaser<sup>10</sup> (or, as from a day to be appointed<sup>11</sup>, by an RTE company<sup>12</sup>), on exchange of contracts or by a tenant who has given notice exercising the right to acquire a new lease<sup>13</sup>; and
- 3431 (c) with respect to the following matters, namely the person with whom any such deposit is to be lodged and the capacity in which any such person is to hold it and the circumstances in which the whole or part of any such deposit is to be returned or forfeited<sup>14</sup>.

1 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

2 le a notice under ibid s 13 (as amended): see PARA 1585 post.

3 le under ibid Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq post.

4 le a notice under ibid s 42 (as amended): see PARA 1677 post.

5 le except as otherwise provided by ibid Pt I Ch I (as amended) or, as the case may be, Pt I Ch II (as amended).

6 As to the Secretary of State see PARA 27 note 3 ante.

7 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.



8 Leasehold Reform, Housing and Urban Development Act 1993 s 98(1). As to the making of regulations generally see PARA 1537 ante. In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407 (as amended) (see PARAS 1646, 1691, 1704 post) which came into force on 1 November 1993: reg 1(1).

9 le a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) or s 42 (as amended).

10 le within the meaning of *ibid* Pt I Ch I (ss 1-38): see PARAS 1576-1577 post.

11 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

12 As to RTE companies see PARA 1581 et seq post.

13 See note 4 *supra*.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 98(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 35, as from a day to be appointed (see note 11 *supra*)).

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### **1541. Notices.**

Any notice required or authorised to be given<sup>1</sup> must be in writing and may be sent by post<sup>2</sup>.

Where<sup>3</sup> an address in England and Wales is specified as an address at which notices may be given<sup>4</sup> to any person or persons:

- 3432 (1) any notice required or authorised to be give to that person or those persons may<sup>5</sup> be given to him or them at the address so specified; but
- 3433 (2) if a new address is so specified in substitution for that address by the giving of a notice to that effect, any notice so required or authorised to be given may be given to him or them at that new address instead<sup>6</sup>.

Where a tenant<sup>7</sup> is required or authorised to give any notice<sup>8</sup> to a person who is the tenant's immediate landlord<sup>9</sup> and is such a landlord in respect of premises to which the obligation to furnish information to tenants<sup>10</sup> applies, the tenant may, unless he has been subsequently notified by the landlord of a different address, give the notice to the landlord:

- 3434 (a) at the address last furnished<sup>11</sup> to the tenant as the landlord's address for service; or
- 3435 (b) if no such address has been furnished, at the address last furnished<sup>12</sup> to the tenant as the landlord's address in accordance with the requirements relating to demands for rent<sup>13</sup>.

Any notice which is given<sup>14</sup> by any tenants or tenant must:

- 3436 (i) if it is a notice exercising the right to collective enfranchisement<sup>15</sup> or the right to a new lease<sup>16</sup>, be signed by each of the tenants or, as the case may be, by the tenant, by whom it is given<sup>17</sup>; or

- 3437 (ii) as from a day to be appointed<sup>18</sup>, if it is a notice exercising the right to a new lease, be signed by the tenant by whom it is given<sup>19</sup>; and
- 3438 (iii) in any other case, be signed by or on behalf of each of the tenants or, as the case may be, by or on behalf of the tenant, by whom it is given<sup>20</sup>.

The Secretary of State<sup>21</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>22</sup> may by regulations prescribe the form of any notice required or authorised to be given<sup>23</sup> and the particulars which any such notice must contain, whether in addition to, or in substitution for, any particulars required<sup>24</sup> by virtue of any of the statutory provisions<sup>25</sup>.

- 1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-103) (as amended): see PARAS 81, 411 et seq, 1396-1264, 1404, 1415, 1443-1447, 1504, 1511, 1531, 1532 et seq ante, PARA 1542 et seq post.
- 2    Ibid s 99(1).
- 3    Ie in accordance with ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or, as the case may be, Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).
- 4    Ie under ibid Pt I Ch I (as amended) or, as the case may be, Pt I Ch II (as amended).
- 5    Ie without prejudice to the operation of ibid s 99(3): see the text and notes 7-13 infra.
- 6    Ibid s 99(2). Section 99(2), (3) applies to notices in proceedings under Pt I Ch I (as amended) or Pt I Ch II (as amended) as it applies to notices required or authorised to be given under Pt I Ch I (as amended) or Pt I Ch II (as amended): s 99(4).
- 7    For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 8    See note 4 supra.
- 9    For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq post.
- 10   Ie premises to which the Landlord and Tenant Act 1987 Pt VI (ss 46-50) (as amended) applies: see PARAS 53, 257 ante.
- 11   Ie in accordance with ibid s 48 (as amended): see PARA 53 ante.
- 12   Ie in accordance with ibid s 47 (as amended): see PARA 257 ante.
- 13   Leasehold Reform, Housing and Urban Development Act 1993 s 99(3). See also note 6 supra.
- 14   See note 4 supra.
- 15   Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 post.
- 16   Ie a notice under ibid s 42 (as amended): see PARA 1677 post.
- 17   Ibid s 99(5)(a) (as originally enacted). A personal signature is required when the notice must be signed by each of the tenants or by the tenant within s 99(5)(a) (as originally enacted): see *St Ermins Property Co v Tingay* [2002] EWHC 1673 (Ch), [2002] 3 EGLR 53 (notice signed by tenant's son under a power of attorney was invalid).
- 18   Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 19   Leasehold Reform, Housing and Urban Development Act 1993 s 99(5)(a) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 18 supra)). Once this prospective amendment is brought into force, a notice exercising the right of collective enfranchisement will no longer have to be signed by each of the tenants but may be signed by or on behalf of each of the tenants; cf note 17 supra.

- 20 Leasehold Reform, Housing and Urban Development Act 1993 s 99(5)(b).
- 21 As to the Secretary of State see PARA 27 note 3 ante.
- 22 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 23 See note 1 supra.
- 24 Ie by virtue of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (as amended).
- 25 Ibid s 99(6). As to the exercise of this power see eg the Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002, SI 2002/3208; the Leasehold Reform (Collective Enfranchisement) (Counter-notices) (Wales) Regulations 2003, SI 2003/990; both cited in PARA 1606 post.

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### **1542. Enforcement of obligations.**

The court<sup>1</sup> may, on the application of any person interested, make an order requiring any person who has failed to comply with any requirement imposed on him under or by virtue of any provision relating to the right to collective enfranchisement<sup>2</sup> or the right to a new lease<sup>3</sup> to make good the default within such time as is specified in the order<sup>4</sup>.

Such an application may not, however, be made unless:

- 3439 (1) a notice has been previously given to the person in question requiring him to make good the default; and
- 3440 (2) more than 14 days have elapsed since the date of the giving of that notice without his having done so<sup>5</sup>.

- 1 For the meaning of 'the court' see PARA 1539 note 3 ante.
- 2 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.
- 3 Ie ibid Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq post.
- 4 Ibid s 92(1).
- 5 Ibid s 92(2). As to the giving of notices see PARA 1541 ante.

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### **1543. Registration of notices, applications and orders.**

No lease<sup>1</sup> is registrable under the Land Charges Act 1972 or is to be taken to be an estate contract<sup>2</sup> by reason of any rights or obligations of the tenant<sup>3</sup> or landlord<sup>4</sup> (or, as from a day to

be appointed<sup>5</sup>, of an RTE company<sup>6</sup>) which may arise under the statutory provisions<sup>7</sup> relating to the right to collective enfranchisement and the right to a new lease<sup>8</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 le within the meaning of the Land Charges Act 1972: see LAND CHARGES vol 26 (2004 Reissue) PARA 632.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 For the meaning of 'landlord' see PARA 1535 note 3 ante.

5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARA 1581 et seq post.

7 le the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) and Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).

8 Ibid s 97(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 34, as from a day to be appointed (see note 5 supra)). Any right of a tenant (or, as from a day to be appointed, of a tenant or an RTE company) arising from a notice given under s 13 (as amended) (see PARA 1585 post) or s 42 (as amended) (see PARA 1677 post) is not capable of falling within the Land Registration Act 2002 Sch 1 para 2 (interests of persons in actual occupation overriding first registration: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 866) or Sch 3 para 2 (interests of persons in actual occupation overriding registered dispositions: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 962); but a notice given under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) or s 42 (as amended) is registrable under the Land Charges Act 1972 (see LAND CHARGES vol 26 (2004 Reissue) PARA 632), or may be the subject of a notice under the Land Registration Act 2002 (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq), as if it were an estate contract: Leasehold Reform, Housing and Urban Development Act 1993 s 97(1) (amended by the Land Registration Act 2002 s 133, Sch 11 para 30(1), (3); and as so prospectively amended).

The Land Charges Act 1972 and the Land Registration Act 2002: (1) apply in relation to an order made under the Leasehold Reform, Housing and Urban Development Act 1993 s 26(1) (as amended) (see PARA 1614 post) or s 50(1) (see PARA 1697 post) as they apply in relation to an order affecting land which is made by the court for the purpose of enforcing a judgment or recognisance; and (2) apply in relation to an application for such an order as they apply in relation to other pending land actions: s 97(2) (amended by the Land Registration Act 2002 s 133, Sch 11 para 30(1), (4)).

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#### **1544. Term dates and other matters relating to periodical tenancies.**

Where either:

- 3441 (1) the provisions of the Landlord and Tenant Act 1954<sup>1</sup>; or
- 3442 (2) the provisions of the Local Government and Housing Act 1989<sup>2</sup>,

relating to tenancies granted in continuation of long tenancies apply to a tenancy<sup>3</sup>, the tenancy is treated for the relevant purposes<sup>4</sup> as granted to expire on the date which is the term date<sup>5</sup> for the purposes of the Landlord and Tenant Act 1954<sup>6</sup> or on the date which is the term date for the purposes of the Local Government and Housing Act 1989<sup>7</sup>, as the case may be<sup>8</sup>.

Where<sup>9</sup> a tenancy created or arising as a tenancy from year to year or other periodical tenancy is to be treated as a long lease, the term date of that tenancy is to be taken<sup>10</sup> for the relevant purposes to be the date, if any, on which the tenancy is to terminate by virtue of a notice to

quit given by the landlord<sup>11</sup> under the tenancy before the relevant date for those purposes, or else the earliest date on which it could as at that date, in accordance with its terms and apart from any enactment, be brought to an end by such a notice to quit<sup>12</sup>.

In the case of a tenancy granted to continue as a periodical tenancy after the expiry of a term of years certain, or to continue as a periodical tenancy if not terminated at the expiry of such a term, any question whether the tenancy is at any time to be treated for the relevant purposes as a long lease and, if so, with what term date, is to be determined<sup>13</sup> as it would be if there had been two tenancies, as follows:

- 3443 (a) one granted to expire at the earliest time, at or after the expiry of that term of years certain, at which the tenancy could, in accordance with its terms and apart from any enactment, be brought to an end by notice to quit given by the landlord under the tenancy; and
- 3444 (b) the other granted<sup>14</sup> to commence at the expiry of the first<sup>15</sup>.

1    Ie the Landlord and Tenant Act 1954 s 19(2): see PARA 1202 ante.

2    Ie the Local Government and Housing Act 1989 s 186, Sch 10 para 16(2): see PARA 1245 ante.

3    For the meaning of 'tenancy' see PARA 1535 note 3 ante.

4    For these purposes, 'the relevant purposes' means the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or, to the extent that s 7 (as amended) (see PARA 1558 post) has effect for the purposes of Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post) in accordance with s 39(3) (as amended) (see PARA 1671 post), the purposes of Pt I Ch II (as amended): s 102(4).

5    For these purposes, 'the term date', in relation to a lease granted for a term of years certain, means the date of expiry of that term; and, in relation to a tenancy to which any of the provisions of ibid s 102 applies, is to be construed in accordance with s 102: s 101(1). In the case of a lease which derives, in accordance with s 7(6) (see PARA 1558 post), from more than one separate leases (sic), references in Pt I (ss 1-103) (as amended) (see PARAS 81, 411 et seq, 1396-1402, 1404, 1415, 1443-1447, 1504, 1511, 1531, 1532 et seq ante, PARA 1545 et seq post) to the date of the commencement of the lease or to the term date have effect, if the terms of the separate leases commenced at different dates or those leases have different term dates, as references to the date of commencement, or, as the case may be, to the term date, of the lease comprising the flat in question, or the earliest date of commencement or earliest term date of the leases comprising it: s 101(6). Any reference to the date of the commencement of a lease is a reference to the date of the commencement of the term of the lease: s 101(5). For the meaning of 'lease' see PARA 1535 note 3 ante; and for the meaning of 'flat' see PARA 1533 note 2 ante.

6    Ie the first date after the commencement of the Landlord and Tenant Act 1954 on which, apart from that Act, the tenancy could have been brought to an end by a notice to quit given by the landlord under the tenancy.

7    Ie the first date after the commencement of the Local Government and Housing Act 1989 Sch 10 (as amended) on which, apart from Sch 10 (as amended), the tenancy could have been brought to an end by such a notice to quit.

8    Leasehold Reform, Housing and Urban Development Act 1993 s 102(1).

9    Ie under ibid s 7(3) (as amended): see PARA 1558 post.

10   Ie subject to ibid s 102(1): see the text and notes 1-8 supra.

11   For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq post.

12   Leasehold Reform, Housing and Urban Development Act 1993 s 102(2).

13   See note 10 supra.

14   Ie and not being one to which the Leasehold Reform, Housing and Urban Development Act 1993 s 102(1) applies.

15 Ibid s 102(3).

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#### **(4) SPECIAL CATEGORIES OF LANDLORD**

##### **1545. Mortgagee in possession of landlord's interest.**

Where:

- 3445 (1) the interest<sup>1</sup> of a Chapter I<sup>2</sup> or Chapter II landlord<sup>3</sup> is subject to a mortgage<sup>4</sup>;  
and
- 3446 (2) the mortgagee is in possession,

all such proceedings arising out of the relevant notice<sup>5</sup> as would otherwise be taken by or in relation to that landlord ('the mortgagor') must, as regards his interest, be conducted by and through the mortgagee as if he were that landlord<sup>6</sup>.

Where the above provisions apply to a Chapter I landlord, any application for the right to develop<sup>7</sup> that would otherwise be made by the mortgagor, whether alone or together with any other person or persons, must be made<sup>8</sup> by the mortgagee as if he were the mortgagor<sup>9</sup>.

Where:

- 3447 (a) the interest of a Chapter I landlord is subject to a mortgage; and
- 3448 (b) a receiver appointed by the mortgagee or by order of any court is in receipt of the rents and profits,

the person referred to in head (a) above may not make any application for the right to develop without the consent of the mortgagee<sup>10</sup>.

Where:

- 3449 (i) the interest of a Chapter I or Chapter II landlord is subject to a mortgage;  
and
- 3450 (ii) the mortgagee is in possession or a receiver appointed by the mortgagee or by order of any court is in receipt of the rents and profits,

the relevant notice or a copy of it is regarded as duly given to that landlord if it is given to the mortgagee or to any such receiver; but whichever of the landlord, the mortgagee and any such receiver are not the recipient of the notice must be given a copy of it by the recipient<sup>11</sup>.

Where:

- 3451 (A) a Chapter I or Chapter II landlord is given the relevant notice or a copy of it;  
and
- 3452 (B) his interest is subject to a mortgage to secure the payment of money,

the landlord must<sup>12</sup> forthwith inform the mortgagee, unless the notice was given to him or a receiver appointed by virtue of the mortgage, that the notice has been given, and must give him such further information as may from time to time be reasonably required from the landlord by the mortgagee<sup>13</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 For these purposes, 'Chapter I landlord' means a person who is, in relation to a claim made under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post), a relevant landlord within the meaning of Pt I Ch I (as amended) (see PARA 1559 post): s 9(4), Sch 2 para 1(1) (definition amended by the Housing Act 1996 s 107, Sch 10 para 16).

3 For these purposes, 'Chapter II landlord' means a person who is, in relation to a claim made under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post), the landlord within the meaning of Pt I Ch II (as amended) or any of the other landlords, as defined by s 40(4) (see PARA 1672 note 11 post): s 40(5), Sch 2 para 1(1).

4 For these purposes, 'mortgage' includes a charge or lien; and related expressions are to be construed accordingly: ibid Sch 2 para 1(1).

5 For these purposes, 'the relevant notice' means (1) in relation to a Chapter I landlord, the notice given under ibid s 13 (as amended) (see PARA 1585 post); and (2) in relation to a Chapter II landlord, the notice given under s 42 (as amended) (see PARA 1677 post): Sch 2 para 1(1).

6 Ibid Sch 2 para 2(1). Schedule 2 para 2(1) does not, in its application to a Chapter I landlord, affect the operation in relation to the mortgagee of s 35 (as amended) (see PARA 1652 post) or s 35(1), Sch 8 (as amended) (see PARA 1653 et seq post): Sch 2 para 2(1). As to the giving of notices see PARA 1541 ante.

7 Ie any application under ibid s 23(1): see PARA 1611 post.

8 Ie without prejudice to the generality of ibid Sch 2 para 2(1): see the text and notes 1-6 supra.

9 Ibid Sch 2 para 2(2).

10 Ibid Sch 2 para 2(3). The mortgagee may by notice given to that person require that, as regards his interest, Sch 2 para 2 shall apply, either generally or so far as it relates to s 23 (as amended), as if the mortgagee were a mortgagee in possession: Sch 2 para 2(3).

11 Ibid Sch 2 para 2(4). Schedule 2 para 2(4) has effect in relation to a debenture holders' charge as if any reference to the mortgage were a reference to the trustees for the debenture holders; but, where the relevant notice is given to a Chapter I or Chapter II landlord whose interest is subject to any such charge and there is no trustee for the debenture holders, the landlord must forthwith send it or a copy of it to any receiver appointed by virtue of the charge: Sch 2 para 2(5). For these purposes, 'debenture holders' charge' means a charge, whether a floating charge or not, in favour of the holders of a series of debentures issued by a company or other body of persons, or in favour of trustees for such debenture holders: Sch 2 para 1(1).

12 Ie subject to ibid Sch 2 para 2(7): see note 13 infra.

13 Ibid Sch 2 para 2(6). Schedule 2 para 2(6) does not apply to a debenture holders' charge: Sch 2 para 2(7).

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#### **1546. Landlord's interest vested in custodian trustee.**

Where the interest<sup>1</sup> of a Chapter I<sup>2</sup> or Chapter II<sup>3</sup> landlord is vested in a person as custodian trustee<sup>4</sup>, the interest is deemed<sup>5</sup> to be vested in the managing trustees or committee of

management as owners of that interest, except as regards the execution of any instrument disposing of or otherwise affecting that interest<sup>6</sup>.

- 1 For the meaning of 'interest' see PARA 408 note 16 ante.
- 2 For the meaning of 'Chapter I landlord' see PARA 1545 note 2 ante.
- 3 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.
- 4 As to custodian trustees generally see TRUSTS vol 48 (2007 Reissue) PARA 792 et seq.
- 5 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or, as the case may be, Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).
- 6 Ibid ss 9(4), 40(5), Sch 2 para 3.

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#### **1547. Landlord lacking capacity.**

Where a Chapter I<sup>1</sup> or Chapter II landlord<sup>2</sup> lacks capacity within the meaning of the Mental Capacity Act 2005<sup>3</sup> to exercise his functions as a landlord, then as from a day to be appointed<sup>4</sup> the landlord's place is to be taken for the statutory purposes<sup>5</sup>:

- 3453 (1) by a donee of an enduring power of attorney or lasting power of attorney<sup>6</sup> or a deputy appointed for him by the Court of Protection, with power to exercise those functions; or
- 3454 (2) if no deputy or donee has that power, by a person authorised in that respect by that court<sup>7</sup>.

Until that appointed day, the following provisions have effect. Where a Chapter I or Chapter II landlord is incapable by reason of mental disorder<sup>8</sup> of managing and administering his property and affairs, the landlord's receiver<sup>9</sup> or, if no such receiver is acting for him, any person authorised in that behalf, takes the place for the statutory purposes<sup>10</sup>, under an order of the authority having jurisdiction under the Mental Health Act 1983<sup>11</sup>, of the landlord<sup>12</sup>.

- 1 For the meaning of 'Chapter I landlord' see PARA 1545 note 2 ante.
- 2 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.
- 3 See the Mental Capacity Act 2005 s 2; and MENTAL HEALTH.
- 4 le as from a day to be appointed under ibid s 68(1). At the date at which this title states the law, no such day had been appointed.
- 5 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq post) or, as the case may be, Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).
- 6 le within the meaning of the Mental Capacity Act 2005: see ss 9-14; and MENTAL HEALTH.



7 Leasehold Reform, Housing and Urban Development Act 1993 ss 9(4), 40(5), Sch 2 para 4 (prospectively substituted by the Mental Capacity Act 2005 s 67(1), Sch 6 para 39(1), as from a day to be appointed (see note 4 supra)).

8 le within the meaning of the Mental Health Act 1983: see s 1; and MENTAL HEALTH.

9 le appointed under ibid Pt VII (ss 93-113) (as amended and prospectively repealed) (see MENTAL HEALTH) or under the Mental Health Act 1959 Pt VIII (ss 100-121) (repealed).

10 See note 5 supra.

11 le under the Mental Health Act 1983 Pt VII (ss 93-113) (as amended and prospectively repealed): see MENTAL HEALTH.

12 Leasehold Reform, Housing and Urban Development Act 1993 ss 9(4), 40(5), Sch 2 para 4 (as originally enacted).

## UPDATE

### 1547 Landlord lacking capacity

TEXT AND NOTE 4--Day now appointed: SI 2007/1897.

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### 1548. Landlord's interest held in trust.

Where the interest<sup>1</sup> of a Chapter I landlord<sup>2</sup> is subject to a trust of land, any sum payable to the landlord by way of the price payable for the interest on its acquisition<sup>3</sup> must be dealt with as if it were proceeds of sale arising under the trust<sup>4</sup>.

Where the interest of a Chapter II landlord<sup>5</sup> is subject to a trust of land, any sum payable to the landlord by way of a premium<sup>6</sup> on the grant of a new lease<sup>7</sup> must be dealt with as if it were proceeds of sale arising under the trust<sup>8</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 For the meaning of 'Chapter I landlord' see PARA 1545 note 2 ante.

3 le in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

4 Ibid s 9(4), Sch 2 para 5(1) (Sch 2 para 5 amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), (2), Sch 3 para 27(2), Sch 4).

5 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.

6 For these purposes, any reference to a premium payable on the grant of a lease includes a reference to any other amount payable by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 56, Sch 13 (as amended) (see PARA 1705 et seq post) in connection with its grant: Sch 2 para 1(2).

7 le under ibid Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post) or s 93(4) (see PARA 1538 ante).

8 Ibid s 40(5), Sch 2 para 5(2) (as amended: see note 4 supra).

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### **1549. Landlord's interest subject to a settlement.**

Where the interest<sup>1</sup> of a Chapter II landlord<sup>2</sup> is subject to a settlement<sup>3</sup>, the purposes authorised for the application of capital money<sup>4</sup> and as purposes for which money may be raised by mortgage<sup>5</sup> include the payment of compensation by the landlord on the termination of a new lease granted<sup>6</sup> under the relevant statutory provisions<sup>7</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.

3 I.e. within the meaning of the Settled Land Act 1925. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

4 I.e. the purposes authorised by the Settled Land Act 1923 s 73 (as amended): see SETTLEMENTS vol 42 (Reissue) PARA 808.

5 I.e. the purposes authorised by ibid s 71 (as amended): see SETTLEMENTS vol 42 (Reissue) PARAS 849-850. For the meaning of 'mortgage' see PARA 1545 note 4 ante.

6 I.e. granted under the Leasehold Reform, Housing and Urban Development Act 1993 Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post) or s 93(4) (see PARA 1538 ante).

7 Ibid s 40(5), Sch 2 para 6 (amended by the Trusts of Land and Appointment of Trustees Act 1996, s 25(1), Sch 3, PARA 27(2)). This applies whether the payment is made in pursuance of an order under the Leasehold Reform, Housing and Urban Development Act 1993 s 61 (see PARA 1725 post) or in pursuance of an agreement made in conformity with Sch 14 para 5 (see PARA 1728 post) without an application having been made under s 61: Sch 2 para 6 (as so amended).

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### **1550. University or college landlords.**

Where a Chapter I landlord<sup>1</sup> is a university or college to which the Universities and College Estates Act 1925<sup>2</sup> applies, any sum payable to the landlord by way of the price payable for any interest<sup>3</sup> on its acquisition<sup>4</sup> must be dealt with as if it were an amount payable by way of consideration on a sale effected under that Act<sup>5</sup>.

Where a Chapter II landlord<sup>6</sup> is a university or college to which that Act applies:

- 3455 (1) any sum payable to the landlord by way of a premium<sup>7</sup> on the grant of a new lease<sup>8</sup> must be dealt with as if it were an amount payable by way of consideration on a sale effected under that Act; and

3456 (2) the purposes authorised<sup>9</sup> for the application of capital money and as purposes for which money may be raised by mortgage<sup>10</sup> include the payment<sup>11</sup> of compensation<sup>12</sup>.

1 For the meaning of 'Chapter I landlord' see PARA 1545 note 2 ante.

2 As to the Universities and College Estates Act 1925 see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post.

5 Ibid s 9(4), Sch 2 para 7(1).

6 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.

7 For the meaning of references to a premium payable on the grant of a lease see PARA 1548 note 6 ante.

8 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post) or s 93(4) (as amended) (see PARA 1538 ante).

9 Ie purposes authorised by the Universities and College Estates Act 1925 s 26 (as amended): see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.

10 Ie purposes authorised by ibid s 31 (as amended): see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.

11 Ie the payment of compensation as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 40(5), Sch 2 para 6 (as amended): see PARA 1549 ante.

12 Ibid Sch 2 para 7(2) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 27(2)).

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### **1551. Ecclesiastical landlords.**

The following provisions have effect as regards Chapter I<sup>1</sup> or Chapter II<sup>2</sup> landlords who are ecclesiastical landlords<sup>3</sup>.

In relation to an interest<sup>4</sup> of an ecclesiastical landlord, the consent of the Church Commissioners<sup>5</sup> is required to sanction:

3457 (1) the provisions to be contained in a conveyance<sup>6</sup> or in any lease granted<sup>7</sup>, and the price or premium<sup>8</sup> payable, except as regards matters determined by the court or a leasehold valuation tribunal;

3458 (2) any exercise of the ecclesiastical landlord's rights to terminate a new lease on the grounds of redevelopment<sup>9</sup>, except as aforesaid, and any agreement for the payment of compensation to a tenant<sup>10</sup> without an application having been made<sup>11</sup>; and

3459 (3) any grant of a lease in connection with an agreement excluding or modifying the tenant's rights<sup>12</sup>;

and the Church Commissioners are entitled to appear and be heard in any proceedings<sup>13</sup> to which an ecclesiastical landlord is a party or in which he is entitled to appear and be heard<sup>14</sup>.

Where a capitular body has an interest in property which forms part of the endowment of a cathedral church:

3460 (a) any sum payable to that body by way of the price payable for any interest in the property on its acquisition in pursuance of the right to collective enfranchisement<sup>15</sup> or a premium on the grant of a new lease<sup>16</sup> is treated as part of that endowment; and

3461 (b) the powers conferred by the Cathedrals Measure 1963<sup>17</sup> in relation to the investment in the acquisition of land of money forming part of the endowment of a cathedral church extend to the application of any such money in the payment<sup>18</sup> of compensation<sup>19</sup>.

In the case of a diocesan board of finance:

3462 (i) no consent or concurrence other than that of the Church Commissioners<sup>20</sup> is required to a disposition<sup>21</sup> of the interest of the diocesan board of finance in property, including a grant of a new lease in connection with an agreement excluding or modifying the tenant's rights<sup>22</sup>;

3463 (ii) any sum payable to the diocesan board of finance by way of the price payable for any interest in property on its acquisition in pursuance of the right to collective enfranchisement<sup>23</sup> or a premium on the grant of a new lease of property<sup>24</sup> must be paid to the Church Commissioners to be applied for purposes for which the proceeds of any such disposition of property by agreement would be applicable under any enactment or Measure authorising such a disposition or disposing of the proceeds of such a disposition; and

3464 (iii) any sum required for the payment of compensation<sup>25</sup> may be paid by the Church Commissioners on behalf of the diocesan board of finance out of any money held by them<sup>26</sup>.

1 For the meaning of 'Chapter I landlord' see PARA 1545 note 2 ante.

2 For the meaning of 'Chapter II landlord' see PARA 1545 note 3 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 ss 9(4), 40(5), Sch 2 para 8(1). For these purposes, 'ecclesiastical landlord' means (1) a capitular body within the meaning of the Cathedrals Measure 1963 (as to the construction of references to such a body see PARA 1509 note 3 ante) having an interest as landlord in property; or (2) a diocesan board of finance having an interest as landlord in property belonging to the board as diocesan glebe land: Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(1). 'Diocesan board of finance' and 'diocesan glebe land' have the same meaning as in the Endowments and Glebe Measure 1976: Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(5).

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 As to the Church Commissioners see ECCLESIASTICAL LAW vol 14 para 361 et seq.

6 In accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 34 (as amended) (see PARA 1647 post) and s 34(9), Sch 7 (as amended) (see PARA 1648 et seq post).

7 In any lease granted under *ibid* s 56: see PARA 1703 post.

8 For the meaning of references to a premium payable on the grant of a lease see PARA 1548 note 6 ante.

9 In rights under the Leasehold Reform, Housing and Urban Development Act 1993 s 61: see PARA 1725 post.

10 In conformity with *ibid* s 61(4), Sch 14 para 5: see PARA 1728 post.

- 11    Ie under ibid s 61.
- 12    Ie a lease granted in pursuance of ibid s 93(4) (as amended): see PARA 1538 ante.
- 13    Ie under ibid Pt I (ss 1-103) (as amended): see PARA 1532 et seq ante, PARA 1552 et seq post.
- 14    Ibid Sch 2 para 8(2).
- 15    Ie its acquisition in pursuance of ibid Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq post. Property within the precinct of a cathedral church cannot be so acquired: see PARA 1536 ante.
- 16    Ie under ibid Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post) or s 93(4) (as amended). No interest may be so granted in property within the precinct of a cathedral church: see PARA 1536 ante.
- 17    Ie the Cathedrals Measure 1963 ss 21, 23 (repealed with savings by the Cathedrals Measure 1999 ss 38(1), (3), 39(2), Sch 3): see ECCLESIASTICAL LAW vol 14 paras 629, 630.
- 18    Ie the payment of compensation as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 40(5), Sch 2 para 6 (as amended): see PARA 1549 ante.
- 19    Ibid Sch 2 para 8(3) (Sch 2 para 8(3), (4) amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 27(2)).
- 20    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(2): see the text and notes 4-14 supra.
- 21    See note 13 supra.
- 22    See note 12 supra.
- 23    Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended).
- 24    See note 16 supra.
- 25    See note 18 supra.
- 26    Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(4) (as amended: see note 19 supra).

## **UPDATE**

### **1551 Ecclesiastical landlords**

TEXT AND NOTES 14, 26--Leasehold Reform, Housing and Urban Development Act 1993 Sch 2 para 8(2) amended, Sch 2 para 8(4) further amended: Church of England (Miscellaneous Provisions) Measure 2006 Sch 5 para 31.

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## **(5) COLLECTIVE ENFRANCHISEMENT**

### **(i) In general**

#### **1552. The right to collective enfranchisement.**

The relevant provisions of the Leasehold Reform, Housing and Urban Development Act 1993<sup>1</sup> have effect for the purpose of conferring on qualifying tenants<sup>2</sup> of flats<sup>3</sup> contained in premises to which those provisions apply<sup>4</sup> on the relevant date<sup>5</sup> the right<sup>6</sup> ('the right to collective enfranchisement') to have the freehold of those premises acquired on their behalf by a person or persons appointed by them for the purpose and at a price determined<sup>7</sup> in accordance with those provisions<sup>8</sup>. As from a day to be appointed<sup>9</sup>, however, the relevant provisions of the Leasehold Reform, Housing and Urban Development Act 1993<sup>10</sup> have effect for the purpose of conferring the right ('the right to collective enfranchisement') to acquire the freehold of premises to which those provisions apply<sup>11</sup> on the relevant date:

- 3465 (1) at a price determined in accordance with those provisions; and
- 3466 (2) exercisable subject to and in accordance with those provisions by a company (an 'RTE company')<sup>12</sup> of which qualifying tenants of flats contained in the premises are members<sup>13</sup>.

Where the right to collective enfranchisement is exercised in relation to any such premises ('the relevant premises'):

- 3467 (a) the qualifying tenants by whom the right is exercised are entitled<sup>14</sup> to have acquired; or
- 3468 (b) as from a day to be appointed<sup>15</sup>, the RTE company by which the right to collective enfranchisement is exercised is entitled<sup>16</sup> to acquire,

in like manner, the freehold of any property which is not comprised in the relevant premises but to which these provisions<sup>17</sup> apply<sup>18</sup>.

These provisions apply to any property if at the relevant date either:

- 3469 (i) it is appurtenant property<sup>19</sup> which is demised by the lease<sup>20</sup> held by a qualifying tenant of a flat<sup>21</sup> contained in the relevant premises; or
- 3470 (ii) it is property which any such tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises, whether those premises are contained in the relevant premises or not<sup>22</sup>.

The right of acquisition in respect of the freehold of any such property as is mentioned in head (ii) above is, however, taken to be satisfied with respect to that property if, on the acquisition of the relevant premises<sup>23</sup>, either:

- 3471 (A) there are granted by the person who owns the freehold of that property over that property or over any other property such permanent rights as will ensure that thereafter the occupier of the flat referred to in head (ii) above has as nearly as may be the same rights as those enjoyed in relation to that property on the relevant date by the qualifying tenant under the terms of his lease; or
- 3472 (B) there is acquired from the freeholder the freehold of any other property over which any such permanent rights may be granted<sup>24</sup>.

A claim by qualifying tenants, or by an RTE company<sup>25</sup>, to exercise the right to collective enfranchisement may be made in relation to any premises<sup>26</sup> despite the fact that those premises are less extensive than the entirety of the premises in relation to which those tenants are, or the RTE company is<sup>27</sup>, entitled to exercise that right<sup>28</sup>.

Any right or obligation<sup>29</sup> to acquire any interest in property does not extend to underlying minerals in which that interest subsists if the owner of the interest requires the minerals to be

excepted and proper provision is made for the support of the property as it is enjoyed on the relevant date<sup>30</sup>.

- 1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see the text and notes 2-30 infra; and PARA 1553 et seq post.
- 2    For the meaning of 'qualifying tenant' see PARA 1557 post.
- 3    For the meaning of 'flat' see PARA 1533 note 2 ante.
- 4    Ie premises to which the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) applies: see PARA 1554 post. As to premises excluded from the right to collective enfranchisement see PARA 1555 post.
- 5    For these purposes, 'the relevant date', in relation to any claim to exercise the right to collective enfranchisement, means the date on which notice of the claim is given under ibid s 13 (as amended) (see PARA 1585 post): ss 1(8), 38(1). As to the giving of notices see PARA 1541 ante.
- 6    Ie exercisable subject to and in accordance with ibid Pt I Ch I (as amended).
- 7    Ie a price determined in accordance with ibid Pt I Ch I (as amended). As to determination of the price see PARA 1623 et seq post.
- 8    Ibid ss 1(1), 38(1).
- 9    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 10   See note 1 supra.
- 11   See note 4 supra.
- 12   As to RTE companies see PARA 1581 et seq post.
- 13   Leasehold Reform, Housing and Urban Development Act 1993 s 1(1) (s 1(1), (2), (5) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2-4, as from a day to be appointed (see note 9 supra)).
- 14   Ie subject to and in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended). Since the additional right is an entitlement the qualifying tenants (or RTE company) do not have to include the additional property.
- 15   See note 9 supra.
- 16   See note 14 supra.
- 17   Ie to which ibid s 1(2) (as amended) applies by virtue of s 1(3) (see the text and notes 19-22 infra).
- 18   Ibid s 1(2)(a), (7) (s 1(2)(a) as prospectively amended (see note 13 supra)). Until that amendment comes into force, head (a) in the text applies; as from the appointed day, head (b) in the text, and not head (a), will apply. Section 2 (as amended) (see PARA 1553 post) has effect with respect to the acquisition of leasehold interests to which 2(1)(a) or (b) (as originally enacted or as prospectively substituted) (see PARA 1553 post) applies: s 1(2)(b), (7).
- 19   For these purposes, 'appurtenant property', in relation to a flat, means any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat: ibid s 1(7). A storeroom on a different floor of a block to that of the flat was an appurtenance to the flat, but not an outhouse: *Cadogan v McGirk* [1996] 4 All ER 643, [1996] 2 EGLR 75, CA.
- 20   For the meaning of 'lease' see PARA 1535 note 3 ante.
- 21   For these purposes, any reference, however expressed, to the lease held by a qualifying tenant of a flat is a reference to a lease held by him under which the demised premises consist of or include the flat, whether with or without one or more other flats: Leasehold Reform, Housing and Urban Development Act 1993 s 101(3).
- 22   Ibid s 1(3) (amended by the Housing Act 1996 ss 107(3), 227, Sch 19 Pt V).

- 23    Ie in pursuance of *ibid* Pt I Ch I (as amended).
- 24    Leasehold Reform, Housing and Urban Development Act 1993 s 1(4) (amended by the Housing Act 1996 s 107(4), Sch 10 para 2).
- 25    Ie by an RTE company as from a day to be appointed: see note 9 *supra*.
- 26    See note 4 *supra*.
- 27    Ie as from a day to be appointed: see note 9 *supra*.
- 28    Leasehold Reform, Housing and Urban Development Act 1993 s 1(5) (as prospectively amended (see note 13 *supra*)).
- 29    Ie under *ibid* Pt I Ch I (as amended).
- 30    *Ibid* s 1(6).

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### **1553. Acquisition of leasehold interests.**

Where the right to collective enfranchisement<sup>1</sup> is exercised in relation to any premises to which these provisions<sup>2</sup> apply ('the relevant premises'), then:

- 3473 (1) there must be acquired<sup>3</sup> on behalf of the qualifying tenants<sup>4</sup> by whom the right is exercised every interest<sup>5</sup> of the tenant under any lease<sup>6</sup> which is superior to the lease held by a qualifying tenant of a flat<sup>7</sup> contained in the relevant premises<sup>8</sup>; and
- 3474 (2) those tenants are entitled to have acquired on their behalf any interest of the tenant under any lease<sup>9</sup> under which the demised premises consist of or include:
- 199    43. (a) any common parts<sup>10</sup> of the relevant premises; or
- 200    44. (b) any specified property<sup>11</sup> which is to be acquired<sup>12</sup>,
- 3475    where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts or, as the case may be, that property, on behalf of the tenants by whom the right to collective enfranchisement is exercised<sup>13</sup>;

and any interest so acquired on behalf of those tenants must be acquired in the specified<sup>14</sup> manner<sup>15</sup>.

As from a day to be appointed<sup>16</sup>, however, where the right to collective enfranchisement is exercised by an RTE company<sup>17</sup> in relation to any premises to which these provisions apply<sup>18</sup> ('the relevant premises'), then:

- 3476 (i) there must be acquired<sup>19</sup> by the RTE company every interest of the tenant under any lease which is superior to the lease held by a qualifying tenant of a flat contained in the relevant premises<sup>20</sup>; and
- 3477 (ii) the RTE company is entitled to acquire any interest of the tenant under any lease not falling within head (i) above under which the demised premises consist of



or include any common parts of the relevant premises or any specified property<sup>21</sup> which is to be acquired<sup>22</sup>, where the acquisition of that interest is reasonably necessary for the proper management or maintenance of those common parts or, as the case may be, that property<sup>23</sup>;

and any interest which the RTE company so acquires must be acquired in the specified<sup>24</sup> manner<sup>25</sup>.

Where the demised premises under any lease<sup>26</sup> include any premises other than:

- 3478 (A) a flat contained in the relevant premises which is held by a qualifying tenant;
- 3479 (B) any common parts of those premises; or
- 3480 (C) any such property as is mentioned in head (2)(b) above,

the obligation or, as the case may be, right<sup>27</sup> to acquire the interest of the tenant under the lease does not extend to his interest under the lease in any such other premises<sup>28</sup>.

Where the qualifying tenant of a flat is a public sector landlord<sup>29</sup> and the flat is let under a secure tenancy<sup>30</sup> or an introductory tenancy<sup>31</sup> then, if the specified condition<sup>32</sup> is satisfied and the lease of the qualifying tenant is directly derived out of a lease under which the tenant is a public sector landlord, the interest of that public sector landlord as tenant under that lease is not liable to be acquired<sup>33</sup> to the extent that it is an interest in the flat or in any appurtenant property<sup>34</sup>; and the interest of a public sector landlord as tenant under any lease out of which the qualifying tenant's lease is indirectly derived is not, to the like extent, liable to be so acquired, so long as the tenant under every lease intermediate between that lease and the qualifying tenant's lease is a public sector landlord<sup>35</sup>. The condition so specified is that either the qualifying tenant is the immediate landlord under the secure tenancy or, as the case may be, the introductory tenancy or he is the landlord under a lease which is superior to the secure tenancy or, as the case may be, the introductory tenancy and the tenant under that lease, and the tenant under every lease, if any, intermediate between it and the secure tenancy or the introductory tenancy is also a public sector landlord<sup>35</sup>.

1 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

2 Ie any premises to which the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) applies: see PARA 1554 post. As to premises excluded from the right to collective enfranchisement see PARA 1555 post.

3 Ie subject to and in accordance with *ibid* Pt I Ch I (as amended): see PARA 1552 ante, PARA 1554 et seq post.

4 For the meaning of 'qualifying tenant' see PARA 1557 post.

5 For the meaning of 'interest' see PARA 408 note 16 ante.

6 For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of references to the lease held by a qualifying tenant of a flat see PARA 1552 note 21 ante; and for the meaning of 'flat' see PARA 1533 note 2 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 2(1)(a), (2), (7) (as originally enacted).

9 Ie any lease not falling within *ibid* s 2(2): see head (1) in the text.

10 For the meaning of 'common parts' see PARA 411 note 3 ante.

11 Ie any property falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 1(2)(a) (as originally enacted): see PARA 1552 ante.

- 12    Ie by virtue of *ibid* s 1(2)(a) (as originally enacted).
- 13    *Ibid* s 2(1)(b), (3), (7) (as originally enacted).
- 14    Ie the manner mentioned in *ibid* s 1(1)(a) or (b) (as originally enacted): see PARA 1552 ante.
- 15    *Ibid* s 2(1) (as originally enacted).
- 16    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 17    As to RTE companies see PARA 1581 et seq post.
- 18    See note 2 supra.
- 19    See note 3 supra.
- 20    Leasehold Reform, Housing and Urban Development Act 1993 s 2(1)(a), (2), (7) (s 2(1) prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 4, as from a day to be appointed (see note 16 supra)).
- 21    Ie any property falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 1(2)(a) (as prospectively substituted): see PARA 1552 ante.
- 22    Ie by virtue of *ibid* s 1(2)(a) (as prospectively substituted).
- 23    *Ibid* s 2(1)(b), (3), (7) (s 2(1)(b) as prospectively substituted (see note 20 supra); s 2(3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 16 supra)).
- 24    Ie the manner mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 1(1)(a) or (b) (as prospectively substituted): see PARA 1552 ante.
- 25    *Ibid* s 2(1) (as prospectively substituted: see note 20 supra).
- 26    Ie any lease falling within *ibid* s 2(2) or (3) (as originally enacted or as prospectively amended).
- 27    Ie under *ibid* s 2(1) (as originally enacted or as prospectively substituted).
- 28    *Ibid* s 2(4).
- 29    For these purposes, 'public sector landlord' means any of the persons listed in the Housing Act 1985 s 171(2) (as amended) (see PARA 1798 post): Leasehold Reform, Housing and Urban Development Act 1993 s 38(1).
- 30    For these purposes, 'secure tenancy' has the meaning given by the Housing Act 1985 s 79 (see PARA 1300 ante): Leasehold Reform, Housing and Urban Development Act 1993 s 38(1).
- 31    For these purposes, 'introductory tenancy' has the same meaning as in the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) (see PARA 1286 et seq ante): Leasehold Reform, Housing and Urban Development Act 1993 s 38(1) (definition added by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 9(b)).
- 32    Ie the condition specified in the Leasehold Reform, Housing and Urban Development Act 1993 s 2(6) (as amended): see the text and note 36 infra.
- 33    Ie by virtue of *ibid* s 2(1) (as originally enacted or as prospectively substituted).
- 34    For these purposes, 'appurtenant property' has the same meaning as in *ibid* s 1 (as amended) (see PARA 1552 note 19 ante): s 2(6).
- 35    *Ibid* s 2(5) (s 2(5), (6) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule, PARA 9(a)).
- 36    Leasehold Reform, Housing and Urban Development Act 1993 s 2(6) (as amended: see note 35 supra).

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#### **1554. Premises to which the right to collective enfranchisement applies.**

The statutory provisions relating to collective enfranchisement<sup>1</sup> apply<sup>2</sup> to any premises if:

- 3481 (1) they consist of a self-contained building or part of a building;
- 3482 (2) they contain two or more flats<sup>3</sup> held by qualifying tenants<sup>4</sup>; and
- 3483 (3) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises<sup>5</sup>.

For these purposes, a building is a self-contained building if it is structurally detached, and a part of a building is a self-contained part of a building if:

- 3484 (a) it constitutes a vertical division of the building and the structure of the building is such that that part could be redeveloped independently of the remainder of the building; and
- 3485 (b) the relevant services<sup>6</sup> provided for occupiers of that part either:
  - 201 45. (i) are provided independently of the relevant services provided for occupiers of the remainder of the building; or
  - 46. (ii) could be so provided without involving the carrying out of any works likely to result in a significant interruption in the provision of any such services for occupiers of the remainder of the building<sup>7</sup>.
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1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARAS 1552-1553 ante, PARA 1555 et seq post.

2    Ie subject to ibid s 4 (as amended): see PARA 1555 post.

3    For the meaning of 'flat' see PARA 1533 note 2 ante.

4    For the meaning of 'qualifying tenant' see PARA 1557 post.

5    Leasehold Reform, Housing and Urban Development Act 1993 s 3(1) (amended by the Housing Act 1996 ss 107(1), 227, Sch 19 Pt V).

6    For these purposes, 'relevant services' means services provided by means of pipes, cables or other fixed installations: Leasehold Reform, Housing and Urban Development Act 1993 s 3(2).

7    Ibid s 3(2).

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#### **1555. Premises excluded from right.**

The right to collective enfranchisement<sup>1</sup> does not apply to premises<sup>2</sup>:

3486 (1) if:

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47. (a) any part or parts of the premises is or are neither occupied, or intended to be occupied, for residential purposes<sup>3</sup>, nor comprised in any common parts of the premises; and

48. (b) the internal floor area<sup>4</sup> of that part or of those parts, taken together, exceeds 25% of the internal floor area of the premises, taken as a whole<sup>5</sup>;

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3487 (2) where different persons own the freehold of different parts of the premises, if any of those parts is a self-contained part of a building<sup>6</sup> for the statutory purposes<sup>7</sup>;

3488 (3) if the premises are premises with a resident landlord<sup>8</sup> and do not contain more than four units<sup>9</sup>;

3489 (4) if the freehold of the premises includes track<sup>10</sup> of an operational<sup>11</sup> railway<sup>12</sup>.

The right to collective enfranchisement does not apply to National Trust property<sup>13</sup> or to property within the precinct of a cathedral church<sup>14</sup>.

1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1556 et seq post.

2    Ie premises falling within ibid s 3(1) (as amended): see PARA 1554 ante at heads (1)-(3) in the text.

3    Where in the case of any such premises any part of the premises, such as eg a garage, parking space or storage area, is used, or intended for use, in conjunction with a particular dwelling contained in the premises, and accordingly is not comprised in any common parts of the premises, it is to be taken to be occupied, or intended to be occupied, for residential purposes: ibid s 4(2). For the meaning of 'common parts' see PARA 411 note 3 ante; and for the meaning of 'dwelling' see PARA 1533 note 2 ante.

4    For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part must be taken to extend, without interruption, throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part must be disregarded: ibid s 4(3).

5    Ibid s 4(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 115). The percentage previously specified in head (b) in the text was 10%. For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 1.

6    Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 3 (as amended): see PARA 1554 ante.

7    Ibid s 4(3A) (added by the Housing Act 1996 s 107(2)).

8    For the meaning of 'premises with a resident landlord' see PARA 1556 post.

9    Leasehold Reform, Housing and Urban Development Act 1993 s 4(4). For these purposes, 'unit' means (1) a flat; (2) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling; or (3) a separate set of premises let, or intended for letting, on a business lease: s 38(1). For the meaning of 'flat' see PARA 1533 note 2 ante; and for the meaning of 'business lease' see PARA 405 note 4 ante.

10   For these purposes, 'track' includes any land or other property comprising the permanent way of a railway (whether or not it is also used for other purposes) and includes any bridge, tunnel, culvert, retaining wall or other structure used for the support of, or otherwise in connection with, track; and 'railway' has the same meaning as in any provision of the Railways Act 1993 Pt I (ss 4-83) (as amended) for the purposes of which that term is stated to have its wider meaning (see s 81(2); and RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 82): Leasehold Reform, Housing and Urban Development Act 1993 s 4(5)(a), (c) s 4(5) added by the Commonhold and Leasehold Reform Act 2002 s 116).

11 For these purposes, 'operational' means not disused: Leasehold Reform, Housing and Urban Development Act 1993 s 4(5)(b) (as added: see note 10 supra).

12 Ibid s 4(5) (as added: see note 10 supra).

13 See PARA 1535 ante.

14 See PARA 1536 ante.

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### **1556. Meaning of 'premises with a resident landlord'.**

For the purposes of the right to collective enfranchisement<sup>1</sup> any premises to which that right applies<sup>2</sup> are premises with a resident landlord<sup>3</sup> at any time if:

- 3490 (1) the premises are not, and do not form part of, a purpose-built block of flats<sup>4</sup>;
- 3491 (2) the same person has owned the freehold of the premises since before the conversion of the premises into two or more flats or other units<sup>5</sup>; and
- 3492 (3) he, or an adult member of his family<sup>6</sup>, has occupied a flat or other unit contained in the premises as his only or principal home<sup>7</sup> throughout the period of 12 months ending with that time<sup>8</sup>.

Where the freehold of any premises is held on trust, the above provisions apply as if:

- 3493 (a) the requirement in head (2) above were that the same person has had an interest under the trust, whether or not also a trustee, since before the conversion of the premises; and
- 3494 (b) head (3) above referred to him or an adult member of his family<sup>9</sup>.

1 For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1557 et seq post.

2 For any premises falling within ibid s 3(1) (as amended): see PARA 1554 ante.

3 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 For these purposes, 'purpose-built block of flats' means a building which as constructed contained two or more flats: Leasehold Reform, Housing and Urban Development Act 1993 s 10(6). For the meaning of 'flat' see PARA 1533 note 2 ante.

5 For the meaning of 'unit' see PARA 1555 note 9 ante.

6 For these purposes, a person is an adult member of another's family if that person is (1) the other's spouse or civil partner; or (2) a son or daughter or a son-in-law or daughter-in-law of the other, or of the other's spouse or civil partner, who has attained the age of 18; or (3) the father or mother of the other, or of the other's spouse or civil partner; and in head (2) supra any reference to a person's son or daughter includes a reference to any stepson or stepdaughter of that person, and 'son-in-law' and 'daughter-in-law' are to be construed accordingly: ibid s 10(5) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 48).

7 As to the meaning of 'only or principal home' see PARAS 1018 note 8, 1300 note 19 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 ss 10(1), 38(1) (s 10(1), (4) substituted by the Commonhold and Leasehold Reform Act 2002 s 118(1)-(3); for transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 1.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 10(4) (as substituted: see note 8 supra). For these purposes, the interest relied upon has to be continuous; the interests cannot be mixed with each other to result in a continuous whole and the test in s 10(4) (as substituted) cannot supplement but only supplant the test in s 10(1) (as amended); thus there must be continuity on the part of the freeholder or, if the freehold is held on trust, on the part of the person having an interest under the trust: see *Slamon v Planchon* [2004] EWCA Civ 799, [2005] Ch 142, [2004] 4 All ER 407.

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## **(ii) Qualifying Tenants**

### **1557. Meaning of 'qualifying tenant'.**

A person is<sup>1</sup> a qualifying tenant of a flat<sup>2</sup> if he is tenant<sup>3</sup> of the flat under a long lease<sup>4</sup>, except where:

- 3495 (1) the lease is a business lease<sup>5</sup>; or
- 3496 (2) the immediate landlord<sup>6</sup> under the lease is a charitable housing trust<sup>7</sup> and the flat forms part of the housing accommodation provided by it in the pursuit of its charitable purposes<sup>8</sup>; or
- 3497 (3) the lease was granted by sub-demise out of a superior lease other than a long lease, the grant was made in breach of the terms of the superior lease, and there has been no waiver of the breach by the superior landlord<sup>9</sup>.

No flat may have more than one qualifying tenant at any one time<sup>10</sup>. Accordingly:

- 3498 (a) where a flat is for the time being let under two or more such leases<sup>11</sup>, any tenant under any of those leases which is superior to that held by any other such tenant is not<sup>12</sup> a qualifying tenant of the flat; and
- 3499 (b) where a flat is for the time being let to joint tenants under such a lease<sup>13</sup>, the joint tenants are regarded<sup>14</sup> as jointly constituting the qualifying tenant of the flat<sup>15</sup>.

Where:

- 3500 (i) a person would be regarded as being, or as being among those constituting, the qualifying tenant of a flat contained in any particular premises consisting of the whole or part of a building; but
- 3501 (ii) that person would also be regarded as being, or as being among those constituting, the qualifying tenant of each of two or more other flats contained in those premises,

then, whether that person is tenant of the flats referred to in heads (i) and (ii) above under a single lease or otherwise, there is to be taken to be no qualifying tenant of any of those flats<sup>16</sup>.

Where two or more persons jointly constitute the qualifying tenant in relation to a lease of a flat, any reference to the qualifying tenant is, unless the context otherwise requires, a reference to both or all of the persons who jointly constitute the qualifying tenant<sup>17</sup>.

1     Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1558 et seq post.

2     For the meaning of 'flat' see PARA 1533 note 2 ante.

3     For the meaning of 'tenant' see PARA 1535 note 3 ante.

4     Leasehold Reform, Housing and Urban Development Act 1993 ss 5(1), 38(1) (s 5(1) amended by the Commonhold and Leasehold Reform Act 2002 ss 117(1), 180, Sch 14). For the meaning of 'long lease' see PARA 1558 post. Before 26 July 2002 in relation to England and 1 January 2003 in relation to Wales, the long lease had also to be at a low rent unless it was for a particularly long term: see the Leasehold Reform, Housing and Urban Development Act 1993 ss 8, 8A (repealed). Before those dates in relation to England and Wales, a qualifying tenant had also to satisfy a residence condition, ie he must have occupied the flat as his only or principal home for the previous 12 months or for periods amounting to three years in the previous ten years, whether or not he had used the flat for other purposes: see s 6 (repealed). Thus a qualifying tenant had to be an individual and not a company; the repeal of s 6 has removed that restriction. For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(ii), Sch 1, Pt 1, Sch 2 paras 1, 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(ii), Sch 1, Pt 1, Sch 2 paras 1, 4.

5     For the meaning of 'business lease' see PARA 405 note 4 ante.

6     For the meaning of 'landlord' see PARA 1535 note 3 ante.

7     For these purposes, 'charitable housing trust' means a housing trust within the meaning of the Housing Act 1985 (see s 6; and HOUSING vol 22 (2006 Reissue) PARA 12) which is a charity within the meaning of the Charities Act 1993 (see CHARITIES vol 8 (2010) PARA 1): Leasehold Reform, Housing and Urban Development Act 1993 s 5(2).

8     The fact that the freehold owner of a block of flats is a charitable housing trust, and that some of the flats therein are let by it pursuant to its charitable objectives, does not disqualify other tenants under long leases from exercising their right to collective enfranchisement: see *Brick Farm Management Ltd v Richmond Housing Partnership Ltd* [2005] EWHC 1650 (QB), [2005] 1 WLR 3934, [2005] 3 EGLR 57 (flats let under assured tenancies, but not those held under long leases, in the block of flats in question constituted social housing accommodation provided by the housing trust).

9     Leasehold Reform, Housing and Urban Development Act 1993 s 5(2) (amended by the Housing Act 1996 s 106, Sch 9 para 3(2)(b); the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

10    Leasehold Reform, Housing and Urban Development Act 1993 s 5(3).

11    Ie leases to which *ibid* s 5(1) (as amended) applies.

12    See note 1 *supra*.

13    Ie a lease to which the Leasehold Reform, Housing and Urban Development Act 1993 s 5(1) (as amended) applies.

14    Ie for the purposes of *ibid* Pt I Ch I (as amended) but subject to s 5(4)(a) (see head (a) in the text) and s 5(5) (see the text and note 16 *infra*).

15    *Ibid* s 5(4).

16    *Ibid* s 5(5). For the purposes of s 5(5) in its application to a body corporate, any flat let to an associated company, whether alone or jointly with any other person or persons, is treated as if it were so let to that body; and 'associated company' means another body corporate which is, within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25), that body's holding company, a subsidiary of

that body or another subsidiary of that body's holding company: Leasehold Reform, Housing and Urban Development Act 1993 s 5(6).

17 Ibid s 101(4).

## UPDATE

### 1557 Meaning of 'qualifying tenant'

NOTE 16--In definition of 'associated company' reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159 (see COMPANIES vol 14 (2009) PARA 25): Leasehold Reform, Housing and Urban Development Act 1993 s 5(6) (definition amended by SI 2009/1941).

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### 1558. Meaning of 'long lease'.

'Long lease' means<sup>1</sup>:

- 3502 (1) a lease<sup>2</sup> granted for a term of years certain exceeding 21 years, whether or not it is, or may become, terminable before the end of that term by notice given by or to the tenant<sup>3</sup> or by re-entry, forfeiture or otherwise;
- 3503 (2) a lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal<sup>4</sup>, other than a lease by sub-demise from one which is not a long lease, or a lease terminable after a death or marriage or the formation of a civil partnership<sup>5</sup>;
- 3504 (3) a lease granted in pursuance of the right to buy<sup>6</sup> or in pursuance of the former right to acquire on rent to mortgage terms<sup>7</sup>;
- 3505 (4) a shared ownership lease<sup>8</sup>, where the tenant's total share<sup>9</sup> is 100%; or
- 3506 (5) a lease granted in pursuance of the right to acquire<sup>10</sup> by virtue of the extension of the right to buy to certain tenants of registered social landlords<sup>11</sup>.

A lease terminable by notice after a death, a marriage or the formation of a civil partnership is not, however, to be treated<sup>12</sup> as a long lease if:

- 3507 (a) the notice is capable of being given at any time after the death or marriage of the tenant;
- 3508 (b) the length of the notice is not more than three months; and
- 3509 (c) the terms of the lease preclude both its assignment otherwise than by way of exchange<sup>13</sup> and the subletting of the whole of the premises comprised in it<sup>14</sup>.

Where the tenant of any property under a long lease, on the coming to an end of that lease, becomes or has become tenant of the property or part of it under any subsequent tenancy, whether by express grant or by implication of law, that tenancy is deemed<sup>15</sup> to be a long lease irrespective of its terms<sup>16</sup>.

Where:



- 3510 (i) a lease is or has been granted for a term of years certain not exceeding 21 years, but with a covenant or obligation for renewal without payment of a premium, but not for perpetual renewal; and
- 3511 (ii) the lease is or has been renewed on one or more occasions so as to bring to more than 21 years the total of the terms granted, including any interval between the end of a lease and the grant of a renewal,

the statutory provisions relating to the right to collective enfranchisement<sup>17</sup> apply as if the term originally granted had been one exceeding 21 years<sup>18</sup>.

References<sup>19</sup> to a long lease include:

- 3512 (A) any period during which the lease is or was continued under Part I of the Landlord and Tenant Act 1954<sup>20</sup> or under the Local Government and Housing Act 1989<sup>21</sup>;
- 3513 (B) any period during which the lease was continued<sup>22</sup> under the Leasehold Property (Temporary Provisions) Act 1951<sup>23</sup>.

Where in the case of a flat<sup>24</sup> there are at any time two or more separate leases, with the same landlord<sup>25</sup> and the same tenant, and the property comprised in one of those leases consists of either the flat or part of it, in either case with or without appurtenant property<sup>26</sup>, and the property comprised in every other lease consists of either a part of the flat, with or without appurtenant property, or appurtenant property only, then, in relation to the property comprised in such of those leases as are long leases, the statutory provisions relating to the right to collective enfranchisement apply as they would if at that time there were a single lease of that property and that lease were a long lease<sup>27</sup>.

1    Ie in the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1559 et seq post.

2    For the meaning of 'lease' see PARA 1535 note 3 ante.

3    For the meaning of 'tenant' see PARA 1535 note 3 ante.

4    As to covenants for perpetual renewal see PARAS 540-541 ante.

5    Ie a lease taking effect under the Law of Property Act 1925 s 149(6) (as amended): see PARA 240 ante.

6    Ie the right conferred by the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1803 et seq post.

7    Ie the right formerly conferred by ibid Pt V (as amended): see PARA 1872 et seq post. As to the abolition of the right to acquire on rent to mortgage terms, except in transitional cases, see PARA 1872 post.

8    Ie whether granted in pursuance of ibid Pt V (as amended) or otherwise. For these purposes, 'shared ownership lease' means a lease (1) granted on payment of a premium calculated by reference to a percentage of the value of the demised premises or the cost of providing them; or (2) under which the tenant, or his personal representatives, will or may be entitled to a sum calculated by reference, directly or indirectly, to the value of those premises: Leasehold Reform, Housing and Urban Development Act 1993 s 7(7). As to the abolition of the statutory right to a shared ownership lease under the Housing Act 1985 Pt V (as amended) see PARA 1795 post.

9    For these purposes, 'total share', in relation to the interest of a tenant under a shared ownership lease, means his initial share plus any additional share or shares in the demised premises which he has acquired: Leasehold Reform, Housing and Urban Development Act 1993 s 7(7).

10   Ie granted in pursuance of the Housing Act 1985 Pt V (as amended) as it has effect by virtue of the Housing Act 1996 s 17: see PARA 1804 et seq post.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 7(1) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 47(1), (2); and by the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 2, Schedule para 7).

12 Ie for the purposes of *ibid* Pt I Ch I (as amended).

13 Ie otherwise than by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 7(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 47(1), (3)).

15 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended), including any further application of s 7(3) (as amended).

16 *Ibid* s 7(3) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

17 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended).

18 *Ibid* s 7(4).

19 See note 1 *supra*.

20 Ie the Landlord and Tenant Act 1954 Pt I (ss 1-22) (as amended): see PARA 1196 et seq ante.

21 Ie the Local Government and Housing Act 1989 s 186, Sch 10 (as amended): see PARA 1237 et seq ante.

22 Ie under the Leasehold Property (Temporary Provisions) Act 1951 (repealed).

23 Leasehold Reform, Housing and Urban Development Act 1993 s 7(5).

24 For the meaning of 'flat' see PARA 1533 note 2 ante.

25 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

26 For these purposes, 'appurtenant property' has the same meaning as in the Leasehold Reform, Housing and Urban Development Act 1993 s 1 (as amended) (see PARA 1552 note 19 ante): s 7(7).

27 *Ibid* s 7(6). Section 7(6) has effect, however, subject to the operation of s 7(3)-(5) (as amended) in relation to any of the separate leases: s 7(6).

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### **(iii) The Reversioner and Other Relevant Landlords**

#### **A. IN GENERAL**

##### **1559. The reversioner and other relevant landlords; in general.**

Where, in connection with any claim to exercise the right to collective enfranchisement<sup>1</sup> in relation to any premises the freehold of the whole of which is owned by the same person, it is not proposed to acquire any interests<sup>2</sup> other than:

3514 (1) the freehold of the premises; or

3515 (2) any other interests of the person who owns the freehold of the premises,

that person is<sup>3</sup> the reversioner in respect of the premises<sup>4</sup>.

Where, in connection with any such claim as is mentioned above, it is proposed to acquire interests of persons other than the person who owns the freehold of the premises to which the claim relates, then:

3516 (a) the reversioner in respect of the premises is<sup>5</sup> the person identified as such by the statutory provisions relating to such premises<sup>6</sup>; and

3517 (b) the person who owns the freehold of the premises, every person who owns any freehold interest which it is proposed to acquire<sup>7</sup> and every person who owns any leasehold interest which it is proposed to acquire<sup>8</sup> is a relevant landlord for those purposes<sup>9</sup>.

In the case of any claim to exercise the right to collective enfranchisement in relation to any premises the freehold of the whole of which is not owned by the same person:

3518 (i) the reversioner in respect of the premises is<sup>10</sup> the person identified as such by the statutory provisions relating to premises with multiple freeholds<sup>11</sup>; and

3519 (ii) every person who owns a freehold interest in the premises, every person who owns any freehold interest which it is proposed to acquire<sup>12</sup> and every person who owns any leasehold interest which it is proposed to acquire<sup>13</sup> is a relevant landlord for those purposes<sup>14</sup>.

The reversioner in respect of any premises must<sup>15</sup>, in a case to which heads (a) and (b) above or heads (i) and (ii) above apply, conduct on behalf of all the relevant landlords all proceedings arising out of any notice given with respect to the premises<sup>16</sup> whether the proceedings are for resisting or giving effect to the claim in question<sup>17</sup>.

1 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1560 et seq post.

4 Ibid s 9(1) (s 9(1), (2), (3) amended by the Housing Act 1996 s 107, Sch 10 para 3(2), (3), (5)). For these purposes, 'relevant landlord' and 'the reversioner' are to be construed in accordance with s 9 (as amended): s 38(1). As to special categories of landlord see PARA 1545 et seq ante.

5 See note 3 supra.

6 Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2)(a), Sch 1 Pt I (paras 1-5) (as amended): see PARAS 1560-1561 post.

7 Ie by virtue of ibid 1(2)(a) (as originally enacted or as prospectively amended): see PARA 1552 ante.

8 Ie proposed to acquire under or by virtue of ibid s 2(1)(a) or (b) (as originally enacted or as prospectively substituted): see PARA 1553 ante.

9 Ibid s 9(2) (as amended: see note 4 supra).

10 See note 3 supra.

11 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 Pt 1A (paras 5A-5E) (as added and prospectively amended): see PARAS 1562-1563 post.

12 See note 7 supra.

13 See note 8 supra.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 9(2A) (added by the Housing Act 1996 Sch 10 para 3(4)).

15 le subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 Pt II (paras 6-9) (as amended): see note 17 *infra*; and PARAS 1564-1566 *post*.

16 le under *ibid* s 13 (as amended): see PARA 1585 *post*.

17 *Ibid* s 9(3) (as amended: see note 4 *supra*). The authority given to the reversioner by s 9(3) (as so amended) does not extend to the bringing of proceedings under s 23(1) (see PARA 1611 *post*) on behalf of any of the other relevant landlords or preclude any of those landlords from bringing proceedings thereunder on his own behalf: Sch 1 para 9.

As to the giving of notices see PARA 1541 *ante*.

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## ***B. IDENTIFYING THE REVERSIONER IN COMPLEX CASES***

### **1560. Freeholder to be reversioner where premises have one freeholder.**

In respect of any premises the freehold of the whole of which is owned by the same person, but where it is proposed to acquire interests of persons other than the person who owns the freehold<sup>1</sup>, the reversioner is<sup>2</sup> the person who owns the freehold of those premises<sup>3</sup>.

1 le in a case to which the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2) (as amended) applies: see PARA 1559 *ante* at heads (a)-(b) in the text.

2 le subject to *ibid* s 9(2)(a), Sch 1 paras 2-4 (as amended): see PARA 1561 *post*.

3 *Ibid* Sch 1 para 1 (amended by the Housing Act 1996 s 107, Sch 10 para 14).

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### **1561. Replacement of freeholder by other relevant landlord where premises have one freeholder.**

The court<sup>1</sup> may, on the application of all the relevant landlords<sup>2</sup> of any premises, appoint to be the reversioner in respect of those premises, in place of the person designated by statute<sup>3</sup>, such person as may have been determined by agreement between them<sup>4</sup>.

If it appears to the court, on the application of a relevant landlord of any premises:

- 3520 (1) that the respective interests<sup>5</sup> of the relevant landlords of those premises, the absence or incapacity of the freeholder<sup>6</sup> or other special circumstances require that some person other than the freeholder should act as the reversioner in respect of the premises; or
- 3521 (2) that the freeholder is unwilling to act as the reversioner,

the court may appoint to be the reversioner in respect of those premises, in place of the person designated by statute<sup>7</sup> such person as it thinks fit<sup>8</sup>.

The court may also, on the application of any of the relevant landlords or of the nominee purchaser<sup>9</sup> (or, as from a day to be appointed<sup>10</sup>, on the application of the RTE company<sup>11</sup>) remove the reversioner in respect of any premises and appoint another person in his place, if it appears to the court proper to do so by reason of any delay or default, actual or apprehended, on the part of the reversioner<sup>12</sup>.

A person appointed by the court under any of the above provisions must be a relevant landlord but may be so appointed on such terms and conditions as the court thinks fit<sup>13</sup>.

1 For the meaning of 'the court' see PARA 1539 note 3 ante.

2 For the meaning of 'relevant landlord' see PARA 1559 ante.

3 In place of the person designated by the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2)(a), Sch 1 para 1 (as amended): see PARA 1560 ante.

4 Ibid Sch 1 para 2.

5 For the meaning of 'interest' see PARA 408 note 16 ante.

6 In the person referred to in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 1 (as amended): see PARA 1560 ante.

7 See note 3 supra.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 3.

9 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

10 In as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11 As to RTE companies see PARAS 1581-1583 post.

12 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 4 (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (2), as from a day to be appointed (see note 10 supra)).

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 5.

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## **1562. Initial reversioner where premises have multiple freeholders.**

In respect of any premises the freehold of the whole of which is not owned by the same person<sup>1</sup>, the reversioner is<sup>2</sup> the person specified in the initial notice<sup>3</sup> as the recipient<sup>4</sup>.

1    le in a case in which the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2A) (as added) applies: see PARA 1559 ante at heads (i)-(ii) in the text.

2    le subject to ibid s 9(2A)(a), Sch 1 paras 5B-5D (as added and prospectively amended): see PARA 1563 post.

3    le specified in the initial notice in accordance with ibid s 13(2A) (as added): see PARA 1585 post.

4    Ibid Sch 1 para 5A (added by the Housing Act 1996 s 107, Sch 10 para 15).

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### **1563. Change of reversioner where premises have multiple freeholders.**

The court<sup>1</sup> may, on the application of all the relevant landlords<sup>2</sup> of any premises, appoint to be the reversioner in respect of those premises, in place of the person designated by statute<sup>3</sup>, such person as may have been determined by agreement between them<sup>4</sup>.

If it appears to the court, on the application of a relevant landlord of any premises:

3522 (1) that the respective interests<sup>5</sup> of the relevant landlords of those premises, the absence or incapacity of the initial reversioner<sup>6</sup> or other special circumstances require that some person other than the initial reversioner should act as the reversioner in respect of the premises; or

3523 (2) that the initial reversioner is unwilling to act as the reversioner,

the court may appoint to be the reversioner in respect of those premises, in place of the person designated by statute<sup>7</sup>, such person as it thinks fit<sup>8</sup>.

The court may also, on the application of any of the relevant landlords or of the nominee purchaser<sup>9</sup> (or, as from a day to be appointed<sup>10</sup>, on the application of any of the relevant landlords or of the RTE company<sup>11</sup>), remove the reversioner in respect of any premises and appoint another person in his place, if it appears to the court proper to do so by reason of any delay or default, actual or apprehended, on the part of the reversioner<sup>12</sup>.

A person appointed by the court under any of the above provisions must be a relevant landlord but may be so appointed on such terms and conditions as the court thinks fit<sup>13</sup>.

1    For the meaning of 'the court' see PARA 1539 note 3 ante.

2    For the meaning of 'relevant landlord' see PARA 1559 ante.

3    le in place of the person designated by the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2A)(a), Sch 1 para 5A (as added): see PARA 1562 ante.

4    Ibid Sch 1 para 5B (Sch 1 paras 5B-5E added by the Housing Act 1996 s 107, Sch 10 para 15).

5    For the meaning of 'interest' see PARA 408 note 16 ante.

6     le the person referred to in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 5A (as added): see PARA 1562 ante.

7     See note 3 supra.

8     Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 5C (as added: see note 4 supra).

9     For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

10    le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11    As to RTE companies see PARAS 1581-1583 post.

12    Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 5D (as added (see note 4 supra); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (2), as from a day to be appointed (see note 10 supra)).

13    Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 5E (as added: see note 4 supra).

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### ***C. CONDUCT OF PROCEEDINGS ON BEHALF OF OTHER LANDLORDS***

#### **1564. Acts of reversioner binding on other landlords.**

Any notice given by or to the reversioner<sup>1</sup> following the giving of the initial notice<sup>2</sup> must<sup>3</sup> be given or received by him on behalf of all the relevant landlords<sup>4</sup>; and the reversioner may<sup>5</sup> on behalf and in the name of all or, as the case may be, any of those landlords:

- 3524 (1) deduce, evidence or verify the title to any property;
- 3525 (2) negotiate and agree<sup>6</sup> with the nominee purchaser<sup>7</sup> (or, as from a day to be appointed<sup>8</sup>, with the RTE company<sup>9</sup>), the terms of acquisition;
- 3526 (3) execute any conveyance<sup>10</sup> for the purpose of transferring any interest<sup>11</sup> to the nominee purchaser (or, as from a day to be appointed<sup>12</sup>, to the RTE company);
- 3527 (4) receive the price payable for the acquisition of any interest;
- 3528 (5) take or defend any legal proceedings<sup>13</sup> in respect of matters arising out of the initial notice<sup>14</sup>.

The reversioner's acts in relation to matters within the authority conferred on him<sup>15</sup> and any determination<sup>16</sup> of the court<sup>17</sup> or a leasehold valuation tribunal in proceedings between the reversioner and the nominee purchaser (or, as from a day to be appointed<sup>18</sup>, between the reversioner and the RTE company) are binding on the other relevant landlords and on their interests in the specified premises<sup>19</sup> or any other property; but in the event of dispute the reversioner or any of the other relevant landlords may apply to the court for directions as to the manner in which the reversioner should act in the dispute<sup>20</sup>.

If any of the other relevant landlords cannot be found, or his identity cannot be ascertained, the reversioner must apply to the court for directions; and the court may make such order as it

thinks proper with a view to giving effect to the rights of the participating tenants<sup>21</sup> (or, as from a day to be appointed<sup>22</sup>, the rights of the RTE company) and protecting the interests of other persons, but subject to any such directions:

- 3529 (a) the reversioner must proceed as in other cases;
- 3530 (b) any conveyance executed by the reversioner on behalf of that relevant landlord which identifies the interest to be conveyed has the same effect as if executed in his name; and
- 3531 (c) any sum paid as the price for the acquisition of that relevant landlord's interest, and any other sum payable to him by virtue of the statutory provisions relating to the purchase price payable<sup>23</sup>, must be paid into court<sup>24</sup>.

If the reversioner acts in good faith and with reasonable care and diligence, he is not liable to any of the other relevant landlords for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority conferred<sup>25</sup> on him<sup>26</sup>.

1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1565 et seq post) or s 74(3) (as amended) (see PARA 1740 post). For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2    For the meaning of 'the initial notice' see PARA 1585 post.

3    Ie without prejudice to the generality of the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3) (as amended); see PARA 1559 ante.

4    For the meaning of 'relevant landlord' see PARA 1559 ante.

5    See note 3 supra.

6    For these purposes, any reference to agreement in relation to all or any of the terms of acquisition is a reference to agreement subject to contract: Leasehold Reform, Housing and Urban Development Act 1993 s 38(4). For the meaning of 'the terms of acquisition' see PARA 1612 note 8 post.

7    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

8    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9    As to RTE companies see PARAS 1581-1583 post.

10   For these purposes, 'conveyance' includes assignment, transfer and surrender; and related expressions are to be construed accordingly: Leasehold Reform, Housing and Urban Development Act 1993 s 38(1).

11   For the meaning of 'interest' see PARA 408 note 16 ante.

12   See note 8 supra.

13   Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended).

14   Ibid s 9(3) (as amended), Sch 1 para 6(1) (Sch 1 para 6(1), (2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (2), as from a day to be appointed (see note 8 supra)). As to the giving of notices see PARA 1541 ante.

15   Ie by ibid s 9(3) (as amended): see PARA 1559 ante.

16   See note 13 supra.

17   For the meaning of 'the court' see PARA 1539 note 3 ante.

18   See note 8 supra.

19   For these purposes, any reference to the interest of a relevant landlord in the specified premises is a reference to the interest in those premises by virtue of which he is, in accordance with the Leasehold Reform,



Housing and Urban Development Act 1993 s 9(2)(b) (as amended) or s 9(2A)(b) (as added) (see PARA 1559 ante at heads (b), (ii) in the text), a relevant landlord: s 38(3) (amended by the Housing Act 1996 s 107(4), Sch 10 paras 1, 13). For the meaning of 'the specified premises' see PARA 1586 note 5 post.

20 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 6(2) (as amended: see note 14 supra).

21 For the meaning of 'the participating tenants' see PARAS 1571-1575 post.

22 See note 8 supra.

23 In the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 (as amended): see PARA 1624 et seq post.

24 Ibid Sch 1 para 6(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (3), as from a day to be appointed (see note 8 supra)).

25 See note 15 supra.

26 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 6(4).

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### **1565. Other landlords acting independently.**

Any of the other relevant landlords<sup>1</sup> is entitled<sup>2</sup>, at any time after the giving by the reversioner<sup>3</sup> of a counter-notice<sup>4</sup> and on giving notice of his intention to do so to both the reversioner and the nominee purchaser<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, to both the reversioner and the RTE company<sup>7</sup>):

3532 (1) to deal directly with the nominee purchaser (or, as from a day to be appointed<sup>8</sup>, with the RTE company) in connection with any of the specified matters<sup>9</sup> so far as relating to the acquisition of any interest<sup>10</sup> of his;

3533 (2) to be separately represented in any legal proceedings in which his title to any property comes in question, or in any legal proceedings relating to the terms of acquisition<sup>11</sup> so far as relating to the acquisition of any interest of his<sup>12</sup>.

If the nominee purchaser (or, as from a day to be appointed<sup>13</sup>, the RTE company) so requires by notice given to the reversioner and any of the other relevant landlords, that landlord must deal directly with the nominee purchaser (or the RTE company) for the purpose of deducing, evidencing or verifying the landlord's title to any property<sup>14</sup>.

Any of the other relevant landlords may by notice given to the reversioner require him to apply to a leasehold valuation tribunal for the determination by the tribunal of any of the terms of acquisition so far as relating to the acquisition of any interest of the landlord<sup>15</sup>.

Any of the other relevant landlords may also, on giving notice to the reversioner and the nominee purchaser (or, as from a day to be appointed<sup>16</sup>, to the reversioner and the RTE company), require that the price payable for the acquisition of his interest shall be paid by the nominee purchaser (or by the RTE company) to him, or to a person authorised by him to receive it, instead of to the reversioner; but, if, after being given proper notice of the time and method of completion with the nominee purchaser (or with the RTE company), either:

- 3534 (a) he fails to notify the reversioner of the arrangements made with the nominee purchaser (or with the RTE company) to receive payment; or  
 3535 (b) having notified the reversioner of those arrangements, the arrangements are not duly implemented,

the reversioner is authorised to receive the payment for him; and the reversioner's written receipt for the amount payable is a complete discharge to the nominee purchaser (or to the RTE company)<sup>17</sup>.

1 For the meaning of 'relevant landlord' see PARA 1559 ante.

2 Ie notwithstanding anything in the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3) (as amended) (see PARA 1559 ante) or s 9(3), Sch 1 para 6 (as amended) (see PARA 1564 ante).

3 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

4 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 post.

5 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

6 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

7 As to RTE companies see PARAS 1581-1583 post.

8 See note 6 supra.

9 Ie any of the matters specified in the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3), Sch 1 para 6(1)(b)(i)-(iii) (as amended): see PARA 1564 ante at heads (1)-(3) in the text.

10 For the meaning of 'interest' see PARA 408 note 16 ante.

11 For the meaning of 'the terms of acquisition' see PARA 1612 note 8 post.

12 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 7(1) (Sch 1 para 7(1), (2), (4) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (2), as from a day to be appointed (see note 6 supra)). As to the giving of notices see PARA 1541 ante.

If a relevant landlord acts independently under the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 7 (as so amended), he is entitled to require any party to claims under the 1993 Act (as described in Sch 1 para 7(1)(b) (see head (2) in the text) to supply him, on payment of the reasonable costs of copying, with copies of all documents which that party has served on the other parties to the claim: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.7.

13 See note 6 supra.

14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 7(2) (as amended: see note 12 supra).

15 Ibid Sch 1 para 7(3).

16 See note 6 supra.

17 Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 7(4) (as amended: see note 12 supra).

PROCEEDINGS ON BEHALF OF OTHER LANDLORDS/1566. Obligations of other landlords to reversioner.

### **1566. Obligations of other landlords to reversioner.**

It is the duty of each of the other relevant landlords<sup>1</sup>:

- 3536 (1) to give<sup>2</sup> the reversioner<sup>3</sup> all such information and assistance as he may reasonably require; and
- 3537 (2) after being given proper notice of the time and method of completion with the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, with the RTE company<sup>6</sup>) to ensure that all deeds and other documents that ought on his part to be delivered to the nominee purchaser (or to the RTE company) on completion are available for the purpose<sup>7</sup>;

and, if any of the other relevant landlords fails to comply with these provisions, that relevant landlord must indemnify the reversioner against any liability incurred by the reversioner in consequence of the failure<sup>8</sup>.

Each of the other relevant landlords must make such contribution as is just to the costs and expenses properly incurred by the reversioner<sup>9</sup> which are not recoverable or not recovered from the nominee purchaser (or, as from a day to be appointed<sup>10</sup>, from the RTE company) or any other person<sup>11</sup>.

<sup>1</sup> For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.

<sup>2</sup> Ie subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3), Sch 1 para 7 (as amended): see PARA 1565 ante.

<sup>3</sup> For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

<sup>4</sup> For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

<sup>5</sup> Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

<sup>6</sup> As to RTE companies see PARAS 1581-1583 post.

<sup>7</sup> Ie including in the case of registered land the land certificate and any other documents necessary to perfect the nominee purchaser's (or the RTE company's) title: Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 8(1)(b) (as amended: see note 8 infra). However, land certificates are no longer issued although official copies of the register and of the title plan are available as is a 'title information document' explaining why the official copy has been issued and how to obtain further copies: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1129.

<sup>8</sup> Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 8(1) (Sch 1 para 8 prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 36(1), (2), as from a day to be appointed (see note 5 supra)). As to the giving of notices see PARA 1541 ante.

<sup>9</sup> Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3) (as amended): see PARA 1559 ante.

<sup>10</sup> See note 5 supra.

<sup>11</sup> Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 8(2) (as amended: see note 8 supra).

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#### **(iv) Preliminary Inquiries by Tenants**

##### **1567. Right of qualifying tenant to obtain information about superior interests etc.**

A qualifying tenant<sup>1</sup> of a flat<sup>2</sup> may give to any immediate landlord<sup>3</sup> of his or to any person receiving rent on behalf of any immediate landlord of his a notice requiring the recipient to give the tenant, so far as known to the recipient, the name and address in England and Wales of every person who owns a freehold interest in the relevant premises<sup>4</sup> and the name and address of every other person who has a specified<sup>5</sup> interest<sup>6</sup>.

In relation to a qualifying tenant of a flat, these provisions apply to the following interests, namely:

- 3538 (1) the freehold of any property not contained in the relevant premises which is demised by the lease<sup>7</sup> held by the tenant or which the tenant is entitled under the terms of his lease to use in common with other persons; and
- 3539 (2) any leasehold interest in the relevant premises or in any such property which is superior to that of any immediate landlord of the tenant<sup>8</sup>.

Any qualifying tenant of a flat may give to any person who owns a freehold interest in the relevant premises a notice requiring him to give the tenant, so far as known to him, the name and address of every person, apart from the tenant, who is:

- 3540 (a) a tenant of the whole of the relevant premises; or
  - 3541 (b) a tenant or licensee of any separate set or sets of premises contained in the relevant premises; or
  - 3542 (c) a tenant or licensee of the whole or any part of any common parts<sup>9</sup> so contained or of any property not so contained:
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- 49. (i) which is demised by the lease held by a qualifying tenant of a flat contained in the relevant premises; or
  - 50. (ii) which any such qualifying tenant is entitled under the terms of his lease to use in common with other persons<sup>10</sup>.
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Any such qualifying tenant may also give to any person who owns a freehold interest in the relevant premises, to any person who owns a freehold interest in any such property as is mentioned in head (c) above or to any person falling within head (a), head (b) or head (c) above a notice requiring him to give the tenant:

- 3543 (A) such information relating to his interest in the relevant premises or, as the case may be, in any such property; or
- 3544 (B) so far as known to him, such information relating to any interest derived, whether directly or indirectly, out of that interest,

as is specified in the notice, where the information is reasonably required by the tenant in connection with the making of a claim (or, as from a day to be appointed<sup>11</sup>, in connection with

the making by an RTE company<sup>12</sup> of a claim) to exercise the right to collective enfranchisement<sup>13</sup> in relation to the whole or part of the relevant premises<sup>14</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 For these purposes, 'the relevant premises', in relation to any qualifying tenant of a flat, means (1) if the person who owns the freehold interest in the flat owns, or the persons who own the freehold interests in the flat own, the freehold of the whole of the building in which the flat is contained, that building; or (2) if that person owns, or those persons own, the freehold of part only of that building, that part of that building; and any reference to an interest in the relevant premises includes an interest in part of those premises: Leasehold Reform, Housing and Urban Development Act 1993 s 11(9) (definition amended by the Housing Act 1996 s 107, Sch 10 para 5(1), (7)). For the meaning of 'interest' see PARA 408 note 16 ante.

5 Ie an interest to which the Leasehold Reform, Housing and Urban Development Act 1993 s 11(2) (as amended) applies: see the text and notes 7-8 infra.

6 Ibid s 11(1) (s 11(1)-(3) amended by the Housing Act 1996 s 107, Sch 10 para 5(1)-(4)). As to the time for compliance see PARA 1568 post; and as to the giving of notices see PARA 1541 ante.

7 For the meaning of 'lease' see PARA 1535 note 3 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 11(2) (as amended: see note 6 supra).

9 For the meaning of 'common parts' see PARA 411 note 3 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 11(3) (as amended: see note 6 supra). As to the time for compliance see PARA 1568 post.

11 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

12 As to RTE companies see PARAS 1581-1583 post.

13 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 11(4) (amended by the Housing Act 1996 ss 107, 227, Sch 10 para 5(5), Sch 19 Pt V; prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 5, as from a day to be appointed (see note 11 supra)). As to the effect of such a notice and the time for compliance see PARA 1568 post.

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### **1568. Effect of notice requiring information about superior interests etc.**

Where a notice requiring information about superior interests etc<sup>1</sup> is given by a qualifying tenant<sup>2</sup>, the following rights are exercisable by him in relation to the recipient of the notice, namely:

3545 (1) a right, on giving reasonable notice, to be provided with a list of specified documents<sup>3</sup>;

- 3546 (2) a right to inspect, at any reasonable time and on giving reasonable notice, any of those specified documents; and
- 3547 (3) a right, on payment of a reasonable fee, to be provided with a copy of any documents which are contained in any list provided under head (1) above or have been inspected under head (2) above<sup>4</sup>.

These provisions apply to any document in the custody or under the control of the recipient of the notice requiring such information<sup>5</sup>:

- 3548 (a) sight of which is reasonably required<sup>6</sup> in connection with the making of a claim to exercise the right to collective enfranchisement in relation to the whole or part of the relevant premises<sup>7</sup>; and
- 3549 (b) which, on a proposed sale by a willing seller to a willing buyer of the recipient's interest in the relevant premises or, as the case may be, in any specified property<sup>8</sup>, the seller would be expected to make available to the buyer, whether at or before contract or completion<sup>9</sup>.

Any person who:

- 3550 (i) is required by a notice<sup>10</sup> to give any information to a qualifying tenant; or
- 3551 (ii) is required by a qualifying tenant<sup>11</sup> to supply any list of documents, to permit the inspection of any documents or to supply a copy of any documents,

must comply with that requirement within the period of 28 days beginning with the date of the giving of the notice referred to in head (i) above or, as the case may be, with the date of the making of the requirement referred to in head (ii) above<sup>12</sup>.

Where a person has received a notice requiring information<sup>13</sup> and within the period of six months beginning with the date of receipt of the notice, he:

- 3552 (A) disposes of any interest, whether legal or equitable, in the relevant premises or in any specified property<sup>14</sup> otherwise than by the creation of an interest by way of security for a loan; or
- 3553 (B) acquires any such interest, otherwise than by way of security for a loan,

then, unless that disposal or acquisition has already been notified to the qualifying tenant<sup>15</sup>, he must notify the qualifying tenant of that disposal or acquisition within the period of 28 days beginning with the date when it occurred<sup>16</sup>.

1    le a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 11(4) (as amended): see PARA 1567 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

2    For the meaning of 'qualifying tenant' see PARA 1557 ante.

3    le documents to which the Leasehold Reform, Housing and Urban Development Act 1993 s 11(6) (as amended) applies: see the text and notes 5-9 infra. For these purposes, 'document' means anything in which information of any description is recorded, and in relation to a document in which information is recorded otherwise than in legible form any reference to sight of the document is to sight of the information in legible form: Leasehold Reform, Housing and Urban Development Act 1993 s 11(9) (definition substituted by the Civil Evidence Act 1995 s 15(1), Sch 1 para 17).

4    Leasehold Reform, Housing and Urban Development Act 1993 s 11(5). As to the giving of notices see PARA 1541 ante.

5    See note 1 supra.

6 le by the qualifying tenant.

7 le such a claim as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 11(4) (as amended). For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante; and for the meaning of 'the relevant premises' see PARA 1567 note 4 ante.

8 le any such property as is mentioned in *ibid* s 11(3)(c): see PARA 1567 ante at head (c) in the text.

9 *Ibid* s 11(6) (prospectively amended, so as to omit the words 'by the qualifying tenant' (see note 6 supra), by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed).

10 le a notice under any of the Leasehold Reform, Housing and Urban Development Act 1993 s 11(1)-(4) (as amended): see PARA 1567 ante.

11 le under *ibid* s 11(5): see the text and notes 1-4 supra.

12 *Ibid* s 11(7).

13 See note 1 supra.

14 See note 8 supra.

15 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 11(7): see the text and notes 10-12 supra.

16 *Ibid* s 11(8) (amended by the Housing Act 1996 s 107, Sch 10 para 5(1), (6)).

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### **1569. Right of qualifying tenant to obtain information about other matters.**

Any notice given by a qualifying tenant<sup>1</sup> to obtain information<sup>2</sup> must, in addition to any other requirement duly imposed<sup>3</sup>, require the recipient to give the tenant the following information so far as known to the recipient<sup>4</sup>:

3554 (1) whether the tenant's flat<sup>5</sup> is comprised in any property which is qualifying property<sup>6</sup>; and

3555 (2) if an application for designation or for a direction is pending<sup>7</sup>, the date of the application in question<sup>8</sup>.

Where:

3556 (a) the recipient of a notice requiring information given by the tenant<sup>9</sup> has informed the tenant, in accordance with the above provisions, of any such application as is referred to in head (2) above; and

3557 (b) within the period of six months beginning with the date of the receipt of the notice, the application is either granted or refused by the Commissioners for Revenue and Customs or is withdrawn by the applicant,

the recipient must, within the period of 28 days beginning with the date of the granting, refusal or withdrawal of the application, notify the tenant that it has been granted, refused or withdrawn<sup>10</sup>.

Further, until a day to be appointed<sup>11</sup>, any notice given by a qualifying tenant to obtain information<sup>12</sup> must, in addition to any other requirement duly imposed<sup>13</sup>, require the recipient to give the tenant the following information:

- 3558 (i) whether the recipient has received in respect of any premises containing the tenant's flat a notice claiming to exercise the right to collective enfranchisement<sup>14</sup> in respect of which the relevant claim<sup>15</sup> is still current or a copy of such a notice; and
- 3559 (ii) if so, the date on which that notice was given and the name and address of the nominee purchaser for the time being appointed<sup>16</sup> in relation to that claim<sup>17</sup>.

Until that day, where:

- 3560 (A) within the period of six months beginning with the date of receipt of a tenant's notice requiring information<sup>18</sup>, the recipient of the notice receives in respect of any premises containing the tenant's flat a notice claiming to exercise the right to collective enfranchisement or a copy of such a notice; and
- 3561 (B) the tenant is not one of the qualifying tenants by whom that notice is given,

the recipient must, within the period of 28 days beginning with the date of receipt of the notice claiming to exercise the right to collective enfranchisement or, as the case may be, the copy, notify the tenant of the date on which the notice was given and of the name and address of the nominee purchaser for the time being appointed in relation to the relevant claim<sup>19</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 Ie any notice given under the Leasehold Reform, Housing and Urban Development Act 1993 s 11(4) (as amended): see PARA 1567 ante.

3 Ie any other requirement imposed in accordance with *ibid* s 11(4) (as amended).

4 *Ibid* s 12(1)(b). As to the giving of notices see PARA 1541 ante.

5 For the meaning of 'flat' see PARA 1533 note 2 ante.

6 Ie any property in the case of which any of the Leasehold Reform, Housing and Urban Development Act 1993 s 31(2)(a)-(d) is applicable: see PARA 1622 post.

7 Ie if *ibid* s 31(2)(b) or (d) is applicable.

8 *Ibid* s 12(3).

9 See note 2 *supra*.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 12(5) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).

11 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

12 See note 2 *supra*.

13 See note 3 *supra*.

14 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 post.

15 For these purposes, 'the relevant claim', in relation to a notice under *ibid* s 13 (as amended), means the claim in respect of which that notice is given; and, for the purposes of s 12(2) (prospectively repealed), any



such claim is current if (1) that notice continues in force in accordance with s 13(11) (as amended) (see PARA 1587 post); or (2) a binding contract entered into in pursuance of that notice remains in force; or (3) where an order has been made under s 24(4)(a) or (b) (as amended) (see PARA 1612 post) or s 25(6)(a) or (b) (as amended) (see PARA 1613 post) with respect to any such premises as are referred to in s 12(2)(a) (prospectively repealed), any interests which by virtue of the order fall to be vested in the nominee purchaser have yet to be so vested: s 12(6) (s 12(1)(a), (2), (4), (6) prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 11 supra). For the meaning of 'interest' see PARA 408 note 16 ante; and for the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

16    le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 15 (prospectively repealed): see PARAS 1576-1577 post.

17    Ibid s 12(1)(a), (2) (prospectively repealed: see note 15 supra).

18    See note 2 supra.

19    Leasehold Reform, Housing and Urban Development Act 1993 s 12(4) (prospectively repealed: see note 15 supra).

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## **(v) Conduct of Tenants' Proceedings for Collective Enfranchisement**

### **A. INTRODUCTION**

#### **1570. Current and prospective means of conducting tenants' proceedings for collective enfranchisement.**

At the date at which this title states the law, all proceedings arising out of the initial notice<sup>1</sup> are conducted by the nominee purchaser<sup>2</sup> on behalf of the participating tenants<sup>3</sup>; and statutory provision is made for the identification of those participating tenants<sup>4</sup> and for the appointment and replacement of the nominee purchaser<sup>5</sup>.

The Commonhold and Leasehold Reform Act 2002, however, makes prospective changes to the means of conducting the proceedings for collective enfranchisement. As from a day to be appointed under that Act<sup>6</sup>, there is to be an RTE company<sup>7</sup> in relation to the premises and that company will conduct the proceedings. Before making a claim to exercise the right to collective enfranchisement, the RTE company must issue a notice inviting qualifying tenants<sup>8</sup> who are not participating members<sup>9</sup> of the company to become such members<sup>10</sup>.

1    For the meaning of 'the initial notice' see PARA 1585 post.

2    As to the nominee purchaser see PARA 1576 et seq post.

3    As to the participating tenants see PARA 1571 et seq post.

4    See the Leasehold Reform, Housing and Urban Development Act 1993 s 14 (prospectively repealed); and PARA 1571 et seq post.

5    See ibid ss 15, 16 (prospectively repealed); and PARA 1576 et seq post.

6    le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

- 7 As to RTE companies see PARAS 1581-1583 post.
- 8 For the meaning of 'qualifying tenant' see PARA 1557 ante.
- 9 As to participating members see PARA 1582 post.
- 10 See PARA 1584 post.

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## ***B. PARTICIPATING TENANTS AND THE NOMINEE PURCHASER***

### **(A) PARTICIPATING TENANTS**

#### **1571. Participating tenants; in general.**

At the date at which this title states the law, the following provisions have effect. In relation to any claim to exercise the right to collective enfranchisement<sup>1</sup>, the participating tenants are<sup>2</sup> the following persons, namely:

- 3562 (1) in relation to the relevant date<sup>3</sup>, the qualifying tenants<sup>4</sup> by whom the initial notice<sup>5</sup> is given; and
- 3563 (2) in relation to any time falling after that date, such of those qualifying tenants as for the time being remain qualifying tenants of flats<sup>6</sup> contained in the specified premises<sup>7</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>8</sup>, as from a day to be appointed under that Act<sup>9</sup>.

1 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

2 Ie subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 14 (see the text and notes 3-7 infra; and PARAS 1572-1575 post) and s 13(13), Sch 3 Pt I (paras 1-10) (as amended) (see PARA 1590 et seq post).

3 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

4 For the meaning of 'qualifying tenant' see PARA 1557 ante.

5 For the meaning of 'the initial notice' see PARA 1585 post.

6 For the meaning of 'flat' see PARA 1533 note 2 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 14(1) (prospectively repealed: see the text and notes 8-9 infra). For these purposes, 'the participating tenants' is to be construed in accordance with s 14 (as so repealed): s 38(1) (definition prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 9 infra)).

Nothing in the Leasehold Reform, Housing and Urban Development Act 1993 s 14 (as so repealed) has effect for requiring or authorising anything to be done at any time after a binding contract is entered into in pursuance of the initial notice: s 14(11) (as so repealed). For these purposes, the reference to a binding contract being

entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: ss 24(4), 25(6), Sch 5 para 5(1), (2)(a) (Sch 5 para 5(2)(a) as so repealed). As to vesting orders see PARA 1615 et seq post. For the meaning of 'the specified premises' see PARA 1586 note 5 post.

8 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

9 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### **1572. Assignee of lease.**

At the date at which this title states the law, the following provisions have effect. Where the lease<sup>1</sup> by virtue of which a participating tenant<sup>2</sup> is a qualifying tenant<sup>3</sup> of his flat<sup>4</sup> is assigned to another person, the assignee<sup>5</sup> of the lease must, within the period of 14 days beginning with the date of the assignment, notify the nominee purchaser<sup>6</sup>:

3564 (1) of the assignment; and

3565 (2) as to whether or not the assignee is electing to participate in the proposed acquisition<sup>7</sup>.

Where, however, a qualifying tenant of a flat contained in the specified premises<sup>8</sup>:

3566 (a) is not one of the persons by whom the initial notice was given; and

3567 (b) is not an assignee of the lease of a participating tenant<sup>9</sup>,

he may elect<sup>10</sup> to participate in the proposed acquisition, but only with the agreement of all the persons who are for the time being participating tenants; and, if he does so elect, he must notify the nominee purchaser forthwith of his election<sup>11</sup>.

Where a person so notifies<sup>12</sup> the nominee purchaser of his election to participate in the proposed acquisition, he is regarded as a participating tenant<sup>13</sup> as from the date of the assignment or agreement<sup>14</sup> and so long as he remains a qualifying tenant of a flat contained in the specified premises<sup>15</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>16</sup>, as from a day to be appointed under that Act<sup>17</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'the participating tenants' see PARA 1571 ante.

3 For the meaning of 'qualifying tenant' see PARA 1557 ante.

4 For the meaning of 'flat' see PARA 1533 note 2 ante.

5 For these purposes, references to assignment include an assent by personal representatives and assignment by operation of law, where the assignment is (1) to a trustee in bankruptcy; or (2) to a mortgagee under the Law of Property Act 1925 s 89(2) (foreclosure of leasehold mortgage: see MORTGAGE vol 77 (2010) PARA

607); and references to an assignee are to be construed accordingly: Leasehold Reform, Housing and Urban Development Act 1993 s 14(10) (prospectively repealed: see the text and notes 16-17 infra).

6 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 14(2) (prospectively repealed: see the text and notes 16-17 infra). See also PARA 1571 note 7 ante.

8 For the meaning of 'the specified premises' see PARA 1586 note 5 post.

9 le such as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 14(2) (prospectively repealed): see the text and notes 1-7 supra.

10 le subject to ibid s 13(13), Sch 3 para 8 (prospectively repealed): see PARA 1597 post.

11 Ibid s 14(3) (prospectively repealed: see the text and notes 16-17 infra). See also PARA 1571 note 7 ante.

12 le under ibid s 14(2) or (3) (prospectively repealed).

13 le for the purposes of ibid Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1573 et seq post.

14 le the assignment or agreement referred to in ibid s 14(2) or (3) (prospectively repealed).

15 Ibid s 14(4) (prospectively repealed: see the text and notes 16-17 infra). See also PARA 1571 note 7 ante.

16 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

17 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### **1573. Death of participating tenant.**

At the date at which this title states the law, the following provisions have effect. Where a participating tenant<sup>1</sup> dies, his personal representatives must, within the period of 56 days beginning with the date of death, notify the nominee purchaser<sup>2</sup>:

3568 (1) of the death of the tenant; and

3569 (2) as to whether or not the personal representatives are electing to withdraw from participation in the proposed acquisition;

and, unless the personal representatives of a participating tenant so notify the nominee purchaser that they are electing to withdraw from participation in that acquisition, they are regarded<sup>3</sup> as a participating tenant as from the date of the death of the tenant and so long as his lease<sup>4</sup> remains vested in them<sup>5</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>6</sup>, as from a day to be appointed under that Act<sup>7</sup>.

1 For the meaning of 'the participating tenants' see PARA 1571 ante.

2 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

3 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1574 et seq post.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 14(5) (prospectively repealed: see the text and notes 6-7 infra). See also PARA 1571 note 7 ante.

6 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

7 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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#### **1574. Assignee or personal representatives as participating tenant.**

At the date at which this title states the law, the following provisions have effect. Where<sup>1</sup> any assignee<sup>2</sup> or personal representatives of a participating tenant<sup>3</sup> ('the tenant') is or are to be regarded as a participating tenant<sup>4</sup>, any arrangements made between the nominee purchaser<sup>5</sup> and the participating tenants and having effect immediately before the date of the assignment or, as the case may be, the date of death have effect as from that date:

3570 (1) with such modifications as are necessary for substituting the assignee or, as the case may be, the personal representatives as a party to the arrangements in the place of the tenant; or

3571 (2) in the case of an assignment by a person who remains a qualifying tenant of a flat<sup>6</sup> contained in the specified premises<sup>7</sup>, with such modifications as are necessary for adding the assignee as a party to the arrangements<sup>8</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>9</sup>, as from a day to be appointed under that Act<sup>10</sup>.

1 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 14(4) (prospectively repealed) (see PARA 1572 ante) or s 14(5) (prospectively repealed) (see PARA 1573 ante).

2 For the meaning of 'assignee' see PARA 1572 note 5 ante.

3 For the meaning of 'the participating tenants' see PARAS 1571-1573 ante.

4 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1575 et seq post.

5 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.

6 For the meaning of 'flat' see PARA 1533 note 2 ante.

7 For the meaning of 'the specified premises' see PARA 1586 note 5 post.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 14(6) (prospectively repealed: see the text and notes 9-10 infra). See also PARA 1571 note 7 ante.

9 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

10 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### 1575. Effect of notification.

At the date at which this title states the law, the following provisions have effect. Where the nominee purchaser<sup>1</sup> receives a notification<sup>2</sup>, he must, within the period of 28 days beginning with the date of receipt of the notification, give a notice<sup>3</sup> to the reversioner<sup>4</sup> in respect of the specified premises<sup>5</sup> and give a copy of that notice to every other relevant landlord<sup>6</sup>.

Such a notice is a notice stating:

3572 (1) in the case of a notification of an assignment<sup>7</sup>:

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51. (a) the date of the assignment and the name and address of the assignee;

52. (b) that the assignee has or, as the case may be, has not become a participating tenant<sup>8</sup>; and

53. (c) if he has become a participating tenant<sup>9</sup>, that he has become such a tenant in place of his assignor;

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3573 (2) in the case of a notification of an election to participate in the proposed acquisition<sup>10</sup>, the name and address of the person who has become a participating tenant<sup>11</sup>; and

3574 (3) in the case of a notification on the death of a participating tenant<sup>12</sup>:

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54. (a) the date of death of the deceased tenant;

55. (b) the names and addresses of the personal representatives of the tenant; and

56. (c) that those persons are or, as the case may be, are not to be regarded<sup>13</sup> as a participating tenant<sup>14</sup>.

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Every notice under heads (1) to (3) above:

3575 (i) must identify the flat<sup>15</sup> with respect to which it is given; and

3576 (ii) if it states that any person or persons is or are to be regarded as a participating tenant, must be signed by the person or persons in question<sup>16</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>17</sup>, as from a day to be appointed under that Act<sup>18</sup>.

- 1 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 post.
- 2 Ie a notification under the Leasehold Reform, Housing and Urban Development Act 1993 s 14(2) or (3) (prospectively repealed) (see PARA 1572 ante) or s 14(5) (prospectively repealed) (see PARA 1573 ante).
- 3 Ie under ibid s 14(8) (prospectively repealed): see the text and notes 7-14 infra.
- 4 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.
- 5 For the meaning of 'the specified premises' see PARA 1586 note 5 post.
- 6 Leasehold Reform, Housing and Urban Development Act 1993 s 14(7) (prospectively repealed: see the text and notes 17-18 infra). See also PARA 1571 note 7 ante. As to the giving of notices see PARA 1541 ante. For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.
- 7 Ie in the case of a notification under ibid s 14(2) (prospectively repealed). For the meaning of 'assignment' see PARA 1572 note 5 ante.
- 8 Ie in accordance with ibid s 14(4) (prospectively repealed): see PARA 1572 ante.
- 9 Ie otherwise than in a case to which ibid s 14(6)(b) (prospectively repealed) applies: see PARA 1574 ante at head (2) in the text.
- 10 Ie in the case of a notification under ibid s 14(3) (prospectively repealed).
- 11 See note 8 supra.
- 12 Ie in the case of a notification under the Leasehold Reform, Housing and Urban Development Act 1993 s 14(5) (prospectively repealed).
- 13 Ie in accordance with ibid s 14(5) (prospectively repealed).
- 14 Ibid s 14(8) (prospectively repealed: see the text and notes 17-18 infra). See also PARA 1571 note 7 ante.
- 15 For the meaning of 'flat' see PARA 1533 note 2 ante.
- 16 Leasehold Reform, Housing and Urban Development Act 1993 s 14(9) (prospectively repealed: see the text and notes 17-18 infra). See also PARA 1571 note 7 ante.
- 17 Ie by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.
- 18 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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## (B) THE NOMINEE PURCHASER

### **1576. Appointment.**

At the date at which this title states the law, the following provisions have effect. The nominee purchaser must conduct on behalf of the participating tenants<sup>1</sup> all proceedings arising out of the initial notice<sup>2</sup>, with a view to the eventual acquisition by him, on their behalf, of such freehold and other interests<sup>3</sup> as fall to be so acquired under a contract entered into in pursuance of that notice<sup>4</sup>.

In relation to any claim to exercise the right to collective enfranchisement<sup>5</sup> with respect to any premises, the nominee purchaser must be such person or persons as may for the time being be appointed for these purposes by the participating tenants; and in the first instance the nominee purchaser must be the person or persons specified<sup>6</sup> in the initial notice<sup>7</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>8</sup>, as from a day to be appointed under that Act<sup>9</sup>.

1 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

2 For the meaning of 'the initial notice' see PARA 1585 post.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 15(1) (prospectively repealed: see the text and notes 8-9 infra). For these purposes, 'the nominee purchaser' is to be construed in accordance with s 15 (prospectively repealed): s 38(1) (definition as so repealed).

Nothing in s 15 (prospectively repealed) applies in relation to the termination of the appointment of the nominee purchaser, or of any of the persons constituting the nominee purchaser, at any time after a binding contract is entered into in pursuance of the initial notice; and in Pt I Ch I (ss 1-38) (as amended) references to the nominee purchaser, so far as referring to anything done by or in relation to the nominee purchaser at any time falling after such a contract is so entered into, are references to the person or persons constituting the nominee purchaser at the time when the contract is entered into or such other person as is for the time being the purchaser under the contract: s 15(12) (prospectively repealed: see the text and notes 8-9 infra). For these purposes, except in so far as s 15(12) (prospectively repealed) provides for the interpretation of references to the nominee purchaser, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: ss 24(4), 25(6), Sch 5 para 5(1), (2)(b) (Sch 5 para 5(2)(b) prospectively repealed: see the text and notes 8-9 infra). As to vesting orders see PARA 1615 et seq post.

5 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

6 In pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(f) (as originally enacted): see PARA 1586 post at head (6) in the text.

7 Ibid s 15(2) (prospectively repealed: see the text and notes 8-9 infra).

8 In the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

9 In the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### **1577. Termination of appointment.**

At the date at which this title states the law, the following provisions have effect. The appointment of any person as the nominee purchaser<sup>1</sup>, or as one of the persons constituting the nominee purchaser, may be terminated by the participating tenants<sup>2</sup> by the giving of a notice stating that that person's appointment is to terminate on the date on which the notice is given<sup>3</sup>. Any such notice must be given:

- 3577 (1) to the person whose appointment is being terminated; and



3578 (2) to the reversioner in respect of the specified premises<sup>4</sup>.

Any such notice must in addition either:

3579 (a) specify the name or names of the person or persons constituting the nominee purchaser as from the date of the giving of the notice, and an address in England and Wales at which notices may be given to that person or those persons<sup>5</sup>; or

3580 (b) state that the following particulars will be contained in a further notice given to the reversioner within the period of 28 days beginning with that date, namely:

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57. (i) the name of the person or persons for the time being constituting the nominee purchaser;

58. (ii) if falling after that date, the date of appointment of that person or of each of those persons; and

59. (iii) an address in England and Wales at which notices may be given to that person or those persons;

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and the appointment of any person by way of replacement for the person whose appointment is being terminated is not valid unless his name is specified, or is one of those specified, under head (a) or head (b) above<sup>6</sup>.

Where the appointment of any person is so terminated, anything done by or in relation to the nominee purchaser before the date of termination of that person's appointment is to be treated, so far as necessary for the purpose of continuing its effect, as having been done by or in relation to the nominee purchaser as constituted on or after that date<sup>7</sup>.

Where the appointment of any person is so terminated, he is not liable<sup>8</sup> for any costs incurred in connection with the proposed acquisition<sup>9</sup> at any time after the date of termination of his appointment; but, if:

3581 (A) at any such time he is requested by the nominee purchaser for the time being to supply to the nominee purchaser, at an address in England and Wales specified in the request, all or any documents in his custody or under his control that relate to that acquisition; and

3582 (B) he fails without reasonable cause to comply with any such request or is guilty of any unreasonable delay in complying with it,

he is liable for any costs which are incurred by the nominee purchaser, or for which the nominee purchaser is liable<sup>10</sup>, in consequence of the failure<sup>11</sup>.

Where two or more persons together constitute the nominee purchaser and the appointment of any, but not both or all, of them is so terminated without any person being appointed by way of immediate replacement, the person or persons remaining for the time being constitutes or constitute the nominee purchaser<sup>12</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>13</sup>, as from a day to be appointed under that Act<sup>14</sup>.

1 As to the appointment of the nominee purchaser see PARA 1576 ante.

2 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 s 15(3) (prospectively repealed: see the text and notes 13-14 *infra*). See also PARA 1576 note 4 *ante*. As to the giving of notices see PARA 1541 *ante*.

Where a notice given under s 15(3) (as so repealed) contains such a statement as is mentioned in s 15(5)(b) (prospectively repealed) (see head (b) in the text) and as a result of the termination of the appointment in question there is no nominee purchaser for the time being, the running of any period which (1) is prescribed by or under Pt I (ss 1-103) (as amended) for the giving of any other notice or the making of any application; and (2) would otherwise expire during the period beginning with the date of the giving of the notice under s 15(3) (as so repealed) and ending with the date when the particulars specified in s 15(5)(b) (prospectively repealed) are notified to the reversioner, is suspended throughout the period mentioned in head (2) in the text: s 15(9) (as so repealed).

If, however, the circumstances are as mentioned in s 15(9)(a), (b) (as so repealed) (see heads (1)-(2) *supra*) but the particulars specified in s 15(5)(b) (prospectively repealed) are not notified to the reversioner within the period of 28 days specified therein, the initial notice is deemed to have been withdrawn at the end of that period: s 15(10) (as so repealed). As to the liability for costs where the initial notice is so deemed to have been withdrawn see s 29(7) (prospectively repealed); and PARA 1620 note 11 *post*; and for the meaning of 'the initial notice' see PARA 1585 *post*.

A copy of any notice given under s 15(3) (as so repealed) or s 15(5)(b) (prospectively repealed) must be given by the participating tenants to every relevant landlord, other than the reversioner, to whom the initial notice or a copy of it was given in accordance with s 13 (as amended) (see PARAS 1585-1587 *post*) and s 13(13), Sch 3 Pt II (paras 11-14) (as amended) (see PARAS 1598-1600 *post*); and, where a notice under s 15(3) (as so repealed) terminates the appointment of a person who is one of two or more persons together constituting the nominee purchaser, a copy of the notice must also be so given to every other person included among those persons: s 15(11) (as so repealed). For the meaning of 'relevant landlord' see PARA 1559 *ante*; and for the meaning of 'the reversioner' see PARAS 1559-1563 *ante*. As to special categories of landlord see PARA 1545 *et seq ante*.

4 *Ibid* s 15(4) (prospectively repealed: see the text and notes 13-14 *infra*). For the meaning of 'the specified premises' see PARA 1586 note 5 *post*.

5 *Ie* under *ibid* Pt I Ch I (ss 1-38) (as amended): see PARA 1552 *et seq ante*, PARA 1578 *et seq post*.

6 *Ibid* s 15(5) (prospectively repealed: see the text and notes 13-14 *infra*). See also note 3 *supra*.

7 *Ibid* s 15(6) (prospectively repealed: see the text and notes 13-14 *infra*).

8 *Ie* under *ibid* s 33 (as originally enacted): see PARA 1645 *post*.

9 See note 5 *supra*.

10 See note 8 *supra*.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 15(7) (prospectively repealed: see the text and notes 13-14 *infra*).

12 *Ibid* s 15(8).

13 *Ie* by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

14 *Ie* as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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## 1578. Retirement.

At the date at which this title states the law, the following provisions have effect. The appointment of any person as the nominee purchaser<sup>1</sup>, or as one of the persons constituting

the nominee purchaser, may be terminated by that person by the giving of a notice stating that he is resigning his appointment with effect from 21 days after the date of the notice<sup>2</sup>.

Any such notice must be given:

- 3583 (1) to each of the participating tenants<sup>3</sup>; and
- 3584 (2) to the reversioner in respect of the specified premises<sup>4</sup>.

Where the participating tenants have received any such notice, they must, within the period of 56 days beginning with the date of the notice, give to the reversioner a notice informing him of the resignation and containing the following particulars, namely:

- 3585 (a) the name or names of the person or persons for the time being constituting the nominee purchaser;
- 3586 (b) if falling after that date, the date of appointment of that person or of each of those persons; and
- 3587 (c) an address in England and Wales at which notices may be given to that person or those persons<sup>5</sup>;

and the appointment of any person by way of replacement for the person resigning his appointment is not valid unless his name is specified, or is one of those specified, under head (a) above<sup>6</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>7</sup>, as from a day to be appointed under that Act<sup>8</sup>.

1 As to the appointment of the nominee purchaser see PARA 1576 ante.

2 Leasehold Reform, Housing and Urban Development Act 1993 s 16(1) (prospectively repealed: see the text and notes 7-8 infra). As to the giving of notices see PARA 1541 ante.

Section 15(6)-(8) (prospectively repealed) (see PARA 1577 ante) has effect in connection with a person's resignation of his appointment in accordance with s 16 (prospectively repealed) as it has effect in connection with the termination of a person's appointment in accordance with s 15 (prospectively repealed) (see PARAS 1576-1577 ante): s 16(4) (as so repealed).

Nothing in s 16 (prospectively repealed) applies in relation to the resignation of the nominee purchaser, or any of the persons together constituting the nominee purchaser, at any time after a binding contract is entered into in pursuance of the initial notice: s 16(10) (as so repealed). For these purposes, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: ss 24(4), 25(6), Sch 5 para 5(1), (2)(c) (Sch 5 para (2)(c) as so repealed). As to vesting orders see PARA 1615 et seq post; and for the meaning of 'the initial notice' see PARA 1585 post.

Where a notice under s 16(1) (as so repealed) is given by a person who is one of two or more persons together constituting the nominee purchaser, a copy of the notice must be given by him to every other person included among those persons; and a copy of any notice given under s 16(3) (prospectively repealed) (see the text and notes 5-6 infra) or s 16(5) (prospectively repealed) (see PARA 1579 post) must be given by the participating tenants to every relevant landlord, other than the reversioner, to whom the initial notice or a copy of it was given in accordance with s 13 (as amended) (see PARAS 1585-1587 post) and s 13(13), Sch 3 Pt II (paras 11-14) (as amended) (see PARAS 1598-1600 post): s 16(9) (as so repealed). For the meaning of 'relevant landlord' see PARA 1559 ante; and for the meaning of 'the reversioner' see PARAS 1559-1563 ante. As to special categories of landlord see PARA 1545 et seq ante.

3 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 16(2) (prospectively repealed: see the text and notes 7-8 infra). For the meaning of 'the specified premises' see PARA 1586 note 5 post.

5 le under ibid Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1579 et seq post.

6 Ibid s 16(3) (prospectively repealed: see the text and notes 7-8 infra)

7 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

8 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### **1579. Death of person constituting the nominee purchaser.**

At the date at which this title states the law, the following provisions have effect. Where the person, or one of the persons, constituting the nominee purchaser<sup>1</sup> dies, the participating tenants<sup>2</sup> must, within the period of 56 days beginning with the date of death, give to the reversioner<sup>3</sup> a notice informing him of the death and containing the following particulars, namely:

- 3588 (1) the name or names of the person or persons for the time being constituting the nominee purchaser;
- 3589 (2) if falling after that date, the date of appointment of that person or of each of those persons; and
- 3590 (3) an address in England and Wales at which notices may be given to that person or those persons<sup>4</sup>;

and the appointment of any person by way of replacement for the person who has died is not valid unless his name is specified, or is one of those specified, under head (1) above<sup>5</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>6</sup>, as from a day to be appointed under that Act<sup>7</sup>.

1 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

2 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

3 For the meaning of 'the reversioner' see PARAS 1559-1561 ante.

4 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1580 et seq post.

5 Ibid s 16(5) (prospectively repealed: see the text and notes 6-7 infra). See also PARA 1578 note 2 ante. As to the giving of notices see PARA 1541 ante.

Section 15(6), (8) (prospectively repealed) (see PARA 1577 ante) has effect in connection with the death of any such person as it has effect in connection with the termination of a person's appointment in accordance with s 15 (prospectively repealed) (see PARAS 1576-1577 ante): s 16(6) (as so repealed).

6 le by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

7 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### **1580. Effect of notice.**

At the date at which this title states the law, the following provisions have effect. If:

- 3591 (1) the participating tenants<sup>1</sup> are required to give a notice following the resignation or death of the nominee purchaser<sup>2</sup>; and
- 3592 (2) as a result of the resignation or death there is no nominee purchaser for the time being,

the running of any period which:

- 3593 (a) is prescribed<sup>3</sup> for the giving of any other notice or the making of any application; and
- 3594 (b) would otherwise expire during the period beginning with the relevant date<sup>4</sup> and ending with the date when the specified particulars<sup>5</sup> are notified to the reversioner<sup>6</sup>,

is suspended throughout the period mentioned in head (b) above<sup>7</sup>.

If, however, the circumstances are as mentioned in heads (1) and (2) above but the participating tenants fail to give a notice<sup>8</sup> within the specified period of 56 days<sup>9</sup>, the initial notice<sup>10</sup> is deemed to have been withdrawn at the end of that period<sup>11</sup>.

These provisions are, however, prospectively repealed by the Commonhold and Leasehold Reform Act 2002<sup>12</sup>, as from a day to be appointed under that Act<sup>13</sup>.

1 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

2 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 16(3) (prospectively repealed) (see PARA 1578 ante) or s 16(5) (see PARA 1579 ante).

3 Ie by or under ibid Pt I (ss 1-103) (as amended).

4 For these purposes, 'the relevant date' means the date of the notice of resignation under ibid s 16(1) (prospectively repealed) (see PARA 1578 ante) or the date of death, as the case may be: s 16(7) (prospectively repealed: see the text and notes 12-13 infra).

5 Ie the particulars specified in ibid s 16(3) (prospectively repealed) or, as the case may be s 16(5) (prospectively repealed).

6 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 16(7) (prospectively repealed: see the text and notes 12-13 infra). See also PARA 1578 note 2 ante.

8 Ie under ibid s 16(3) (prospectively repealed) or, as the case may be, s 16(5) (prospectively repealed).

9 Ie the period of 56 days specified in ibid s 16(3) (prospectively repealed) or, as the case may be, s 16(5) (prospectively repealed).

10 For the meaning of 'the initial notice' see PARA 1585 post.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 16(8) (prospectively repealed: see the text and notes 12-13 *infra*). As to the liability for costs where the initial notice is so deemed to have been withdrawn see s 29(7) (prospectively repealed); and PARA 1620 note 11 *post*.

12 *Ie* by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

13 *Ie* as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

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### ***C. RTE COMPANIES***

#### **1581. Introduction; meaning of 'RTE company'.**

As from a day to be appointed<sup>1</sup>, the 'nominee purchaser'<sup>2</sup> will be replaced with the 'RTE company' as a means of conducting the proceedings for collective enfranchisement and acquiring the freehold<sup>3</sup>.

As from that day, a company is an RTE company in relation to premises if:

- 3595 (1) it is a private company limited by guarantee<sup>4</sup>; and
- 3596 (2) its memorandum of association states that its object, or one of its objects, is the exercise of the right to collective enfranchisement with respect to the premises<sup>5</sup>.

A company is not an RTE company, however, if it is a commonhold association<sup>6</sup>; and a company is not an RTE company in relation to premises if another company which is an RTE company in relation to:

- 3597 (a) the premises; or
- 3598 (b) any premises containing or contained in the premises,

has given a notice claiming to exercise the right to collective enfranchisement<sup>7</sup> with respect to the premises, or any premises containing or contained in the premises, and the notice continues<sup>8</sup> in force<sup>9</sup>.

1 *Ie* as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2 As to the nominee purchaser see PARA 1576 *et seq ante*.

3 As to collective enfranchisement see PARA 1552 *et seq ante*, PARA 1581 *et seq post*.

4 As to private companies limited by guarantee see COMPANIES vol 14 (2009) PARA 102.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 4A(1) (s 4A prospectively added by the Commonhold and Leasehold Reform Act 2002 s 122, as from a day to be appointed (see note 1 *supra*)).

6 Leasehold Reform, Housing and Urban Development Act 1993 s 4A(2) (as prospectively added: see note 5 supra). For these purposes, 'commonhold association' means a commonhold association within the meaning of the Commonhold and Leasehold Reform Act 2002 Pt 1 (ss 1-70) (see COMMONHOLD vol 13 (2009) PARA 305): Leasehold Reform, Housing and Urban Development Act 1993 s 4A(2) (as so added).

7 le a notice under ibid s 13 (as amended): see PARAS 1585-1587 post.

8 le continues in force in accordance with ibid s 13(11) (as amended): see PARA 1587 post.

9 Ibid s 4A(3) (as prospectively added: see note 5 supra).

## UPDATE

### 1581 Introduction; meaning of 'RTE company'

TEXT AND NOTES 4, 5--Leasehold Reform, Housing and Urban Development Act 1993 s 4A(1) amended: SI 2009/1941.

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### 1582. Membership of RTE companies.

As from a day to be appointed<sup>1</sup>, the following provisions have effect. Before the execution of a relevant conveyance<sup>2</sup> to a company which is an RTE company<sup>3</sup> in relation to any premises the following persons are entitled to be members of the company:

- 3599 (1) qualifying tenants<sup>4</sup> of flats<sup>5</sup> contained in the premises; and
- 3600 (2) if the company is also an RTM company<sup>6</sup> which has acquired the right to manage the premises, landlords<sup>7</sup> under leases<sup>8</sup> of the whole or any part of the premises<sup>9</sup>.

On the execution of a relevant conveyance to the RTE company, any member of the company who is not a participating member ceases to be a member<sup>10</sup>; and for these purposes 'participating member', in relation to an RTE company, means a person who is a member by virtue of head (1) above and who:

- 3601 (a) has given a participation notice<sup>11</sup> to the company before the date when the company gives a notice claiming to exercise the right to collective enfranchisement<sup>12</sup> or during the participation period<sup>13</sup>; or
- 3602 (b) is a participating member by virtue of either of the following two heads<sup>14</sup>, namely:

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- 60. (i) a member who is the assignee of a lease by virtue of which a participating member was a qualifying tenant of his flat is a participating member if he has given a participation notice to the company within the period beginning with the date of the assignment<sup>15</sup> and ending 28 days later or, if earlier, on the execution of a relevant conveyance to the company<sup>16</sup>;
- 61. (ii) and if the personal representatives of a participating member are a member, they are a participating member if they have given a participation notice to

the company at any time before the execution of a relevant conveyance to the company<sup>17</sup>.

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1     le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

2     For these purposes, 'relevant conveyance' means a conveyance of the freehold of the premises or of any premises containing or contained in the premises: Leasehold Reform, Housing and Urban Development Act 1993 s 4B(2) (s 4B prospectively added by the Commonhold and Leasehold Reform Act 2002 s 122, as from a day to be appointed (see note 1 supra)).

3     For the meaning of 'RTE company' see PARA 1581 ante.

4     For the meaning of 'qualifying tenant' see PARA 1557 ante.

5     For the meaning of 'flat' see PARA 1533 note 2 ante.

6     For these purposes, 'RTM company' has the same meaning as in the Commonhold and Leasehold Reform Act 2002 Pt 2 Ch 1 (ss 71-113) (see PARA 367 et seq ante): Leasehold Reform, Housing and Urban Development Act 1993 s 4B(2) (as added: see note 2 supra).

7     For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

8     For the meaning of 'lease' see PARA 1535 note 3 ante.

9     Leasehold Reform, Housing and Urban Development Act 1993 s 4B(1) (as added: see note 2 supra).

10    Ibid s 4B(3) (as added: see note 2 supra).

11    For these purposes, 'participation notice', in relation to a member of the company, means a notice stating that he wishes to be a participating member: *ibid* s 4B(7) (as added: see note 2 supra). A participation notice given to the company during the period (a) beginning with the date when the company gives a notice under s 13 (as amended) (see PARAS 1585-1587 post); and (b) ending immediately before a binding contract is entered into in pursuance of the notice under s 13 (as amended), is of no effect unless a copy of the participation notice has been given during that period to the person who (in accordance with s 9 (as amended) (see PARA 1559 ante) is the reversioner in respect of the premises: s 4B(8) (as so added).

12    le a notice under *ibid* s 13 (as amended): see PARAS 1585-1587 post.

13    For these purposes, 'the participation period' is the period beginning with the date when the company gives a notice under *ibid* s 13 (as amended) and ending (1) six months, or such other time as the Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister, may by order specify, after that date; or (2) immediately before a binding contract is entered into in pursuance of the notice under s 13 (as amended), whichever is the earlier: s 4B(9) (as added: see note 2 supra). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

14    Ibid s 4B(4) (as added: see note 2 supra).

15    For these purposes, references to assignment include an assent by personal representatives, and assignment by operation of law where the assignment is to a trustee in bankruptcy or to a mortgagee under the Law of Property Act 1925 s 89(2) (foreclosure of leasehold mortgage: see MORTGAGE vol 77 (2010) PARA 607); and references to an assignee are to be construed accordingly: Leasehold Reform, Housing and Urban Development Act 1993 s 4B(10) (as added: see note 2 supra).

16    Ibid s 4B(5) (as added: see note 2 supra).

17    Ibid s 4B(6) (as added: see note 2 supra).



PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(5) COLLECTIVE ENFRANCHISEMENT/(v) Conduct of Tenants' Proceedings for Collective Enfranchisement/C. RTE COMPANIES/1583. RTE companies; regulations.

### **1583. RTE companies; regulations.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> must by regulations<sup>3</sup> make provision about the content and form of the memorandum of association and articles of association of RTE companies<sup>4</sup>.

An RTE company may adopt provisions of the regulations for its memorandum or articles<sup>5</sup>; and the regulations may include provision which is to have effect for an RTE company whether or not it is adopted by the company<sup>6</sup>. A provision of the memorandum or articles of an RTE company has no effect to the extent that it is inconsistent with the regulations<sup>7</sup>.

The regulations have effect in relation to a memorandum or articles:

- 3603 (1) irrespective of the date of the memorandum or articles; but
- 3604 (2) subject to any transitional provisions of the regulations<sup>8</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 As to the making of regulations generally see PARA 1537 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 4C(1) (s 4C added by the Commonhold and Leasehold Reform Act 2002 s 122). At the date at which this title states the law, no such regulations had been made.

The following provisions of the Companies Act 1985 do not apply to an RTE company, ie (1) ss 2(7), 3 (memorandum: see COMPANIES vol 14 (2009) PARA 104); and (2) s 8 (articles: see COMPANIES vol 14 (2009) PARA 104 et seq): Leasehold Reform, Housing and Urban Development Act 1993 s 4C(6) (as so added).

5 Ibid s 4C(2) (as added: see note 4 supra).

6 Ibid s 4C(3) (as added: see note 4 supra).

7 Ibid s 4C(4) (as added: see note 4 supra).

8 Ibid s 4C(5) (as added: see note 4 supra).

## **UPDATE**

### **1583 RTE companies; regulations**

TEXT AND NOTES 1-4--Leasehold Reform, Housing and Urban Development Act 1993 s 4C(1) amended: SI 2009/1941.

NOTE 4--The Companies Act 2006 s 20 (see COMPANIES vol 14 (2009) PARA 228) does not apply to a RTE company: Leasehold Reform, Housing and Urban Development Act 1993 s 4C(6) (substituted by SI 2009/1941).

TEXT AND NOTE 5--Leasehold Reform, Housing and Urban Development Act 1993 s 4C(2) amended: SI 2009/1941.

TEXT AND NOTE 7--Leasehold Reform, Housing and Urban Development Act 1993 s 4C(4) amended: SI 2009/1941.

TEXT AND NOTE 8--Leasehold Reform, Housing and Urban Development Act 1993 s 4C(5) amended: SI 2009/1941.

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#### **1584. Notice of invitation to participate.**

As from a day to be appointed<sup>1</sup>, the following provisions have effect. Before making a claim to exercise the right to collective enfranchisement<sup>2</sup> with respect to any premises, an RTE company<sup>3</sup> must give notice to each person who at the time when the notice is given:

- 3605 (1) is the qualifying tenant<sup>4</sup> of a flat<sup>5</sup> contained in the premises; but
- 3606 (2) neither is nor has agreed to become a participating member<sup>6</sup> of the RTE company<sup>7</sup>.

A notice so given (a 'notice of invitation to participate') must:

- 3607 (a) state that the RTE company intends to exercise the right to collective enfranchisement with respect to the premises;
- 3608 (b) state the names of the participating members of the RTE company;
- 3609 (c) explain the rights and obligations of the members of the RTE company with respect to the exercise of the right, including their rights and obligations in relation to meeting the price payable in respect of the freehold, and any other interests to be acquired<sup>8</sup>, and associated costs;
- 3610 (d) include an estimate of that price and those costs; and
- 3611 (e) invite the recipients of the notice to become participating members of the RTE company<sup>9</sup>.

A notice of invitation to participate must either:

- 3612 (i) be accompanied by a copy of the memorandum of association and articles of association of the RTE company; or
- 3613 (ii) include a statement about inspection and copying of the memorandum of association and articles of association of the RTE company<sup>10</sup>.

Where a notice given to a person includes a statement under head (ii) above, the notice is to be treated as not having been given to him if he is not allowed to undertake an inspection, or is not provided with a copy, in accordance with the statement<sup>11</sup>.

A notice of invitation to participate is not to be invalidated by any inaccuracy in any of the particulars required by or by virtue of the above provisions<sup>12</sup>.

At the date at which this title states the law, however, the above provisions had not been brought into force.

<sup>1</sup> ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

- 2 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.
- 3 As to RTE companies see PARAS 1581-1583 ante.
- 4 For the meaning of 'qualifying tenant' see PARA 1557 ante.
- 5 For the meaning of 'flat' see PARA 1533 note 2 ante.
- 6 For the meaning of 'participating member' see PARA 1582 ante.
- 7 Leasehold Reform, Housing and Urban Development Act 1993 s 12A(1) (s 12A prospectively added by the Commonhold and Leasehold Reform Act 2002 s 123(1), as from a day to be appointed (see note 1 supra)). As to the giving of notices see PARA 1541 ante.
- 8 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1585 et seq post.
- 9 Ibid s 12A(2) (as added: see note 7 supra).
- 10 Ibid s 12A(3) (as added: see note 7 supra). A statement under head (ii) in the text must: (1) specify a place in England or Wales at which the memorandum of association and articles of association may be inspected; (2) specify as the times at which they may be inspected periods of at least two hours on each of at least three days (including a Saturday or Sunday or both) within the seven days beginning with the day following that on which the notice is given; (3) specify a place (in England or Wales) at which, at any time within those seven days, a copy of the memorandum of association and articles of association may be ordered; and (4) specify a fee for the provision of an ordered copy, not exceeding the reasonable cost of providing it: s 12A(4) (as so added).
- 11 Ibid s 12A(5) (as added: see note 7 supra).
- 12 Ibid s 12A(6) (as added: see note 7 supra).

## **UPDATE**

### **1584 Notice of invitation to participate**

TEXT AND NOTE 10--Leasehold Reform, Housing and Urban Development Act 1993 ss 12A(3), (4) amended: SI 2009/1941.

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## **(vi) Initial Notice**

### **A. IN GENERAL**

#### **1585. Notice by qualifying tenants of claim to exercise right.**

A claim to exercise the right to collective enfranchisement<sup>1</sup> with respect to any premises is made by the giving<sup>2</sup> of notice of the claim under the following provisions<sup>3</sup>.

A notice so given ('the initial notice') must be given:

- 3614 (1) in a case where the freehold of the premises is owned by one person<sup>4</sup>, to the reversioner<sup>5</sup> in respect of those premises<sup>6</sup>; and
- 3615 (2) in a case where there are multiple freeholds<sup>7</sup>, to the person specified in the notice as the recipient<sup>8</sup>; and
- 3616 (3) by a number of qualifying tenants<sup>9</sup> (or, as from a day to be appointed<sup>10</sup>, by an RTE company<sup>11</sup> which has among its participating members<sup>12</sup> a number of qualifying tenants) of flats<sup>13</sup> contained in the premises as at the relevant date<sup>14</sup> which is not less than one-half of the total number of flats so contained<sup>15</sup>.

1 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

2 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see the text and notes 3-15 infra; and PARAS 1586-1587 post.

3 Ibid s 13(1). As to the giving of notices see PARA 1541 ante.

In a transaction undertaken to give effect to an initial notice the nominee purchaser, the reversioner and any relevant landlord are bound, unless they agree otherwise, by the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 2, Sch 1 (as amended): reg 2. See further PARA 1646 post. As to the nominee purchaser see PARAS 1576-1577 ante.

4 le in a cases to which the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2) (as amended) applies: see PARA 1559 ante.

5 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(a)(i) (s 13(2)(a)(i) amended, and s 13(2)(a)(ii) added, by the Housing Act 1996 s 107, Sch 10 para 6(2)).

7 le in a case to which the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2A) (as added) applies: see PARA 1559 ante.

8 Ibid s 13(2)(a)(ii) (as added: see note 6 supra). In a case to which s 9(2A) (as added) applies, the initial notice must specify (1) a person who owns a freehold interest in the premises; or (2) if every person falling within head (1) supra is a person who cannot be found or whose identity cannot be ascertained, a relevant landlord, as the recipient of the notice: s 13(2A) (added by the Housing Act 1996 Sch 10, PARA 6(3)). For the meaning of 'relevant landlord' see PARA 1559 ante.

9 For the meaning of 'qualifying tenant' see PARA 1557 ante.

10 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11 As to RTE companies see PARAS 1581-1583 ante.

12 As to participating members see PARA 1582 ante.

13 For the meaning of 'flat' see PARA 1533 note 2 ante.

14 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (amended by the Commonhold and Leasehold Reform Act 2002 ss 119, 120, 180, Sch 14; further prospectively amended by s 121(1), (2), as from a day to be appointed (see note 10 supra)). For transitional provisions and savings in relation to the amendments which were in force at the date at which this title states the law see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, Sch 2 paras 1, 2; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, Sch 2 paras 1, 2.

As from a day to be appointed (see note 10 supra), the following provisions have effect: (1) the initial notice may not be given unless each person required to be given a notice of invitation to participate (see PARA 1584 ante) has been given such a notice at least 14 days before (Leasehold Reform, Housing and Urban Development Act 1993 s 13(2ZB) (prospectively added by the Commonhold and Leasehold Reform Act 2002 s 123(1), (2), as from that day); and (2) in a case where, at the relevant date, there are only two qualifying tenants of flats contained in the premises, the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended) is not satisfied unless both are participating members of the RTE company: s 13(2ZA) (prospectively

added by the Commonhold and Leasehold Reform Act 2002 s 123(1), (3), as from that day). See also the Leasehold Reform, Housing and Urban Development Act 1993 s 13(5A) (as prospectively added) cited in PARA 1586 note 3 post.

## UPDATE

### 1585 Notice by qualifying tenants of claim to exercise right

NOTE 15--See *Hilmi & Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314, [2010] All ER (D) 279 (Mar) (notice was not valid as only one director of the tenant company had signed the notice).

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### 1586. Contents of the initial notice.

The initial notice<sup>1</sup> must:

- 3617 (1) specify and be accompanied by a plan<sup>2</sup> showing:
  - 215 62. (a) the premises of which the freehold is proposed to be acquired<sup>3</sup>;
  - 63. (b) any property appurtenant or used in common with the occupiers of other premises of which the freehold is proposed to be acquired<sup>4</sup>; and
  - 64. (c) any property over which it is proposed that rights, specified in the notice, should be granted in connection with the acquisition of the freehold of the specified premises<sup>5</sup> or of any such property<sup>6</sup>;
- 216 3618 (2) contain a statement of the grounds on which it is claimed that the specified premises are, on the relevant date<sup>7</sup>, premises to which the right to collective enfranchisement<sup>8</sup> applies;
- 3619 (3) specify:
  - 217 65. (a) any leasehold interest<sup>9</sup> proposed to be acquired<sup>10</sup>; and
  - 66. (b) any flats<sup>11</sup> or other units<sup>12</sup> contained in the specified premises in relation to which it is considered that any of the statutory provisions relating to mandatory leaseback<sup>13</sup> are applicable;
- 218 3620 (4) specify the proposed purchase price<sup>14</sup> for each of the following, namely:
  - 219 67. (a) the freehold interest in the specified premises or, if the freehold of the whole of the specified premises is not owned by the same person, each of the freehold interests in those premises;
  - 68. (b) the freehold interest in any property specified under head (1)(b) above; and
  - 69. (c) any leasehold interest specified under head (3)(a) above;
- 220 3621 (5) state the full names of all the qualifying tenants<sup>15</sup> of flats contained in the specified premises (or, as from a day to be appointed<sup>16</sup>, all the qualifying tenants of flats contained in the specified premises who are participating members<sup>17</sup> of the RTE company<sup>18</sup>) and the addresses of their flats, and contain in relation to each of

those tenants, such particulars of his lease<sup>19</sup> as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term;

3622 (6) state the full name or names of the person or persons appointed by those tenants as the nominee purchaser<sup>20</sup>, and an address in England and Wales at which notices may be given to that person or those persons<sup>21</sup> (or, as from a day to be appointed<sup>22</sup>, state the name and registered office of the RTE company); and

3623 (7) specify the date<sup>23</sup> by which the reversioner<sup>24</sup> must respond to the notice by giving<sup>25</sup> a counter-notice<sup>26</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 It has been held in the county court that the omission of a plan invalidates the initial notice: see *Mutual Place Property Management Ltd v Blaquiére* [1996] 2 EGLR 78, [1996] 28 EG 143, Central London county court.

3 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 1(1) (as amended): see PARA 1552 ante. As from a day to be appointed (see note 16 infra), a copy of a notice under s 13 (as amended) (see the text and notes 4-26 infra; and PARA 1585 ante, PARA 1587 post) must be given to each person who at the relevant date is the qualifying tenant of a flat contained in the premises specified under head (1)(a) in the text: s 13(5A) (prospectively added by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 6(1), (3), as from that day). See also notes 7, 11, 15 infra.

4 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 1(2)(a) (as amended): see PARA 1552 ante.

5 For these purposes, 'the specified premises', in relation to a claim made under ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1587 et seq post), means (1) the premises specified in the initial notice under s 13(3)(a)(i); or (2) if it is subsequently agreed or determined under Pt I Ch I (as amended) that any less extensive premises should be acquired in pursuance of the notice in satisfaction of the claim, those premises; and similarly references to any property or interest specified in the initial notice under s 13(3)(a)(ii) or (c)(i) are to be read, if it is subsequently agreed or determined under Pt I Ch I (as amended) that any less extensive property or interest should be acquired in pursuance of the notice, as references to that property or interest: ss 13(12), 38(1).

6 Ie so far as falling within ibid s 1(3)(a) (as amended): see PARA 1552 ante.

7 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

8 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended)

9 For the meaning of 'interest' see PARA 408 note 16 ante.

10 Ie under or by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 2(1)(a) or (b) (as originally enacted or as prospectively substituted): see PARA 1553 ante.

11 For the meaning of 'flat' see PARA 1533 note 2 ante.

12 For the meaning of 'unit' see PARA 1555 note 9 ante.

13 Ie the requirements in the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 Pt II (paras 2-4) (as amended): see PARAS 1657-1659 post.

14 The sum specified must be realistic: *Cadogan v Morris* (1998) 77 P & CR 336, 31 HLR 732, CA (a decision on similar wording in the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended) (see PARA 1677 post)); and see *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55, [2000] All ER (D) 320, CA.

15 For the meaning of 'qualifying tenant' see PARA 1557 ante.

16 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

17 As to participating members see PARA 1582 ante.

18 As to RTE companies see PARAS 1581-1583 ante.

19 For the meaning of 'lease' see PARA 1535 note 3 ante.

20 For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 15 (prospectively repealed): see PARAS 1576-1577 ante. For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

21 For under ibid Pt I Ch I (as amended).

22 See note 16 supra.

23 The date so specified must be a date falling not less than two months after the relevant date: Leasehold Reform, Housing and Urban Development Act 1993 s 13(5).

24 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

25 For under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 post. As to the giving of notices see PARA 1541 ante.

26 Ibid s 13(3) (amended by the Housing Act 1996 ss 107(4), 227, Sch 10 para 6(4), Sch 19 Pt V; the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14; further prospectively amended by s 124, Sch 8 paras 2, 6(1), (2), as from a day to be appointed (see note 14 supra)). For transitional provisions and savings in relation to the amendments made by the 2002 Act which were in force at the date at which this title states the law see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(ii), Sch 1 Pt 1, Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(ii), Sch 1 Pt 1, Sch 2 para 1.

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### **1587. Effect of initial notice.**

Where any premises have been specified in the initial notice<sup>1</sup>, no subsequent notice which specifies the whole or part of those premises<sup>2</sup> may be given so long as the earlier notice continues in force<sup>3</sup>.

Where any premises have been specified in such a notice and:

- 3624 (1) that notice has been withdrawn or is deemed to have been withdrawn<sup>4</sup>; or
- 3625 (2) in response to that notice, an order has been applied for and obtained<sup>5</sup> on the grounds of the landlord's intention to develop,

no subsequent notice which specifies the whole or part of those premises may be given<sup>6</sup> within the period of 12 months beginning with the date of the withdrawal or deemed withdrawal of the earlier notice or with the time when the order<sup>7</sup> becomes final<sup>8</sup>, as the case may be<sup>9</sup>.

Where an initial notice is given, the notice continues in force<sup>10</sup> as from the relevant date<sup>11</sup>:

- 3626 (a) until a binding contract is entered into in pursuance of the notice, or an order is made<sup>12</sup> providing for the vesting of interests<sup>13</sup> in the nominee purchaser<sup>14</sup> (or, as from a day to be appointed<sup>15</sup>, in the RTE company<sup>16</sup>);
- 3627 (b) if the notice is withdrawn or deemed to have been withdrawn<sup>17</sup>, until the date of the withdrawal or deemed withdrawal; or
- 3628 (c) until such other time as the notice ceases<sup>18</sup> to have effect<sup>19</sup>.

- 1 For the meaning of 'the initial notice' see PARA 1585 ante.
- 2 For these purposes, any reference to a notice which specifies the whole or part of any premises includes a reference to a notice which specifies any premises which contain the whole or part of those premises; and 'specifies' means specifies under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(a)(i) (see PARA 1586 ante at head (1)(a) in the text): s 13(10).
- 3 Ibid s 13(8).
- 4 Ie under or by virtue of any provision of ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1588 et seq post) or under s 74(3) (as amended) (see PARA 1740 post).
- 5 Ie under ibid s 23(1): see PARA 1611 post.
- 6 Ie under ibid s 13 (as amended): see PARAS 1585-1586 ante.
- 7 See note 5 supra.
- 8 For these purposes, an order of a court or a decision of a leasehold valuation tribunal is treated as becoming final (1) if not appealed against, on the expiry of the time for bringing an appeal; or (2) if appealed against and not set aside in consequence of the appeal, at the time when the appeal and any further appeal is disposed of (a) by the determination of it and the expiry of the time for bringing a further appeal, if any; or (b) by its being abandoned or otherwise ceasing to have effect: Leasehold Reform, Housing and Urban Development Act 1993 s 101(9).
- 9 Ibid s 13(9). As to the giving of notices see PARA 1541 ante.
- 10 Ie for the purposes of ibid Pt I Ch I (as amended).
- 11 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 12 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 24(4)(a) or (b) (as amended) (see PARA 1612 post) or s 25(6)(a) or (b) (as amended) (see PARA 1613 post).
- 13 For the meaning of 'interest' see PARA 408 note 16 ante.
- 14 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 15 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 16 As to RTE companies see PARAS 1581-1583 ante.
- 17 See note 4 supra.
- 18 Ie by virtue of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended).
- 19 Ibid s 13(11) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 6(1), (4), as from a day to be appointed (see note 15 supra)).

## UPDATE

### 1587 Effect of initial notice

NOTE 3--A notice purportedly given under the 1993 Act s 13 that has failed to comply with the statutory requirements is an invalid notice having no statutory consequences so that the tenants are not barred from serving without delay a valid s 13 notice: *Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Co Ltd* [2007] EWHC 1776 (Ch), [2007] 49 EG 104.



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### **1588. Inaccuracies or misdescription in initial notice.**

The initial notice<sup>1</sup> is not invalidated by any inaccuracy in any of the required particulars<sup>2</sup> or by any misdescription of any of the property to which the claim extends<sup>3</sup>.

Where the initial notice:

- 3629 (1) specifies any property or interest<sup>4</sup> which was not liable to acquisition<sup>5</sup>; or
- 3630 (2) fails to specify any property or interest which is so liable to acquisition,

the notice may, with the leave of the court and on such terms as the court may think fit, be amended so as to exclude or include the property or interest in question<sup>6</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 I.e. the particulars required by (or, as from a day to be appointed (see note 3 supra), by or by virtue of) the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3) (as amended): see PARA 1586 ante.

3 Ibid s 13(13), Sch 3 para 15(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 6(1), (5), 37(1), (11), as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed).

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 I.e. under or by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 1 (as amended) (see PARA 1552 ante) or s 2 (as amended) (see PARA 1553 ante).

6 Ibid Sch 3 para 15(2). Where the initial notice is so amended as to exclude any property or interest, references to the property or interests specified in the notice under any provision of s 13(3) (as amended) are to be construed accordingly; and, where it is so amended as to include any property or interest, the property or interest is to be treated as if it had been specified under the provision of s 13 (as amended) under which it would have fallen to be specified if its acquisition had been proposed at the relevant date: Sch 3 para 15(3). For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

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### **1589. Effect on initial notice of tenant's or member's lack of qualification to participate.**

At the date at which this title states the law, the following provisions have effect. Where at the relevant date<sup>1</sup> any of the persons by whom the initial notice<sup>2</sup> is given:

- 3631 (1) is not a qualifying tenant<sup>3</sup> of a flat<sup>4</sup> contained in the specified premises<sup>5</sup>; or
- 3632 (2) is such a qualifying tenant but is prohibited<sup>6</sup> from participating in the giving of the notice; or

3633 (3) if it is claimed in the notice that he satisfies the former residence condition<sup>7</sup>, does not satisfy that condition,

the notice is not invalidated on that account, so long as the notice was in fact properly given by a sufficient number<sup>8</sup> of qualifying tenants of flats contained in the premises as at the relevant date and not less than one-half of the qualifying tenants by whom it was so given then satisfied the former residence condition (if applicable)<sup>9</sup>.

As from a day to be appointed<sup>10</sup>, however, the following provisions have effect in substitution for those set out above. Where any of the members of the RTE company<sup>11</sup> by which an initial notice is given was not the qualifying tenant of a flat contained in the premises at the relevant date even though his name was stated in the notice, the notice is not invalidated on that account, so long as a sufficient number of qualifying tenants of flats contained in the premises were members of the company at that date; and for this purpose a 'sufficient number' is a number, greater than one, which is not less than one-half of the total number of flats contained in the premises at that date<sup>12</sup>.

1 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

2 For the meaning of 'the initial notice' see PARA 1585 ante.

3 For the meaning of 'qualifying tenant' see PARA 1557 ante.

4 For the meaning of 'flat' see PARA 1533 note 2 ante.

5 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

6 Ie by the Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 Pt I (paras 1-10) (as amended): see PARA 1590 et seq post.

7 As to the former residence condition see PARA 1557 note 4 ante.

8 For these purposes, a sufficient number is a number which (1) is not less than two-thirds of the total number of qualifying tenants of flats contained in the specified premises as at the relevant date; and (2) is not less than one-half of the total number of flats so contained: Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 16(2) (as originally enacted).

9 See ibid Sch 3 para 16(1) (as originally enacted). The residence condition formerly contained in s 6 has been repealed, but Sch 3 para 16(1), (2) (as originally enacted) contains no corresponding amendments.

10 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11 As to RTE companies see PARAS 1581-1583 ante.

12 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 16 (prospectively substituted by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (12), as from a day to be appointed (see note 10 supra)).

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## ***B. RESTRICTIONS ON PARTICIPATION BY INDIVIDUAL TENANTS; EFFECT OF CLAIMS***

### 1590. Prior notice by tenant terminating lease.

At the date at which this title states the law, a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> may not participate in the giving of a relevant notice of claim<sup>3</sup> if the notice is given:

- 3634 (1) after the tenant has given notice terminating the lease<sup>4</sup> of the flat, other than a notice that has been superseded by the grant, express or implied, of a new tenancy<sup>5</sup>; or
- 3635 (2) during the subsistence of an agreement for the grant to the tenant of a future tenancy of the flat, where the agreement is one to which the Local Government and Housing Act 1989<sup>6</sup> applies<sup>7</sup>.

As from a day to be appointed<sup>8</sup>, a qualifying tenant of a flat must be disregarded when considering whether the statutory requirement that the RTE company<sup>9</sup> has among its participating members<sup>10</sup> the required number of qualifying tenants<sup>11</sup> is satisfied in relation to a relevant notice of claim<sup>12</sup> if the notice is given as described in head (1) or head (2) above<sup>13</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 For these purposes, 'relevant notice of claim', in relation to any flat, means a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante) in the case of which the specified premises contain that flat, and references to participating in the giving of such a notice are references to being one of the persons by whom the notice is given (s 13(13), Sch 3 para 10(1)(a) (as originally enacted); and references to a notice under s 13 (as amended) include, in so far as the context permits, references to a notice purporting to be given under s 13 (as amended), whether by persons who are qualifying tenants or not (Sch 3 para 10(1)(b) (as originally enacted)). For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 For the meaning of 'tenancy' see PARA 1535 note 3 ante.

6 Ie the Local Government and Housing Act 1989 s 186, Sch 10 para 17: see PARA 1241 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 1 (as originally enacted). As to the giving of notices see PARA 1541 ante.

8 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9 As to RTE companies see PARAS 1581-1583 ante.

10 As to participating members see PARA 1582 ante.

11 Ie the requirement in the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended): see PARA 1585 ante.

12 For these purposes, 'relevant notice of claim', in relation to any flat, means a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante) in the case of which the specified premises contain that flat; and references to a notice under s 13 (as amended) include, in so far as the context permits, references to a notice purporting to be given under s 13 (as amended): Sch 3 para 10(1) (a), (b) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 8 supra)).

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 1 (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (2), as from a day to be appointed (see note 8 supra)).

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### **1591. Prior notice by landlord terminating lease.**

A qualifying tenant<sup>1</sup> of a flat<sup>2</sup>:

3636 (1) may not, at the date at which this title states the law, participate in the giving of a relevant notice of claim<sup>3</sup>; or

3637 (2) as from a day to be appointed<sup>4</sup>, must be disregarded when considering whether the statutory requirement that the RTE company<sup>5</sup> has among its participating members<sup>6</sup> the required number of qualifying tenants<sup>7</sup> is satisfied in relation to a relevant notice of claim<sup>8</sup>,

if the notice is given more than four months after a landlord's<sup>9</sup> notice terminating the tenant's lease<sup>10</sup> of the flat has been given under the Landlord and Tenant Act 1954<sup>11</sup> or served under the Local Government and Housing Act 1989<sup>12</sup>, whether or not the notice has effect to terminate the lease<sup>13</sup>.

Where, in the case of any qualifying tenant of a flat, any such landlord's notice is so given or so served but that notice was not given or served more than four months before the date when a relevant notice of claim is given, the landlord's notice ceases to have effect on that date<sup>14</sup>.

If any such landlord's notice so ceases to have effect but the claim made in pursuance of the relevant notice of claim is not effective<sup>15</sup>, the following provisions<sup>16</sup> apply to any landlord's notice terminating the tenant's lease of the flat which is so given under the Landlord and Tenant Act 1954 or so served under the Local Government and Housing Act 1989 and is so given or served within one month after the expiry of the period of currency<sup>17</sup> of that claim<sup>18</sup>. The earliest date which may be specified in the notice as the date of termination is<sup>19</sup>:

3638 (a) in the case of a notice given under the Landlord and Tenant Act 1954, the date of termination specified in the previous notice or the date of expiry of the period of three months beginning with the date of the giving of the new notice, whichever is the later; or

3639 (b) in the case of a notice served under the Local Government and Housing Act 1989, the date of termination specified in the previous notice or the date of expiry of the period of four months beginning with the date of service of the new notice, whichever is the later<sup>20</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 3 ante.

4 ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 As to participating members see PARA 1582 ante.

7     le the requirement in the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended): see PARA 1585 ante.

8     For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 12 ante.

9     For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

10    For the meaning of 'lease' see PARA 1535 note 3 ante.

11    le under the Landlord and Tenant Act 1954 s 4: see PARA 1212 ante.

12    le under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.

13    Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 2(1) (prospectively amended, so as to substituted for the wording set out in head (1) in the text the wording set out in head (2) in the text, by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (2), as from a day to be appointed (see note 4 supra)). As to the giving of notices see PARA 1541 ante.

14    Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 2(2).

15    For these purposes, references to a claim being effective are references to a binding contract being entered into for the acquisition of the freehold and other interests falling to be acquired in pursuance of the claim or to the making of an order under *ibid* s 24(4)(a) or (b) (as amended) (see PARA 1612 post) or s 25(6)(a) or (b) (as amended) (see PARA 1613 post) which provides for the vesting of those interests: Sch 3 para 10(1)(c). For the meaning of 'interest' see PARA 408 note 16 ante.

16    le *ibid* Sch 3 para 2(4): see the text and notes 19-20 *infra*.

17    For these purposes, references to the currency of a claim are (1) where the claim is made by a valid notice under *ibid* s 13 (as amended), references to the period during which the notice continues in force in accordance with s 13(11) (as amended) (see PARA 1587 ante); or (2) where the claim is made by a notice which is not a valid notice under s 13 (as amended), references to the period beginning with the giving of the notice and ending with the time when the notice is set aside by the court or is withdrawn or when it would, if valid, cease to have effect or be deemed to have been withdrawn: Sch 3 para 10(1)(d). The date when a notice is set aside or would, if valid, cease to have effect in consequence of an order of a court is to be taken to be the date when the order becomes final: Sch 3 para 10(2). As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

18    Ibid Sch 3 para 2(3).

19    le where *ibid* Sch 3 para 2(4) applies.

20    Ibid Sch 3 para 2(4). Where: (1) by virtue of Sch 3 para 2(4), a landlord's notice specifies as the date of termination of a lease a date earlier than six months after the date of the giving of the notice; and (2) the notice proposes a statutory tenancy, the Landlord and Tenant Act 1954 s 7(2) (as amended) (see PARA 1216 ante) applies in relation to the notice with the substitution, for references to the period of two months ending with the date of termination specified in the notice and the beginning of that period, of references to the period of three months beginning with the date of the giving of the notice and the end of that period: Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 2(5).

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## **1592. Orders for possession and pending proceedings for forfeiture etc.**

A qualifying tenant<sup>1</sup> of a flat<sup>2</sup>:

- 3640 (1) may not, at the date at which this title states the law, participate in the giving of a relevant notice of claim<sup>3</sup>; or
- 3641 (2) as from a day to be appointed<sup>4</sup>, must be disregarded when considering whether the statutory requirement that the RTE company<sup>5</sup> has among its participating members<sup>6</sup> the required number of qualifying tenants<sup>7</sup> is satisfied in relation to a relevant notice of claim<sup>8</sup>,

if at the time when it is given he is obliged to give up possession of his flat in pursuance of an order of a court or will be so obliged at a date specified in such an order<sup>9</sup>.

Except with the leave of the court<sup>10</sup>, a qualifying tenant of a flat may not participate as described in head (1) above (or must be disregarded as described in head (2) above) in the giving of a relevant notice of claim<sup>11</sup> at a time when any proceedings are pending<sup>12</sup> to enforce a right of re-entry or forfeiture terminating his lease<sup>13</sup> of the flat<sup>14</sup>. Leave may only be so granted if the court is satisfied that the tenant does not wish to participate in the giving of such a notice of claim (or, as from a day to be appointed<sup>15</sup>, does not wish such a notice of claim to be given) solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are pending<sup>16</sup>. If leave is so granted and a relevant notice of claim is given, the tenant's lease is deemed for the purposes of the claim to be a subsisting lease despite the existence of those proceedings and any order made afterwards in those proceedings; and, if the claim is effective<sup>17</sup>, the court in which those proceedings were brought may set aside or vary any such order to such extent and on such terms as appear to that court to be appropriate<sup>18</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 3 ante.

4 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 As to participating members see PARA 1582 ante.

7 le the requirement in the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended): see PARA 1585 ante.

8 For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 12 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 3(1) (Sch 3 para 3(1), (2) prospectively amended, so as to substitute for the wording set out in head (1) in the text the wording set out in head (2) in the text, by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (2), as from a day to be appointed (see note 4 supra)). As to the giving of notices see PARA 1541 ante.

10 For the meaning of 'the court' see PARA 1539 note 3 ante.

11 See notes 3, 8 supra.

12 Proceedings are pending until an unconditional order for relief is made: *Martin v Maryland Estates Ltd* (1998) 31 HLR 218, [1998] 2 EGLR 81, CA (where an order for conditional relief was made but the condition remained unsatisfied).

13 For the meaning of 'lease' see PARA 1535 note 3 ante.

14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 3(2) (as prospectively amended: see note 9 supra). Leave under this provision cannot be given retrospectively: see *Martin v Maryland Estates Ltd* (1998) 31 HLR 218, [1998] 2 EGLR 81, CA.

15 See note 4 supra.

16 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 3(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (3), as from a day to be appointed (see note 4 supra)).

17 For the meaning of references to a claim being effective see PARA 1591 note 15 ante.

18 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 3(4).

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### **1593. Institution of compulsory purchase procedures.**

A qualifying tenant<sup>1</sup> of a flat<sup>2</sup>:

3642 (1) may not, at the date at which this title states the law, participate in the giving of a relevant notice of claim<sup>3</sup>; or

3643 (2) as from a day to be appointed<sup>4</sup>, must be disregarded when considering whether the statutory requirement that the RTE company<sup>5</sup> has among its participating members<sup>6</sup> the required number of qualifying tenants<sup>7</sup> is satisfied in relation to a relevant notice of claim<sup>8</sup>,

if on the date when the notice is given:

3644 (a) any person or body of persons who has or have been, or could be, authorised to acquire the whole or part of the flat compulsorily for any purpose has or have, with a view to its acquisition for that purpose, either served a notice to treat on that tenant, or entered into a contract for the purchase of his interest<sup>9</sup> in the whole or part of the flat; and

3645 (b) the notice to treat or contract remains in force<sup>10</sup>.

Where:

3646 (i) a relevant notice of claim is given; and

3647 (ii) during the currency of the claim<sup>11</sup> any such person or body of persons as is mentioned in head (a) above serves notice to treat<sup>12</sup> in relation to the flat held by a participating tenant<sup>13</sup> (or, as from a day to be appointed<sup>14</sup>, by a qualifying tenant),

then at the date at which this title states the law the tenant ceases to be entitled to participate in the making of the claim by virtue of being a qualifying tenant of the flat, and accordingly ceases to be a participating tenant in respect of the flat<sup>15</sup>; and as from a day to be appointed<sup>16</sup> the tenant ceases to be a member of the RTE company<sup>17</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 3 ante.

4 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 As to participating members see PARA 1582 ante.

7 le the requirement in the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended): see PARA 1585 ante.

8 For the meaning of 'relevant notice of claim' for these purposes see PARA 1590 note 12 ante.

9 For the meaning of 'interest' see PARA 408 note 16 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 4(1) (prospectively amended, so as to substitute for the wording set out in head (1) in the text the wording set out in head (2) in the text, by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (2), as from a day to be appointed (see note 4 supra). As to the giving of notices see PARA 1541 ante.

11 For the meaning of references to the currency of a claim see PARA 1591 note 17 ante.

12 le as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 4(1)(a): see head (a) in the text.

13 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

14 See note 4 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 4(2).

16 See note 4 supra.

17 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 4(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (4)).

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#### **1594. Notice terminating lease given by tenant or landlord during currency of claim.**

Where a relevant notice of claim<sup>1</sup> is given, any notice terminating the lease<sup>2</sup> of any flat<sup>3</sup> held by a participating tenant<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, held by a participating member<sup>6</sup> of the RTE company<sup>7</sup>) whether it is:

3648 (1) a notice given by the tenant; or

3649 (2) a landlord's notice given under the Landlord and Tenant Act 1954<sup>8</sup> or served under the Local Government and Housing Act 1989<sup>9</sup>,

is of no effect if it is given or served during the currency<sup>10</sup> of the claim<sup>11</sup>.

1 For the meaning of 'relevant notice of claim' see PARA 1590 notes 3, 12 ante.

2 For the meaning of 'lease' see PARA 1535 note 3 ante.



- 3 For the meaning of 'flat' see PARA 1533 note 2 ante.
- 4 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.
- 5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 6 As to participating members see PARA 1582 ante.
- 7 As to RTE companies see PARAS 1581-1583 ante.
- 8 le under the Landlord and Tenant Act 1954 s 4: see PARA 1212 ante.
- 9 le under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.
- 10 For the meaning of references to the currency of a claim see PARA 1591 note 17 ante.
- 11 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 5 (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (5), as from a day to be appointed (see note 5 supra)).

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### **1595. Initial notice operates to prevent termination of tenant's lease by other means.**

Where a relevant notice of claim<sup>1</sup> is given, then during the currency of the claim<sup>2</sup> and for three months thereafter the lease<sup>3</sup> of any flat<sup>4</sup> held by a participating tenant<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, held by a participating member<sup>7</sup> of the RTE company<sup>8</sup>) may not terminate:

- 3650 (1) by effluxion of time; or
- 3651 (2) in pursuance of a notice to quit given by the landlord<sup>9</sup>; or
- 3652 (3) by the termination of a superior lease;

but, if the claim is not effective<sup>10</sup>, and the lease would otherwise have so terminated before the end of those three months, the lease so terminates at the end of those three months<sup>11</sup>.

The above provisions are not, however, to be taken to prevent an earlier termination of the lease in any manner not so mentioned, and do not affect:

- 3653 (a) the power<sup>12</sup> to grant a tenant relief against the termination of a superior lease; or
- 3654 (b) any right of the tenant to relief<sup>13</sup> where the landlord is proceeding to enforce covenants or relief<sup>14</sup> in proceedings brought by a superior landlord<sup>15</sup>.

- 1 For the meaning of 'relevant notice of claim' see PARA 1590 notes 3, 12 ante.
- 2 For the meaning of references to the currency of a claim see PARA 1591 note 17 ante.
- 3 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 4 For the meaning of 'flat' see PARA 1533 note 2 ante.

- 5 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.
- 6 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 7 As to participating members see PARA 1582 ante.
- 8 As to RTE companies see PARAS 1581-1583 ante.
- 9 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 10 For the meaning of references to a claim being effective see PARA 1591 note 15 ante.
- 11 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 6(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (5), as from a day to be appointed (see note 6 supra)).
- 12 le under the Law of Property Act 1925 s 146(4): see PARA 627 ante.
- 13 le relief under the Landlord and Tenant Act 1954 s 16(2): see PARA 1233 ante. For these purposes, the reference to s 16(2) includes a reference to s 16(2) as it applies in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq ante): Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 6(3).
- 14 le relief under the Landlord and Tenant Act 1954 s 21(5), Sch 5 para 9: see PARA 1234 ante. For these purposes, the reference to Sch 5 para 9 includes a reference to Sch 5 para 9 as it applies in relation to the Local Government and Housing Act 1989 Sch 10 (as amended): Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 6(3).
- 15 Ibid Sch 3 para 6(2).

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### **1596. Restriction on proceedings to enforce right of re-entry or forfeiture.**

Where a relevant notice of claim<sup>1</sup> is given, then during the currency of the claim<sup>2</sup>:

- 3655 (1) no proceedings to enforce any right of re-entry or forfeiture terminating the lease<sup>3</sup> of any flat<sup>4</sup> held by a participating tenant<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, by a participating member<sup>7</sup> of the RTE company<sup>8</sup>), may be brought in any court without the leave of that court; and
- 3656 (2) leave may only be granted if the court is satisfied that the tenant is participating in the making of the claim (or, as from a day to be appointed<sup>9</sup>, that the member is a participating member) solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are proposed to be brought<sup>10</sup>.

If leave is so granted, then at the date at which this title states the law the tenant ceases to be entitled to participate in the making of the claim by virtue of being a qualifying tenant<sup>11</sup> of the flat referred to above, and accordingly ceases to be a participating tenant in respect of the

flat<sup>12</sup>; and as from a day to be appointed<sup>13</sup>, the tenant ceases to be a member of the RTE company<sup>14</sup>.

- 1 For the meaning of 'relevant notice of claim' see PARA 1590 notes 3, 12 ante.
- 2 For the meaning of references to the currency of a claim see PARA 1591 note 17 ante.
- 3 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 4 For the meaning of 'flat' see PARA 1533 note 2 ante.
- 5 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.
- 6 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 7 As to participating members see PARA 1582 ante.
- 8 As to RTE companies see PARAS 1581-1583 ante.
- 9 See note 6 supra.
- 10 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 7(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (6)(a), (b), as from a day to be appointed (see note 6 supra)).
- 11 For the meaning of 'qualifying tenant' see PARA 1557 ante.
- 12 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 7(2).
- 13 See note 6 supra.
- 14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 7(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (6)(c), as from a day to be appointed (see note 6 supra)).

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### **1597. Restrictions on, and effect of, certain elections by tenants.**

At the date at which this title states the law, the following provisions have effect. Where a relevant notice of claim<sup>1</sup> is given, a qualifying tenant<sup>2</sup> of a flat<sup>3</sup> may not subsequently make an election to participate<sup>4</sup>:

- 3657 (1) if he was prohibited<sup>5</sup> from participating in the giving of the notice; or
- 3658 (2) at a time when he would be so prohibited from participating in the giving of a relevant notice of claim, if such a notice were to be given then<sup>6</sup>.

Where a relevant notice of claim is given, then, except with the leave of the court, a qualifying tenant of a flat may not subsequently make such an election at a time when any proceedings are pending to enforce a right of re-entry or forfeiture terminating his lease<sup>7</sup> of the flat<sup>8</sup>. Leave may only be so granted if the court is satisfied that the tenant does not wish to make such an

election solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are pending<sup>9</sup>.

If leave is so granted and the tenant makes such an election, the tenant's lease is deemed for the purposes of the claim to be a subsisting lease despite the existence of those proceedings and any order made afterwards in those proceedings; and, if the claim is effective<sup>10</sup>, the court in which those proceedings were brought may set aside or vary any such order to such extent and on such terms as appear to that court to be appropriate<sup>11</sup>.

The following provisions apply to a qualifying tenant of a flat who, following the giving of a relevant notice of claim, makes<sup>12</sup> an election to participate<sup>13</sup>. Where in the case of any such tenant:

- 3659 (a) a landlord's<sup>14</sup> notice terminating the tenant's lease of the flat has been given or served<sup>15</sup>, whether or not the notice has effect to terminate the lease; but
- 3660 (b) that notice was not given or served more than four months before the date when the tenant makes his election,

the landlord's notice ceases to have effect on that date<sup>16</sup>.

The above provisions are, however, repealed by the Commonhold and Leasehold Reform Act 2002<sup>17</sup>, as from a day to be appointed under that Act<sup>18</sup>.

1 For the meaning of 'relevant notice of claim' see PARA 1590 note 3 ante.

2 For the meaning of 'qualifying tenant' see PARA 1557 ante.

3 For the meaning of 'flat' see PARA 1533 note 2 ante.

4 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 14(3) (prospectively repealed): see PARA 1572 ante. For these purposes, references to making an election under s 14(3) are references to making such an election to participate in the making of the claim in respect of which the relevant notice of claim is given: Sch 3 paras 8(5), 9(4) (prospectively repealed: see the text and note 17 infra).

5 Ie by virtue of ibid Sch 3 para 1, Sch 3 para 2(1), Sch 3 para 3(1) or Sch 3 para 4(1) (each as originally enacted): see PARAS 1590-1593 ante.

6 Ibid Sch 3 para 8(1) (prospectively repealed: see the text and note 17 infra).

7 For the meaning of 'lease' see PARA 1535 note 3 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 8(2) (prospectively repealed: see the text and note 17 infra).

9 Ibid Sch 3 para 8(3) (prospectively repealed: see the text and note 17 infra).

10 For the meaning of references to a claim being effective see PARA 1591 note 15 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 8(4) (prospectively repealed: see the text and note 17 infra).

12 See note 4 supra.

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 9(1) (prospectively repealed: see the text and note 17 infra).

14 For the meaning of 'landlord' see PARA 1535 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

15 Ie as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 2(1) (as originally enacted): see PARA 1591 ante.

16 Ibid Sch 3 para 9(2) (prospectively repealed: see the text and note 17 infra). If any such landlord's notice ceases so to have effect but the claim made in pursuance of the relevant notice of claim is not effective, then Sch 3 para 2(4) (see PARA 1591 ante) applies to any landlord's notice terminating the tenant's lease of the flat which (1) is given under the Landlord and Tenant Act 1954 s 4 (see PARA 1212 ante) or served under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1) (see PARA 1249 ante); and (2) is so given or served within one month after the expiry of the period of currency of that claim; and the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 2(5) (see PARA 1591 ante) applies accordingly: Sch 3 para 9(3) (prospectively repealed: see the text and note 17 infra).

17 See the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14.

18 See *ibid* s 181(1). At the date at which this title states the law, no such day had been appointed.

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### ***C. PROCEDURE FOR GIVING COPIES TO RELEVANT LANDLORDS***

#### **1598. Qualifying tenants or RTE company to give copies of initial notice.**

Where a notice of claim is given<sup>1</sup> in a case where it is proposed to acquire interests of persons other than the person who owns the freehold of the whole premises<sup>2</sup>, the qualifying tenants<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, the RTE company<sup>5</sup>) by whom (or by which) the initial notice<sup>6</sup> is given must, in addition to giving the initial notice to the reversioner<sup>7</sup> in respect of the specified premises<sup>8</sup>, give a copy of the notice to every person known or believed by them (or by it) to be a relevant landlord<sup>9</sup> of those premises<sup>10</sup>. The initial notice must state whether copies are being so given to anyone other than the recipient and, if so, to whom<sup>11</sup>.

Where a notice of claim is given in a case where there are multiple freeholds<sup>12</sup>, the qualifying tenants (or, as from a day to be appointed<sup>13</sup>, the RTE company) by whom (or by which) the initial notice is given must, in addition to giving the initial notice to the person specified in it as the recipient<sup>14</sup>, give a copy of the notice to every other person known or believed by them (or by it) to be a relevant landlord of the specified premises<sup>15</sup>. The initial notice must state whether copies are being so given to anyone other than the person specified in it as the recipient and, if so, to whom<sup>16</sup>.

1 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

2 Ie in a case to which *ibid* s 9(2) (as amended) applies: see PARA 1559 ante.

3 For the meaning of 'qualifying tenant' see PARA 1557 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 For the meaning of 'the initial notice' see PARA 1585 ante.

7 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

8 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

9 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 paras 11, 12(1) (amended by the Housing Act 1996 s 107(4), Sch 10 para 17(2), (3); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (7), as from a day to be appointed (see note 4 supra)). As to the consequences of failure to comply with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 12 (as amended) see PARA 1600 post; and as to the giving of notices see PARA 1541 ante.

Schedule 3 Pt II (paras 11-14) (as amended) (see the text and notes 1-9 supra, 11 infra; and PARAS 1599-1600 post) has effect where a notice under s 13 (as amended) is given in a case to which s 9(2) (as amended) or s 9(2A) (as added) applies: Sch 3 para 11 (as so amended).

11 Ibid Sch 3 para 12(2).

12 Ie in a case to which ibid s 9(2A) (as added) applies: see PARA 1559 ante.

13 See note 4 supra.

14 As to the person specified as the recipient see PARA 1585 note 8 ante.

15 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 12A(1) (added by the Housing Act 1996 s 107, Sch 10 para 17(4); amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (8), as from a day to be appointed (see note 4 supra)).

16 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 12A(2) (as added: see note 15 supra).

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### **1599. Recipient of notice or copy to give further copies.**

A recipient of the initial notice<sup>1</sup> or of a copy of it, including a person receiving a copy under this provision, must, except where the recipient is neither the reversioner<sup>2</sup> nor another relevant landlord<sup>3</sup>, forthwith give a copy to any person who:

3661 (1) is known or believed by him to be a relevant landlord; and

3662 (2) is not stated in the recipient's copy of the notice, or known by him, to have received a copy<sup>4</sup>.

Where a person so gives any copies of the initial notice, he must:

3663 (a) supplement the required statement as to copies<sup>5</sup> by adding any further persons to whom he is giving copies or who are known to him to have received one; and

3664 (b) notify the qualifying tenants<sup>6</sup> (or, as from a date to be appointed<sup>7</sup>, notify the RTE company<sup>8</sup>) by whom or by which the initial notice is given of the persons added by him to that statement<sup>9</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 For the meaning of 'the reversioner' see PARAS 1559-1561 ante.

3 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 13(1), (2). As to the circumstances in which Sch 3 para 13 (as amended) applies see PARA 1598 note 10 ante; as to the consequences of failure to comply with Sch 3 para 13 (as amended) see PARA 1600 post; and as to the giving of notices see PARA 1541 ante.

5 Ie the statement under ibid Sch 3 para 12(2) or, as the case may be, under Sch 3 para 12A(2) (as added); see PARA 1598 ante.

6 For the meaning of 'qualifying tenant' see PARA 1557 ante.

7 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8 As to RTE companies see PARAS 1581-1583 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 13(3) (amended by the Housing Act 1996 s 107(4), Sch 10 para 17(5); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (9), as from a day to be appointed (see note 7 supra)).

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## **1600. Consequences of failure to comply.**

Where:

3665 (1) a relevant landlord<sup>1</sup> of the specified premises<sup>2</sup> does not receive a copy of the initial notice<sup>3</sup> before the end of the period specified in it<sup>4</sup>; but

3666 (2) he was given a notice<sup>5</sup>:

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70. (a) by any of the qualifying tenants<sup>6</sup> by whom the initial notice was given; or

71. (b) as from a day to be appointed<sup>7</sup>, by a qualifying tenant who was a member of the RTE company<sup>8</sup> by which the initial notice was given,

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3667 and, in response to that notice, notified the tenant in question of his interest in the specified premises<sup>9</sup>,

the initial notice ceases to have effect at the end of that period<sup>10</sup>.

Where:

3668 (i) the above provisions<sup>11</sup> do not apply; but

3669 (ii) any person fails without reasonable cause to comply with the statutory obligations to give copies of the initial notice<sup>12</sup> or to give further copies<sup>13</sup>, or is guilty of any unreasonable delay in complying with any of those obligations,

he is liable for any loss thereby occasioned to the qualifying tenants by whom (or, as from a day to be appointed<sup>14</sup>, to the RTE company by which) the initial notice was given or to the reversioner<sup>15</sup> or any other relevant landlord<sup>16</sup>.

- 1 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 3 For the meaning of 'the initial notice' see PARA 1585 ante.
- 4 le in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(g): see PARA 1586 ante at head (7) in the text.
- 5 le under ibid s 11 (as amended): see PARA 1567 ante.
- 6 For the meaning of 'qualifying tenant' see PARA 1557 ante.
- 7 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 8 As to RTE companies see PARAS 1581-1583 ante.
- 9 For the meaning of references to the interest of a relevant landlord in the specified premises see PARA 1564 note 19 ante.
- 10 Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 14(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002, s 124, Sch 8, PARAS 2, 37(1), (10)(a), as from a day to be appointed (see note 7 supra)). As to the circumstances in which the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 14 (as amended) applies see PARA 1598 note 10 ante.
- 11 le ibid Sch 3 para 14(1) (as amended): see the text and notes 1-10 supra.
- 12 le ibid Sch 3 para 12 (as amended) or Sch 3 para 12A (as added and amended): see PARA 1598 ante.
- 13 le ibid Sch 3 para 13 (as amended): see PARA 1599 ante.
- 14 See note 7 supra.
- 15 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.
- 16 Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 para 14(2) (amended by the Housing Act 1996 s 107(4), Sch 10 para 17(6); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 37(1), (10)(b), as from a day to be appointed (see note 7 supra)).

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## **(vii) Procedure following Giving of Initial Notice**

### **A. IN GENERAL**

#### **1601. Rights of access.**

Once the initial notice<sup>1</sup> or a copy of it has been given<sup>2</sup> to the reversioner<sup>3</sup> or to any other relevant landlord<sup>4</sup>, that person and any person authorised to act on his behalf has, in the case of:

- 3670 (1) any part of the specified premises<sup>5</sup>; or
- 3671 (2) any part of any property specified in the initial notice<sup>6</sup>,



in which he has a freehold or leasehold interest<sup>7</sup> which is included in the proposed acquisition by the nominee purchaser<sup>8</sup> (or, as from a day to be appointed<sup>9</sup>, by the RTE company<sup>10</sup>), a right of access thereto for the purpose of enabling him (or it) to obtain a valuation of that interest in connection with the notice or, if it is reasonable, in connection with any other matter arising out of the claim to exercise the right to collective enfranchisement<sup>11</sup>.

Once the initial notice has been given<sup>12</sup>, the nominee purchaser (or, as from a day to be appointed<sup>13</sup>, the RTE company) and any person authorised to act on his (or on its) behalf has a right of access to:

- 3672 (a) any part of the specified premises; or
- 3673 (b) any part of any property specified in the initial notice<sup>14</sup>,

where such access is reasonably required by the nominee purchaser (or by the RTE company) in connection with any matter arising out of the notice<sup>15</sup>.

A right of access so conferred is exercisable at any reasonable time and on giving not less than ten days' notice to the occupier of any premises to which access is sought or, if those premises are unoccupied, to the person entitled to occupy them<sup>16</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante) or s 13(13), Sch 3 Pt II (paras 11-14) (as amended) (see PARAS 1598-1600 ante).

3 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

4 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.

5 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

6 Ie specified in the notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3) (a)(ii): see PARA 1586 ante at head (1)(b) in the text.

7 For the meaning of 'interest' see PARA 408 note 16 ante.

8 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

9 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

10 For these purposes, any reference, however expressed, to the acquisition or proposed acquisition by the nominee purchaser (or, as from a day to be appointed (see note 9 supra) by the RTE company) is a reference to the acquisition or proposed acquisition by the nominee purchaser on behalf of the participating tenants (or, as from that day, by the RTE company) of such freehold and other interests as fall to be so acquired under a contract entered into in pursuance of the initial notice: Leasehold Reform, Housing and Urban Development Act 1993 s 38(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124 Sch 8 paras 2, 27(1), (4)(b), as from a day to be appointed (see note 9 supra)). In the Leasehold Reform, Housing and Urban Development Act 1993 s 38(2) (as so amended), except in so far as it provides for the interpretation of references to the proposed acquisition by the nominee purchaser (or, as from a day to be appointed, by the RTE company), the reference to a contract entered into in pursuance of the initial notice is to be read as including a reference to a vesting order: ss 24(4), 25(6), Sch 5 para 5(5) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 39(1), (2), as from a day to be appointed (see note 9 supra)). For the meaning of 'the participating tenants' see PARAS 1571-1575 ante; as to RTE companies see PARAS 1581-1583 ante; and as to vesting orders see PARA 1615 et seq post.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 17(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 125(1), (2); further prospectively amended by Sch 8 paras 2, 7(1), (2), as from a day to be appointed (see note 9 supra)). For transitional provisions and savings in relation to the amendments that have been brought into force see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1,

Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 1. For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

12    le in accordance with ibid s 13 (as amended).

13    See note 9 supra.

14    See note 6 supra.

15    Leasehold Reform, Housing and Urban Development Act 1993 s 17(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 7(1), (3), as from a day to be appointed (see note 9 supra)). As to the giving of notices see PARA 1541 ante.

16    Leasehold Reform, Housing and Urban Development Act 1993 s 17(3).

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### **1602. Duty of nominee purchaser or RTE company to disclose existence of agreements affecting specified premises etc.**

If at any time during the period beginning with the relevant date<sup>1</sup> and ending with the time when a binding contract is entered into in pursuance of the initial notice<sup>2</sup>, there subsists:

3674   (1)   between the nominee purchaser<sup>3</sup> and a person other than a participating tenant<sup>4</sup>; or

3675   (2)   as from a day to be appointed<sup>5</sup>, between the RTE company<sup>6</sup> and a person other than a participating member<sup>7</sup>,

any agreement, of whatever nature, providing for the disposal<sup>8</sup> of a relevant interest<sup>9</sup>, the existence of that agreement must be notified to the reversioner<sup>10</sup> by the nominee purchaser (or by the RTE company) as soon as possible after the agreement is made or, if in existence on the relevant date, as soon as possible after that date<sup>11</sup>. Similarly, if the nominee purchaser is a company, and at any time during the period mentioned above<sup>12</sup> any person other than a participating tenant holds any share in that company by virtue of which a relevant interest may be acquired, the existence of that shareholding must be notified to the reversioner by the nominee purchaser as soon as possible after the shareholding is established or, if in existence on the relevant date, as soon as possible after that date<sup>13</sup>. This latter obligation is, however, repealed by the Commonhold and Leasehold Reform Act 2002<sup>14</sup>, as from a day to be appointed under that Act<sup>15</sup>.

If the nominee purchaser (or, as from a day to be so appointed, the RTE company) is required so to give any notification but fails to do so before the price payable to the reversioner or any other relevant landlord<sup>16</sup> in respect of the acquisition of any interest of his by the nominee purchaser is determined<sup>17</sup>, and it may reasonably be assumed that, had the nominee purchaser (or the RTE company) given the notification, it would have resulted:

- 3676 (a) in the case of a failure by the nominee purchaser, in the price so determined being increased by an amount referable to the existence of any agreement or shareholding such as is mentioned above; or
- 3677 (b) in the case of a failure by the RTE company, in the price so determined being increased by an amount referable to the existence of any agreement mentioned above,

the nominee purchaser and the participating tenants (or the RTE company and the participating members) are jointly and severally liable to pay the amount to the reversioner or, as the case may be, to the other relevant landlord<sup>18</sup>.

- 1 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 2 For the meaning of 'the initial notice' see PARA 1585 ante.
- 3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 4 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.
- 5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 6 As to RTE companies see PARAS 1581-1583 ante.
- 7 As to participating members see PARA 1582 ante.
- 8 For the meaning of 'disposal' see PARA 408 note 16 ante.
- 9 For these purposes, 'relevant interest' means any interest in, or in any part of, the specified premises or any property specified in the initial notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(a)(ii) (see PARA 1586 ante at head (1)(b) in the text): s 18(3). For the meaning of 'interest' see PARA 408 note 16 ante; and for the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 10 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.
- 11 Leasehold Reform, Housing and Urban Development Act 1993 s 18(1)(a) (s 18(1) amended by the Commonhold and Leasehold Reform Act 2002 s 126(2) and further prospectively amended by s 180, Sch 14, as from a day to be appointed (see note 5 supra); the Leasehold Reform, Housing and Urban Development Act 1993 s 18(1)(a) further prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 8(1), (2), as from such a day). As to the giving of notices see PARA 1541 ante. The Leasehold Reform, Housing and Urban Development Act 1993 s 18(1)(a) (as so amended) does not, however, apply to an agreement if the only disposal of such an interest for which it provides is one consisting in the creation of an interest by way of security for a loan: s 18(4).
- 12 le the period mentioned in *ibid* s 18(1) (as amended): see the text and notes 1-2 supra.
- 13 *Ibid* s 18(1)(b) (prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 5 supra)).
- 14 See note 13 supra.
- 15 See note 5 supra.
- 16 For the meaning of 'relevant landlord' see PARA 1559 ante.
- 17 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 (as amended): see PARA 1624 et seq post. For the meaning of references to the acquisition by the nominee purchaser or the RTE company see PARA 1601 note 10 ante.
- 18 Leasehold Reform, Housing and Urban Development Act 1993 s 18(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 8(1), (3), Sch 14, as from a day to be appointed (see note 5 supra)).

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### **1603. Effect of initial notice as respects subsequent transactions by freeholder etc.**

Where the initial notice<sup>1</sup> has been registered<sup>2</sup>, then, so long as it continues in force:

- 3678 (1) any person who owns the freehold of the whole or any part of the specified premises<sup>3</sup> or the freehold of any property specified in the notice<sup>4</sup> must not:
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72. (a) make any disposal<sup>5</sup> severing his interest<sup>6</sup> in those premises or in that property; or
73. (b) grant out of that interest any lease<sup>7</sup> under which, if it had been granted before the relevant date<sup>8</sup>, the interest of the tenant<sup>9</sup> would to any extent have been liable to acquisition on that date<sup>10</sup>; and
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- 3679 (2) no other relevant landlord<sup>11</sup> may grant out of his interest in the specified premises or in any property so specified any such lease as is mentioned in head (1) (b) above;

and any transaction is void to the extent that it purports to effect any such disposal or any such grant of a lease as is mentioned in head (1) or head (2) above<sup>12</sup>.

Where the initial notice has been so registered and at any time when it continues in force:

- 3680 (i) any person who owns the freehold of the whole or any part of the specified premises or the freehold of any property specified in the notice<sup>13</sup> disposes of his interest in those premises or that property,
- 3681 (ii) any other relevant landlord disposes of any interest of his specified in the notice<sup>14</sup>,

all parties are<sup>15</sup> in the same position as if the person acquiring the interest under the disposal:

- 3682 (A) had become its owner before the initial notice was given, and was accordingly a relevant landlord in place of the person making the disposal; and
- 3683 (B) had been given any notice or copy of a notice given to that person<sup>16</sup>; and
- 3684 (C) had taken all steps which that person had taken<sup>17</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 97(1) (as amended): see PARA 1543 ante.

3 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(a)(ii): see PARA 1586 ante at head (1)(b) in the text.

5 For the meaning of 'disposal' see PARA 408 note 16 ante.

6 For the meaning of 'interest' see PARA 408 note 16 ante.

- 7 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 8 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 9 For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 10 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 2(1)(a) or (b) (as originally enacted or as prospectively substituted): see PARA 1553 ante.
- 11 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 12 Leasehold Reform, Housing and Urban Development Act 1993 s 19(1) (amended by the Housing Act 1996 s 107, Sch 10 para 7(2)).
- 13 See note 4 supra.
- 14 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(c)(i): see PARA 1586 ante at head (3)(a) in the text.
- 15 Ie for the purposes of ibid Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1604 et seq post.
- 16 Ie under ibid Pt I Ch I (as amended).
- 17 Ibid s 19(2), (3)(a)-(c) (s 19(2) amended by the Housing Act 1996 Sch 10 para 7(3)). If any subsequent disposal of that interest takes place at any time when the initial notice continues in force, the Leasehold Reform, Housing and Urban Development Act 1993 s 19(3) applies in relation to that disposal as if any reference to the person making the disposal included any predecessor in title of his: s 19(3).

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#### **1604. Suspension of existing contracts.**

Where immediately before the relevant date<sup>1</sup> there is in force a binding contract<sup>2</sup> relating to the disposal<sup>3</sup> to any extent by:

- 3685 (1) any person who owns the freehold of the whole or any part of the specified premises<sup>4</sup> or the freehold of any property specified in the notice<sup>5</sup>; or
- 3686 (2) any other relevant landlord<sup>6</sup>,

of any interest<sup>7</sup> in those premises or in any specified property<sup>8</sup> then, so long as the initial notice<sup>9</sup> continues in force, the operation of the contract is suspended so far as it relates to any such disposal<sup>10</sup>. Where:

- 3687 (a) the operation of a contract has been so suspended ('the suspended contract'); and
- 3688 (b) a binding contract is entered into in pursuance of the initial notice<sup>11</sup>,

then, without prejudice to the general law as to the frustration of contracts, the person referred to in heads (1) or (2) above is, together with all other persons, discharged from the further performance of the suspended contract so far as it relates to any such disposal<sup>12</sup>.

- 1 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 2 For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 19(4), (5) (as amended), any reference to a contract, except in the context of such a contract as is mentioned in s 19(5)(b) (see head (b) in the text), includes a contract made in pursuance of an order of any court; but s 19(4), (5) (as amended) does not apply to any contract providing for the eventuality of a notice being given under s 13 (as amended) in relation to the whole or part of the property in which any such interest as is referred to in s 19(4) (as amended) subsists: s 19(6).
- 3 For the meaning of 'disposal' see PARA 408 note 16 ante.
- 4 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 5 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(a)(ii): see PARA 1586 ante at head (1)(b) in the text.
- 6 For the meaning of 'relevant landlord' see PARA 1559 ante.
- 7 For the meaning of 'interest' see PARA 408 note 16 ante.
- 8 le any interest falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 19(2)(a) or (b) (as amended): see PARA 1603 ante at heads (i)-(ii) in the text.
- 9 For the meaning of 'the initial notice' see PARA 1585 ante.
- 10 Leasehold Reform, Housing and Urban Development Act 1993 s 19(4). (amended by the Housing Act 1996 s 107, Sch 10 para 7(4)).
- 11 For these purposes, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: Leasehold Reform, Housing and Urban Development Act 1993 ss 24(4), 25(6), Sch 5 para 5(1), (2)(d). As to vesting orders see PARA 1615 et seq post.
- 12 Ibid s 19(5).

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### **1605. Right of reversioner to require evidence of tenant's right to participate.**

The reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> may, within the period of 21 days beginning with the relevant date<sup>3</sup>:

- 3689 (1) give the nominee purchaser<sup>4</sup> a notice requiring him, in the case of any person by whom the initial notice<sup>5</sup> was given, to deduce the title of that person to the lease<sup>6</sup> by virtue of which it is claimed that he is a qualifying tenant<sup>7</sup> of a flat<sup>8</sup> contained in the specified premises<sup>9</sup>; or
- 3690 (2) as from a day to be appointed<sup>10</sup>, give the RTE company<sup>11</sup> a notice requiring it, in the case of any qualifying tenant of a flat contained in the specified premises who was a participating member<sup>12</sup> of the company at the relevant time, to deduce the title of that qualifying tenant to the lease by virtue of which it is claimed that he is a qualifying tenant of a flat contained in the specified premises<sup>13</sup>.

The nominee purchaser (or, as from a day to be appointed<sup>14</sup>, the RTE company) must comply with any such requirement within the period of 21 days beginning with the date of the giving of the notice<sup>15</sup>. Where:

- 3691 (a) the nominee purchaser (or, as from a day to be appointed<sup>16</sup>, the RTE company) fails to comply with any such requirement<sup>17</sup> in the case of any person (or any qualifying tenant) within the specified period<sup>18</sup>; and
- 3692 (b) the initial notice would not have been given<sup>19</sup> if that person (or that qualifying tenant) and any other person (or qualifying tenant) in the case of whom a like failure by the nominee purchaser (or by the RTE company) has occurred had been neither included among the persons who gave the notice (or members of the RTE company) nor included among the qualifying tenants of the flats<sup>20</sup>,

the initial notice is deemed to have been withdrawn at the end of that period<sup>21</sup>.

1 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

4 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

5 For the meaning of 'the initial notice' see PARA 1585 ante.

6 For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of 'qualifying tenant' see PARA 1557 ante.

8 For the meaning of 'flat' see PARA 1533 note 2 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 20(1) (as originally enacted). As to the giving of notices see PARA 1541 ante. The requirement to deduce the titles of the participating tenants to the leases by which they claim to be qualifying tenants is not a requirement that title must be proved conclusively as at 'the relevant date'; it is no more than an administrative or procedural requirement on the nominee purchaser to provide evidence to support the assertion in the initial notice that the tenant in question is, as at the relevant date, the owner of the leasehold interest particularised in the initial notice; and to do so within 21 days: see *Raymere Ltd v Belle Vue Gardens Ltd* [2003] EWCA Civ 996, [2004] Ch 29, [2003] All ER (D) 290 (Jul).

10 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11 As to RTE companies see PARAS 1581-1583 ante.

12 As to participating members see PARA 1582 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 20(1) (s 20(1)-(3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 9(1)-(4), as from a day to be appointed (see note 10 supra)).

14 See note 10 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 20(2) (as amended: see note 13 supra).

16 See note 10 supra.

17 Ie a requirement under the Leasehold Reform, Housing and Urban Development Act 1993 s 20(1) (as originally enacted or as prospectively amended): see the text and notes 1-13 supra.

18 Ie within the period mentioned in *ibid* s 20(2) (as originally enacted or as prospectively amended): see the text and notes 14-15 supra.

19 Ie in accordance with *ibid* s 13(2)(b) (as amended): see PARA 1585 ante.

20 le referred to in *ibid* s 13(2)(b).

21 *Ibid* s 20(3) (as amended: see note 13 *supra*).

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## ***B. REVERSIONER'S COUNTER-NOTICE***

### **1606. In general.**

The reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> must give a counter-notice to the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, to the RTE company<sup>5</sup>) by the date specified<sup>6</sup> in the initial notice<sup>7</sup>.

The counter-notice must comply with one of the following requirements, namely:

- 3693 (1) state that the reversioner admits that the participating tenants<sup>8</sup> were (or, as from a day to be appointed<sup>9</sup>, the RTE company was) on the relevant date<sup>10</sup> entitled to exercise the right to collective enfranchisement<sup>11</sup> in relation to the specified premises;
- 3694 (2) state that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were (or the RTE company was) so entitled;
- 3695 (3) contain such a statement as is mentioned in head (1) or head (2) above but state that an application for an order<sup>12</sup> is to be made by such appropriate landlord<sup>13</sup> as is specified in the counter-notice, on the grounds that he intends to redevelop the whole or a substantial part of the specified premises<sup>14</sup>.

If the counter-notice complies with the requirement set out in head (1) above, it must in addition:

- 3696 (a) state which, if any, of the proposals contained in the initial notice are accepted by the reversioner and which, if any, of those proposals are not so accepted and specify:
  - 225 74. (i) in relation to any proposal which is not so accepted, the reversioner's counter-proposal<sup>15</sup>; and
  - 75. (ii) any additional leaseback proposals<sup>16</sup> by the reversioner;
  - 226 3697 (b) if, in a case where any property specified in the initial notice<sup>17</sup> is property which a qualifying tenant is entitled under the terms of the lease of his flat to use in common with the occupiers of other premises, whether those premises are contained in the relevant premises or not<sup>18</sup>, any such counter-proposal relates to the grant of rights or the disposal<sup>19</sup> of any freehold interest<sup>20</sup>, specify:
    - 227 76. (i) the nature of those rights and the property over which it is proposed to grant them; or
    - 77. (ii) the property in respect of which it is proposed to dispose of any such interest,



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3698 as the case may be;

3699 (c) state which interest, if any, the nominee purchaser (or, as from a day to be appointed<sup>21</sup>, the RTE company) is to be required to acquire<sup>22</sup>;3700 (d) state which rights, if any, any relevant landlord<sup>23</sup> desires to retain:

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78. (i) over any property in which he has any interest which is included in the proposed acquisition by the nominee purchaser (or by the RTE company); or

79. (ii) over any property in which he has any interest which the nominee purchaser (or the RTE company) is to be required to acquire<sup>24</sup>,

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3701 on the grounds that the rights are necessary for the proper management or maintenance of property in which he is to retain a freehold or leasehold interest; and

3702 (e) include a description of any provisions which the reversioner or any other relevant landlord considers should be included<sup>25</sup> in any conveyance<sup>26</sup> to the nominee purchaser (or to the RTE company)<sup>27</sup>.

A counter-notice so given must also contain, in addition to the particulars so required, a statement as to whether or not the specified premises are within the area of a scheme approved<sup>28</sup> as an estate management scheme<sup>29</sup>.

The nominee purchaser may be required to acquire on behalf of the participating tenants (or, as from a day to be appointed<sup>30</sup>, the RTE company may be required to acquire) the interest in any property of any relevant landlord, if the property:

3703 (A) would for all practical purposes cease to be of use and benefit to him; or

3704 (B) would cease to be capable of being reasonably managed or maintained by him,

in the event of his interest in the specified premises or, as the case may be, in any other property being acquired<sup>31</sup> by the nominee purchaser (or by the RTE company)<sup>32</sup>.

Every counter-notice must specify an address in England and Wales at which notices may be given<sup>33</sup> to the reversioner<sup>34</sup>.

1 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(g): see PARA 1586 ante at head (7) in the text.

7 Ibid s 21(1) (s 21(1)-(5) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 10, as from a day to be appointed (see note 4 supra)). For the meaning of 'the initial notice' see PARA 1585 ante; and as to the giving of notices see PARA 1541 ante.

8 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

9 See note 4 supra.

- 10 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 11 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.
- 12 Ie an order under the Leasehold Reform, Housing and Urban Development Act 1993 s 23(1): see PARA 1611 post.
- 13 Ie within the meaning of ibid s 23 (as amended): see PARA 1611 note 6 post.
- 14 Ibid s 21(2) (as amended: see note 7 supra).
- 15 A counter-notice under ibid s 21 (as amended) is not invalidated if the landlord proposes a purchase price which is unrealistically high, since the requirement applicable to an initial notice under s 13 (as amended) (see PARA 1585 ante), or a tenant's notice under s 42 (as amended) (see PARA 1677 post), that the price or premium must be a realistic figure, does not apply to the proposed purchase price in a counter-notice under s 21 (as amended), which requires a different construction: *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough* [2005] EWCA Civ 324, [2005] 4 All ER 1207, [2005] HLR 642.
- 16 For these purposes, the reference to additional leaseback proposals is a reference to proposals which relate to the leasing back, in accordance with ibid s 36 (as amended) (see PARA 1656 post) and s 36(1), Sch 9 (as amended) (see PARA 1657 et seq post), of flats or other units contained in the specified premises and which are made either (1) in respect of flats in relation to which Sch 9 Pt II (paras 2-4) (as amended) (see PARAS 1657-1659 post) is applicable but which were not specified in the initial notice under s 13(3)(c)(ii) (see PARA 1586 ante at head (3)(b) in the text); or (2) in respect of flats or other units in relation to which Sch 9 Pt III (paras 5-7) (as amended) (see PARAS 1660-1662 post) is applicable: s 21(7). For the meaning of 'unit' see PARA 1555 note 9 ante.
- 17 Ie under ibid s 13(3)(a)(ii): see PARA 1586 ante at head (1)(b) in the text.
- 18 Ie property falling within ibid s 1(3)(b): see PARA 1552 ante.
- 19 For the meaning of 'disposal' see PARA 408 note 16 ante.
- 20 Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 1(4) (as amended): see PARA 1552 ante. For the meaning of 'interest' see PARA 408 note 16 ante.
- 21 See note 4 supra.
- 22 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 21(4) (as amended): see the text and notes 30-32 infra.
- 23 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 24 See note 22 supra.
- 25 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 34 (as amended) (see PARA 1647 post) and s 34(9), Sch 7 (as amended) (see PARA 1648 et seq post).
- 26 For the meaning of 'conveyance' see PARA 1564 note 10 ante.
- 27 Leasehold Reform, Housing and Urban Development Act 1993 s 21(3) (s 21(3) amended by the Housing Act 1996 s 107(4), Sch 10 para 8(1), (2); prospectively amended (see note 7 supra)). Where a counter-notice specifies any interest in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 21(3) (c) (as originally enacted or as prospectively amended) (see head (c) in the text), the nominee purchaser (or, as from a day to be appointed (see note 4 supra), the RTE company) or any person authorised to act on his (or its) behalf has, in the case of any part of the property in which that interest subsists, a right of access thereto for the purpose of enabling the nominee purchaser (or the RTE company) to obtain, in connection with the proposed acquisition by him (or by it), a valuation of that interest; and s 17(3) (see PARA 1601 ante) applies in relation to the exercise of that right as it applies in relation to the exercise of the right of access conferred by s 17 (as amended) (see PARA 1601 ante): s 21(5) (as amended: see note 7 supra)).
- 28 Ie under ibid s 70 (as amended): see PARA 1736 post.
- 29 Leasehold Reform (Collective Enfranchisement) (Counter-notices) (England) Regulations 2002, SI 2002/3208, regs 3, 4; Leasehold Reform (Collective Enfranchisement) (Counter-notices) (Wales) Regulations 2003, SI 2003/990, regs 3, 4. A failure to declare in a landlord's counter-notice that there is no estate management scheme affecting a property cannot, however, be of such importance that the omission renders

invalid a notice which in all other respects is accurate and effective: see *7 Strathray Gardens Ltd v Pointstar Shipping and Finance Ltd* [2004] EWCA Civ 1669, [2005] 07 EG 144, [2004] All ER (D) 240 (Dec).

30 See note 4 *supra*.

31 *Ie* under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 *et seq ante*, PARA 1610 *et seq post*.

32 *Ibid* s 21(4) (amended by the Housing Act 1996 s 107(4), Sch 10 para 8(1), (3); prospectively amended (see note 7 *supra*)).

33 See note 31 *supra*.

34 Leasehold Reform, Housing and Urban Development Act 1993 s 21(6).

## UPDATE

### 1606 In general

NOTE 16--A failure to specify an additional leaseback proposal in a counter-notice precludes any subsequent attempt to notify such a proposal in a leaseback notice: *Cawthorne v Hamdan* [2007] EWCA Civ 6, [2007] Ch 187.

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### 1607. Information to accompany counter-notice.

Where, before the date of the giving of a counter-notice<sup>1</sup>, the reversioner<sup>2</sup> or any other relevant landlord<sup>3</sup>:

- 3705 (1) has received a notice by a qualifying tenant claiming to exercise the right to acquire a new lease with respect to any flat<sup>4</sup> contained in the specified premises<sup>5</sup>, or a copy of such a notice; or
- 3706 (2) has given any counter-notice<sup>6</sup> in response to any such notice,

a copy of every notice which, or a copy of which, has been received as mentioned in head (1) above, and a copy of every counter-notice which has been given as mentioned in head (2) above, must either accompany any counter-notice given<sup>7</sup> or be given to the nominee purchaser<sup>8</sup> (or, as from a day to be appointed<sup>9</sup>, to the RTE company<sup>10</sup>) by the reversioner as soon as possible after the date of the giving of any such counter-notice<sup>11</sup>.

1 *Ie* under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 *ante*.

2 For the meaning of 'the reversioner' see PARAS 1559-1563 *ante*.

3 For the meaning of 'relevant landlord' see PARA 1559 *ante*. As to special categories of landlord see PARA 1545 *et seq ante*.

4 For the meaning of 'flat' see PARA 1533 note 2 *ante*.

5 le a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended) (see PARA 1677 post), being a notice to which s 54(1) or (2) (see PARA 1701 post) applies on that date. For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

6 le under ibid s 45 (as amended): see PARA 1692 post.

7 See note 1 supra.

8 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

9 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

10 As to RTE companies see PARAS 1581-1583 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 21(8), Sch 4 para 1(1), (2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 38, as from a day to be appointed (see note 9 supra)).

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### **1608. Continuing duty to furnish information.**

Where, on or after the date of the giving of a counter-notice<sup>1</sup>, the reversioner<sup>2</sup> or any other relevant landlord<sup>3</sup> receives:

3707 (1) a notice by a qualifying tenant claiming to exercise the right to acquire a new lease<sup>4</sup> with respect to any flat<sup>5</sup> contained in the specified premises<sup>6</sup> or a copy of such a notice; or

3708 (2) any notice of withdrawal duly given<sup>7</sup> and relating to any such notice<sup>8</sup> of which a copy has already been furnished<sup>9</sup> to the nominee purchaser<sup>10</sup> (or, as from a day to be appointed<sup>11</sup>, to the RTE company<sup>12</sup>),

a copy of every notice which, or a copy of which, is received as mentioned in head (1) or head (2) above must be given to the nominee purchaser (or to the RTE company) by the reversioner<sup>13</sup> as soon as possible after the time when the notice or copy is received by the reversioner or, as the case may be, the other relevant landlord<sup>14</sup>.

The above provisions do not, however, apply if the notice or copy is received by the reversioner or, as the case may be, the other relevant landlord otherwise than at a time when:

3709 (a) the initial notice<sup>15</sup> continues in force; or

3710 (b) a binding contract entered into in pursuance of that notice remains in force; or

3711 (c) where an order has been made<sup>16</sup> with respect to the specified premises, any interests<sup>17</sup> which by virtue of the order fall to be vested in the nominee purchaser (or, as from a day to be appointed<sup>18</sup>, in the RTE company) have yet to be so vested<sup>19</sup>.

1 le a counter-notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 ante.

- 2 For the meaning of 'the reversioner' see PARA 1559-1563 ante.
- 3 For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 4 Is a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 post.
- 5 For the meaning of 'flat' see PARA 1533 note 2 ante.
- 6 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 7 Is under the Leasehold Reform, Housing and Urban Development Act 1993 s 52: see PARA 1699 post.
- 8 See note 4 supra.
- 9 Is under the Leasehold Reform, Housing and Urban Development Act 1993 s 21(8), Sch 4 (as amended): see PARA 1607 ante, PARA 1609 post.
- 10 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 11 Is as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 12 As to RTE companies see PARAS 1581-1583 ante.
- 13 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.
- 14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 4 para 2(1), (2) (Sch 4 para 2 prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 38, as from a day to be appointed (see note 11 supra)). As to the giving of notices see PARA 1541 ante.
- 15 For the meaning of 'the initial notice' see PARA 1585 ante.
- 16 Is under the Leasehold Reform, Housing and Urban Development Act 1993 s 24(4)(a) or (b) (as originally enacted or as amended) (see PARA 1612 post) or s 25(6)(a) or (b) (as originally enacted or as amended) (see PARA 1613 post).
- 17 For the meaning of 'interest' see PARA 408 note 16 ante.
- 18 See note 11 supra.
- 19 Leasehold Reform, Housing and Urban Development Act 1993 Sch 4 para 2(3) (as amended: see note 14 supra).

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### **1609. Duty of other landlords to furnish copies to reversioner.**

The general obligations of other landlords to give information and assistance to the reversioner<sup>1</sup> extend<sup>2</sup> to requiring any relevant landlord<sup>3</sup>, other than the reversioner, who:

- 3712 (1) receives a relevant notice<sup>4</sup> or a copy of such a notice; or
- 3713 (2) gives a relevant counter-notice,

to furnish a copy of the notice or counter-notice to the reversioner as soon as possible after the time when the notice or copy is received or, as the case may be, the counter-notice is given by the relevant landlord<sup>5</sup>.

1     le the duty imposed by the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3), Sch 1 para 8(1)(a): see PARA 1566 ante. For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2     le without prejudice to the generality of *ibid* Sch 1 para 8(1)(a).

3     For the meaning of 'relevant landlord' see PARA 1559 ante. As to special categories of landlord see PARA 1545 et seq ante.

4     For these purposes, 'relevant notice' and 'relevant counter-notice' mean respectively any notice of which a copy is required to be given to the nominee purchaser (or, as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1), to the RTE company) by the reversioner in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 21(8), Sch 4 (as amended) (see PARAS 1607-1608 ante) and any counter-notice of which a copy is required to be so given: Sch 4 para 3(2) (prospectively amended, as from such a day, by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 38; at the date at which this title states the law, no such day had been appointed). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and as to RTE companies see PARAS 1581-1583 ante.

5     Leasehold Reform, Housing and Urban Development Act 1993 Sch 4 para 3(1). As to the giving of notices see PARA 1541 ante.

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## **(viii) Applications to Court or Leasehold Valuation Tribunal**

### **A. IN GENERAL**

#### **1610. Proceedings relating to validity of initial notice.**

Where:

3714 (1) the reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> has given<sup>3</sup> the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, has given the RTE company<sup>6</sup>) a counter-notice which<sup>7</sup> states that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants were entitled to exercise the right to collective enfranchisement (or that the RTE company was so entitled)<sup>8</sup>; but

3715 (2) the court<sup>9</sup> is satisfied, on an application made by the nominee purchaser (or by the RTE company), that the participating tenants were on the relevant date<sup>10</sup> entitled to exercise the right to collective enfranchisement in relation to the specified premises (or that the RTE company was so entitled),

the court must by order make a declaration to that effect<sup>11</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning with the date of the giving of the counter-notice to the nominee purchaser (or, as from a day to be appointed<sup>12</sup>, to the RTE company)<sup>13</sup>.

If on any such application the court makes such an order, the court must make an order:

- 3716 (a) declaring that the reversioner's counter-notice is of no effect; and
- 3717 (b) requiring the reversioner to give a further counter-notice to the nominee purchaser (or, as from a day to be appointed<sup>14</sup>, to the RTE company) by such date as is specified in the order<sup>15</sup>.

If an application by the nominee purchaser (or, as from a day to be appointed<sup>16</sup>, by the RTE company) for an order under heads (1) and (2) above is dismissed by the court, the initial notice<sup>17</sup> ceases to have effect at the time when the order dismissing the application becomes final<sup>18</sup>.

1 For the meaning of 'the reversioner' see PARA 1559-1563 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 ante.

4 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARAS 1581-1583 ante.

7 le whether or not it complies with the Leasehold Reform, Housing and Urban Development Act 1993 s 21(2)(b) or (c) (as amended): see PARA 1606 ante.

8 le such a statement as is mentioned in ibid s 21(2)(b) (as amended). For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

9 For the meaning of 'the court' see PARA 1539 note 3 ante.

10 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 22(1) (s 22(1)-(3), (6) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 11, as from a day to be appointed (see note 5 supra)). As to deemed withdrawal of the initial notice see PARA 1620 post.

12 See note 5 supra.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 22(2) (as amended: see note 11 supra).

14 See note 5 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 22(3) (as amended: see note 11 supra). Section 22(3) (as so amended) does not, however, apply if (1) the counter-notice complies with the requirement set out in s 21(2)(c) (see PARA 1606 ante); and (2) either an application for an order under s 23(1) (see PARA 1611 post) is pending or the period specified in s 23(3) (as amended) (see PARA 1611 post) as the period for the making of such an application has not expired: s 22(4).

Section 21(3)-(5) (as amended) (see PARA 1606 ante) applies to any further counter-notice required to be given by the reversioner under s 22(3) (as so amended) as if it were a counter-notice under s 21 (as amended) complying with the requirement set out in s 21(2)(a) (as amended): s 22(5).

16 See note 5 supra.

17 For the meaning of 'the initial notice' see PARA 1585 ante.

18 Leasehold Reform, Housing and Urban Development Act 1993 s 22(6) (as amended: see note 11 supra). As to when an order of the court becomes final see PARA 1587 note 8 ante.

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### **1611. Tenants' claim to be defeated where landlord intends to redevelop.**

Where the reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> has given a counter-notice<sup>3</sup> which states that an application is to be made for an order on the grounds that he intends to redevelop the whole or a substantial part of those premises<sup>4</sup>, the court<sup>5</sup> may, on the application of any appropriate landlord<sup>6</sup>, by order declare that the right to collective enfranchisement<sup>7</sup> is not exercisable in relation to those premises by reason of that landlord's intention to redevelop the whole or a substantial part of the premises<sup>8</sup>.

The court may not make such an order unless it is satisfied:

- 3718 (1) that not less than two-thirds of all the long leases<sup>9</sup> on which flats<sup>10</sup> contained in the specified premises are held are due to terminate within the period of five years beginning with the relevant date<sup>11</sup>; and
- 3719 (2) that for the purposes of redevelopment the applicant intends, once the leases in question have so terminated, to demolish or reconstruct, or to carry out substantial works of construction on, the whole or a substantial part of the specified premises; and
- 3720 (3) that he could not reasonably do so without obtaining possession of the flats demised by those leases<sup>12</sup>.

Any application for such an order must be made within the period of two months beginning with the date of the giving of the counter-notice to the nominee purchaser<sup>13</sup> (or, as from a day to be appointed<sup>14</sup>, to the RTE company)<sup>15</sup>.

Where such an order is made by the court, the initial notice<sup>16</sup> ceases to have effect on the order becoming final<sup>17</sup>.

Where an application for such an order is dismissed by the court, the court must make an order:

- 3721 (a) declaring that the reversioner's counter-notice is of no effect; and
- 3722 (b) requiring the reversioner to give a further counter-notice to the nominee purchaser (or, as from a day to be appointed<sup>18</sup>, to the RTE company) by such date as is specified in the order<sup>19</sup>.

Where the reversioner has given such a counter-notice<sup>20</sup> but either:

- 3723 (i) no application for an order<sup>21</sup> is made within the specified period<sup>22</sup>; or
- 3724 (ii) such an application is so made but is subsequently withdrawn,

the reversioner must give a further counter-notice to the nominee purchaser (or, as from a day to be appointed<sup>23</sup>, to the RTE company) within the period of two months beginning with the appropriate date<sup>24</sup>.

1 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.



2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 ante.

4 le which complies with the requirement set out in ibid s 21(2)(c): see PARA 1606 ante.

5 For the meaning of 'the court' see PARA 1539 note 3 ante.

6 For these purposes, 'appropriate landlord', in relation to the specified premises, means (1) the reversioner or any other relevant landlord; or (2) any two or more persons falling within head (1) supra who are acting together: ibid s 23(10). For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.

If a claim is made under s 23(1) by a person other than the reversioner, then on the issue of the claim form in accordance with CPR Pt 8 (alternative procedure for claims: see PRACTICE CIVIL PROCEDURE vol 11 (2009) PARA 127), the claimant must send a copy to the reversioner: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.2(1).

7 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 23(1). If a claim is made under s 23(1) by a person other than the reversioner, then the claimant must promptly inform the reversioner either: (1) of the court's decision; or (2) that the claim has been withdrawn: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.2(2).

9 For the meaning of 'long lease' see PARA 1558 ante.

10 For the meaning of 'flat' see PARA 1533 note 2 ante.

11 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 23(2).

13 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

14 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 23(3) (s 23(3), (5), (6), (8) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8, PARAS 2, 12, as from a day to be appointed (see note 14 supra)). As to RTE companies see PARAS 1581-1583 ante. See also note 6 supra.

Where, however, the counter-notice is one falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 22(1)(a) (as amended) (see PARA 1610 ante), such an application may not be proceeded with until such time, if any, as an order under s 22(1) (as amended) (see PARA 1610 ante) becomes final: s 23(3). As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

16 For the meaning of 'the initial notice' see PARA 1585 ante.

17 Leasehold Reform, Housing and Urban Development Act 1993 s 23(4).

18 See note 14 supra.

19 Leasehold Reform, Housing and Urban Development Act 1993 s 23(5) (as amended) (see note 15 supra). Section 21(3)-(5) (as amended) (see PARA 1606 ante) applies to any further counter-notice required to be given by the reversioner under s 23(5) (as so amended) or s 23(6) (see the text and notes 20-24 infra) as if it were a counter-notice under s 21 (as amended) complying with the requirement set out in s 21(2)(a) (as amended): s 23(9).

20 le such a counter-notice as is mentioned in ibid s 23(1).

21 le under ibid s 23(1).

22 le the period referred to in ibid s 23(3) (as amended).

23 See note 14 supra.

24 Leasehold Reform, Housing and Urban Development Act 1993 s 23(6) (as amended: see note 15 supra). For these purposes, 'the appropriate date' means (1) if head (i) in the text applies, the date immediately following the end of the period referred to in s 23(3) (as amended); and (2) if head (ii) in the text applies, the date of withdrawal of the application: s 23(7).

Section 23(6) (as so amended) does not, however, apply if any application has been made by the nominee purchaser (or, as from a day to be appointed (see note 14 supra) by the RTE company) under s 22(1) (as amended): s 23(8) (as amended: see note 15 supra). See also note 19 supra.

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### **1612. Applications where terms in dispute or failure to enter contract.**

Where the reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> has given the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, has given the RTE company<sup>5</sup>) a counter-notice<sup>6</sup> or further counter-notice<sup>7</sup> but any of the terms of acquisition<sup>8</sup> remain in dispute at the end of the period of two months beginning with the date on which the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the nominee purchaser (or the RTE company) or the reversioner, determine the matters in dispute<sup>9</sup>.

Any such application must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the nominee purchaser (or, as from a day to be appointed<sup>10</sup>, to the RTE company)<sup>11</sup>. As well as the general particulars to be included with an application to a leasehold valuation tribunal<sup>12</sup>, the following documents and particulars must be included with an application under the above provisions:

- 3725 (1) a copy of any notice served in relation to the enfranchisement;
- 3726 (2) the name and address of the freeholder and any intermediate landlord;
- and
- 3727 (3) the name and address of any person having a mortgage or other charge over an interest in the premises the subject of the application held by the freeholder or other landlord<sup>13</sup>.

The tribunal may, however, dispense with or relax any of the requirements of heads (1) to (3) above if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application<sup>14</sup>.

Where:

- 3728 (a) the reversioner has so given the nominee purchaser (or the RTE company) a counter-notice or further counter-notice<sup>15</sup>; and
- 3729 (b) all of the terms of acquisition have been either agreed<sup>16</sup> between the parties<sup>17</sup> or so determined by a leasehold valuation tribunal,

but a binding contract incorporating those terms has not been entered into by the end of the appropriate period<sup>18</sup>, the court<sup>19</sup> may, on the application of either the nominee purchaser (or, as from a day to be appointed<sup>20</sup>, of the RTE company) or the reversioner, make such order<sup>21</sup> as it thinks fit<sup>22</sup>.

The court may make an order:

- 3730 (i) providing for the interests to be acquired by the nominee purchaser (or, as from a day to be appointed<sup>23</sup>, by the RTE company) to be vested in him (or in it) on the terms referred to in head (b) above;
- 3731 (ii) providing for those interests to be vested in him (or in it) on those terms but subject to such modifications as may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser (or the RTE company) or the reversioner, to be required by reason of any change in circumstances since the time when the terms were agreed or determined<sup>24</sup> and are specified in the order; or
- 3732 (iii) providing for the initial notice<sup>25</sup> to be deemed to have been withdrawn at the end of the appropriate period<sup>26</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period<sup>27</sup>.

1 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 Ie a counter-notice complying with the requirement set out in the Leasehold Reform, Housing and Urban Development Act 1993 s 21(2)(a) (as amended): see PARA 1606 ante.

7 Ie a further counter-notice required by or by virtue of *ibid* s 22(3) (as amended) (see PARA 1610 ante) or s 23(5) or (6) (as amended) (see PARA 1611 ante).

8 For these purposes, 'the terms of acquisition', in relation to a claim made under *ibid* Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1613 et seq post), means the terms of the proposed acquisition by the nominee purchaser (or, as from a day to be appointed (see note 4 supra) by the RTE company), whether relating to (1) the interests to be acquired; (2) the extent of the property to which those interests relate or the rights to be granted over any property; (3) the amounts payable as the purchase price for such interests; (4) the apportionment of conditions or other matters in connection with the severance of any reversionary interest; or (5) the provisions to be contained in any conveyance, or otherwise, and includes any such terms in respect of any interest to be acquired in pursuance of s 1(4) (as amended) (see PARA 1552 ante) or s 21(4) (as amended) (see PARA 1606 ante): ss 24(8), 38(1) (s 24(1)-(4), (7), (8) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 13, as from a day to be appointed (see note 4 supra)). For the meaning of 'interest' see PARA 408 note 16 ante; and for the meaning of 'conveyance' see PARA 1564 note 10 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 24(1) (as amended: see note 8 supra). 'May' in this context imports an obligation and does not permit a discretion: *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55, [2000] All ER (D) 320, CA; and see note 26 infra. As to deemed withdrawal of the initial notice see PARA 1620 post.

10 See note 4 supra.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 24(2) (as amended: see note 8 supra).

12 See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(1); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(1); and PARA 60 ante.

13 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(d), Sch 2 para 1(1)-(3); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(d), Sch 2 para 1(1)-(3).

14 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

15 Is such a counter-notice or further counter-notice as is mentioned in *ibid* s 24(1)(a) or (b) (as amended): see the text and notes 1-7 *supra*.

16 For the meaning of references to agreement in relation to all or any of the terms of acquisition see PARA 1564 note 6 *ante*.

17 For these purposes, 'the parties' means the nominee purchaser (or, as from a day to be appointed (see note 4 *supra*) the RTE company) and the reversioner and any relevant landlord who has given to those persons a notice for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 9(2), Sch 1 para 7(1)(a) (as amended) (see PARA 1565 *ante*): s 24(7) (as amended: see note 8 *supra*). For the meaning of 'relevant landlord' see PARA 1559 *ante*; and as to special categories of landlord see PARA 1545 *et seq ante*.

18 For these purposes, the appropriate period is (1) where all of the terms of acquisition have been agreed between the parties, the period of two months beginning with the date when those terms were finally so agreed; (2) where all or any of those terms have been determined by a leasehold valuation tribunal under *ibid* s 24(1) (as amended): (a) the period of two months beginning with the date when the decision of the tribunal under s 24(1) (as amended) becomes final; or (b) such other period as may have been fixed by the tribunal when making its determination: s 24(6). As to when the decision of a tribunal becomes final see PARA 1587 note 8 *ante*.

19 For the meaning of 'the court' see PARA 1539 note 3 *ante*.

20 See note 4 *supra*.

21 Is under the Leasehold Reform, Housing and Urban Development Act 1993 s 24(4) (as amended): see the text and notes 23-26 *infra*.

22 *Ibid* s 24(3) (as amended: see note 8 *supra*); and see *Penman v Upavon Enterprises Ltd* [2001] EWCA Civ 956, [2001] All ER (D) 115 (Jun).

23 See note 4 *supra*.

24 Is as mentioned in *ibid* s 24(3) (as amended).

25 For the meaning of 'the initial notice' see PARA 1585 *ante*.

26 Leasehold Reform, Housing and Urban Development Act 1993 s 24(4) (as amended: see note 8 *supra*). Section 24(4), Sch 5 (as amended) (see PARAS 1615-1617 *post*) has effect in relation to any such order as is mentioned in s 24(4)(a) or (b) (as amended): s 24(4).

27 *Ibid* s 24(5).

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### **1613. Applications where reversioner fails to give counter-notice or further counter-notice.**

Where the initial notice<sup>1</sup> has been given<sup>2</sup> but:

- 3733 (1) the reversioner<sup>3</sup> has failed to give the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, has failed to give the RTE company<sup>6</sup>) a counter-notice<sup>7</sup>; or  
 3734 (2) if required to give the nominee purchaser (or the RTE company) a further counter-notice<sup>8</sup>, the reversioner has failed to comply with that requirement,

the court<sup>9</sup> may, on the application of the nominee purchaser (or of the RTE company), make an order determining the terms on which he (or it) is to acquire, in accordance with the proposals contained in the initial notice, such interests<sup>10</sup> and rights as are specified<sup>11</sup> in it<sup>12</sup>.

The terms so determined by the court must in certain circumstances<sup>13</sup> include terms which provide for the leasing back<sup>14</sup> of flats<sup>15</sup> or other units<sup>16</sup> contained in the specified premises<sup>17</sup>.

Any application for such an order must be made not later than the end of the period of six months beginning with the date by which the counter-notice or further counter-notice<sup>18</sup> was to be given to the nominee purchaser (or, as from a day to be appointed<sup>19</sup>, to the RTE company)<sup>20</sup>.

The court may not, however, make any order on an application made by virtue of head (1) above unless it is satisfied:

- 3735 (a) that the participating tenants<sup>21</sup> were on the relevant date<sup>22</sup> entitled to exercise the right to collective enfranchisement<sup>23</sup> in relation to the specified premises (or, as from a day to be appointed<sup>24</sup>, that the RTE company was so entitled); and  
 3736 (b) if applicable, that the statutory requirements<sup>25</sup> were complied with as respects the giving of copies of the initial notice<sup>26</sup>.

Where the terms of acquisition<sup>27</sup> have been so determined by an order of the court but a binding contract incorporating those terms has not been entered into by the end of the appropriate period<sup>28</sup>, the court may, on the application of either the nominee purchaser (or, as from a day to be appointed<sup>29</sup>, of the RTE company) or the reversioner, make such order<sup>30</sup> as it thinks fit<sup>31</sup>.

The court may make an order:

- 3737 (i) providing for the interests to be acquired by the nominee purchaser to be vested<sup>32</sup> in him (or, as from a day to be appointed<sup>33</sup>, for the interests acquired by the RTE company to be vested in it);  
 3738 (ii) providing for those interests to be vested<sup>34</sup> in him (or in the RTE company) but subject to such modifications as:  
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 80. (A) may have been determined by a leasehold valuation tribunal, on the application of either the nominee purchaser (or of the RTE company) or the reversioner, to be required by reason of any change in circumstances since the time when the terms were determined<sup>35</sup>; and  
 81. (B) are specified in the order; or  
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 3739 (iii) providing for the initial notice to be deemed to have been withdrawn at the end of the appropriate period<sup>36</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period<sup>37</sup>.

1 For the meaning of 'the initial notice' see PARA 1585 ante.

2 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

3 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

4 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARAS 1581-1583 ante.

7 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 21(1) (as amended): see PARA 1606 ante.

8 le by or by virtue of ibid s 22(3) (as amended) (see PARA 1610 ante) or s 23(5) or (6) (as amended) (see PARA 1611 ante).

9 For the meaning of 'the court' see PARA 1539 note 3 ante.

10 For the meaning of 'interest' see PARA 408 note 16 ante.

11 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3) (as amended): see PARA 1585 ante.

12 Ibid s 25(1) (s 25(1), (3)-(6) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 14, as from a day to be appointed (see note 5 supra)). Provided that the Leasehold Reform, Housing and Urban Development Act 1993 s 25(3) (as amended) (see the text and notes 21-26 infra) is complied with, the court has no discretion under s 25(1) (as amended) other than to order that the tenant acquire the interests and rights specified under the initial notice, and the determination has to be in accordance with the proposals contained in the initial notice: *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55, [2000] All ER (D) 320, CA. As to deemed withdrawal of the initial notice see PARA 1620 post.

13 le if the Leasehold Reform, Housing and Urban Development Act 1993 s 36, Sch 9 Pt II (paras 2-4) (as amended) is applicable: see PARAS 1657-1659 post.

14 le in accordance with ibid s 36 (as amended) (see PARA 1656 post) and Sch 9 Pt II (paras 2-4) (as amended).

15 For the meaning of 'flat' see PARA 1533 note 2 ante.

16 For the meaning of 'unit' see PARA 1555 note 9 ante.

17 Leasehold Reform, Housing and Urban Development Act 1993 s 25(2). For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

18 le the counter-notice or further counter-notice referred to in ibid s 25(1) (as amended).

19 see note 5 supra.

20 Leasehold Reform, Housing and Urban Development Act 1993 s 25(4) (as amended: see note 12 supra). As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1612 ante at heads (1)-(3) in the text must be included with an application under the above provisions: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(e); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(e). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1612 the text and note 14 ante.

21 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

22 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

23 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

24 See note 5 supra.

- 25 le the requirements of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 Pt II (paras 11-14) (as amended): see PARAS 1598-1600 ante.
- 26 Ibid s 25(3) (as amended: see note 12 supra). See also note 12 supra.
- 27 For the meaning of 'the terms of acquisition' see PARA 1612 note 8 ante.
- 28 For these purposes, the appropriate period is (1) the period of two months beginning with the date when the order of the court under the Leasehold Reform, Housing and Urban Development Act 1993 25(1) (as amended) becomes final; or (2) such other period as may have been fixed by the court when making that order: s 25(8). As to when an order of the court becomes final see PARA 1587 note 8 ante.
- 29 See note 5 supra.
- 30 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 25(6) (as amended): see the text and notes 32-36 infra.
- 31 Ibid s 25(5) (as amended: see note 12 supra). As to deemed withdrawal of the initial notice see PARA 1620 post.
- 32 le on the terms referred to in ibid s 25(5) (as amended): see the text and notes 27-31 supra.
- 33 See note 5 supra.
- 34 See note 32 supra.
- 35 le as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 25(5) (as amended).
- 36 Ibid s 25(6) (as amended: see note 12 supra). Section 25(6), Sch 5 (as amended) (see PARAS 1615-1617 post) has effect in relation to any such order as is mentioned in s 25(6)(a) or (b) (as amended): s 25(6).
- 37 Ibid s 25(7).

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#### **1614. Applications where relevant landlord cannot be found.**

The following provisions apply where:

- 3740 (1) at the date at which this title states the law, not less than two-thirds of the qualifying tenants<sup>1</sup> of flats<sup>2</sup> contained in any premises to which the right to collective enfranchisement applies<sup>3</sup> desire to make a claim to exercise that right in relation to those premises; or
- 3741 (2) as from a day to be appointed<sup>4</sup>, an RTE company<sup>5</sup> which has among its participating members<sup>6</sup> a number of qualifying tenants of flats contained in the premises as at the relevant date<sup>7</sup> which is not less than one-half of the total number of flats so contained<sup>8</sup> wishes to make a claim to exercise the right to collective enfranchisement,

and the case falls within head (a) or head (b) below<sup>9</sup>. In a case where:

- 3742 (a) it is not proposed to acquire any interests other than the freehold of the premises or any other interests of the person who owns the freehold of the

- premises and the freehold of the whole of the premises is owned by one person<sup>10</sup> but that person cannot be found or his identity cannot be ascertained; or
- 3743 (b) either it is proposed to acquire interests of persons other than the person who owns the freehold of the whole of the premises to which the claim relates<sup>11</sup>, or there are multiple freeholds<sup>12</sup>, but each of the relevant landlords<sup>13</sup> is someone who cannot be found or whose identity cannot be ascertained,

the court<sup>14</sup> may, on the application of the qualifying tenants in question (or, as from a day to be appointed<sup>15</sup>, on the application of the RTE company), make a vesting order with respect to any interests of that person, whether in those premises or in any other property, which are liable to acquisition<sup>16</sup> on behalf of those tenants (or by the RTE company) or with respect to any interests of those landlords which are so liable to acquisition<sup>17</sup>, as the case may be<sup>18</sup>.

Where in a case where it is proposed to acquire interests of persons other than the person who owns the freehold of the whole of the premises to which the claim relates<sup>19</sup>, and either head (1) or head (2) above applies and head (b) above does not apply, but a notice of that claim or, as the case may be, a copy of such a notice cannot be given<sup>20</sup> to any person to whom it would otherwise be required to be so given because he cannot be found or his identity cannot be ascertained, the court may, on the application of the qualifying tenants in question (or, as from a day to be appointed<sup>21</sup>, on the application of the RTE company), make an order dispensing with the need to give such a notice or, as the case may be, a copy of such a notice to that person<sup>22</sup>. If that person is the person who owns the freehold of the premises, then, on the application of those tenants (or of the RTE company), the court may, in connection with such an order, make an order appointing any other relevant landlord to be the reversioner<sup>23</sup> in respect of the premises in place of that person<sup>24</sup>.

Similarly, where in a case where there are multiple freeholds<sup>25</sup> and either head (1) or head (2) above applies and head (b) above does not apply, but a copy of a notice of the claim to exercise the right to collective enfranchisement cannot be given<sup>26</sup> to any person to whom it would otherwise be required to be so given because he cannot be found or his identity cannot be ascertained, the court may, on the application of the qualifying tenants in question (or, as from a day to be appointed<sup>27</sup>, on the application of the RTE company), make an order dispensing with the need to give a copy of such a notice to that person<sup>28</sup>.

The court may not make an order on any application under the above provisions<sup>29</sup> unless it is satisfied:

- 3744 (i) that on the date of the making of the application the premises to which the application relates were premises to which the right to collective enfranchisement applies; and
- 3745 (ii) that on that date the applicants (or the RTE company) would not have been precluded<sup>30</sup> from giving a valid notice<sup>31</sup> with respect to those premises (and, as from a day to be appointed<sup>32</sup>, that the RTE company has given notice of the application to each person who is the qualifying tenant of a flat contained in those premises<sup>33</sup>).

Before making any such order, the court may require the applicants (or, as from a day to be appointed<sup>34</sup>, the RTE company) to take such further steps by way of advertisement or otherwise as the court thinks proper for the purpose of tracing the person or persons in question; and, if, after an application is made for a vesting order<sup>35</sup> and before any interest is vested in pursuance of the application, the person or, as the case may be, any of the persons referred to in head (a) or head (b) above is traced, then no further proceedings may be taken with a view to any interest being so vested; but<sup>36</sup>:

- 3746 (A) the rights and obligations of all parties must be determined as if the applicants (or the RTE company) had, at the date of the application, duly given



notice<sup>37</sup> of their (or its) claim to exercise the right to collective enfranchisement in relation to the premises to which the application relates; and  
 3747 (B) the court may give such directions<sup>38</sup> as it thinks fit as to the steps to be taken for giving effect to those rights and obligations<sup>39</sup>.

An application for a vesting order may be withdrawn at any time before execution of a conveyance<sup>40</sup> and, after it is withdrawn, head (A) above does not apply; but, where any step is taken, whether by the applicants (or, as from a day to be appointed<sup>41</sup>, by the RTE company) or otherwise, for the purpose of giving effect to head (A) above in the case of any application, the application may not afterwards be withdrawn except with the consent of every person who is the owner of any interest the vesting of which is sought by the applicants (or by the RTE company) or by leave of the court; and the court may not give leave unless it appears to the court just to do so by reason of matters coming to the knowledge of the applicants (or of the RTE company) in consequence of the tracing of any such person<sup>42</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1557 ante.

2 For the meaning of 'flat' see PARA 1533 note 2 ante.

3 Ie any premises to which the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1615 et seq post) applies. For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 As to participating members see PARA 1582 ante.

7 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

8 Ie an RTE company which satisfies the requirement in the Leasehold Reform, Housing and Urban Development Act 1993 s 13(2)(b) (as amended): see PARA 1585 ante.

9 Ibid s 26(1) (s 26(1)-(6), (9) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 15, as from a day to be appointed (see note 4 supra)).

10 Ie in a case to which ibid s 9(1) (as amended) applies: see PARA 1559 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

11 Ie in a case to which ibid s 9(2) (as amended) applies: see PARA 1559 ante.

12 Ie in a case to which ibid s 9(2A) (as added) applies: see PARA 1559 ante.

13 For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.

14 For the meaning of 'the court' see PARA 1539 note 3 ante.

15 See note 4 supra.

16 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 1(1) or (2)(a) (as amended) (see PARA 1552 ante) or s 2(1) (as originally enacted or as prospectively substituted) (see PARA 1553 ante).

17 See note 16 supra.

18 Leasehold Reform, Housing and Urban Development Act 1993 s 26(1) (as amended: see note 9 supra). Where an application is made under s 26(1) or (2) (as originally enacted or as so amended), it must be made by the issue of a claim form in accordance with the procedure under CPR Pt 8 (alternative procedure for claims: see CIVIL PROCEDURE vol 11 (2009) PARA 127) which need not be served on any other party; and the court may grant or refuse the application or give directions for its future conduct, including the addition as defendants of

such persons as appear to have an interest in it: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.3(1), (2).

19 See note 11 supra.

20 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante) or Sch 3 Pt II (paras 11-14) (as amended) (see PARAS 1598-1600 ante).

21 See note 4 supra.

22 Leasehold Reform, Housing and Urban Development Act 1993 s 26(2) (as amended: see note 9 supra). See also note 18 supra. Where an order has been so made, or has been made under s 26(3A) (as added and amended) (see the text and notes 25-28 infra) dispensing with the need to give a notice under s 13 (as amended), or a copy of such a notice, to a particular person with respect to any particular premises, then if (1) a notice is subsequently given under s 13 (as amended) with respect to those premises; and (2) in reliance on the order, the notice or a copy of the notice is not to be given to that person, the notice must contain a statement of the effect of the order: s 26(7). Where a notice under s 13 (as amended) contains such a statement in accordance with s 26(7), then in determining for the purposes of any provision of Pt I Ch I (as amended) whether the requirements of s 13 (as amended) or Sch 3 Pt II (paras 11-14) (as amended) have been complied with in relation to the notice, those requirements are deemed to have been complied with so far as relating to the giving of the notice or a copy of it to the person referred to in s 26(7): s 26(8).

23 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

24 Leasehold Reform, Housing and Urban Development Act 1993 s 26(3) (amended by the Housing Act 1996 s 107(4), Sch 10 para 9(1), (3); prospectively amended (see note 9 supra)). If the court so makes an order, references in the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended) to the reversioner apply accordingly: s 26(3). Rules of court must make provision (1) for requiring notice of any application under s 26(3) (as so amended) to be served by the persons making the application on any person who the applicants know or have reason to believe is a relevant landlord (or, as from a day to be appointed (see note 4 supra), to be served by the RTE company on any person who it knows or has reason to believe is a relevant landlord); and (2) for enabling persons served with any such notice to be joined as parties to the proceedings: s 26(9) (as so amended).

An application under s 26(3) (as originally enacted or as amended) must be made by the issue of a claim form in accordance with the procedure under CPR Pt 8 (alternative procedure for claims: see CIVIL PROCEDURE vol 11 (2009) PARA 127) and: (1) the claimants must serve the claim form on any person who they know or have reason to believe is a relevant landlord, giving particulars of the claim and the hearing date and informing that person of his right to be joined as a party to the claim; (2) the landlord whom it is sought to appoint as the reversioner must be a defendant, and must file an acknowledgment of service; (3) a person on whom notice is served under head (1) supra must be joined as a defendant to the claim if he gives notice in writing to the court of his wish to be added as a party, and the court will notify all other parties of the addition: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.4.

25 See note 12 supra.

26 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3 Pt II (as amended): see PARAS 1598-1600 ante.

27 See note 4 supra.

28 Leasehold Reform, Housing and Urban Development Act 1993 s 26(3A) (added by the Housing Act 1996 Sch 10 para 9(1), (4); prospectively amended (see note 9 supra)). See also note 22 supra.

29 Ie on any application under *ibid* s 26(1) or (2) (as amended) or s 26(3A) (as added and amended).

30 Ie by any provision of *ibid* Pt I Ch I (as amended).

31 Ie under *ibid* s 13 (as amended): see PARA 1585 ante.

32 See note 4 supra.

33 Leasehold Reform, Housing and Urban Development Act 1993 s 26(4) (amended by the Housing Act 1996 Sch 10 para 9(1), (5); prospectively amended (see note 9 supra)).

34 See note 4 supra.

35 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 26(1) (as amended).

36 le subject to *ibid* s 26(6) (as amended): see the text and notes 40-42 *infra*.

37 See note 31 *supra*.

38 le including directions modifying or dispensing with any of the requirements of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended) or of regulations made under Pt I (ss 1-103) (as amended) (see *PARA* 1532 *et seq ante*, *PARA* 1615 *et seq post*).

39 *Ibid* s 26(5) (as amended: see note 9 *supra*).

40 le under *ibid* s 27(3) (as amended): see *PARA* 1618 *post*. For the meaning of 'conveyance' see *PARA* 1564 note 10 *ante*.

41 See note 4 *supra*.

42 Leasehold Reform, Housing and Urban Development Act 1993 s 26(6) (as amended: see note 9 *supra*).

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## ***B. VESTING ORDERS***

### **1615. Execution of conveyance.**

Where any interests<sup>1</sup> are to be vested in the nominee purchaser<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, in the RTE company<sup>4</sup>) by virtue of a vesting order<sup>5</sup>, then, on his (or its) paying into court the appropriate sum<sup>6</sup> in respect of each of those interests, there must be executed by such person as the court<sup>7</sup> may designate a conveyance<sup>8</sup> which:

- 3748 (1) is in a form approved by a leasehold valuation tribunal; and
- 3749 (2) contains such provisions as may be so approved for the purpose of giving effect to the relevant terms of acquisition<sup>9</sup>.

The conveyance is effective to vest in the nominee purchaser (or in the RTE company) the interests expressed to be conveyed, subject to and in accordance with the terms of the conveyance<sup>10</sup>.

1 For the meaning of 'interest' see *PARA* 408 note 16 *ante*.

2 For the meaning of 'the nominee purchaser' see *PARAS* 1576-1577 *ante*.

3 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

4 As to RTE companies see *PARAS* 1581-1583 *ante*.

5 For these purposes, 'a vesting order' means an order made by the court under the Leasehold Reform, Housing and Urban Development Act 1993 s 24(4)(a) or (b) (as amended) (see *PARA* 1612 *ante*) or s 25(6)(a) or (b) (as amended) (see *PARA* 1613 *ante*): ss 24(4), 25(6), Sch 5 para 1(1).

6 For the meaning of 'the appropriate sum' see *PARA* 1616 *post*.

7 For the meaning of 'the court' see *PARA* 1539 note 3 *ante*.

8 For the meaning of 'conveyance' see *PARA* 1564 note 10 *ante*.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 5 para 2(1) (Sch 2 para 2 prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 39(1), (2), as from a day to be appointed (see note 3 supra)). For these purposes, 'the relevant terms of acquisition', in relation to a vesting order, means the terms of acquisition referred to in s 24(4)(a) or (b) (as amended) or s 25(6)(a) or (b) (as amended), as the case may be: Sch 5 para 1(2). For the meaning of 'the terms of acquisition' see PARA 1612 note 8 ante.

10 Ibid Sch 5 para 2(2) (as amended: see note 9 supra).

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### **1616. The appropriate sum.**

In the case of any vesting order<sup>1</sup>, the appropriate sum which is to be paid into court<sup>2</sup> in respect of any interest<sup>3</sup> is the aggregate of:

- 3750 (1) such amount as is fixed by the relevant terms of acquisition<sup>4</sup> as the price which is payable<sup>5</sup> in respect of that interest; and
- 3751 (2) any amounts or estimated amounts determined by a leasehold valuation tribunal as being, at the time of execution of the conveyance<sup>6</sup>, due to the transferor<sup>7</sup> from any tenants<sup>8</sup> of his of premises comprised in the premises in which that interest subsists, whether due under or in respect of their leases<sup>9</sup> or under or in respect of agreements collateral thereto<sup>10</sup>.

1 For the meaning of 'vesting order' see PARA 1615 note 5 ante.

2 In accordance with the Leasehold Reform, Housing and Urban Development Act 1993 ss 24(4), 25(6), Sch 5 para 2(1) (as amended): see PARA 1615 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 For the meaning of 'the relevant terms of acquisition' see PARA 1615 note 9 ante.

5 In accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 (as amended): see PARA 1624 et seq post.

6 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

7 For these purposes, 'the transferor', in relation to any interest, means the person from whom the interest is to be acquired by the nominee purchaser (or, as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1), by the RTE company): Leasehold Reform, Housing and Urban Development Act 1993 Sch 5 para 3(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 39(1), (2), as from such a day; at the date at which this title states the law, no such day had been appointed). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

8 For the meaning of 'tenant' see PARA 1535 note 3 ante.

9 For the meaning of 'lease' see PARA 1535 note 3 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 5 para 3(1).

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### **1617. Effect of payment of appropriate sum into court.**

Where any interest<sup>1</sup> is vested<sup>2</sup> in the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, in the RTE company<sup>5</sup>) the payment into court of the appropriate sum<sup>6</sup> in respect of that interest is taken to have satisfied any claims against the nominee purchaser or the participating tenants<sup>7</sup> (or against the RTE company and its members) or the personal representatives or assigns of any of them, in respect of the price payable<sup>8</sup> for the acquisition of that interest<sup>9</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 ss 24(4), 25(6), Sch 5 (as amended): see PARAS 1615-1616 ante.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 For the meaning of 'the appropriate sum' see PARA 1616 ante.

7 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

8 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1618 et seq post.

9 Ibid Sch 5 para 4 (prospectively amended by the Commonhold and Leasehold Reform Act 2002, s 124, Sch 8, PARAS 2, 39(1)-(3), as from a day to be appointed (see note 4 supra)).

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### **1618. Orders where relevant landlord cannot be found.**

A vesting order made where the freeholder or a relevant landlord cannot be found<sup>1</sup> is an order providing for the vesting of any specified interests<sup>2</sup>:

3752 (1) in such person or persons as may be appointed for the purpose by the applicants for the order (or, as from a day to be appointed<sup>3</sup>, in the RTE company<sup>4</sup>); and

3753 (2) on such terms as may be determined by a leasehold valuation tribunal to be appropriate with a view to the interests being vested in that person or those persons (or in the RTE company) in like manner, so far as the circumstances permit, as if the applicants had, at the date of their application (or the RTE company had, at the date of its application), given notice<sup>5</sup> of their (or its) claim to

exercise the right to collective enfranchisement<sup>6</sup> in relation to the premises with respect to which the order is made<sup>7</sup>.

If a leasehold valuation tribunal so determines in the case of such a vesting order, the order has effect in relation to interests which are less extensive than those specified in the application on which the order was made<sup>8</sup>.

Where any interests are to be vested in any person or persons (or, as from a day to be appointed<sup>9</sup>, in the RTE company) by virtue of such a vesting order, then, on his or their (or its) paying into court the appropriate sum in respect of each of those interests, there must be executed by such person as the court<sup>10</sup> may designate a conveyance<sup>11</sup> which:

- 3754 (a) is in a form approved by a leasehold valuation tribunal; and
- 3755 (b) contains such provisions as may be so approved for the purpose of giving effect so far as possible to the statutory requirements<sup>12</sup>;

and that conveyance is effective to vest in the person or persons to whom the conveyance is made (or in the RTE company) the interests expressed to be conveyed, subject to and in accordance with the terms of the conveyance<sup>13</sup>. In connection with the determination by a leasehold valuation tribunal of any question as to the interests to be conveyed by any such conveyance, or as to the rights with or subject to which they are to be conveyed, it is to be assumed, unless the contrary is shown, that any person whose interests are to be conveyed ('the transferor') has no interest in property other than those interests and, for the purpose of excepting them from the conveyance, any minerals underlying the property in question<sup>14</sup>.

The appropriate sum which is to be so paid into court in respect of any interest is the aggregate of:

- 3756 (i) such amount as may be determined by a leasehold valuation tribunal to be the price which would be payable<sup>15</sup> in respect of that interest if the interest were being acquired in pursuance of such a notice as is mentioned in head (2) above; and
- 3757 (ii) any amounts or estimated amounts determined by such a tribunal as being, at the time of execution of the conveyance, due to the transferor from any tenants of his of premises comprised in the premises in which that interest subsists, whether due under or in respect of their leases<sup>16</sup> or under or in respect of agreements collateral thereto<sup>17</sup>.

Where any interest is so vested in any person or persons (or, as from a day to be appointed<sup>18</sup>, in the RTE company), the payment into court of the appropriate sum in respect of that interest is to be taken to have satisfied any claims against the applicants for the vesting order, their personal representatives or assigns (or against the RTE company) in respect of the price payable<sup>19</sup> for the acquisition of that interest<sup>20</sup>.

1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 26(1) (as amended): see PARA 1614 ante.

2    Ie any such interests as are referred to in *ibid* s 26(1)(i) (as amended) or s 26(1)(ii): see PARA 1614 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

3    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

4    As to RTE companies see PARAS 1581-1583 ante.

5 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

6 For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 27(1) (s 27(1), (3), (6), (7) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 16, as from a day to be appointed (see note 3 supra)). Where any interest is so vested in any person or persons (or, as from such a day, in the RTE company), s 32(5) (as amended) (see PARA 1623 note 6 post) applies in relation to his or their acquisition of that interest as it applies in relation to the acquisition of any interest by a nominee purchaser (or to its acquisition of that interest): s 27(7) (as so amended). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1612 ante at heads (1)-(3) in the text must be included with an application under s 27 (as amended): see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(f); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(f). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1612 the text and note 14 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 27(2).

9 See note 3 supra.

10 For the meaning of 'the court' see PARA 1539 note 3 ante.

11 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

12 le the requirements of the Leasehold Reform, Housing and Urban Development Act 1993 s 34 (as amended) (see PARA 1647 post) and s 34(9), Sch 7 (as amended) (see PARA 1648 et seq post).

13 Ibid s 27(3) (as amended: see note 7 supra). If a person wishes to pay money into court under s 27(3) (as originally enacted or as amended), s 51(3) (see PARA 1698 post) or Sch 8 para 4 (as originally enacted or as amended) (see PARA 1655 post), he must file in the office of the appropriate court an application notice containing or accompanied by evidence stating (1) the reasons for the payment into court; (2) the interest or interests in the property to which the payment relates (or where the payment into court is made under s 51(3), the flat to which it relates); (3) details of any vesting order; (4) the name and address of the landlord; and (5) so far as they are known to the tenant, the name and address of every person who is or may be interested in or entitled to the money: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.5(1). On the filing of the witness statement the money must be paid into court and the court will send notice of the payment to the landlord and every person whose name and address are given in the witness statement: para 14.5(2). Any subsequent payment into court by the landlord must be made to the credit of the same account as the earlier payment into court: para 14.5(3). The appropriate court for these purposes is: (a) where a vesting order has been made, the county court that made the order; or (b) where no such order has been made, the county court in whose district the property is situated: para 14.5(4).

14 Leasehold Reform, Housing and Urban Development Act 1993 s 27(4).

15 le in accordance with ibid s 32(1), Sch 6 (as amended): see PARA 1624 et seq post.

16 For the meaning of 'lease' see PARA 1535 note 3 ante.

17 Leasehold Reform, Housing and Urban Development Act 1993 s 27(5).

18 See note 3 supra.

19 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1619 et seq post.

20 Ibid s 27(6) (as amended: see note 7 supra).

PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(5) COLLECTIVE ENFRANCHISEMENT/(ix) Termination of Acquisition Procedures/1619. Withdrawal from acquisition by participating tenants or RTE company.

## **(ix) Termination of Acquisition Procedures**

### **1619. Withdrawal from acquisition by participating tenants or RTE company.**

At any time before a binding contract is entered into in pursuance of the initial notice<sup>1</sup>, the participating tenants<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, the RTE company<sup>4</sup>) may withdraw that notice by the giving of a notice to that effect ('a notice of withdrawal')<sup>5</sup>.

At the date at which this title states the law, a notice of withdrawal must be given by the participating tenants:

- 3758 (1) to the nominee purchaser<sup>6</sup>;
- 3759 (2) to the reversioner<sup>7</sup> in respect of the specified premises<sup>8</sup>; and
- 3760 (3) to every other relevant landlord<sup>9</sup> who is known or believed by the participating tenants to have given to the nominee purchaser a notice of his intention to act independently<sup>10</sup>;

and, if by virtue of head (3) above a notice of withdrawal falls to be given to any person falling within that head, it must state that he is a recipient of the notice<sup>11</sup>. On receiving a notice of withdrawal, the nominee purchaser must give a copy of it to every relevant landlord who has given to the nominee purchaser such a notice as is mentioned in head (3) above and is not stated in the notice of withdrawal to be a recipient of it<sup>12</sup>.

Where a notice of withdrawal is so given by the participating tenants:

- 3761 (a) those persons are; and
- 3762 (b) every other person who is not a participating tenant for the time being but has at any time been such a tenant is

liable to the reversioner and to every other relevant landlord for all relevant costs<sup>13</sup> incurred by him in pursuance of the initial notice down to the time when the notice of withdrawal or a copy of it is given<sup>14</sup> to him<sup>15</sup>. A person falling within head (b) above is not, however, liable for any costs<sup>16</sup> if the lease<sup>17</sup> in respect of which he was a participating tenant has been assigned<sup>18</sup> to another person and that other person has become<sup>19</sup> a participating tenant<sup>20</sup>.

As from a day to be appointed<sup>21</sup>, however, a notice of withdrawal must be given by the RTE company:

- 3763 (i) to each person who is the qualifying tenant<sup>22</sup> of a flat<sup>23</sup> contained in the specified premises;
- 3764 (ii) to the reversioner in respect of the specified premises; and
- 3765 (iii) every other relevant landlord who has given to the RTE company a notice<sup>24</sup> of his intention to act independently<sup>25</sup>.

Where a notice of withdrawal is so given, then:

- 3766 (A) the RTE company; and
- 3767 (B) every person who is, or has at any time been, a participating member of the company,



is liable<sup>26</sup> to the reversioner and to every other relevant landlord for all relevant costs<sup>27</sup> incurred by him in pursuance of the initial notice down to the time when the notice of withdrawal or a copy of it is given<sup>28</sup> to him<sup>29</sup>; but a person falling within head (B) above is not so liable for any costs if the lease in respect of which he was a qualifying tenant has been assigned<sup>30</sup> to another person and that other person has become a member of the RTE company<sup>31</sup>.

1 For these purposes, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: Leasehold Reform, Housing and Urban Development Act 1993 ss 24(4), 25(6), Sch 6 para 5(1), (2)(e). As to vesting orders see PARA 1615 et seq ante. For the meaning of 'the initial notice' see PARA 1585 ante.

2 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

3 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

4 As to RTE companies see PARAS 1581-1583 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 28(1) (s 28(1), (4)-(7) prospectively amended, s 28(2) prospectively substituted, and s 28(3) prospectively repealed, by the Commonhold and Leasehold Reform Act 2002 ss 124, 180, Sch 8 paras 2, 17, Sch 14, as from a day to be appointed (see note 3 supra)). As to the giving of notices see PARA 1541 ante.

6 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

7 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

8 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

9 For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.

10 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3), Sch 1 para 7(1) or (4) (as originally enacted): see PARA 1565 ante.

11 Ibid s 28(2) (as originally enacted).

12 Ibid s 28(3) (prospectively repealed).

13 For these purposes, 'relevant costs', in relation to the reversioner or any other relevant landlord, means costs for which the nominee purchaser would, apart from ibid s 28(6) (as originally enacted) (see note 15 infra), be liable to that person under s 33 (as originally enacted) (see PARA 1645 post): s 28(7) (as originally enacted).

14 Ie in accordance with ibid s 28(2) or (3) (as originally enacted).

15 Ibid s 28(4) (as originally enacted). Where any liability for costs so arises, it is a joint and several liability of the persons concerned and the nominee purchaser is not liable for any costs under s 33 (as originally enacted): s 28(6) (as originally enacted).

16 Ie by virtue of ibid s 28(4) (as originally enacted).

17 For the meaning of 'lease' see PARA 1535 note 3 ante.

18 For these purposes, the reference to an assignment is to be construed in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 14(10) (prospectively repealed) (see PARA 1572 note 5 ante): s 28(5) (as originally enacted).

19 Ie in accordance with ibid s 14(4) (prospectively repealed): see PARA 1572 ante.

20 Ibid s 28(5) (as originally enacted).

21 See note 3 supra.

22 For the meaning of 'qualifying tenant' see PARA 1557 ante.

23 For the meaning of 'flat' see PARA 1533 note 2 ante.

24 le a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 9(3), Sch 1 para 7(1) or (4) (as prospectively amended): see PARA 1565 ante.

25 Ibid s 28(2) (as substituted: see note 5 supra).

26 le subject to ibid s 28(5) (as amended): see the text and notes 30-31 infra.

27 For these purposes, 'relevant costs', in relation to the reversioner or any other relevant landlord, means costs for which the RTE company would, apart from ibid s 28(6) (as amended) (see note 29 infra), be liable to that person under s 33 (as prospectively amended) (see PARA 1645 post): s 28(7) (as amended: see note 5 supra).

28 le in accordance with ibid s 28(2) (as substituted).

29 Ibid s 28(4) (as amended: see note 5 supra). Where any liability for costs so arises, it is a joint and several liability of the persons concerned and the RTE company is not liable for any costs under s 33 (as prospectively amended): s 28(6) (as amended: see note 5 supra).

30 This reference to an assignment includes an assent by personal representatives, and assignment by operation of law where the assignment is to a trustee in bankruptcy or to a mortgagee under the Law of Property Act 1925 s 89(2) (foreclosure of leasehold mortgage: see MORTGAGE vol 77 (2010) PARA 607); Leasehold Reform, Housing and Urban Development Act 1993 s 28(5) (as amended: see note 5 supra).

31 Ibid s 28(5) (as amended: see note 5 supra).

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## **1620. Deemed withdrawal of initial notice.**

Where, in a case where the reversioner<sup>1</sup> in respect of the specified premises<sup>2</sup> has given<sup>3</sup> a counter-notice which states that, for such reasons as are specified in the counter-notice, the reversioner does not admit that the participating tenants<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, the RTE company<sup>6</sup>) were (or was) entitled to exercise the right to collective enfranchisement<sup>7</sup>:

- 3768 (1) no application for an order<sup>8</sup> is made within the specified period<sup>9</sup>; or
- 3769 (2) such an application is so made but is subsequently withdrawn,

the initial notice<sup>10</sup> is deemed to have been withdrawn:

- 3770 (a) if head (1) above applies, at the end of that period; or
- 3771 (b) if head (2) above applies, on the date of the withdrawal of the application<sup>11</sup>.

Where:

- 3772 (i) in a case where the reversioner in respect of the specified premises has given<sup>12</sup> a counter-notice or a further counter-notice but any of the terms of acquisition remain in dispute<sup>13</sup>, no application<sup>14</sup> is made to a leasehold valuation tribunal within the specified period<sup>15</sup>; or
- 3773 (ii) in a case where the reversioner has given<sup>16</sup> a counter-notice or further counter-notice and all of the terms of acquisition have been either agreed<sup>17</sup> between the parties or determined by a leasehold valuation tribunal but a binding

contract incorporating the terms of acquisition has not been entered into<sup>18</sup>, no application for an order<sup>19</sup> is made to the court<sup>20</sup> within the specified period<sup>21</sup>,

the initial notice is deemed to have been withdrawn at the end of the period referred to in head (i) or head (ii) above, as the case may be<sup>22</sup>.

Where the initial notice has been given but the reversioner has failed to give<sup>23</sup> a counter-notice or, if required to give<sup>24</sup> a further counter-notice, the reversioner has failed to comply with that requirement<sup>25</sup>, and no application to the court for an order<sup>26</sup> is made within the specified period<sup>27</sup>, the initial notice is deemed to have been withdrawn at the end of that period<sup>28</sup>.

Where the terms of acquisition have been determined by an order of the court but a binding contract incorporating those terms has not been entered into<sup>29</sup>, and no application to the court for an order<sup>30</sup> is made within the specified period<sup>31</sup>, the initial notice is deemed to have been withdrawn at the end of that period<sup>32</sup>.

As from a day to be appointed<sup>33</sup>, the initial notice is also to be deemed to have been withdrawn if:

- 3774 (A) a winding-up order is made, or a resolution for voluntary winding up is passed, with respect to the RTE company, or the RTE company enters administration;
- 3775 (B) a receiver or a manager of the RTE company's undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the RTE company comprised in or subject to the charge;
- 3776 (C) a voluntary arrangement proposed in the case of the RTE company for the purposes of Part I of the Insolvency Act 1986<sup>34</sup> is approved under that Part of that Act; or
- 3777 (D) the RTE company's name is struck off the register under the relevant provisions<sup>35</sup> of the Companies Act 1985<sup>36</sup>.

1 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 le to the nominee purchaser or, as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1), to the RTE company. For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and see note 6 infra.

4 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

5 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARAS 1581-1583 ante.

7 le in a case falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 22(1)(a) (as amended); see PARA 1610 ante at head (1) in the text. For the meaning of 'the right to collective enfranchisement' see PARA 1552 ante.

8 le under ibid s 22(1) (as amended).

9 le the period specified in ibid s 22(2) (as amended); see PARA 1610 ante.

10 For the meaning of 'the initial notice' see PARA 1585 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 29(1). The following provisions, namely: (1) s 15(10) (prospectively repealed) (see PARA 1577 ante); (2) s 16(8) (prospectively repealed) (see PARA 1580 ante); (4) s 20(3) (as amended) (see PARA 1605 ante); (4) s 24(4)(c) (see PARA 1612 ante); and (5) s 25(6)(c) (see

PARA 1613 ante), also make provision for a notice under s 13 (as amended) to be deemed to have been withdrawn at a particular time: s 29(5) (prospectively amended, so as to remove heads (1)-(2) supra, by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 5 supra)).

Where the initial notice is deemed to have been withdrawn at any time by virtue of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1621 et seq post) s 28(4), (5) (as amended) (see PARA 1619 ante) applies for the purposes of s 29 (as amended) in like manner as it applies where a notice of withdrawal is given under s 28 (as amended), but as if the reference in s 28(4) (as amended) to the time when a notice or copy is given as there mentioned were a reference to the time when the initial notice is so deemed to have been withdrawn: s 29(6). Where the initial notice is deemed to have been withdrawn by virtue of s 15(10) (prospectively repealed) (see PARA 1577 ante) or s 16(8) (prospectively repealed) (see PARA 1580 ante), the liability for costs arising by virtue of s 29(6) is a joint and several liability of the persons concerned and the nominee purchaser is not liable for any costs under s 33 (as originally enacted) (see PARA 1645 post): s 29(7) (prospectively repealed by the Commonhold and Leasehold Reform Act 2002 Sch 14, as from a day to be appointed (see note 5 supra)). In the provisions applied by the Leasehold Reform, Housing and Urban Development Act 1993 s 29(6), 'relevant costs', in relation to the reversioner or any other relevant landlord, means costs for which (a) at the date at which this title states the law, the nominee purchaser is, or would apart from s 29(7) (prospectively repealed) be, liable to that person under s 33 (as originally enacted); or (b) as from a day to be appointed (see note 5 supra), the RTE company is liable to that person under s 33 (as amended): s 29(8) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 18(1), (3), as from a day to be appointed (see note 5 supra)). For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.

12 See note 3 supra.

13 Ie in a case to which the Leasehold Reform, Housing and Urban Development Act 1993 s 24(1) (as amended) applies: see PARA 1612 ante.

14 Ie under ibid s 24(1) (as amended).

15 Ie the period specified in ibid s 24(2) (as amended): see PARA 1612 ante.

16 See note 3 supra.

17 For the meaning of references to agreement in relation to all or any of the terms of acquisition see PARA 1564 note 6 ante.

18 Ie in a case to which the Leasehold Reform, Housing and Urban Development Act 1993 s 24(3) (as amended) applies: see PARA 1612 ante.

19 Ie an order under ibid s 24(4) (as amended): see PARA 1612 ante.

20 For the meaning of 'the court' see PARA 1539 note 3 ante.

21 Ie the period specified in the Leasehold Reform, Housing and Urban Development Act 1993 s 24(5): see PARA 1612 ante.

22 Ibid s 29(2).

23 See note 3 supra.

24 See note 3 supra.

25 Ie in a case falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 25(1)(a) or (b) (as amended): see PARA 1613 ante.

26 Ie under ibid s 25(1) (as amended): see PARA 1613 ante.

27 Ie the period specified in ibid s 25(4) (as amended): see PARA 1613 ante.

28 Ibid s 29(3).

29 Ie in a case to which ibid s 25(5) (as amended) applies: see PARA 1613 ante.

30 Ie under ibid s 25(6) (as amended): see PARA 1613 ante.

31 Ie the period specified in ibid s 25(7): see PARA 1613 ante.

32 Ibid s 29(4).

33 See note 5 supra.

34 Ie under the Insolvency Act 1986 Pt I (ss 1-7B) (as amended): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 71 et seq.

35 Ie under the Companies Act 1985 s 652 or s 652A (as added): see COMPANIES vol 15 (2009) PARA 1521 et seq.

36 Leasehold Reform, Housing and Urban Development Act 1993 s 29(4A) (prospectively added by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 18(1), (2), as from a day to be appointed (see note 5 supra); amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096, art 4, Schedule Pt 1 para 20).

## UPDATE

### 1620 Deemed withdrawal of initial notice

TEXT AND NOTES 33-36--Leasehold Reform, Housing and Urban Development Act 1993 s 29(4A) amended: SI 2009/1941.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(5) COLLECTIVE ENFRANCHISEMENT/(ix) Termination of Acquisition Procedures/1621. Effect on initial notice or subsequent contract of institution of compulsory acquisition procedures.

### 1621. Effect on initial notice or subsequent contract of institution of compulsory acquisition procedures.

A notice exercising the right to collective enfranchisement<sup>1</sup> is of no effect if on the relevant date<sup>2</sup>:

3778 (1) any acquiring authority<sup>3</sup> has, with a view to the acquisition of the whole or part of the specified premises for any authorised purpose<sup>4</sup> served notice to treat on any relevant person<sup>5</sup> or entered into a contract for the purchase of the interest<sup>6</sup> of any such person in the premises or part of them; and

3779 (2) the notice to treat or contract remains in force<sup>7</sup>.

A notice exercising the right to collective enfranchisement must not specify<sup>8</sup> any property or leasehold interest in property if on the relevant date:

3780 (a) any acquiring authority has, with a view to the acquisition of the whole or part of the property for any authorised purpose served notice to treat on the person who owns the freehold of, or any such leasehold interest in, the property or entered into a contract for the purchase of the interest of any such person in the property or part of it; and

3781 (b) the notice to treat or contract remains in force<sup>9</sup>.

A notice exercising the right to collective enfranchisement ceases to have effect if, before a binding contract is entered into in pursuance of the notice<sup>10</sup>, any acquiring authority serves,

with a view to the acquisition of the whole or part of the specified premises for any authorised purpose, notice to treat as mentioned in head (1) above<sup>11</sup>.

Where any such authority so serves notice to treat at any time after a binding contract is entered into in pursuance of exercising the right to collective enfranchisement but before completion of the acquisition by the nominee purchaser<sup>12</sup> (or, as from a day to be appointed<sup>13</sup>, before completion of the acquisition by the RTE company<sup>14</sup>), then, without prejudice to the general law as to the frustration of contracts<sup>15</sup>, the parties to the contract are discharged from the further performance of the contract<sup>16</sup>.

1     I.e. a notice given under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

2     For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

3     For these purposes, 'acquiring authority', in relation to the specified premises or any other property, means any person or body of persons who has been, or could be, authorised to acquire the whole or part of those premises or that property compulsorily for any purpose: Leasehold Reform, Housing and Urban Development Act 1993 s 30(7)(a). For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4     For these purposes, 'authorised purpose', in relation to any acquiring authority, means any such purpose as is mentioned in *ibid* s 30(7)(a) (see note 3 *supra*): s 30(7)(b).

5     For these purposes, 'relevant person', in relation to the specified premises, means (1) the person who owns the freehold of the premises or, where the freehold of the whole of the premises is not owned by the same person, any person who owns the freehold of part of them; or (2) any other person who owns any leasehold interest in the premises which is specified in the initial notice under *ibid* s 13(3)(c)(i) (see PARA 1586 ante at head (3)(a) in the text): s 30(2) (amended by the Housing Act 1996 s 107, Sch 10 para 10). For the meaning of 'the initial notice' see PARA 1585 ante.

6     For the meaning of 'interest' see PARA 408 note 16 ante.

7     Leasehold Reform, Housing and Urban Development Act 1993 s 30(1). Where, at any time after a vesting order is made but before the interests falling to be vested in the nominee purchaser (or, as from a day to be appointed (see note 13 *infra*), in the RTE company (see note 14 *infra*)) by virtue of the order have been so vested, any acquiring authority, within the meaning of s 30 (as amended), serves notice to treat as mentioned in s 30(1)(a), the vesting order ceases to have effect: ss 24(4), 25(6), Sch 5 para 5(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 39). Where the Leasehold Reform, Housing and Urban Development Act 1993 Sch 5 para 5(3) (as so amended) applies to any vesting order, then on the occasion of the compulsory acquisition in question the compensation payable in respect of any interest in the specified premises, whether or not the one to which the notice to treat relates, must be determined on the basis of the value of the interest subject to and with the benefit of the rights and obligations arising from the initial notice and affecting the interest: Sch 5 para 5(4). As to vesting orders see PARA 1615 *et seq* ante. For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

8     I.e. under *ibid* s 13(3)(a)(ii) or (c)(i): see PARA 1586 ante at head (1)(b) or head (3)(a) in the text.

9     *Ibid* s 30(3).

10    For these purposes, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: *ibid* Sch 5 para 5(1), (2)(f).

11    *Ibid* s 30(4). Where s 30(4) or s 30(5) (as amended) (see the text and notes 12-16 *infra*) applies in relation to the initial notice or any contract entered into in pursuance of it, then on the occasion of the compulsory acquisition in question the compensation payable in respect of any interest in the specified premises, whether or not the one to which the relevant notice to treat relates, must be determined on the basis of the value of the interest (1) if s 30(4) applies, subject to and with the benefit of the rights and obligations arising from the initial notice and affecting that interest; or (2) if s 30(5) (as amended) applies, subject to and with the benefit of the rights and obligations arising from the contract and affecting that interest: s 30(6).

12    I.e. under *ibid* Pt I Ch I (ss 1-38) (as amended): see PARA 1552 *et seq* ante, PARA 1622 *et seq* post.

13    I.e. as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

14 As to RTE companies see PARAS 1581-1583 ante.

15 As to the doctrine of frustration see CONTRACT vol 9(1) (Reissue) PARA 888 et seq.

16 Leasehold Reform, Housing and Urban Development Act 1993 s 30(5) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 19, as from a day to be appointed (see note 13 supra)). See also note 11 supra.

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### **1622. Effect on initial notice of designation for inheritance tax purposes and applications for designation.**

A notice claiming to exercise the right to collective enfranchisement<sup>1</sup> is of no effect if on the relevant date<sup>2</sup> the whole or any part of the specified premises<sup>3</sup> or any property specified in the notice<sup>4</sup> is qualifying property<sup>5</sup>. For these purposes, the whole or any part of the specified premises, or any property specified as mentioned above<sup>6</sup>, is qualifying property if:

- 3782 (1) it has been designated under the Inheritance Tax Act 1984<sup>7</sup>, whether with or without any other property, and no chargeable event<sup>8</sup> has subsequently occurred with respect to it; or
- 3783 (2) an application to the Board<sup>9</sup> for it to be so designated is pending<sup>10</sup>; or
- 3784 (3) it is the property of a body not established or conducted for profit and a direction has been given<sup>11</sup> in relation to it, whether with or without any other property; or
- 3785 (4) an application to the Board for a direction to be so given in relation to it is pending<sup>12</sup>.

A notice claiming to exercise the right to collective enfranchisement ceases to have effect if, before a binding contract<sup>13</sup> is entered into in pursuance of the notice, the whole or any part of the specified premises or any property specified in the notice<sup>14</sup> becomes qualifying property<sup>15</sup>.

Where it is claimed that either of the above provisions<sup>16</sup> applies in relation to a notice claiming to exercise the right to collective enfranchisement, the person making the claim must, at the time of making it, furnish the nominee purchaser<sup>17</sup> (or, as from a day to be appointed<sup>18</sup>, the RTE company<sup>19</sup>) with evidence in support of it; and, if he fails to do so, he is liable for any costs which are reasonably incurred by the nominee purchaser in consequence of the failure<sup>20</sup>.

Where such a notice ceases so to have effect<sup>21</sup>, the nominee purchaser (or, as from a day to be appointed<sup>22</sup>, the RTE company), is not liable for any costs of enfranchisement<sup>23</sup>; and the person who applied or is applying for designation or a direction is liable:

- 3786 (a) at the date at which this title states the law, to the qualifying tenants<sup>24</sup> by whom the notice was given for all reasonable costs incurred by them in the preparation and giving of the notice and to the nominee purchaser for all reasonable costs incurred in pursuance of the notice by him or by any other person who has acted as the nominee purchaser<sup>25</sup>; or
- 3787 (b) as from a day to be appointed<sup>26</sup>, to the RTE company for all reasonable costs incurred in the preparation or giving of the notice or in pursuance of it<sup>27</sup>.

- 1    Ie a notice given under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.
- 2    For the meaning of 'the relevant date' see PARA 1552 note 5 ante.
- 3    For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 4    Ie specified in the notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3) (a)(ii): see PARA 1586 ante at head (1)(b) in the text.
- 5    Ibid s 31(1).
- 6    Ie any property specified as mentioned in ibid s 31(1): see the text and notes 1-5 supra.
- 7    Ie under the Inheritance Tax Act 1984 s 31(1)(b), (c) or s 31(1)(d) (as added) (designation and undertakings relating to conditionally exempt transfers): see INHERITANCE TAXATION vol 24 (Reissue) PARA 536. The Leasehold Reform, Housing and Urban Development Act 1993 s 31(2)(a), (b) applies to designation under the Finance Act 1975 s 34(1)(a), (b) or (c) (repealed) or the Finance Act 1976 s 77(1)(b), (c) or (d) (repealed) as it applies to designation under the Inheritance Tax Act 1984 s 31(1)(b), (c) or s 31(1)(d) (as added): Leasehold Reform, Housing and Urban Development Act 1993 s 31(7)(a).
- 8    For these purposes, 'chargeable event' means (1) any event which in accordance with any provision of the Inheritance Tax Act 1984 Pt II Ch II (ss 30-35A) (as amended) (see INHERITANCE TAXATION vol 24 (Reissue) PARA 535 et seq) is a chargeable event, including any such provision as applied by s 78(3) (as amended) (conditionally exempt occasions: see INHERITANCE TAXATION vol 24 (Reissue) PARA 546); or (2) any event which would have been a chargeable event in the circumstances mentioned in s 79(3) (as amended) (exemption from ten-yearly charge: see INHERITANCE TAXATION vol 24 (Reissue) PARA 547): Leasehold Reform, Housing and Urban Development Act 1993 s 31(8).
- 9    For these purposes, 'the Board' means the Commissioners for Her Majesty's Revenue and Customs: ibid s 31(8) (amended by virtue of the Commissioners for Revenue and Customs Act 2005 s 50(1)).
- 10   For these purposes, an application is pending as from the time when it is made to the Board until such time as it is either granted or refused by the Board or withdrawn by the applicant; and an application is not to be regarded as made unless and until the applicant has submitted to the Board all such information in support of the application as is required by the Board: Leasehold Reform, Housing and Urban Development Act 1993 s 31(3).
- 11   Ie under the Inheritance Tax Act 1984 s 26 (repealed) (gifts for public benefit): see INHERITANCE TAXATION vol 24 (Reissue) PARA 524. The Leasehold Reform, Housing and Urban Development Act 1993 s 31(2)(c), (d) applies to a direction under the Finance Act 1975 Sch 6 para 13 (repealed) as it applies to a direction under the Inheritance Tax Act 1984 s 26 (repealed): Leasehold Reform, Housing and Urban Development Act 1993 s 31(7) (b).
- 12   Ibid s 31(2).
- 13   For these purposes, the reference to a binding contract being entered into in pursuance of the initial notice is to be read as including a reference to the making of a vesting order: ibid Sch 5 para 5(1), (2)(g). As to vesting orders see PARA 1615 et seq ante; and for the meaning of 'the initial notice' see PARA 1585 ante.
- 14   See note 4 supra.
- 15   Leasehold Reform, Housing and Urban Development Act 1993 s 31(4).
- 16   Ie either ibid s 31(1) or (4).
- 17   For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 18   Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 19   As to RTE companies see PARAS 1581-1583 ante.
- 20   Leasehold Reform, Housing and Urban Development Act 1993 s 31(6) (s 31(5), (6) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 20, as from a day to be appointed (see note 18 supra)).



- 21    le by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 31(4).
- 22    See note 18 *supra*.
- 23    le under the Leasehold Reform, Housing and Urban Development Act 1993 s 33 (as amended): see PARA 1645 *post*.
- 24    For the meaning of 'qualifying tenant' see PARA 1557 *ante*.
- 25    Leasehold Reform, Housing and Urban Development Act 1993 s 31(5) (as originally enacted).
- 26    See note 18 *supra*.
- 27    Leasehold Reform, Housing and Urban Development Act 1993 s 31(5) (as amended: see note 20 *supra*).

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## **(x) Determination of Price; Costs**

### **A. PRICE PAYABLE**

#### **(A) IN GENERAL**

#### **1623. Price payable; in general.**

The price payable by the nominee purchaser<sup>1</sup> (or, as from a day to be appointed<sup>2</sup>, by the RTE company<sup>3</sup>) in respect of each of the freehold and other interests<sup>4</sup> to be acquired by him (or by it) in pursuance of the right to collective enfranchisement<sup>5</sup> is to be determined<sup>6</sup> in accordance with the statutory provisions<sup>7</sup>.

The lien of the owner of any such interest, as vendor, on the specified premises or, as the case may be, on any other property<sup>8</sup>, for the price payable extends to:

- 3788 (1) any amounts which, at the time of the conveyance<sup>9</sup> of that interest, are due to him from any tenants<sup>10</sup> of his of premises comprised in the premises in which that interest subsists, whether due under or in respect of their leases<sup>11</sup> or under or in respect of agreements collateral thereto<sup>12</sup>; and
- 3789 (2) any amount payable<sup>13</sup> to him by the nominee purchaser and the participating tenants<sup>14</sup> (or, as from a day to be appointed<sup>15</sup>, by the RTE company and the participating members)<sup>16</sup>; and
- 3790 (3) any costs payable<sup>17</sup> to him<sup>18</sup>.

1    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 *ante*.

2    le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

3    As to RTE companies see PARAS 1581-1583 *ante*.

4    For the meaning of 'interest' see PARA 408 note 16 *ante*.

5 le in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1624 et seq post.

6 le ibid s 32(1), Sch 6 (as amended) has effect: see PARA 1624 et seq post. Despite the fact that in accordance with Sch 6 (as amended) no payment or only a nominal payment is payable by the nominee purchaser (or, as from a day to be appointed (see note 2 supra) by the RTE company) in respect of the acquisition by him (or by it) of any interest, he (or the RTE company) is nevertheless deemed for all purposes to be a purchaser of that interest for a valuable consideration in money or money's worth: s 32(5) (s 32(1), (5) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 21, as from a day to be appointed (see note 2 supra)).

7 Leasehold Reform, Housing and Urban Development Act 1993 s 32(1) (as amended: see note 6 supra).

8 For these purposes, the reference to the specified premises or any other property includes a reference to a part of those premises or that property: ibid s 32(4). For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

9 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

10 For the meaning of 'tenant' see PARA 1535 note 3 ante.

11 For the meaning of 'lease' see PARA 1535 note 3 ante.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 32(2)(a). Section 32(2)(a) does not, however, apply in relation to amounts due to the owner of any such interest from tenants of any premises which are to be comprised in the premises demised by a lease granted in accordance with s 36 (as amended) (see PARA 1656 post) and Sch 9 (as amended) (see PARA 1657 et seq post): s 32(3).

13 le payable by virtue of ibid s 18(2) (as amended): see PARA 1602 ante.

14 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

15 See note 2 supra.

16 Leasehold Reform, Housing and Urban Development Act 1993 s 32(2)(b). As to participating members see PARA 1582 ante.

17 le by virtue of ibid s 33 (as amended): see PARA 1645 post.

18 Ibid s 32(2)(c).

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## (B) FREEHOLD OF SPECIFIED PREMISES

### **1624. Price payable for freehold of specified premises.**

Where the freehold of the whole of the specified premises<sup>1</sup> is owned by the same person, the price payable by the nominee purchaser<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, by the RTE company<sup>4</sup>) for the freehold of those premises is<sup>5</sup> the aggregate of:

- 3791 (1) the value of the freeholder's interest<sup>6</sup> in the premises<sup>7</sup>;
- 3792 (2) the freeholder's share of the marriage value<sup>8</sup>; and
- 3793 (3) any amount of compensation payable<sup>9</sup> to the freeholder<sup>10</sup>.

Where the amount so arrived at is a negative amount, the price payable by the nominee purchaser (or by the RTE company) for the freehold is nil<sup>11</sup>.

- 1 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 2 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 3 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 4 As to RTE companies see PARAS 1581-1583 ante.
- 5 Ie subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 2 (as amended): see the text and notes 6-11 infra.
- 6 For the meaning of 'interest' see PARA 408 note 16 ante.
- 7 Ie as determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 3 (as amended): see PARA 1625 post.
- 8 Ie as determined in accordance with ibid Sch 6 para 4 (as amended): see PARA 1626 post.
- 9 Ie under ibid Sch 6 para 5 (as amended): see PARA 1627 post.
- 10 Ibid Sch 6 para 2(1) (amended by the Housing Act 1996 s 107(4), Sch 10 para 18(3); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 3 supra)). The Leasehold Reform, Housing and Urban Development Act 1993 6 Pt II (paras 2-5C) (as amended) (see PARAS 1625-1628 post) has effect subject to the provisions of Sch 6 Pt V (paras 14-17) (as amended) (see PARAS 1637-1640 post) and Sch 6 Pt VI (paras 18-21) (as amended) (see PARAS 1641-1644 post): Sch 6 para 1(2).
- 11 Ibid Sch 6 para 2(2) (as prospectively amended: see note 10 supra). Where an estate management scheme is registered in the appropriate local land charges register, any price payable under Sch 6 (as amended) must be adjusted so far as is appropriate, if at all: see s 70(12); and PARA 1736 post.

## UPDATE

### 1624 Price payable for freehold of specified premises

NOTES--It is not permissible to include the 'hope value' in the valuation: *Cadogan v Sportelli* [2007] EWCA Civ 1042, [2008] 2 All ER 220.

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### 1625. Value of freeholder's interest.

The value of the freeholder's<sup>1</sup> interest<sup>2</sup> in the specified premises<sup>3</sup> is<sup>4</sup> the amount which at the relevant date<sup>5</sup> that interest might be expected to realise if sold on the open market by a willing seller, with no specified person<sup>6</sup> buying or seeking to buy, on the following assumptions:

- 3794 (1) on the assumption that the vendor is selling for an estate in fee simple:
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82. (a) subject to any leases<sup>7</sup> subject to which the freeholder's interest in the premises is to be acquired by the nominee purchaser<sup>8</sup> (or, as from a day to be appointed<sup>9</sup>, by the RTE company<sup>10</sup>); but
83. (b) subject also to any intermediate<sup>11</sup> or other leasehold interests in the premises which are to be acquired by the nominee purchaser (or by the RTE company);
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- 3795 (2) on the assumption that the relevant statutory provisions<sup>12</sup> confer no right to acquire any interest in the specified premises or to acquire any new lease, except that this does not preclude the taking into account of a notice claiming to exercise the right to acquire a new lease<sup>13</sup> with respect to a flat contained in the specified premises where it is given by a person other than a participating tenant<sup>14</sup> (or a participating member of the RTE company<sup>15</sup>);
- 3796 (3) on the assumption that any increase in the value of any flat held by a participating tenant (or a participating member of the RTE company) which is attributable to an improvement carried out at his own expense by the tenant (or member) or by any predecessor in title is to be disregarded; and
- 3797 (4) on the assumption that, subject to heads (1) and (2) above, the vendor is selling with and subject to the rights and burdens with and subject to which the conveyance<sup>16</sup> to the nominee purchaser (or to the RTE company) of the freeholder's interest is to be made, and in particular with and subject to such permanent or extended rights and burdens as are to be created in order to give effect to the statutory provisions<sup>17</sup> relating to the conveyance to the nominee purchaser (or to the RTE company) on enfranchisement<sup>18</sup>.

In determining that amount there must be made such deduction, if any, in respect of any defect in title as on a sale of the interest on the open market might be expected to be allowed between a willing seller and a willing buyer<sup>19</sup>.

Where a lease of any flat or other unit<sup>20</sup> contained in the specified premises is to be granted<sup>21</sup> to the freeholder, the value of his interest in those premises at the relevant date so far as relating to that flat or other unit is to be taken to be the difference as at that date between:

- 3798 (i) the value of his freehold interest in it; and
- 3799 (ii) the value of his interest in it under that lease, assuming it to have been granted to him at that date;

and each of those values must be determined, so far as is appropriate, in like manner as the value of the freeholder's interest in the whole of the specified premises is<sup>22</sup> determined<sup>23</sup>.

The value of the freeholder's interest in the specified premises may not be increased by reason of:

- 3800 (A) any transaction which is entered into on or after 20 July 1993, otherwise than in pursuance of a contract entered into before that date, and involves the creation or transfer of an interest superior to, whether or not preceding, any interest held by a qualifying tenant of a flat contained in the specified premises; or
- 3801 (B) any alteration on or after that date of the terms on which any such superior interest is held<sup>24</sup>.

1 le the person owning the freehold of the whole of the premises: see PARA 1624 ante. As to the application of these provisions to a person owning part only of the premises see notes 6, 18, 23 infra; and PARA 1628 post.

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 le subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 3 (as amended): see the text and notes 5-24 infra.

5 For the meaning of 'the relevant date' see PARA 1552 note 5 ante.

6 le no person falling within the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 3(1A) (as added and amended). A person falls within that provision if he is (1) the nominee purchaser (or, as from a day to be appointed (see note 9 infra) the RTE company); or (2) a tenant of premises contained in the specified premises; or (3) an owner of an interest which the nominee purchaser (or the RTE company) is to acquire in pursuance of s 1(2)(a) (as amended) (see PARA 1552 ante); or (4) an owner of an interest which the nominee purchaser (or the RTE company) is to acquire in pursuance of s 2(1)(b) (as originally enacted or as substituted) (see PARA 1553 ante): Sch 6 para 3(1A) (added by the Housing Act 1996 s 109(1), (3); amended by s 107(4), Sch 10 para 18(4); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 9 infra)).

In its application in accordance with (a) the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(a) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (1) in the text); (b) Sch 6 para 7(1) (price payable for intermediate freehold interests: see PARA 1629 post); or (c) Sch 6 para 11(2) (value of other interests: see PARA 1634 post), Sch 6 para 3(1A) (as so added and amended) has effect with the insertion, after Sch 6 para 3(1A)(a) (as added and amended) (see head (1) supra) of the words ' (aa) an owner of a freehold interest in the specified premises, or': Sch 6 para 5B(1), (3) (Sch 6 para 5B added by the Housing Act 1996 s 107, Sch 10 para 18(5)); Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 7(1A) (added by the Housing Act 1996 s 109(4)); Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 11(4) (added by the Housing Act 1996 s 109(5)).

7 For the meaning of 'lease' see PARA 1535 note 3 ante.

8 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

9 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

10 As to RTE companies see PARAS 1581-1583 ante.

11 For these purposes, 'intermediate leasehold interest' means the interest of the tenant under a lease which is superior to the lease held by a qualifying tenant of a flat contained in the specified premises, to the extent that (1) any such interest is to be acquired by the nominee purchaser by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 2(1)(a) (as originally enacted) (or, as from a day to be appointed (see note 9 supra), acquired by the RTE company under s 2(1)(a) (as substituted) (see PARA 1553 ante); and (2) it is an interest in the specified premises: Sch 6 para 1(1). For the meaning of 'qualifying tenant' see PARA 1557 ante; and for the meaning of 'flat' see PARA 1533 note 2 ante.

12 le ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1626 et seq post) and Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq post).

13 le a notice under ibid s 42 (as amended): see PARA 1677 post.

14 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

15 As to participating members see PARA 1582 ante.

16 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

17 le the Leasehold Reform, Housing and Urban Development Act 1993 s 34(9), Sch 7 (as amended): see PARAS 1648-1651 post.

18 Ibid Sch 6 para 3(1) (amended by the Housing Act 1996 s 109(1), (2); and by the Commonhold and Leasehold Reform Act 2002 s 126(1); prospectively amended by Sch 8 paras 2, 40, as from a day to be appointed (see note 9 supra)). As to the application of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 3 (as amended) see PARA 1624 note 10 ante.

The fact that Sch 6 para 3(1) (as so amended) requires assumptions to be made as to the matters specified in Sch 6 para 3(1)(a)-(d) (as amended) (see heads (1)-(4) in the text) does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the relevant date the freeholder's interest in the specified premises might be expected to realise if sold as mentioned in Sch 6 para 3(1) (as amended): Sch 6 para 3(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 126(1)).

In its application in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(a) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (1) in the text), Sch 6 para 3(1)(a)(ii) (as amended) (see head (1)(b) in the text) has effect with the insertion at the end of the words 'so far as relating to the part of the premises in which the freeholder's interest subsists': Sch 6 para 5B(1), (2) (as added: see note 6 supra).

19 Ibid Sch 6 para 3(3).

20 For the meaning of 'unit' see PARA 1555 note 9 ante.

21 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) (see PARA 1656 post) and Sch 9 (as amended) (see PARA 1657 et seq post).

22 Ie is determined for the purposes of ibid Sch 6 para 2(1)(a): see PARA 1624 ante at head (1) in the text.

23 Ibid Sch 6 para 3(4) (amended by the Commonhold and Leasehold Reform Act 2002 s 126(1)). In its application in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(a) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (1) in the text), Sch 6 para 3(4) (as so amended) has effect with the following modifications: (1) the words 'the whole of' are to be omitted; and (2) for '2(1)(a)' there is to be substituted '5A(2)(a)': Sch 6 para 5B(1), (4) (as added: see note 6 supra).

24 Ibid Sch 6 para 3(5). Schedule 6 para 3(5) does not have the effect of preventing an increase in value of the freeholder's interest in the specified premises in a case where the increase is attributable to any such leasehold interest with a negative value as is mentioned in Sch 6 para 14(2) (see PARA 1637 post): Sch 6 para 3(6). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante. For the purposes, however, of Sch 6 para 3 (as amended) as it applies in relation to any acquisition such as is mentioned in s 69(1)(b) (as substituted) (see PARA 1734 post), it is to be assumed that any scheme approved under s 73(1) and relating to the property in question had not been so approved: see s 73(10); and PARA 1739 note 7 post.

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## **1626. Freeholder's share of marriage value.**

The marriage value is the amount referred to in head (1) or head (2) below<sup>1</sup>, and the freeholder's share of the marriage value is 50 per cent of that amount<sup>2</sup>.

The marriage value is<sup>3</sup>:

3802 (1) at the date at which this title states the law, any increase in the aggregate value of the freehold and every intermediate leasehold interest<sup>4</sup> in the specified premises<sup>5</sup>, when regarded as being, in consequence of their being acquired by the nominee purchaser<sup>6</sup>, interests under the control of the persons who are participating tenants<sup>7</sup> immediately before a binding contract is entered into in pursuance of the initial notice<sup>8</sup>, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value:

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84. (a) which is attributable to the potential ability of the persons who are such participating tenants, once those interests have been so acquired, to have new leases<sup>9</sup> granted to them without payment of any premium and without restriction as to length of term; and

85. (b) which, if those interests were being sold to the nominee purchaser on the open market by willing sellers, the nominee purchaser would have to agree to share with the sellers in order to reach agreement as to price<sup>10</sup>;

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3803 (2) as from a day to be appointed<sup>11</sup>, any increase in the aggregate value of the freehold and every intermediate leasehold interest in the specified premises, when regarded as being, in consequence of their being acquired by the RTE company<sup>12</sup>, interests under the control of persons who are participating members<sup>13</sup> of the RTE company immediately before a binding contract is entered into in pursuance of the initial notice, as compared with the aggregate value of those interests when held by the persons from whom they are to be so acquired, being an increase in value:

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86. (a) which is attributable to the potential ability of those participating members, once those interests have been so acquired, to have new leases granted to them without payment of any premium and without restriction as to length of term; and

87. (b) which, if those interests were being sold to the RTE company on the open market by willing sellers, the RTE company would have to agree to share with the sellers in order to reach agreement as to price<sup>14</sup>.

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Where, however, at the relevant date the unexpired term of the lease held by any of those participating tenants (or participating members) exceeds 80 years, any increase in the value of the freehold or any intermediate leasehold interest in the specified premises which is attributable to his potential ability to have a new lease granted to him as mentioned in heads (1)(a) and (2)(a) above is to be ignored<sup>15</sup>.

Accordingly, in so determining the value of an interest when acquired by the nominee purchaser (or, as from a day to be appointed<sup>16</sup>, by the RTE company):

3804 (i) the same assumptions must be made<sup>17</sup> as are to be made<sup>18</sup> in determining the value of the interest when held by the person from whom it is to be acquired by the nominee purchaser (or by the RTE company); and

3805 (ii) any merger or other circumstances affecting the interest on its acquisition by the nominee purchaser (or by the RTE company) must be disregarded<sup>19</sup>.

1    Ie the amount referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 4(2) (as amended) or in Sch 6 para 4(2) (as amended and as prospectively amended): see heads (1)-(2) in the text.

2    Ibid Sch 6 para 4(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 127). As to the application of Sch 6 para 4 (as amended) see PARA 1624 note 10 ante; and as to the application of these provisions to a person owning part only of the premises see notes 10, 19 infra; and PARA 1628 post. For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2, PARA 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2, PARA 1.

3    Ie subject to the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2A) (as added): see the text and note 15 infra.

4    For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante; and for the meaning of 'interest' see PARA 408 note 16 ante.

5    For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

6    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

7    For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

8 For the meaning of 'the initial notice' see PARA 1585 ante.

9 For the meaning of 'lease' see PARA 1535 note 3 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 128(1), (2) (as to transitional provisions and savings see note 2 supra); further amended, with effect from 28 February 2005 in relation to England and 31 May 2005 in relation to Wales and for transitional purposes by the Commonhold and Leasehold Reform Act 2002 (Commencement No 5 and Saving and Transitional Provision) Order 2004, SI 2004/3056, art 4(1) and by the Commonhold and Leasehold Reform Act 2002 (Commencement No 3 and Saving and Transitional Provision) (Wales) Order 2005, SI 2005/1353, art 3(1)). For these purposes, the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the nominee purchaser (1) must be determined on the same basis as it is determined for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 2(1)(a) (see PARA 1624 ante) or, as the case may be, Sch 6 para 6(1)(b)(i) (see PARA 1629 post); and (2) must be so determined as at the relevant date: Sch 6 para 4(3) (amended by the Commonhold and Leasehold Reform Act 2002 s 126(1)). For the meaning of 'the relevant date' see PARA 1552 note 5 ante. As to the factors to be taken into account for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4 (as amended) see *Maryland Estates Ltd v Abbatthure Flat Management Co Ltd* [1999] 1 EGLR 100, [1996] 06 EG 177, Lands Tribunal.

In its application in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(b) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (2) in the text), Sch 6 para 4(2) (as so amended) has effect with the following modifications: (1) after the words 'the specified premises' there are to be inserted the words 'so far as relating to the part of the premises in which the freeholder's interest subsists'; (2) after the phrase 'participating tenants [or participating member[s] of the RTE company]', where it first occurs, there are to be inserted the words 'in whose flats the freeholder's interest subsists'; and (3) in Sch 6 para 4(2)(a) (as amended), for 'the', where it second occurs, there is to be substituted 'those': Sch 6 para 5C(1), (2) (Sch 6 para 5C added by the Housing Act 1996 s 107, Sch 10 para 18(5); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (3), as from a day to be appointed (see note 10 infra)). In its application in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(b) (as added) Sch 6 para 4(3) (as so amended) has effect with the following modifications: (a) after the words 'the specified premises' there are to be inserted the words 'so far as relating to the part of the premises in which the freeholder's interest subsists'; and (b) in Sch 6 para 4(3)(a) (see head (1) supra), for '2(1)(a)' there is to be substituted '5A(2)(a)': Sch 6 para 5C(1), (3) (as so added).

11 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

12 As to RTE companies see PARAS 1581-1583 ante.

13 As to participating members see PARA 1582 ante.

14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2) (as amended (see note 10 supra); further prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40, as from a day to be appointed (see note 11 supra)). For these purposes, the value of the freehold or any intermediate leasehold interest in the specified premises when held by the person from whom it is to be acquired by the RTE company (1) must be determined on the same basis as it is determined for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 2(1)(a) (see PARA 1624 ante) or, as the case may be, Sch 6 para 6(1)(b)(i) (see PARA 1629 post); and (2) must be so determined as at the relevant date: Sch 6 para 4(3) (as amended (see note 10 supra); further prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 11 supra)). For the meaning of 'the relevant date' see PARA 1552 note 5 ante. As to the application of these provisions in accordance with Sch 6 para 5A(2)(b) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (2) in the text) see note 10 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2A) (added by the Commonhold and Leasehold Reform Act 2002 s 128(1), (3)); Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, Sch 2 para 3; Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, Sch 2 para 3.

16 See note 11 supra.

17 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 3(1) (as amended) (see PARA 1625 ante) or, as the case may be, under Sch 6 para 3(1) (as amended) as applied by Sch 6 para 7(1) (see PARA 1630 post).

18 See note 17 supra.



19 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(4) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 11 supra)). For the meaning of references to the acquisition by the nominee purchaser (or by the RTE company) see PARA 1601 note 10 ante. As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

In its application in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5A(2)(b) (as added) (price payable for freehold of part of specified premises: see PARA 1628 post at head (2) in the text), Sch 6 para 4(4) has effect with the modification that in Sch 6 para 4(4)(a), after '3(1)', where it first occurs, there is to be inserted 'as applied by paragraph 5A(2)(a)': Sch 6 para 5C(1), (4) (as added: see note 10 supra).

## UPDATE

### 1626 Freeholder's share of marriage value

NOTES 2, 3--Where provision is made for marriage value to be taken into account in the valuation of a property subject to leasehold enfranchisement, the freeholder is not entitled to an additional amount in respect of 'hope value': *Cadogan v Pitts* [2008] UKHL 71, [2009] 3 All ER 365.

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### 1627. Compensation for loss resulting from enfranchisement.

Where the freeholder<sup>1</sup> will suffer any loss or damage consisting of:

- 3806 (1) any diminution in value of any interest<sup>2</sup> of the freeholder in other property resulting from the acquisition of his interest in the specified premises<sup>3</sup>; and
- 3807 (2) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property,

there is payable to him such amount as is reasonable to compensate him for that loss or damage<sup>4</sup>.

Where the freeholder will suffer such loss or damage, then, in determining the amount of compensation so payable to him, it is not material that:

- 3808 (a) the loss or damage could to any extent be avoided or reduced by the grant to him<sup>5</sup> of a lease<sup>6</sup>; and
- 3809 (b) he is not requiring the nominee purchaser<sup>7</sup> (or, as from a day to be appointed<sup>8</sup>, is not requiring the RTE company<sup>9</sup>) to grant any such lease<sup>10</sup>.

1 le the person owning the freehold of the whole of the premises: see PARA 1624 ante. As to application of these provisions to a person owning part only of the premises see PARA 1628 post.

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 5(1), (2). As to the application of Sch 6 para 5 (as amended) see PARA 1624 note 10 ante.

Without prejudice to the generality of Sch 6 para 5(2)(b) (see head (2) in the text), the kinds of loss falling within Sch 6 para 5(2)(b) include loss of development value in relation to the specified premises to the extent that it is referable as mentioned in Sch 6 para 5(2)(b): Sch 6 para 5(3). For these purposes, 'development value', in relation to the specified premises, means any increase in the value of the freeholder's interest in the premises which is attributable to the possibility of demolishing, reconstructing, or carrying out substantial works of construction on, the whole or a substantial part of the premises: Sch 6 para 5(4).

It has been held that losses resulting from the fact that the freeholder can no longer earn commission on the tenants' insurance premiums may also be included under Sch 6 para 5 (as amended) (see *Blackstone Investments Ltd v Middleton-Dell Management Co Ltd* [1997] RVR 145, [1997] 1 EGLR 185, Lands Tribunal), but it is difficult to see how the value of insurance commissions forms part of the landlord's interest as freeholder. For decisions to the contrary by leasehold valuation tribunals see *35 Dennington Park Road Management Ltd v Maryland Estate* (1997, unreported); *Moore v Escalus Properties Ltd* [1997] 1 EGLR 200, [1997] 07 EG 149 (decided before *Blackstone Investments Ltd v Middleton-Dell Management Co Ltd* supra but not referred to therein).

5 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) and Sch 9 (as amended): see PARA 1656 et seq post.

6 le a lease granted in pursuance of ibid Sch 9 Pt III (paras 5-7) (as amended): see PARAS 1660-1662 post.

7 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

8 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9 As to RTE companies see PARAS 1581-1583 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 5(5) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 8 supra)). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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## **1628. Price payable for freehold of part of specified premises.**

Where different persons own the freehold of different parts of the specified premises<sup>1</sup>, a separate price is payable by the nominee purchaser<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, the price payable by the RTE company<sup>4</sup>) for the freehold of each of those parts, and heads (1) to (3) below apply to determine the price so payable<sup>5</sup>. The price payable by the nominee purchaser (or by the RTE company) for the freehold of part of the specified premises is<sup>6</sup> to be the aggregate of:

- 3810 (1) the value of the freeholder's interest in the part<sup>7</sup>; and
- 3811 (2) the freeholder's share of the marriage value<sup>8</sup>; and
- 3812 (3) any amount of compensation payable<sup>9</sup> to the freeholder<sup>10</sup>.

Where, however, the amount arrived at in accordance with heads (1) to (3) above is a negative amount, the price payable by the nominee purchaser (or by the RTE company) for the freehold of the part is to be nil<sup>11</sup>.

- 1 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 2 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 3 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 4 As to RTE companies see PARAS 1581-1583 ante.
- 5 Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 5A(1) (Sch 6 paras 5A-5C added by the Housing Act 1996 s 107, Sch 10 para 18(5); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1)-(3), as from a day to be appointed (see note 3 supra)). As to the application of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 paras 5A-5C (as so added and amended) see PARA 1624 note 10 ante.
- 7 le as determined in accordance with ibid Sch 6 para 3 (as amended), modified as mentioned in Sch 6 para 5B (as added): see PARA 1625 notes 6, 18, 23 ante.
- 8 le as determined in accordance with ibid Sch 6 para 4 (as amended), modified as mentioned in Sch 6 para 5C (as added): see PARA 1626 notes 10, 19 ante.
- 9 le under ibid Sch 6 para 5 (as amended): see PARA 1627 ante.
- 10 Ibid Sch 6 para 5A(2) (as added and amended: see note 6 supra).
- 11 Ibid Sch 6 para 5A(3) (as added and amended: see note 6 supra). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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## (C) INTERMEDIATE LEASEHOLD INTERESTS

### **1629. Price payable for intermediate leasehold interests.**

Where the nominee purchaser<sup>1</sup> (or, as from a day to be appointed<sup>2</sup>, the RTE company<sup>3</sup>) is to acquire one or more intermediate leasehold interests<sup>4</sup>:

- 3813 (1) a separate price is payable for each of those interests; and
- 3814 (2) that price is<sup>5</sup> the aggregate of the value of the interest<sup>6</sup> and any amount of compensation payable<sup>7</sup> to the owner of that interest<sup>8</sup>.

Where in the case of any intermediate leasehold interest the amount arrived at in accordance with head (2) above is a negative amount, the price payable by the nominee purchaser (or by the RTE company) for the interest is nil<sup>9</sup>.

- 1 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.
- 2 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.
- 3 As to RTE companies see PARAS 1581-1583 ante.
- 4 For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante; and for the meaning of 'interest' see PARA 408 note 16 ante.

5    Ie subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 6 (as amended): see the text and notes 6-9 infra.

6    Ie as determined in accordance with ibid Sch 6 para 7 (as amended): see PARA 1630 post.

7    Ie in accordance with ibid Sch 6 para 8 (as substituted): see PARA 1631 post.

8    Ibid Sch 6 para 6(1) (Sch 6 para 6(1), (2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 2 supra)). The Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 Pt III (paras 6-9) (as amended) (see PARAS 1630-1632 post) has effect subject to the provisions of Sch 6 Pt V (paras 14-17) (as amended) (see PARAS 1637-1640 post) and Sch 6 Pt VI (paras 18-21) (as amended) (see PARAS 1641-1644 post): Sch 6 para 1(2).

9    Ibid Sch 6 para 6(2) (as amended: see note 8 supra). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1630. Value of intermediate leasehold interests.**

The statutory provisions relating to the value of the freeholder's interest<sup>1</sup> apply<sup>2</sup> for determining the value of any intermediate leasehold interest<sup>3</sup> with such modifications<sup>4</sup> as are appropriate<sup>5</sup>.

The value of an intermediate leasehold interest which is the interest of the tenant under a minor intermediate lease<sup>6</sup> must, however, be calculated by applying the following formula:

$$P = \frac{R}{Y} - \frac{R}{Y(1+Y)^n}$$

where P equals the price payable; R equals the profit rent; Y equals the yield, expressed as a decimal fraction, from 2½% Consolidated Stock<sup>7</sup>; and n equals the period, expressed in years, taking any part of a year as a whole year, of the remainder of the term of the minor intermediate lease as at the relevant date<sup>8</sup>.

Where a minor intermediate lease is in immediate reversion on two or more leases:

3815 (1) the above formula must be applied in relation to each of those subleases<sup>9</sup>; and

3816 (2) the value of the interest of the tenant under the minor intermediate lease is accordingly the aggregate of the amounts calculated by so applying the formula<sup>10</sup>.

1    Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 3 (as amended): see PARA 1625 ante.

2    Ie subject to ibid Sch 6 para 7(2): see the text and notes 6-8 infra.

3    Ie for the purposes of ibid Sch 6 para 6(1)(b)(i): see PARA 1629 ante. For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante; and for the meaning of 'interest' see PARA 408 note 16 ante.

4    Ie such modifications as are appropriate to relate ibid Sch 6 para 3 (as amended) to a sale of the interest in question subject, where applicable, to any leases intermediate between that interest and any lease held by a qualifying tenant of a flat contained in the specified premises. For the meaning of 'lease' see PARA 1535 note 3

ante; for the meaning of 'qualifying tenant' see PARA 1557 ante; for the meaning of 'flat' see PARA 1533 note 2 ante; and for the meaning of 'the specified premises' see PARA 1586 note 5 ante. In its application in accordance with Sch 6 para 7(1), Sch 6 para 3(1A) (as added and amended) has effect with the addition after Sch 6 para 3(1A)(a) (as added and amended) of: '(aa) an owner of a freehold interest in the specified premises, or': Sch 6 para 7(1A) (added by the Housing Act 1996 s 109(4)).

5 Ibid Sch 6 para 7(1). As to the application of Sch 6 para 7 (as amended) see PARA 1629 note 8 ante.

6 For these purposes, 'a minor intermediate lease' means a lease complying with the following requirements, namely: (1) it must have an expectation of possession of not more than one month; and (2) the profit rent in respect of the lease must be not more than £5 per year; and, in the case of a lease which is in immediate reversion on two or more leases, those requirements must be complied with in connection with each of the subleases: ibid Sch 6 para 7(3). 'Profit rent' means an amount equal to that of the rent payable under the lease on which the minor intermediate lease is in immediate reversion, less that of the rent payable under the minor intermediate lease: Sch 6 para 7(5). Where the minor intermediate lease or that on which it is in immediate reversion comprises property other than a flat held by a qualifying tenant, then in Sch 6 para 7(5) the reference to the rent payable under it means so much of that rent as is apportioned to any such flat: Sch 6 para 7(6).

The expectation of possession carried by a lease in relation to a lease ('the sublease') on which it is in immediate reversion is the expectation of possession which it carries at the relevant date after the sublease, on the basis that (a) subject to Sch 6 para 7(10), where the sublease is a lease held by a qualifying tenant of a flat contained in the specified premises, it terminates at the relevant date if its term date fell before then, or else it terminates on its term date; and (b) in any other case, the sublease terminates on its term date: Sch 6 para 7(9) (Sch 6 para 7(7)-(9) amended by the Commonhold and Leasehold Reform Act 2002 s 126(1); for transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 5 and Saving and Transitional Provision) Order 2004, SI 2004/3056, arts 3(a), 4(1A) (art 4(1A) added by SI 2005/193); the Commonhold and Leasehold Reform Act 2002 (Commencement No 3 and Saving and Transitional Provision) (Wales) Order 2005, SI 2005/1353, arts 2(a), 3(2)). In a case where before the relevant date for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) the landlord of any such qualifying tenant as is mentioned in Sch 6 para 7(9)(a) (see head (a) supra) had given notice to quit terminating the tenant's sublease on a date earlier than that date, the date specified in the notice to quit must be substituted for the date specified in that provision: Sch 6 para 7(10). For the meaning of 'the relevant date' see PARA 1552 note 5 ante; and for the meaning of 'the term date' see PARA 1544 note 5 ante.

7 In calculating the yield from 2½% Consolidated Stock, the price of that stock is to be taken to be the middle market price at the close of business on the last trading day in the week before the relevant date: ibid Sch 6 para 7(8) (as amended: see note 6 supra).

8 Ibid Sch 6 para 7(2), (7) (as amended: see note 6 supra).

9 Ie and ibid Sch 6 para 7(5), (6) also so applies.

10 Ibid Sch 6 para 7(4). As to the effect of an estate management scheme on the price payable under Sch 6 see PARA 1624 note 11 ante.

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### **1631. Compensation for loss on acquisition of interest.**

Where the owner of the intermediate leasehold interest<sup>1</sup> will suffer any loss or damage to which this provision applies<sup>2</sup>, there is payable to him such amount as is reasonable to compensate him for that loss or damage<sup>3</sup>. This provision applies to:

- 3817 (1) any diminution in value of any interest of the owner of the intermediate leasehold interest in other property resulting from the acquisition of his interest in the specified premises<sup>4</sup>; and

3818 (2) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property<sup>5</sup>;

and without prejudice to the generality of head (2) above, the kinds of loss falling within that head include loss of development value<sup>6</sup> in relation to the specified premises to the extent that it is referable as mentioned therein<sup>7</sup>.

1 For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante.

2 ie any loss or damage to which heads (1)-(2) in the text apply.

3 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 8(1) (Sch 6 para 8 substituted by the Housing Act 1996 s 107, Sch 10 para 18(6)).

4 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 8(2) (as substituted: see note 3 supra).

6 For these purposes, 'development value', in relation to the specified premises, means any increase in the value of the interest in the premises of the owner of the intermediate leasehold interest which is attributable to the possibility of demolishing, reconstructing or carrying out substantial works of construction on the whole or a substantial part of the premises: *ibid* Sch 6 para 8(4) (as substituted: see note 3 supra).

7 *Ibid* Sch 6 para 8(3) (as substituted: see note 3 supra). As to the application of Sch 6 para 8 (as substituted) see PARA 1629 note 8 ante; and as to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1632. Owners of intermediate interests entitled to part of marriage value.**

The following provisions apply where the freehold of the whole of the specified premises<sup>1</sup> is owned by the same person<sup>2</sup> and:

3819 (1) the price payable for the freehold of the specified premises includes an amount in respect of the freeholder's share of the marriage value<sup>3</sup>; and

3820 (2) the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, the RTE company<sup>6</sup>) is to acquire any intermediate leasehold interests<sup>7</sup>.

The amount payable to the freeholder in respect of his share of the marriage value must be divided between the freeholder and the owners of the intermediate leasehold interests in proportion to the value of their respective interests<sup>8</sup> in the specified premises<sup>9</sup>. Where the owner of an intermediate leasehold interest is so entitled to any part of the amount payable to the freeholder in respect of the freeholder's share of the marriage value, the amount to which he is so entitled is payable to him by the freeholder<sup>10</sup>.

The following provisions apply where different persons own the freehold of different parts of the specified premises<sup>11</sup> and:

- 3821 (a) the price payable for the freehold of a part of the specified premises includes an amount in respect of the freeholder's share of the marriage value<sup>12</sup>; and  
 3822 (b) the nominee purchaser (or, as from a day to be appointed<sup>13</sup>, the RTE company) is to acquire any intermediate leasehold interests which subsist in that part<sup>14</sup>.

The amount payable to the freeholder of the part in respect of his share of the marriage value must be divided between the freeholder and the owners of the intermediate leasehold interests which subsist in that part in proportion to the value of their respective interests<sup>15</sup> in the part<sup>16</sup>. Where, however, an intermediate leasehold interest subsists not only in the part of the specified premises in which the freeholder's interest subsists ('the relevant part') but also in another part of those premises:

- 3823 (i) the value of the intermediate leasehold interest as determined for the statutory purposes<sup>17</sup> must be apportioned between the relevant part and the other part of the specified premises in which it subsists; and  
 3824 (ii) the above provisions<sup>18</sup> have effect as if the reference to the value of the intermediate leasehold interest in the relevant part<sup>19</sup> were to the value of that interest as determined on an apportionment in accordance with head (i) above<sup>20</sup>.

Where the owner of an intermediate leasehold interest is so entitled<sup>21</sup> to any part of the amount payable to the freeholder in respect of the freeholder's share of the marriage value, the amount to which he is so entitled is payable to him by the freeholder<sup>22</sup>.

1 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

2 Ie where the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 2 (as amended) applies: see PARA 1624 ante.

3 As to the freeholder's share of the marriage value see PARA 1626 ante.

4 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

5 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARAS 1581-1583 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9(1) (amended by the Housing Act 1996 s 107(4), Sch 10 para 18(7); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 5 supra)). As to the application of Sch 6 para 9 (as amended) see PARA 1629 note 8 ante. For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante.

8 Ie as determined for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 2(1)(a) (see PARA 1624 ante) or Sch 6 para 6(1)(b)(i) (see PARA 1629 ante), as the case may be.

9 Ibid Sch 6 para 9(2).

10 Ibid Sch 6 para 9(3). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

11 Ie where ibid Sch 9 para 5A (as added and amended) applies: see PARA 1628 ante.

12 As to the freeholder's share of the marriage value see PARA 1628 ante.

13 See note 5 supra.

14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9A(1) (Sch 6 para 9A added by the Housing Act 1996 s 107, Sch 10 para 18(8); prospectively amended by the Commonhold and Leasehold

Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 5 supra)). As to the application of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9A (as added and amended) see PARA 1629 note 8 ante.

15 le as determined for the purposes of ibid Sch 6 para 5A(2)(a) (as added) (see PARA 1628 ante) or Sch 6 para 6(1)(b)(i) (see PARA 1629 ante), as the case may be.

16 Ibid Sch 6 para 9A(2) (as added: see note 14 supra).

17 le as determined for the purposes of ibid Sch 6 para 6(1)(b)(i): see PARA 1629 ante.

18 le ibid Sch 6 para 9A(2) (as added): see the text and notes 15-16 supra.

19 See note 17 supra.

20 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9A(3) (as added: see note 14 supra).

21 le in accordance with ibid Sch 6 para 9A(2) (as added).

22 Ibid Sch 6 para 9A(4) (as added: see note 14 supra).

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## (D) OTHER INTERESTS TO BE ACQUIRED

### **1633. Price payable for other interests.**

Where the nominee purchaser<sup>1</sup> (or, as from a day to be appointed<sup>2</sup>, the RTE company<sup>3</sup>) is to acquire any freehold interest not comprised in the relevant premises<sup>4</sup>, or where he (or it) is required to do so<sup>5</sup>, the price payable for that interest is the aggregate of:

- 3825 (1) the value of the interest<sup>6</sup>;
- 3826 (2) any share of the marriage value to which the owner of the interest is entitled<sup>7</sup>; and
- 3827 (3) any amount of compensation payable<sup>8</sup> to the owner of the interest<sup>9</sup>.

Where the nominee purchaser (or the RTE company) is to acquire any leasehold interest under the general right to acquire such an interest<sup>10</sup> other than an intermediate leasehold interest<sup>11</sup>, or he (or it) is to acquire any leasehold interest where he (or it) is required to do so<sup>12</sup>, the price payable for that interest is the aggregate of:

- 3828 (a) the value of the interest<sup>13</sup>; and
- 3829 (b) any amount of compensation payable<sup>14</sup> to the owner of the interest<sup>15</sup>.

Where, however, in the case of any interest the amount so arrived at<sup>16</sup> is a negative amount, the price payable by the nominee purchaser (or by the RTE company) for the interest is nil<sup>17</sup>.

1 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.



2 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

3 As to RTE companies see PARAS 1581-1583 ante.

4 le in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 1(2)(a) or (4) (as amended): see PARA 1552 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

5 le in pursuance of ibid s 21(4) (as amended): see PARA 1606 ante.

6 le as determined in accordance with ibid s 32(1), Sch 6 para 11 (as amended): see PARA 1634 post.

7 le under ibid Sch 6 para 12 (as amended): see PARA 1635 post.

8 le in accordance with ibid Sch 6 para 13 (as substituted): see PARA 1636 post.

9 Ibid Sch 6 para 10(1) Sch 6 para 10 prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40, as from a day to be appointed (see note 2 supra)). The Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 Pt IV (paras 10-13) (as amended) (see PARAS 1633-1636 post) has effect subject to the provisions of Sch 6 Pt V (paras 14-17) (as amended) (see PARAS 1637-1640 post) and Sch 6 Pt VI (paras 18-21) (as amended) (see PARAS 1641-1644 post): Sch 6 para 1(2).

10 le by virtue of ibid s 2(1) (as originally enacted or as substituted): see PARA 1553 ante.

11 For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante.

12 See note 5 supra.

13 See note 6 supra.

14 See note 8 supra.

15 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 10(2) (as amended: see note 9 supra).

16 le in accordance with ibid Sch 6 para 10(1) or (2) (as amended): see the text and notes 1-15 supra.

17 Ibid Sch 6 para 10(3) (as amended: see note 9 supra). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1634. Value of other interests.**

In the case of any freehold interest to be acquired<sup>1</sup>, the statutory provisions relating to the value of the freeholder's interest<sup>2</sup> apply for determining the value of the interest with such modifications as are appropriate to relate it to a sale of the interest subject, where applicable, to any leases<sup>3</sup> intermediate between that interest and any lease held by a qualifying tenant<sup>4</sup> of a flat<sup>5</sup> contained in the specified premises<sup>6</sup>.

In the case of any leasehold interest<sup>7</sup>, the statutory provisions relating to the value of the freeholder's interest likewise<sup>8</sup> apply<sup>9</sup>.

1 le any such freehold interest as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 10(1) (as amended): see PARA 1633 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

2 le *ibid* Sch 6 para 3 (as amended): see PARA 1625 ante.

3 For the meaning of 'lease' see PARA 1535 note 3 ante.

4 For the meaning of 'qualifying tenant' see PARA 1557 ante.

5 For the meaning of 'flat' see PARA 1533 note 2 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 11(1). As to the application of Sch 6 para 11 (as amended) see PARA 1633 note 9 ante. For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

In its application in accordance with Sch 6 para 11(1) or Sch 6 para 11(2) (see the text and notes 8-9 *infra*), Sch 6 para 3(6) (see PARA 1625 ante) has effect as if the reference to Sch 6 para 14(2) (see PARA 1637 post) were a reference to Sch 6 para 18(2) (as amended) (see PARA 1641 post): Sch 6 para 11(3).

7 le any such leasehold interest as is mentioned in *ibid* Sch 6 para 10(2) (as amended): see PARA 1633 ante.

8 le *ibid* Sch 6 para 3 (as amended) applies as mentioned in *ibid* Sch 6 para 11(1): see note 6 *supra*. In its application in accordance with Sch 6 para 11(2) (see note 9 *infra*), Sch 6 para 3(1A) (as added and amended) has effect with the addition after Sch 6 para 3(1A)(a) (as added and amended) of: '(aa) an owner of a freehold interest in the specified premises, or': Sch 6 para 11(4) (added by the Housing Act 1996 s 109(5)).

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 11(2)(a). See also notes 6, 8 *supra*. If, however, it is the interest of the tenant under a minor intermediate lease within the meaning of Sch 6 para 7 (as amended) (see PARA 1630 note 6 ante), Sch 6 para 7(2)-(10) (as amended) (see PARA 1630 ante) applies with such modifications as are appropriate for determining the value of the interest: Sch 6 para 11(2) (b). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1635. Marriage value.**

Where any freehold interest<sup>1</sup> is an interest in any property which is appurtenant property demised by the lease held by a qualifying tenant of a flat contained in the relevant premises<sup>2</sup>:

3830 (1) the statutory provisions relating to the marriage value<sup>3</sup> apply with such modifications as are appropriate for determining the marriage value in connection with the acquisition by the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, by the RTE company<sup>6</sup>) of that interest; and

3831 (2) the statutory provisions relating to the freeholder's share in that value<sup>7</sup> apply with such modifications as are appropriate for determining the share of the marriage value to which the owner of that interest is entitled<sup>8</sup>.

Where:

3832 (a) the owner of any such freehold interest is entitled to any share of the marriage value in respect of any such property; and

3833 (b) the nominee purchaser (or the RTE company) is to acquire any leasehold interests in that property superior to any lease held by a participating tenant<sup>9</sup>,

the amount payable to the owner of the freehold interest in respect of his share of the marriage value in respect of that property must be divided between the owner of that interest and the owners of the leasehold interests in proportion to the value of their respective interests<sup>10</sup> in that property<sup>11</sup>.

Where the owner of any such leasehold interest ('the intermediate landlord') is so entitled<sup>12</sup> to any part of the amount payable to the owner of any freehold interest in respect of his share of the marriage value in respect of any property, the amount to which the intermediate landlord is so entitled is payable to him by the owner of that freehold interest<sup>13</sup>.

1     Ie any such freehold interest as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 10(1) (as amended): see PARA 1633 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

2     Ie any such property as is mentioned in *ibid* s 1(3)(a): see PARA 1552 ante. For the meaning of 'appurtenant property' see PARA 1552 note 19 ante; for the meaning of 'lease' see PARA 1535 note 3 ante; for the meaning of 'qualifying tenant' see PARA 1557 ante; and for the meaning of 'the relevant premises' see PARA 1552 ante.

3     Ie *ibid* Sch 6 para 4(2)-(4) (as amended): see PARA 1626 ante.

4     For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and for the meaning of references to the acquisition by the nominee purchaser (or, as from a day to be appointed (see note 5 *infra*) by the RTE company) see PARA 1601 note 10 ante.

5     Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6     As to RTE companies see PARAS 1581-1583 ante.

7     Ie the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(1) (as amended): see PARA 1626 ante.

8     *Ibid* Sch 6 para 12(1) (Sch 6 para 12(1), (2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 5 *supra*)). As to the application of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 12 (as amended) see PARA 1633 note 9 ante.

9     For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

10    Ie as determined for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 10(1) or (2) (as amended), as the case may be.

11    *Ibid* Sch 6 para 12(2) (as amended: see note 8 *supra*).

12    Ie in accordance with *ibid* Sch 6 para 12(2) (as amended).

13    *Ibid* Sch 6 para 12(3). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1636. Compensation for loss on acquisition of interest.**

Where the owner of any relevant interest<sup>1</sup> will suffer any loss or damage to which this provision applies<sup>2</sup>, there is payable to him such amount as is reasonable to compensate him for that loss or damage<sup>3</sup>. This provision applies to:

- 3834 (1) any diminution in value of any interest in other property belonging to the owner of a relevant interest, being diminution resulting from the acquisition of the property in which the relevant interest subsists; and
- 3835 (2) any other loss or damage which results therefrom to the extent that it is referable to his ownership of any interest in other property<sup>4</sup>;

and without prejudice to the generality of head (2) above, the kinds of loss falling within that head include loss of development value<sup>5</sup> in relation to the property in which the relevant interest subsists to the extent that it is referable to his ownership of any interest in other property<sup>6</sup>.

1    Ie any such freehold or leasehold interest as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 10(1) or (2) (as amended): see PARA 1633 ante.

2    Ie any loss or damage to which heads (1)-(2) in the text apply.

3    Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 13(1) (Sch 6 para 13 substituted by the Housing Act 1996 s 107, Sch 10 para 18(9)).

4    Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 13(2) (as substituted: see note 3 supra).

5    For these purposes, 'development value', in relation to the property in which the relevant interest subsists, means any increase in the value of the relevant interest which is attributable to the possibility of demolishing, reconstructing or carrying out substantial works of construction on the whole or a substantial part of the property: *ibid* Sch 6 para 13(4) (as substituted: see note 3 supra).

6    *Ibid* Sch 6 para 13(3) (as substituted: see note 3 supra) As to the application of Sch 6 para 13 (as substituted) see PARA 1633 note 9 ante; and as to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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## (E) VALUATION ETC OF INTERESTS IN SPECIFIED PREMISES WITH NEGATIVE VALUES

### **1637. Valuation of freehold and intermediate leasehold interests.**

Where the value of the freeholder's interest<sup>1</sup> in a specified premises<sup>2</sup>, as determined for the relevant purposes<sup>3</sup>, or the value of any intermediate leasehold interest<sup>4</sup>, as so determined, is a negative amount, the value of the interest for those purposes is nil<sup>5</sup>.

Where the above provisions apply to any intermediate leasehold interest whose value is a negative amount ('the negative interest'), then for the relevant purposes any interests in the specified premises superior to the negative interest and having a positive value<sup>6</sup> must be reduced in value:

- 3836 (1) beginning with the interest which is immediately superior to the negative interest and continuing, if necessary, with any such other superior interests in order of proximity to the negative interest;
- 3837 (2) until the aggregate amount of the reduction is equal to the negative amount in question; and
- 3838 (3) without reducing the value of any interest to less than nil<sup>7</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 For these purposes, 'the relevant purposes' (1) as respects a freeholder's interest in the specified premises, means the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 2(1)(a) (see PARA 1624 ante) or, as the case may be, Sch 6 para 5A(2)(a) (as added) (see PARA 1628 ante); and (2) as respects any intermediate leasehold interest (see note 4 infra), means the purposes of Sch 6 para 6(1)(b) (i) (see PARA 1629 ante): Sch 6 para 14(5) (Sch 6 para 14(1), (5) amended, and Sch 6 para 14(3A) added, by the Housing Act 1996 s 107(4), Sch 10 para 18(10)-(12)).

4 For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 14(1) (as amended: see note 3 supra).

6 For these purposes, an interest has a positive value if its value for the relevant purposes is otherwise a positive amount: *ibid* Sch 6 para 14(4).

7 *Ibid* Sch 6 para 14(2). In a case where Sch 6 para 14(1) (as amended) applies to two or more intermediate leasehold interests whose values are negative amounts, Sch 6 para 14(2) applies separately in relation to each of those interests (1) beginning with the interest which is inferior to every other of those interests and then in order of proximity to that interest; and (2) with any reduction in the value of any interest for the relevant purposes by virtue of any prior application of Sch 6 para 14(2) being taken into account: Sch 6 para 14(3).

Where Sch 6 para 14(2) applies: (a) for the purposes of Sch 6 para 5A(2)(a) (as added) (see PARA 1628 ante); and (b) in relation to an intermediate leasehold interest in relation to which there is more than one immediately superior interest, any reduction in value made under Sch 6 para 14(2) must be apportioned between the immediately superior interests: Sch 6 para 14(3A) (as added: see note 3 supra).

As to the application of Sch 6 para 14 (as amended) see PARA 1633 note 9 ante; and as to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1638. Calculation of marriage value.**

Where the value<sup>1</sup> of any interest<sup>2</sup>:

- 3839 (1) when held by the person from whom it is to be acquired by the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, by the RTE company<sup>5</sup>); or
- 3840 (2) when acquired by the nominee purchaser (or by the RTE company),

is a negative amount, the value of the interest when so held or acquired is<sup>6</sup> nil<sup>7</sup>.

Where the above provisions apply to any intermediate leasehold interest<sup>8</sup> whose value when so held or acquired is a negative amount, the statutory provisions relating to the valuation of

freehold and intermediate leasehold interests<sup>9</sup> apply<sup>10</sup> for determining<sup>11</sup> the value when so held or acquired of other interests in the specified premises<sup>12</sup>.

1    Ie as determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 4(3), (4) (as amended): see PARA 1626 ante. References in Sch 6 para 15 (as amended) (see the text and notes 2-12 infra) to Sch 6 para 4(2), (3) or (4) (as amended) extend to that provision as it applies in accordance with Sch 6 para 5A(2)(b) (as added) (see PARAS 1626 notes 10, 19, 1628 ante): Sch 6 para 15(4) (added by the Housing Act 1996 s 107(4), Sch 10 para 18(13)).

2    For the meaning of 'interest' see PARA 408 note 16 ante.

3    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5    As to RTE companies see PARAS 1581-1583 ante.

6    Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2) (as amended): see PARA 1626 ante. See also note 1 supra.

7    Ibid Sch 6 para 15(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 4 supra)).

8    For the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante.

9    Ie the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 14(2)-(4) (as amended): see PARA 1637 ante.

10    Ie as if (1) any reference to ibid Sch 6 para 14(1) (as amended) were a reference to Sch 6 para 15(1) (as amended); and (2) any reference to the relevant purposes were, as respects any interest, a reference to the purposes of Sch 6 para 4(2) (as amended) as it applies to the interest when so held or acquired. For the meaning of 'the relevant purposes' see PARA 1637 note 3 ante. See also note 1 supra.

11    See note 6 supra.

12    Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 15(2). References in Sch 6 para 16 (as amended) (see PARA 1639 post) or Sch 6 para 17 (as amended) (see PARA 1640 post) to Sch 6 para 14(2) or (3) do not extend to that provision as it applies in accordance with Sch 6 para 15(2): Sch 6 para 15(3). For the meaning of 'the specified premises' see PARA 1586 note 5 ante. As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1639. Apportionment of marriage value.**

Where the value of the freeholder's interest in a specified premises or the value of any intermediate leasehold interest, as determined for the relevant purposes, is a negative amount<sup>1</sup>, the value of the interest is<sup>2</sup> nil<sup>3</sup>. The above provisions do not, however, apply<sup>4</sup> in a case where the value of a freeholder's interest in the specified premises and the value of every intermediate leasehold interest is a negative amount<sup>5</sup>.

In a case where:

3841 (1) the value of any superior interest<sup>6</sup> ('the superior interest') is reduced<sup>7</sup>; and

3842 (2) there remains<sup>8</sup> any interest whose value for the relevant purposes<sup>9</sup> is a positive amount,

the value of the superior interest<sup>10</sup> is the value which<sup>11</sup> it has for the relevant purposes<sup>12</sup>.

In a case where:

3843 (a) the value of any superior interest<sup>13</sup> ('the superior interest') is reduced<sup>14</sup>; but  
 3844 (b) there remains<sup>15</sup> no such interest as is mentioned in head (2) above,

the value of the superior interest<sup>16</sup> is the value which it has<sup>17</sup> for the relevant purposes<sup>18</sup>.

1    Ie where the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 14(1) (as amended) applies: see PARA 1637 ante. For the meaning of 'interest' see PARA 408 note 16 ante; for the meaning of 'the specified premises' see PARA 1586 note 5 ante; and for the meaning of 'intermediate leasehold interest' see PARA 1625 note 11 ante. As to the relevant purposes see note 9 infra.

2    Ie for the purposes of ibid Sch 6 para 9(2) (see PARA 1632 ante) unless Sch 6 para 16(2) (as amended) (see the text and notes 4-5 infra) applies.

3    Ibid Sch 6 para 16(1).

4    Ie in a case where ibid Sch 6 para 14(1) (as amended) applies to the freeholder's interest in the specified premises and to every intermediate leasehold interest, Sch 6 para 16(1) does not apply for the purposes of Sch 6 para 9(2).

5    Ibid Sch 6 para 16(2)(a) (Sch 6 para 16(2) amended by the Housing Act 1996 s 107(4), Sch 10 para 18(14)). Any division falling to be made on the proportional basis referred to in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9(2) must be so made in such a way as to secure that the greater the negativity of any interest's value the smaller the share in respect of the interest: Sch 6 para 16(2)(b).

6    Ie any such superior interest as is mentioned in ibid Sch 6 para 14(2). For the meaning of references to Sch 6 para 14(2) for these purposes see PARA 1638 note 12 ante.

7    Ie by the operation of ibid Sch 6 para 14(2): see PARA 1637 ante.

8    Ie after the operation of ibid Sch 6 para 14(2).

9    For the meaning of 'the relevant purposes' see PARA 1637 note 3 ante.

10   Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 9(2).

11   Ie in accordance with ibid Sch 6 para 14(2).

12   Ibid Sch 6 para 16(3).

13   See note 6 supra.

14   See note 7 supra.

15   See note 8 supra.

16   See note 10 supra.

17   Ie for the relevant purposes apart from the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 14(2).

18   Ibid Sch 6 para 16(4). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1640. Adjustment of compensation.**

Where:

- 3845 (1) the value of any superior interest<sup>1</sup> ('the superior interest') is reduced<sup>2</sup>; and  
 3846 (2) any amount of compensation is otherwise payable<sup>3</sup> to the owner of any relevant inferior interest<sup>4</sup> in respect of that interest,

there is payable to the owner of the superior interest so much of the amount of compensation as is equal to the amount of the reduction or, if less than that amount, the whole of the amount of compensation<sup>5</sup>.

Where:

- 3847 (a) the value of two or more superior interests<sup>6</sup> ('the superior interests') is reduced<sup>7</sup>; and  
 3848 (b) any amount of compensation is otherwise payable<sup>8</sup> to the owner of any relevant inferior interest in respect of that interest,

the above provisions<sup>9</sup> apply in the first instance as if the reference to the owner of the superior interest were to the owner of such of the superior interests as is furthest from the negative interest, and then, as respects any remaining amount of compensation, as if that reference were to the owner of such of the superior interests as is next furthest from the negative interest, and so on<sup>10</sup>.

1   Ie any such superior interest as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 14(2): see PARA 1637 ante. For the meaning of references to Sch 6 para 14(2) for these purposes see PARA 1638 note 12 ante.

2   Ie by the operation of *ibid* Sch 6 para 14(2).

3   Ie under *ibid* Sch 6 para 8 (as substituted): see PARA 1631 ante.

4   For these purposes, 'relevant inferior interest', in relation to any interest whose value is reduced as mentioned in *ibid* Sch 6 para 17(1) or (2) ('the superior interest') means (1) the negative interest on account of which any such reduction is made; or (2) any other interest intermediate between that negative interest and the superior interest; but Sch 6 para 17(1) applies in the first instance in relation to any amount of compensation payable to the owner of that negative interest, and then, for the purpose of offsetting, so far as possible, any reduction remaining to be offset in accordance with Sch 6 para 17(1) or (2), in relation to any amount of compensation payable to the owner of the interest immediately superior to that negative interest, and so on in order of proximity to it: Sch 6 para 17(3).

5   *Ibid* Sch 6 para 17(1). To the extent that an amount of compensation is payable to the owner of any interest by virtue of Sch 6 para 17 (as amended): (1) Sch 6 para 2(1)(c) (see PARA 1624 ante), Sch 6 para 5A(2) (c) (as added) (see PARA 1628 ante) or Sch 6 para 6(1)(b)(ii) (see PARA 1629 ante) has effect as if it were an amount of compensation payable to him, as owner of that interest, in accordance with Sch 6 para 5 (as amended) (see PARA 1627 ante) or Sch 6 para 8 (as substituted) (see PARA 1631 ante), as the case may be; and (2) the person who would otherwise have been entitled to it in accordance with Sch 6 para 8 (as substituted) is accordingly not so entitled: Sch 6 para 17(4) (amended by the Housing Act 1996 s 107(4), Sch 10 para 18(15)).

In a case where the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 14(2) applies separately in relation to two or more negative interests in accordance with Sch 6 para 14(3) (see PARA 1637 ante), Sch 6 para 17(1)-(4) (as amended) similarly applies separately in relation to the reductions made on



account of each of those interests, and so applies (a) according to the order determined by Sch 6 para 14(3)(a); and (b) with there being taken into account any reduction in the amount of compensation payable to any person under Sch 6 para 8 (as substituted) which results from the prior application of Sch 6 para 17(1)-(4) (as amended): Sch 6 para 17(5). For the meaning of references to Sch 6 para 14(3) for these purposes see PARA 1638 note 12 ante.

Where any reduction in value under Sch 6 para 14(2) is apportioned in accordance with Sch 6 para 14(3A) (as added) (see PARA 1637 ante), any amount of compensation payable by virtue of Sch 6 para 17 (as amended) must be similarly apportioned: Sch 6 para 17(6) (added by the Housing Act 1996 s 107(4), Sch 10 para 18(16)).

6     Ie any such superior interests as are mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 14(2).

7     See note 2 supra.

8     See note 3 supra.

9     Ie the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 17(1): see the text and notes 1-5 supra.

10    Ibid Sch 6 para 17(2). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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## (F) VALUATION ETC OF OTHER INTERESTS WITH NEGATIVE VALUES

### **1641. Valuation of freehold and leasehold interests.**

Where the value of any freehold interest<sup>1</sup> or the value of any leasehold interest<sup>2</sup> is a negative amount, the value of that interest for the relevant purposes<sup>3</sup> is nil<sup>4</sup>.

Where, in the case of any property, the above provisions apply to any leasehold interest in the property whose value is a negative amount ('the negative interest'), then for the relevant purposes any interests in the property superior to the negative interest and having a positive value<sup>5</sup> must be reduced in value, if they are interests which are to be acquired by the nominee purchaser<sup>6</sup> (or, as from a day to be appointed<sup>7</sup>, by the RTE company<sup>8</sup>):

- 3849 (1) beginning with the interest which is nearest to the negative interest and continuing, if necessary, with such other superior interests in order of proximity to the negative interest;
- 3850 (2) until the aggregate amount of the reduction is equal to the negative amount in question; and
- 3851 (3) without reducing the value of any interest to less than nil<sup>9</sup>.

1     Ie as determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 11(1): see PARA 1634 ante. For the meaning of 'interest' see PARA 408 note 16 ante.

2     Ie as determined in accordance with ibid Sch 6 para 11(2): see PARA 1634 ante.

3     For these purposes, 'the relevant purposes' means (1) as respects any freehold interest, the purposes of ibid Sch 6 para 10(1)(a) (see PARA 1633 ante); and (2) as respects any leasehold interest, the purposes of Sch 6 para 10(2)(a) (see PARA 1633 ante): Sch 6 para 18(5).

4 Ibid Sch 6 para 18(1).

5 For these purposes, an interest has a positive value if, apart from ibid Sch 6 para 18(2) (as amended), its value for the relevant purposes is a positive amount: Sch 6 para 18(4).

6 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

7 I.e. as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8 As to RTE companies see PARAS 1581-1583 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 18(2) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 7 supra)). In a case where the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 18(1) (see the text and notes 1-4 supra) applies to two or more leasehold interests in any property whose values are negative amounts, Sch 6 para 18(2) (as so amended) applies separately in relation to each of those interests (1) beginning with the interest which is inferior to every other of those interests and then in order of proximity to that interest; and (2) with any reduction in the value of any interest for the relevant purposes by virtue of any prior application of Sch 6 para 18(2) (as so amended) being taken into account: Sch 6 para 18(3). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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## **1642. Calculation of marriage value.**

Where the value<sup>1</sup> of any interest<sup>2</sup>:

3852 (1) when held by the person from whom it is to be acquired by the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, by the RTE company<sup>5</sup>); or

3853 (2) when acquired by the nominee purchaser (or by the RTE company),

is a negative amount, the value of the interest when so held or acquired is<sup>6</sup> nil<sup>7</sup>.

Where, in the case of any property, the above provisions apply to any leasehold interest in the property whose value when so held or acquired is a negative amount, the statutory provisions relating to the valuation of freehold and leasehold interests<sup>8</sup> apply<sup>9</sup> for determining the value when so held or acquired of other interests in the property<sup>10</sup>.

1 I.e. as determined by the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 4(3), (4) (as amended): see PARA 1626 ante. For these purposes, any reference to any provision of Sch 6 para 4 (as amended) is a reference to that provision as it applies in accordance with Sch 6 para 12(1) (as amended) (see PARA 1635 ante): Sch 6 para 19(3).

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 I.e. as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 4(2): see PARA 1626 ante.

7 Ibid Sch 6 para 19(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 4 supra)).

8 le the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 18(2)-(4) (as amended): see PARA 1641 ante.

9 le as if (1) any reference to ibid Sch 6 para 18(1) were a reference to Sch 6 para 19(1) (as amended); and (2) any reference to the relevant purposes were, as respects any interest, a reference to the purposes of Sch 6 para 4(2) as it applies to the interest when so held or acquired: Sch 6 para 19(2). For the meaning of 'the relevant purposes' see PARA 1641 note 3 ante.

10 Ibid Sch 6 para 19(2). References in Sch 6 para 20 (as amended) (see PARA 1643 post) or Sch 6 para 21 (as amended) (see PARA 1644 post) to Sch 6 para 18(2) (as amended) or Sch 16 para 18(3) do not extend to that provision as it applies in accordance with Sch 6 para 19(2): Sch 6 para 19(4). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 ante.

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### **1643. Apportionment of marriage value.**

Where the value of any freehold interest or the value of any leasehold interest is a negative amount<sup>1</sup>, the value of the interest is<sup>2</sup> nil<sup>3</sup>. The above provisions do not, however, apply<sup>4</sup> where, in the case of any property, the value of every interest which is to be acquired by the nominee purchaser<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, by the RTE company<sup>7</sup>) is a negative amount<sup>8</sup>.

Where in the case of any property:

- 3854 (1) the value of any superior interest<sup>9</sup> ('the superior interest') is reduced<sup>10</sup>; and
- 3855 (2) there remains<sup>11</sup> any interest which is to be acquired by the nominee purchaser (or by the RTE company) and whose value for the relevant purposes<sup>12</sup> is a positive amount,

the value of the superior interest<sup>13</sup> is the value which<sup>14</sup> it has for the relevant purposes<sup>15</sup>.

Where in the case of any property:

- 3856 (a) the value of any superior interest<sup>16</sup> ('the superior interest') is reduced<sup>17</sup>; but
- 3857 (b) there remains<sup>18</sup> no such interest as is mentioned in head (2) above,

the value of the superior interest<sup>19</sup> is the value which it has<sup>20</sup> for the relevant purposes<sup>21</sup>.

1 le where the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 18(1) (see PARA 1641 ante) applies to any interest in any property to which Sch 6 para 12(1) (as amended) (see PARA 1635 ante) applies.

2 le for the purposes of ibid Sch 6 para 12(2) (as amended) (see PARA 1635 ante) unless Sch 6 para 20(2) (as amended) (see the text and notes 4-8 infra) applies.

3 Ibid Sch 6 para 20(1).

4     le where, in the case of any property, *ibid* Sch 6 para 18(1) applies to every interest which is to be acquired by the nominee purchaser (see note 5 *infra*) (or, as from a day to be appointed (see note 6 *infra*) by the RTE company (see note 7 *infra*), Sch 6 para 19(1) does not apply for the purposes of Sch 6 para 12(2) (as amended).

5     For the meaning of 'the nominee purchaser' see PARAS 1576-1577 *ante*.

6     le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

7     As to RTE companies see PARAS 1581-1583 *ante*.

8     Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 20(2)(a) (Sch 6 para 20(2), (3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed (see note 6 *supra*)). Any division falling to be made on the proportional basis referred to in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 12(2) (as amended) must be so made in such a way as to secure that the greater the negativity of an interest's value the smaller the share in respect of the interest: Sch 6 para 20(2)(b).

9     le any such superior interest as is mentioned in *ibid* Sch 6 para 18(2) (as amended): see PARA 1641 *ante*. For the meaning of references to Sch 6 para 18(2) (as amended) for these purposes see PARA 1642 note 10 *ante*.

10    le by the operation of *ibid* Sch 6 para 18(2) (as amended).

11    le after the operation of *ibid* Sch 6 para 18(2) (as amended).

12    For the meaning of 'the relevant purposes' see PARA 1641 note 3 *ante*.

13    le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 12(2) (as amended).

14    le in accordance with *ibid* Sch 6 para 18(2) (as amended).

15    *Ibid* Sch 6 para 20(3) (as amended: see note 8 *supra*).

16    See note 9 *supra*.

17    See note 10 *supra*.

18    See note 11 *supra*.

19    See note 13 *supra*.

20    le for the relevant purposes apart from the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 18(2) (as amended).

21    *Ibid* Sch 6 para 20(4). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 *ante*.

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## **1644. Adjustment of compensation.**

Where in the case of any property:

3858 (1) the value of any superior interest<sup>1</sup> ('the superior interest') is reduced<sup>2</sup>; and

3859 (2) any amount of compensation is otherwise payable<sup>3</sup> to the owner of any relevant inferior interest<sup>4</sup> in respect of that interest,

there is payable to the owner of the superior interest so much of the amount of compensation as is equal to the amount of the reduction or, if less than that amount, the whole of the amount of compensation<sup>5</sup>.

Where in the case of any property:

3860 (a) the value of two or more superior interests<sup>6</sup> ('the superior interests') is reduced<sup>7</sup>; and

3861 (b) any amount of compensation is otherwise payable<sup>8</sup> to the owner of any relevant inferior interest in respect of that interest,

the above provisions<sup>9</sup> apply in the first instance as if the reference to the owner of the superior interest were to the owner of such of the superior interests as is furthest from the negative interest, and then, as respects any remaining amount of compensation, as if that reference were to the owner of such of the superior interests as is next furthest from the negative interest, and so on<sup>10</sup>.

1    Ie any such superior interest as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 para 18(2) (as amended): see PARA 1641 ante. For the meaning of references to Sch 6 para 18(2) for these purposes see PARA 1642 note 10 ante.

2    Ie by the operation of ibid Sch 6 para 18(2) (as amended).

3    Ie by virtue of ibid Sch 6 para 13 (as substituted): see PARA 1636 ante.

4    For these purposes, 'relevant inferior interest', in relation to any interest whose value is reduced as mentioned in ibid Sch 6 para 21(1) or (2) ('the superior interest') means (1) the negative interest on account of which any such reduction is made; or (2) any other interest in the property in question which is to be acquired by the nominee purchaser (or, as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1), by the RTE company) and is intermediate between that negative interest and the superior interest; but the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 21(1) applies in the first instance in relation to any amount of compensation payable to the owner of that negative interest, and then, for the purpose of offsetting, so far as possible, any reduction remaining to be offset in accordance with Sch 6 para 21(1) or (2), in relation to any amount of compensation payable to the owner of such interest falling within head (2) supra as is nearest to that negative interest, and so on in order of proximity to it: Sch 6 para 21(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 40(1), (2), as from a day to be appointed under s 181(1); at the date at which this title states the law, no such day had been appointed). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and as to RTE companies see PARAS 1581-1583 ante.

5    Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 21(1). To the extent that an amount of compensation is payable to the owner of any interest by virtue of Sch 6 para 21 (as amended): (1) Sch 6 para 10(1)(c) (see PARA 1633 ante) or, as the case may be, Sch 6 para 10(2)(b) (see PARA 1633 ante) has effect as if it were an amount of compensation payable to him, as owner of that interest, in accordance with Sch 6 para 13 (as substituted) (see PARA 1636 ante); and (2) the person who would otherwise have been entitled to it in accordance with Sch 6 para 13 (as substituted) is accordingly not so entitled: Sch 6 para 21(4).

In a case where Sch 6 para 18(2) (as amended) applies separately in relation to two or more negative interests in accordance with Sch 6 para 18(3) (see PARA 1641 ante), Sch 6 para 21(1)-(4) (as amended) similarly applies separately in relation to the reductions made on account of each of those interests, and so applies (a) according to the order determined by Sch 6 para 18(3)(a); and (b) with there being taken into account any reduction in the amount of compensation payable to any person by virtue of Sch 6 para 13 (as substituted) which results from the prior application of Sch 6 para 21(1)-(4) (as amended): Sch 6 para 21(5). For the meaning of references to Sch 6 para 18(3) for these purposes see PARA 1642 note 10 ante.

6    Ie any such superior interests as are mentioned in ibid Sch 6 para 18(2) (as amended).

7    See note 2 supra.

8 See note 3 *supra*.

9 *I*e the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 21(1): see the text and notes 1-5 *supra*.

10 *Ibid* Sch 6 para 21(2). As to the effect of an estate management scheme on the price payable under Sch 6 (as amended) see PARA 1624 note 11 *ante*.

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## ***B. COSTS OF ENFRANCHISEMENT***

### **1645. In general.**

Where a notice is given exercising the right to collective enfranchisement<sup>1</sup>, the nominee purchaser<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, the RTE company<sup>4</sup>) is liable<sup>5</sup>, to the extent that they have been incurred in pursuance of the notice by the reversioner<sup>6</sup> or by any other relevant landlord<sup>7</sup>, for the reasonable costs<sup>8</sup> of and incidental to any of the following matters, namely:

- 3862 (1) any investigation reasonably undertaken:
- 239 88. (a) of the question whether any interest<sup>9</sup> in the specified premises<sup>10</sup> or other property is liable to acquisition in pursuance of the initial notice<sup>11</sup>; or
- 89. (b) of any other question arising out of that notice;
- 240 3863 (2) deducing, evidencing and verifying the title to any such interest;
- 3864 (3) making out and furnishing such abstracts and copies as the nominee purchaser (or the RTE company) may require;
- 3865 (4) any valuation of any interest in the specified premises or other property;
- 3866 (5) any conveyance<sup>12</sup> of any such interest;

but the above provisions do not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void<sup>13</sup>.

1 *I*e a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 *ante*.

2 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 *ante*. For these purposes, references to the nominee purchaser include references to any person whose appointment has terminated in accordance with *ibid* s 15(3) (prospectively repealed) (see PARA 1577 *ante*) or s 16(1) (prospectively repealed) (see PARA 1578 *ante*); but s 33 (as originally enacted) has effect in relation to such a person subject to s 15(7) (prospectively repealed) (see PARA 1577 *ante*): s 33(6) (s 33(6), (7) prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 3 *infra*)).

3 *I*e as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

4 As to RTE companies see PARAS 1581-1583 *ante*.

5 *I*e subject to *ibid* s 28(6) (as amended) (see PARA 1619 *ante*), s 29(7) (prospectively repealed) (see PARA 1620 *ante*) and s 31(5) (as amended) (see PARA 1622 *ante*).

6 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

7 For the meaning of 'relevant landlord' see PARA 1559 ante; and as to special categories of landlord see PARA 1545 et seq ante.

8 For these purposes, any costs incurred by the reversioner or any other relevant landlord in respect of professional services rendered by any person are only to be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs: Leasehold Reform, Housing and Urban Development Act 1993 s 33(2).

9 For the meaning of 'interest' see PARA 408 note 16 ante.

10 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

11 For the meaning of 'the initial notice' see PARA 1585 ante. Where, by virtue of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1647 et seq post), the initial notice ceases to have effect at any time, the nominee purchaser's (or, as from a day to be appointed (see note 3 supra), the RTE company's) liability under s 33 (as amended) for costs incurred by any person is a liability for costs incurred by him (or by it) down to that time: s 33(3) (s 33(1), (3)-(5) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 22, Sch 14, as from a day to be appointed (see note 3 supra)). The nominee purchaser (or the RTE company) is not, however, liable for any costs under the Leasehold Reform, Housing and Urban Development Act 1993 s 33 (as amended) if the initial notice ceases to have effect by virtue of s 23(4) (see PARA 1611 ante) or s 30(4) (see PARA 1621 ante) (s 33(4) (as so amended)); nor is the nominee purchaser (or the RTE company) liable under s 33 (as amended) for any costs which a party to any proceedings under Pt I Ch I (as amended) before a leasehold valuation tribunal incurs in connection with the proceedings (s 33(5) (as so amended)).

12 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 33(1) (as amended: see note 10 supra). Where by virtue of s 33 (as amended), or of s 33 (as amended) and s 29(6) (see PARA 1620 ante) taken together, two or more persons are liable for any costs, they are jointly and severally liable for them: s 33(7) (prospectively repealed: see note 2 supra).

As to the avoidance of certain stipulations made on the sale of land see the Law of Property Act 1925 s 48; and SALE OF LAND vol 42 (Reissue) PARA 130.

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## **(xi) Completion of Acquisition**

### **A. CONVEYANCE TO NOMINEE PURCHASER OR RTE COMPANY**

#### **1646. Contract and title.**

In a transaction undertaken to give effect to an initial notice<sup>1</sup> the nominee purchaser<sup>2</sup>, the reversioner and any relevant landlord are, unless they otherwise agree, to be bound by the following provisions<sup>3</sup>.

Where the reversioner has given a counter-notice admitting the right to collective enfranchisement<sup>4</sup> or a further counter-notice, or, if no such counter-notice or further counter-notice is given, the nominee purchaser has applied to the court for an order determining the terms of the acquisition<sup>5</sup>, the nominee purchaser may<sup>6</sup> require the reversioner to deduce title to the interests proposed to be acquired<sup>7</sup> and to any interest in relation to which the reversioner has made proposals<sup>8</sup>, or to any less extensive interest which it has been agreed or determined

by a leasehold valuation tribunal will be acquired, by giving him notice<sup>9</sup>. The reversioner must comply with any such requirement by giving the nominee purchaser:

- 3867 (1) in the case of an interest registered in the register of title kept at Her Majesty's Land Registry, all particulars and information which have to be given or may be required to be given on a sale of registered land; and
- 3868 (2) in the case of any other interest, an epitome of title,

within the period of 28 days beginning with the date the notice is given<sup>10</sup>.

The nominee purchaser must<sup>11</sup> give to the reversioner a statement of any objections to or requisitions on the proof of title within the period of 14 days beginning with the date the proof is given, whether or not within the time required<sup>12</sup>. The reversioner must give to the nominee purchaser an answer to any statement of objections or requisitions within the period of 14 days beginning with the date the statement is given<sup>13</sup>; and the nominee purchaser must give to the reversioner a further statement of any objections to or comments on the answer within the period of seven days beginning with the date the answer is given<sup>14</sup>. Any objection or requisition not included in any statement given within the period referred to above is to be deemed waived, and any matter which could have been raised in a statement so given is to be deemed not to be<sup>15</sup> a defect in title<sup>16</sup>; and any objection not included in any further statement given within the period specified above is to be deemed waived and any matter which could have been raised in a further statement so given is to be deemed not to be<sup>17</sup> a defect in title<sup>18</sup>. If no further statement is given within the time specified above, the reversioner's answer is to be considered satisfactory<sup>19</sup>.

Where:

- 3869 (a) a relevant landlord has given notice<sup>20</sup> of his intention to deal directly with the nominee purchaser in connection with deducing, evidencing or verifying his title; or
- 3870 (b) the nominee purchaser has given notice to a relevant landlord requiring him to deal directly with him<sup>21</sup>,

any notice, statement or further statement given under the above provisions requiring proof of that relevant landlord's title or raising requisitions, or making objections to or comments on that relevant landlord's title, must be given to him and not to the reversioner, and he will be under a duty to comply with any such notice or respond to any such statement instead of the reversioner<sup>22</sup>.

The reversioner must prepare the draft contract and give it to the nominee purchaser within the period of 21 days beginning with the date the terms of acquisition<sup>23</sup> are agreed or determined by a leasehold valuation tribunal<sup>24</sup>; and the nominee purchaser must give to the reversioner a statement of any proposals for amending the draft contract within the period of 14 days beginning with the date the draft contract is given<sup>25</sup>. If no statement is given by the nominee purchaser within the time so specified he is to be deemed to have approved the draft<sup>26</sup>. The reversioner must give to the nominee purchaser an answer, giving any objections to or comments on the proposals in the statement, within the period of 14 days beginning with the date the statement is given<sup>27</sup>; and if no answer is given by the reversioner within the time so specified, he is to be deemed to have agreed to the nominee purchaser's proposals for amendments to the draft contract<sup>28</sup>.

The reversioner may require the nominee purchaser to pay a deposit on exchange of contracts in pursuance of the initial notice<sup>29</sup>. The amount of the deposit required must be £500, or 10 per cent of the purchase price agreed or determined by a leasehold valuation tribunal to be payable for the interests to be acquired, whichever is the greater<sup>30</sup>. The nominee purchaser



must pay the deposit so required to the reversioner's solicitor or licensed conveyancer as stakeholder<sup>31</sup>.

Where the initial notice has been registered as a land charge or a notice under the Land Registration Act 2002 has been registered in respect of it<sup>32</sup>, and either it is withdrawn, deemed to have been withdrawn or otherwise ceases to have effect, the nominee purchaser must at the request of the reversioner without delay take all steps necessary to procure cancellation of the registration<sup>33</sup>.

- 1 As to the initial notice see PARA 1585 et seq ante.
- 2 As to the nominee purchaser see PARAS 1576-1326 ante.
- 3 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 2.
- 4 Ie a counter-notice complying with the Leasehold Reform, Housing and Urban Development Act 1993 s 21(2)(a) (as prospectively amended): see PARA 1606 ante.
- 5 Ie under ibid s 25(1) (as prospectively amended) (applications where reversioner fails to give counter-notice or further counter-notice): see PARA 1613 ante.
- 6 Ie subject to the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 2, Sch 1 para 5: see the text and notes 20-22 infra.
- 7 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 13(3)(a) and (c) (i) (as amended) (matters specified in the initial notice): see PARA 1586 ante.
- 8 Ie in accordance with ibid s 21(3)(b) and (c) (as amended) (matters specified in counter-notice): see PARA 1586 ante.
- 9 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 3(1), (2). Any notice, statement, answer or document required or authorised to be given under the 1993 Regulations must be in writing and may be sent by post: reg 4.
- 10 Ibid Sch 1 para 3(3). See generally SALE OF LAND.
- 11 Ie subject to ibid Sch 1 para 5: see the text and notes 20-22 infra.
- 12 Ibid Sch 1 para 4(1).
- 13 Ibid Sch 1 para 4(2).
- 14 Ibid Sch 1 para 4(3).
- 15 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 6 para 3(3) and as it is applied by Sch 6 para 7(1) and by Sch 6 para 11(1) (effect of defect in title on valuation of interest to be acquired): see PARA 1625, 1630, 1634 ante.
- 16 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 4(4).
- 17 See note 15 supra.
- 18 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 4(5).
- 19 Ibid Sch 1 para 4(6).
- 20 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 1 para 7(1) (a) (as prospectively amended) (relevant landlord's entitlement to act independently of the reversioner): see PARA 1565 ante.
- 21 Ie in accordance with ibid Sch 1 para 7(2) (as prospectively amended) (nominee purchaser's entitlement to require a relevant landlord to deal directly with him): see PARA 1565 ante.

22 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 5(1), (2).

23 'Terms of acquisition' has the meaning given by the Leasehold Reform, Housing and Urban Development Act 1993 s 24(8) (as prospectively amended) (see PARA 1612 note 8 ante): Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 1.

24 Ibid Sch 1 para 6(1).

25 Ibid Sch 1 para 6(2).

26 Ibid Sch 1 para 6(3).

27 Ibid Sch 1 para 6(4).

28 Ibid Sch 1 para 6(5).

29 Ibid Sch 1 para 7(1).

30 Ibid Sch 1 para 7(2).

31 Ibid Sch 1 para 7(3).

32 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 97(1) (as amended): see PARA 1543 ante.

33 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 1 para 8; Interpretation Act 1978 s 17(2).

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#### **1647. Conveyance to nominee purchaser or RTE company; in general.**

Any conveyance<sup>1</sup> executed<sup>2</sup>, being a conveyance to the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, to the RTE company<sup>5</sup>) of the freehold of the specified premises<sup>6</sup>, of a part of those premises or of any other property, must grant to the nominee purchaser (or the RTE company) an estate in fee simple absolute in those premises, that part of those premises or that property, subject only to such incumbrances<sup>7</sup> as may have been agreed or determined<sup>8</sup> to be incumbrances subject to which that estate should be granted, having regard<sup>9</sup> to the following provisions<sup>10</sup>.

Any such conveyance must, where the nominee purchaser (or, as from a day to be appointed<sup>11</sup>, the RTE company) is to acquire any leasehold interest in the specified premises, the part of the specified premises or, as the case may be, in the other property to which the conveyance relates, provide for the disposal<sup>12</sup> to the nominee purchaser (or to the RTE company) of any such interest<sup>13</sup>.

Any conveyance so executed has effect<sup>14</sup> to overreach any incumbrance capable of being overreached<sup>15</sup>:

3871 (1) as if, where the interest conveyed is settled land for the purposes of the Settled Land Act 1925<sup>16</sup>, the conveyance were made under the powers of that Act; and

3872 (2) as if the statutory requirements<sup>17</sup> as to payment of the capital money allowed any part of the purchase price paid or applied in discharge of existing mortgages<sup>18</sup> to be so paid or applied<sup>19</sup>.

A conveyance so executed may not be made subject to any incumbrance capable of being overreached by the conveyance, but must be made subject, where they are not capable of being overreached, to rentcharges redeemable under the Rentcharges Act 1977<sup>20</sup> and estate rentcharges and rentcharges imposed<sup>21</sup> under certain enactments<sup>22</sup>.

Except to the extent that any departure is agreed to by the nominee purchaser (or, as from a day to be appointed<sup>23</sup>, by the RTE company) and the person whose interest is to be conveyed, any conveyance so executed must conform<sup>24</sup> with the statutory requirements<sup>25</sup>; and any such conveyance must in addition include a statement that it is a conveyance executed for the purposes of the statutory provisions relating to collective enfranchisement<sup>26</sup>.

1 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

2 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1648 et seq post.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

7 For these purposes, 'incumbrances' includes: (1) rentcharges; and (2) personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on that land or interest: Leasehold Reform, Housing and Urban Development Act 1993 s 34(4). Burdens originating in tenure, and burdens in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourse are not, however, treated as incumbrances for these purposes; but any conveyance executed for the purposes of Pt I Ch I (as amended) must be made subject to any such burdens: s 34(5). For the meaning of 'interest' see PARA 408 note 16 ante.

8 Ie under ibid Pt I Ch I (as amended).

9 Ie having regard to the provisions of ibid ss 34(2)-(10), 35-38 (as amended): see the text and notes 11-26 infra; and PARA 1648 et seq post.

10 Ibid s 34(1) (s 34(1), (2) amended by the Housing Act 1996 s 107, Sch 10 para 11(1)-(3); the Leasehold Reform, Housing and Urban Development Act 1993 s 34(1), (2), (7)-(9) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 23, as from a day to be appointed (see note 4 supra)).

11 See note 4 supra.

12 For the meaning of 'disposal' see PARA 408 note 16 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 34(2) (as amended: see note 10 supra).

14 Ie under the Law of Property Act 1925 s 2(1) (as amended) (conveyances overreaching certain equitable interests etc): see REAL PROPERTY vol 39(2) (Reissue) PARA 249.

15 See note 14 supra.

16 See SETTLEMENT vol 42 (Reissue) PARA 680. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

17 Ie the Law of Property Act 1925 s 2(1) (as amended).

18    le paid or applied in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 35 (as amended) (see PARA 1652 post) or Sch 8 (as amended) (see PARAS 1652-1655 post).

19    Ibid s 34(3).

20    le under the Rentcharges Act 1977 ss 8-10 (as amended): see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) (Reissue) PARA 900 et seq.

21    le those rentcharges falling within ibid s 2(3)(c), (d) (estate rentcharges and rentcharges imposed under certain enactments): see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774.

22    Leasehold Reform, Housing and Urban Development Act 1993 s 34(6). Where, however, any land is to be conveyed to the nominee purchaser (or, as from a day to be appointed (see note 4 supra), to the RTE company) by a conveyance executed for the purposes of Pt I (as amended), s 34(6) does not preclude the person who owns the freehold interest in the land from releasing, or procuring the release of, the land from any rentcharge: s 34(7) (as amended: see note 10 supra). The conveyance of any such land ('the relevant land') may, with the agreement of the nominee purchaser (or, as from a day to be appointed (see note 4 supra), of the RTE company), which must not be unreasonably withheld, provide in accordance with the Law of Property Act 1925 s 190(1) (charging of rentcharges on land without rent owner's consent: see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 850) that a rentcharge (1) shall be charged exclusively on other land affected by it in exoneration of the relevant land; or (2) shall be apportioned between other land affected by it and the relevant land: Leasehold Reform, Housing and Urban Development Act 1993 s 34(8) (as amended: see note 10 supra).

23    See note 4 supra.

24    le any conveyance so executed must (1) as respects the conveyance of any freehold interest, conform with the provisions of ibid s 34(9), Sch 7 (as amended) (see PARA 1648 et seq post); and (2) as respects the conveyance of any leasehold interest, conform with the provisions of Sch 7 para 2 (as amended) (see PARA 1648 post), any reference therein to the freeholder being read as a reference to the person whose leasehold interest is to be conveyed and with the reference to the covenants for title implied under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended) (see SALE OF LAND vol 42 (Reissue) PARA 349 et seq) being read as excluding the covenant in s 4(1)(b) (compliance with terms of lease: SALE OF LAND vol 42 (Reissue) PARAS 99, 350): see the Leasehold Reform, Housing and Urban Development Act 1993 s 34(9)(a), (b) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 12(1)).

25    Leasehold Reform, Housing and Urban Development Act 1993 s 34(9) (as amended: see note 10 supra).

26    Ibid s 34(10). Any such statement must comply with such requirements as may be prescribed by land registration rules under the Land Registration Act 2002: Leasehold Reform, Housing and Urban Development Act 1993 s 34(10) (amended by the Land Registration Act 2002 s 133, Sch 11 para 30(1), (2)). For the prescribed form of statement see the Land Registration Rules 2003, SI 2003/1417, r 196(1). Where an estate management scheme is registered in the appropriate local land charges register, the Leasehold Reform, Housing and Urban Development Act 1993 s 34 (as amended) and Sch 7 (as amended) have effect subject to the provisions of the scheme: see s 70(12); and PARA 1736 post.

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## **1648. Contents of conveyance; in general.**

The conveyance<sup>1</sup> may not exclude or restrict the general words implied in conveyances<sup>2</sup> or the implied all estate clause<sup>3</sup> unless:

- 3873 (1) the exclusion or restriction is made for the purpose of preserving or recognising any existing interest<sup>4</sup> of the freeholder<sup>5</sup> in tenant's incumbrances<sup>6</sup> or any existing right or interest of any other person; or

3874 (2) the nominee purchaser<sup>7</sup> (or, as from a day to be appointed<sup>8</sup>, the RTE company<sup>9</sup>) consents to the exclusion or restriction<sup>10</sup>.

The freeholder is not bound:

3875 (a) to convey to the nominee purchaser (or to the RTE company) any better title than that which he has or could require to be vested in him; or

3876 (b) to enter into any covenant for title beyond those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994<sup>11</sup> in a case where a disposition is expressed to be made with limited title guarantee<sup>12</sup>;

and in the absence of agreement to the contrary he is entitled to be indemnified by the nominee purchaser (or by the RTE company) in respect of any costs incurred by him in complying with the covenant for further assurance implied<sup>13</sup> by virtue of that Act<sup>14</sup>.

1 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

2 Ie under the Law of Property Act 1925 s 62: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.

3 Ie the clause implied under ibid s 63: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 240.

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 For these purposes, 'the freeholder' means, in relation to the conveyance of a freehold interest, the person whose interest is to be conveyed: Leasehold Reform, Housing and Urban Development Act 1993 s 34(9) (as amended), Sch 7 para 1(b) (substituted by the Housing Act 1996 s 107, Sch 10 para 19).

6 For these purposes, 'tenant's incumbrances' includes any interest directly or indirectly derived out of a lease, and any incumbrance on a lease or any such interest, whether or not the same matter is an incumbrance also on any interest reversionary on the lease; and 'incumbrances' has the same meaning as it has for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 34 (as amended) (see PARA 1647 note 7 ante): Sch 7 para 2(3). For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

8 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9 As to RTE companies see PARAS 1581-1583 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 para 2(1) (Sch 7 para 2(1), (2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 41(1), (2), as from a day to be appointed (see note 8 supra)).

11 Ie under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

12 As to dispositions made with limited title guarantee see SALE OF LAND vol 42 (Reissue) PARA 351.

13 Ie the covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 s 2(1)(b): see SALE OF LAND vol 42 (Reissue) PARA 350.

14 Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 para 2(2) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 12(3); further prospectively amended (see note 10 supra)). As to the effect of an estate management scheme on the application of Sch 7 (as amended) see PARA 1647 note 26 ante.

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### **1649. Rights of support, passage of water etc.**

As regards rights of any of the following descriptions, namely:

- 3877 (1) rights of support for a building or part of a building;
- 3878 (2) rights to the access of light and air to a building or part of a building;
- 3879 (3) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;
- 3880 (4) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

the conveyance<sup>1</sup> must include provisions having the effect of:

- 3881 (a) granting with the relevant premises<sup>2</sup>, so far as the freeholder<sup>3</sup> is capable of granting them:
  - 241 90. (i) all such easements and rights over other property<sup>4</sup> as are necessary to secure as nearly as may be for the benefit of the relevant premises the same rights as exist for the benefit of those premises immediately before the appropriate time<sup>5</sup>; and
  - 91. (ii) such further easements and rights, if any, as are necessary for the reasonable enjoyment of the relevant premises; and
- 242 3882 (b) making the relevant premises subject to the following easements and rights, so far as they are capable of existing in law, namely:
  - 243 92. (i) all easements and rights for the benefit of other property to which the relevant premises are subject immediately before the appropriate time; and
  - 93. (ii) such further easements and rights, if any, as are necessary for the reasonable enjoyment of other property, being property in which the freeholder has an interest at the relevant date<sup>6</sup>.

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1 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

2 For these purposes, 'the relevant premises' means, in relation to the conveyance of any interest, the premises in which the interest subsists: Leasehold Reform, Housing and Urban Development Act 1993 s 34(9) (as amended), Sch 7 para 1(a) (substituted by the Housing Act 1996 s 107, Sch 10 para 19). For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'the freeholder' see PARA 1648 note 5 ante.

4 For these purposes, 'other property' means property of which the freehold is not to be acquired by the nominee purchaser (or, as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1), by the RTE company) under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante, PARA 1650 et seq post): Sch 7 para 1(c) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 41(1), (2), as from a day to

be so appointed; at the date at which this title states the law, no such had been appointed). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and as to RTE companies see PARAS 1581-1583 ante.

5 For these purposes, 'the appropriate time' means, in relation to the conveyance of a freehold interest, the time when the interest is to be conveyed to the nominee purchaser (or, as from a day to be appointed (see note 4 supra), to the RTE company): Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 para 1(d) (substituted by the Housing Act 1996 s 107, Sch 10 para 19; prospectively amended by the Commonhold and Leasehold Reform Act 2002 Sch 8 paras 2, 41(1), (2), as from a day to be appointed (see note 4 supra)).

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 para 3(1), (2). The provisions required to be included in the conveyance by virtue of Sch 7 para 3(2) (see heads (a)-(b) in the text) are accordingly provisions relating to any such rights as are mentioned in Sch 7 para 3(1) (see heads (1)-(4) in the text): Sch 7 para 3(1). For the meaning of 'the relevant date' see PARA 1552 note 5 ante. As to the effect of an estate management scheme on the application of Sch 7 (as amended) see PARA 1647 note 26 ante.

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## **1650. Rights of way.**

The conveyance<sup>1</sup> must include:

3883 (1) such provisions, if any, as the nominee purchaser<sup>2</sup> (or, as from a day to be appointed<sup>3</sup>, the RTE company<sup>4</sup>) may require for the purpose of securing to him (or to it) and the persons deriving title under him (or under it) rights of way over other property<sup>5</sup>, so far as the freeholder<sup>6</sup> is capable of granting them, being rights of way that are necessary for the reasonable enjoyment of the relevant premises<sup>7</sup>; and

3884 (2) such provisions, if any, as the freeholder may require for the purpose of making the relevant premises subject to rights of way necessary for the reasonable enjoyment of other property, being property in which he is to retain an interest<sup>8</sup> after the acquisition of the relevant premises<sup>9</sup>.

1 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

2 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

3 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

4 As to RTE companies see PARAS 1581-1583 ante.

5 For the meaning of 'other property' see PARA 1649 note 4 ante.

6 For the meaning of 'the freeholder' see PARA 1648 note 5 ante.

7 For the meaning of 'the relevant premises' see PARA 1649 note 2 ante.

8 For the meaning of 'interest' see PARA 408 note 16 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 34(9) (as amended), Sch 7 para 4 (prospectively amended by the Commonhold and Leasehold Reform Act 2002, s 124, Sch 8, PARAS 2, 41(1)-(3), as from a day to be appointed (see note 3 supra)). As to the effect of an estate management scheme on the application of Sch 7 (as amended) see PARA 1647 note 26 ante.

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### **1651. Restrictive covenants.**

As regards restrictive covenants<sup>1</sup>, the conveyance<sup>2</sup> must include:

- 3885 (1) such provisions, if any, as the freeholder<sup>3</sup> may require to secure that the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, the RTE company<sup>6</sup>) is bound by, or to indemnify the freeholder against breaches of, restrictive covenants which:
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94. (a) affect the relevant premises<sup>7</sup> otherwise than by virtue of any lease<sup>8</sup> subject to which the relevant premises are to be acquired or any agreement collateral to any such lease; and
95. (b) are immediately before the appropriate time<sup>9</sup> enforceable for the benefit of other property<sup>10</sup>; and
- 246
- 3886 (2) such provisions, if any, as the freeholder or the nominee purchaser (or the RTE company) may require to secure the continuance, with suitable adaptations, of restrictions arising by virtue of any such lease or collateral agreement as is mentioned in head (1)(a) above, being either:
- 247
96. (a) restrictions affecting the relevant premises which are capable of benefiting other property and, if enforceable only by the freeholder, are such as materially to enhance the value of the other property; or
97. (b) restrictions affecting other property which are such as materially to enhance the value of the relevant premises; and
- 248
- 3887 (3) such further restrictions as the freeholder may require to restrict the use of the relevant premises in a way which:
- 249
98. (a) will not interfere with the reasonable enjoyment of those premises as they have been enjoyed during the currency of the leases subject to which they are to be acquired; but
99. (b) will materially enhance the value of other property in which the freeholder has an interest at the relevant date<sup>11</sup>.
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<sup>1</sup> For these purposes, 'restrictive covenant' means a covenant or agreement restrictive of the user of any land or building: Leasehold Reform, Housing and Urban Development Act 1993 s 34(9) (as amended), Sch 7 para 5(2).

<sup>2</sup> For the meaning of 'conveyance' see PARA 1564 note 10 ante.

<sup>3</sup> For the meaning of 'the freeholder' see PARA 1648 note 5 ante.

<sup>4</sup> For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

<sup>5</sup> ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

<sup>6</sup> As to RTE companies see PARAS 1581-1583 ante.



7 For the meaning of 'the relevant premises' see PARA 1649 note 2 ante.

8 For the meaning of 'lease' see PARA 1535 note 3 ante.

9 For the meaning of 'the appropriate time' see PARA 1649 note 5 ante.

10 For the meaning of 'other property' see PARA 1649 note 4 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 para 5(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 41(1), (2), as from a day to be appointed (see note 5 supra)). As to the effect of an estate management scheme on the application of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 7 (as amended) see PARA 1647 note 26 ante.

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## ***B. DISCHARGE OF EXISTING MORTGAGES***

### **1652. Discharge of existing mortgages on transfer to nominee purchaser or RTE company.**

Where any interest<sup>1</sup> is acquired<sup>2</sup> by the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, by the RTE company<sup>5</sup>) the conveyance<sup>6</sup> by virtue of which it is so acquired is effective<sup>7</sup>, as regards any mortgage<sup>8</sup> to which these provisions apply:

3888 (1) to discharge the interest from the mortgage, and from the operation of any order made by a court for the enforcement of the mortgage; and

3889 (2) to extinguish any term of years created for the purposes of the mortgage,

and does so without the persons entitled to or interested in the mortgage or in any such order or term of years becoming parties to or executing the conveyance<sup>9</sup>. These provisions apply<sup>10</sup> to any mortgage of the interest so acquired, however created or arising, which:

3890 (a) is a mortgage to secure the payment of money or the performance of any other obligation by the person from whom the interest is so acquired or any other person; and

3891 (b) is not a mortgage which would otherwise be overreached<sup>11</sup>;

but these provisions do not apply to any such mortgage if it has been agreed between the nominee purchaser and the reversioner<sup>12</sup> (or, as from a day to be appointed<sup>13</sup>, between the RTE company and the reversioner) or, as the case may be, any other relevant landlord<sup>14</sup> that the interest in question should be acquired subject to the mortgage<sup>15</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 In pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante, PARA 1653 et seq post.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

4 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

7 le by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 35 (as amended) but subject to the provisions of s 35(1), Sch 8 (as amended) (see note 9 infra; and PARAS 1653-1655 post).

8 For these purposes, 'mortgage' includes a charge or lien; but neither *ibid* s 35 (as amended) nor Sch 8 (as amended) applies to a rentcharge: s 35(4).

9 *Ibid* s 35(1) (s 35(1), (3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 24, as from a day to be appointed (see note 4 supra)). Where any interest is so discharged from a mortgage, without the obligations secured by the mortgage being satisfied by the receipt of the whole or part of the consideration payable, the discharge of that interest from the mortgage does not prejudice any right or remedy for the enforcement of those obligations against other property comprised in the same or any other security, nor prejudice any personal liability as principal or otherwise of the landlord or any other person: Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 5(1). For these purposes, 'the consideration payable' means the consideration payable for the acquisition of the relevant interest; 'the landlord' means the person from whom the relevant interest is being acquired; and 'the relevant interest' means any such interest as is mentioned in Sch 8 para 2(1) (as amended) (see PARA 1653 post): Sch 8 para 1. As to special categories of landlord see PARA 1545 *et seq* ante.

10 le subject to *ibid* s 35(3) (as amended) (see the text and notes 12-15 infra) and s 35(4) (see note 8 supra).

11 *Ibid* s 35(2).

12 For the meaning of 'the reversioner' see PARAS 1559-1563 ante.

13 See note 4 supra.

14 For the meaning of 'relevant landlord' see PARA 1559 ante.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 35(3) (as amended: see note 9 supra).

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### **1653. Duty of nominee purchaser or RTE company to redeem mortgages.**

Where a conveyance<sup>1</sup> will operate<sup>2</sup> to discharge any interest<sup>3</sup> from a mortgage<sup>4</sup> to secure the payment of money, it is the duty of the nominee purchaser<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, the duty of the RTE company<sup>7</sup>) to apply the consideration payable<sup>8</sup>, in the first instance, in or towards the redemption of any such mortgage and, if there are more than one, then according to their priorities<sup>9</sup>.

If any amount so payable to the person entitled to the benefit of a mortgage is not so paid, nor paid into court<sup>10</sup>, the relevant interest remains subject to the mortgage as regards the amount in question<sup>11</sup>.

1 For the meaning of 'conveyance' see PARA 1564 note 10 ante.

2 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 35(1) (as amended): see PARA 1652 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 For the meaning of 'mortgage' see PARA 1652 note 8 ante.

5 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

6 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

7 As to RTE companies see PARAS 1581-1583 ante.

8 For the meaning of 'the consideration payable' see PARA 1652 note 9 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 2(1) (Sch 8 para 2(1), (4) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 42(1), (2), as from a day to be appointed (see note 6 supra)). As to the determination of amounts payable in respect of mortgages under the Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 2(1) (as amended) see PARA 1654 post.

Schedule 8 para 2(1) (as amended) does not apply to a debenture holders' charge, that is to say, a charge, whether a floating charge or not, in favour of the holders of a series of debentures issued by a company or other body of persons, or in favour of trustees for such debenture holders; and any such charge is to be disregarded in determining priorities for the purposes of Sch 8 para 2(1) (as amended): Sch 8 para 2(3). Schedule 8 para 2(3) does not, however, have effect in relation to a charge in favour of trustees for debenture holders which, at the date of the conveyance by virtue of which the relevant interest is acquired by the nominee purchaser (or, as from a day to be appointed (see note 6 supra) by the RTE company), is (as regards that interest) a specific and not a floating charge: Sch 8 para 2(4) (as so amended). For the meaning of 'the relevant interest' see PARA 1652 note 9 ante.

Nothing in Sch 8 (as amended) (see PARA 1652 ante; the text and notes 1-8 supra, 8-10 infra; and PARAS 1654-1655 post) or s 35 (as amended) (see PARA 1652 ante) is to be construed as preventing a person from joining in the conveyance referred to in Sch 8 para 2(1) (as amended) for the purpose of discharging the relevant interest from any mortgage without payment or for a lesser payment than that to which he would otherwise be entitled; and, if he does so, the persons to whom the consideration payable ought to be paid are to be determined accordingly: Sch 8 para 5(2).

10 le in accordance with *ibid* Sch 8 para 4 (as amended): see PARA 1655 post.

11 *Ibid* Sch 8 para 2(2). To that extent s 35(1) (as amended) (see PARA 1652 ante) does not apply: Sch 8 para 2(2).

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### **1654. Determination of amounts due in respect of mortgages.**

For the purpose of determining the amount payable in respect of any mortgage<sup>1</sup>, a person entitled to the benefit of such a mortgage is not permitted to exercise any right to consolidate that mortgage with a separate mortgage on other property<sup>2</sup>; and

3892 (1) at the date at which this title states the law, if the landlord<sup>3</sup> or any participating tenant<sup>4</sup> is himself entitled to the benefit of such a mortgage, it ranks for payment as it would if another person were entitled to it, and the nominee purchaser<sup>5</sup> is entitled to retain the appropriate amount in respect of any such mortgage of a participating tenant<sup>6</sup>; or

3893 (2) as from a day to be appointed<sup>7</sup>, if the landlord or any member of the RTE company<sup>8</sup> is himself entitled to the benefit of such a mortgage, it ranks for payment as it would if another person were entitled to it, and the RTE company is entitled to retain the appropriate amount in respect of any such mortgage of any of its members<sup>9</sup>.

For the purpose of discharging any interest from such a mortgage, a person may be required to accept three months' or any longer notice of the intention to pay the whole or part of the principal secured by the mortgage, together with interest to the date of payment, notwithstanding that the terms of the security make other provision or no provision as to the time and manner of payment; but he is entitled, if he so requires, to receive such additional payment as is reasonable in the circumstances:

3894 (a) in respect of the costs of reinvestment or other incidental costs and expenses; and

3895 (b) in respect of any reduction in the rate of interest obtainable on reinvestment<sup>10</sup>.

1    le any mortgage under the Leasehold Reform, Housing and Urban Development Act 1993 s 35(1), Sch 8 para 2(1) (as amended): see PARA 1653 ante. For the meaning of 'mortgage' see PARA 1652 note 8 ante.

2    Ibid Sch 8 para 3(1)(a).

3    For the meaning of 'the landlord' see PARA 1652 note 9 ante. As to special categories of landlord see PARA 1545 et seq ante.

4    For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

5    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

6    Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 3(1)(b) (as originally enacted).

7    le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8    As to RTE companies and their members see PARAS 1581-1583 ante.

9    Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 3(1)(b) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 42(1)-(3), as from a day to be appointed (see note 7 supra)).

10   Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 3(2).

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### **1655. Payments into court.**

Where any interest<sup>1</sup> is to be discharged<sup>2</sup> from a mortgage<sup>3</sup> and a person is or may be entitled<sup>4</sup> in respect of the mortgage to receive the whole or part of the consideration payable<sup>5</sup>, then, if:

3896 (1) for any reason difficulty arises in ascertaining how much is payable in respect of the mortgage; or

3897 (2) for any other specified reason<sup>6</sup> difficulty arises in making a payment in respect of the mortgage,

the nominee purchaser<sup>7</sup> (or, as from a day to be appointed<sup>8</sup>, the RTE company<sup>9</sup>) may pay into court on account of the consideration payable the amount, if known, of the payment to be made in respect of the mortgage or, if that amount is not known, the whole of that consideration or such lesser amount as the nominee purchaser (or the RTE company) thinks right in order to provide for that payment<sup>10</sup>.

Payment may be made into court in accordance with head (2) above where the difficulty arises for any of the following reasons, namely:

3898 (a) because a person who is or may be entitled to receive payment cannot be found or his identity cannot be ascertained;

3899 (b) because any such person refuses or fails to make out a title, or to accept payment and give a proper discharge, or to take any steps reasonably required of him to enable the sum payable to be ascertained and paid; or

3900 (c) because a tender of the sum payable cannot, by reason of complications in the title to it or the want of two or more trustees or for other reasons, be effected, or not without incurring or involving unreasonable cost or delay<sup>11</sup>.

The whole or part of the consideration payable must, however, be paid into court<sup>12</sup> by the nominee purchaser (or, as from a day to be appointed<sup>13</sup>, by the RTE company) if, before execution of the conveyance<sup>14</sup>, notice is given to him (or to it):

3901 (i) that the landlord<sup>15</sup>, or a person entitled to the benefit of a mortgage on the relevant interest<sup>16</sup>, requires him (or it) to do so for the purpose of protecting the rights of persons so entitled, or for reasons related to the bankruptcy or winding up of the landlord; or

3902 (ii) that steps have been taken to enforce any mortgage on the relevant interest by the bringing of proceedings in any court, or by the appointment of a receiver, or otherwise;

and, where payment into court is to be made by reason only of a notice under this provision, and the notice is given with reference to proceedings in a court specified in the notice other than a county court, payment must be made into the court so specified<sup>17</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 35(1) (as amended): see PARA 1652 ante.

3 For the meaning of 'mortgage' see PARA 1652 note 8 ante.

4 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 35(1), Sch 8 para 2(1) (as amended): see PARA 1653 ante.

5 For the meaning of 'the consideration payable' see PARA 1652 note 9 ante.

6 Ie for any reason mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 4(2): see heads (a)-(c) in the text.

7 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

8 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

9 As to RTE companies see PARAS 1581-1583 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 4(1) (Sch 8 para 4(1), (3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 42(1), (2), (4), as from a day to be appointed (see note 8 supra)). As to the procedure for making such a payment into court see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.5; and PARA 1618 note 13 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 4(2).

12 Ie without prejudice to ibid Sch 8 para 4(1)(a): see head (1) in the text.

13 See note 8 supra.

14 Ie the conveyance referred to in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 2(1) (as amended): see PARA 1653 ante. For the meaning of 'conveyance' see PARA 1564 note 10 ante.

15 For the meaning of 'the landlord' see PARA 1652 note 9 ante.

16 For the meaning of 'the relevant interest' see PARA 1652 note 9 ante.

17 Leasehold Reform, Housing and Urban Development Act 1993 Sch 8 para 4(3) (as amended: see note 10 supra).

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### **C. GRANT OF LEASES BACK BY NOMINEE PURCHASER OR RTE COMPANY**

#### **(A) IN GENERAL**

#### **1656. Nominee purchaser's or RTE company's duty to grant lease back to former freeholder.**

In connection with the acquisition by him (or by it) of a freehold interest<sup>1</sup> in the specified premises<sup>2</sup>, the nominee purchaser<sup>3</sup> (or, as from a day to be appointed<sup>4</sup>, the RTE company<sup>5</sup>) must grant to the person from whom the interest is acquired such leases<sup>6</sup> of flats<sup>7</sup> or other units<sup>8</sup> contained in those premises as are required by statute<sup>9</sup> to be so granted<sup>10</sup>.

Any such lease must be granted so as to take effect immediately after the acquisition by the nominee purchaser (or, as from a day to be appointed<sup>11</sup>, by the RTE company) of the freehold interest concerned<sup>12</sup>.

Where any flat or other unit demised under any such lease ('the relevant lease') is at the time of that acquisition subject to any existing lease, the relevant lease takes effect as a lease of the freehold reversion in respect of the flat or other unit<sup>13</sup>.

1 For the meaning of 'interest' see PARA 408 note 16 ante.

2 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and for the meaning of references to the acquisition by the nominee purchaser (or, as from a day to be appointed (see note 4 infra), by the RTE company (see note 5 infra)) see PARA 1601 note 10 ante.

4 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of 'flat' see PARA 1533 note 2 ante.

8 For the meaning of 'unit' see PARA 1555 note 9 ante.

9 le by the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 Pt II (paras 2-4) (as amended) (see PARAS 1657-1659 post) or Sch 9 Pt III (paras 5-7) (as amended) (see PARAS 1660-1662 post). Schedule 9 Pt IV (paras 8-18) (as amended) (see PARA 1663 et seq post) has effect with respect to the terms of a lease granted in pursuance of Sch 9 Pt II (as amended) or Sch 9 Pt III (as amended): s 36(4).

10 Ibid s 36(1) (s 36(1), (2) amended by the Housing Act 1996 s 107(4), Sch 10 para 12(1)-(3); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 25(1)-(3), as from a day to be appointed (see note 4 supra)).

11 See note 4 supra.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 36(2) (as amended: see note 10 supra).

13 Ibid s 36(3).

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## (B) MANDATORY LEASEBACK

### **1657. Flats etc let under secure tenancies or introductory tenancies.**

Where immediately before the appropriate time<sup>1</sup> any flat<sup>2</sup>:

- 3903 (1) the freehold of the whole of which is owned by the same person; and
- 3904 (2) which is contained in the specified premises,

is let under a secure tenancy<sup>3</sup> or an introductory tenancy<sup>4</sup> and either:

- 3905 (a) the freeholder<sup>5</sup> is the tenant's<sup>6</sup> immediate landlord<sup>7</sup>; or
- 3906 (b) the freeholder is a public sector landlord<sup>8</sup> and every intermediate landlord<sup>9</sup> of the flat, as well as the immediate landlord under the secure tenancy or the introductory tenancy, is also a public sector landlord<sup>10</sup>,

the nominee purchaser<sup>11</sup> (or, as from a day to be appointed<sup>12</sup>, the RTE company<sup>13</sup>) must grant<sup>14</sup> to the freeholder a lease of the flat<sup>15</sup>.

1 For these purposes, 'the appropriate time', in relation to a flat or other unit contained in the specified premises, means the time when the freehold of the flat or other unit is acquired by the nominee purchaser (or, as from a day to be appointed (see note 11 *infra*), by the RTE company: Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 1(1) (definition substituted by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (2)(a); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 12 *infra*)). For the meaning of 'flat' see PARA 1533 note 2 (but see note 2 *infra*); for the meaning of 'unit' see PARA 1555 note 9; and for the meaning of 'the specified premises' see PARA 1586 note 5 *ante*. As to the nominee purchaser and the RTE company see notes 11, 13 *infra*.

2 For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 2 (as amended) only, any reference to a flat includes a reference to a unit, other than a flat, which is used as a dwelling: Sch 9 para 2(4). For the purposes of Sch 9 (as amended) (see the text and notes 3-15 *infra*; and PARA 1658 *et seq post*), any reference to a flat or other unit, in the context of the grant of a lease of it, includes any yard, garden, garage, outhouses and appurtenances belonging to or usually enjoyed with it and let with it immediately before the appropriate time: Sch 9 para 1(2). For the meaning of 'dwelling' see PARA 1533 note 2 *ante*; and for the meaning of 'lease' see PARA 1535 note 3 *ante*. For the purposes of Pt I (ss 1-103) (as amended) (see PARA 1532 *et seq ante*, PARA 1658 *et seq post*), property is let with other property if the properties are let either under the same lease or under leases which, in accordance with s 7(6) (see PARA 1558 *ante*), are treated as a single lease: s 101(7).

3 For the meaning of 'secure tenancy' see PARA 1553 note 30 *ante*.

4 For the meaning of 'introductory tenancy' see PARA 1553 note 31 *ante*.

5 For these purposes, 'the freeholder', in relation to a flat or other unit contained in the specified premises, means the person who owns the freehold of the flat or other unit immediately before the appropriate time: Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 1(1) (definition substituted by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (2)(b)).

6 For the meaning of 'tenant' see PARA 1535 note 3 *ante*.

7 For the meaning of 'landlord' see PARA 1535 note 3 *ante*; and as to special categories of landlord see PARA 1545 *et seq ante*.

8 For the meaning of 'public sector landlord' see PARA 1553 note 29 *ante*.

9 For these purposes, 'intermediate landlord', in relation to a flat or other unit let to a tenant, means a person who holds a leasehold interest in the flat or other unit which is superior to that held by the tenant's immediate landlord: Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 1(1).

10 Ibid Sch 9 para 2(1)(b) (see head (b) in the text) has effect whether any such intermediate landlord, or the immediate landlord under the secure tenancy or the introductory tenancy, is or is not a qualifying tenant of the flat: Sch 9 para 2(2) (amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 9(d)(i), (ii)). For the meaning of 'qualifying tenant' see PARA 1557 *ante*.

11 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 *ante*.

12 *Ie* as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

13 As to RTE companies see PARAS 1581-1583 *ante*.

14 *Ie* in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) (see PARA 1656 *ante*) and Sch 9 para 4 (as amended) (see PARA 1659 *post*).

15 Ibid Sch 9 para 2(1), (1A), (3) (Sch 9 para 2(1) amended, and Sch 9 para 2(1A) added, by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (3); the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 2(1) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule, PARA 9(d)(i), (ii); the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 2(3) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 12 *supra*)).



PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(5) COLLECTIVE ENFRANCHISEMENT/(xi) Completion of Acquisition/C. GRANT OF LEASES BACK BY NOMINEE PURCHASER OR RTE COMPANY/(B) Mandatory Leaseback/1658. Flats etc let by housing associations under tenancies other than secure tenancies.

**1658. Flats etc let by housing associations under tenancies other than secure tenancies.**

Where immediately before the appropriate time<sup>1</sup> any flat<sup>2</sup>:

- 3907 (1) the freehold of the whole of which is owned by the same person; and
- 3908 (2) which is contained in the specified premises<sup>3</sup>,

is let by a housing association<sup>4</sup> under a tenancy<sup>5</sup> other than a secure tenancy<sup>6</sup> and:

- 3909 (a) the housing association is the freeholder<sup>7</sup>; and
- 3910 (b) the tenant is not a qualifying tenant<sup>8</sup> of the flat,

the nominee purchaser<sup>9</sup> (or, as from a day to be appointed<sup>10</sup>, the RTE company<sup>11</sup>) must grant<sup>12</sup> to the freeholder, that is to say to the housing association, a lease of the flat<sup>13</sup>.

1 For the meaning of 'the appropriate time' see PARA 1657 note 1 ante.

2 For the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 para 3 (as amended) only, any reference to a flat includes a reference to a unit, other than a flat, which is used as a dwelling: Sch 9 para 3(3). For the meaning of references to a flat or other unit see PARA 1657 note 2 ante; for the meaning of 'flat' generally see PARA 1533 note 2 ante; for the meaning of 'unit' generally see PARA 1555 note 9 ante; and for the meaning of 'dwelling' see PARA 1533 note 2 ante.

3 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 For these purposes, 'housing association' has the meaning given by the Housing Associations Act 1985 s 1(1) (see PARA 863 note 5 ante): Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 1(1).

5 For the meaning of 'tenancy' see PARA 1535 note 3 ante.

6 For the meaning of 'secure tenancy' see PARA 1553 note 30 ante.

7 For the meaning of 'the freeholder' see PARA 1657 note 5 ante.

8 For the meaning of 'qualifying tenant' see PARA 1557 ante.

9 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

10 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

11 As to RTE companies see PARAS 1581-1583 ante.

12 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) (see PARA 1656 ante) and Sch 9 para 4 (as amended) (see PARA 1659 post).

13 Ibid Sch 9 para 3(1), (1A), (2) (Sch 9 para 3(1) amended, and Sch 9 para 3(1A) added, by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (4); the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 3(2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 10 supra)).

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### **1659. Provisions as to terms of lease.**

Any lease<sup>1</sup> granted to the freeholder<sup>2</sup> in pursuance of the statutory provisions relating to mandatory leaseback<sup>3</sup>, and any agreement collateral to it, must conform with the statutory provisions<sup>4</sup> except to the extent that any departure from those provisions is agreed to by the nominee purchaser<sup>5</sup> (or, as from a day to be appointed<sup>6</sup>, by the RTE company<sup>7</sup>) and the freeholder with the approval of a leasehold valuation tribunal<sup>8</sup>.

A leasehold valuation tribunal may not, however, approve any such departure from those provisions unless it appears to the tribunal that it is reasonable in the circumstances<sup>9</sup>. In determining whether any such departure is reasonable in the circumstances, the tribunal must have particular regard to the interests of the tenant under the secure tenancy<sup>10</sup> or introductory tenancy<sup>11</sup> or, as the case may be, under<sup>12</sup> the housing association tenancy<sup>13</sup>.

Any such lease or agreement<sup>14</sup> may include<sup>15</sup> such terms as are reasonable in the circumstances<sup>16</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'the freeholder' see PARA 1657 note 5 ante.

3 Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 para 2 (as amended) (see PARA 1657 ante) or Sch 9 para 3 (as amended) (see PARA 1658 ante).

4 Ie ibid Sch 9 Pt IV (paras 8-18) (as amended): see PARA 1663 et seq post.

5 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

6 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

7 As to RTE companies see PARAS 1581-1583 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 4(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 6 supra)).

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 4(2).

10 Ie the secure tenancy referred to in ibid Sch 9 para 2(1) (as amended): see PARA 1657 ante. For the meaning of 'secure tenancy' see PARA 1553 note 30 ante.

11 Ie the introductory tenancy referred to in ibid Sch 9 para 2(1) (as amended): see PARA 1657 ante. For the meaning of 'introductory tenancy' see PARA 1553 note 31 ante.

12 Ie under the housing association tenancy referred to in ibid Sch 9 para 3(1) (as amended): see PARA 1658 ante. For the meaning of 'housing association' see PARA 1658 note 4 ante.

13 Ibid Sch 9 para 4(3) (amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 9(d)(iii)).

14 Ie any such lease or agreement as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 4(1) (as amended): see the text and notes 1-8 supra.

15 Ie subject to ibid Sch 9 para 4(1)-(3) (as amended): see the text and notes 1-13 supra.

16 Ibid Sch 9 para 4(4).

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## (C) FREEHOLDER'S RIGHT TO REQUIRE LEASEBACK OF CERTAIN UNITS

### **1660. Flats without qualifying tenants and other units.**

With regard to any unit<sup>1</sup>:

- 3911 (1) the freehold of the whole of which is owned by the same person; and
- 3912 (2) which is contained in the specified premises<sup>2</sup>,

which is not immediately before the appropriate time<sup>3</sup> a flat<sup>4</sup> let to a person who is a qualifying tenant<sup>5</sup> of it, the nominee purchaser<sup>6</sup> (or, as from a day to be appointed<sup>7</sup>, the RTE company<sup>8</sup>) must, if the freeholder<sup>9</sup> by notice requires him to do so<sup>10</sup>, grant<sup>11</sup> to the freeholder a lease<sup>12</sup> of the unit<sup>13</sup>.

1    Ie any unit falling within heads (1)-(2) in the text. For the meaning of references to a unit see PARA 1657 note 2 ante; and for the meaning of 'unit' generally see PARA 1555 note 9.

2    For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

3    For the meaning of 'the appropriate time' see PARA 1657 note 1 ante.

4    For the meaning of references to a flat see PARA 1657 note 2 ante; and for the meaning of 'flat' generally see PARA 1533 note 2 ante.

5    For the meaning of 'qualifying tenant' see PARA 1557 ante.

6    For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

7    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8    As to RTE companies see PARAS 1581-1583 ante.

9    For the meaning of 'the freeholder' see PARA 1657 note 5 ante.

10   Such notice may be given in the reversioner's counter-notice and needs to be given, practically, before the price and terms of acquisition are agreed; but it appears that notice may be given at any time prior to completion. It has been suggested that this point is a result of a statutory oversight: see *West Hampstead Management Co Ltd v Pearl Property Ltd* [2002] EWCA Civ 1372 at [52], [2002] 3 EGLR 55, [2002] All ER (D) 440 (Jul) per Arden LJ.

11   Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) (see PARA 1656 ante) and s 36(1), Sch 9 para 7 (as amended) (see PARA 1662 post).

12   For the meaning of 'lease' see PARA 1535 note 3 ante.

13   Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 5(1), (1A), (2) (Sch 9 para 5(1) amended, and Sch 9 para 5(1A) added, by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (5); the Leasehold

Reform, Housing and Urban Development Act 1993 Sch 9 para 5(2) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 7 supra)). As to the giving of notices see PARA 1541 ante.

The Leasehold Reform, Housing and Urban Development Act 1993 Schedule 9 para 5 (as so amended) does not, however, apply to a flat or other unit to which Sch 9 para 2 (as amended) (see PARA 1657 ante) or Sch 9 para 3 (as amended) (see PARA 1658 ante) applies: Sch 9 para 5(3).

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### **1661. Flat etc occupied by resident landlord.**

Where immediately before the freehold of a flat<sup>1</sup> or other unit<sup>2</sup> contained in the specified premises<sup>3</sup> is acquired by the nominee purchaser<sup>4</sup> (or, as from a day to be appointed<sup>5</sup>, by the RTE company<sup>6</sup>):

3913 (1) those premises are premises with a resident landlord<sup>7</sup> by virtue of the occupation of the flat or other unit by the freeholder<sup>8</sup> of it; and

3914 (2) the freeholder of the flat or other unit is a qualifying tenant<sup>9</sup> of it,

then if the freeholder of the flat or other unit ('the relevant unit') by notice requires the nominee purchaser (or the RTE company) to do so<sup>10</sup>, the nominee purchaser (or the RTE company) must grant<sup>11</sup> to the freeholder a lease<sup>12</sup> of the relevant unit; and, on the grant of such a lease to the freeholder, he is deemed to have surrendered any lease of the relevant unit held by him immediately before the appropriate time<sup>13</sup>.

1 For the meaning of references to a flat see PARA 1657 note 2 ante; and for the meaning of 'flat' generally see PARA 1533 note 2 ante.

2 For the meaning of references to a unit see PARA 1657 note 2 ante; and for the meaning of 'unit' generally see PARA 1555 note 9 ante.

3 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.

4 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

5 As from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

6 As to RTE companies see PARAS 1581-1583 ante.

7 For the meaning of 'premises with a resident landlord' see PARA 1556 ante.

8 For the meaning of 'the freeholder' see PARA 1657 note 5 ante.

9 The Leasehold Reform, Housing and Urban Development Act 1993 s 5 (as amended) (see PARA 1557 ante), s 7 (as amended) (see PARA 1558 ante) and s 8 (repealed subject to transitional provisions) apply for the purposes of determining whether, for the purposes of Sch 9 para 6(1)(b) (as substituted) (see head (2) in the text), the freeholder is a qualifying tenant of a unit other than a flat as they apply for the purpose of determining whether a person is a qualifying tenant of a flat: Sch 9 para 6(3) (amended by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (7)). For the meaning of 'qualifying tenant' see PARA 1557 ante.

10 Such notice may be given in the reversioner's counter-notice and needs to be given, practically, before the price and terms of acquisition are agreed; but it appears that notice may be given at any time prior to completion. It has been suggested that this point is a result of a statutory oversight: see *West Hampstead Management Co Ltd v Pearl Property Ltd* [2002] EWCA Civ 1372 at [52], [2002] 3 EGLR 55, [2002] All ER (D) 440 (Jul) per Arden LJ.

11 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 36 (as amended) (see PARA 1656 ante) and s 36(1), Sch 9 para 7 (as amended) (see PARA 1662 post).

12 For the meaning of 'lease' see PARA 1535 note 3 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 6(1), (2) (substituted by the Housing Act 1996 s 107(4), Sch 10 para 20(1), (6); prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 5 supra)). For the meaning of 'the appropriate time' see PARA 1657 note 1 ante; and as to the giving of notices see PARA 1541 ante.

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## **1662. Provisions as to terms of lease.**

Any lease<sup>1</sup> granted to the freeholder<sup>2</sup> in pursuance of the statutory provisions requiring leaseback of certain flats or other units<sup>3</sup>, and any agreement collateral to it, must conform with the statutory provisions<sup>4</sup> except to the extent that any departure from those provisions:

- 3915 (1) is agreed to by the nominee purchaser<sup>5</sup> and the freeholder (or, as from a day to be appointed<sup>6</sup>, is agreed to by the RTE company<sup>7</sup> and the freeholder); or
- 3916 (2) is directed by a leasehold valuation tribunal on an application made by either of those persons<sup>8</sup>.

A leasehold valuation tribunal may not, however, direct any such departure from those provisions unless it appears to the tribunal that it is reasonable in the circumstances<sup>9</sup>. In determining whether any such departure is reasonable in the circumstances, the tribunal must have particular regard to the interests of any person who will be the tenant<sup>10</sup> of the flat<sup>11</sup> or other unit<sup>12</sup> in question under a lease inferior to the lease to be granted to the freeholder<sup>13</sup>.

Any such lease or agreement<sup>14</sup> may include<sup>15</sup> such terms as are reasonable in the circumstances<sup>16</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'the freeholder' see PARA 1657 note 5 ante.

3 Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 para 5 (as amended) (see PARA 1660 ante) or Sch 9 para 6 (as amended) (see PARA 1661 ante).

4 Ie ibid Sch 9 Pt IV (ss 8-18) (as amended): see PARA 1663 et seq post.

5 For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante.

6 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

7 As to RTE companies see PARAS 1581-1583 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 7(1) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 43, as from a day to be appointed (see note 6 supra)).

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 7(2).

10 For the meaning of 'tenant' see PARA 1535 note 3 ante.

11 For the meaning of references to a flat see PARA 1657 note 2 ante; and for the meaning of 'flat' generally see PARA 1533 note 2 ante.

12 For the meaning of references to a unit see PARA 1657 note 2 ante; and for the meaning of 'unit' generally see PARA 1555 note 9 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 7(3).

14 In any such lease or agreement as is mentioned in *ibid* Sch 9 para 7(1) (as amended): see the text and notes 1-8 supra.

15 In subject to *ibid* Sch 9 para 7(1)-(3) (as amended): see the text and notes 1-13 supra.

16 *Ibid* Sch 9 para 7(4).

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## (D) TERMS OF LEASE GRANTED TO FREEHOLDER

### **1663. Terms of lease granted to freeholder; in general.**

The lease<sup>1</sup> must be a lease granted for a term of 999 years at a peppercorn rent<sup>2</sup>.

The lease may not exclude or restrict the general words implied in conveyances<sup>3</sup> unless the exclusion or restriction is made for the purpose of preserving or recognising an existing right or interest<sup>4</sup> of any person<sup>5</sup>.

The lessor is not bound to enter into any covenant for title beyond those implied from the grant, and those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994<sup>6</sup> in a case where a disposition is expressed to be made with limited title guarantee<sup>7</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 8.

3 In under the Law of Property Act 1925 s 62: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 9.

6 In under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 9A (added by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 12(4)). As to dispositions made with limited title guarantee see SALE OF LAND vol 42 (Reissue) PARA 351.

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#### **1664. Rights of support, passage of water etc.**

As regards rights of any of the following descriptions, namely:

- 3917 (1) rights of support for a building or part of a building;
- 3918 (2) rights to the access of light and air to a building or part of a building;
- 3919 (3) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal; and
- 3920 (4) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions,

the lease<sup>1</sup> must include provisions having the effect of:

- 3921 (a) granting with the demised premises<sup>2</sup>, so far as the lessor is capable of granting them:
- 251 100. (i) all such easements and rights over other property<sup>3</sup> as are necessary to secure as nearly as may be for the benefit of the demised premises the same rights as exist for the benefit of those premises immediately before the appropriate time<sup>4</sup>; and
- 101. (ii) such further easements and rights, if any, as are necessary for the reasonable enjoyment of the demised premises; and
- 252 3922 (b) making the demised premises subject to the following easements and rights, so far as they are capable of existing in law, namely:
- 253 102. (i) all easements and rights for the benefit of other property to which the demised premises are subject immediately before the appropriate time; and
- 103. (ii) such further easements and rights, if any, as are necessary for the reasonable enjoyment of other property, being property in which the lessor acquires an interest<sup>5</sup> at the appropriate time<sup>6</sup>.
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1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For these purposes, 'the demised premises', in relation to a lease granted or to be granted in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 Pt II (paras 2-4) (as amended) (see PARAS 1657-1659 ante) or Sch 9 Pt III (paras 5-7) (as amended) (see PARAS 1660-1662 ante) means (1) the flat or other unit demised or to be demised under the lease; or (2) in the case of such a lease under which two

or more units are demised, both or all of those units or, if the context so permits, any of them: Sch 9 para 1(1). For the meaning of references to a flat or other unit see PARA 1657 note 2 ante.

3 For these purposes, 'other property' means property other than the demised premises: *ibid* Sch 9 para 1(1).

4 For the meaning of 'the appropriate time' see PARA 1657 note 1 ante.

5 For the meaning of 'interest' see PARA 408 note 16 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 10(1), (2). The provisions required to be included in the lease by virtue of Sch 9 para 10(2) (see heads (a)-(b) in the text) are accordingly provisions relating to any such rights as are mentioned in Sch 9 para 10(1) (see heads (1)-(4) in the text): Sch 9 para 10(1).

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### **1665. Rights of way; common use of premises and facilities.**

The lease<sup>1</sup> must include:

- 3923 (1) such provisions, if any, as the lessee may require for the purpose of securing to him, and persons deriving title under him, rights of way over other property<sup>2</sup>, so far as the lessor is capable of granting them, being rights of way that are necessary for the reasonable enjoyment of the demised premises<sup>3</sup>; and
- 3924 (2) such provisions, if any, as the lessor may require for the purpose of making the demised premises subject to rights of way necessary for the reasonable enjoyment of other property, being property in which the lessor acquires an interest<sup>4</sup> at the appropriate time<sup>5</sup>.

The lease must also include, so far as the lessor is capable of granting them, the like rights to use in common with others any premises, facilities or services as are enjoyed immediately before the appropriate time by any tenant<sup>6</sup> of the demised premises<sup>7</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'other property' see PARA 1664 note 3 ante.

3 For the meaning of 'the demised premises' see PARA 1664 note 2 ante.

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 11. For the meaning of 'the appropriate time' see PARA 1657 note 1 ante.

6 For the meaning of 'tenant' see PARA 1535 note 3 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 12.



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### **1666. Covenants etc.**

The lease<sup>1</sup> must include such provisions, if any, as the lessor may require to secure that the lessee is bound by, or to indemnify the lessor against breaches of, restrictive covenants, that is to say, covenants or agreements restrictive of the use of any land or premises, affecting the demised premises<sup>2</sup> immediately before the appropriate time<sup>3</sup> and enforceable for the benefit of other property<sup>4</sup>.

The lease must include covenants by the lessor:

- 3925 (1) to keep in repair the structure and exterior of the demised premises and of the specified premises<sup>5</sup>, including drains, gutters and external pipes, and to make good any defect affecting that structure;
- 3926 (2) to keep in repair any other property over or in respect of which the lessee has rights<sup>6</sup>;
- 3927 (3) to ensure, so far as practicable, that the services which are to be provided by the lessor and to which the lessee is entitled, whether alone or in common with others, are maintained at a reasonable level, and to keep in repair any installation connected with the provision of any of those services<sup>7</sup>.

The lease must also include a covenant requiring the lessor:

- 3928 (a) to insure the specified premises for their full reinstatement value against destruction or damage by fire, tempest, flood or any other cause against the risk of which it is the normal practice to insure;
- 3929 (b) to rebuild or reinstate the demised premises or the specified premises in the case of any such destruction or damage<sup>8</sup>.

The lease must include a covenant by the lessee to ensure that the interior of the demised premises is kept in good repair, including decorative repair<sup>9</sup>.

The lease may require the lessee to bear a reasonable part of the costs incurred by the lessor in discharging or insuring against the obligations imposed by his covenants to repair etc<sup>10</sup> or in discharging the obligation imposed by<sup>11</sup> his covenant to insure<sup>12</sup>.

Except where the demised premises consist of or include any unit<sup>13</sup> let or intended for letting on a business lease<sup>14</sup>, the lease may not include any provision prohibiting or restricting the assignment of the lease or the subletting of the whole or part of the demised premises<sup>15</sup>. Where the demised premises consist of or include any such unit<sup>16</sup>, the lease must contain a prohibition against:

- 3930 (i) assigning or subletting the whole or part of any such unit; or
- 3931 (ii) altering the user of any such unit,

without the prior written consent of the lessor, such consent not to be unreasonably withheld<sup>17</sup>.

The lease may not include any provision for the lease to be terminated otherwise than by forfeiture on breach of any term of the lease by the lessee<sup>18</sup>.

- 1 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 2 For the meaning of 'the demised premises' see PARA 1664 note 2 ante.
- 3 For the meaning of 'the appropriate time' see PARA 1657 note 1 ante.
- 4 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 13. For the meaning of 'other property' see PARA 1664 note 3 ante.
- 5 For the meaning of 'the specified premises' see PARA 1586 note 5 ante.
- 6 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 (as amended): see PARA 1657 et seq ante; and the text and notes 1-5 supra, 7-18 infra.
- 7 Ibid Sch 9 para 14(1). As to the construction of repairing covenants generally see PARA 436 et seq ante.
- 8 Ibid Sch 9 para 14(2). As to the construction of covenants to insure for the full cost of reinstatement see PARA 532 ante.
- 9 Ibid s 36(1) (as amended), Sch 9 para 15.
- 10 Ie the covenants required by ibid s 36(1) (as amended), Sch 9 para 14(1): see heads (1)-(3) in the text.
- 11 Ie the obligation imposed by the covenant required by ibid Sch 9 para 14(2)(a): see head (a) in the text.
- 12 Ibid Sch 9 para 16(1). Where a covenant required by Sch 9 para 14(1) or Sch 9 para 14(2)(a) has been modified to any extent in accordance with Sch 9 para 4 (as amended) (see PARA 1659 ante) or Sch 9 para 7 (as amended) (see PARA 1662 ante), the reference in Sch 9 para 16(1) to the obligations or, as the case may be, the obligation imposed by that covenant is to be read as a reference to the obligations or obligation imposed by that covenant as so modified: Sch 9 para 16(2).
- 13 For the meaning of references to a unit see PARA 1657 note 2 ante.
- 14 For the meaning of 'business lease' see PARA 405 note 4 ante; and for the meaning of 'lease' see PARA 1535 note 3 ante.
- 15 Leasehold Reform, Housing and Urban Development Act 1993 s 36(1) (as amended), Sch 9 para 17(1).
- 16 Ie any such unit as is mentioned in ibid Sch 9 para 17(1): see the text and notes 13-15 supra.
- 17 Ibid Sch 9 para 17(2).
- 18 Ibid s 36(1) (as amended), Sch 9 para 18. As to forfeiture generally see PARA 603 et seq ante.

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## **(xii) Acquisition of Interests from Local Authorities etc**

### **1667. Disapplication of provisions relating to disposals by local authorities etc.**

Nothing in any of the specified provisions<sup>1</sup>, which impose requirements as to consent or consultation or other restrictions in relation to certain disposals<sup>2</sup>, applies to any disposal of a

freehold or leasehold interest<sup>3</sup> in any premises which is made in pursuance of the statutory provisions<sup>4</sup> relating to the right to collective enfranchisement<sup>5</sup>.

1 The provisions so specified are those listed infra (see the Leasehold Reform, Housing and Urban Development Act 1993 s 37, Sch 10 para 1(2) (amended by the Housing Act 1996 s 227, Sch 19 Pt IX; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 21(3)) ie:

- 47 (1) the Housing Act 1985 ss 32, 43 (as amended) (disposals of land by local authorities: see HOUSING vol 22 (2006 Reissue) PARAS 305, 314) and the Housing Act 1988 s 133 (as amended) (certain subsequent disposals);
- 48 (2) the Housing Act 1996 ss 9, 42 (as amended) and the Housing Associations Act 1985 s 9 (as amended) (disposals by registered social landlords and other housing associations: see HOUSING vol 22 (2006 Reissue) PARAS 43, 99, 106);
- 49 (3) the Housing Act 1988 s 79(1), (2) (as amended) (disposals by housing action trusts: see HOUSING vol 22 (2006 Reissue) PARA 350) and s 81 (as amended) (certain subsequent disposals: see HOUSING vol 22 (2006 Reissue) PARA 353).

2 For the meaning of 'disposal' see PARA 408 note 16 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante.

5 Ibid Sch 10 para 1(1).

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### **1668. Provision relating to secure and introductory tenants following leaseback.**

The following provisions apply where a lease<sup>1</sup> is granted<sup>2</sup> to a public sector landlord<sup>3</sup>. Where:

3932 (1) immediately before the appropriate time<sup>4</sup> the public sector landlord was the immediate landlord under a secure tenancy<sup>5</sup> or an introductory tenancy<sup>6</sup> of a flat<sup>7</sup> contained in the demised premises<sup>8</sup>; and

3933 (2) that tenancy continues in force after the grant of that lease,

the tenant<sup>9</sup> is deemed to have continued without interruption as tenant of the landlord under the secure tenancy or, as the case may be, under the introductory tenancy, despite the disposal<sup>10</sup> of the landlord's interest<sup>11</sup> which immediately preceded the grant of that lease<sup>12</sup>.

Where:

3934 (a) immediately before the appropriate time a person was a successor<sup>13</sup> in relation to a secure tenancy or an introductory tenancy of a flat contained in the demised premises; and

3935 (b) that person is, in connection with the grant of that lease, granted a new secure tenancy of that flat which is a tenancy for a term certain,

that person is<sup>14</sup> also a successor in relation to the new tenancy<sup>15</sup>.

Where:

- 3936 (i) immediately before the appropriate time a person was the tenant under a secure tenancy or an introductory tenancy of a flat contained in the demised premises; and
- 3937 (ii) that person is, in connection with the grant of that lease, granted a new secure tenancy or introductory tenancy of that flat,

then, for the purpose of determining whether either of the specified conditions<sup>16</sup> is satisfied, the new tenancy is not regarded as a new letting of the flat but is instead regarded as a continuation of the secure tenancy or introductory tenancy referred to in head (i) above<sup>17</sup>. Those conditions are:

- 3938 (A) the exception<sup>18</sup> to the right to buy in the case of letting in connection with employment; and
- 3939 (B) the exception<sup>19</sup> to the right to buy in the case of letting for occupation by a person of pensionable age etc<sup>20</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 In pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 36(1), Sch 9 para 2 (as amended): see PARA 1657 ante.

3 Ibid s 37, Sch 10 para 2(1). For the meaning of 'public sector landlord' see PARA 1553 note 29 ante.

4 For these purposes, 'the appropriate time' has the same meaning as in ibid Sch 9 (as amended) (see PARA 1657 note 1 ante): Sch 10 para 2(7)(a).

5 For these purposes, any reference to a secure tenancy or an introductory tenancy of a flat is a reference to a secure tenancy or an introductory tenancy of a flat whether with or without any yard, garden, garage, outhouses or appurtenances belonging to or usually enjoyed with it: ibid Sch 10 para 2(6)(a) (Sch 10 para 2(2)-(4), (6)-(7) amended by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule para 9(e)). For the meaning of 'secure tenancy' generally see PARA 1553 note 30 ante; and for the meaning of 'flat' see note 7 infra.

6 For the meaning of 'introductory tenancy' generally see PARA 1553 note 31 ante; but see note 5 supra.

7 For these purposes, any reference to a flat includes a reference to a unit, other than a flat, which is used as a dwelling: Leasehold Reform, Housing and Urban Development Act 1993 Sch 10 para 2(6)(b). For the meaning of 'flat' generally see PARA 1535 note 3 ante; for the meaning of 'unit' see PARA 1555 note 9 ante; and for the meaning of 'dwelling' see PARA 1533 note 2 ante.

8 For these purposes, 'the demised premises' has the same meaning as in ibid Sch 9 (as amended) (see PARA 1664 note 2 ante): Sch 9 para 2(7)(a).

9 For the meaning of 'tenant' see PARA 1535 note 3 ante.

10 For the meaning of 'disposal' see PARA 408 note 16 ante.

11 For the meaning of 'interest' see PARA 408 note 16 ante.

12 Leasehold Reform, Housing and Urban Development Act 1993 Sch 10 para 2(2) (as amended: see note 5 supra).

13 For these purposes, 'successor' has the same meaning as in the Housing Act 1985 s 88 (as amended) (see PARA 1320 ante) in relation to a secure tenancy and as in the Housing Act 1996 s 132 (as amended) (see PARA 1290 ante) in relation to an introductory tenancy: Leasehold Reform, Housing and Urban Development Act 1993 Sch 10 para 2(7)(b) (as amended: see note 5 supra).

14 In the purposes of the Housing Act 1985 ss 87-90 (as amended): see PARAS 1319-1322 ante.

- 15 Leasehold Reform, Housing and Urban Development Act 1993 Sch 10 para 2(3) (as amended: see note 5 supra).
- 16 Ie the conditions referred to in *ibid* Sch 10 para 2(5): see heads (A)-(B) in the text.
- 17 *Ibid* Sch 10 para 2(4) (as amended: see note 5 supra).
- 18 Ie the condition specified in the Housing Act 1985 Sch 5 para 5(1)(b) (as amended): see PARA 1812 post at head (2) in the text.
- 19 Ie the condition specified in *ibid* Sch 5 para 11(1)(b) (as substituted): see PARA 1815 post at head (2)(b) in the text.
- 20 Leasehold Reform, Housing and Urban Development Act 1993 Sch 10 para 2(5).

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### **(xiii) Landlord's Right to Compensation where Claim Ineffective**

#### **1669. Compensation for postponement of termination in connection with ineffective claims.**

The following provisions apply where a claim to exercise the right to collective enfranchisement<sup>1</sup> in respect of any premises is made:

- 3940 (1) on or after 15 January 1999 by tenants<sup>2</sup> of flats<sup>3</sup> contained in the premises;  
or  
3941 (2) as from a day to be appointed<sup>4</sup>, by an RTE company<sup>5</sup>,

and the claim is not effective<sup>6</sup>. A person who is a participating tenant<sup>7</sup> (or, as from a day to be appointed<sup>8</sup>, a qualifying tenant<sup>9</sup> who is a participating member of the RTE company<sup>10</sup>) immediately before the claim ceases to have effect is liable to pay compensation if:

- 3942 (a) the claim was not made at least two years before the term date<sup>11</sup> of the lease<sup>12</sup> by virtue of which he is a qualifying tenant ('the existing lease'); and  
3943 (b) any of the specified conditions<sup>13</sup> is met<sup>14</sup>.

The specified conditions are:

- 3944 (i) that the making of the claim<sup>15</sup> caused a notice of termination served by the landlord<sup>16</sup> in respect of the existing lease to cease to have effect and the date on which the claim ceases to have effect<sup>17</sup> is later than four months before the termination date specified in the notice;  
3945 (ii) that the making of the claim prevented the service of an effective notice of termination<sup>18</sup> in respect of the existing lease, but did not cause a notice served<sup>19</sup> in respect of that lease to cease to have effect, and the date on which the claim ceases to have effect is a date later than six months before the term date of the existing lease; and  
3946 (iii) that the existing lease has been continued<sup>20</sup> by virtue of the claim<sup>21</sup>.

Compensation under the above provisions becomes payable at the end of the appropriate period<sup>22</sup> and is the right of the person who is the tenant's immediate landlord<sup>23</sup> at that time<sup>24</sup>. The amount which a tenant is so liable to pay is equal to the difference between the rent for the appropriate period under the existing lease, and the rent which might reasonably be expected to be payable for that period were the property to which the existing lease relates let for a term equivalent to that period on the open market by a willing landlord on the following assumptions:

- 3947 (A) that no premium is payable in connection with the letting;
- 3948 (B) that the letting confers no security of tenure; and
- 3949 (C) that, except as otherwise provided by this provision, the letting is on the same terms as the existing lease<sup>25</sup>.

1 For these purposes, references to a claim to exercise the right to collective enfranchisement are to be taken as references to a notice given, or purporting to be given (whether by persons who are qualifying tenants or not), under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante): s 37A(8)(a) (s 37A added by the Housing Act 1996 s 116, Sch 11 para 2(1); the Leasehold Reform, Housing and Urban Development Act 1993 s 37A(8)(a) prospectively amended, so as to repeal the words in parentheses, by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 4 infra)).

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

3 For the meaning of 'flat' see PARA 1533 note 2 ante.

4 Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

5 As to RTE companies see PARAS 1581-1583 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 37A(1) (as added (see note 1 supra); s 37A(1), (2) prospectively amended by the Commonhold and Leasehold Reform Act 2002, s 124, Sch 8, PARAS 2, 26(1)-(3), as from a day to be appointed (see note 4 supra)). For these purposes, a claim to exercise the right to collective enfranchisement is not effective if it ceases to have effect for any reason other than (1) the application of the Leasehold Reform, Housing and Urban Development Act 1993 s 23(4) (see PARA 1611 ante), s 30(4) (see PARA 1621 ante) or s 31(4) (see PARA 1622 ante); (2) the entry into a binding contract for the acquisition of the freehold and other interests falling to be acquired in pursuance of the claim; or (3) the making of an order under s 24(4)(a) or (b) (as amended) (see PARA 1612 ante) or s 25(6)(a) or (b) (as amended) (see PARA 1613 ante) which provides for the vesting of those interests: s 37A(8)(c) (as so added).

7 For the meaning of 'the participating tenants' see PARAS 1571-1575 ante.

8 See note 4 supra.

9 For the meaning of 'qualifying tenant' see PARA 1557 ante.

10 As to participating members see PARA 1582 ante.

11 For the meaning of 'term date' see PARA 1544 note 5 ante.

12 For the meaning of 'lease' see PARA 1535 note 3 ante.

13 Ie the conditions mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 37A(3) (as added): see heads (i)-(iii) in the text.

14 Ibid s 37A(2) (as added (see note 1 supra) and prospectively amended (see note 6 supra)).

15 In the case of a person who becomes a participating tenant by virtue of an election under ibid s 14(3) (prospectively repealed), the references in s 37A(3)(a) and (b) (as added) (see heads (i)-(ii) in the text) and s 37A(6)(b)(i) (as added) (see note 22 head (2)(a) infra) to the making of the claim are to be construed as references to the making of the election: s 37A(7) (as added (see note 1 supra); prospectively repealed by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14, as from a day to be appointed (see note 4 supra)).

16 Ie under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.

17 For these purposes, references to the date on which a claim ceases to have effect are, in the case of a claim made by a notice which is not a valid notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended) (see PARA 1585 ante), to be taken as references to the date on which the notice is set aside by the court or is withdrawn or would, if valid, cease to have effect or be deemed to have been withdrawn, that date being taken, where the notice is set aside, or would, if valid, cease to have effect, in consequence of a court order, to be the date when the order becomes final: s 37A(8)(b) (as added: see note 1 supra). For the meaning of 'the court' see PARA 1539 note 3 ante; and as to when a court order is treated as becoming final see PARA 1587 note 8 ante.

18 See note 16 supra.

19 Ie a notice served as mentioned in note 16 supra.

20 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 13(13), Sch 3 para 6(1) (as amended): see PARA 1595 ante.

21 Ibid s 37A(3) (as added: see note 1 supra).

22 For the purposes of ibid s 37A(4), (5) (as added), the appropriate period is: (1) in a case falling within s 37A(3)(a) (as added) (see head (i) in the text), the period (a) beginning with the termination date specified in the notice mentioned in that provision; and (b) ending with the earliest date of termination which could have been specified in a notice under the Local Government and Housing Act 1989 Sch 10 para 4(1) in respect of the existing lease served immediately after the date on which the claim ceases to have effect, or, if the existing lease is terminated before then, with the date of its termination; (2) in a case falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 37A(3)(b) (as added) (see head (ii) in the text), the period (a) beginning with the later of six months from the date on which the claim is made and the term date of the existing lease; and (b) ending six months after the date on which the claim ceases to have effect, or, if the existing lease is terminated before then, with the date of its termination; and (3) in a case falling within s 37A(3)(c) (as added) (see head (iii) in the text), the period for which the existing lease is continued under Sch 3 para 6(1) (as amended): s 37A(6) (as added: see note 1 supra).

23 For the meaning of 'the landlord' see PARA 1535 note 3 ante; and as to special categories of landlord see PARA 1545 et seq ante.

24 Leasehold Reform, Housing and Urban Development Act 1993 s 37A(4) (as added: see note 1 supra).

25 Ibid s 37A(5) (as added: see note 1 supra).

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### **1670. Compensation where there has been change in the immediate reversion.**

Where a tenant's<sup>1</sup> liability to pay compensation<sup>2</sup> relates to a period during which there has been a change in the interest<sup>3</sup> immediately expectant on the determination of his lease<sup>4</sup>, the provisions relating to payment of compensation for the postponement of termination<sup>5</sup> have effect with the following modifications<sup>6</sup>. Compensation<sup>7</sup> becomes payable at the end of the appropriate period<sup>8</sup> and there is a separate right to compensation in respect of each of the interests which, during that period, have been immediately expectant on the determination of the existing lease<sup>9</sup>. Such compensation:

3950 (1) in the case of the interest which is immediately expectant on the determination of the existing lease at the end of the appropriate period, is the right of the person in whom that interest is vested at that time; and

3951 (2) in the case of an interest which ceases during the appropriate period to be immediately expectant on the determination of the existing lease, is the right of

the person in whom the interest was vested immediately before it ceased to be so expectant<sup>10</sup>.

The amount which the tenant is liable to pay<sup>11</sup> in respect of any interest is equal to the difference between:

- 3952 (a) the rent under the existing lease for the part of the appropriate period during which the interest was immediately expectant on the determination of that lease; and
- 3953 (b) the rent which might reasonably be expected to be payable for that part of that period were the property to which the existing lease relates let for a term equivalent to that part of that period on the open market by a willing landlord on the following assumptions:
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104. (i) that no premium is payable in connection with the letting;
105. (ii) that the letting confers no security of tenure; and
106. (iii) that, except as otherwise provided by this provision, the letting is on the same terms as the existing lease<sup>12</sup>.
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1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 37A (as added and amended): see PARA 1669 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 37A (as added and amended): see PARA 1669 ante.

6 Ibid s 37B(1) (s 37B added by the Housing Act 1996 s 116, Sch 11 para 2(1)).

7 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 37A(2) (as added and amended): see PARA 1669 ante.

8 Ibid s 37A(6) (as added) (meaning of 'the appropriate period': see PARA 1669 note 22 ante) applies with the substitution, for the words 'for the purposes of subsections (4) and (5)' of the words 'for the purposes of subsections (4) to (5A)': s 37B(3) (as added: see note 6 supra).

9 Ibid s 37A(4) (s 37A(4)-(5A) substituted for these purposes by s 37B(2) (as added: see note 6 supra)).

10 Ibid s 37A(5) (as substituted: see note 9 supra).

11 See note 7 supra.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 37A(5A) (as substituted: see note 9 supra)

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## **(6) INDIVIDUAL RIGHT OF TENANT TO ACQUIRE NEW LEASE**



## (i) In general

### 1671. Right of qualifying tenant of flat to acquire new lease.

The following provisions<sup>1</sup> have effect for the purpose of conferring on a tenant<sup>2</sup> of a flat<sup>3</sup>, in the specified circumstances<sup>4</sup>, the right, exercisable subject to and in accordance with the statutory provisions, to acquire a new lease<sup>5</sup> of the flat on payment<sup>6</sup> of a premium<sup>7</sup>. The specified circumstances are that on the relevant date<sup>8</sup> the tenant has for the last two years been a qualifying tenant<sup>9</sup> of the flat<sup>10</sup>. On the death of such a person, the right to acquire a new lease<sup>11</sup> is exercisable<sup>12</sup> by his personal representatives<sup>13</sup>.

The right so conferred on a tenant to acquire a new lease does not extend to underlying minerals comprised in his existing lease<sup>14</sup> if:

- 3954 (1) the landlord requires the minerals to be excepted; and
- 3955 (2) proper provision is made for the support of the premises demised by that existing lease as they are enjoyed on the relevant date<sup>15</sup>.

A person can be, or be among those constituting, the qualifying tenant of each of two or more flats at the same time for the statutory purposes, whether he is tenant of those flats under one lease or under two or more separate leases<sup>16</sup>.

1   Ie the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see the text and notes 2-16 infra; and PARA 1672 et seq post.

2   For the meaning of 'tenant' see PARA 1535 note 3 ante.

3   For these purposes, references to a flat, in relation to a claim by a tenant under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended), include any garage, outhouse, garden, yard and appurtenances belonging to, or usually enjoyed with, the flat and let to the tenant with the flat on the relevant date or, in a case where an application is made under s 50(1) (see PARA 1697 post), on the date of the making of the application: s 62(2). Section 62(2) does not, however, apply (1) to any reference to a flat in s 47 (see PARA 1694 post) or s 55(1) (see PARA 1702 post); or (2) to any reference to a flat, not falling within head (1) supra, which occurs in the context of a reference to any premises containing the flat: s 62(3). An appurtenance for these purposes has to be within the curtilage of the block but need not be within the curtilage of the flat; nor is it essential that the appurtenance is capable of passing under an assignment of the flat without express mention: *Cadogan v McGirk* [1996] 4 All ER 643, [1996] 2 EGLR 75, CA (storeroom not within the general meaning of 'flat' (as to which see PARA 1533 note 2 ante) was an 'appurtenance' of the flat within the meaning of the Leasehold Reform, Housing and Urban Development Act 1993 s 62(2)).

4   Ie the circumstances mentioned in *ibid* s 39(2) (as amended): see the text and notes 8-10 infra.

5   For the meaning of 'lease' see PARA 1535 note 3 ante.

6   Ie the payment of a premium determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended): see PARA 1705 et seq post.

7   *Ibid* s 39(1).

8   For these purposes, 'the relevant date', in relation to a claim by a tenant under *ibid* Pt I Ch II (as amended), means the date on which notice of the claim is given to the landlord under s 42 (as amended) (see PARA 1677 post): s 39(8). Unless the context otherwise requires, 'the relevant date' has the meaning given by s 39(8): s 62(1). See also PARA 1677 note 4 post. For the meaning of 'the landlord' see PARA 1672 post; and as to special categories of landlord see PARA 1545 et seq ante.

9   For these purposes, 'qualifying tenant' is to be construed in accordance with *ibid* s 39(3) (as amended): s 62(1). The following provisions, namely s 5 (as amended) (see PARA 1557 ante), with the omission of s 5(5), (6); and s 7 (as amended) (see PARA 1558 ante) apply for the purpose of determining whether a person is a qualifying tenant of a flat for the purposes of Pt I Ch II (as amended) as they apply for the purpose of determining whether a person is such a tenant for the purposes of Pt I Ch I (ss 1-38) (as amended) (see PARA

1552 et seq ante); and references to a qualifying tenant of a flat are to be construed by reference to those provisions: s 39(3) (amended by the Housing Act 1996 ss 106, 227, Sch 9 para 4(2), Sch 19 Pt V; the Commonhold and Leasehold Reform Act 2002 ss 131, 180, Sch 14; for transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2 para 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b), Sch 1 Pt 1, Sch 2 para 4). Where two or more persons jointly constitute the qualifying tenant in relation to a lease of a flat, any reference to the qualifying tenant is, unless the context otherwise requires, a reference to both or all of the persons who jointly constitute the qualifying tenant: Leasehold Reform, Housing and Urban Development Act 1993 s 101(4).

10 Ibid s 39(2)(a) (amended by the Commonhold and Leasehold Reform Act 2002 s 130(1), (2)).

11 Ie the right conferred by the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

12 Ie subject to and in accordance with ibid Pt I Ch II (as amended).

13 Ibid s 39(3A) (added by the Commonhold and Leasehold Reform Act 2002 s 132(1)). Accordingly, in such a case references in the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II to the tenant are, in so far as the context permits, to the personal representatives: s 39(3A) (as so added).

14 For these purposes, 'the existing lease', in relation to a claim by a tenant under ibid Pt I Ch II (as amended), means the lease in relation to which the claim is made: s 62(1).

15 Ibid s 39(7).

16 Ibid s 39(4); and see *Maurice v Hollow-Ware Products Ltd* [2005] EWHC 815 (Ch), (2005) Times, 31 March, [2005] All ER (D) 254 (Mar).

## UPDATE

### 1671 Right of qualifying tenant of flat to acquire new lease

NOTE 16--*Aggio v Howard de Walden Estates Ltd; 26 Cadogan Square Ltd v Earl Cadogan* [2008] UKHL 44, [2008] 4 All ER 382 (any lessee under a lease of property can be a qualifying tenant of a flat).

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## (ii) The Landlord

### 1672. Meaning of 'the landlord'.

'The landlord', in relation to the lease<sup>1</sup> held by a qualifying tenant<sup>2</sup> of a flat<sup>3</sup>, means<sup>4</sup> the person who is the owner of that interest<sup>5</sup> in the flat which for the time being fulfils the following conditions, namely:

3956 (1) it is an interest in reversion expectant, whether immediately or not, on the termination of the tenant's lease<sup>6</sup>; and

3957 (2) it is either a freehold interest or a leasehold interest whose duration is such as to enable that person to grant<sup>7</sup> a new lease of that flat,

and is not itself expectant, whether immediately or not, on an interest which fulfils those conditions<sup>8</sup>.

Where<sup>9</sup> the immediate landlord under the lease of a qualifying tenant of a flat is not the landlord in relation to that lease, the person who is<sup>10</sup> the landlord in relation to it must conduct on behalf of all the other landlords<sup>11</sup> all proceedings arising out of any notice given<sup>12</sup> by the tenant with respect to the flat, whether the proceedings are for resisting or giving effect to the claim in question<sup>13</sup>.

The statutory provisions relating to special categories of landlord<sup>14</sup> have effect for the purposes of the right to acquire a new lease<sup>15</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

3 For the meaning of 'flat' see PARA 1671 note 3 ante.

4 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 ante, PARA 1673 et seq post.

5 For the meaning of 'interest' see PARA 408 note 16 ante.

6 For these purposes, 'the tenant' means any such tenant as is referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 40(2) (see the text and notes 9-13 infra); and 'the tenant's lease' means the lease by virtue of which he is a qualifying tenant: s 40(4)(a).

7 Ie in accordance with ibid Pt I Ch II (as amended).

8 Ibid s 40(1). 'The landlord', in relation to a claim by a tenant under Pt I Ch II (as amended), has the meaning given by s 40(1): s 62(1).

9 Ie in accordance with ibid s 40(1).

10 See note 4 supra.

11 For these purposes, 'other landlord' means any person, other than the tenant or a trustee for him, in whom there is vested a concurrent tenancy intermediate between the interest of the competent landlord and the tenant's lease (Leasehold Reform, Housing and Urban Development Act 1993 s 40(4)(c)); and 'the competent landlord' means the person who, in relation to the tenant's lease, is the landlord, as defined by s 40(1), for the purposes of Pt I Ch II (as amended) (s 40(4)(b)).

12 Ie under ibid s 42 (as amended): see PARA 1677 post.

13 Ibid s 40(2). Section 40(2) has effect subject to the provisions of s 40(3), Sch 11 (see PARA 1673 et seq post): s 40(3).

The authority given to the competent landlord by s 40(2) does not extend to the bringing of proceedings under s 47(1) (see PARA 1694 post) on behalf of any of the other landlords, or preclude any of those landlords from bringing proceedings under that provision on his own behalf as if he were the competent landlord: Sch 11 para 9(1).

14 Ie ibid s 40(5), Sch 2 (as amended): see PARAS 1545-1551 ante.

15 Ibid s 40(5).

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### 1673. Acts of competent landlord binding on other landlords.

Any notice given<sup>1</sup> by the competent landlord<sup>2</sup> to the tenant<sup>3</sup>, any agreement<sup>4</sup> between that landlord and the tenant and any determination of the court or a leasehold valuation tribunal<sup>5</sup> in proceedings between that landlord and the tenant, is binding<sup>6</sup> on the other landlords<sup>7</sup> and on their interests<sup>8</sup> in the property demised by the tenant's lease<sup>9</sup> or any other property; but in the event of dispute the competent landlord or any of the other landlords may apply to the court for directions as to the manner in which the competent landlord should act in the dispute<sup>10</sup>.

If any of the other landlords cannot be found, or his identity cannot be ascertained, the competent landlord must apply to the court for directions and the court may make such order as it thinks proper with a view to giving effect to the rights of the tenant and protecting the interests of other persons; but, subject to any such directions, the competent landlord must proceed as in other cases<sup>11</sup>.

The competent landlord, if he acts in good faith and with reasonable care and diligence, is not liable to any of the other landlords for any loss or damage caused by any act or omission in the exercise or intended exercise of the authority given<sup>12</sup> to him<sup>13</sup>.

1    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1674 et seq post.

2    For the meaning of 'the competent landlord' see PARA 1672 note 11 ante.

3    For the meaning of 'the tenant' see PARA 1672 note 6 ante.

4    Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

5    See note 1 supra.

6    Ie without prejudice to the generality of the Leasehold Reform, Housing and Urban Development Act 1993 s 40(2): see PARA 1672 ante.

7    For the meaning of 'other landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.

8    For the meaning of 'interest' see PARA 408 note 16 ante.

9    For the meaning of 'the tenant's lease' see PARA 1672 note 6 ante.

10   Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 para 6(1). Subject to Sch 11 para 7(2) (see PARA 1674 post), the authority given to the competent landlord by s 40(2) extends to receiving on behalf of any other landlord any amount payable to that person by virtue of s 56(1), Sch 13 (as amended) (see PARA 1705 et seq post): Sch 11 para 6(2).

11   Ibid Sch 11 para 6(3).

12   Ie the authority given to him by ibid s 40(2).

13   Ibid Sch 11 para 6(4).

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### 1674. Other landlords acting independently.

Any of the other landlords<sup>1</sup> is entitled<sup>2</sup>, at any time after the giving by the competent landlord<sup>3</sup> of a counter-notice<sup>4</sup> and on giving notice to both the competent landlord and the tenant<sup>5</sup> of his intention to be so represented, to be separately represented:

- 3958 (1) in any legal proceedings in which his title to any property comes in question; or
- 3959 (2) in any legal proceedings relating to the determination of any amount payable<sup>6</sup> to him<sup>7</sup>.

Any of the other landlords may also, on giving notice to the competent landlord and the tenant, require that any amount payable<sup>8</sup> to him shall be paid by the tenant to him, or to a person authorised by him to receive it, instead of to the competent landlord; but, if after being given proper notice of the time and method of completion with the tenant, either:

- 3960 (a) he fails to notify the competent landlord of the arrangements made with the tenant to receive payment; or
- 3961 (b) having notified the competent landlord of those arrangements, the arrangements are not duly implemented,

the competent landlord is authorised to receive the payment for him; and the competent landlord's written receipt for the amount payable is a complete discharge to the tenant<sup>9</sup>.

1 For the meaning of 'other landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 Ie notwithstanding anything in the Leasehold Reform, Housing and Urban Development Act 1993 s 40(2): see PARA 1672 ante.

3 For the meaning of 'the competent landlord' see PARA 1672 note 11 ante.

4 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 45 (as amended): see PARA 1692 post.

5 For the meaning of 'the tenant' see PARA 1672 note 6 ante.

6 Ie by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 (as amended): see PARA 1705 et seq post.

7 Ibid s 40(3), Sch 11 para 7(1). As to the giving of notices see PARA 1541 ante.

8 See note 6 supra.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 11 para 7(2).

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## **1675. Obligations of other landlords to competent landlord.**

It is the duty<sup>1</sup> of each of the other landlords<sup>2</sup> to give the competent landlord<sup>3</sup> all such information and assistance as he may reasonably require; and, if any of the other landlords fails so to comply, that landlord must indemnify the competent landlord against any liability incurred by him in consequence of the failure<sup>4</sup>.

Each of the other landlords must make such contribution as is just to costs and expenses which are properly incurred by the competent landlord<sup>5</sup> but are not recoverable or not recovered from the tenant<sup>6</sup>.

1    In subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 para 7: see PARA 1674 ante.

2    For the meaning of 'other landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.

3    For the meaning of 'the competent landlord' see PARA 1672 note 11 ante.

4    Leasehold Reform, Housing and Urban Development Act 1993 Sch 11 para 8(1).

5    In pursuance of ibid s 40(2): see PARA 1672 ante.

6    Ibid Sch 11 para 8(2). For the meaning of 'the tenant' see PARA 1672 note 6 ante.

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### **(iii) Preliminary Inquiries by Qualifying Tenant**

#### **1676. Right of qualifying tenant to obtain information about superior interests etc.**

A qualifying tenant<sup>1</sup> of a flat<sup>2</sup> may give to his immediate landlord<sup>3</sup> or to any person receiving rent on behalf of his immediate landlord, a notice requiring the recipient to state whether the immediate landlord is the owner of the freehold interest<sup>4</sup> in the flat and, if not, to give the tenant the specified information<sup>5</sup>, so far as known to the recipient<sup>6</sup>.

The information so specified is:

- 3962 (1) the name and address in England and Wales of the person who owns the freehold interest in the flat;
- 3963 (2) the duration of the leasehold interest in the flat of the tenant's immediate landlord and the extent of the premises in which it subsists; and
- 3964 (3) the name and address of every person who has a leasehold interest in the flat which is superior to that of the tenant's immediate landlord, the duration of any such interest and the extent of the premises in which it subsists<sup>7</sup>.

If the immediate landlord of any such qualifying tenant is not the owner of the freehold interest in the flat, the tenant may also:

- 3965 (a) give to the person who is the owner of that interest a notice requiring him to give the tenant such information as is mentioned in head (3) above, so far as known to that person;

3966 (b) give to any person falling within head (3) above a notice requiring him to give the tenant particulars of the duration of his leasehold interest in the flat and the extent of the premises in which it subsists and, so far as known to him, such information as is mentioned in head (1) above and, as regards any other person falling within head (3) above, such information as is mentioned therein<sup>8</sup>.

Any notice so given by a qualifying tenant must also<sup>9</sup> require the recipient to state:

3967 (i) whether he has received in respect of any premises containing the tenant's flat a notice claiming to exercise the right to collective enfranchisement<sup>10</sup> or a copy of such a notice; and, if so

3968 (ii) the date on which that notice was given and:  
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107. (A) at the date at which this title states the law, the name and address of the nominee purchaser appointed<sup>11</sup> in relation to that claim<sup>12</sup>; or

108. (B) as from a day to be appointed<sup>13</sup>, the name and registered office of the RTE company by which it was given<sup>14</sup>.

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Any person who is required to give any information by virtue of such a notice must give that information to the qualifying tenant within the period of 28 days beginning with the date of the giving of the notice<sup>15</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante.

3 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 I.e. such information as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 41(2): see heads (1)-(3) in the text.

6 Ibid s 41(1). As to the giving of notices see PARA 1541 ante.

7 Ibid s 41(2).

8 Ibid s 41(3).

9 I.e. in addition to any other requirement imposed in accordance with ibid s 41(1)-(3): see the text and notes 1-8 supra.

10 I.e. a notice under ibid s 13 (as amended) (see PARA 1585 ante) in the case of which the relevant claim under Chapter I is still current. For these purposes, 'the relevant claim under Chapter I', in relation to a notice under s 13 (as amended), means the claim in respect of which that notice is given; and any such claim is current if (1) that notice continues in force in accordance with s 13(11) (as amended); or (2) a binding contract entered into in pursuance of that notice remains in force; or (3) where an order has been made under s 24(4)(a) or (b) (as amended) (see PARA 1612 ante) or s 25(6)(a) or (b) (as amended) (see PARA 1613 ante) with respect to any such premises as are referred to in s 41(4)(a) (see head (i) in the text), any interests which by virtue of the order fall to be vested in the nominee purchaser (or, as from a day to be appointed (see note 13 infra), in the RTE company) for the purposes of Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante) have yet to be so vested: s 41(5) (s 41(4), (5) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 28(1), (2), as from a day to be appointed (see note 13 infra)). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and as to RTE companies see PARAS 1581-1583 ante.

11 I.e. for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 15 (prospectively repealed): see PARAS 1576-1577 ante.

12 Ibid s 41(4) (as originally enacted).

13 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

14 Ibid s 41(4) (as prospectively amended: see note 10 supra).

15 Ibid s 41(6).

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## **(iv) The Tenant's Notice**

### **A. IN GENERAL**

#### **1677. Notice by qualifying tenant of claim to exercise right.**

A claim by a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> to exercise the right to acquire a new lease<sup>3</sup> of the flat is made by the giving of notice of the claim under the following provisions<sup>4</sup>.

A notice so given by a tenant ('the tenant's notice') must be given to the landlord<sup>5</sup> and to any third party<sup>6</sup> to the tenant's lease<sup>7</sup>.

The tenant's notice must:

3969 (1) state the full name of the tenant and the address of the flat in respect of which he claims<sup>8</sup> a new lease<sup>9</sup>;

3970 (2) contain the following particulars, namely:  
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109. (a) sufficient particulars of that flat to identify the property to which the claim extends;

110. (b) such particulars of the tenant's lease as are sufficient to identify it, including the date on which the lease was entered into, the term for which it was granted and the date of the commencement of the term<sup>10</sup>;

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3971 (3) specify the premium which the tenant proposes to pay in respect of the grant of a new lease<sup>11</sup> and, where any other amount will be payable by him<sup>12</sup>, the amount which he proposes to pay<sup>13</sup>;

3972 (4) specify the terms which the tenant proposes should be contained in any such lease<sup>14</sup>;

3973 (5) state the name of the person, if any, appointed by the tenant to act for him in connection with his claim, and an address in England and Wales at which notices may be given<sup>15</sup> to any such person<sup>16</sup>; and

3974 (6) specify the date<sup>17</sup> by which the landlord must respond to the notice by giving<sup>18</sup> a counter-notice<sup>19</sup>.

Such a notice may not be given by the personal representatives of a tenant later than two years after the grant of probate or letters of administration<sup>20</sup>.



Where a notice has been so given with respect to any flat, no subsequent notice may be given with respect to the flat so long as the earlier notice continues in force<sup>21</sup>.

Where a notice has been so given with respect to a flat and:

- 3975 (i) that notice has been withdrawn, or is deemed to have been withdrawn<sup>22</sup>; or
- 3976 (ii) in response to that notice, an order has been applied for and obtained under the statutory provisions relating to redevelopment<sup>23</sup>,

no subsequent notice may be given with respect to the flat within the period of 12 months beginning with the date of the withdrawal or deemed withdrawal of the earlier notice or with the time when the order<sup>24</sup> becomes final<sup>25</sup>, as the case may be<sup>26</sup>.

Where a notice is so given, the notice continues in force<sup>27</sup> as from the relevant date<sup>28</sup>:

- 3977 (A) until a new lease is granted in pursuance of the notice;
- 3978 (B) if the notice is withdrawn, or is deemed to have been withdrawn<sup>29</sup>, until the date of the withdrawal or deemed withdrawal; or
- 3979 (C) until such other time as the notice ceases<sup>30</sup> to have effect<sup>31</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante.

3 For the meaning of 'lease' see PARA 1535 note 3 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 42(1). As to the giving of notices see PARA 1541 ante. A personal signature is required: see *St Ermins Property Co v Tingay* [2002] EWHC 1673 (Ch), [2002] 3 EGLR 53 (notice signed by tenant's son under a power of attorney was invalid).

The Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 (see PARA 1682 et seq post), which contains restrictions on terminating a tenant's lease where he has given notice under s 42 (as amended) and makes other provision in connection with the giving of notices under s 42 (as amended), has effect: s 42(9).

The tenant's notice under s 42 (as amended) is regarded as given to the competent landlord for the purposes of s 42(2)(a) if it is given to any of the other landlords instead; and references in Pt I Ch II (ss 39-62) (as amended) to the relevant date are to be construed accordingly: s 40(3), Sch 11 para 1. For the meaning of 'the competent landlord' and 'other landlord' see PARA 1672 note 11 ante.

In a transaction undertaken to give effect to a tenant's notice the landlord and the tenant are bound, unless they agree otherwise, by the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 3, Sch 2 (as amended): reg 3. See PARAS 1691, 1704 post.

Where the benefit and obligation of a tenant's notice is assigned to a subsequent purchaser after the deposit has been paid to the landlord, the purchaser is under an obligation, if he obtains the benefit of the new lease in due course, to pay the whole of the premium to the landlord, regardless of the deposit that has been put up, and the amount of the deposit is recoverable by the vendor: see *Money v Westholme Investments Ltd* [2003] All ER (D) 317 (Feb), (2003) 147 Sol Jo LB 357, CA.

5 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

6 For these purposes, 'third party', in relation to a lease, means any person who is a party to the lease apart from the tenant under the lease and his immediate landlord: Leasehold Reform, Housing and Urban Development Act 1993 s 62(1).

7 Ibid ss 42(2), 62(1). The notice must be served on the landlord and the third party at the same time: *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Secchi* (1999) 32 HLR 820, [1999] All ER (D) 1087, CA.

8 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended): see PARA 1671 et seq ante, PARA 1678 et seq post.

9 Ibid s 42(3)(a).

10 Ibid s 42(3)(b) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14; for transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(ii), Sch 1 Pt 2, Sch 2 para 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(ii), Sch 1 Pt 2, Sch 2 para 4). An inaccuracy in the particulars so given does not invalidate the tenant's notice: see the Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 9(1); and PARA 1681 post.

11 See note 8 supra. A realistic figure must be specified: see *Cadogan v Morris* (1998) 77 P & CR 336, 31 HLR 732, CA. See also *Mount Cook Land Ltd v Rosen* [2003] 1 EGLR 75, [2003] 10 EG 165, Central London county court.

12 Ie in accordance with any provision of the Leasehold Reform, Housing and Urban Development Act 1993 s 56, Sch 13 (as amended): see PARA 1705 et seq post.

13 Ibid s 42(3)(c).

14 Ibid s 42(3)(d).

15 See note 8 supra.

16 Leasehold Reform, Housing and Urban Development Act 1993 s 42(3)(e).

17 The date so specified must be a date falling not less than two months after the date of the giving of the notice: ibid s 42(5).

18 Ie under ibid s 45 (as amended): see PARA 1692 post.

19 Ibid s 42(3)(f).

20 Ibid s 42(4A) (added by the Commonhold and Leasehold Reform Act 2002 s 132(2)).

21 Leasehold Reform, Housing and Urban Development Act 1993 s 42(6).

22 Ie under or by virtue of any provision of ibid Pt I Ch II (as amended).

23 Ie under ibid s 47(1): see PARA 1694 post.

24 See note 23 supra.

25 As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

26 Leasehold Reform, Housing and Urban Development Act 1993 s 42(7).

27 Ie for the purposes of ibid Pt I Ch II (as amended).

28 For the meaning of 'the relevant date' see PARA 1671 note 8 ante. See also note 4 supra.

29 See note 22 supra.

30 Ie by virtue of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

31 Ibid s 42(8). Section 42(8) has effect subject to s 54 (as amended) (see PARA 1701 post): s 42(8).

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## **1678. Tenant to give copies of notice.**

Where the tenant's notice<sup>1</sup> is given to the competent landlord<sup>2</sup>, the tenant<sup>3</sup> must give a copy of the notice to every person known or believed by him to be one of the other landlords<sup>4</sup>.

Where the tenant's notice is so given to one of the other landlords, the tenant must give a copy of the notice to every person, apart from the recipient of the notice, known or believed by the tenant to be either the competent landlord or one of the other landlords<sup>5</sup>.

The tenant's notice must state whether copies are being so given to anyone other than the recipient and, if so, to whom<sup>6</sup>.

1 For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 For the meaning of 'the competent landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.

3 For the meaning of 'the tenant' see PARA 1672 note 6 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 para 2(1). For the meaning of 'other landlord' see PARA 1672 note 11 ante. As to the giving of notices see PARA 1541 ante.

5 Ibid Sch 11 para 2(2).

6 Ibid Sch 11 para 2(3).

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### **1679. Recipient of notice or copy to give further copies.**

A recipient of the tenant's notice<sup>1</sup> or of a copy of it, including a person receiving a copy under these provisions:

- 3980 (1) must forthwith give a copy to any person who is known or believed by him to be the competent landlord<sup>2</sup> or one of the other landlords<sup>3</sup> and is not stated in the recipient's copy of the notice, or known by him, to have received a copy; and
- 3981 (2) if he knows who is, or he believes himself to be, the competent landlord, must give a notice to the tenant<sup>4</sup> stating who is the person thought by him to be the competent landlord and give a copy of it to that person, if not himself, and to every person known or believed by him to be one of the other landlords<sup>5</sup>.

The above provisions do not, however, apply where the recipient is neither the competent landlord nor one of the other landlords<sup>6</sup>.

Where a person gives any copies of the tenant's notice in accordance with head (1) above, he must:

- 3982 (a) supplement the statement to be included in his notice<sup>7</sup> by adding any further persons to whom he is giving copies or who are known by him to have received one; and
- 3983 (b) notify the tenant of the persons added by him to that statement<sup>8</sup>.

- 1 For the meaning of 'the tenant's notice' see PARA 1677 ante.
- 2 For the meaning of 'the competent landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 3 For the meaning of 'other landlord' see PARA 1672 note 11 ante.
- 4 For the meaning of 'the tenant' see PARA 1672 note 6 ante.
- 5 Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 para 3(1). As to the giving of notices see PARA 1541 ante.
- 6 Ibid Sch 11 para 3(2).
- 7 Ie the statement under ibid Sch 11 para 2(3): see PARA 1678 ante.
- 8 Ibid Sch 11 para 3(3).

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#### **1680. Consequences of failure to give copies of notice etc.**

Where:

- 3984 (1) the competent landlord<sup>1</sup> or any of the other landlords<sup>2</sup> does not receive a copy of the tenant's notice<sup>3</sup> before the end of the period specified in it<sup>4</sup>; but
- 3985 (2) he was given a notice<sup>5</sup> by the tenant<sup>6</sup> and, in response to that notice, notified the tenant of his interest<sup>7</sup> in the tenant's flat<sup>8</sup>,

the tenant's notice ceases to have effect at the end of that period<sup>9</sup>.

Where:

- 3986 (a) the above provisions<sup>10</sup> do not apply; but
- 3987 (b) any person fails without reasonable cause to comply with the duty to give notices<sup>11</sup>, or is guilty of any unreasonable delay in complying with that duty<sup>12</sup>,

he is liable for any loss thereby occasioned to the tenant or to the competent landlord or any of the other landlords<sup>13</sup>.

- 1 For the meaning of 'the competent landlord' see PARA 1672 note 11 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 2 For the meaning of 'other landlord' see PARA 1672 note 11 ante.
- 3 For the meaning of 'the tenant's notice' see PARA 1677 ante.
- 4 Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 42(3)(f): see PARA 1677 ante at head (6) in the text.
- 5 Ie under ibid s 41 (as amended): see PARA 1676 ante.
- 6 For the meaning of 'the tenant' see PARA 1672 note 6 ante.

7 For the meaning of 'interest' see PARA 408 note 16 ante.

8 For the meaning of 'flat' see PARA 1671 note 3 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 para 4(1). On the proper construction of this provision, only the total failure to give notice to a landlord renders a notice under s 42 (as amended) invalid and ineffective so that a tenant's claim for renewal of the lease will fail; where there has been a failure without reasonable cause to give copies of the notice as required by Sch 11 paras 2, 3 (see PARAS 1678-1679 ante), a tenant will be liable for loss thereby occasioned to any of the landlords arising out of that failure (see the text and notes 10-13 infra) but the notice will not be invalidated: *Wellcome Trust Ltd v Bellhurst Ltd* [2002] EWCA Civ 790, [2003] HLR 102, [2002] All ER (D) 258 (May).

10 Ie the Leasehold Reform, Housing and Urban Development Act 1993 Sch 11 para 4(1): see the text and notes 1-9 supra.

11 Ie fails to comply with ibid Sch 11 para 2 (see PARA 1678 ante) or Sch 11 para 3 (see PARA 1679 ante).

12 Ie delay in complying with either ibid Sch 11 para 2 or Sch 11 para 3.

13 Ibid Sch 11 para 4(2).

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### **1681. Validity of notice; court's power to amend notice.**

The tenant's notice<sup>1</sup> is not invalidated by any inaccuracy in any of the particulars required to be included<sup>2</sup> or by any misdescription of any of the property to which the claim extends<sup>3</sup>.

Where the tenant's notice:

3988 (1) specifies any property which he is not entitled to have demised to him under a new lease<sup>4</sup>; or

3989 (2) fails to specify any property which he is entitled to have so demised to him,

the notice may, with the leave of the court<sup>5</sup> and on such terms as the court may think fit, be amended so as to exclude or include the property in question<sup>6</sup>.

1 For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 Ie any of the particulars required by the Leasehold Reform, Housing and Urban Development Act 1993 s 42(3) (as amended): see PARA 1677 ante.

3 Ibid s 42(9), Sch 12 para 9(1). Schedule 12 para 9 applies only to those aspects of s 42 (as amended) which can properly be called particulars, namely those contained in s 42(3)(b) (as amended) (see PARA 1677 ante at head (2) in the text), and not to any other of the requirements of s 42(3) (as amended) (*Cadogan v Morris* (1998) 77 P & CR 336, 31 HLR 732, CA); thus a notice which failed to comply with s 42(3)(f) (see PARA 1677 ante at head (6) in the text) and which was served late was not saved by Sch 12 para 9(1): *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Secchi* (1999) 32 HLR 820, [1999] All ER (D) 1087, CA.

4 Ie a new lease granted in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1682 et seq post. For the meaning of 'lease' see PARA 1535 note 3 ante.

5 For the meaning of 'the court' see PARA 1539 note 3 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 9(2).

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## ***B. EFFECT OF TENANT'S NOTICE***

### **1682. Prior notice by tenant terminating lease.**

A notice given<sup>1</sup> by a qualifying tenant<sup>2</sup> of a flat<sup>3</sup> is of no effect if it is given:

3990 (1) after the tenant has given notice terminating the lease<sup>4</sup> of the flat, other than a notice that has been superseded by the grant, express or implied, of a new tenancy; or

3991 (2) during the subsistence of an agreement for the grant to the tenant of a future tenancy of the flat, where the agreement is one to which the Local Government and Housing Act 1989<sup>5</sup> applies<sup>6</sup>.

1 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For these purposes, references to a notice under s 42 (as amended) include, in so far as the context permits, references to a notice purporting to be given under s 42 (as amended), whether by a qualifying tenant or not; and references to the tenant by whom a notice is given are to be construed accordingly: s 42(9), Sch 12 para 8(1)(a).

2 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

3 For the meaning of 'flat' see PARA 1671 note 3 ante.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 le the Local Government and Housing Act 1989 s 186, Sch 10 para 17: see PARA 1241 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 1.

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### **1683. Prior notice by landlord terminating lease.**

A notice given<sup>1</sup> by a qualifying tenant<sup>2</sup> of a flat<sup>3</sup> is of no effect<sup>4</sup> if it is given more than two months after a landlord's<sup>5</sup> notice terminating the tenant's lease<sup>6</sup> of the flat has been given under the Landlord and Tenant Act 1954<sup>7</sup> or served under the Local Government and Housing Act 1989<sup>8</sup>, whether or not the notice has effect to terminate the lease<sup>9</sup>.

Where in the case of a qualifying tenant of a flat who gives such a notice:

- 3992 (1) any such landlord's notice is so given or served; but  
 3993 (2) that notice was not given or served more than two months before the date on which the tenant's notice is given to the landlord,

the landlord's notice ceases to have effect on that date<sup>10</sup>.

If any such landlord's notice ceases so to have effect, but the claim made by the tenant by the giving of his notice is not effective<sup>11</sup>, then, in the case of any landlord's notice terminating the tenant's lease of the flat which is given under the Landlord and Tenant Act 1954<sup>12</sup> or served under the Local Government and Housing Act 1989<sup>13</sup> and is so given or served within one month after the expiry of the period of currency of that claim<sup>14</sup>, the earliest date which may be specified in the notice as the date of termination is:

- 3994 (a) in the case of a notice given under the Landlord and Tenant Act 1954, the date of termination specified in the previous notice or the date of expiry of the period of three months beginning with the date of the giving of the new notice, whichever is the later; or  
 3995 (b) in the case of a notice served under the Local Government and Housing Act 1989, the date of termination specified in the previous notice or the date of expiry of the period of four months beginning with the date of service of the new notice, whichever is the later<sup>15</sup>.

1    le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of references to a notice under s 42 (as amended) see PARA 1682 note 1 ante.

2    For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

3    For the meaning of 'flat' see PARA 1671 note 3 ante.

4    le subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 2(2): see note 9 infra.

5    For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

6    For the meaning of 'lease' see PARA 1535 note 3 ante.

7    le under the Landlord and Tenant Act 1954 s 4: see PARA 1212 ante.

8    le under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.

9    Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 2(1). Schedule 12 para 2(1) does not, however, apply where the landlord gives his written consent to a notice being given under s 42 (as amended) after the end of those two months: Sch 12 para 2(2).

10   Ibid Sch 12 para 2(3).

11   For these purposes, references to a claim being effective are references to a new lease being acquired in pursuance of the claim: *ibid* Sch 12 para 8(1)(b).

12   See note 7 *supra*.

13   See note 8 *supra*.

14   For these purposes, references to the currency of a claim are (1) where the claim is made by a valid notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42, references to the period during which the notice continues in force in accordance with s 42(8); or (2) where the claim is made by a notice which is not a valid notice under s 42, references to the period beginning with the giving of the notice and ending with the time when the notice is set aside by the court or is withdrawn or when it would, if valid,

cease to have effect or be deemed to have been withdrawn: Sch 12 para 8(1)(c). The date when a notice is set aside or would, if valid, cease to have effect in consequence of an order of a court is to be taken to be the date when the order becomes final: Sch 12 para 8(2). As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

15 Ibid Sch 12 para 2(4), (5). Where (1) by virtue of Sch 12 para 2(5) a landlord's notice specifies as the date of termination of a lease a date earlier than six months after the date of the giving of the notice; and (2) the notice proposes a statutory tenancy, the Landlord and Tenant Act 1954 s 7(2) (as amended) (see PARA 1216 ante) applies in relation to the notice with the substitution, for references to the period of two months ending with the date of termination specified in the notice and the beginning of that period, of references to the period of three months beginning with the date of the giving of the notice and the end of that period: Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 2(6).

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#### **1684. Orders for possession and pending proceedings for forfeiture etc.**

A notice given<sup>1</sup> by a qualifying tenant<sup>2</sup> of a flat<sup>3</sup> is of no effect if, at the time when it is given, he is obliged to give up possession of his flat in pursuance of an order of a court or will be so obliged at a date specified in such an order<sup>4</sup>.

Except with the leave of the court, a qualifying tenant of a flat may not give such a notice at a time when any proceedings are pending to enforce a right of re-entry or forfeiture terminating his lease of the flat<sup>5</sup>. Leave may only be so granted if the court is satisfied that the tenant does not wish to give such a notice solely or mainly for the purpose of avoiding the consequences of the breach of the terms of his lease in respect of which proceedings are pending<sup>6</sup>. If:

3996 (1) leave is so granted; and

3997 (2) the tenant by such a notice makes a claim to acquire a new lease of his flat, the tenant's lease is deemed for the purposes of the claim to be a subsisting lease despite the existence of those proceedings and any order made afterwards in those proceedings; and, if the claim is effective<sup>7</sup>, the court in which those proceedings were brought may set aside or vary any such order to such extent and on such terms as appear to that court to be appropriate<sup>8</sup>.

1 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of references to a notice under s 42 see PARA 1682 note 1 ante.

2 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

3 For the meaning of 'flat' see PARA 1671 note 3 ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 3(1).

5 Ibid Sch 12 para 3(2). For a decision on similar wording relating to a collective enfranchisement see *Martin v Maryland Estates Ltd* (1998) 31 HLR 218, [1998] 2 EGLR 81, CA, cited in PARA 1592 notes 12, 14 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 3(3).

7 For the meaning of references to the claim being effective see PARA 1683 note 11 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 3(4).



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**1685. Notice terminating lease given by tenant or landlord during currency of claim.**

Where by a notice given under the relevant statutory provisions<sup>1</sup> a tenant<sup>2</sup> makes a claim to acquire a new lease<sup>3</sup> of a flat<sup>4</sup>, any notice terminating the tenant's lease of the flat, whether it is:

- 3998 (1) a notice given by the tenant; or
- 3999 (2) a landlord's notice given under the Landlord and Tenant Act 1954<sup>5</sup> or served under the Local Government and Housing Act 1989<sup>6</sup>,

is of no effect if it is given or served during the currency of the claim<sup>7</sup>.

1 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of references to a notice under s 42 see PARA 1682 note 1 ante.

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

3 For the meaning of 'lease' see PARA 1535 note 3 ante.

4 For the meaning of 'flat' see PARA 1671 note 3 ante.

5 le under the Landlord and Tenant Act 1954 s 4: see PARA 1212 ante.

6 le under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 4.

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**1686. Tenant's notice operates to prevent termination of lease.**

Where by a notice<sup>1</sup> a tenant<sup>2</sup> makes a claim to acquire a new lease<sup>3</sup> of a flat<sup>4</sup>, then during the currency of the claim<sup>5</sup> and for three months thereafter the lease of the flat may not terminate:

- 4000 (1) by effluxion of time; or
- 4001 (2) in pursuance of a notice to quit given by the immediate landlord of the tenant; or
- 4002 (3) by the termination of a superior lease;

but, if the claim is not effective<sup>6</sup>, and the lease would otherwise have so terminated before the end of those three months, the lease so terminates at the end of those three months<sup>7</sup>.

1     le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of references to a notice under s 42 (as amended) see PARA 1682 note 1 ante.

2     For the meaning of 'tenant' see PARA 1535 note 3 ante.

3     For the meaning of 'lease' see PARA 1535 note 3 ante.

4     For the meaning of 'flat' see PARA 1671 note 3 ante.

5     For the meaning of references to the currency of a claim see PARA 1683 note 14 ante.

6     For the meaning of references to a claim being effective see PARA 1683 note 11 ante.

7     Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 5(1). Schedule 12 para 5(1) is not, however, to be taken to prevent an earlier termination of the lease in any manner not mentioned therein and does not affect (1) the power under the Law of Property Act 1925 s 146(4) (relief against forfeiture of leases: see PARA 627 ante) to grant a tenant relief against the termination of a superior lease; or (2) any right of the tenant to relief under the Landlord and Tenant Act 1954 s 16(2) (relief where landlord proceeding to enforce covenants: see PARA 1233 ante) or under Sch 5 para 9 (relief in proceedings brought by superior landlord: see PARA 1234 ante): Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 5(2). For these purposes, references (a) to the Landlord and Tenant Act 1954 s 16 and to s 16(2); and (b) to Sch 5 para 9 and to Sch 5 para 9(2), include references to those provisions as they apply in relation to the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (security of tenure on ending of long residential tenancies: see PARA 1237 et seq ante): Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 8(3).

## UPDATE

### 1686 Tenant's notice operates to prevent termination of lease

NOTE 7--See *Ackerman v Lay* [2008] EWCA Civ 1428, [2009] 1 WLR 1556, [2008] All ER (D) 172 (Dec).

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### 1687. Restriction on proceedings to enforce right of re-entry or forfeiture.

Where by a notice<sup>1</sup> a tenant<sup>2</sup> makes a claim to acquire a new lease<sup>3</sup> of a flat<sup>4</sup>, then during the currency of the claim<sup>5</sup>:

4003 (1) no proceedings to enforce any right of re-entry or forfeiture terminating the lease of the flat may be brought in any court without the leave of that court; and

4004 (2) leave may only be granted if the court is satisfied that the notice was given solely or mainly for the purpose of avoiding the consequences of the breach of the terms of the tenant's lease in respect of which proceedings are proposed to be brought;

but, where leave is granted, the notice ceases to have effect<sup>6</sup>.

- 1 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of references to a notice under s 42 (as amended) see PARA 1682 note 1 ante.
- 2 For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 3 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 4 For the meaning of 'flat' see PARA 1671 note 3 ante.
- 5 For the meaning of references to the currency of a claim see PARA 1683 note 14 ante.
- 6 Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 6.

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# **1688. Effect on tenant's notice of application for relief against proceedings to enforce covenants.**

A tenant<sup>1</sup> who, in proceedings to enforce a right of re-entry or forfeiture or a right to damages in respect of a failure to comply with any terms of his lease<sup>2</sup>, applies for relief against proceedings to enforce covenants<sup>3</sup> is not thereby precluded from making a claim<sup>4</sup> to acquire a new lease; but, if he gives notice<sup>5</sup> under which he is relieved from any order for recovery of possession or for payment of damages, but the tenancy is cut short, any notice of claim given<sup>6</sup> by him with respect to property comprised in his lease is of no effect or, if already given, ceases to have effect<sup>7</sup>.

- 1 For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 2 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 3 le under the Landlord and Tenant Act 1954 s 16: see PARA 1233 ante. For the meaning of references to s 16 for these purposes see PARA 1686 note 7 ante.
- 4 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante.
- 5 le under the Landlord and Tenant Act 1954 s 16(2): see PARA 1233 ante. For the meaning of references to s 16(2) for these purposes see PARA 1686 note 7 ante.
- 6 See note 4 supra.
- 7 Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 7(1). Schedule 12 para 7(1) applies in relation to proceedings relating to a superior tenancy with the substitution for the references to the Landlord and Tenant Act 1954 s 16 and to s 16(2) of references to Sch 5 para 9 and to Sch 5 para 9(2): Leasehold Reform, Housing and Urban Development Act 1993 Sch 12 para 7(2). For the meaning of references to the Landlord and Tenant Act 1954 Sch 5 para 9 and Sch 5 para 9(2) for these purposes see PARA 1686 note 7 ante.

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RIGHT OF TENANT TO ACQUIRE NEW LEASE/(iv) The Tenant's Notice/B. EFFECT OF TENANT'S NOTICE/1689. Assignability.

### **1689. Assignability.**

Where a notice has been given<sup>1</sup> claiming to exercise the right to acquire a new lease with respect to any flat<sup>2</sup>, the rights and obligations of the landlord<sup>3</sup> and the tenant<sup>4</sup> arising from the notice enure for the benefit of and are enforceable against them, their personal representatives and assigns to the like extent, but no further, as rights and obligations arising under a contract for leasing freely entered into between the landlord and the tenant<sup>5</sup>.

The rights and obligations of the tenant are<sup>6</sup>, however, assignable with, but are not capable of subsisting apart from, the lease<sup>7</sup> of the entire flat; and, if the tenant's lease is assigned without the benefit of the notice, the notice is accordingly deemed to have been withdrawn by the tenant as at the date of the assignment<sup>8</sup>.

In the event of any default by the landlord or the tenant in carrying out the obligations arising from the tenant's notice, the other of them has the like rights and remedies as in the case of a contract freely entered into<sup>9</sup>.

1     le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante.

2     For the meaning of 'flat' see PARA 1671 note 3 ante.

3     For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

4     For the meaning of 'tenant' see PARA 1535 note 3 ante.

5     Leasehold Reform, Housing and Urban Development Act 1993 s 43(1). Accordingly, in relation to matters arising out of any such notice, references in Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1690 et seq post) to the landlord and the tenant include, in so far as the context permits, their respective personal representatives and assigns: s 43(2).

In a case to which s 40(2) (see PARA 1672 ante) applies, the rights and obligations of the landlord arising out of the tenant's notice are, so far as their interests are affected, rights and obligations respectively of the competent landlord and of each of the other landlords, and references to the landlord apply accordingly: s 43(5). For these purposes, 'competent landlord' and 'other landlord' have the meaning given by s 40(4) (see PARA 1672 note 11 ante); and s 43(5) has effect without prejudice to the operation of s 40(2) or Sch 11 (see PARA 1672 et seq ante): s 43(6). For the meaning of 'interest' see PARA 408 note 16 ante.

6     le notwithstanding ibid s 43(1): see the text and notes 1-5 supra.

7     For the meaning of 'lease' see PARA 1535 note 3 ante.

8     Leasehold Reform, Housing and Urban Development Act 1993 s 43(3); and see *Aldavon Co Ltd v Deverill* [1999] 2 EGLR 69, [1999] 32 EG 92, Bromley county court. As to deemed withdrawal of the tenant's notice see PARA 1700 post.

9     Leasehold Reform, Housing and Urban Development Act 1993 s 43(4).

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### **(v) Procedure Following Giving of Tenant's Notice**

### **1690. Access by landlords for valuation purposes.**

Once the tenant's notice<sup>1</sup> or a copy of it has been given<sup>2</sup> to the landlord<sup>3</sup> or to any other landlord<sup>4</sup>, that landlord and any person authorised to act on his behalf has a right of access to the flat<sup>5</sup> to which the notice relates for the purposes of enabling that landlord to obtain, in connection with the notice, a valuation of his interest<sup>6</sup> in the flat<sup>7</sup>.

That right is exercisable at any reasonable time and on giving not less than three days' notice to the tenant<sup>8</sup>.

1 For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended) (see PARA 1677 ante) or s 40(3), Sch 11 Pt I (paras 1-4) (see PARA 1677 et seq ante).

3 Ie the landlord for the purposes of ibid Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1692 et seq post.

4 Ie as defined by ibid s 40(4): see PARA 1672 note 11 ante.

5 For the meaning of 'flat' see PARA 1671 note 3 ante.

6 For the meaning of 'interest' see PARA 408 note 16 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 44(1).

8 Ibid s 44(2).

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### **1691. Deposit and tenant's title.**

In a transaction undertaken to give effect to a tenant's notice, the landlord and the tenant are, unless they otherwise agree, bound by the following provisions<sup>1</sup>.

The landlord<sup>2</sup> may give to the tenant<sup>3</sup> a notice requiring him to pay a deposit on account of the premium payable for the lease at any time when the tenant's notice continues<sup>4</sup> in force<sup>5</sup>. The amount of the deposit must be £250, or 10 per cent of the amount proposed in the tenant's notice as payable on the grant of the lease<sup>6</sup>, whichever is the greater<sup>7</sup>. The tenant must pay the deposit so required to the landlord's solicitor or licensed conveyancer as stakeholder within the period of 14 days beginning with the date the notice is given<sup>8</sup>.

The tenant may<sup>9</sup> give to the landlord a notice requiring him to procure the return of the deposit to the tenant at any time after the tenant's notice is withdrawn, deemed to have been withdrawn or otherwise ceases to have effect<sup>10</sup>; and the landlord must comply with any such requirement within the period of 14 days beginning with the date the notice is given<sup>11</sup>. The landlord is, however, entitled to have deducted from the deposit any amount due to him from the tenant<sup>12</sup> in respect of his costs<sup>13</sup>.

The landlord may require the tenant to deduce his title to his tenancy, by giving him notice within the period of 21 days beginning with the relevant date<sup>14</sup>; and the tenant must comply

with any such requirement within the period of 21 days beginning with the date the notice is given<sup>15</sup>.

1 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 3. For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 For the meaning of 'the landlord' see PARA 1672 ante (definition applied by ibid reg 3, Sch 2 para 1).

3 'Tenant' means a tenant who has given a tenant's notice: ibid Sch 2 para 1.

4 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 42(8): see PARA 1677 ante.

5 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 2(1). As to the giving of notice see reg 4, cited in PARA 1646 ante.

6 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 (as amended) (premium and other amounts payable by tenant on grant of new lease): see PARA 1705 et seq post.

7 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 2(2).

8 Ibid Sch 2 para 2(3).

9 Ie subject to ibid Sch 2 para 3(3): see the text and notes 12-13 infra.

10 Ibid Sch 2 para 3(1).

11 Ibid Sch 2 para 3(2).

12 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 60: see PARA 1724 post.

13 See the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 3(3).

14 Ibid Sch 2 para 4(1) (substituted in relation to England by SI 2003/1990; and in relation to Wales by SI 2004/670). For the meaning of 'the relevant date' see PARA 1671 note 8 ante (definition applied by the Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 1).

15 Ibid Sch 2 para 4(2).

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## **1692. Landlord's counter-notice.**

The landlord<sup>1</sup> must give a counter-notice to the tenant<sup>2</sup> by the date specified<sup>3</sup> in the tenant's notice<sup>4</sup>; and the counter-notice must comply with one of the following requirements:

4005 (1) state that the landlord admits that the tenant had on the relevant date<sup>5</sup> the right to acquire a new lease<sup>6</sup> of his flat<sup>7</sup>;

4006 (2) state that, for such reasons as are specified in the counter-notice, the landlord does not admit that the tenant had such a right on that date;

- 4007 (3) contain such a statement as is mentioned in head (1) or head (2) above but state that the landlord intends to make an application for an order<sup>8</sup> on the grounds that he intends to redevelop any premises in which the flat is contained<sup>9</sup>.

If the counter-notice complies with the requirement set out in head (1) above, it must in addition:

- 4008 (a) state which, if any, of the proposals contained in the tenant's notice are accepted by the landlord and which, if any, of those proposals are not so accepted; and  
 4009 (b) specify, in relation to each proposal which is not accepted, the landlord's counter-proposal<sup>10</sup>.

The counter-notice must specify an address in England and Wales at which notices may be given<sup>11</sup> to the landlord<sup>12</sup>.

Where the counter-notice admits the tenant's right to acquire a new lease of his flat, the admission is binding on the landlord as to the specified matters<sup>13</sup>, unless the landlord shows that he was induced to make the admission by misrepresentation or the concealment of material facts; but the admission does not conclude any question whether the particulars of the flat stated in the tenant's notice<sup>14</sup> are correct<sup>15</sup>.

It has been held that the tenant may waive the statutory requirement that a counter-notice be served by the competent landlord<sup>16</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

3 le in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 s 42(3)(f): see PARA 1677 ante at head (6) in the text.

4 Ibid s 45(1). Any counter-notice given to the tenant by the competent landlord must specify the other landlords on whose behalf he is acting: s 40(3), Sch 11 para 5. See also *Lay v Ackerman* [2004] EWCA Civ 184, [2004] HLR 684, [2004] All ER (D) 109 (Mar) (counter-notice leaving tenants in doubt as to identity of landlord was invalid). As to the giving of notices see PARA 1541 ante; and for the meanings of 'the competent landlord' and 'other landlord' see PARA 1672 note 11 ante.

5 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

6 For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of 'flat' see PARA 1671 note 3 ante. It is not possible to identify some irreducible minimum unit that constitutes 'premises in which the [tenant's flat] is contained' for the purposes of ss 45 (as amended), 47 (see PARA 1694 post): see *Majorstake Ltd v Curtis* [2006] EWCA Civ 1171, [2006] 33 LS Gaz R 25, [2006] All ER (D) 47 (Aug) (the creation of a single maisonette out of two vertically adjacent flats did not seem to run counter to the purposes of the statute and that part of the building that comprised the two flats could properly be described as premises containing the tenant's flat just as much as the floor of the building on which the flat was situated).

8 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 47(1): see PARA 1694 post.

9 Ibid s 45(2). In s 45(2)(c) (see head (3) in the text) any reference to the competent landlord includes a reference to any of the other landlords or to any two or more of the following, namely the competent landlord and the other landlords, acting together; and in s 47(1), (2) references to the landlord are to be construed accordingly; but, if any of the other landlords intends to make such an application as is mentioned in s 45(2)(c), whether alone or together with any other person or persons, his name must be stated in the counter-notice: Sch 11 para 9(2).

In order to comply with s 45(2)(a), (3), a landlord's counter-notice must state (1) that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat, and (2) which (if any) of the proposals contained in the tenant's notice have been accepted by the landlord: see *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] Ch 256, [2002] 1 All ER 144 (where the counter-notice was held to be invalid).

10 Leasehold Reform, Housing and Urban Development Act 1993 s 45(3). The landlord's counter-proposal as to the amount of premium to be paid need not be a realistic figure: *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough* [2005] EWCA Civ 324 at [63], [2005] 4 All ER 1207, [2005] HLR 642 per Arden LJ.

11 le under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1693 et seq post.

12 Ibid s 45(4).

13 le the matters mentioned in ibid s 39(2)(a) (as amended): see PARA 1671 ante.

14 le in pursuance of ibid s 42(3)(b)(i): see PARA 1677 ante at head (2)(a) in the text.

15 Ibid s 45(5) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14).

16 See *Latifi v Colherne Court Freehold Ltd* [2002] EWHC 2873 (QB), [2003] 12 EG 130, [2002] All ER (D) 240 (Nov) (notice mistakenly served by an intermediate landlord).

## UPDATE

### 1692 Landlord's counter-notice

NOTE 7--*Majorstake*, cited, reversed: [2008] UKHL 10, [2008] 2 All ER 303.

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## (vi) Applications to Court or Leasehold Valuation Tribunal

### 1693. Proceedings relating to validity of tenant's notice.

Where:

- 4010 (1) the landlord<sup>1</sup> has given<sup>2</sup> the tenant<sup>3</sup> a counter-notice which<sup>4</sup> contains a statement that, for such reasons as are specified in the counter-notice, the landlord does not admit that the tenant had a right to acquire a new lease of his flat<sup>5</sup>; and
- 4011 (2) the court<sup>6</sup> is satisfied, on an application made by the landlord, that on the relevant date<sup>7</sup> the tenant had no right<sup>8</sup> to acquire a new lease of his flat,

the court must by order make a declaration to that effect<sup>9</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning with the date of the giving of the counter-notice to the tenant; and, if, in a case falling within head (1) above, either:



- 4012 (a) no application for such an order is made by the landlord within that period;  
or  
4013 (b) such an application is so made but is subsequently withdrawn,

the statutory provisions relating to the landlord's failure to give a counter-notice or a further counter-notice<sup>10</sup> apply as if the landlord had not given the counter-notice<sup>11</sup>.

If on any such application the court makes such a declaration, the tenant's notice ceases to have effect on the order becoming final<sup>12</sup>.

If, however, any such application is dismissed by the court, the court must make<sup>13</sup> an order:

- 4014 (i) declaring that the landlord's counter-notice is of no effect; and  
4015 (ii) requiring the landlord to give a further counter-notice to the tenant by such date as is specified in the order<sup>14</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 45 (as amended): see PARA 1692 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 Ie whether it complies with the requirement set out in the Leasehold Reform, Housing and Urban Development Act 1993 s 45(2)(b) or with that set out in s 45(2)(c): see PARA 1692 ante at heads (2)-(3) in the text.

5 Ie such a statement as is mentioned in ibid s 45(2)(b).

6 For the meaning of 'the court' see PARA 1539 note 3 ante.

7 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

8 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1694 et seq post.

9 Ibid s 46(1).

10 Ie ibid s 49: see PARA 1696 post.

11 Ibid s 46(2).

12 Ibid s 46(3). As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

13 Ie subject to ibid s 46(5): see note 14 infra.

14 Ibid s 46(4). Section 45(3) (see PARA 1692 ante) applies to any further counter-notice required to be given by the landlord under s 46(4) as if it were a counter-notice under s 45 (as amended) complying with the requirement set out in s 45(2)(a) (see PARA 1692 ante at head (1) in the text): s 46(6). Section 46(4) does not, however, apply if (1) the counter-notice complies with the requirement set out in s 45(2)(c); and (2) either an application for an order under s 47(1) (see PARA 1694 post) is pending or the period specified in s 47(3) (see PARA 1694 post) as the period for the making of such an application has not expired: s 46(5).

**1694. Application to defeat tenant's claim where landlord intends to redevelop.**

Where the landlord<sup>1</sup> has given<sup>2</sup> the tenant<sup>3</sup> a counter-notice which contains the requisite statement but states that the landlord intends to make an application to the court for an order on the grounds that he intends to redevelop any premises in which the flat is contained<sup>4</sup>, the court<sup>5</sup> may, on the application of the landlord, by order declare that the right to acquire a new lease<sup>6</sup> shall not be exercisable by the tenant by reason of the landlord's intention to redevelop any premises in which the tenant's flat<sup>7</sup> is contained; and, on such an order becoming final<sup>8</sup>, the tenant's notice ceases to have effect<sup>9</sup>.

Any application for such an order must be made within the period of two months beginning with the date of the giving of the counter-notice to the tenant; but, where the counter-notice contains the specified statement<sup>10</sup>, such an application may not be proceeded with until such time, if any, as any order dismissing an application as to the validity of the tenant's claim<sup>11</sup> becomes final<sup>12</sup>.

The court may not make an order under the above provisions<sup>13</sup> unless it is satisfied:

- 4016 (1) that the tenant's lease of his flat is due to terminate within the period of five years beginning with the relevant date<sup>14</sup>; and
- 4017 (2) that for the purposes of redevelopment the landlord intends, once the lease has so terminated, to demolish or reconstruct, or to carry out substantial works of construction on, the whole or a substantial part of any premises in which the flat is contained; and
- 4018 (3) that he could not reasonably do so without obtaining possession of the flat<sup>15</sup>.

Where an application for such an order is dismissed by the court, the court must make an order:

- 4019 (a) declaring that the landlord's counter-notice is of no effect; and
- 4020 (b) requiring the landlord to give a further counter-notice to the tenant by such date as is specified in the order<sup>16</sup>.

Where the landlord has given such a counter-notice<sup>17</sup> but either:

- 4021 (i) no application for an order<sup>18</sup> is made within the specified period<sup>19</sup>; or
- 4022 (ii) such an application is so made but is subsequently withdrawn,

the landlord must give<sup>20</sup> a further counter-notice to the tenant within the period of two months beginning with the appropriate date<sup>21</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 45 (as amended): see PARA 1692 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 Ie which complies with the requirement set out in the Leasehold Reform, Housing and Urban Development Act 1993 s 45(2)(c): see PARA 1692 ante at head (3) in the text.

5 For the meaning of 'the court' see PARA 1539 note 3 ante.

6 For the meaning of 'lease' see PARA 1535 note 3 ante.

7 For the meaning of 'flat' see PARA 1533 note 2 ante. The Leasehold Reform, Housing and Urban Development Act 1993 s 62(2) (meaning of references to a flat: see PARA 1671 note 3 ante) does not apply for the purposes of s 47: s 62(3)(a). It is not possible to identify some irreducible minimum unit that constitutes 'premises in which the [tenant's flat] is contained' for the purposes of ss 45 (as amended), 47: see *Majorstake Ltd v Curtis* [2006] EWCA Civ 1171, [2006] 33 LS Gaz R 25, [2006] All ER (D) 47 (Aug), cited in PARA 1692 note 7 ante.

8 As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 47(1). The authority given to the competent landlord by s 40(2) (see PARA 1672 ante) does not extend to the bringing of proceedings under s 47(1) on behalf of any of the other landlords, or preclude any of those landlords from bringing proceedings under that provision on his own behalf as if he were the competent landlord: see s 40(3), Sch 11 para 9(1), cited in PARA 1672 note 13 ante.

10 Ie where the counter-notice is one falling within *ibid* s 46(1)(a): see PARA 1693 ante at head (1) in the text.

11 Ie under *ibid* s 46(1): see PARA 1693 ante.

12 *Ibid* s 47(3).

13 Ie under *ibid* s 47(1): see the text and notes 1-9 *supra*.

14 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 47(2). As to the requisite intention on the part of the landlord in the context of the similarly worded provision in the Landlord and Tenant Act 1954 s 30(1) (f) see PARA 742 ante; and as to what constitutes demolition etc in that context see PARA 743 ante.

16 Leasehold Reform, Housing and Urban Development Act 1993 s 47(4). Section 45(3) (see PARA 1692 ante) applies to any further counter-notice required to be given by the landlord under s 47(4) or s 47(5) (see the text and notes 17-21 *infra*) as if it were a counter-notice under s 45 (as amended) complying with the requirement set out in s 45(2)(a): s 47(8).

17 Ie such a counter-notice as is mentioned in *ibid* s 47(1).

18 Ie under *ibid* s 47(1).

19 Ie the period referred to in *ibid* s 47(3).

20 Ie subject to *ibid* s 47(7): see note 21 *infra*.

21 *Ibid* s 47(5). For these purposes, 'the appropriate date' means (1) if s 47(5)(b)(i) (see head (i) in the text) applies, the date immediately following the end of the period referred to in s 47(3); and (2) if s 47(5)(b)(ii) (see head (ii) in the text) applies, the date of withdrawal of the application: s 47(6). See also note 16 *supra*.

Section 47(5) does not, however, apply if any application has been made by the landlord for an order under s 46(1): s 47(7).

## UPDATE

### 1694 Application to defeat tenant's claim where landlord intends to redevelop

NOTE 7--*Majorstake*, cited, reversed: [2008] UKHL 10, [2008] 2 All ER 303.

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**1695. Applications where terms in dispute or failure to enter into new lease.**

Where the landlord<sup>1</sup> has given the tenant<sup>2</sup>:

- 4023 (1) a counter-notice<sup>3</sup> which states that the landlord admits that the tenant had on the relevant date the right to acquire a new lease of his flat<sup>4</sup>; or
- 4024 (2) a further counter-notice<sup>5</sup>,

but any of the terms of acquisition<sup>6</sup> remain in dispute at the end of the period of two months beginning with the date when the counter-notice or further counter-notice was so given, a leasehold valuation tribunal may, on the application of either the tenant or the landlord, determine the matters in dispute<sup>7</sup>.

Any such application must be made not later than the end of the period of six months beginning with the date on which the counter-notice or further counter-notice was given to the tenant<sup>8</sup>. As well as the general particulars to be included with an application to a leasehold valuation tribunal<sup>9</sup>, the following documents and particulars must be included with an application under the above provisions:

- 4025 (a) a copy of any notice served in relation to the enfranchisement;
- 4026 (b) the name and address of the freeholder and any intermediate landlord;
- 4027 (c) the name and address of any person having a mortgage or other charge over an interest in the premises the subject of the application held by the freeholder or other landlord; and
- 4028 (d) a copy of the lease<sup>10</sup>.

The tribunal may, however, dispense with or relax any of the requirements of heads (a) to (d) above if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application<sup>11</sup>.

Where:

- 4029 (i) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in head (1) or head (2) above; and
- 4030 (ii) all the terms of acquisition have been either agreed between those persons or determined by a leasehold valuation tribunal,

but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period<sup>12</sup>, the court<sup>13</sup> may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice<sup>14</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period<sup>15</sup>; and any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period<sup>16</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

3 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 45 (as amended): see PARA 1692 ante.

4 le the requirement set out in *ibid* s 45(2)(a): see PARA 1692 ante at head (1) in the text.

5 le a further counter-notice required by or by virtue of *ibid* s 46(4) (see PARA 1693 ante) or s 47(4) or (5) (see PARA 1694 ante).

6 For these purposes, 'the terms of acquisition', in relation to a claim by a tenant under *ibid* Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1696 et seq post), means the terms on which the tenant is to acquire a new lease of his flat, whether they relate to the terms to be contained in the lease or to the premium or any other amount payable by virtue of s 56(1), Sch 13 (as amended) (see PARA 1705 et seq post) in connection with the grant of the lease, or otherwise: ss 48(7), 62(1). For the meaning of 'lease' see PARA 1535 note 3 ante; and for the meaning of 'flat' see PARA 1671 note 3 ante.

7 *Ibid* s 48(1). As to deemed withdrawal of the tenant's notice see PARA 1700 post.

8 *Ibid* s 48(2).

9 See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(1); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(1); and PARA 60 ante.

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(g), Sch 2 para 1(1)-(3), (6) (Sch 2 para 1(6) added by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(g), Sch 2 para 1(1)-(3), (6) (Sch 2 para 1(6) added by SI 2005/1356).

11 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

12 For these purposes, the appropriate period is (1) where all of the terms of acquisition have been agreed between the tenant and the landlord, the period of two months beginning with the date when those terms were finally so agreed; or (2) where all or any of those terms have been determined by a leasehold valuation tribunal under the Leasehold Reform, Housing and Urban Development Act 1993 s 48(1) (see the text and notes 1-7 supra), the period of two months beginning with the date when the decision of the tribunal under s 48(1) becomes final or such other period as may have been fixed by the tribunal when making its determination: s 48(6). As to when a decision of the tribunal is treated as becoming final see PARA 1587 note 8 ante.

13 For the meaning of 'the court' see PARA 1539 note 3 ante.

14 Leasehold Reform, Housing and Urban Development Act 1993 s 48(3). As to deemed withdrawal of the tenant's notice see PARA 1700 post.

15 *Ibid* s 48(5).

16 *Ibid* s 48(4). As to deemed withdrawal of the tenant's notice see PARA 1700 post.

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### **1696. Applications where landlord fails to give counter-notice or further counter-notice.**

Where the tenant's notice<sup>1</sup> has been given<sup>2</sup> but:

4031 (1) the landlord<sup>3</sup> has failed to give<sup>4</sup> the tenant<sup>5</sup> a counter-notice; or

4032 (2) if required<sup>6</sup> to give a further counter-notice to the tenant, the landlord has failed to comply with that requirement,

the court<sup>7</sup> may, on the application of the tenant, make an order determining, in accordance with the proposals contained in the tenant's notice, the terms of acquisition<sup>8</sup>.

Any application for such an order must be made not later than the end of the period of six months beginning with the date by which the counter-notice or further counter-notice was required to be given<sup>9</sup>.

The court may not make such an order on an application made by virtue of head (1) above unless it is satisfied:

- 4033 (a) that on the relevant date<sup>10</sup> the tenant had the right to acquire a new lease<sup>11</sup> of his flat<sup>12</sup>; and
- 4034 (b) if applicable, that the statutory requirements relating to procedure on the tenant's notice<sup>13</sup> were complied with as respects the giving of copies of the tenant's notice<sup>14</sup>.

Where:

- 4035 (i) the terms of acquisition have been determined by an order of the court; but
- 4036 (ii) a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period<sup>15</sup>,

the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice<sup>16</sup>.

Any application for such an order must be made not later than the end of the period of two months beginning immediately after the end of the appropriate period<sup>17</sup>; and any such order may provide for the tenant's notice to be deemed to have been withdrawn at the end of the appropriate period<sup>18</sup>.

1 For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante.

3 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 45(1): see PARA 1692 ante.

5 For the meaning of 'tenant' see PARA 1535 note 3 ante.

6 Ie by or by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 46(4) (see PARA 1693 ante) or s 47(4) or (5) (see PARA 1694 ante).

7 For the meaning of 'the court' see PARA 1539 note 3 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 49(1). The court has no discretion and must make an order in accordance with the proposals in the tenant's notice: *Willingale v Globalgrange Ltd* [2000] 2 EGLR 55, [2000] All ER (D) 320, CA (a case decided on the identical form of wording in the Leasehold Reform, Housing and Urban Development Act 1993 s 25 (as amended): see PARA 1613 ante). For the meaning of 'the terms of acquisition' see PARA 1695 note 6 ante. As to deemed withdrawal of the tenant's notice see PARA 1700 post.

- 9 Ibid s 49(3).
- 10 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.
- 11 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 12 For the meaning of 'flat' see PARA 1671 note 3 ante.
- 13 In the Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 Pt I (paras 1-4): see PARA 1677 et seq ante.
- 14 Ibid s 49(2).
- 15 For these purposes, the appropriate period is (1) the period of two months beginning with the date when the order of the court under ibid s 49(1) (see the text and notes 1-8 supra) becomes final; or (2) such other period as may have been fixed by the court when making that order: s 49(7). As to when an order of the court is treated as becoming final see PARA 1587 note 8 ante.
- 16 Ibid s 49(4). As to deemed withdrawal of the tenant's notice see PARA 1700 post.
- 17 Ibid s 49(6).
- 18 Ibid s 49(5). As to deemed withdrawal of the tenant's notice see PARA 1700 post.

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### **1697. Applications where landlord etc cannot be found.**

Where:

- 4037 (1) a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> desires to make a claim to exercise the right to acquire a new lease<sup>3</sup> of his flat; but
- 4038 (2) the landlord<sup>4</sup> cannot be found or his identity cannot be ascertained,

the court<sup>5</sup> may, on the application of the tenant, make a vesting order<sup>6</sup>.

Where:

- 4039 (a) a qualifying tenant of a flat desires to make such a claim; and
- 4040 (b) head (2) above does not apply; but
- 4041 (c) a copy of a notice of that claim cannot be given<sup>7</sup> to any person to whom it would otherwise be required to be so given because that person cannot be found or his identity cannot be ascertained,

the court may, on the application of the tenant, make an order dispensing with the need to give a copy of such a notice to that person<sup>8</sup>.

The court may not make an order on any such application unless it is satisfied:

- 4042 (i) that on the date of the making of the application the tenant had the right to acquire a new lease of his flat; and
- 4043 (ii) that on that date he would not have been precluded<sup>9</sup> from giving<sup>10</sup> a valid notice with respect to his flat<sup>11</sup>.

Before making any such order, the court may require the tenant to take such further steps by way of advertisement or otherwise as the court thinks proper for the purpose of tracing the person in question; and, if, after an application is made for a vesting order and before any lease is executed in pursuance of the application, the landlord is traced, no further proceedings may be taken with a view to a lease being so executed, but<sup>12</sup>:

4044 (A) the rights and obligations of all parties must be determined as if the tenant had, at the date of the application, duly given notice<sup>13</sup> of his claim to exercise the right to acquire a new lease of his flat; and

4045 (B) the court may give such directions as it thinks fit as to the steps to be taken for giving effect to those rights and obligations, including directions modifying or dispensing with<sup>14</sup> any of the statutory requirements<sup>15</sup>.

An application for a vesting order may be withdrawn at any time before execution of a lease<sup>16</sup> and, after it is withdrawn, head (A) above does not apply; but, where any step is taken, whether by the landlord or the tenant, for the purpose of giving effect to head (A) above in the case of any application, the application may not afterwards be withdrawn except with the consent of the landlord or by leave of the court; and the court may not give leave unless it appears to the court just to do so by reason of matters coming to the knowledge of the tenant in consequence of the tracing of the landlord<sup>17</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante.

3 For the meaning of 'lease' see PARA 1535 note 3 ante.

4 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

5 For the meaning of 'the court' see PARA 1539 note 3 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 50(1). As to vesting orders see PARA 1698 post. Where an application is made under s 50(1) or (2), it must be made by the issue of a claim form in accordance with the procedure under CPR Pt 8 (alternative procedure for claims: see CIVIL PROCEDURE vol 11 (2009) PARA 127) which need not be served on any other party; and the court may grant or refuse the application or give directions for its future conduct, including the addition as defendants of such persons as appear to have an interest in it: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.3(1), (2).

7 In accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 40(3), Sch 11 Pt I (paras 1-4): see PARA 1677 et seq ante.

8 Ibid s 50(2). Where an order has been made under s 50(2) dispensing with the need to give a copy of a notice under s 42 (as amended) to a particular person with respect to any flat, then, if (1) a notice is subsequently given under s 42 (as amended) with respect to that flat; and (2) in reliance on the order, a copy of the notice is not to be given to that person, the notice must contain a statement of the effect of the order: s 50(6). Where a notice under s 42 (as amended) contains such a statement in accordance with s 50(6), then, in determining for the purposes of any provision of Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1698 et seq post) whether the requirements of Sch 11 Pt I (paras 1-4) have been complied with in relation to the notice, those requirements are deemed to have been complied with so far as relating to the giving of the notice to the person referred to in s 50(6): s 50(7).

9 In accordance with any provision of ibid Pt I Ch II (as amended).

10 In accordance with ibid s 42 (as amended): see PARA 1677 ante.

11 Ibid s 50(3).

12 In accordance with ibid s 50(5): see the text and notes 16-17 infra.



13 See note 10 *supra*.

14 *Ie* directions modifying or dispensing with any of the requirements of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended) or of regulations made thereunder.

15 *Ibid* s 50(4).

16 *Ie* under *ibid* s 51(3); see PARA 1698 *post*.

17 *Ibid* s 50(5).

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### **1698. Vesting orders.**

A vesting order<sup>1</sup> is an order providing for the surrender of the tenant's<sup>2</sup> lease<sup>3</sup> of his flat<sup>4</sup> and for the granting to him of a new lease of it on such terms as may be determined by a leasehold valuation tribunal to be appropriate with a view to the lease being granted to him in like manner, so far as the circumstances permit, as if he had, at the date of his application, given notice<sup>5</sup> of his claim to exercise the right to acquire a new lease of his flat<sup>6</sup>. If a leasehold tribunal so determines in the case of such a vesting order, the order has effect in relation to property which is less extensive than that specified in the application on which the order was made<sup>7</sup>.

In connection with the determination by a leasehold valuation tribunal of any question as to the property to be demised by any such lease, or as to the rights with or subject to which it is to be demised, it is to be assumed, unless the contrary is shown, that the landlord<sup>8</sup> has no interest<sup>9</sup> in property other than the property to be demised and, for the purpose of excepting them from the lease, any minerals underlying that property<sup>10</sup>.

Where any lease is to be granted to a tenant by virtue of such a vesting order, then, on his paying into court the appropriate sum, there must be executed by such person as the court<sup>11</sup> may designate a lease which:

- 4046 (1) is in a form approved by a leasehold valuation tribunal; and
- 4047 (2) contains such provisions as may be so approved for the purpose of giving effect so far as possible to the statutory requirements<sup>12</sup>;

and that lease is effective to vest in the person to whom it is granted the property expressed to be demised by it, subject to and in accordance with the terms of the lease<sup>13</sup>.

The appropriate sum to be so paid into court is the aggregate of:

- 4048 (a) such amount as may be determined by a leasehold valuation tribunal to be the premium which is payable<sup>14</sup> in respect of the grant of the new lease;
- 4049 (b) such other amount or amounts, if any, as may be determined by such a tribunal to be payable<sup>15</sup> in connection with the grant of that lease; and
- 4050 (c) any amounts or estimated amounts determined by such a tribunal as being, at the time of execution of that lease, due to the landlord from the tenant,

whether due under or in respect of the tenant's lease of his flat or under or in respect of any agreement collateral thereto<sup>16</sup>.

Where any lease is so granted to a person, the payment into court of the appropriate sum is to be taken to have satisfied any claims against the tenant, his personal representatives or assigns in respect of the premium and any other amounts payable as mentioned in heads (a) and (b) above<sup>17</sup>.

1     le under the Leasehold Reform, Housing and Urban Development Act 1993 s 50(1): see PARA 1697 ante.

2     For the meaning of 'tenant' see PARA 1535 note 3 ante.

3     For the meaning of 'lease' see PARA 1535 note 3 ante.

4     For the meaning of 'flat' see PARA 1671 note 3 ante.

5     le under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante.

6     Ibid s 51(1). As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1695 ante at heads (a)-(d) in the text must be included with an application under s 51: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(h); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(h). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1695 the text and note 11 ante.

7     Leasehold Reform, Housing and Urban Development Act 1993 s 51(2).

8     For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

9     For the meaning of 'interest' see PARA 408 note 16 ante.

10    Leasehold Reform, Housing and Urban Development Act 1993 s 51(4).

11    le giving effect so far as possible to ibid s 56(1) (see PARA 1703 post) and s 57 (as amended) (see PARA 1714 et seq post), as s 57 (as amended) applies in accordance with s 51(7), (8). Subject to s 51(8), the following provisions, namely ss 57-59 (as amended) (see PARA 1714 et seq post); s 61 (see PARA 1725 post); and Sch 14 (as amended) (see PARA 1725 et seq post), apply, so far as capable of applying to a lease granted in accordance with s 51, to such a lease as they apply to a lease granted under s 56 (see PARA 1703 post); and s 56(6), (7) applies in relation to a lease granted in accordance with s 51 as it applies in relation to a lease granted under s 56: s 51(7). In its application to a lease granted in accordance with s 51: (1) s 57 (as amended) (see PARA 1714 et seq post) has effect as if (a) any reference to the relevant date were a reference to the date of the application under s 50(1) in pursuance of which the vesting order under that provision was made; and (b) in s 57(5) the reference to s 56(3)(a) were a reference to s 51(5)(c); and (2) s 58 (see PARA 1721 post) has effect as if (a) in s 58(3) the second reference to the landlord were a reference to the person designated under s 51(3); and (b) s 58(6)(a), (7) were omitted: s 51(8).

12    For the meaning of 'the court' see PARA 1539 note 3 ante.

13    Leasehold Reform, Housing and Urban Development Act 1993 s 51(3). As to the procedure for making a payment into court under s 51(3) see *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 14.5, cited in PARA 1618 note 13 ante.

14    le under the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 (as amended): see PARA 1705 et seq post.

15    See note 14 supra.

16    Leasehold Reform, Housing and Urban Development Act 1993 s 51(5).

17    Ibid s 51(6).

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## **(vii) Termination or Suspension of Acquisition Procedures**

### **1699. Withdrawal by tenant from acquisition of new lease.**

At any time before a new lease<sup>1</sup> is entered into in pursuance of the tenant's notice<sup>2</sup>, the tenant may withdraw that notice by the giving of a notice to that effect ('a notice of withdrawal')<sup>3</sup>.

A notice of withdrawal must be given:

- 4051 (1) to the landlord<sup>4</sup>;
- 4052 (2) to every other landlord<sup>5</sup>; and
- 4053 (3) to any third party<sup>6</sup> to the tenant's lease<sup>7</sup>.

Where a notice of withdrawal is so given by the tenant to any person, the tenant's liability<sup>8</sup> for costs incurred by that person is a liability for costs incurred by him down to the time when the notice is given to him<sup>9</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'the tenant's notice' see PARA 1677 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 s 52(1). As to the giving of notices see PARA 1541 ante.

4 I.e. the landlord for the purposes of *ibid* Pt I Ch II (ss 39-62) (as amended): see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

5 I.e. as defined by *ibid* s 40(4): see PARA 1672 note 11 ante.

6 For the meaning of 'third party' see PARA 1677 note 6 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 52(2).

8 I.e. under *ibid* s 60: see PARA 1724 post.

9 *Ibid* s 52(3).

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### **1700. Deemed withdrawal of tenant's notice.**

Where:

4054 (1) the landlord has given the tenant a counter-notice or further counter-notice and any of the terms of acquisition remain in dispute<sup>1</sup> but no application to a leasehold valuation tribunal is made<sup>2</sup> within the specified period<sup>3</sup>; or

4055 (2) the landlord has given the tenant a counter-notice or further counter-notice and all the terms of acquisition have either been agreed between those persons or determined by a leasehold valuation tribunal but a new lease has not been entered into<sup>4</sup> and no application to the court for an order is made<sup>5</sup> within the specified period<sup>6</sup>,

the tenant's notice<sup>7</sup> is deemed to have been withdrawn at the end of the period referred to in head (1) or head (2) above, as the case may be<sup>8</sup>.

Where the tenant's notice has been given but the landlord has failed to give the tenant a counter-notice or, if required to give a further counter-notice, has failed to comply with that requirement<sup>9</sup> but no application to the court for an order is made<sup>10</sup> within the specified period<sup>11</sup>, the tenant's notice is deemed to have been withdrawn at the end of that period<sup>12</sup>.

Where the terms of acquisition have been determined by an order of the court but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period<sup>13</sup> and no application to the court for an order is made<sup>14</sup> within the specified period<sup>15</sup>, the tenant's notice is deemed to have been withdrawn at the end of that period<sup>16</sup>.

1    Ie in a case to which the Leasehold Reform, Housing and Urban Development Act 1993 s 48(1) applies: see PARA 1695 ante.

2    Ie under *ibid* s 48(1).

3    Ie the period specified in *ibid* s 48(2): see PARA 1695 ante.

4    Ie in a case to which *ibid* s 48(3) applies: see PARA 1695 ante.

5    Ie under *ibid* s 48(3). For the meaning of 'the court' see PARA 1539 note 3 ante.

6    Ie the period specified in *ibid* s 48(5): see PARA 1695 ante.

7    For the meaning of 'the tenant's notice' see PARA 1677 ante.

8    Leasehold Reform, Housing and Urban Development Act 1993 s 53(1). The following provisions, namely s 43(3) (see PARA 1689 ante) s 48(4) (see PARA 1695 ante) and s 49(5) (see PARA 1696 ante), also make provision for a notice under s 42 (as amended) to be deemed to have been withdrawn at a particular time: s 53(4).

9    Ie in a case falling within *ibid* s 49(1)(a) or (b): see PARA 1696 ante at heads (1)-(2) in the text.

10   Ie under *ibid* s 49(1).

11   Ie the period specified in *ibid* s 49(3): see PARA 1696 ante.

12   *Ibid* s 53(2).

13   Ie in a case to which *ibid* s 49(4) applies: see PARA 1696 ante.

14   Ie under *ibid* s 49(4).

15   Ie the period specified in *ibid* s 49(6): see PARA 1696 ante.

16   *Ibid* s 53(3).

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### **1701. Suspension of tenant's notice during claim for collective enfranchisement.**

The operation of the tenant's notice<sup>1</sup> is suspended:

- 4056 (1) if, at the time when that notice is given:  
 261  
 111. (a) a notice has been given claiming to exercise the right to collective enfranchisement<sup>2</sup> with respect to any premises containing the tenant's flat<sup>3</sup>; and  
 112. (b) the relevant claim<sup>4</sup> is still current<sup>5</sup>,  
 262  
 4057 during the currency of that claim; and, so long as it is so suspended, no further notice may be given<sup>6</sup>, and no application may be made<sup>7</sup>, with a view to resisting or giving effect to the tenant's claim<sup>8</sup>;  
 4058 (2) during the currency of the relevant claim<sup>9</sup>:  
 263  
 113. (a) if, at any time when the tenant's notice continues in force, a notice claiming to exercise the right to collective enfranchisement is given with respect to any premises containing the tenant's flat; and  
 114. (b) as from the date which is the relevant date<sup>10</sup> in relation to that notice;  
 264  
 4059 and, so long as it is suspended, no further notice may be given<sup>11</sup>, and no application may be made or proceeded with<sup>12</sup>, with a view to resisting or giving effect to the tenant's claim<sup>13</sup>.

Where the operation of the tenant's notice is suspended:

- 4060 (i) by virtue of either head (1) or head (2) above, the landlord<sup>14</sup> must give the tenant a notice informing him of its suspension within the specified time<sup>15</sup>; and any such notice must in addition inform the tenant of the date on which the notice claiming to exercise the right to collective enfranchisement was given and:  
 265  
 115. (A) at the date at which this title states the law, of the name and address of the nominee purchaser for the time being appointed<sup>16</sup> in relation to<sup>17</sup> the relevant claim<sup>18</sup>; or  
 116. (B) as from a day to be appointed<sup>19</sup>, of the name and registered office of the RTE company by which it was given<sup>20</sup>;  
 266  
 4061 (ii) by virtue of head (1) above and as a result of the relevant claim<sup>21</sup> ceasing to be current, the operation of the tenant's notice subsequently ceases to be so suspended and the tenant's notice thereupon continues in force<sup>22</sup>, then, as from the date when the claim ceases to be current ('the termination date'), the statutory provisions relating to the right to have a new lease<sup>23</sup> apply as if there were substituted for the date specified in the tenant's notice<sup>24</sup> such date as results in the period of time intervening between the termination date and that date being equal to the period of time intervening between the relevant date and the date originally so specified<sup>25</sup>;

4062 (iii) by virtue of head (2) above, and its suspension began in the specified circumstances<sup>26</sup>, and as a result of the relevant claim<sup>27</sup> ceasing to be current, the operation of the tenant's notice subsequently ceases to be so suspended and the tenant's notice thereupon continues in force<sup>28</sup>, any relevant period<sup>29</sup> is deemed to have begun on the date when that claim ceases to be current<sup>30</sup>;

4063 (iv) by virtue of head (2) above, and its suspension began otherwise than in the specified circumstances<sup>31</sup>, and as a result of the relevant claim<sup>32</sup> ceasing to be current, the operation of the tenant's notice subsequently ceases to be so suspended and the tenant's notice thereupon continues in force<sup>33</sup>, any relevant period<sup>34</sup> is deemed to have begun on the date on which the tenant is given a notice<sup>35</sup> by the landlord or, if earlier, the date on which the tenant gives the landlord a notice informing him of the circumstances by virtue of which the operation of the tenant's notice has ceased to be suspended<sup>36</sup>.

1 For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

3 For the meaning of 'flat' see PARA 1533 note 2 ante. Ibid s 62(2) (meaning of references to a flat: see PARA 1671 note 3 ante) does not apply in this context: see s 62(3)(b); and PARA 1671 note 3 ante.

4 Ie the relevant claim under ibid Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante. For these purposes, 'the relevant claim under Chapter I', in relation to a notice under s 13 (as amended), means the claim in respect of which that notice is given: s 54(11)(a).

5 For these purposes, any claim is current if (1) the notice under ibid s 13 (as amended) continues in force under s 13(11) (as amended); or (2) a binding contract entered into in pursuance of that notice remains in force; or (3) where an order has been made under s 24(4)(a) or (b) (as amended) (see PARA 1612 ante) or s 25(6)(a) or (b) (as amended) (see PARA 1613 ante) with respect to any such premises as are referred to in s 54(1) or s 54(2) (see the text and notes 6-13 infra), as the case may be, any interests which by virtue of the order fall to be vested in the nominee purchaser (or, as from a day to be appointed (see note 19 infra), in the RTE company) for the purposes of Pt I Ch I (ss 1-38) (as amended) have yet to be so vested: s 54(11)(b) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 29(1), (3), as from a day to be appointed (see note 19 infra)). For the meaning of 'interest' see PARA 408 note 16 ante; for the meaning of 'the nominee purchaser' see PARAS 1576-1577 ante; and as to RTE companies see PARAS 1581-1583 ante.

6 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1702 et seq post.

7 See note 6 supra.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 54(1).

9 See note 4 supra.

10 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended): see PARA 1552 note 5 ante.

11 Ie under ibid Pt I Ch II (as amended).

12 See note 11 supra.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 54(2).

14 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

15 The time so specified is (1) if the operation of the tenant's notice is suspended by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 54(1) (see head (1) in the text), not later than the date specified in the tenant's notice in pursuance of s 42(3)(f) (see PARA 1677 ante at head (6) in the text); or (2) if it is suspended by virtue of s 54(2) (see head (2) in the text), as soon as possible after the date referred to in s 54(2): s 54(3)(a), (b).

16    Ie for the purposes of *ibid* s 15 (prospectively repealed): see PARAS 1576-1577 ante.

17    Ie in relation to the relevant claim under *ibid* Pt I Ch I (as amended): see note 4 supra.

18    *Ibid* s 54(3) (as originally enacted).

19    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

20    Leasehold Reform, Housing and Urban Development Act 1993 s 54(3) (prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 29(1), (2), as from a day to be appointed (see note 19 supra)).

21    See note 4 supra.

22    Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 42(8): see PARA 1677 ante.

23    Ie *ibid* Pt I Ch II (as amended).

24    Ie in pursuance of *ibid* s 42(3)(f).

25    *Ibid* s 54(4). Where s 54(4) or 54(5) or (7) (see heads (iii)-(iv) in the text) applies, the landlord must, as soon as possible after becoming aware of the circumstances by virtue of which the operation of the tenant's notice has ceased to be suspended as mentioned in s 54(4), (5) or (7), give the tenant a notice informing him that, as from the date when the relevant claim under Chapter I ceased to be current, the operation of his notice is no longer suspended: s 54(8). Section 54(8) does not, however, require the landlord to give any such notice if he has received a notice from the tenant under s 54(7): s 54(9).

26    The circumstances so specified are that the suspension of the operation of the tenant's notice began (1) before the date specified in the tenant's notice in pursuance of *ibid* s 42(3)(f) and before the landlord had given the tenant a counter-notice under s 45 (as amended) (see PARA 1692 ante); or (2) after the landlord had given the tenant a counter-notice under s 45 (as amended) complying with the requirement set out in s 45(2)(b) or (c) but before any application had been made for an order under s 46(1) (see PARA 1693 ante) or s 47(1) (see PARA 1694 ante) and before the period for making any such application had expired; or (3) after an order had been made under s 46(4) (see PARA 1693 ante) or s 47(4) (see PARA 1694 ante) but before the landlord had given the tenant a further counter-notice in accordance with the order and before the period for giving any such counter-notice had expired: s 54(6).

27    See note 4 supra.

28    See note 22 supra.

29    For these purposes, 'relevant period' means any period which (1) is prescribed by or under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-103) (as amended) for the giving of any notice, or the making of any application, in connection with the tenant's notice; and (2) was current at the time when the suspension of the operation of the tenant's notice began: s 54(10).

30    *Ibid* s 54(5).

31    Ie other than in circumstances falling within *ibid* s 54(6): see note 26 supra.

32    See note 4 supra.

33    See note 22 supra.

34    See note 29 supra.

35    Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 54(8): see note 25 supra.

36    *Ibid* s 54(7).

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### **1702. Effect on tenant's notice of institution of compulsory acquisition procedures.**

A notice given by a tenant<sup>1</sup> exercising the right to acquire a new lease of his flat<sup>2</sup> is of no effect if on the relevant date<sup>3</sup>:

- 4064 (1) any person or body of persons who has been, or could be, authorised to acquire the whole or part of the tenant's flat<sup>4</sup> compulsorily for any purpose has, with a view to its acquisition for that purpose, served notice to treat on the landlord<sup>5</sup> or the tenant or entered into a contract for the purchase of the interest<sup>6</sup> of either of them in the flat or part of it; and
- 4065 (2) the notice to treat or contract remains in force<sup>7</sup>.

A notice so given by a tenant ceases to have effect if, before a new lease is entered into in pursuance of it, any such person or body of persons as is mentioned above<sup>8</sup> so serves notice to treat<sup>9</sup>.

1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 I.e. a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of 'lease' see PARA 1535 note 3 ante.

3 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

4 For the meaning of 'flat' see PARA 1533 note 2 ante. The Leasehold Reform, Housing and Urban Development Act 1993 s 62(2) (meaning of references to a flat: see PARA 1671 note 3 ante) does not apply for the purposes of s 55(1): s 62(3)(a).

5 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

6 For the meaning of 'interest' see PARA 408 note 16 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 55(1).

8 I.e. any such person or body of persons as is mentioned in ibid s 55(1): see the text and notes 1-7 supra.

9 Ibid s 55(2). Where s 55(2) applies in relation to a notice given by a tenant under s 42 (as amended), then on the occasion of the compulsory acquisition in question the compensation payable in respect of any interest in the tenant's flat, whether or not the one to which the relevant notice to treat relates, must be determined on the basis of the value of the interest subject to and with the benefit of the rights and obligations arising from the tenant's notice and affecting that interest: s 55(3).

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### **(viii) Grant of New Lease**



## **A. IN GENERAL**

### **1703. Obligation to grant new lease.**

Where a qualifying tenant<sup>1</sup> of a flat<sup>2</sup> has a right<sup>3</sup> to acquire a new lease<sup>4</sup> of the flat and duly gives notice<sup>5</sup> of his claim, the landlord<sup>6</sup> is bound<sup>7</sup> to grant to the tenant, and the tenant is bound to accept:

- 4066 (1) in substitution for the existing lease<sup>8</sup>; and
- 4067 (2) on payment of the premium payable<sup>9</sup> in respect of the grant,

a new lease of the flat at a peppercorn rent for a term expiring 90 years after the term date<sup>10</sup> of the existing lease<sup>11</sup>.

In addition to any such premium there are payable by the tenant in connection with the grant of any such new lease such amounts to the owners of any intermediate leasehold interests<sup>12</sup> as are payable<sup>13</sup> by virtue of the relevant statutory provisions<sup>14</sup>.

A tenant is not entitled to require the execution of any such new lease otherwise than on tendering to the landlord, in addition to the amount of any such premium and any other amounts payable<sup>15</sup>, the amount so far as ascertained:

- 4068 (a) of any sums payable by him by way of rent or recoverable from him as rent in respect of the flat up to the date of tender;
- 4069 (b) of any sums for which at that date the tenant is liable<sup>16</sup> in respect of costs incurred by any relevant person<sup>17</sup>; and
- 4070 (c) of any other sums due and payable by him to any such person under or in respect of the existing lease;

and, if the amount of any such sums is not or may not be fully ascertained, on offering reasonable security for the payment of such amount as may afterwards be found to be payable in respect of them<sup>18</sup>.

No provision of any lease prohibiting, restricting or otherwise relating to a sub-demise by the tenant under the lease has effect with reference to the granting of any lease under the above provisions<sup>19</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante.

3 I.e. under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1705 et seq post.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 I.e. in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante.

6 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

7 I.e. except as provided in the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (as amended).

8 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

9 le the premium payable under the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 (as amended): see PARA 1705 et seq post.

10 For the meaning of 'the term date' see PARA 1544 note 5 ante.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 56(1). Nothing in any of the provisions specified in s 37, Sch 10 para 1(2) (as amended) (see PARA 1667 note 1 ante) applies to the granting of any lease under s 56: s 56(6). For these purposes, Sch 10 para 1(2) (as amended) has effect as if the reference to the Housing Act 1988 s 79(2) (as amended), which is not relevant in the context of the Leasehold Reform, Housing and Urban Development Act 1993 s 56(6), were omitted: s 56(7).

Where a lease is executed under s 56 or s 93(4) (as amended) (see PARA 1538 ante) or in pursuance of an order made under Pt I Ch II (as amended), then, subject to Sch 11 para 10(3), that instrument has effect for the creation of the tenant's new lease of his flat, and for the operation of the rights and obligations conferred and imposed by it, as if there had been a surrender and regrant of any subsisting lease intermediate between the interest of the competent landlord and the existing lease; and the covenants and other provisions of that instrument must be framed and take effect accordingly: s 40(3), Sch 11 para 10(1). Where a lease of the tenant's flat superior to the existing lease is vested in the tenant or a trustee for him, the new lease must include an actual surrender of that superior lease without a regrant; and it must accordingly be disregarded for the purposes of Sch 11 para 10(1): Sch 11 para 10(3). For the meaning of 'the competent landlord' see PARA 1672 note 11 ante.

12 le within the meaning of *ibid* Sch 13 (as amended): see PARA 1706 note 9 post. For the meaning of 'interest' see PARA 408 note 16 ante.

13 le by virtue of *ibid* Sch 13 (as amended).

14 *Ibid* s 56(2).

15 See note 13 *supra*.

16 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 60: see PARA 1724 post.

17 le within the meaning of *ibid* s 60: see PARA 1724 note 2 post.

18 *Ibid* s 56(3). To the extent that any amount tendered to the landlord in accordance with s 56(3) is an amount due to a person other than the landlord, that amount is payable to that person by the landlord; and s 56(3) has effect subject to s 40(5), Sch 11 para 7(2) (see PARA 1674 ante): s 56(4).

19 *Ibid* s 56(5).

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#### **1704. Deducing title, preparation of lease and completion.**

In a transaction undertaken to give effect to a tenant's notice, the landlord and the tenant are, unless they otherwise agree, bound by the following provisions<sup>1</sup>.

Where the landlord<sup>2</sup> has given a counter-notice<sup>3</sup> admitting the right to a new lease or a further counter-notice, or, if no such counter-notice or further counter-notice is given, the tenant<sup>4</sup> has applied to the court for an order determining the terms of acquisition<sup>5</sup>, the tenant may require the landlord to deduce title to his interest in the flat to which the tenant's notice relates by giving him notice<sup>6</sup>. The landlord must comply with any such requirement by giving the tenant:

- 4071 (1) in the case of an interest registered in the register of title kept at Her Majesty's Land Registry, all particulars and information which have to be given or may be required to be given on a sale of registered land;

4072 (2) in the case of any other interest, an epitome of title,

within the period of 28 days beginning with the date the notice is given<sup>7</sup>; and in a case where the landlord is not the freeholder, and the title to the freehold or any leasehold reversion to the landlord's title, if any, is not registered at Her Majesty's Land Registry, the landlord must use his best endeavours to obtain an epitome of that title and must also give it to the tenant<sup>8</sup>.

The tenant must give to the landlord a statement of any objections to or requisitions on the proof of title within the period of 14 days beginning with the date the proof is given, whether or not within the time required<sup>9</sup>. The landlord must give to the tenant an answer to any statement of objections or requisitions within the period of 14 days beginning with the date the statement is given<sup>10</sup>; and the tenant must give to the landlord a further statement of any objections to or comments on the answer within the period of seven days beginning with the date the answer is given<sup>11</sup>. Any objection or requisition not included in any statement given within the period referred to above is deemed waived, and any matter which could have been raised in a statement so given is deemed not to be a defect in title<sup>12</sup> for the statutory purposes<sup>13</sup>. Any objection not included in any further statement given within the period specified above is also deemed waived and any matter which could have been raised in a further statement so given is deemed not to form<sup>14</sup> a defect in the title<sup>15</sup>. If no further statement is given within the time specified above, the landlord's answer is to be considered satisfactory<sup>16</sup>.

The landlord must prepare a draft lease and give it to the tenant within the period of 14 days beginning with the date the terms of acquisition<sup>17</sup> are agreed or determined by a leasehold valuation tribunal<sup>18</sup>. The tenant must give to the landlord a statement of any proposals for amending the draft lease within the period of 14 days beginning with the date the draft lease is given<sup>19</sup>; and if no statement is given by the tenant within the time so specified he is deemed to have approved the draft lease<sup>20</sup>. The landlord must give to the tenant an answer giving any objections to or comments on the proposals in the statement within the period of 14 days beginning with the date the statement is given<sup>21</sup>; and if no answer is given by the landlord within the time so specified, he is deemed to have approved the amendments to the draft lease proposed by the tenant<sup>22</sup>. The landlord must prepare the lease and as many counterparts as he may reasonably require and must give the counterpart or counterparts to the tenant for execution a reasonable time before the completion date<sup>23</sup>. The tenant must give the counterpart or counterparts of the lease, duly executed, to the landlord and the landlord must give the lease, duly executed, to the tenant, on the completion date or as soon as possible afterwards<sup>24</sup>.

After the draft lease is approved or deemed to have been approved, either the landlord or the tenant may give the other notice<sup>25</sup> requiring him to complete the grant of the lease on the first working day after the expiration of 21 days beginning with the date the notice is given<sup>26</sup>; but this does not apply if the date for completion would fall after the expiry of the appropriate period specified for the statutory purposes<sup>27</sup> and in that event the date for completion must be such day as the landlord and tenant agree in writing or the court orders<sup>28</sup> under the relevant statutory provisions<sup>29</sup>. The landlord must by notice inform any other landlord who has given notice that he is acting independently<sup>30</sup> of the date for completion as soon as possible after notice has been given, or the date for completion has been agreed or ordered by the court, in accordance with the above provisions<sup>31</sup>. Completion must take place at the office of the landlord's solicitor or licensed conveyancer<sup>32</sup>.

Where a tenant's notice has been registered<sup>33</sup> as a land charge or a notice has been registered in respect of it, and it is withdrawn, deemed to have been withdrawn or otherwise ceases to have effect, the tenant must at the request of the landlord without delay take all steps necessary to procure cancellation of the registration<sup>34</sup>.

1 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, reg 3. For the meaning of 'the tenant's notice' see PARA 1677 ante.

2 For the meaning of 'the landlord' see PARA 1672 ante (definition applied by ibid reg 3, Sch 2 para 1).

3 Ie complying with the Leasehold Reform, Housing and Urban Development Act 1993 s 45(2)(a): see PARA 1692 ante.

4 For the meaning of 'tenant' see PARA 1535 note 3 ante.

5 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 49(1) (applications where landlord fails to give counter-notice or further counter-notice): see PARA 1696 ante.

6 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 5(1), (2).

7 Ibid Sch 2 para 5(3).

8 Ibid Sch 2 para 5(4). As to deducing title see generally SALE OF LAND.

9 Ibid Sch 2 para 6(1).

10 Ibid Sch 2 para 6(2).

11 Ibid Sch 2 para 6(3).

12 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 3(5) and as it is applied by Sch 13 para 8(1) (effect of defect in title on calculation of diminution in value of landlord's interest or any intermediate leasehold interest): see PARAS 1706, 1711 post.

13 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 6(4).

14 See note 12 supra.

15 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 6(5).

16 Ibid Sch 2 para 6(6).

17 For the meaning of 'terms of acquisition' see PARA 1695 note 6 ante (definition applied by ibid Sch 2 para 1).

18 Ibid Sch 2 para 7(1).

19 Ibid Sch 2 para 7(2).

20 Ibid Sch 2 para 7(3).

21 Ibid Sch 2 para 7(4).

22 Ibid Sch 2 para 7(5).

23 Ibid Sch 2 para 7(6).

24 Ibid Sch 2 para 7(7).

25 As to the giving of notices see ibid reg 4, cited in PARA 1646 ante.

26 Ibid Sch 2 para 8(1).

27 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 48 or s 49 (applications where terms in dispute or failure to enter into new lease, and applications where landlord fails to give counter-notice or further counter-notice): see PARAS 1695-1696 ante.

28 Ie under ibid s 48(3) or s 49(4) (order of the court on failure to enter into new lease): see PARAS 1695-1696 ante.

29 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 8(2).

30 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 11 para 7(2) (other landlords acting independently): see PARA 1674 ante.

31 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 8(3).

32 Ibid Sch 2 para 8(4).

33 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 97(1) (as amended): see PARA 1543 ante.

34 Leasehold Reform (Collective Enfranchisement and Lease Renewal) Regulations 1993, SI 1993/2407, Sch 2 para 9.

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## ***B. PREMIUM ETC PAYABLE BY TENANT ON GRANT***

### **1705. Premium payable by tenant.**

The premium payable by the tenant<sup>1</sup> in respect of the grant of the new lease<sup>2</sup> is the aggregate of:

- 4073 (1) the diminution in value of the landlord's interest<sup>3</sup> in the tenant's flat<sup>4</sup>;
- 4074 (2) the landlord's share of the marriage value<sup>5</sup>; and
- 4075 (3) any amount of compensation payable<sup>6</sup> to the landlord<sup>7</sup>.

1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 For the meaning of 'lease' see PARA 1535 note 3 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 le as determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 3 (as amended): see PARA 1706 post. For the meaning of 'the landlord' see PARA 1672 ante; and for the meaning of 'flat' see PARA 1671 note 3 ante. As to special categories of landlord see PARA 1545 et seq ante.

5 le as determined in accordance with ibid Sch 13 para 4 (as amended): see PARA 1707 post.

6 le under ibid Sch 13 para 5: see PARA 1708 post.

7 Ibid Sch 13 para 2.

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### 1706. Diminution in value of landlord's interest.

The diminution in value of the landlord's<sup>1</sup> interest<sup>2</sup> is the difference between:

- 4076 (1) the value of the landlord's interest in the tenant's<sup>3</sup> flat<sup>4</sup> prior to the grant of the new lease<sup>5</sup>; and
- 4077 (2) the value of his interest in the flat once the new lease is granted<sup>6</sup>.

The value of any such interest of the landlord as is mentioned in heads (1) and (2) above is<sup>7</sup> the amount which at the relevant date<sup>8</sup> that interest might be expected to realise if sold on the open market by a willing seller, with neither the tenant nor any owner of an intermediate leasehold interest<sup>9</sup> buying or seeking to buy, on the following assumptions:

- 4078 (a) on the assumption that the vendor is selling for an estate in fee simple or, as the case may be, such other interest as is held by the landlord, subject to the relevant lease<sup>10</sup> and any intermediate leasehold interests;
- 4079 (b) on the assumption that no right is conferred<sup>11</sup> to acquire any interest in any premises containing the tenant's flat or to acquire any new lease;
- 4080 (c) on the assumption that any increase in the value of the flat which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and
- 4081 (d) on the assumption that, subject to head (b) above, the vendor is selling with and subject to the rights and burdens with and subject to which the relevant lease has effect or, as the case may be, is to be granted<sup>12</sup>.

In determining any such amount there must be made such deduction, if any, in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer<sup>13</sup>.

The value of any such interest of the landlord as is mentioned in heads (1) and (2) above must not be increased by reason of:

- 4082 (i) any transaction which is entered into on or after 20 July 1993, otherwise than in pursuance of a contract entered into before that date and which involves the creation or transfer of an interest superior to, whether or not preceding, any interest held by the tenant; or
- 4083 (ii) any alteration on or after that date of the terms on which any such superior interest is held<sup>14</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 For the meaning of 'flat' see PARA 1671 note 3 ante.

5 For the meaning of 'lease' see PARA 1535 note 3 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 3(1).

7 ie subject to the provisions of ibid Sch 13 para 3 (as amended).

8 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

9 For these purposes, 'intermediate leasehold interest' means the interest of any person falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 40(4)(c) (see PARA 1672 note 11 ante), to the extent that it is an interest in the tenant's flat subsisting immediately before the grant of the new lease: Sch 13 para 1.

10 For these purposes, 'the relevant lease' means either the tenant's existing lease or the new lease, depending on whether the valuation is for the purposes of ibid Sch 13 para 3(1)(a) or (b): Sch 13 para 3(3). For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

11 le by ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante) and Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1707 et seq post).

12 Ibid Sch 13 para 3(2) (amended by the Housing Act 1996 s 110(2), (5); and by the Commonhold and Leasehold Reform Act 2002 s 134). The fact that the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 3(2) (as so amended) requires assumptions to be made as to the matters specified in Sch 13 para 3(2)(a)-(d) (see heads (a)-(d) in the text) does not, however, preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the relevant date any such interest of the landlord as is mentioned in Sch 13 para 3(1)(a) or (b) might be expected to realise if sold as mentioned in Sch 13 para 3(2) (as so amended): Sch 13 para 3(4) (amended by the Commonhold and Leasehold Reform Act 2002 s 134). For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 4.

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 3(5).

14 Ibid Sch 13 para 3(6). As to valuation under Sch 13 (as amended) see further Hague on Leasehold Enfranchisement (4th Edn, 2003) PARAS 33-03-33-04 and the unreported cases there cited.

## UPDATE

### 1706 Diminution in value of landlord's interest

NOTE 12--The value of the landlord's interest might be negative: *Nailrile Ltd v Earl Cadogan*; *Daejan Properties Ltd v Eyre Estate Trustees*; *Lalvani v Earl Cadogan*; *Metropolitan Properties Co (FGC) Ltd v Kingston*; *UAE Properties Ltd v Alim Investments Ltd* [2009] RVR 95.

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### 1707. Landlord's share of marriage value.

The marriage value is the amount referred to in heads (1) and (2) below<sup>1</sup> and the landlord's<sup>2</sup> share of the marriage value is 50 per cent of that amount<sup>3</sup>.

The marriage value is<sup>4</sup> the difference between the following amounts, namely:

4084 (1) the aggregate of:

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117. (a) the value of the interest<sup>5</sup> of the tenant<sup>6</sup> under his existing lease<sup>7</sup>;

118. (b) the value of the landlord's interest in the tenant's flat<sup>8</sup> prior to the grant of the new lease<sup>9</sup>; and

119. (c) the values prior to the grant of that lease of all intermediate leasehold interests<sup>10</sup>, if any; and

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4085 (2) the aggregate of:

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120. (a) the value of the interest to be held by the tenant under the new lease<sup>11</sup>;

121. (b) the value of the landlord's interest in the tenant's flat once the new lease is granted; and

122. (c) the values of all intermediate leasehold interests, if any, once that lease is granted<sup>12</sup>.

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Where, however, at the relevant date the unexpired term of the tenant's existing lease exceeds 80 years, the marriage value is taken to be nil<sup>13</sup>.

1     le the amount referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 4(2) (as amended): see heads (1)-(2) in the text.

2     For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

3     Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 135). For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 4.

4     le subject to the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4(2A) (as added): see the text and note 13 infra.

5     For the meaning of 'interest' see PARA 408 note 16 ante.

6     For the meaning of 'tenant' see PARA 1535 note 3 ante.

7     For the meaning of 'the existing lease' see PARA 1671 note 14 ante. For these purposes, the value of the interest of the tenant under his existing lease is to be determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4A (as added): Sch 13 para 4(3)(a) (Sch 13 para 4(3)(a), (aa) substituted, and Sch 13 paras 4A, 4B added, by the Housing Act 1996 s 110(3)-(5)).

Subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 4A (as added and amended), the value of the interest of the tenant under the existing lease is the amount which at the relevant date that interest might be expected to realise if sold on the open market by a willing seller (with neither the landlord nor any owner of an intermediate leasehold interest buying or seeking to buy) on the following assumptions: (1) on the assumption that the vendor is selling such interest as is held by the tenant subject to any interest inferior to the interest of the tenant; (2) on the assumption that Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante) and Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1708 et seq post) confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease; (3) on the assumption that any increase in the value of the flat which is attributable to an improvement carried out at his own expense by the tenant or by any predecessor in title is to be disregarded; and (4) on the assumption that (subject to head (2) supra) the vendor is selling with and subject to the rights and burdens with and subject to which any interest inferior to the existing lease of the tenant has effect: Sch 13 para 4A(1) (as so added: Sch 13 paras 4A(1), (2), 4B(1), (2) amended by the Commonhold and Leasehold Reform Act 2002 s 134). The fact that the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4A(1) (as so added and amended) requires assumptions to be made in relation to particular matters does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the relevant date the interest of the tenant under his existing lease might be expected to realise if sold as mentioned in that provision: Sch 13 para 4A(2) (as so added and amended). In determining any such amount there must be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer: Sch 13 para 4A(3) (as so added). Subject to Sch 13 para 4A(5) (as added), the value of the interest of the tenant under his existing lease is not to be increased by reason of: (a) any transaction which is entered into after 19 January 1996 and involves the creation or transfer of an interest inferior to the tenant's existing lease; or (b) any alteration after that date of the terms on which any such inferior interest is held (Sch 13 para 4A(4) (as so added)); but this does not apply to any transaction which falls within head (a) supra if: (i) the transaction is entered into in pursuance of a contract entered into on or before



the date there mentioned; and (ii) the amount of the premium payable by the tenant in respect of the grant of the new lease was determined on or before that date either by agreement or by a leasehold valuation tribunal under Pt I Ch II (as amended) (Sch 13 para 4A(5) (as so added)). For the meaning of 'lease' see PARA 1535 note 3 ante; for the meaning of 'the relevant date' see PARA 1671 note 8 ante; and for the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante. For the meaning of 'sale on the open market' see *Goldstein v Conley* [1999] 1 EGLR 95, [1999] 03 EG 137, Lands Tribunal. See also note 8 infra.

8 For the meaning of 'flat' see PARA 1671 note 3 ante.

9 For these purposes, the value of any such interest of the landlord as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4(2)(a) or (b) (see heads (1)-(2) in the text) is the amount determined for the purposes of Sch 13 para 3(1)(a) (see PARA 1706 ante) or Sch 13 para 3(1)(b) (see PARA 1706 ante), as the case may be: Sch 13 para 4(3)(b).

10 For these purposes, the value of any intermediate leasehold interest must be determined in accordance with *ibid* Sch 13 para 8 (as amended) (see PARA 1711 post), and must be so determined as at the relevant date: Sch 13 para 4(3)(c) (amended by the Commonhold and Leasehold Reform Act 2002 s 134).

11 For these purposes, the value of the interest to be held by the tenant under the new lease must be determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4B (as added and amended): Sch 13 para 4(3) (as substituted: see note 7 supra). Subject to the provisions of Sch 13 para 4B (as added and amended) the value of the interest to be held by the tenant under the new lease is the amount which at the relevant date that interest (assuming it to have been granted to him at that date) might be expected to realise if sold on the open market by a willing seller (with the owner of any interest superior to the interest of the tenant not buying or seeking to buy) on the following assumptions: (1) on the assumption that the vendor is selling such interest as is to be held by the tenant under the new lease subject to the inferior interests to which the tenant's existing lease is subject at the relevant date; (2) on the assumption that Pt I Ch I (as amended) and Pt I Ch II (as amended) confer no right to acquire any interest in any premises containing the tenant's flat or to acquire any new lease; (3) on the assumption that there is to be disregarded any increase in the value of the flat which would fall to be disregarded under Sch 13 para 4A(1)(c) (as added) (see note 7 head (3) supra) in valuing in accordance with that provision the interest of the tenant under his existing lease; and (4) on the assumption that (subject to head (2) supra) the vendor is selling with and subject to the rights and burdens with and subject to which any interest inferior to the tenant's existing lease at the relevant date then has effect: Sch 13 para 4B(1) (as added and amended: see note 7 supra). The fact that Sch 13 para 4B(1) (as so added and amended) requires assumptions to be made in relation to particular matters does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the relevant date the interest to be held by the tenant under the new lease might be expected to realise if sold as mentioned in that provision: Sch 13 para 4B(2) (as so added and amended). In determining any such amount there must be made such deduction (if any) in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer: Sch 13 para 4B(3) (as so added). Subject to Sch 13 para 4B(5) (as added), the value of the interest to be held by the tenant under the new lease is not to be decreased by reason of (a) any transaction which is entered into after 19 January 1996 and involves the creation or transfer of an interest inferior to the tenant's existing lease; or (b) any alteration after that date of the terms on which any such inferior interest is held (Sch 13 para 4B(4) (as so added)); but this does not apply to any transaction which falls within head (a) supra if (i) the transaction is entered into in pursuance of a contract entered into on or before the date mentioned in that provision; and (ii) the amount of the premium payable by the tenant in respect of the grant of the new lease was determined on or before that date either by agreement or by a leasehold valuation tribunal under Pt I Ch II (as amended) (Sch 13 para 4B(5) (as so added)).

12 *Ibid* Sch 13 para 4(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 136(1), (2)).

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 4(2A) (added by the Commonhold and Leasehold Reform Act 2002 s 136(1), (3)).

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## **1708. Compensation for loss arising out of grant of new lease.**

Where the landlord<sup>1</sup> will suffer any loss or damage in respect of:

- 4086 (1) any diminution in value of any interest<sup>2</sup> of the landlord in any property other than the tenant's<sup>3</sup> flat<sup>4</sup> which results from the grant to the tenant of the new lease<sup>5</sup>; and
- 4087 (2) any other loss or damage which results therefrom to the extent that it is referable to the landlord's ownership of any such interest,

there is payable to him such amount as is reasonable to compensate him for that loss or damage<sup>6</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'interest' see PARA 408 note 16 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 For the meaning of 'flat' see PARA 1671 note 3 ante.

5 For the meaning of 'lease' see PARA 1535 note 3 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 5(1), (2). Without prejudice to the generality of Sch 13 para 5(2)(b) (see head (2) in the text), the kinds of loss falling within Sch 13 para 5(2)(b) include loss of development value in relation to the tenant's flat to the extent that it is referable as therein mentioned: Sch 13 para 5(3). For these purposes, 'development value', in relation to the tenant's flat, means any increase in the value of the landlord's interest in the flat which is attributable to the possibility of demolishing, reconstructing, or carrying out substantial works of construction affecting, the flat, whether together with any other premises or otherwise: Sch 13 para 5(4).

As to compensation see further Hague on Leasehold Enfranchisement (4th Edn, 2003) PARA 33-08 and the unreported cases there cited.

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### ***C. AMOUNTS PAYABLE TO OWNERS OF INTERMEDIATE LEASEHOLD INTERESTS***

#### **1709. Amount payable to owner of intermediate interest.**

In connection with the grant of the new lease<sup>1</sup> to the tenant<sup>2</sup> there is payable by the tenant to the owner of any intermediate leasehold interest<sup>3</sup> an amount which is the aggregate of:

- 4088 (1) the diminution in value of that interest<sup>4</sup>; and
- 4089 (2) any amount of compensation payable<sup>5</sup> to him<sup>6</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

- 3 For the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante.
- 4 le as determined in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 7 (as amended): see PARA 1710 post.
- 5 le under ibid Sch 13 para 9: see PARA 1712 post.
- 6 Ibid Sch 13 para 6.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(6) INDIVIDUAL RIGHT OF TENANT TO ACQUIRE NEW LEASE/(viii) Grant of New Lease/C. AMOUNTS PAYABLE TO OWNERS OF INTERMEDIATE LEASEHOLD INTERESTS/1710. Diminution in value of intermediate interest.

### **1710. Diminution in value of intermediate interest.**

The diminution in value of any intermediate leasehold interest<sup>1</sup> is the difference between:

- 4090 (1) the value of that interest prior to the grant of the new lease<sup>2</sup>; and
- 4091 (2) the value of that interest once the new lease is granted<sup>3</sup>.

- 1 For the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante.
- 2 For the meaning of 'lease' see PARA 1535 note 3 ante.
- 3 Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 7(1). Each of those values must be determined, as at the relevant date, in accordance with Sch 13 para 8 (as amended) (see PARA 1711 post): Sch 13 para 7(2) (amended by the Commonhold and Leasehold Reform Act 2002 s 134). For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

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### **1711. Value of intermediate interests.**

The statutory provisions relating to the calculation of the diminution in value of the landlord's interest<sup>1</sup> apply<sup>2</sup> for determining the value of any intermediate leasehold interest<sup>3</sup> with such modifications<sup>4</sup> as are appropriate<sup>5</sup>.

The value of an intermediate leasehold interest which is the interest of the tenant under a minor intermediate lease<sup>6</sup> must, however, be calculated by applying the following formula:

$$P = £ \frac{R}{Y} - \frac{R}{Y(1+Y)^n}$$

where P equals the price payable; R equals the profit rent; Y equals the yield, expressed as a decimal fraction, from 2½% Consolidated Stock<sup>7</sup>; and n equals the period, expressed in years,

taking any part of a year as a whole year, of the remainder of the term of the minor intermediate lease as at the relevant date<sup>8</sup>.

1    le the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 3(2)-(6) (as amended): see PARA 1706 ante.

2    le subject to *ibid* Sch 13 para 8(2): see the text and notes 6-8 *infra*.

3    For the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante.

4    le such modifications as are appropriate to relate the Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 3(2)-(6) (as amended) to a sale of the interest in question but subject to the tenant's lease for the time being and to any leases intermediate between the interest in question and that lease. For the meanings of 'tenant' and 'lease' see PARA 1535 note 3 ante.

5    *Ibid* Sch 13 para 8(1).

6    For these purposes, 'a minor intermediate lease' means a lease complying with the following requirements, namely (1) it must have an expectation of possession of not more than one month; and (2) the profit rent in respect of the lease must be not more than £5 per year: *ibid* Sch 13 para 8(3). 'Profit rent' means an amount equal to that of the rent payable under the lease on which the minor intermediate lease is in immediate reversion, less that of the rent payable under the minor intermediate lease: Sch 13 para 8(4). Where the minor intermediate lease or that on which it is in immediate reversion comprises property other than the tenant's flat, then in Sch 13 para 8(4) the reference to the rent payable under it means so much of that rent as is apportioned to that flat: Sch 13 para 8(5). For the meaning of 'flat' see PARA 1671 note 3 ante.

The expectation of possession carried by a lease is the expectation which it carries at the relevant date of possession after the tenant's lease, on the basis that (a) subject to Sch 13 para 8(9), the tenant's lease terminates at the relevant date if its term date fell before then, or else it terminates on its term date; and (b) any other lease terminates on its term date: Sch 13 para 8(8) (Sch 13 para 8(6)-(8) amended by the Commonhold and Leasehold Reform Act 2002 s 134). In a case where before the relevant date for the purposes of Pt I Ch II (ss 39-62) (as amended) the immediate landlord of the tenant had given notice to quit terminating the tenant's lease on a date earlier than that date, the date specified in the notice to quit is to be substituted for the date specified in Sch 13 para 8(8)(a) (as amended): Sch 13 para 8(9). For the meaning of 'the relevant date' see PARA 1671 note 8 ante; and for the meaning of 'the term date' see PARA 1544 note 5 ante.

7    In calculating the yield from 2½% Consolidated Stock, the price of that stock is to be taken to be the middle market price at the close of business on the last trading day in the week before the relevant date: *ibid* Sch 13 para 8(7) (as amended: see note 6 *supra*).

8    *Ibid* Sch 13 para 8(2), (6) (as amended: see note 6 *supra*). See further Hague on Leasehold Enfranchisement (4th Edn, 2003) PARA 33-09 and the unreported cases there cited.

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### **1712. Compensation for loss arising out of grant of new lease.**

The statutory provisions relating to compensation for loss arising out of the grant of a new lease<sup>1</sup> apply in relation to the owner of any intermediate leasehold interest<sup>2</sup> as they apply in relation to the landlord<sup>3</sup>.

1    le the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 5: see PARA 1708 ante.

2    For the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante.

3 Leasehold Reform, Housing and Urban Development Act 1993 Sch 13 para 9. For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

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### **1713. Owners of intermediate interests entitled to part of marriage value.**

Where:

- 4092 (1) the premium payable by the tenant<sup>1</sup> in respect of the grant of the new lease<sup>2</sup> includes an amount in respect of the landlord's share of the marriage value<sup>3</sup>; and  
4093 (2) there are any intermediate leasehold interests<sup>4</sup>,

the amount payable to the landlord<sup>5</sup> in respect of his share of the marriage value must be divided between the landlord and the owners of any such intermediate interests in proportion to the amounts by which the values of their respective interests in the flat<sup>6</sup> will be diminished<sup>7</sup> in consequence of the grant of the new lease<sup>8</sup>.

1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 For the meaning of 'lease' see PARA 1535 note 3 ante.

3 As to the landlord's share of the marriage value see PARA 1707 ante.

4 For the meaning of 'intermediate leasehold interest' see PARA 1706 note 9 ante.

5 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

6 For the meaning of 'flat' see PARA 1671 note 3 ante.

7 For these purposes (1) the amount by which the value of the landlord's interest in the flat will be so diminished is the diminution in value of that interest as determined for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 56(1), Sch 13 para 2(a) (see PARA 1705 ante at head (1) in the text); and (2) the amount by which the value of any intermediate leasehold interest will be so diminished is the diminution in value of that interest as determined for the purposes of Sch 13 para 6(a) (see PARA 1709 ante at head (1) in the text): Sch 13 para 10(3).

8 Ibid Sch 13 para 10(1), (2). Where the owner of any intermediate leasehold interest is entitled in accordance with Sch 13 para 10(2) to any part of the amount payable to the landlord in respect of the landlord's share of the marriage value, the amount to which he is so entitled is payable to him by the landlord: Sch 13 para 10(4).

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## ***D. TERMS OF NEW LEASE***

### **1714. Terms of new lease; in general.**

The new lease<sup>1</sup> to be granted<sup>2</sup> to a tenant<sup>3</sup> must be<sup>4</sup> a lease on the same terms as those of the existing lease<sup>5</sup>, as they apply on the relevant date<sup>6</sup>, but with such modifications as may be required or appropriate to take account:

- 4094 (1) of the omission from the new lease of property included in the existing lease but not comprised in the flat<sup>7</sup>;
- 4095 (2) of alterations made to the property demised since the grant of the existing lease; or
- 4096 (3) in a case where the existing lease derives<sup>8</sup> from more than one separate leases, of their combined effect and of the differences, if any, in their terms<sup>9</sup>.

Provision must be made<sup>10</sup> by the terms of the new lease or by an agreement collateral thereto for the continuance, with any suitable adaptations, of any agreement collateral to the existing lease<sup>11</sup>.

The terms of the new lease must make provision excluding the right to acquire a new lease where a long lease has been created under the lease<sup>12</sup> and must reserve to the person who is for the time being the tenant's immediate landlord the right to obtain possession<sup>13</sup> of the flat<sup>14</sup>.

The new lease must contain a statement that it is a lease granted<sup>15</sup> under the statutory power<sup>16</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 Ie subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1715 et seq post) and in particular to the provisions as to rent and duration contained in s 56(1) (see PARA 1703 ante).

5 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

6 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

7 For the meaning of 'flat' see PARA 1671 note 3 ante.

8 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 7(6) (see PARA 1558 ante) as it applies in accordance with s 39(3) (as amended) (see PARA 1671 ante).

9 Ibid s 57(1). Section 57(1) has effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto: see s 57(6), cited in PARA 1719 post.

10 Ie subject to ibid s 57(4): see PARA 1718 post.

11 Ibid s 57(3). Section 57(3) has effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto: see PARA 1719 post.

12 Ie the terms of the new lease must make provision in accordance with ibid s 59(3): see PARA 1723 post.

13 Ie in accordance with ibid s 61: see PARA 1725 post.

14 Ibid s 57(7).

15 Ie a statement that it is a lease granted under ibid s 56.

16 Ibid s 57(11). Any such statement must comply with such requirements as may be prescribed by land registration rules under the Land Registration Act 2002: Leasehold Reform, Housing and Urban Development Act 1993 s 57(11) (amended by the Land Registration Act 2002 s 133, Sch 11 para 30(1), (2)). For the prescribed form of statement see the Land Registration Rules 2003, SI 2003/1417, r 196(2).

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### **1715. Provision of services etc.**

Where during the continuance of the new lease<sup>1</sup> the landlord<sup>2</sup> will be under any obligation for the provision of services, or for repairs, maintenance or insurance:

- 4097 (1) the new lease may require payments to be made by the tenant, whether as rent or otherwise, in consideration of those matters or in respect of the cost thereof to the landlord; and
- 4098 (2) if the terms of the existing lease<sup>3</sup> do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount, the terms of the new lease must make, as from the term date<sup>4</sup> of the existing lease, such provision as may be just for the making by the tenant of payments related to the cost from time to time to the landlord and for the tenant's liability to make those payments to be enforceable by distress, re-entry or otherwise in like manner as if it were a liability for payment of rent<sup>5</sup>.

1 I.e. the new lease to be granted to the tenant under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante. For the meaning of 'lease' see PARA 1535 note 3 ante; and for the meaning of 'tenant' see PARA 1535 note 3 ante.

2 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

3 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

4 For the meaning of 'the term date' see PARA 1544 note 5 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 57(2). Section 57(2) applies to the new lease on the basis that account is to be taken of obligations imposed on any of the other landlords by virtue of that or any superior lease: Sch 11 para 10(2). Where a lease of the tenant's flat superior to the existing lease is vested in the tenant or a trustee for him, the new lease must include an actual surrender of that superior lease without a regrant; and it must accordingly be disregarded for the purposes of Sch 11 para 10(2): Sch 11 para 10(3). Section 57(2) has effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto: see PARA 1719 post. For the meaning of 'other landlord' see PARA 1672 note 11 ante.

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### **1716. Covenants for title.**

In granting the new lease<sup>1</sup> the landlord<sup>2</sup> is not bound to enter into any covenant for title beyond:

- 4099 (1) those implied from the grant; and
- 4100 (2) those implied under Part I of the Law of Property (Miscellaneous Provisions) Act 1994<sup>3</sup> in a case where a disposition is expressed to be made with limited title guarantee<sup>4</sup>, but not including, in the case of an underlease, the covenant that there is no subsisting breach of a condition or tenant's obligation, and nothing which at that time would render the lease liable to forfeiture<sup>5</sup>;

and in the absence of agreement to the contrary he is entitled to be indemnified by the tenant in respect of any costs incurred by him in complying with the covenant for further assurance implied<sup>6</sup> by virtue of that Act<sup>7</sup>.

A person entering into any covenant required of him as landlord, whether under the above provision or otherwise, is entitled to limit his personal liability to breaches of that covenant for which he is responsible<sup>8</sup>.

1    le the new lease to be granted to the tenant under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante. For the meaning of 'lease' see PARA 1535 note 3 ante; and for the meaning of 'tenant' see PARA 1535 note 3 ante.

2    For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

3    le under the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

4    As to dispositions made with limited title guarantee see SALE OF LAND vol 42 (Reissue) PARA 351.

5    le the covenant in the Law of Property (Miscellaneous Provisions) Act 1994 s 4(1)(b): see SALE OF LAND vol 42 (Reissue) PARA 350.

6    le the covenant implied by virtue of *ibid* s 2(1)(b): see SALE OF LAND vol 42 (Reissue) PARA 350.

7    Leasehold Reform, Housing and Urban Development Act 1993 s 57(8) (s 57(8), (8A) substituted by the Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1, PARA 12(2)).

8    Leasehold Reform, Housing and Urban Development Act 1993 s 57(8A) (as substituted: see note 7 *supra*).

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### **1717. Grant of new lease after term date.**

Where the new lease<sup>1</sup> is granted after the term date<sup>2</sup> of the existing lease<sup>3</sup>, then on the grant of the new lease there is payable by the tenant to the landlord<sup>4</sup>, as an addition to the rent payable under the existing lease, any amount by which, for the period since the term date or the relevant date<sup>5</sup>, whichever is the later, the sums payable to the landlord in respect of the flat<sup>6</sup>, after making any necessary apportionment, for the provision of services, or for repairs,



maintenance or insurance<sup>7</sup>, fall short in total of the sums that would have been payable for such matters under the new lease if it had been granted on that date<sup>8</sup>.

1   le the new lease to be granted to the tenant under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante. For the meanings of 'lease' and 'tenant' see PARA 1535 note 3 ante.

2   For the meaning of 'the term date' see PARA 1544 note 5 ante.

3   For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

4   For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

5   For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

6   For the meaning of 'flat' see PARA 1671 note 3 ante.

7   le the matters referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 57(2): see PARA 1715 ante.

8   Ibid s 57(5). Section 56(3)(a) (see PARA 1703 ante at head (a) in the text) applies accordingly: s 57(5). Section 57(5) has effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto: see PARA 1719 post.

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### **1718. Excluded matters.**

There must be excluded<sup>1</sup> from the new lease<sup>2</sup> any term of the existing lease<sup>3</sup> or of any agreement collateral thereto in so far as that term:

- 4101 (1) provides for or relates to the renewal of the lease;
- 4102 (2) confers any option to purchase or right of pre-emption in relation to the flat<sup>4</sup> demised by the existing lease; or
- 4103 (3) provides for the termination of the existing lease before its term date<sup>5</sup> otherwise than in the event of a breach of its terms;

and there must be made in the terms of the new lease or any agreement collateral thereto such modifications as may be required or appropriate to take account of the exclusion of any such term<sup>6</sup>.

1   le for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 s 57(1), (3): see PARA 1714 ante.

2   le the new lease to be granted to the tenant under ibid s 56: see PARA 1703 ante. For the meanings of 'lease' and 'tenant' see PARA 1535 note 3 ante.

3   For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

4   For the meaning of 'flat' see PARA 1671 note 3 ante.

5   For the meaning of 'the term date' see PARA 1544 note 5 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 57(4). Section 57(4) has effect subject to any agreement between the landlord and the tenant as to the terms of the new lease or any agreement collateral thereto: see PARA 1719 post.

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### **1719. Changes to existing lease by agreement or to modify defects.**

The statutory provisions relating to the matters to be included in the new lease<sup>1</sup> have effect subject to any agreement between the landlord<sup>2</sup> and tenant<sup>3</sup> as to the terms of the new lease or any agreement collateral thereto; and either of them may require that for the purposes of the new lease any term of the existing lease<sup>4</sup> shall be excluded or modified in so far as it is necessary to do so in order to remedy a defect in the existing lease or it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date<sup>5</sup> of the provisions of that lease<sup>6</sup>.

1 le the Leasehold Reform, Housing and Urban Development Act 1993 s 57(1)-(5): see PARAS 1714-1715, 1717-1718 ante.

2 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

5 For the meaning of 'the relevant date' see PARA 1671 note 8 ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 57(6).

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### **1720. Third parties.**

Where any person is a third party<sup>1</sup> to the existing lease<sup>2</sup> or, not being the landlord<sup>3</sup> or tenant<sup>4</sup>, is a party to any agreement collateral thereto, then, subject to any agreement between him and the landlord and the tenant, he must be made a party to the new lease or, as the case may be, to an agreement collateral thereto, and must accordingly join in its execution; but nothing in this provision has effect so as to require the new lease or, as the case may be, any such collateral agreement to provide for him to discharge any function at any time after the term date<sup>5</sup> of the existing lease<sup>6</sup>.

Where:

- 4104 (1) any such person ('the third party') is to discharge any function down to the term date of the existing lease; but
- 4105 (2) it is necessary or expedient in connection with the proper enjoyment by the tenant of the property demised by the new lease for provision to be made for the continued discharge of that function after that date,

the new lease or an agreement collateral thereto must make provision for that function to be discharged after that date, whether by the third party or by some other person<sup>7</sup>.

- 1 For the meaning of 'third party' see PARA 1677 note 6 ante.
- 2 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.
- 3 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 4 For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 5 For the meaning of 'the term date' see PARA 1544 note 5 ante.
- 6 Leasehold Reform, Housing and Urban Development Act 1993 s 57(9).
- 7 Ibid s 57(10).

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## ***E. INTERESTS SUBJECT TO MORTGAGES; PRIORITY OF INTERESTS***

### **1721. Interests subject to mortgages; in general.**

A qualifying tenant<sup>1</sup> is entitled<sup>2</sup> to be granted<sup>3</sup> a new lease<sup>4</sup> despite the fact that the grant of the existing lease<sup>5</sup> was subsequent to the creation of a mortgage<sup>6</sup> on the landlord's<sup>7</sup> interest<sup>8</sup> and not authorised as against the persons interested in the mortgage; and a lease so granted:

- 4106 (1) is deemed to be authorised as against the persons interested in any mortgage on the landlord's interest, however created or arising; and
- 4107 (2) is binding on those persons<sup>9</sup>.

A lease so granted is not so binding on the persons interested in any such mortgage if the existing lease is granted on or after 1 November 1993 and, being granted subsequent to the creation of the mortgage, would not otherwise be binding on the persons interested in the mortgage<sup>10</sup>.

Where a lease is so granted and any person having a mortgage on the landlord's interest is thereby entitled to possession of the documents of title relating to that interest, the landlord must, within one month of the execution of the lease, deliver to that person a counterpart of it duly executed by the tenant<sup>11</sup>.

Where the existing lease is, immediately before its surrender on the grant of such a lease, subject to any mortgage, the new lease takes effect subject to the mortgage in substitution for the existing lease; and the terms of the mortgage, as set out in the instrument creating or evidencing it, accordingly apply in relation to the new lease in like manner as they applied in relation to the existing lease<sup>12</sup>.

Where:

- 4108 (a) a lease so granted takes effect subject to any such subsisting mortgage on the existing lease; and
- 4109 (b) at the time of execution of the new lease the person having the mortgage is thereby entitled to possession of the documents of title relating to the existing lease,

he is similarly entitled to possession of the documents of title relating to the new lease; and the tenant must deliver the new lease to him within one month of the date on which the lease is received from Her Majesty's Land Registry following its registration<sup>13</sup>.

Where:

- 4110 (i) the landlord fails so to deliver a counterpart of the new lease; or
- 4111 (ii) the tenant fails so to deliver the new lease,

the instrument creating or evidencing the mortgage in question applies as if the obligation to deliver a counterpart or, as the case may be, deliver the lease were included in the terms of the mortgage as set out in that instrument<sup>14</sup>.

A landlord granting a new lease is bound to take such steps as may be necessary to secure that the lease is not liable<sup>15</sup> to be defeated by persons interested in a mortgage on his interest; but a landlord is not obliged, in order to grant a lease for the statutory purposes<sup>16</sup>, to acquire a better title than he has or could require to be vested in him<sup>17</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante.

2 le subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 58(2): see the text and note 10 infra.

3 le under ibid s 56: see PARA 1703 ante.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 For the meaning of 'the existing lease' see PARA 1671 note 14 ante.

6 For these purposes, 'mortgage' includes a charge or lien: Leasehold Reform, Housing and Urban Development Act 1993 s 62(1).

7 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

8 For the meaning of 'interest' see PARA 408 note 16 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 s 58(1).

10 Ibid s 58(2); Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5. Where by reason of the Leasehold Reform, Housing and Urban Development Act 1993 s 58(2) it is necessary to make any payment to discharge the tenant's flat from a mortgage affecting the interest of any landlord, then, if the competent landlord is not the landlord liable or primarily liable in respect of the mortgage, he is not required to make that payment otherwise than out of money made available for the purpose by the landlord so liable; and it is the duty of that landlord to

provide for the mortgage being discharged: s 40(3), Sch 11 para 11. For the meaning of 'the competent landlord' see PARA 1672 note 11 ante.

11 Ibid s 58(3).

12 Ibid s 58(4).

13 Ibid s 58(5).

14 Ibid s 58(6).

15 Ie in accordance with ibid s 58(2): see the text and note 10 supra.

16 Ie for the purposes of ibid s 56: see PARA 1703 ante.

17 Ibid s 58(7).

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## **1722. Priority of interests on grant of new lease.**

Where a lease<sup>1</sup> granted under the statutory obligation to grant a new lease<sup>2</sup> takes effect subject to two or more interests<sup>3</sup> to which the existing lease<sup>4</sup> was subject immediately before its surrender, the interests have the same priority in relation to one another on the grant of the new lease as they had immediately before the surrender of the existing lease<sup>5</sup>; but this is subject to agreement to the contrary<sup>6</sup>.

Where a person who is entitled on the grant of a lease<sup>7</sup> to rights of occupation<sup>8</sup> in relation to the flat<sup>9</sup> comprised in that lease was entitled immediately before the surrender of the existing lease to rights of occupation in relation to the flat comprised in that lease, the rights to which he is entitled on the grant of the new lease are to be treated as a continuation of the rights to which he was entitled immediately before the surrender of the existing lease<sup>10</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 For these purposes, 'the existing lease', in relation to a lease granted under the Leasehold Reform, Housing and Urban Development Act 1993 s 56, means the lease surrendered on the grant of the new lease: s 58A(4) (s 58A added by the Housing Act 1996 s 117).

5 Leasehold Reform, Housing and Urban Development Act 1993 s 58A(1) (as added: see note 4 supra).

6 Ibid s 58A(2) (as added: see note 4 supra).

7 See note 2 supra.

8 For these purposes, 'rights of occupation' has the same meaning as in the Matrimonial Homes Act 1983 (repealed): Leasehold Reform, Housing and Urban Development Act 1993 s 58A(4) (as added: see note 4 supra). As to the rights of occupation of spouses, civil partners and cohabitants in respect of family homes see now the Family Law Act 1996 Pt IV (ss 30-63) (as amended); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

9 For the meaning of 'flat' see PARA 1671 note 3 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 s 58A(3) (as added: see note 4 supra).

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## ***F. FURTHER RENEWAL OR ENFRANCHISEMENT***

### **1723. Further renewal, but no security of tenure, after grant of new lease.**

The right to acquire a new lease<sup>1</sup> may be exercised in relation to a lease of a flat<sup>2</sup> despite the fact that the lease is<sup>3</sup> itself a new lease<sup>4</sup>.

Where a new lease has been granted:

- 4112 (1) none of the statutory provisions relating to security of tenure for tenants applies to the lease;
- 4113 (2) after the term date<sup>5</sup> of the lease none of the following provisions, namely:  
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  - 123. (a) the statutory provisions relating to security of tenure on the ending of long residential tenancies<sup>6</sup>; or
  - 124. (b) Part II of the Landlord and Tenant Act 1954<sup>7</sup>,  
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  - 4114 apply to any sublease directly or indirectly derived out of the lease; and
  - 4115 (3) after that date no person is entitled by virtue of any such sublease to retain possession under:  
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    - 125. (a) Part VII of the Rent Act 1977<sup>8</sup> or any enactment applying or extending that Part;
    - 126. (b) the Rent (Agriculture) Act 1976<sup>9</sup>; or
    - 127. (c) Part I<sup>10</sup> of the Housing Act 1988<sup>11</sup>.  
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Where a new lease has been granted, no long lease<sup>12</sup> created immediately or derivatively by way of sub-demise under the lease confers on the subtenant, as against the tenant's landlord, any right to acquire a new lease<sup>13</sup>.

Any person who:

- 4116 (i) grants a sublease to which heads (2) and (3) above will apply; or
- 4117 (ii) negotiates with a view to the grant of such a sublease by him or by a person for whom he is acting as agent,

must inform the other party that the sublease is to be derived out of a new lease granted under the statutory right<sup>14</sup>, unless either he knows that the other party is aware of it or he himself is unaware of it<sup>15</sup>.

Where any lease contains a statement to the effect that it is a new lease granted under the statutory right, the statement is conclusive<sup>16</sup> in favour of any person who is not a party to the lease, unless the statement appears from the lease to be untrue<sup>17</sup>.

1     Ie under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante, PARA 1724 et seq post. For the meaning of 'lease' see PARA 1535 note 3 ante.

2     For the meaning of 'flat' see PARA 1671 note 3 ante.

3     Ie despite the fact that the lease is itself a lease granted under the Leasehold Reform, Housing and Urban Development Act 1993 s 56: see PARA 1703 ante.

4     Ibid s 59(1). The provisions of Pt I Ch II (as amended) apply, with any necessary modifications, for the purposes of or in connection with any claim to exercise that right in relation to a lease so granted as they apply for the purposes of or in connection with any claim to exercise that right in relation to a lease which has not been so granted: s 59(1).

5     For the meaning of 'the term date' see PARA 1544 note 5 ante.

6     Ie the Landlord and Tenant Act 1954 s 1 (as amended) (see PARA 1196 ante) or the Local Government and Housing Act 1989 s 186, Sch 10 (as amended) (see PARA 1237 et seq ante).

7     Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

8     Ie the Rent Act 1977 Pt VII (ss 98-107) (as amended): see PARA 942 et seq ante.

9     As to the Rent (Agriculture) Act 1976 see PARA 1134 et seq ante.

10    Ie the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARAS 1011 et seq, 1183 et seq ante.

11    Leasehold Reform, Housing and Urban Development Act 1993 s 59(2).

12    For these purposes, 'long lease' is to be construed in accordance with ibid s 7 (as amended) (see PARA 1558 ante): s 59(3).

13    Ibid s 59(3). Section 59(3) applies on the basis that the reference therein to the tenant's landlord includes the immediate landlord from whom the new lease will be held and all superior landlords, including any superior to the competent landlord: Sch 11 para 10(2). Where a lease of the tenant's flat superior to the existing lease is vested in the tenant or a trustee for him, the new lease must include an actual surrender of that superior lease without a regrant; and it must accordingly be disregarded for the purposes of Sch 11 para 10(2): Sch 11 para 10(3). For the meaning of 'tenant' see PARA 1535 note 3 ante; for the meaning of 'the competent landlord' see PARA 1672 note 11 ante; and for the meaning of 'the existing lease' see PARA 1671 note 14 ante. As to special categories of landlord see PARA 1545 et seq ante.

14    Ie a lease granted under ibid s 56.

15    Ibid s 59(4).

16    Ie for the purposes of ibid s 59(2)-(4): see the text and notes 5-15 supra.

17    Ibid s 59(5).

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## **(ix) Costs in Connection with New Lease**

**1724. Costs incurred in connection with new lease to be paid by tenant.**

Where a notice is given by a qualifying tenant exercising his right to acquire a new lease of his flat<sup>1</sup>, the tenant by whom it is given is liable, to the extent that they have been incurred by any relevant person<sup>2</sup> in pursuance of the notice, for the reasonable costs of and incidental to any of the following matters, namely:

- 4118 (1) any investigation reasonably undertaken of the tenant's right to a new lease;
- 4119 (2) any valuation of the tenant's flat obtained for the purpose of fixing the premium or any other amount payable<sup>3</sup> in connection with the grant of a new lease under the statutory right<sup>4</sup>;
- 4120 (3) the grant of a new lease under that right;

but the above provisions do not apply to any costs if on a sale made voluntarily a stipulation that they were to be borne by the purchaser would be void<sup>5</sup>.

Any costs incurred by a relevant person in respect of professional services rendered by any person are only to be regarded as reasonable if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs<sup>6</sup>.

Where<sup>7</sup> the tenant's notice ceases to have effect, or is deemed to have been withdrawn<sup>8</sup>, at any time, the tenant's liability for costs incurred by any person is a liability for costs incurred by him down to that time<sup>9</sup>; but a tenant is not so liable for any costs if the tenant's notice ceases<sup>10</sup> to have effect<sup>11</sup>.

The tenant is not so liable for any costs which a party to any proceedings<sup>12</sup> before a leasehold valuation tribunal incurs in connection with the proceedings<sup>13</sup>.

1    I.e. a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended): see PARA 1677 ante. For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante; for the meaning of 'lease' see PARA 1535 note 3 ante; and for the meaning of 'flat' see PARA 1671 note 3 ante.

2    For these purposes, 'relevant person', in relation to a claim by a tenant under *ibid* Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1725 et seq post), means the landlord for the purposes of Pt I Ch II (as amended) (see PARA 1672 ante), any other landlord, as defined by s 40(4) (see PARA 1672 note 11 ante), or any third party to the tenant's lease: s 60(6). For the meaning of 'third party' see PARA 1677 note 6 ante. As to special categories of landlord see PARA 1545 et seq ante.

3    I.e. under *ibid* s 56(1), Sch 13 (as amended): see PARA 1705 et seq ante.

4    I.e. under *ibid* s 56: see PARA 1703 ante.

5    Ibid s 60(1). As to the avoidance of certain stipulations made on the sale of land see the Law of Property Act 1925 s 48; and SALE OF LAND vol 42 (Reissue) PARA 130.

For the purposes of stamp duty land tax, any liability of the tenant for costs under the Leasehold Reform, Housing and Urban Development Act 1993 s 60 does not count as chargeable consideration: see the Finance Act 2003 s 120, Sch 17A para 10(1)(f) (as added); and PARA 124 ante.

6    Leasehold Reform, Housing and Urban Development Act 1993 s 60(2).

7    I.e. by virtue of any provision of *ibid* Pt I Ch II (as amended).

8    As to the deemed withdrawal of the tenant's notice see PARA 1700 ante.

9    Leasehold Reform, Housing and Urban Development Act 1993 s 60(3).

10   I.e. by virtue of *ibid* s 47(1) (see PARA 1694 ante) or s 55(2) (see PARA 1702 ante).



11 Ibid s 60(4).

12 Ie under ibid Pt I Ch II (as amended).

13 Ibid s 60(5). As to the tenant's liability to pay costs see further Hague on Leasehold Enfranchisement (4th Edn, 2003) PARA 32-18 and the unreported case there cited.

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## **(x) Landlord's Right to Terminate New Lease**

### **1725. In general.**

Where a lease<sup>1</sup> of a flat<sup>2</sup> ('the new lease') has been granted<sup>3</sup> but the court is satisfied, on an application made by the landlord<sup>4</sup>:

4121 (1) that for the purposes of redevelopment the landlord intends to demolish or reconstruct, or to carry out substantial works of construction on, the whole or a substantial part of any premises in which the flat is contained; and

4122 (2) that he could not reasonably do so without obtaining possession of the flat,

the court must by order declare that the landlord is entitled as against the tenant to obtain possession of the flat and the tenant is entitled to be paid compensation by the landlord for the loss of the flat<sup>5</sup>.

An application for such an order may be made:

4123 (a) at any time during the period of 12 months ending with the term date<sup>6</sup> of the lease in relation to which the right to acquire a new lease was exercised; and

4124 (b) at any time during the period of five years ending with the term date of the new lease<sup>7</sup>.

Where an order is so made, the new lease determines, and compensation becomes payable, in accordance with the statutory provisions<sup>8</sup> relating to determination and compensation<sup>9</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante. For these purposes, except in the Leasehold Reform, Housing and Urban Development Act 1993 s 61(1)(a) or (b) (see heads (1)-(2) in the text), any reference to the flat held by the tenant under the new lease includes any premises let with the flat under that lease: s 61(5). For the meaning of 'tenant' see PARA 1535 note 3 ante; and for the meaning of references to property let with other property see PARA 1657 note 2 ante.

3 Ie under ibid s 56: see PARA 1703 ante.

4 For the meaning of 'the landlord' see PARA 1672 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 61(1). As to the requisite intention on the part of the landlord in the context of the similarly-worded provision in the Landlord and Tenant Act 1954 s 30(1) (f) see PARA 742 ante; and as to what constitutes demolition etc in that context see PARA 743 ante.

6 For the meaning of 'the term date' see PARA 1544 note 5 ante.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 61(2). Where the new lease is not the first lease to be granted under s 56 in respect of a flat, s 61(2) applies as if s 61(2)(b) (see head (b) in the text) included a reference to the term date of any previous lease granted under s 56 in respect of the flat; but s 61(2)(a) (see head (a) in the text) is to be taken to be referring to the term date of the lease in relation to which the right to acquire a new lease was first exercised: s 61(3).

8 *Ibid* s 61(4), Sch 14 (as amended): see PARA 1726 et seq post. Schedule 14 (as amended) has effect where a tenant of a flat is entitled to be paid compensation under s 61 or would be so entitled on the landlord obtaining an order for possession or where an application for such an order is dismissed or withdrawn: Sch 14 para 1(1). For these purposes, 'order for possession' means an order made under s 61; and 'application for possession' means a landlord's application under s 61: Sch 14 para 1(2).

9 *Ibid* s 61(4). The provisions of Sch 14 have effect as regards the measure of compensation payable by virtue of any such order and the effects of any such order where there are subleases, and as regards other matters relating to orders and applications under s 61: s 61(4).

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### **1726. Date when compensation payable.**

Where an order for possession<sup>1</sup> is made:

4125 (1) the new lease<sup>2</sup> determines; and

4126 (2) the compensation payable to the tenant<sup>3</sup> by virtue of the order becomes payable,

on such date as may, when the amount of compensation has been determined either by agreement between the landlord<sup>4</sup> and the tenant or by a leasehold valuation tribunal<sup>5</sup>, be fixed by order of the court made on the application of either the landlord or the tenant<sup>6</sup>.

Where, however, the application for possession<sup>7</sup> was made during the period of 12 months ending with the term date of the lease in relation to which the right to acquire a new lease was exercised<sup>8</sup>, an order of the court may not fix a date earlier than:

4127 (a) the term date<sup>9</sup> of the lease in relation to which the right to acquire a new lease was exercised; or

4128 (b) in a case where the new lease was not the first such lease to be granted<sup>10</sup>, the term date of the lease in relation to which the right to acquire a new lease was first exercised<sup>11</sup>.

In fixing the date the court must have regard to the conduct of the parties and to the extent to which the landlord has made reasonable preparations for proceeding with the redevelopment, including the obtaining of, or preparations relating to the obtaining of, any requisite permission or consent, whether from any authority whose permission or consent is required under any enactment or from the owner of an interest<sup>12</sup> in any property<sup>13</sup>.

The court may by order direct that the whole or part of the compensation payable to the tenant shall be paid into court, if the court thinks it expedient to do so for the purpose of ensuring that the sum paid is available for meeting any mortgage<sup>14</sup> on the tenant's interest in the flat<sup>15</sup> in question, or for the purpose of division, or for any other purpose<sup>16</sup>.

Where an order has been so made by a county court, that court or another county court has jurisdiction to hear and determine any proceedings brought by virtue of the order to recover possession of the property or to recover the compensation<sup>17</sup>.

- 1 For the meaning of 'order for possession' see PARA 1725 note 8 ante.
- 2 For these purposes, 'the new lease' has the same meaning as in the Leasehold Reform, Housing and Urban Development Act 1993 s 61 (see PARA 1725 ante): s 61(4), Sch 14 para 1(2).
- 3 For the meaning of 'tenant' see PARA 1535 note 3 ante.
- 4 For the meaning of 'landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.
- 5 As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1695 ante at heads (a)-(d) in the text must be included with an application to a leasehold valuation tribunal under the above provisions: see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(I); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(I). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1695 the text and note 11 ante.
- 6 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 2(1). As to the circumstances in which Sch 14 (as amended) applies see PARA 1725 note 8 ante.
- 7 For the meaning of 'application for possession' see PARA 1725 note 8 ante.
- 8 Ie where the application for possession was made by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 61(2)(a): see PARA 1725 ante at head (a) in the text.
- 9 For the meaning of 'the term date' see PARA 1544 note 5 ante.
- 10 Ie in a case where the Leasehold Reform, Housing and Urban Development Act 1993 s 61(2)(a) applies by virtue of s 61(3): see PARA 1725 note 7 ante.
- 11 Ibid Sch 14 para 2(2).
- 12 For the meaning of 'interest' see PARA 408 note 16 ante.
- 13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 2(3).
- 14 For the meaning of 'mortgage' see PARA 1721 note 6 ante.
- 15 For these purposes, except in the case of the reference in the Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 5(1)(b) (see PARA 1728 post) to the flat as a dwelling, references to the flat held by the tenant under the new lease are to be construed in accordance with s 61(5) (see PARA 1725 note 2 ante): Sch 14 para 1(2). For the meaning of 'dwelling' see PARA 1533 note 2 ante.
- 16 Ibid Sch 14 para 2(4).
- 17 Ibid Sch 14 para 4.

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## **1727. Subleases.**

On the termination of a lease<sup>1</sup> under an order for possession<sup>2</sup> there terminates also any immediate or derivative sublease; and the tenant<sup>3</sup> is bound to give up possession of the flat<sup>4</sup> in question to the landlord<sup>5</sup> except in so far as he is precluded from doing so by the rights of other persons to retain possession under or by virtue of any enactment<sup>6</sup>.

Where a sublease of property comprised in the lease has been created after the date of the application for possession<sup>7</sup>, no person is entitled in respect of that sublease under any specified provisions relating to retaining possession on the termination of a superior tenancy<sup>8</sup> to retain possession of that property after the termination of the lease under the order for possession<sup>9</sup>.

In exercising its jurisdiction the court must assume that the landlord, having obtained an order for possession, will not be precluded from obtaining possession by the right of any person to retain possession by virtue of specified statutory provisions relating to security of tenure<sup>10</sup> or otherwise<sup>11</sup>.

1 For the meaning of 'lease' see PARA 1535 note 3 ante.

2 For the meaning of 'order for possession' see PARA 1725 note 8 ante.

3 For the meaning of 'tenant' see PARA 1535 note 3 ante.

4 For the meaning of references to the flat held by the tenant under the new lease see PARA 1726 note 15 ante; and for the meaning of 'the new lease' see PARA 1726 note 2 ante.

5 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

6 Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 3(1). As to the circumstances in which Sch 14 (as amended) applies see PARA 1725 note 8 ante.

A person in occupation of any property under a sublease liable to terminate under Sch 14 para 3(1) may, with the leave of the court, appear and be heard on any application for possession or any application under Sch 14 para 2 (see PARA 1726 ante): Sch 14 para 3(4). For the meaning of 'the court' see PARA 1539 note 3 ante.

7 For the meaning of 'application for possession' see PARA 1725 note 8 ante.

8 I.e. the Rent Act 1977 s 137(2) (see PARA 976 ante) or any enactment, including s 137(5) (as amended) (see PARA 977 ante), applying or extending it, the Rent (Agriculture) Act 1976 s 9(2) (see PARA 1167 ante) as extended by s 9(5) (as amended) (see PARA 1167 ante) and the Housing Act 1988 s 18(1) (see PARA 1085 ante).

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 3(2).

10 I.e. the Rent Act 1977 Pt VII (ss 98-107) (as amended) (see PARAS 942-944, 959, 972, 1002 et seq ante) or any enactment applying or extending Pt VII (ss 98-107) (as amended), the Rent (Agriculture) Act 1976 (see PARA 1134 et seq ante) or the Housing Act 1988 Pt I (ss 1-45) (as amended) (see PARA 1011 et seq ante).

11 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 3(3).

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## **1728. Amount of compensation.**

The amount payable to a tenant<sup>1</sup>, by virtue of an order for possession<sup>2</sup>, by way of compensation for loss of his flat<sup>3</sup> is the amount which at the valuation date<sup>4</sup> the new lease, if sold on the open market by a willing seller, might be expected to realise on the following assumptions:

- 4129 (1) on the assumption that no right is conferred<sup>5</sup> to acquire any interest<sup>6</sup> in any premises containing the tenant's flat or to acquire any new lease;
- 4130 (2) on the assumption that the vendor is selling:
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128. (a) subject to the rights of any person who will on the termination of the lease be entitled to retain possession as against the landlord<sup>7</sup>, but otherwise with vacant possession; and
129. (b) subject to any restriction that would be required, in addition to any imposed by the terms of the lease, to limit the uses of the flat to those to which it has been put since the commencement of the lease and to preclude the erection of any new dwelling<sup>8</sup> or any other building not ancillary to the flat<sup>9</sup> as a dwelling; and
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- 4131 (3) on the assumption that, subject to heads (1) and (2) above, the vendor is selling with and subject to the rights and burdens with and subject to which the flat will be held by the landlord on the termination of the lease<sup>10</sup>.

In determining any such amount there must be made such deduction, if any, in respect of any defect in title as on a sale of that interest on the open market might be expected to be allowed between a willing seller and a willing buyer<sup>11</sup>.

1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 For the meaning of 'order for possession' see PARA 1725 note 8 ante.

3 For the meaning of references to a flat held by a tenant under the new lease see PARA 1726 note 15 ante; and for the meaning of 'the new lease' see PARA 1726 note 2 ante.

4 For these purposes, 'the valuation date' means the date when the amount of the compensation payable to the tenant is determined as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 2(1) (see PARA 1726 ante); Sch 14 para 5(4).

5 le by ibid Pt Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante) or Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante, PARA 1729 et seq post).

6 For the meaning of 'interest' see PARA 408 note 16 ante.

7 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

8 For the meaning of 'dwelling' see PARA 1533 note 2 ante.

9 For the meaning of 'flat' for these purposes see PARA 1533 note 2 ante.

10 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 5(1). As to the circumstances in which Sch 14 (as amended) applies see PARA 1725 note 8 ante.

The fact that Sch 14 para 5(1) requires assumptions to be made as to the matters specified in Sch 14 para 5(1) (a)-(c) (see heads (1)-(3) in the text) does not preclude the making of assumptions as to other matters where those assumptions are appropriate for determining the amount which at the valuation date the new lease might be expected to realise if sold as mentioned in Sch 14 para 5(1): Sch 14 para 5(2).

The Landlord and Tenant Act 1927 Pt I (ss 1-17) (as amended) (see PARA 789 et seq ante) does not apply on the termination of the new lease or any sublease in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 (as amended); and a request for a new tenancy under the Landlord and Tenant Act 1954 s 26 (as amended) (see PARA 718 ante) in respect of the new lease or any sublease is of no effect if made after the application for possession, or ceases to have effect on the making of that application: Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 6(1). For the meaning of 'application for possession' see PARA 1725 note 8 ante.

Where a sublease terminating with the new lease in accordance with Sch 14 para 3 (see PARA 1727 ante) is one to which the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (see PARA 701 et seq ante) applies, the compensation payable to the tenant must be divided between him and the subtenant in such proportions as

may be just, regard being had to their respective interests in the flat in question and to any loss arising from the termination of those interests and not incurred by imprudence: Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 6(2). Where the amount of the compensation payable to the tenant is agreed between him and the landlord without the consent of a subtenant entitled under Sch 14 para 6(2) to a share in the compensation, and is shown by the subtenant to be less than might reasonably have been obtained by the tenant, the subtenant is entitled under Sch 14 para 6(2) to recover from the tenant such increased share as may be just: Sch 14 para 6(3).

11 Ibid Sch 14 para 5(3).

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### **1729. Application of compensation; deductions.**

The landlord<sup>1</sup> is not to be concerned with the application of the amount payable to the tenant<sup>2</sup> by way of compensation under an order for possession<sup>3</sup>; but, subject to any statutory requirements as to payment of capital money arising under a settlement<sup>4</sup> or a trust of land and to any order<sup>5</sup> for payment into court, the written receipt of the tenant is a complete discharge for the amount payable<sup>6</sup>.

The landlord is entitled to deduct from the amount so payable to the tenant:

- 4132 (1) the amount of any sum recoverable as rent in respect of the flat<sup>7</sup> up to the termination of the new lease; and
- 4133 (2) the amount of any other sums due and payable by the tenant to the landlord under or in respect of the lease or any agreement collateral thereto<sup>8</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'tenant' see PARA 1535 note 3 ante.

3 For the meaning of 'order for possession' see PARA 1725 note 8 ante.

4 Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

5 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 2(4): see PARA 1726 ante.

6 Ibid Sch 14 para 7(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 27(3)). As to the circumstances in which the Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 (as amended) applies see PARA 1725 note 8 ante.

7 For the meaning of references to a flat held by a tenant under the new lease see PARA 1726 note 15 ante; and for the meaning of 'the new lease' see PARA 1726 note 2 ante.

8 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 7(2).

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PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(6) INDIVIDUAL RIGHT OF TENANT TO ACQUIRE NEW LEASE/(x) Landlord's Right to Terminate New Lease/1730. Unreasonable delay or default etc.

### **1730. Unreasonable delay or default etc.**

Where a landlord<sup>1</sup> makes an application for possession<sup>2</sup>, and it is made to appear to the court<sup>3</sup> that in relation to matters arising out of that application, including the giving up of possession of the flat<sup>4</sup> or the payment of compensation, the landlord or the tenant has been guilty of any unreasonable delay or default, the court may:

- 4134 (1) by order revoke or vary, and direct repayment of sums paid under, any provision made by a previous order as to payment of the costs of proceedings taken in the court on or with reference to the application; or
- 4135 (2) where costs have not been awarded, award costs<sup>5</sup>.

Where an application for possession is dismissed or withdrawn, and it is made to appear to the court:

- 4136 (a) that the application was not made in good faith; or
- 4137 (b) that the landlord had attempted in any material respect to support by misrepresentation or the concealment of material facts a request to the tenant to deliver up possession without an application for possession,

the court may order that no further application for possession of the flat made by the landlord shall be entertained if it is made within the period of five years beginning with the date of the order<sup>6</sup>.

1 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

2 For the meaning of 'application for possession' see PARA 1725 note 8 ante.

3 For the meaning of 'the court' see PARA 1539 note 3 ante.

4 For the meaning of references to the flat held by the tenant under the new lease see PARA 1726 note 15 ante; for the meaning of 'tenant' see PARA 1535 note 3 ante; and for the meaning of 'the new lease' see PARA 1726 note 2 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 8(1). As to the circumstances in which Sch 14 (as amended) applies see PARA 1725 note 8 ante.

6 Ibid Sch 14 para 8(2).

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### **1731. Treatment of compensation.**

Where:

- 4138 (1) the new lease<sup>1</sup> is subject to a trust of land; and  
 4139 (2) compensation is paid<sup>2</sup> by the landlord<sup>3</sup> on the termination of the new lease,

the sum received must be dealt with as if it were proceeds of sale arising under the trust<sup>4</sup>.

Where:

- 4140 (a) the tenant<sup>5</sup> under the new lease is a university or college to which the Universities and College Estates Act 1925<sup>6</sup> applies; and  
 4141 (b) compensation is paid as mentioned in head (2) above,

the sum received must be dealt with as if it were an amount payable by way of consideration on a sale effected under that Act<sup>7</sup>.

Where:

- 4142 (i) the tenant under the new lease is a capitular body<sup>8</sup> and the lease comprises property which forms part of the endowment of a cathedral church; and  
 4143 (ii) compensation is paid as mentioned in head (2) above,

the sum received must be treated as part of that endowment<sup>9</sup>.

Where:

- 4144 (A) the tenant under the new lease is a diocesan board of finance<sup>10</sup> and the lease comprises diocesan glebe land<sup>11</sup>; and  
 4145 (B) compensation is paid as mentioned in head (2) above,

the sum received must be paid to the Church Commissioners<sup>12</sup> to be applied for purposes for which the proceeds of any disposition of property by agreement would be applicable under any enactment or Measure authorising such a disposition or disposing of the proceeds of such a disposition<sup>13</sup>.

1 For the meaning of 'the new lease' see PARA 1726 note 2 ante.

2 Ie whether the payment is made in pursuance of an order for possession or in pursuance of an agreement made in conformity with the Leasehold Reform, Housing and Urban Development Act 1993 s 61(4), Sch 14 para 5 (see PARA 1728 ante) without an application having been made under s 61 (see PARA 1725 ante).

3 For the meaning of 'the landlord' see PARA 1672 ante. As to special categories of landlord see PARA 1545 et seq ante.

4 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 9 (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 27(3)). As to the circumstances in which the Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 (as amended) applies see PARA 1725 note 8 ante.

5 For the meaning of 'tenant' see PARA 1535 note 3 ante.

6 As to the Universities and College Estates Act 1925 see EDUCATION vol 15(2) (2006 Reissue) PARA 1379.

7 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 10.

8 Ie within the meaning of the Cathedrals Measure 1963: see PARA 1509 note 3 ante.

9 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 11. There is no right under Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante) to acquire a new lease of any property in the precinct



of a cathedral church, and thus no right of compensation arises under Sch 14 (as amended) in respect of such property: see PARA 1536 ante.

10 For these purposes, 'diocesan board of finance' has the same meaning as in the Endowments and Glebe Measure 1976: Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 12(2).

11 For these purposes, 'diocesan glebe land' has the same meaning as in the Endowments and Glebe Measure 1976: Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 12(2).

12 As to the Church Commissioners see ECCLESIASTICAL LAW vol 14 para 361 et seq.

13 Leasehold Reform, Housing and Urban Development Act 1993 Sch 14 para 12(1).

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## **(xi) Landlord's Right to Compensation where Claim Ineffective**

### **1732. Compensation for postponement of termination in connection with ineffective claims.**

The following provisions apply where, on or after 15 January 1999:

- 4146 (1) a tenant<sup>1</sup> of a flat<sup>2</sup> makes a claim to acquire a new lease<sup>3</sup> of the flat; and
- 4147 (2) the claim is not made at least two years before the term date<sup>4</sup> of the lease in respect of which the claim is made ('the existing lease')<sup>5</sup>.

The tenant is liable to pay compensation if the claim is not effective<sup>6</sup> and:

- 4148 (a) the making of the claim caused a notice of termination served by the landlord<sup>7</sup> in respect of the existing lease to cease to have effect and the date on which the claim ceases to have effect<sup>8</sup> is later than four months before the termination date specified in the notice;
- 4149 (b) the making of the claim prevented the service of an effective notice of termination<sup>9</sup> but did not cause a notice served<sup>10</sup> to cease to have effect and the date on which the claim ceases to have effect is a date later than six months before the term date of the existing lease; or
- 4150 (c) the existing lease is continued<sup>11</sup> by virtue of the claim<sup>12</sup>.

Compensation under the above provisions become payable at the end of the appropriate period<sup>13</sup> and is the right of the person who is the tenant's immediate landlord<sup>14</sup> at that time<sup>15</sup>. The amount which the tenant is so liable to pay is equal to the difference between:

- 4151 (i) the rent for the appropriate period under the existing lease; and
- 4152 (ii) the rent which might reasonably be expected to be payable for that period were the property to which the existing lease relates let for a term equivalent to that period on the open market by a willing landlord on the following assumptions:

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- 130. (A) that no premium is payable in connection with the letting;

131. (B) that the letting confers no security of tenure; and  
 132. (C) that, except as otherwise provided by this provision, the letting is on the same terms as the existing lease<sup>16</sup>.

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1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 For the meaning of 'flat' see PARA 1671 note 3 ante.

3 For these purposes, references to a claim to acquire a new lease are to be taken as references to a notice given, or purporting to be given (whether by a qualifying tenant or not), under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended) (see PARA 1677 ante): s 61A(7)(a) (s 61A added by the Housing Act 1996 s 116, Sch 11 para 3(1)). For the meaning of 'qualifying tenant' see PARA 1671 note 9 ante; and for the meaning of 'lease' see PARA 1535 note 3 ante.

4 For the meaning of 'term date' see PARA 1544 note 5 ante.

5 Leasehold Reform, Housing and Urban Development Act 1993 s 61A(1) (as added: see note 3 supra).

6 For these purposes, a claim to a new lease is not effective if it ceases to have effect for any reason other than: (1) the application of s 47(1) (see PARA 1694 ante) or s 55(2) (see PARA 1702 ante); or (2) the acquisition of the new lease in pursuance of the claim: *ibid* s 61A(6) (as added: see note 3 supra).

7 *Ie* under the Local Government and Housing Act 1989 s 186, Sch 10 para 4(1): see PARA 1249 ante.

8 For these purposes, references to the date on which a claim ceases to have effect are, in the case of a claim made by a notice which is not a valid notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 42 (as amended), to be taken as references to the date on which the notice is set aside by the court or is withdrawn or would, if valid, cease to have effect or be deemed to have been withdrawn, that date being taken, where the notice is set aside, or would, if valid, cease to have effect, in consequence of a court order, to be the date when the order becomes final: s 61A(8)(b) (as added: see note 3 supra). For the meaning of 'the court' see PARA 1539 note 3 ante; and as to when a court order is treated as becoming final see PARA 1587 note 8 ante.

9 See note 7 supra.

10 *Ie* a notice served as mentioned in note 7 supra.

11 *Ie* under the Leasehold Reform, Housing and Urban Development Act 1993 s 42(9), Sch 12 para 5(1): see PARA 1686 ante.

12 *Ibid* s 61A(2) (as added: see note 3 supra).

13 For the purposes of *ibid* s 61A(3), (4) (as added), the appropriate period is: (1) in a case falling within s 61A(2)(a) (as added) (see head (a) in the text), the period (a) beginning with the termination date specified in the notice mentioned in that provision; and (b) ending with the earliest date of termination which could have been specified in a notice under the Local Government and Housing Act 1989 Sch 10 para 4(1) served immediately after the date on which the claim ceases to have effect, or, if the existing lease is terminated before then, with the date on which it is terminated; (2) in a case falling within s 61A(2)(b) (as added) (see head (2) in the text), the period: (a) beginning with the later of six months from the date on which the claim is made and the term date of the existing lease; and (b) ending six months after the date on which the claim ceases to have effect, or, if the existing lease is terminated before then, with the date of its termination; and (3) in a case falling within s 61A(2)(c) (as added) (see head (c) in the text), the period for which the existing lease is continued under Sch 12 para 5(1): s 61A(5) (as added: see note 3 supra).

14 For the meaning of 'landlord' see PARA 1535 note 3 ante.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 61A(3) (as added: see note 3 supra).

16 *Ibid* s 61A(4) (as added: see note 3 supra).

PARAS 1386-2000)/25. ENFRANCHISEMENT ETC; PRIVATE SECTOR FLATS/(6) INDIVIDUAL RIGHT OF TENANT TO ACQUIRE NEW LEASE/(xi) Landlord's Right to Compensation where Claim Ineffective/1733. Compensation where there has been a change in the immediate reversion.

### **1733. Compensation where there has been a change in the immediate reversion.**

Where a tenant's<sup>1</sup> liability to pay compensation<sup>2</sup> relates to a period during which there has been a change in the interest<sup>3</sup> immediately expectant on the determination of his lease<sup>4</sup>, the provisions relating to payment of compensation for the postponement of termination<sup>5</sup> have effect with the following modifications<sup>6</sup>. Compensation<sup>7</sup> becomes payable at the end of the appropriate period<sup>8</sup> and there is a separate right to compensation in respect of each of the interests which, during that period, have been immediately expectant on the determination of the existing lease<sup>9</sup>. Such compensation:

- 4153 (1) in the case of the interest which is immediately expectant on the determination of the existing lease at the end of the appropriate period, is the right of the person in whom that interest is vested at that time; and
- 4154 (2) in the case of an interest which ceases during the appropriate period to be immediately expectant on the determination of the existing lease, is the right of the person in whom the interest was vested immediately before it ceased to be so expectant<sup>10</sup>.

The amount which the tenant is liable to pay<sup>11</sup> in respect of any interest is equal to the difference between:

- 4155 (a) the rent under the existing lease for the part of the appropriate period during which the interest was immediately expectant on the determination of that lease; and
- 4156 (b) the rent which might reasonably be expected to be payable for that part of that period were the property to which the existing lease relates let for a term equivalent to that part of that period on the open market by a willing landlord on the following assumptions:

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- 133. (i) that no premium is payable in connection with the letting;
- 134. (ii) that the letting confers no security of tenure; and
- 135. (iii) that, except as otherwise provided by this provision, the letting is on the same terms as the existing lease<sup>12</sup>.

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1 For the meaning of 'tenant' see PARA 1535 note 3 ante.

2 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 61A (as added): see PARA 1732 ante.

3 For the meaning of 'interest' see PARA 408 note 16 ante.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 Ie the Leasehold Reform, Housing and Urban Development Act 1993 s 61A (as added): see PARA 1732 ante.

6 Ibid s 61B(1) (ss 61A, 61B added by the Housing Act 1996 s 116, Sch 11 para 3(1)).

7 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 61A(2) (as added): see PARA 1732 ante.

8 Ibid s 61A(5) (as added) (meaning of 'the appropriate period': see PARA 1732 note 13 ante) applies with the substitution, for the words 'for the purposes of subsections (3) and (4)' of the words 'for the purposes of subsections (3) to (4A)': s 61B(3) (as added: see note 6 supra).

9 Ibid s 61A(3) (s 61A(3)-(4A) substituted for these purposes by s 61B(2) (as added: see note 6 supra)).

10 Ibid s 61A(4) (as substituted: see note 9 supra).

11 See note 7 supra.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 61A(4A) (as substituted: see note 9 supra)

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## **(7) ESTATE MANAGEMENT SCHEMES IN CONNECTION WITH ENFRANCHISEMENT**

### **1734. Meaning of 'estate management scheme'.**

An estate management scheme is<sup>1</sup> a scheme which<sup>2</sup> is approved<sup>3</sup> by a leasehold valuation tribunal for an area occupied directly or indirectly under leases<sup>4</sup> held from one landlord<sup>5</sup>, apart from property occupied by him or his licensees or for the time being unoccupied, and which is designed to secure that in the event of tenants<sup>6</sup>:

- 4157 (1) acquiring the landlord's interest in their house and premises<sup>7</sup> ('the house') by virtue of the specified provisions of the Leasehold Reform Act 1967<sup>8</sup>; or
- 4158 (2) acquiring the landlord's interest in any premises ('the premises') in accordance with the right to collective enfranchisement<sup>9</sup> in the specified circumstances<sup>10</sup>,

the landlord will:

- 4159 (a) retain powers of management in respect of the house or premises; and
- 4160 (b) have rights against the house or premises in respect of the benefits arising from the exercise elsewhere of his powers of management<sup>11</sup>.

1 Ie for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch IV (ss 69-75) (as amended): see PARA 1504 ante; the text and notes 2-11infra; and PARA 1735 et seq post.

2 Ie subject to ibid s 71 (see PARA 1737 post) and s 73 (see PARA 1739 post).

3 Ie under ibid s 70 (as amended): see PARA 1736 post.

4 For the meaning of 'lease' see PARA 1535 note 3 ante.

5 For the meaning of 'landlord' see PARA 1535 note 3 ante.

6 For the meaning of 'tenant' see PARA 1535 note 3 ante.

7 Ie under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 et seq ante.

8 le by virtue of the provisions of *ibid* s 1AA (as added by the Housing Act 1996 s 106, Sch 9 para 1): see PARA 1397 ante. The Leasehold Reform Act 1967 s 1AA (as so added) is now further amended by the Commonhold and Leasehold Reform Act 2002 ss 141, 180, Sch 14: see PARA 1397 ante.

9 le in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante.

10 le in circumstances in which, but for the Commonhold and Leasehold Reform Act 2002 s 117(1) and the repeal by that Act of the Housing Act 1996 Sch 9 para 3, they would have been entitled to acquire it by virtue of the amendments of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I made by the Housing Act 1996 Sch 9 para 3.

11 Leasehold Reform, Housing and Urban Development Act 1993 s 69(1) (amended by the Housing Act 1996 s 118(2); the Commonhold and Leasehold Reform Act 2002 s 117(2)). For transitional provisions and savings see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 1; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 1.

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### **1735. Contents of estate management scheme.**

An estate management scheme<sup>1</sup> may make different provision for different parts of the area of the scheme, and must include provision for terminating or varying all or any of the provisions of the scheme, or excluding part of the area, if a change of circumstances makes it appropriate, or for enabling it to be done by or with the approval of a leasehold valuation tribunal<sup>2</sup>.

An estate management scheme may provide<sup>3</sup> for all or any of the following matters:

- 4161 (1) for regulating the redevelopment, use or appearance of property in which tenants have acquired the landlord's<sup>4</sup> interest<sup>5</sup>;
- 4162 (2) for empowering the landlord for the time being<sup>6</sup> to carry out works of maintenance, repair, renewal or replacement in relation to any such property or carry out work to remedy a failure in respect of any such property to comply with the scheme, or for making the operation of any provisions of the scheme conditional on his doing so or on the provision or maintenance by him of services, facilities or amenities of any description;
- 4163 (3) for imposing on persons from time to time occupying or interested in any such property obligations in respect of the carrying out of works of maintenance, repair, renewal or replacement in relation to the property or to property used or enjoyed by them in common with others, or in respect of costs incurred by the landlord for the time being on any matter referred to in this head or in head (2) above;
- 4164 (4) for the inspection from time to time of any such property on behalf of the landlord for the time being, and for the recovery by him of sums due to him under the scheme in respect of any such property by means of a charge on the property;

and for the enforcement of any charge imposed under the scheme the landlord for the time being has the same powers and remedies under the Law of Property Act 1925 and otherwise as if he were a mortgagee by deed having powers of sale and leasing and of appointing a receiver<sup>7</sup>.

Except as provided by the scheme, the operation of an estate management scheme is not affected by any disposition or devolution of the landlord's interest in the property within the area of the scheme or in parts of that property; but the scheme must include provision:

- 4165 (a) for identifying the person who is for the purposes of the scheme to be treated as the landlord for the time being; and also
- 4166 (b) for transferring, or allowing the landlord for the time being to transfer, all or any of the powers and rights conferred by the scheme on the landlord for the time being to a local authority or other body, including a body constituted for the purpose<sup>8</sup>.

An estate management scheme may:

- 4167 (i) provide<sup>9</sup> for the operation of any provision for transfer included in the scheme in accordance with head (b) above to be dependent on a determination of a leasehold valuation tribunal effecting or approving the transfer or on such other circumstances as the scheme may provide<sup>10</sup>;
- 4168 (ii) extend to property in which the landlord's interest is disposed of otherwise than in the specified circumstances<sup>11</sup>, whether residential property or not, so as to make that property, or allow it to be made, subject to any such provision as is or might be made by the scheme for property in which tenants acquire the landlord's interest as mentioned in either of those circumstances<sup>12</sup>.

1 For the meaning of 'estate management scheme' see PARA 1734 ante.

2 Leasehold Reform, Housing and Urban Development Act 1993 s 69(2).

3 Ie without prejudice to any other provision of *ibid* s 69 (as amended): see PARA 1734 ante; and the text and notes 4-12 *infra*.

4 For the meaning of 'landlord' see PARA 1535 note 3 ante.

5 Ie as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) or (b) (as amended): see PARA 1734 ante at heads (1)-(2) in the text. For the meaning of 'interest' see PARA 408 note 16 ante.

6 For these purposes, references to the landlord for the time being have effect, in relation to powers and rights transferred to a local authority or other body as contemplated by *ibid* s 69(4)(b) (see head (b) in the text), as references to that authority or body: s 69(7).

7 *Ibid* s 69(3). As to a mortgagee's powers of sale, leasing and appointing a receiver see generally MORTGAGE vol 77 (2010) PARA 101 et seq.

8 *Ibid* s 69(4).

9 Ie without prejudice to the generality of *ibid* s 69(4)(b): see head (b) in the text.

10 *Ibid* s 69(5).

11 Ie otherwise than as mentioned in *ibid* s 69(1)(a) or (b).

12 *Ibid* s 69(6).

MANAGEMENT SCHEMES IN CONNECTION WITH ENFRANCHISEMENT/1736. Approval by leasehold valuation tribunal of estate management scheme.

**1736. Approval by leasehold valuation tribunal of estate management scheme.**

A leasehold valuation tribunal may, on an application made by a landlord<sup>1</sup> for the approval of a scheme submitted by him to the tribunal, approve the scheme as an estate management scheme for such area<sup>2</sup> as is specified in the scheme; but, unless<sup>3</sup> the Secretary of State<sup>4</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>5</sup> gives his or its consent for an application to be made outside the statutory time limit<sup>6</sup>, any such application was to be made within the period of two years beginning with 1 April 1997<sup>7</sup>.

A leasehold valuation tribunal may not approve a scheme as an estate management scheme for any area unless it is satisfied that, in order to maintain adequate standards of appearance and amenity and regulate redevelopment within the area in the event of tenants acquiring the interest of the landlord in any property<sup>8</sup>, it is in the general interest that the landlord should retain such powers of management and have such rights<sup>9</sup> as are conferred by the scheme<sup>10</sup>.

In considering whether to approve a scheme as an estate management scheme for any area, a leasehold valuation tribunal must have regard primarily to:

- 4169 (1) the benefit likely to result from the scheme to the area as a whole, including houses or premises likely to be acquired from the landlord<sup>11</sup>; and
- 4170 (2) the extent to which it is reasonable to impose, for the benefit of the area, obligations on tenants<sup>12</sup> so acquiring the interest of their landlord;

but the tribunal may also have regard to the past development and present character of the area and to architectural or historical considerations, to neighbouring areas and to the circumstances generally<sup>13</sup>.

A leasehold valuation tribunal must not consider any application for it to approve a scheme unless it is satisfied that the applicant has, by advertisement or otherwise, given adequate notice to persons interested<sup>14</sup>:

- 4171 (a) informing them of the application for approval of the scheme and the provision intended to be made by the scheme<sup>15</sup>; and
- 4172 (b) inviting them to make representations to the tribunal about the application within a time which appears to the tribunal to be reasonable<sup>16</sup>.

A leasehold valuation tribunal must<sup>17</sup>, after considering the application, approve the scheme in question either as originally submitted or with any relevant modifications<sup>18</sup> proposed or agreed to by the applicant, if the scheme (with those modifications, if any) appears to the tribunal to be fair and practicable and not to give the landlord a degree of control out of proportion to that previously exercised by him or to that required for the purposes of the scheme<sup>19</sup>.

If, having regard to the matters mentioned in heads (1) and (2) above and the provision which it is practicable to make by a scheme, the tribunal thinks it proper to do so, the tribunal may declare that no scheme can be approved for the area in question in pursuance of the application<sup>20</sup>.

A leasehold valuation tribunal may not dismiss an application for the approval of a scheme unless:

- 4173 (i) it makes such a declaration<sup>21</sup>; or

4174 (ii) in the opinion of the tribunal the applicant is unwilling to agree to a suitable scheme or is not proceeding in the matter with due dispatch<sup>22</sup>.

A scheme approved under the above provisions as an estate management scheme for an area is<sup>23</sup> a local land charge<sup>24</sup>.

1 For the meaning of 'landlord' see PARA 1535 note 3 ante.

2 Ie such area falling within the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1) (as amended): see PARA 1734 ante. For the meaning of 'estate management scheme' see PARA 1734 ante.

3 Ie subject to *ibid* s 72: see PARA 1738 post.

4 As to the Secretary of State see PARA 27 note 3 ante.

5 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

6 Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 72: see PARA 1738 post. A copy of any consent given under s 72 must accompany the application: see note 7 *infra*.

7 Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (amended by the Housing Act 1996 s 118(1), (3)); Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2, Schedule, PARA 3. The original time limit was two years beginning with 1 November 1993: see the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (as originally enacted); the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 5(a).

As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), an application in relation to an estate management scheme must be accompanied: (1) by a copy of any estate management agreement or the proposed estate management scheme; (2) by a statement that the applicant is either a natural person, a representative body within the meaning of the Leasehold Reform, Housing and Urban Development Act 1993 s 71(3) (see PARA 1737 post) or a relevant authority within the meaning of s 73(5) (see PARA 1739 post); (3) where an application is made under s 70 (as amended), by a copy of the notice given by the applicant under s 70(4) (see the text and notes 14-16 *infra*); (4) where (a) approval is sought for a scheme; (b) approval is sought to modify the area of an existing scheme; or (c) approval is sought to vary an existing scheme, by a description of the area of (i) the proposed scheme; (ii) the proposed modification; or (iii) the proposed variation, including identification of the area by a map or plan; and (5) where an application is made under s 70, a copy of any consent given by the Secretary of State or the Assembly or minister under s 72(1): Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(4), Sch 1 para 3, Sch 2 para 3(1)-(5); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(4), Sch 1 para 3, Sch 2 para 3(1)-(5). The tribunal may, however, dispense with or relax any of the requirements of heads (1)-(5) *supra* if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

8 Ie as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) or (b) (as amended): see PARA 1734 ante at heads (1)-(2) in the text. For the meaning of 'interest' see PARA 408 note 16 ante.

9 Ie such rights falling within *ibid* s 69(1)(i), (ii): see PARA 1734 ante at heads (a)-(b) in the text.

10 *Ibid* s 70(2).

11 See note 8 *supra*.

12 For the meaning of 'tenant' see PARA 1535 note 3 ante.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 70(3).

14 For these purposes, 'persons interested' includes, in particular, in relation to any application for the approval of a scheme for any area ('the scheme area') within a conservation area (1) each local planning authority within whose area any part of the scheme area falls; and (2) if the whole of the scheme area is in England, the Historic Buildings and Monuments Commission for England (commonly known as 'English Heritage'): *ibid* s 70(5). For these purposes, and for the purposes of s 73 (see PARA 1739 post), 'conservation



area' and 'local planning authority' have the same meaning as in the Planning (Listed Buildings and Conservation Areas) Act 1990 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARAS 1073, 1169); and in connection with the latter expression (a) the expression 'the planning Acts' in the Town and Country Planning Act 1990 is to be treated as including the Leasehold Reform, Housing and Urban Development Act 1993; and (b) the Planning (Listed Buildings and Conservation Areas) Act 1990 s 81, Sch 4 paras 4, 5 (as amended) (further provisions as to the exercise of functions by different authorities: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1073) apply in relation to functions under or by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 70 (as amended) or s 73 as they apply in relation to functions under the Planning (Listed Buildings and Conservation Areas) Act 1990 s 69 (designation of conservation areas: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1169): Leasehold Reform, Housing and Urban Development Act 1993 ss 70(14), 73(11).

As to English Heritage see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 803 et seq; TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1058.

15 Leasehold Reform, Housing and Urban Development Act 1993 s 70(4)(a).

16 Ibid s 70(4)(b). Where the application is to be considered in an oral hearing, the tribunal must afford to any person making representations under s 70(4)(b) about the application an opportunity to appear at the hearing: s 70(6) (substituted, and s 70(10A) added, by the Commonhold and Leasehold Reform Act 2002 s 176, Sch 13, PARAS 12, 13(1)-(3)). Any person who makes representations under the Leasehold Reform, Housing and Urban Development Act 1993 s 70(4)(b) about an application for the approval of a scheme may appeal from a decision of the tribunal in proceedings on the application: s 70(10A) (as so added).

17 Ie subject to ibid s 70(1)-(6) (as amended): see the text and notes 1-16 supra.

18 For these purposes, 'relevant modifications' means modifications relating to the extent of the area to which the scheme is to apply or to the provisions contained in it: ibid s 70(8).

19 Ibid s 70(7).

20 Ibid s 70(9).

21 Ie such a declaration as is mentioned in ibid s 70(9).

22 Ibid s 70(10).

23 Ie notwithstanding the Local Land Charges Act 1975 s 2(a) or (b) (matters which are not local land charges): see LAND CHARGES vol 26 (2004 Reissue) PARA 673.

24 Leasehold Reform, Housing and Urban Development Act 1993 s 70(11). For the purposes of the Local Land Charges Act 1975, the landlord for that area is treated as the originating authority as respects any such charge: Leasehold Reform, Housing and Urban Development Act 1993 s 70(11).

Where such a scheme is registered in the appropriate local land charges register (1) the provisions of the scheme relating to property of any description, so far as they respectively affect the persons from time to time occupying or interested in that property, are enforceable by the landlord for the time being against them, as if each of them had covenanted with the landlord for the time being to be bound by the scheme; (2) in relation to any acquisition such as is mentioned in s 69(1)(a) (as amended), the Leasehold Reform Act 1967 s 10 (as amended) (rights to be conveyed on enfranchisement: see PARAS 1452-1455, 1459 ante) has effect subject to the provisions of the scheme and the price payable under s 9 (as amended) (see PARAS 1441-1442, 1446, 1466-1467 ante) must be adjusted so far as is appropriate, if at all; and (3) in relation to any acquisition such as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 69(1)(b) (as amended), s 34 (as amended) (see PARA 1647 ante) and Sch 7 (as amended) (see PARA 1648 et seq ante) have effect subject to the provisions of the scheme, and any price payable under s 32(1), Sch 6 (as amended) (see PARA 1624 et seq ante) must be adjusted so far as is appropriate, if at all: s 70(12).

The Local Land Charges Act 1975 s 10 (as amended) (compensation for non-registration etc: see LAND CHARGES vol 26 (2004 Reissue) PARA 694) does not apply to schemes which, by virtue of the Leasehold Reform, Housing and Urban Development Act 1993 s 70(11), are local land charges: s 70(13).

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### **1737. Applications by two or more landlords, or by representative bodies.**

Where, on a joint application made by two or more persons as landlords<sup>1</sup> of neighbouring areas, it appears to a leasehold valuation tribunal:

- 4175 (1) that a scheme could be approved<sup>2</sup> as an estate management scheme<sup>3</sup> for those areas, treated as a unit, if the interests<sup>4</sup> of those persons were held by a single person; and
- 4176 (2) that the applicants are willing to be bound by the scheme to co-operate in the management of their property in those areas and in the administration of the scheme,

the tribunal may<sup>5</sup> approve the scheme<sup>6</sup> as an estate management scheme for those areas as a whole<sup>7</sup>. Any such scheme must be made subject to conditions, enforceable in such manner as may be provided by the scheme, for securing that the landlords and their successors co-operate as mentioned in head (2) above<sup>8</sup>.

Where it appears to a leasehold valuation tribunal:

- 4177 (a) that a scheme could, on the application of any landlord or landlords, be approved<sup>9</sup> as an estate management scheme for any area or areas; and
- 4178 (b) that any body of persons is so constituted as to be capable of representing for the purposes of the scheme the persons occupying or interested in property in the area or areas, other than the landlord or landlords or his or their licensees, or such of them as are or may become entitled to acquire their landlord's interest<sup>10</sup>, and is otherwise suitable,

an application for the approval of the scheme<sup>11</sup> may be made to the tribunal by the representative body alone or by the landlord or landlords alone or by both jointly and, by leave of the tribunal, may be proceeded with by the representative body or by the landlord or landlords despite the fact that the body or landlord or landlords in question did not make the application<sup>12</sup>.

Any such scheme may<sup>13</sup> with the consent of the landlord or landlords, or on such terms as to compensation or otherwise as appear to the tribunal to be just:

- 4179 (i) confer on the representative body any such rights or powers under the scheme as might be conferred on the landlord or landlords for the time being<sup>14</sup>; or
- 4180 (ii) enable the representative body to participate in the administration of the scheme or in the management by the landlord or landlords of his or their property in the area or areas<sup>15</sup>.

1 For the meaning of 'landlord' see PARA 1535 note 3 ante.

2 Ie in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1), (2) (as amended): see PARA 1736 ante.

3 For the meaning of 'estate management scheme' see PARA 1734 ante.

4 For the meaning of 'interest' see PARA 408 note 16 ante.

5 Ie subject to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 70 (as amended) (see PARA 1736 ante) and s 71(2) (see the text and note 8 infra).

6 Ie under ibid s 70 (as amended).

- 7 Ibid s 71(1).
- 8 Ibid s 71(2).
- 9 See note 6 supra.
- 10 Ie as mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) or (b) (as amended): see PARA 1734 ante at heads (1)-(2) in the text.
- 11 See note 6 supra.
- 12 Leasehold Reform, Housing and Urban Development Act 1993 s 71(3).
- 13 Ie without prejudice to ibid s 69(4)(b): see PARA 1735 ante at head (b) in the text.
- 14 For the meaning of 'landlord for the time being' see PARA 1735 note 6 ante.
- 15 Leasehold Reform, Housing and Urban Development Act 1993 s 71(4). Where any such scheme confers any rights or powers on the representative body in accordance with s 71(4), s 70(11), (12)(a) (see PARA 1736 ante) has effect with such modifications, if any, as are provided for in the scheme: s 71(5).

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### **1738. Applications after expiry of two-year period.**

An application for the approval of a scheme for an area<sup>1</sup> may be made after the expiry of the period of two years beginning with 1 April 1997<sup>2</sup> if the Secretary of State<sup>3</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>4</sup> has, not more than six months previously, consented to the making of such an application for that area or for an area within which that area falls<sup>5</sup>.

The Secretary of State or the Assembly or minister may so give consent to the making of an application ('the proposed application') only where he or it is satisfied:

- 4181 (1) that either or both of the specified conditions<sup>6</sup> apply; and
- 4182 (2) that adequate notice has been given to persons interested informing them of the request for consent and the purpose of the request<sup>7</sup>.

The conditions so specified are:

- 4183 (a) that the proposed application could not have been made before the period of two years beginning with 1 April 1997<sup>8</sup>; and
- 4184 (b) that:
  - 281 136. (i) any application for the approval of a scheme<sup>9</sup> for the area, or part of the area, to which the proposed application relates would probably have been dismissed<sup>10</sup> had it been made before the expiry of that period; but
  - 137. (ii) because of a change in any of the circumstances required to be considered<sup>11</sup> the proposed application would, if made following the giving of consent by the Secretary of State or the Assembly or the relevant Welsh minister, probably be granted<sup>12</sup>.

A request for such consent must be in writing and must comply with such requirements, if any, as to the form of, or the particulars to be contained in, any such request as the Secretary of State or the Assembly or the relevant Welsh minister may by regulations prescribe<sup>13</sup>; and the procedure for considering a request for such consent is such as may be prescribed by regulations made by him or by the Assembly or minister<sup>14</sup>.

1     Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 70 (as amended) (see PARA 1736 ante), including an application in accordance with s 71(1) or (3) (see PARA 1737 ante).

2     Ie the expiry of the period mentioned in *ibid* s 70(1) (as amended): see PARA 1736 ante.

3     As to the Secretary of State see PARA 27 note 3 ante.

4     As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

5     Leasehold Reform, Housing and Urban Development Act 1993 s 72(1).

6     Ie either or both of the conditions mentioned in *ibid* s 72(3): see heads (a)-(b) in the text.

7     *Ibid* s 72(2).

8     See note 2 *supra*.

9     See note 1 *supra*.

10    Ie under the Leasehold Reform, Housing and Urban Development Act 1993 s 70(10)(a): see PARA 1736 ante at head (i) in the text.

11    Ie under *ibid* s 70(3): see PARA 1736 ante.

12    *Ibid* s 72(3).

13    *Ibid* s 72(4). As to the making of regulations generally see PARA 1537 ante. At the date at which this title states the law, no such regulations had been made.

14    *Ibid* s 72(5).

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### **1739. Applications by certain public bodies.**

Where it appears to a leasehold valuation tribunal after the expiry of the period of two years beginning with 1 April 1997<sup>1</sup> that a scheme could, on the application of any landlord<sup>2</sup> or landlords within that period, have been approved<sup>3</sup> as an estate management scheme<sup>4</sup> for any area or areas within a conservation area<sup>5</sup>, an application for approval of the scheme may be made<sup>6</sup> to the tribunal by one or more bodies constituting the relevant authority for these purposes<sup>7</sup>.

Such an application may be made only if:

- 4185 (1) no scheme has been approved<sup>8</sup> for the whole or any part of the area or areas to which the application relates ('the scheme area'); and  
 4186 (2) any application which has been made<sup>9</sup> for the approval of a scheme for the whole or any part of the scheme area has been withdrawn or dismissed; and  
 4187 (3) no request for consent<sup>10</sup> which relates to the whole or any part of the scheme area is pending or has been granted within the last six months<sup>11</sup>.

Such an application must be made within the period of six months beginning:

- 4188 (a) with the date on which the period of two years beginning with 1 April 1997<sup>12</sup> expires; or  
 4189 (b) if any application has been made as mentioned in head (2) above, with the date or, as the case may be, the latest date on which any such application is withdrawn or dismissed,

whichever is the later; but, if at any time during that period of six months a request of a kind mentioned in head (3) above is pending or granted, an application may be made within the period of:

- 4190 (i) six months beginning with the date on which the request is withdrawn or refused; or  
 4191 (ii) 12 months beginning with the date on which the request is granted,

as the case may be<sup>13</sup>.

A scheme approved on such an application may confer on the applicant or applicants any such rights or powers under the scheme as might have been conferred on the landlord or landlords for the time being<sup>14</sup>.

Where a scheme is approved on an application by two or more bodies acting jointly, the scheme must, if the tribunal considers it appropriate, be made subject to conditions, enforceable in such manner as may be provided by the scheme, for securing that those bodies co-operate in the administration of the scheme<sup>15</sup>.

A scheme so approved is not enforceable by a local planning authority in relation to any property falling outside the authority's area; and, in the case of a scheme approved on a joint application by one or more local planning authorities and the Historic Buildings and Monuments Commission for England (commonly known as 'English Heritage'), the scheme may provide for any of its provisions to be enforceable in relation to property falling within the area of a local planning authority either by the authority alone, or by the Commission alone, or by the authority and the Commission acting jointly, as the scheme may provide<sup>16</sup>.

<sup>1</sup> I.e. the expiry of the period mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (as amended): see PARA 1736 ante.

<sup>2</sup> For the meaning of 'landlord' see PARA 1535 note 3 ante.

<sup>3</sup> I.e. under the Leasehold Reform, Housing and Urban Development Act 1993 s 70 (as amended): see PARA 1736 ante.

<sup>4</sup> For the meaning of 'estate management scheme' see PARA 1734 ante.

<sup>5</sup> For the meaning of 'conservation area' see PARA 1736 note 14 ante.

<sup>6</sup> I.e. subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 73(2)-(3): see the text and notes 8-13 infra.

7 Ibid s 73(1). For these purposes, the relevant authority for the scheme area is (1) where that area falls wholly within the area of a local planning authority (a) that authority; or (b) that authority acting jointly with the Historic Buildings and Monuments Commission for England ('the Commission'); or (c) the Commission; (2) in any other case (a) all of the local planning authorities within each of whose areas any part of the scheme area falls, acting jointly; or (b) one or more of those authorities acting jointly with the Commission; or (c) the Commission: s 73(5). The Commission may, however, make, or join in the making of, an application under s 73(1) only if the whole of the scheme area is in England and it has consulted any local planning authority within whose area the whole or any part of the scheme area falls: s 73(6). For the meaning of 'local planning authority' see PARA 1736 note 14 ante. As to the Commission (commonly known as 'English Heritage') see NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 803 et seq; TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1058.

Where a scheme is approved on an application under s 73(1): (i) s 70(11), (12)(a) (see PARA 1736 ante) has effect, subject to s 73(9) (see the text and note 16 infra), as if any reference to the landlord, or the landlord for the time being, for the area for which an estate management scheme has been approved were a reference to the applicant or applicants; and (ii) s 70(12)(b) and (c) (see PARA 1736 ante) each has effect with the omission of so much thereof as relates to the adjustment of any such price as is there mentioned: s 73(8). For the meaning of 'landlord for the time being' see PARA 1735 note 6 ante.

For the purposes of (A) the Leasehold Reform Act 1967 s 9(1A) (as added and amended) (purchase price on enfranchisement: see PARA 1442 ante) as it applies in relation to any acquisition such as is mentioned in the Leasehold Reform, Housing and Urban Development Act 1993 s 69(1)(a) (as amended) (see PARA 1734 ante at head (1) in the text); and (B) s 32(1), Sch 6 para 3 (as amended) (see PARA 1625 ante) as it applies in relation to any acquisition such as is mentioned in s 69(1)(b) (as amended) (see PARA 1734 ante at head (2) in the text), including s 69(1)(b) (as amended) as it applies by virtue of Sch 6 para 7 (as amended) (see PARA 1630 ante) or Sch 6 para 11 (as amended) (see PARA 1634 ante), it is to be assumed that any scheme approved under s 73(1) and relating to the property in question had not been so approved; and accordingly any application for such a scheme to be approved, and the possibility of such an application being made, is to be disregarded: s 73(10).

8 See note 3 supra.

9 In accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 70(1) (as amended) (see PARA 1736 ante), s 71(1) (see PARA 1737 ante) or s 71(3) (see PARA 1737 ante).

10 In under ibid s 72(1): see PARA 1738 ante.

11 Ibid s 73(2).

12 See note 1 supra.

13 Leasehold Reform, Housing and Urban Development Act 1993 s 73(3).

14 Ibid s 73(4).

15 Ibid s 73(7).

16 Ibid s 73(9).

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### **1740. Effect of application for approval on claim to acquire freehold.**

The following provisions apply<sup>1</sup> where:

4192 (1) an application ('the scheme application') is made for the approval of a scheme as an estate management scheme<sup>2</sup> for any area<sup>3</sup> or a request ('the request for consent') is made for consent<sup>4</sup> in relation to any area; and

4193 (2) whether before or after the making of the application or request:

138. (a) the tenant of a house in that area gives notice of his desire to have the freehold<sup>5</sup>; or
139. (b) a notice is given<sup>6</sup> claiming the right to collective enfranchisement<sup>7</sup> in respect of any premises in the area; and
- 284 4194 (3) in the case of an application for the approval of a scheme as an estate management scheme, the scheme would extend to the house or premises if acquired in pursuance of the notice<sup>8</sup>.

Where the above provisions apply by virtue of head (2)(a) above:

- 4195 (i) no further steps need be taken towards the execution of a conveyance<sup>9</sup> beyond those which appear to the landlord<sup>10</sup> to be reasonable in the circumstances; and
- 4196 (ii) if the notice referred to in head (2)(a) above ('the tenant's notice') was given before the making of the scheme application or the request for consent, that notice may be withdrawn by a further notice given by the tenant<sup>11</sup> to the landlord<sup>12</sup>.

Where the above provisions apply by virtue of head (2)(b) above:

- 4197 (A) if the notice referred to therein ('the initial notice') was given before the making of the scheme application or the request for consent, the notice may be withdrawn by a further notice given by the nominee purchaser (or, as from a day to be appointed<sup>13</sup>, by the RTE company) to the reversioner;
- 4198 (B) unless the initial notice is so withdrawn, the reversioner must, if he has not already given the nominee purchaser (or the RTE company) a counter-notice<sup>14</sup>, give him (or it) by the specified date<sup>15</sup> a counter-notice which complies with one of the statutory requirements<sup>16</sup>; and
- 4199 (C) no proceedings may be brought<sup>17</sup> in pursuance of the initial notice otherwise than in specified circumstances<sup>18</sup>, and, if the court makes an order<sup>19</sup> requiring the reversioner to give a further counter-notice to the nominee purchaser (or to the RTE company), the date by which it is to be given is such date as falls two months after the above provisions<sup>20</sup> cease to apply;

but no other counter-notice need be given<sup>21</sup> and no further steps need be taken<sup>22</sup> towards the final determination, whether by agreement or otherwise, of the terms of the proposed acquisition by the nominee purchaser (or by the RTE company) beyond those which appear to the reversioner to be reasonable in the circumstances<sup>23</sup>.

If the tenant's notice or the initial notice is so withdrawn<sup>24</sup>, the payment of any costs incurred in pursuance of that notice will not be<sup>25</sup> required<sup>26</sup>.

Where the scheme application is withdrawn or dismissed, the above provisions<sup>27</sup> do not apply at any time falling after the date of the withdrawal of the application or the date when the decision of the tribunal dismissing the application becomes final<sup>28</sup>, as the case may be; nor do those provisions apply at any time falling after the date on which a scheme is approved for the relevant area<sup>29</sup>, or for any part of it, in pursuance of the scheme application<sup>30</sup>.

Where the request for consent is withdrawn or refused, the above provisions<sup>31</sup> do not apply at any time falling after the date on which the request is withdrawn or refused, as the case may be; nor do those provisions apply at any time falling more than six months after the date on which it is granted, unless those provisions apply by virtue of an application made in reliance on the consent<sup>32</sup>.

1 le subject to the Leasehold Reform, Housing and Urban Development Act 1993 s 74(5), (6): see the text and notes 27-32 *infra*.

2 For the meaning of 'estate management scheme' see PARA 1734 *ante*.

3 For these purposes, references to the approval of a scheme for any area include references to the approval of a scheme for two or more areas in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 71 (see PARA 1737 *ante*) or s 73 (see PARA 1739 *ante*): s 74(10).

4 le under *ibid* s 72(1): see PARA 1738 *ante*.

5 le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see PARA 1389 *et seq ante*.

6 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 *ante*.

7 As to the right to collective enfranchisement see PARA 1552 *ante*.

8 Leasehold Reform, Housing and Urban Development Act 1993 s 74(1), (10) (s 74(1) amended by the Housing Act 1996 s 118(4)). Where, in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 74(5) or (6) (see the text and notes 27-32 *infra*), s 74(1) (as amended) ceases to apply as from a particular date, it does so without prejudice to (1) the effect of anything done before that date in pursuance of s 74(2) or (3) (as amended) (see the text and notes 12-23 *infra*); or (2) the operation of any provision of Pt I (ss 1-103) (as amended) (see PARAS 81, 411 *et seq*, 1396-1402, 1404, 1415, 1443-1447, 1504, 1511, 1531, 1532 *et seq ante*), or of regulations made thereunder, in relation to anything so done: s 74(7).

If, however, no notice of withdrawal has been given in accordance with s 74(3) (as amended) before the date when s 74(1) (as amended) so ceases to apply and before that date either (a) the reversioner has given the nominee purchaser (or, as from a day to be appointed (see note 13 *infra*), has given the RTE company) a counter-notice under s 21 (as amended) (see PARA 1606 *ante*) complying with the requirement set out in s 21(2) (a) (as amended); or (b) s 23(6) (as amended) (see PARA 1611 *ante*) would, but for s 74(3) (as amended), have applied to require the reversioner to give a further counter-notice to the nominee purchaser (or to the RTE company), the reversioner must give a further counter-notice to the nominee purchaser (or to the RTE company) within the period of two months beginning with the date when s 74(1) (as amended) ceases to apply: s 74(8) (s 74(3), (8), (10) prospectively amended by the Commonhold and Leasehold Reform Act 2002 s 124, Sch 8 paras 2, 30(1), (2), as from a day to be appointed (see note 13 *infra*)).

The Leasehold Reform, Housing and Urban Development Act 1993 s 21(3)-(5) (as amended) (see PARA 1606 *ante*) applies to any further counter-notice required to be given by the reversioner under s 74(8) (as amended) as if it were a counter-notice under s 21 (as amended) complying with the requirement set out in s 21(2)(a) (as amended); and s 24 (as amended) (see PARA 1612 *ante*) and s 25 (as amended) (see PARA 1613 *ante*) apply in relation to any such counter-notice as they apply in relation to one required by s 22(3): s 74(9). For these purposes, 'the nominee purchaser' (or, as from a day to be appointed, 'the RTE company') and 'the reversioner' have the same meaning as in *ibid* Pt I Ch I (ss 1-38) (as amended): s 74(10) (as so amended). For the meaning of 'the nominee purchaser' see PARAS 1576-1577 *ante*; for the meaning of 'the reversioner' see PARAS 1559-1561 *ante*; and as to RTE companies see PARAS 1581-1583 *ante*.

9 le to give effect to the Leasehold Reform Act 1967 s 10 (as amended): see PARA 1452 *et seq ante*.

10 For the meaning of 'landlord' see PARA 1535 note 3 *ante*.

11 For the meaning of 'tenant' see PARA 1535 note 3 *ante*.

12 Leasehold Reform, Housing and Urban Development Act 1993 s 74(2).

13 le as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

14 le under the Leasehold Reform, Housing and Urban Development Act 1993 s 21 (as amended): see PARA 1606 *ante*.

15 le the date referred to in *ibid* s 21(1) (as amended): see PARA 1606 *ante*.

16 le the requirements set out in *ibid* s 21(2) (as amended) (see PARA 1606 *ante*), but in relation to which s 21(3) (as amended) (see PARA 1606 *ante*) need not be complied with.

17 le under *ibid* Pt I Ch I (ss 1-38) (as amended): see PARA 1552 *et seq ante*.



- 18    Ie otherwise than under *ibid* s 22 (as amended) (see PARA 1610 ante) or s 23 (as amended) (see PARA 1611 ante).
- 19    Ie under either *ibid* s 22 or 23 (each as amended).
- 20    Ie *ibid* s 74(1) (as amended): see the text and notes 1-8 supra.
- 21    See note 17 supra.
- 22    Ie subject to the preceding provisions of the Leasehold Reform, Housing and Urban Development Act 1993 s 74(3) (as amended): see the text and notes 13-21 supra.
- 23    Ibid s 74(3) (as amended: see note 8 supra).
- 24    Ie in accordance with *ibid* s 74(2) or (3) (as amended).
- 25    Ie the Leasehold Reform Act 1967 s 9(4) (see PARA 1466 ante) or, as the case may be, the Leasehold Reform, Housing and Urban Development Act 1993 s 33 (as amended) (see PARA 1645 ante) do not have effect to require the payment of any such costs.
- 26    Ibid s 74(4).
- 27    See note 20 supra.
- 28    As to when the decision of a tribunal is treated as becoming final see PARA 1587 note 8 ante.
- 29    Ie the area referred to in the Leasehold Reform, Housing and Urban Development Act 1993 s 74(1) (as amended).
- 30    Ibid s 74(5).
- 31    See note 20 supra.
- 32    Leasehold Reform, Housing and Urban Development Act 1993 s 74(6).

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#### **1741. Charges under estate management schemes.**

Where an estate management scheme<sup>1</sup> or a corresponding scheme in relation to areas occupied under leases from the Crown<sup>2</sup> includes provision imposing estate charges, a variable estate charge<sup>3</sup> is payable only to the extent that the amount of the charge is reasonable<sup>4</sup>. The procedure for challenging the reasonableness of such charges has already been discussed<sup>5</sup>.

1    For the meaning of 'estate management scheme' for these purposes see PARA 1506 note 1 ante. See also PARA 1734 ante.

2    Ie a scheme under the Leasehold Reform, Housing and Urban Development Act 1993 s 94(6): see PARA 1534 ante.

3    For the meaning of 'variable estate charge' see PARA 1506 note 4 ante.

4    See the Commonhold and Leasehold Reform Act 2002 s 159(1), (2); and PARA 1506 ante.

5    See PARA 1506 ante.

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## **(8) JURISDICTION**

### **1742. Jurisdiction of county courts.**

Any jurisdiction expressed to be conferred on the court<sup>1</sup> must be exercised by a county court<sup>2</sup>. There must also be brought in a county court any proceedings for determining any question arising under or by virtue of any relevant statutory provision<sup>3</sup> which is not a question so falling within its jurisdiction<sup>4</sup> or is not one falling<sup>5</sup> within the jurisdiction of a leasehold valuation tribunal<sup>6</sup>. Where any proceedings are so brought in a county court, the court has jurisdiction to hear and determine any other proceedings joined with those proceedings, despite the fact that those other proceedings would otherwise be outside the court's jurisdiction<sup>7</sup>.

Where, however, there are brought in the High Court any proceedings which are otherwise proceedings within the jurisdiction of the High Court, the High Court has jurisdiction to hear and determine any proceedings joined with those proceedings which are<sup>8</sup> proceedings within the jurisdiction of a county court<sup>9</sup>.

1    Ie by the Leasehold Reform, Housing and Urban Development Act 1993 Pt I (ss 1-103) (as amended): see PARAS 81, 411 et seq, 1396-1402, 1404, 1415, 1443-1447, 1504, 1511, 1531, 1532 et seq ante, PARA 1743 post.

2    Ibid s 90(1).

3    Ie any question arising under or by virtue of any provision of ibid Pt I Ch I (ss 1-38) (as amended) (see PARA 1552 et seq ante) or Pt I Ch II (ss 39-62) (as amended) (see PARA 1671 et seq ante).

4    Ie ibid s 90(1).

5    Ie by virtue of ibid s 91 (as amended): see PARA 1743 post.

6    Ibid s 90(2).

7    Ibid s 90(4).

8    Ie by virtue of ibid s 90(1), (2).

9    Ibid s 90(3).

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### **1743. Jurisdiction of leasehold valuation tribunals.**

Any question arising in relation to any of the specified matters<sup>1</sup> must, in default of agreement, be determined by a leasehold valuation tribunal<sup>2</sup>.

The matters so specified are:

- 4200 (1) the terms of acquisition<sup>3</sup> relating to any interest<sup>4</sup> which is to be acquired<sup>5</sup> by a nominee purchaser<sup>6</sup> (or, as from a day to be appointed<sup>7</sup>, by an RTE company<sup>8</sup>) or any new lease<sup>9</sup> which is to be granted<sup>10</sup> to a tenant<sup>11</sup>, including in particular any matter which needs to be determined in respect of the purchase price payable by a nominee purchaser (or by an RTE company)<sup>12</sup> or the premium and other amounts payable by the tenant<sup>13</sup>;
- 4201 (2) the terms of any lease which is to be granted<sup>14</sup>;
- 4202 (3) the amount of any payment falling to be made to the reversioner by the nominee purchaser and the participating tenants (or by the RTE company)<sup>15</sup>;
- 4203 (4) the amount of any compensation payable where a claim to collective enfranchisement is ineffective<sup>16</sup>;
- 4204 (5) the amount of any compensation payable where a claim to acquire a new lease is ineffective<sup>17</sup>;
- 4205 (6) the amount of any costs payable by any person or persons by virtue of any statutory provision relating to the right to collective enfranchisement or the right to acquire a new lease<sup>18</sup>; and
- 4206 (7) the apportionment between two or more persons of any amount, whether of costs or otherwise, payable by virtue of any such provision<sup>19</sup>.

A leasehold valuation tribunal may, when determining the property in which any interest is to be acquired in pursuance of a notice exercising the right to collective enfranchisement<sup>20</sup> or the right to a new lease<sup>21</sup>, specify in its determination property which is less extensive than that specified in that notice<sup>22</sup>.

The Lands Tribunal is reluctant, on an appeal, to disturb a valuation arrived at by a leasehold valuation tribunal under the above provisions and will treat any new evidence before it with great care<sup>23</sup>.

1    Ie any of the matters specified in the Leasehold Reform, Housing and Urban Development Act 1993 s 91(2) (as amended): see heads (1)-(7) in the text.

2    Ibid s 91(1) (amended by the Commonhold and Leasehold Reform Act 2002 s 180, Sch 14). As well as the general particulars to be included with an application to a leasehold valuation tribunal (see PARA 60 ante), the documents and particulars mentioned in PARA 1695 ante at heads (a)-(d) in the text must be included with an application under the Leasehold Reform, Housing and Urban Development Act 1993 s 91 (as amended): see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(j); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(j). The tribunal may, however, dispense with or relax any of those requirements if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application: see PARA 1695 the text and note 11 ante.

3    For these purposes, 'the terms of acquisition' are to be construed in accordance with the Leasehold Reform, Housing and Urban Development Act 1993 s 24(8) (as amended) (see PARA 1612 note 8 ante) or s 48(7) (see PARA 1695 note 6 ante), as appropriate: s 91(11).

4    For the meaning of 'interest' see PARA 408 note 16 ante.

5    Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante.

6    For these purposes, 'the nominee purchaser' has the same meaning as in ibid Pt I Ch I (as amended) (see PARAS 1576-1577 ante): s 91(11) (as originally enacted).

7    Ie as from a day to be appointed under the Commonhold and Leasehold Reform Act 2002 s 181(1). At the date at which this title states the law, no such day had been appointed.

8    For these purposes, 'RTE company' has the same meaning as in the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (as amended): s 91(11) (s 91(2), (11) prospectively amended by the Commonhold and Leasehold Reform Act 2002, s 124, Sch 8 paras 2, 31(1), (2), as from a day to be appointed (see note 7 supra)). As to RTE companies see PARAS 1581-1583 ante.

9 For the meaning of 'lease' see PARA 1535 note 3 ante.

10 Ie in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch II (ss 39-62) (as amended): see PARA 1671 et seq ante.

11 For the meaning of 'tenant' see PARA 1535 note 3 ante.

12 Ie any matter which needs to be determined for the purposes of any provision of the Leasehold Reform, Housing and Urban Development Act 1993 s 32(1), Sch 6 (as amended): see PARA 1624 et seq ante.

13 Ie any matter which needs to be determined for the purposes of any provision of ibid s 56(1), Sch 13 (as amended): see PARA 1705 et seq ante.

14 Ie in accordance with ibid s 36 (as amended) (see PARA 1656 ante) and Sch 9 (as amended) (see PARA 1657 et seq ante).

15 Ie any payment falling to be made by virtue of ibid s 18(2) (as amended): see PARA 1602 ante. As to the participating tenants see PARAS 1571-1575 ante.

16 Ie any compensation payable under ibid s 37A (as added and amended): see PARA 1669 ante.

17 Ie any compensation payable under ibid s 61A (as added): see PARA 1732 ante.

18 Ie by virtue of any provision of ibid Pt I Ch I (as amended) or Pt I Ch II (as amended) and, in the case of costs to which s 33(1) (as amended) (see PARA 1645 ante) or s 60(1) (see PARA 1724 ante) applies, the liability of any person or persons by virtue of any such provision to pay any such costs.

19 Ibid s 91(2) (amended by the Housing Act 1996 s 116, Sch 11 paras 2(2), 3(2); further prospectively amended (see note 8 supra)).

20 Ie a notice under the Leasehold Reform, Housing and Urban Development Act 1993 s 13 (as amended): see PARA 1585 ante.

21 Ie a notice under ibid s 42 (as amended): see PARA 1677 ante.

22 Ibid s 91(9).

23 See *Sinclair Gardens Investments (Kensington) Ltd v Franks* (1997) 76 P & CR 230, [1998] RVR 261, Lands Tribunal (where it was stated that lessors should not be encouraged to think that they could reserve evidence which should have been offered before the leasehold valuation tribunal, where the parties appeared on an equal footing, to the Lands Tribunal where a nominee purchaser might have exhausted his funds and be on risk as to costs). See also *Maryland Estates Ltd v 63 Perham Road Ltd* [1997] 2 EGLR 198, [1997] 35 EG 94, Lands Tribunal (where the nominee purchaser was held liable to pay the costs of the freeholder notwithstanding that it had withdrawn its notice of intention to appear and took no part in the proceedings).

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## **26. TENANCIES OF FLATS; OTHER COLLECTIVE RIGHTS**

### **(1) COLLECTIVE RIGHT OF FIRST REFUSAL**

#### **(i) In general**

##### **1744. Right of first refusal on disposals by landlord.**

A landlord<sup>1</sup> may not make a relevant disposal<sup>2</sup> affecting any qualifying premises<sup>3</sup> unless:

- 4207 (1) he has previously served<sup>4</sup> a notice<sup>5</sup> with respect to the disposal on the qualifying tenants<sup>6</sup> of the flats<sup>7</sup> contained in those premises, being a notice by virtue of which rights of first refusal are conferred on those tenants; and
- 4208 (2) the disposal is made<sup>8</sup> in accordance with the statutory requirements<sup>9</sup>.

1 For the meaning of 'landlord' see PARA 1747 post.

2 For the meaning of 'relevant disposal' see PARA 1750 post.

3 In any premises to which at the date of the disposal the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see heads (1)-(2) in the text; and PARA 1746 et seq post) applies. As to those premises see PARA 1746 post.

4 In accordance with ibid s 5 (as substituted): see PARA 1752 post.

5 In under ibid s 5 (as substituted).

6 For the meaning of 'qualifying tenant' see PARA 1748 post. Any reference in ibid Pt I (ss 1-20) (as amended) to a tenant of a particular description is to be construed, in relation to any time when the interest under his tenancy has ceased to be vested in him, as a reference to the person who is for the time being the successor in title to that interest: s 20(3). For the meanings of 'tenant' and 'tenancy' see PARA 53 note 1 ante.

7 For these purposes, 'flat' means a separate set of premises, whether or not on the same floor, which (1) forms part of a building; and (2) is divided horizontally from some other part of that building; and (3) is constructed or adapted for use for the purposes of a dwelling: ibid s 60(1).

8 In made in accordance with the requirements of ibid ss 6-10 (as substituted): see PARA 1758 et seq post.

9 Ibid s 1(1). As to the enforcement by an injunction granted by the court of a restriction imposed by s 1(1) see PARA 1781 post; and as to the determination of questions arising under Pt I (as amended) by the county court see PARA 53 note 10 ante.

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### **1745. Application of right of first refusal to contracts.**

The statutory provisions conferring a collective right of first refusal<sup>1</sup> apply:

- 4209 (1) to a contract to create or transfer an estate or interest in land, whether conditional or unconditional and whether or not enforceable by specific performance, as they apply in relation to a disposal<sup>2</sup> consisting of the creation or transfer of such an estate or interest<sup>3</sup>; and as they so apply:

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140. (a) references to a disposal of any description are to be construed as references to a contract to make such a disposal;

141. (b) references to making a disposal of any description are to be construed as references to entering into a contract to make such a disposal; and

142. (c) references to the transferee<sup>4</sup> under the disposal are to be construed as references to the other party to the contract and include a reference to any other person to whom an estate or interest is to be granted or transferred in pursuance of the contract<sup>5</sup>;

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4210 (2) to an assignment of rights under such a contract as is mentioned in head (1) above as they apply in relation to a disposal consisting of the transfer of an estate or interest in land<sup>6</sup>; and as they so apply:

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- 143. (a) references to a disposal of any description are to be construed as references to an assignment of rights under a contract to make such a disposal;
- 144. (b) references to making a disposal of any description are to be construed as references to making an assignment of rights under a contract to make such a disposal;
- 145. (c) references to the landlord<sup>7</sup> are to be construed as references to the assignor; and
- 146. (d) references to the transferee under the disposal are to be construed as references to the assignee of such rights<sup>8</sup>;

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4211 (3) to a contract to make such an assignment as is mentioned in head (2) above as they apply, in accordance with head (1) above, to a contract to create or transfer an estate or interest in land<sup>9</sup>.

Nothing in the above provisions, however, affects the operation of the statutory provisions<sup>10</sup> relating to options or rights of pre-emption<sup>11</sup>.

1   I.e. the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 ante, PARA 1746 et seq post.

2   For the meaning of 'disposal' see PARA 1750 note 3 post.

3   Landlord and Tenant Act 1987 s 4A(1) (s 4A added by the Housing Act 1996 s 89(1)).

4   For the meaning of 'the transferee' generally see PARA 1750 note 3 post.

5   Landlord and Tenant Act 1987 s 4A(1)(a)-(c) (as added: see note 3 supra).

6   Ibid s 4A(2) (as added: see note 3 supra).

7   For the meaning of 'landlord' generally see PARA 1747 post.

8   Landlord and Tenant Act 1987 s 4A(2)(a)-(d) (as added: see note 3 supra).

9   Ibid s 4A(3) (as added: see note 3 supra). Section 4A (as so added) remedies the defects in the original legislation to which attention was drawn in *Mainwaring v Henry Smith's Charity Trustees* [1998] QB 1, [1996] 2 All ER 220, CA, and reverses the decision in that case that a 'relevant disposal' (see PARA 1750 post) referred to a completed conveyance.

10   I.e. the provisions of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1746 et seq post.

11   Ibid s 4A(4) (as added: see note 3 supra).

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#### **1746. Premises to which the right of first refusal applies.**

The statutory provisions relating to tenants' right of first refusal<sup>1</sup> apply to premises if:

- 4212 (1) they consist of the whole or part of a building<sup>2</sup>; and
- 4213 (2) they contain two or more flats<sup>3</sup> held by qualifying tenants<sup>4</sup>; and
- 4214 (3) the number of flats held by such tenants exceeds 50% of the total number of flats contained in the premises<sup>5</sup>.

Those provisions do not, however, apply:

- 4215 (a) to such premises if:  
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  - 147. (i) any part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and
  - 148. (ii) the internal floor area of that part or those parts, taken together, exceeds 50%<sup>6</sup> of the internal floor area of the premises, taken as a whole;
- 290 4216 and for these purposes, the internal floor area of any common parts<sup>7</sup> is to be disregarded<sup>8</sup>;
- 4217 (b) to any such premises at a time when the interest of the landlord<sup>9</sup> is held by an exempt landlord<sup>10</sup> or a resident landlord<sup>11</sup>.

1    I.e. the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARAS 1744-1745 ante; the text and notes 2-11 infra; and PARA 1747 et seq post.

2    For these purposes, a building is not confined to the bricks and mortar of which the building is constructed but extends to the garden and other appurtenances which are expressly or impliedly included in the demise of a flat to a tenant: *Denetower Ltd v Toop* [1991] 3 All ER 661, [1991] 1 WLR 945, CA, applying *St Thomas's Hospital Governors v Charing Cross Rly Co* (1861) 1 John & H 400. The fact that the building is included within one or more registered titles is irrelevant: *Kay Green v Twinsectra Ltd* [1996] 4 All ER 546, [1996] 1 WLR 1587, CA; and see *Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch), [2005] Ch 61, [2005] 4 All ER 413.

3    For the meaning of 'flat' see PARA 1744 note 7 ante.

4    For the meaning of 'qualifying tenant' see PARA 1748 post.

5    Landlord and Tenant Act 1987 s 1(2). Section 1(2) is subject to s 1(3), (4) (see the text and notes 6-11 infra): s 1(2). As to the determination of question arising under Pt I (as amended) by the county court see PARA 53 note 10 ante.

6    The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order substitute for the percentage for the time being so specified such other percentage as is specified in the order: see *ibid* s 1(5). At the date at which this title states the law, no order had been made specifying any substituted percentage. As to the Secretary of State see PARA 27 note 3 ante. As to the transfer of functions of the Secretary of State under the Landlord and Tenant Act 1987 so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7    For these purposes, 'common parts', in relation to any building or part of a building, includes the structure and exterior of that building or part and any common facilities within it: Landlord and Tenant Act 1987 s 60(1).

8    *Ibid* s 1(3).

9    For the meaning of 'landlord' see PARA 1747 post.

10   For the meaning of 'exempt landlord' see the Landlord and Tenant Act 1987 s 58(1) (as amended); and PARA 354 ante.

11   *Ibid* s 1(4). For the meaning of 'resident landlord' see s 58(2); and PARA 399 note 8 ante.

## UPDATE

### 1746 Premises to which the right of first refusal applies

NOTE 2--See also *Dartmouth Court Blackheath Ltd v Berisworth Ltd* [2008] EWHC 350 (Ch), [2008] 2 P & CR 36, [2008] All ER (D) 381 (Feb) (extent of relevant premises had to be ascertained in an objective way, disregarding the disposal concerned).

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### **1747. Landlords to whose premises the right of first refusal applies.**

A person is<sup>1</sup> the landlord in relation to any premises consisting of the whole or part of a building if he is:

- 4218 (1) the immediate landlord of the qualifying tenants<sup>2</sup> of the flats<sup>3</sup> contained in those premises; or
- 4219 (2) where any of those tenants is a statutory tenant<sup>4</sup>, the person who, apart from the statutory tenancy<sup>5</sup>, would be entitled to possession of the flat in question<sup>6</sup>.

Where the person who is<sup>7</sup> the landlord in relation to any such premises<sup>8</sup> ('the immediate landlord') is himself a tenant of those premises under a tenancy which is either:

- 4220 (a) a tenancy for a term of less than seven years; or
- 4221 (b) a tenancy for a longer term but terminable within the first seven years at the option of the person who is the landlord under that tenancy ('the superior landlord'),

the superior landlord is also regarded as the landlord in relation to those premises; and, if the superior landlord is himself a tenant of those premises under a tenancy falling within head (a) or head (b) above, the person who is the landlord under the tenancy is also so regarded, and so on<sup>9</sup>.

1    Ie for the purposes of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARAS 1744-1746 ante; the text and notes 2-9 infra; and PARA 1748 et seq post) but subject to s 2(2) (see the text and notes 7-9 infra) and s 4(1A) (as added) (see PARA 1750 post).

2    For the meaning of 'qualifying tenant' see PARA 1748 post.

3    For the meaning of 'flat' see PARA 1744 note 7 ante.

4    For the meaning of 'statutory tenant' see PARA 53 note 1 ante; and for the meaning of 'tenant' see PARA 1744 note 6 ante.

5    For the meanings of 'tenancy' and 'statutory tenancy' see PARA 53 note 1 ante.

6    Landlord and Tenant Act 1987 s 2(1) (amended by the Housing Act 1988 s 119, Sch 13 para 1); Landlord and Tenant Act 1987 s 20(1). As to the determination of questions arising under Pt I (as amended) by the county court see PARA 53 note 10 ante.

7    Ie in accordance with *ibid* s 2(1).

8    Ie for the purposes of *ibid* Pt I (as amended).



9 Ibid ss 2(2), 20(1).

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### **1748. Meaning of 'qualifying tenant'.**

A person is<sup>1</sup> a qualifying tenant of a flat<sup>2</sup> if he is the tenant<sup>3</sup> of the flat under a tenancy<sup>4</sup> other than:

- 4222 (1) a protected shorthold tenancy<sup>5</sup>;
- 4223 (2) a tenancy to which Part II of the Landlord and Tenant Act 1954<sup>6</sup> applies;
- 4224 (3) a tenancy terminable on the cessation of his employment; or
- 4225 (4) an assured tenancy or assured agricultural occupancy<sup>7</sup>.

A person is not to be regarded as being a qualifying tenant of any flat contained in any particular premises consisting of the whole or part of a building if, by virtue of one or more tenancies none of which falls within heads (1) to (4) above, he is the tenant not only of the flat in question but also of at least two other flats contained in those premises<sup>8</sup>.

A tenant of a flat whose landlord is a qualifying tenant of that flat is not to be regarded as being a qualifying tenant of that flat<sup>9</sup>.

1 Ie for the purposes of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante; the text and notes 2-9 infra; and PARA 1750 et seq post.

2 For the meaning of 'flat' see PARA 1744 note 7 ante.

3 For the meaning of 'tenant' see PARA 1744 note 6 ante.

4 For the meaning of 'tenancy' see PARA 53 note 1 ante.

5 Ie as defined in the Housing Act 1980 s 52 (repealed with savings): see PARA 1009 ante.

6 Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended) (business tenancies: see PARA 701 et seq ante).

7 Landlord and Tenant Act 1987 s 3(1) (amended by the Housing Act 1988 ss 119, 140(2), Sch 13 para 2(1), Sch 18); Landlord and Tenant Act 1987 s 20(1). For these purposes, 'assured tenancy' and 'assured agricultural occupancy' have the meanings given by the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARAS 1011 et seq, 1183-1186 ante; Landlord and Tenant Act 1987 s 3(1) (as so amended).

As to the determination of questions arising under Pt I (as amended) by the county court see PARA 53 note 10 ante.

8 Ibid s 3(2) (amended by the Housing Act 1988 Sch 13 para 2(2)); Landlord and Tenant Act 1987 s 20(1). For the purposes of s 3(2) (as so amended), any tenant of a flat contained in the premises in question who is a body corporate is treated as the tenant of any other flat so contained and let to an associated company: s 3(3) (amended by the Housing Act 1988 Sch 13 para 2(2)); Landlord and Tenant Act 1987 s 20(1). 'Associated company', in relation to a body corporate, means another body corporate which is, within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25), that body's holding company, a subsidiary of that body or another subsidiary of that body's holding company: Landlord and Tenant Act 1987 s 20(1); and see *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104, [1999] 1 All ER 356, CA.

9 Landlord and Tenant Act 1987 ss 3(4), 20(1).

## UPDATE

### 1748 Meaning of 'qualifying tenant'

NOTE 8--In definition of 'associated company' reference to Companies Act 1985 s 736 now to Companies Act 2006 s 1159; Landlord and Tenant Act 1987 s 20(1) (definition amended by SI 2009/1941).

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### 1749. The requisite majority of qualifying tenants.

The requisite majority of qualifying tenants<sup>1</sup> of the constituent flats<sup>2</sup> means<sup>3</sup> qualifying tenants of constituent flats with more than 50% of the available votes<sup>4</sup>. The total number of available votes is to be determined as follows:

- 4226 (1) where an offer notice has been served<sup>5</sup>, that number is equal to the total number of constituent flats let to qualifying tenants on the date when the period specified in that notice as the period for accepting the offer expires<sup>6</sup>;
- 4227 (2) where a notice requiring information<sup>7</sup> is served<sup>8</sup> without an offer notice having been previously served<sup>9</sup>, that number is equal to the total number of constituent flats let to qualifying tenants on the date of service of the notice requiring information<sup>10</sup>;
- 4228 (3) where a notice is served under the statutory provisions allowing the qualifying tenants to take the benefit of the contract<sup>11</sup>, to compel a sale by the purchaser<sup>12</sup> or to compel the grant of a new tenancy by the superior landlord<sup>13</sup> without a notice having been previously served as described in head (1) or head (2) above, that number is equal to the total number of constituent flats let to qualifying tenants on the date of service of the relevant<sup>14</sup> notice<sup>15</sup>.

There is one available vote in respect of each of the flats so let on the date referred to in the relevant provision set out in heads (1) to (3) above, which must be attributed to the qualifying tenant to whom it is let<sup>16</sup>.

The persons constituting the requisite majority of qualifying tenants for one purpose may be different from the persons constituting such a majority for another purpose<sup>17</sup>.

1 For the meaning of 'qualifying tenant' see PARA 1748 ante.

2 For these purposes, 'constituent flat' is to be construed in accordance with the Landlord and Tenant Act 1987 s 5(1) (as substituted) (see PARA 1752 post) or s 11(2) (as substituted) (see PARA 1769 post), as the case may require: s 20(1) (definition substituted by the Housing Act 1996 ss 89(3), 92(1), Sch 6 Pt IV para 3). For the meaning of 'flat' see PARA 1744 note 7 ante.

3 le for the purposes of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1750 et seq post.

4 Ibid s 18A(1) (s 18A added by the Housing Act 1996 s 92(1), Sch 6 Pt IV para 2).

- 5 le under the Landlord and Tenant Act 1987 s 5 (as substituted): see PARA 1752 post. As to service of notices see PARA 1751 post.
- 6 Ibid s 18A(2)(a) (as added: see note 4 supra).
- 7 le a notice under ibid s 11A (as substituted)): see PARA 1770 post.
- 8 le under ibid s 11A (as substituted): see PARA 1770 post.
- 9 See note 5 supra.
- 10 Landlord and Tenant Act 1987 s 18(2)(b) (as added: see note 4 supra).
- 11 le under ibid s 12A (as substituted): see PARA 1771 post.
- 12 le under ibid 12B (as substituted): see PARAS 1772-1773 post.
- 13 le under ibid s 12C (as substituted): see PARA 1775 post.
- 14 le service of the notice under ibid s 12A, s 12B or s 12C (as substituted), as the case may be.
- 15 Ibid s 18(2)(c) (as added: see note 4 supra).
- 16 Ibid s 18(3) (as added: see note 4 supra).
- 17 Ibid s 18(4) (as added: see note 4 supra).

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### **1750. Meaning of 'relevant disposal'.**

References to a relevant disposal affecting any qualifying premises<sup>1</sup> are<sup>2</sup> references to the disposal<sup>3</sup> by the landlord<sup>4</sup> of any estate or interest<sup>5</sup>, whether legal or equitable, in any such premises, including the disposal of any such estate or interest in any common parts<sup>6</sup> of any such premises but excluding:

- 4229 (1) the grant of any tenancy under which the demised premises consist of a single flat<sup>7</sup>, whether with or without any appurtenant premises<sup>8</sup>; and
- 4230 (2) any of the specified<sup>9</sup> disposals<sup>10</sup>.

The disposals referred to in head (2) above are:

- 4231 (a) a disposal of any interest of a beneficiary in settled land<sup>11</sup> or any incorporeal hereditament;
- 4232 (b) a disposal by way of security for a loan;
- 4233 (c) a disposal to a trustee in bankruptcy or to the liquidator of a company;
- 4234 (d) a disposal in pursuance of a property adjustment order or an order for the sale of property made in connection with matrimonial proceedings<sup>12</sup>, an order as to financial provision to be made from an estate<sup>13</sup>, a property adjustment order or an order for the sale of property after an overseas divorce, etc<sup>14</sup>, an order for financial relief against a parent<sup>15</sup> or a property adjustment order or order for the sale of property in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>16</sup>;

- 4235 (e) a disposal in pursuance of a compulsory purchase order or in pursuance of an agreement entered into in circumstances where, but for the agreement, such an order would have been made or, as the case may be, carried into effect;
- 4236 (f) a disposal of any freehold or leasehold interest in pursuance of the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993<sup>17</sup>;
- 4237 (g) a disposal by way of gift to a member of the landlord's family<sup>18</sup> or to a charity<sup>19</sup>;
- 4238 (h) a disposal by one charity to another of an estate or interest in land which prior to the disposal is functional land<sup>20</sup> of the first-mentioned charity and which is intended to be functional land of the other charity once the disposal is made;
- 4239 (i) a disposal consisting of the transfer of an estate or interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee or in connection with the discharge of any trustee;
- 4240 (j) a disposal consisting of a transfer by two or more persons who are members of the same family either to fewer of their number or to a different combination of members of the family, but one that includes at least one of the transferors;
- 4241 (k) a disposal in pursuance of a contract, option or right of pre-emption binding on the landlord, except as otherwise provided<sup>21</sup>;
- 4242 (l) a disposal consisting of the surrender of a tenancy in pursuance of any covenant, condition or agreement contained in it;
- 4243 (m) a disposal to the Crown; and
- 4244 (n) a disposal by a body corporate to a company which has been an associated company<sup>22</sup> of that body for at least two years<sup>23</sup>.

1    le any premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante; the text and notes 2-23 infra; and PARA 1752 et seq post) applies. As to those premises see PARA 1746 ante.

2    le for the purposes of ibid Pt I (as amended).

3    For these purposes, 'disposal' means a disposal, whether by the creation or the transfer of an estate or interest, and (1) includes the surrender of a tenancy and the grant of an option or right of pre-emption; but (2) excludes a disposal under the terms of a will or under the law relating to intestacy; and references to the transferee in connection with a disposal are to be construed accordingly: ibid ss 4(3), 20(1). In Pt I (as amended), 'disposal' is to be construed in accordance with s 4(3) and s 4A (as added) (application of provisions to contracts: see PARA 1745 ante) and references to the acquisition of an estate or interest are to be construed accordingly: 20(1) (definition amended by the Housing Act 1996 ss 89(3), 92(1), Sch 6 Pt IV para 3). For the meaning of 'tenancy' see PARA 53 note 1 ante.

4    For the meaning of 'landlord' see PARA 1747 ante.

5    Where an estate or interest of the landlord has been mortgaged, the reference to the disposal of an estate or interest by the landlord includes a reference to its disposal by the mortgagee in exercise of a power of sale or leasing, whether or not the disposal is made in the name of the landlord; and, in relation to such a proposed disposal by the mortgagee, any reference in the Landlord and Tenant Act 1987 s 4(2)-(6) (as amended) (see the text and notes 6-23 infra) and ss 5-20 (as amended) (see PARA 1752 et seq post) to the landlord is to be construed as a reference to the mortgagee: s 4(1A) (added by the Housing Act 1988 s 119, Sch 13 para 3(1)). For the meaning of 'mortgagee' see PARA 400 note 13 ante.

6    For the meaning of 'common parts' see PARA 1746 note 7 ante.

7    For the meaning of 'flat' see PARA 1744 note 7 ante.

8    For these purposes, 'appurtenant premises', in relation to any flat, means any yard, garden, outhouse or appurtenance, not being a common part of the building containing the flat, which belongs to, or is usually enjoyed with, the flat: Landlord and Tenant Act 1987 s 4(4).

9    le any of the disposals falling within ibid s 4(2) (as amended): see the text and notes 11-23 infra.

10 Ibid ss 4(1), 20(1). As to the determination of questions arising under Pt I (as amended) by the county court see PARA 53 note 10 ante.

11 Ie within the meaning of the Settled Land Act 1925: see SETTLEMENTS vol 42 (Reissue) PARA 680. Subject to certain exceptions, no settlement created on or after 1 January 1997 is a strict settlement under the Settled Land Act 1925 and no such settlement is deemed to be made on or after that date: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676.

12 Ie in pursuance of an order made under (1) the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante); or (2) s 24A (as added and amended) where, in the latter case, the order includes provision requiring the property concerned to be offered for sale to a person or class of persons specified in the order.

13 Ie an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 691-692.

14 Ie in pursuance of an order made under (1) the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante); or (2) s 17(2) where, in the latter case, the order includes provision requiring the property concerned to be offered for sale to a person or class of persons specified in the order.

15 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

16 Ie an order made under (1) the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3); or (2) Sch 5 Pt 3, or Sch 7 para 9(4), where, in the latter case, the order includes provision requiring the property concerned to be offered for sale to a person or class of persons specified in the order: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

17 Ie a disposal in pursuance of the Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended): see PARA 1552 et seq ante.

18 For these purposes, a person is a member of another's family if (1) that person is the spouse or civil partner of that other person, or the two of them live together as husband and wife or as if they were civil partners; or (2) that person is that other person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece: Landlord and Tenant Act 1987 s 4(5) (s 4(5), (6) amended by the Civil Partnership Act 2004 s 81, Sch 8 para 40(1), (3), (4)). For the purposes of head (2) supra: (a) a relationship by marriage or civil partnership is treated as a relationship by blood; (b) a relationship of the half-blood is treated as a relationship of the whole blood; (c) the stepchild of a person is treated as his child; and (d) the illegitimate child is treated as the legitimate child of his mother and reputed father: Landlord and Tenant Act 1987 s 4(6) (as so amended)).

19 For the meaning of 'charity' see PARA 354 note 18 ante.

20 For the meaning of 'functional land' see PARA 399 note 11 ante.

21 Ie except as provided by the Landlord and Tenant Act 1987 s 8D (as substituted) (application of ss 11-17) (as substituted) to disposal in pursuance of option or right of pre-emption: see PARA 1764 post.

22 For the meaning of 'associated company' see PARA 1748 note 8 ante.

23 Landlord and Tenant Act 1988 s 4(2) (amended by the Housing Act 1988 ss 119, 140(2), Sch 17 para 3(2), Sch 18; the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 26; the Housing Act 1996 ss 89(2), 90(1), 92, 216(3), 227, Sch 6 Pt IV para 1, Sch 18 para 18, Sch 19 Pt III; the Family Law Act 1996 s 66(1), Sch 8 para 38; the Civil Partnership Act 2004 ss 81, s 261(4), Sch 8 para 40(1), (2), Sch 30); Landlord and Tenant Act 1987 s 20(1).

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## **1751. Notices.**

Any notice required or authorised to be served under the Landlord and Tenant Act 1987 must be in writing and may be sent by post<sup>1</sup>.

Any notice purporting to be a notice served under any provision of Part I or Part III of that Act<sup>2</sup> by the requisite majority of any qualifying tenants<sup>3</sup> must specify the names of all of the persons by whom it is served and the addresses of the flats<sup>4</sup> of which they are qualifying tenants<sup>5</sup>. The Secretary of State<sup>6</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>7</sup> may by regulations<sup>8</sup> prescribe:

4245 (1) the form of any notices required or authorised to be served under or in pursuance of any such provision; and

4246 (2) the particulars which any such notices must contain, whether in addition to, or in substitution for, any particulars required by virtue of the provision in question<sup>9</sup>.

1 Landlord and Tenant Act 1987 s 54(1). Service of the notice required by a provision of Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante, PARA 1752 et seq post) is a formal step and is not effected by correspondence through a tenant's solicitor, or by office copy entries of the freehold title sent to a tenant by the Land Registry, since it was plainly the intention of Parliament that the tenants who were, together, to exercise the group right should be put in a position where they would know that the opportunity to exercise that right had arisen: see *Savva v Galway-Cooper* [2005] EWCA Civ 1068, [2005] 3 EGLR 40, [2005] All ER (D) 68 (Jul).

2 Ie under the Landlord and Tenant Act 1987 Pt I (as amended) (see PARA 1744 et seq ante, PARA 1752 et seq post) or Pt III (ss 25-34) (as amended) (compulsory acquisition by tenants of their landlord's interest: see PARA 1783 et seq post).

3 Ie as defined for the purposes of that provision: see PARA 1749 ante, PARA 1785 post.

4 For the meaning of 'flat' see PARA 1744 note 7 ante.

5 Landlord and Tenant Act 1987 s 54(2). The requirement to state addresses is not, however, essential to the operation of the legislation and a failure in that respect does not necessarily invalidate a notice: see *M25 Group Ltd v Tudor* [2003] EWCA Civ 1760, [2004] 2 All ER 80, sub nom *Tudor v M25 Group Ltd* [2004] 1 WLR 2319. The requirements of the Landlord and Tenant Act 1987 s 54(2) were not, however, satisfied by service of a letter purporting to include a list of all the tenants of the building which was inaccurate in that it included some persons who were no longer tenants since the notice had to identify those on whose behalf it was given: see *Elnaschie v Pitt Place (Epsom) Ltd* (1998) 78 P & CR 44, 31 HLR 278, CA.

6 As to the Secretary of State see PARA 27 note 3 ante.

7 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

8 As to the making of regulations generally see the Landlord and Tenant Act 1987 s 53(1); and PARA 352 note 9 ante.

9 Ibid s 54(3). Section 54(3)(b) (see head (2) in the text) is not to be construed as authorising the Secretary of State or the Assembly or the relevant Welsh minister to make regulations under s 54(3) varying any of the periods specified in s 5A(4) or (5), 5B(5) or (6), 5C(4) or (5), 5D(4) or (5) or 5E(3) (all as substituted) (see PARA 1753 et seq post), which accordingly can only be varied by regulations under s 20(4) (see PARA 1752 post): s 54(4) (amended by the Housing Act 1996 s 92(1), Sch 6 Pt IV para 9).

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## **(ii) Right of First Refusal**

## **A. LANDLORD'S OFFER NOTICE**

### **1752. Landlord required to serve offer notice on tenants.**

Where the landlord<sup>1</sup> proposes<sup>2</sup> to make a relevant disposal<sup>3</sup> affecting premises to which the collective right of first refusal applies<sup>4</sup>, he must serve a notice<sup>5</sup> (an 'offer notice') on the qualifying tenants<sup>6</sup> of the flats<sup>7</sup> contained in the premises (the 'constituent flats')<sup>8</sup>. An offer notice must comply with the requirements of whichever is applicable of the following:

- 4247 (1) the statutory requirements in the case of a contract to be completed by conveyance etc<sup>9</sup>;
- 4248 (2) the statutory requirements in the case of a sale at auction<sup>10</sup>;
- 4249 (3) the statutory requirements in the case of a grant of an option or right of pre-emption<sup>11</sup>;
- 4250 (4) the statutory requirements in the case of a conveyance not preceded by contract etc<sup>12</sup>;

and in the case of a disposal for non-monetary consideration<sup>13</sup> the notice must also comply with the relevant additional<sup>14</sup> requirements<sup>15</sup>. Where a landlord proposes to effect a transaction involving the disposal of an estate or interest in more than one building, whether or not involving the same estate or interest, he must, for the purpose of complying with these provisions, sever the transaction so as to deal with each building separately<sup>16</sup>.

If, as a result of the offer notice being served on different tenants on different dates, the period specified in the notice as the period for accepting the offer would end on different dates, the notice has effect in relation to all the qualifying tenants on whom it is served as if it provided for that period to end with the latest of those dates<sup>17</sup>.

A landlord who has not served an offer notice on all of the qualifying tenants on whom it was required to be served is nevertheless to be treated as having complied with the above provisions:

- 4251 (a) if he has served an offer notice on not less than 90% of the qualifying tenants on whom such a notice was required to be served; or
- 4252 (b) where the qualifying tenants on whom it was required to be served number less than ten, if he has served such a notice on all but one of them<sup>18</sup>.

1 For the meaning of 'landlord' see PARA 1747 ante.

2 For these purposes, 'proposes' denotes a state of mind between mere consideration of a possible course of action, on the one hand, and a fixed and irrevocable determination to pursue that course of action, on the other: see *Mainwaring v Henry Smith's Charity Trustees* [1998] QB 1, [1996] 2 All ER 220, CA (decided under the Landlord and Tenant Act 1987 s 5 as originally enacted).

3 For the meaning of 'relevant disposal' see PARA 1750 ante; and for the meaning of 'disposal' see PARA 1750 note 3 ante.

4 I.e. any premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) see PARA 1744 et seq ante; the text and notes 4-18 infra; and PARA 1758 et seq post) applies. As to such premises see PARA 1746 ante.

5 As to the service of notices see PARA 1751 ante.

6 For the meaning of 'qualifying tenant' see PARA 1748 ante.

7 For the meaning of 'flat' see PARA 1744 note 7 ante.

8 Landlord and Tenant Act 1987 s 5(1) (s 5 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). Where the premises are managed by an RTM company, the landlord must serve a copy of the offer notice on that company: Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 7. As to RTM companies see PARA 367 et seq ante.

The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by regulations make such modifications of any of the provisions of the Landlord and Tenant Act 1987 ss 5-18 (as amended) as he or it considers appropriate; and any such regulations may contain such incidental, supplemental or transitional provisions as he or the Assembly or minister considers appropriate in connection with the regulations (s 20(4)); and, for these purposes, 'modifications' includes additions, omissions and alterations (s 20(5)). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante. In exercise of this power, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Tenants' Rights of First Refusal (Amendment) Regulations 1996, SI 1996/2371, which came into force on 3 October 1996 (reg 1) and which amend the Landlord and Tenant Act 1987 s 18(3)(a) (see regs 2, 3; and PARA 1780 post).

As to the determination of questions arising under Pt I (ss 1-20) (as amended) by the county court see PARA 53 note 10 ante.

9 le ibid s 5A (as substituted): see PARA 1753 post.

10 le ibid s 5B (as substituted): see PARA 1754 post.

11 le ibid s 5C (as substituted): see PARA 1755 post.

12 le ibid s 5D (as substituted): see PARA 1756 post.

13 le a disposal to which ibid s 5E (as substituted) applies: see PARA 1757 post.

14 le it must comply with the requirements of ibid s 5E (as substituted).

15 Ibid s 5(2) (as substituted: see note 7 supra).

16 Ibid s 5(3) (as substituted: see note 7 supra). Section 5(3) (as so substituted) is not intended to require integrated developments to be split into inappropriate and unwieldy sections; thus qualifying flats contained in structures which have been using the same associated or appurtenant areas in common are to be regarded as one building and 'building' may be construed for these purposes to mean either a single building or one or more buildings, where the occupants of the qualifying flats in each of those buildings share the use of the same appurtenant premises: see *Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch) at [68], [72]-[74], [2005] Ch 61, [2005] 4 All ER 413 per Geoffrey Vos QC, sitting as a deputy judge of the High Court.

17 Landlord and Tenant Act 1987 s 5(4) (as substituted: see note 7 supra).

18 Ibid s 5(5) (as substituted: see note 7 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/26. TENANCIES OF FLATS; OTHER COLLECTIVE RIGHTS/(1) COLLECTIVE RIGHT OF FIRST REFUSAL/(ii) Right of First Refusal/A. LANDLORD'S OFFER NOTICE/1753. Requirements in case of contract to be completed by conveyance etc.

### **1753. Requirements in case of contract to be completed by conveyance etc.**

The following requirements must be met in relation to an offer notice<sup>1</sup> where the disposal<sup>2</sup> consists of entering into a contract to create or transfer an estate or interest in land<sup>3</sup>.

The notice must:

4253 (1) contain particulars of the principal terms of the disposal proposed by the landlord<sup>4</sup>, including in particular:

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149. (a) the property, and the estate or interest in that property, to which the contract relates;
150. (b) the principal terms of the contract, including the deposit and consideration required<sup>5</sup>;
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- 4254 (2) state that the notice constitutes an offer by the landlord to enter into a contract on those terms which may be accepted by the requisite majority of qualifying tenants<sup>6</sup> of the constituent flats<sup>7</sup>;
- 4255 (3) specify a period within which that offer may be so accepted, being a period of not less than two months which is to begin with the date of service of the notice<sup>8</sup>;
- 4256 (4) specify a further period of not less than two months within which a person or persons may be nominated<sup>9</sup> by the tenants<sup>10</sup>.

The above provisions do not apply to the grant of an option or right of pre-emption<sup>11</sup>.

1 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

2 For the meaning of 'disposal' see PARA 1750 note 3 ante.

3 Landlord and Tenant Act 1987 s 5A(1) (s 5A substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

4 For the meaning of 'the landlord' see PARA 1747 ante.

5 Landlord and Tenant Act 1987 s 5A(2) (as substituted: see note 3 supra).

6 For the meaning of 'qualifying tenant' see PARA 1748 ante.

7 Landlord and Tenant Act 1987 s 5A(3) (as substituted: see note 3 supra). For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

8 Ibid s 5A(4) (as substituted: see note 3 supra). As to the position where the notice is served on different tenants at different dates see PARA 1752 the text and note 17 ante.

9 Ie under ibid s 6 (as substituted): see PARA 1758 post.

10 Ibid s 5A(5) (as substituted: see note 3 supra).

11 Ibid s 5A(6) (as substituted: see note 3 supra). As to the grant of an option or right of pre-emption see PARA 1755 post.

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 5A (as substituted) by regulations see PARA 1752 note 8 ante.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/26. TENANCIES OF FLATS; OTHER COLLECTIVE RIGHTS/(1) COLLECTIVE RIGHT OF FIRST REFUSAL/(ii) Right of First Refusal/A. LANDLORD'S OFFER NOTICE/1754. Requirements in case of sale by auction.

#### **1754. Requirements in case of sale by auction.**

The following requirements must be met in relation to an offer notice<sup>1</sup> where the landlord<sup>2</sup> proposes to make the disposal<sup>3</sup> by means of a sale at a public auction held in England and Wales<sup>4</sup>.

The notice must:

- 4257 (1) contain particulars of the principal terms of the disposal proposed by the landlord, including in particular the property to which it relates and the estate or interest in that property proposed to be disposed of<sup>5</sup>;
- 4258 (2) state that the disposal is proposed to be made by means of a sale at a public auction<sup>6</sup>;
- 4259 (3) state that the notice constitutes an offer by the landlord, which may be accepted by the requisite majority of qualifying tenants<sup>7</sup> of the constituent flats<sup>8</sup>, for the contract, if any, entered into by the landlord at the auction to have effect as if a person or persons nominated by them, and not the purchaser, had entered into it<sup>9</sup>;
- 4260 (4) specify a period within which that offer may be so accepted, being a period of not less than two months beginning with the date of service of the notice<sup>10</sup>;
- 4261 (5) specify a further period of not less than 28 days within which a person or persons may be nominated<sup>11</sup> by the tenants<sup>12</sup>;
- 4262 (6) be served not less than four months or more than six months before the date of the auction; and:
- 293 151. (a) the period specified in the notice as the period within which the offer may be accepted must end not less than two months before the date of the auction; and
152. (b) the period specified in the notice as the period within which a person may be nominated<sup>13</sup> must end not less than 28 days before the date of the auction<sup>14</sup>.
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Unless the time and place of the auction and the name of the auctioneers are stated in the notice, the landlord must, not less than 28 days before the date of the auction, serve on the requisite majority of qualifying tenants of the constituent flats a further notice stating those particulars<sup>15</sup>.

1 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

2 For the meaning of 'the landlord' see PARA 1747 ante.

3 For the meaning of 'disposal' see PARA 1750 note 3 ante.

4 Landlord and Tenant Act 1987 s 5B(1) (s 5B substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

5 Landlord and Tenant Act 1987 s 5B(2) (as substituted: see note 4 supra).

6 Ibid s 5B(3) (as substituted: see note 4 supra).

7 For the meaning of 'qualifying tenant' see PARA 1748 ante.

8 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

9 Landlord and Tenant Act 1987 s 5B(4) (as substituted: see note 4 supra).

10 Ibid s 5B(5) (as substituted: see note 4 supra). As to the position where the notice is served on different tenants at different dates see PARA 1752 the text and note 17 ante.

11 Ie under ibid s 6 (as substituted): see PARA 1758 post.

12 Ibid s 5B(6) (as substituted: see note 4 supra).

13 See note 11 supra.

14 Landlord and Tenant Act 1987 s 5B(7) (as substituted: see note 4 supra).

15 Ibid s 5B(8) (as substituted: see note 4 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 5B (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1755. Requirements in case of grant of option or right of pre-emption.**

The following requirements must be met in relation to an offer notice<sup>1</sup> where the disposal<sup>2</sup> consists of the grant of an option or right of pre-emption<sup>3</sup>.

The notice must:

- 4263 (1) contain particulars of the principal terms of the disposal proposed by the landlord<sup>4</sup>, including in particular:
  - 295 153. (a) the property, and the estate or interest in that property, to which the option or right of pre-emption relates;
  - 154. (b) the consideration required by the landlord for granting the option or right of pre-emption; and
  - 155. (c) the principal terms on which the option or right of pre-emption would be exercisable, including the consideration payable on its exercise<sup>5</sup>;
- 296 4264 (2) state that the notice constitutes an offer by the landlord to grant an option or right of pre-emption on those terms which may be accepted by the requisite majority of qualifying tenants<sup>6</sup> of the constituent flats<sup>7</sup>;
- 4265 (3) specify a period within which that offer may be so accepted, being a period of not less than two months which is to begin with the date of service of the notice<sup>8</sup>;
- 4266 (4) specify a further period of not less than two months within which a person or persons may be nominated<sup>9</sup> by the tenants<sup>10</sup>.

1 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

2 For the meaning of 'disposal' see PARA 1750 note 3 ante.

3 Landlord and Tenant Act 1987 s 5C(1) (s 5C substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

4 For the meaning of 'the landlord' see PARA 1747 ante.

5 Landlord and Tenant Act 1987 s 5C(2) (as substituted: see note 3 supra).

6 For the meaning of 'qualifying tenant' see PARA 1748 ante.

7 Landlord and Tenant Act 1987 s 5C(3) (as substituted: see note 3 supra). For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

8 Ibid s 5C(4) (as substituted: see note 3 supra). As to the position where the notice is served on different tenants at different dates see PARA 1752 the text and note 17 ante.

9 I.e. under ibid s 6 (as substituted): see PARA 1758 post.

10 Ibid s 5C(5) (as substituted: see note 3 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 5C (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1756. Requirements in case of conveyance not preceded by contract etc.**

The following requirements must be met in relation to an offer notice<sup>1</sup> where the disposal<sup>2</sup> is not made in pursuance of a contract, option or right of pre-emption binding on the landlord<sup>3</sup>.

The notice must:

- 4267 (1) contain particulars of the principal terms of the disposal proposed by the landlord, including in particular:
  - 297 156. (a) the property to which it relates and the estate or interest in that property proposed to be disposed of; and
  - 157. (b) the consideration required by the landlord for making the disposal<sup>4</sup>;
  - 298 4268 (2) state that the notice constitutes an offer by the landlord to dispose of the property on those terms which may be accepted by the requisite majority of qualifying tenants<sup>5</sup> of the constituent flats<sup>6</sup>;
  - 4269 (3) specify a period within which that offer may be so accepted, being a period of not less than two months which is to begin with the date of service of the notice<sup>7</sup>;
  - 4270 (4) specify a further period of not less than two months within which a person or persons may be nominated<sup>8</sup> by the tenants<sup>9</sup>.

1 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

2 For the meaning of 'disposal' see PARA 1750 note 3 ante.

3 Landlord and Tenant Act 1987 s 5D(1) (s 5D substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'the landlord' see PARA 1747 ante.

4 Landlord and Tenant Act 1987 s 5D(2) (as substituted: see note 3 supra).

5 For the meaning of 'qualifying tenant' see PARA 1748 ante.

6 Landlord and Tenant Act 1987 s 5D(3) (as substituted: see note 3 supra). For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

7 Ibid s 5D(4) (as substituted: see note 3 supra). As to the position where the notice is served on different tenants at different dates see PARA 1752 the text and note 17 ante.

8 le under ibid s 6 (as substituted): see PARA 1758 post.

9 Ibid s 5D(5) (as substituted: see note 3 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 5D (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1757. Disposal for non-monetary consideration.**

The following provisions apply where, in any case in which the landlord<sup>1</sup> is required to serve an offer notice<sup>2</sup>, the consideration required by the landlord for making the disposal<sup>3</sup> does not consist, or does not wholly consist, of money<sup>4</sup>. The offer notice, in addition to complying with whichever is applicable of:

- 4271 (1) the statutory requirements in the case of a contract to be completed by conveyance etc<sup>5</sup>;
- 4272 (2) the statutory requirements in the case of a sale at auction<sup>6</sup>;
- 4273 (3) the statutory requirements in the case of a grant of an option or right of pre-emption<sup>7</sup>;
- 4274 (4) the statutory requirements in the case of a conveyance not preceded by contract etc<sup>8</sup>,

must state that an election may be made under the relevant statutory provision<sup>9</sup>, explaining its effect, and that, accordingly, the notice also constitutes an offer<sup>10</sup> by the landlord, which may be accepted by the requisite majority of qualifying tenants<sup>11</sup> of the constituent flats<sup>12</sup>, for a person or persons nominated by them to acquire the property in pursuance<sup>13</sup> of the statutory procedure<sup>14</sup>. The notice must specify a period within which that offer may be so accepted, being a period of not less than two months which is to begin with the date of service of the notice<sup>15</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 Ie in any case to which the Landlord and Tenant Act 1987 s 5 (as substituted) applies: see PARA 1752 ante. For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

3 For the meaning of 'disposal' see PARA 1750 note 3 ante.

4 Landlord and Tenant Act 1987 s 5E(1) (s 5E substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

5 Ie the Landlord and Tenant Act 1987 s 5A (as substituted): see PARA 1753 ante.

6 Ie ibid s 5B (as substituted): see PARA 1754 ante.

7 Ie ibid s 5C (as substituted): see PARA 1755 ante.

8 Ie ibid s 5D (as substituted): see PARA 1756 ante.

9 Ie under ibid s 8C (as substituted): see PARA 1763 post.

10 For these purposes, any reference to an offer is a reference to an offer made subject to contract: ibid s 20(2)(a) (amended by the Housing Act 1996 ss 92(1), 227, Sch 6 Pt IV para 4, Sch 19 Pt III).

11 For the meaning of 'qualifying tenant' see PARA 1748 ante.

12 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

13 Ie in pursuance of the Landlord and Tenant Act 1987 ss 11-17 (as substituted): see PARA 1769 et seq post.

14 Ibid s 5E(2) (as substituted: see note 4 supra).

15 Ibid s 5E(3) (as substituted: see note 4 supra). As to the position where the notice is served on different tenants at different dates see PARA 1752 the text and note 17 ante.

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 5E (as substituted) by regulations see PARA 1752 note 8 ante.

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## ***B. ACCEPTANCE OF LANDLORD'S OFFER***

### **1758. Acceptance of landlord's offer; in general.**

Where a landlord<sup>1</sup> has served an offer notice<sup>2</sup>, he must not during:

- 4275 (1) the period specified in the notice as the period during which the offer may be accepted; or
- 4276 (2) such longer period as may be agreed between him and the requisite majority of the qualifying tenants<sup>3</sup> of the constituent flats<sup>4</sup>,

dispose of the protected interest<sup>5</sup> except to a person or persons nominated by the tenants under the following provisions<sup>6</sup>.

Where an acceptance notice<sup>7</sup> is duly served<sup>8</sup> on him, he must not during the protected period<sup>9</sup> dispose of the protected interest except to a person duly nominated<sup>10</sup> for these purposes by the requisite majority of qualifying tenants of the constituent flats (a 'nominated person')<sup>11</sup>. A person nominated for these purposes by the requisite majority of qualifying tenants of the constituent flats may be replaced by another person so nominated if, and only if, he has for any reason ceased to be able to act as a nominated person<sup>12</sup>. Where two or more persons have been nominated and any of them ceases to act without being replaced, the remaining person or persons so nominated may continue to act<sup>13</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

3 For the meaning of 'qualifying tenant' see PARA 1748 ante.

4 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

5 'The protected interest' means the estate, interest or other subject-matter of an offer notice: Landlord and Tenant Act 1987 s 20(1) (definition substituted by the Housing Act 1996 ss 89(3), 92(1), Sch 6 Pt IV para 3).

6 Landlord and Tenant Act 1987 s 6(1) (s 6 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

7 An 'acceptance notice' means a notice served on the landlord by the requisite majority of qualifying tenants of the constituent flats informing him that the persons by whom it is served accept the offer contained in his notice: Landlord and Tenant Act 1987 s 6(3) (as substituted: see note 6 supra). For these purposes, any reference to the acceptance of an offer is a reference to its acceptance subject to contract: s 20(2)(b) (amended by the Housing Act 1996 ss 92(1), 227, Sch 6 Pt IV para 4, Sch 19 Pt III). A tenant cannot by contract deprive himself of his right to withdraw his acceptance of the landlords' offer, so an agreement not to withdraw made

with other tenants is not irrevocable; likewise, the appointment by the tenants of one of their number as agent is also not irrevocable in this context: see *Mainwaring v Henry Smith's Charity Trustees (No 2)* (1996) 29 HLR 572, [1997] 1 EGLR 93, CA (decided under the Landlord and Tenant Act 1987 s 6 as originally enacted). For the meaning of 'offer' see PARA 1757 note 10 ante.

8 An acceptance notice is 'duly served' if it is served within: (1) the period specified in the offer notice as the period within which the offer may be accepted; or (2) such longer period as may be agreed between the landlord and the requisite majority of qualifying tenants of the constituent flats: Landlord and Tenant Act 1987 s 6(3)(a), (b) (as substituted; see note 6 supra).

9 The 'protected period' is the period beginning with the date of service of the acceptance notice and ending with (1) the end of the period specified in the offer notice as the period for nominating a person under s 6 (as substituted); or (2) such later date as may be agreed between the landlord and the requisite majority of qualifying tenants of constituent flats: *ibid* s 6(4) (as substituted; see note 6 supra).

10 A person is 'duly nominated' for these purposes if he is nominated at the same time as the acceptance notice is served or at any time after that notice is served and before the end of: (1) the period specified in the offer notice as the period for nomination; or (2) such longer period as may be agreed between the landlord and the requisite majority of qualifying tenants of the constituent flats: *ibid* s 6(5) (as substituted; see note 6 supra).

11 *Ibid* s 6(2) (as substituted; see note 6 supra).

12 *Ibid* s 6(6) (as substituted; see note 6 supra).

13 *Ibid* s 6(7) (as substituted; see note 6 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 6 (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1759. Failure to accept landlord's offer or to make nomination.**

Where a landlord<sup>1</sup> has served an offer notice<sup>2</sup> on the qualifying tenants<sup>3</sup> of the constituent flats<sup>4</sup> and

- 4277 (1) no acceptance notice<sup>5</sup> is duly served<sup>6</sup> on the landlord; or
- 4278 (2) no person is nominated<sup>7</sup> during the protected period<sup>8</sup>,

the landlord may, during the period of 12 months beginning with the end of that period, dispose of the protected interest<sup>9</sup> to such person as he thinks fit, but subject to the following restrictions<sup>10</sup>.

Where the offer notice was one to which the statutory requirements in the case of a sale at auction<sup>11</sup> applied, the restrictions are:

- 4279 (a) that the disposal<sup>12</sup> is made by means of a sale at a public auction; and
- 4280 (b) that the other terms correspond to those specified in the offer notice<sup>13</sup>.

In any other case the restrictions are:

- 4281 (i) that the deposit and consideration required are not less than those specified in the offer notice; and
- 4282 (ii) that the other terms correspond to those specified in the offer notice<sup>14</sup>.

The entitlement of a landlord, by virtue of the above provisions or any other corresponding provision<sup>15</sup>, to dispose of the protected interest during a specified period of 12 months extends only to a disposal of that interest, and accordingly the statutory requirements<sup>16</sup> must be satisfied with respect to any other disposal by him during that period of 12 months, unless the disposal is not a relevant disposal<sup>17</sup> affecting any premises to which at the time of the disposal the collective right of first refusal<sup>18</sup> applies<sup>19</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

3 For the meaning of 'qualifying tenant' see PARA 1748 ante.

4 For the meaning of 'constituent flat' see PARA 1749 note 2 ante.

5 For the meaning of 'acceptance notice' see PARA 1758 note 7 ante.

6 For the meaning of 'duly served', in relation to an acceptance notice, see PARA 1758 note 8 ante.

7 Ie for the purposes of the Landlord and Tenant Act 1987 s 6 (as substituted): see PARA 1758 ante.

8 For the meaning of 'the protected period' see PARA 1758 note 9 ante.

9 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.

10 Landlord and Tenant Act 1987 s 7(1) (s 7 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

11 Ie the Landlord and Tenant Act 1987 s 5B (as substituted): see PARA 1754 ante.

12 For the meaning of 'disposal' see PARA 1750 note 3 ante.

13 Landlord and Tenant Act 1987 s 7(2) (as substituted: see note 10 supra).

14 Ibid s 7(3) (as substituted: see note 10 supra).

15 Ie any other corresponding provision of ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1760 et seq post.

16 Ie the requirements of ibid s 1(1): see PARA 1744 ante.

17 For the meaning of 'relevant disposal' see PARA 1750 ante.

18 Ie the Landlord and Tenant Act 1987 Pt I (as amended).

19 Ibid s 7(4) (as substituted: see note 10 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 7 (as substituted) by regulations see PARA 1752 note 8 ante.

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## **1760. Landlord's obligations in case of acceptance and nomination.**



The following provisions apply where the landlord<sup>1</sup> serves an offer notice<sup>2</sup> on the qualifying tenants<sup>3</sup> of the constituent flats<sup>4</sup> and:

- 4283 (1) an acceptance notice<sup>5</sup> is duly served<sup>6</sup> on him; and
- 4284 (2) a person is duly nominated<sup>7</sup>,

by the requisite majority of qualifying tenants of the constituent flats<sup>8</sup>.

The landlord must not<sup>9</sup> dispose of the protected interest<sup>10</sup> except to the nominated person<sup>11</sup>.

Within the period of one month beginning with the date of service of notice of nomination, the landlord either

- 4285 (a) must serve notice on the nominated person indicating an intention no longer to proceed with the disposal<sup>12</sup> of the protected interest<sup>13</sup>; or
- 4286 (b) is obliged to proceed in accordance with the statutory provisions<sup>14</sup> set out below<sup>15</sup>.

Nothing in these provisions, however, is to be taken as prejudicing the application of the statutory provisions relating to the collective right of first refusal<sup>16</sup> to any further offer notice served by the landlord on the qualifying tenants of the constituent flats<sup>17</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

3 For the meaning of 'qualifying tenant' see PARA 1748 ante.

4 For the meaning of 'constituent flat' see PARA 1749 note 2 ante.

5 For the meaning of 'acceptance notice' see PARA 1758 note 7 ante.

6 For the meaning of 'duly served', in relation to an acceptance notice, see PARA 1758 note 8 ante.

7 Ie for the purposes of the Landlord and Tenant Act 1987 s 6 (as substituted): see PARA 1758 ante.

8 Ibid s 8(1) (s 8 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

9 Ie subject to the Landlord and Tenant Act 1987 ss 8(3)-20 (as amended): see the text and notes 12-17 infra; and PARA 1761 et seq post.

10 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.

11 Landlord and Tenant Act 1987 s 8(2) (as substituted: see note 8 supra). 'The nominated person' means the person or persons for the time being nominated by the requisite majority of the qualifying tenants of the constituent flats: s 20(1) (definition substituted by the Housing Act 1996 ss 89(3), 92(1), Sch 6 Pt IV para 3).

12 For the meaning of 'disposal' see PARA 1750 note 3 ante.

13 A notice under the Landlord and Tenant Act 1987 s 8(3)(a) (as substituted) (see head (a) in the text) is a notice of withdrawal for the purposes of s 9B(2)-(4) (as substituted) (consequences of notice of withdrawal by landlord: see PARA 1767 post): s 8(4) (as substituted: see note 8 supra).

14 Ie in accordance with ibid ss 8A-20 (as amended): see PARA 1761 et seq post.

15 Ibid s 8(3) (as substituted: see note 8 supra).

16 Ie ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1761 et seq post.

17 Ibid s 8(5) (as substituted: see note 8 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8 (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1761. General provisions relating to landlord's obligation.**

The following provisions apply where the landlord<sup>1</sup> is obliged to proceed<sup>2</sup> and the offer notice<sup>3</sup> was not one to which the statutory requirements relating to a sale by auction<sup>4</sup> applied<sup>5</sup>.

The landlord must, within the period of one month beginning with the date of service of the notice of nomination, send to the nominated person<sup>6</sup> a form of contract for the acquisition of the protected interest<sup>7</sup> on the terms specified in the landlord's offer notice<sup>8</sup>. If he fails to do so, the provisions set out below<sup>9</sup> apply as if he had given notice of withdrawal<sup>10</sup> at the end of that period<sup>11</sup>. If, however, he complies with this requirement, the nominated person must, within the period of two months beginning with the date on which it is sent or such longer period beginning with that date as may be agreed between the landlord and that person, either:

4287 (1) serve notice on the landlord indicating an intention no longer to proceed with the acquisition of the protected interest; or

4288 (2) offer an exchange of contracts, that is to say, sign the contract and send it to the landlord, together with the requisite deposit<sup>12</sup>.

If the nominated person either serves notice in pursuance of head (1) above or fails to offer an exchange of contracts within the specified period<sup>13</sup>, the provisions set out below<sup>14</sup> apply as if he had given notice of withdrawal<sup>15</sup> at the same time as that notice or, as the case may be, at the end of that period<sup>16</sup>. If, however, the nominated person offers an exchange of contracts within the specified period but the landlord fails to complete the exchange within the period of seven days beginning with the day on which he received that person's contract, the provisions set out below<sup>17</sup> apply as if the landlord had given notice of withdrawal<sup>18</sup> at the end of that period<sup>19</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 As to when the landlord is obliged to proceed see PARA 1760 ante.

3 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

4 I.e. the Landlord and Tenant Act 1987 s 5B (as substituted): see PARA 1754 ante.

5 Ibid s 8A(1) (s 8A substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

6 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

7 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.

8 Landlord and Tenant Act 1987 s 8A(2) (as substituted: see note 5 supra).

9 I.e. ibid ss 8B-20 (as amended): see PARA 1762 et seq post.

10 I.e. notice under ibid s 9B (as substituted): see PARA 1767 post.

- 11 Ibid s 8A(3) (as substituted: see note 5 supra).
- 12 Ibid s 8A(4) (as substituted: see note 5 supra). For these purposes, 'the requisite deposit' means a deposit of an amount determined by or under the contract or an amount equal to 10% of the consideration, whichever is the less: s 8A(4) (as so substituted).
- 13 Ie the period specified in ibid s 8A(4) (as substituted).
- 14 See note 9 supra.
- 15 Ie notice under the Landlord and Tenant Act 1987 s 9A (as substituted): see PARA 1766 post.
- 16 Ibid s 8A(5) (as substituted: see note 5 supra).
- 17 See note 9 supra.
- 18 See note 10 supra.
- 19 Landlord and Tenant Act 1987 s 8A(6) (as substituted: see note 5 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8A (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1762. Election in case of sale at auction.**

The following provisions apply where the landlord<sup>1</sup> is obliged to proceed<sup>2</sup> and the offer notice<sup>3</sup> was one to which the statutory requirements relating to a sale by auction<sup>4</sup> applied<sup>5</sup>.

The nominated person<sup>6</sup> may, by notice served on the landlord not less than 28 days before the date of the auction, elect that these provisions are to apply<sup>7</sup>.

If a contract for the disposal is entered into at the auction, the landlord must, within the period of seven days beginning with the date of the auction, send a copy of the contract to the nominated person<sup>8</sup>. If, within the period of 28 days beginning with the date on which such a copy is so sent, the nominated person:

- 4289 (1) serves notice on the landlord accepting the terms of the contract; and
- 4290 (2) fulfils any conditions falling to be fulfilled by the purchaser<sup>9</sup> on entering into the contract,

the contract has effect as if the nominated person, and not the purchaser, had entered into the contract<sup>10</sup>. Unless otherwise agreed, any time limit in the contract as it so has effect starts to run again on the service of such a notice; and nothing in the contract as it has effect by virtue of such a notice requires the nominated person to complete the purchase before the end of the period of 28 days beginning with the day on which he is deemed to have entered into the contract<sup>11</sup>.

If the nominated person:

- 4291 (a) does not serve notice of election<sup>12</sup> on the landlord by the time mentioned above<sup>13</sup>; or

4292 (b) does not satisfy the requirements of heads (1) and (2) above within the statutory period<sup>14</sup>,

the relevant statutory provisions<sup>15</sup> apply as if he had given notice of withdrawal<sup>16</sup> at the end of that period<sup>17</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 As to when the landlord is obliged to proceed see PARA 1760 ante.

3 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

4 Ie the Landlord and Tenant Act 1987 s 5B (as substituted): see PARA 1754 ante.

5 Ibid s 8B(1) (s 8B substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

6 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

7 Landlord and Tenant Act 1987 s 8B(2) (as substituted: see note 5 supra).

8 Ibid s 8B(3) (as substituted: see note 5 supra).

9 For the meaning of 'purchaser' see PARA 1769 note 18 post.

10 Landlord and Tenant Act 1987 s 8B(4) (as substituted: see note 5 supra).

11 Ibid s 8B(5) (as substituted: see note 5 supra).

12 Ie notice under ibid s 8B(2) (as substituted).

13 Ie by the time mentioned in ibid s 8B(2) (as substituted).

14 Ie within the time mentioned in ibid s 8B(4) (as substituted).

15 Ie ibid ss 8C-20 (as amended): see PARA 1763 et seq post.

16 Ie notice under ibid s 9A (as substituted): see PARA 1766 post.

17 Ibid s 8B(6) (as substituted: see note 5 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8B (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1763. Election in case of disposal for non-monetary consideration.**

The following provisions apply where an acceptance notice<sup>1</sup> is duly served<sup>2</sup> on the landlord<sup>3</sup> indicating an intention to accept the offer<sup>4</sup> where the consideration required does not consist, or does not wholly consist, of money<sup>5</sup>.

The requisite majority of qualifying tenants<sup>6</sup> of the constituent flats<sup>7</sup> may, by notice served on the landlord within:

- 4293 (1) the period specified in the offer notice<sup>8</sup> for nominating a person or persons<sup>9</sup>; or
- 4294 (2) such longer period as may be agreed between the landlord and the requisite majority of qualifying tenants of the constituent flats,

elect that the following provisions are to apply<sup>10</sup>. Where such an election is made and the landlord disposes of the protected interest<sup>11</sup> on terms corresponding to those specified in his offer notice in accordance with the statutory requirements<sup>12</sup>, the statutory provisions relating to the enforcement of the tenants' rights against the purchaser and subsequent purchasers<sup>13</sup> have effect as if no offer notice had been served and with other specified modifications<sup>14</sup>. For the purposes of those provisions as they so have effect, so much of the consideration for the original disposal<sup>15</sup> as did not consist of money is to be treated as such amount in money as was equivalent to its value in the hands of the landlord<sup>16</sup>; and the landlord or the nominated person<sup>17</sup> may apply to have that amount determined by a leasehold valuation tribunal<sup>18</sup>.

1 For the meaning of 'acceptance notice' see PARA 1758 note 7 ante.

2 For the meaning of 'duly served', in relation to an acceptance notice, see PARA 1758 note 8 ante.

3 For the meaning of 'the landlord' see PARA 1747 ante.

4 I.e. the offer referred to in the Landlord and Tenant Act 1987 s 5E (as substituted): see PARA 1757 ante. For the meaning of 'offer' generally see PARA 1757 note 10 ante.

5 Ibid s 8C(1) (s 8C substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

6 For the meaning of 'qualifying tenant' see PARA 1748 ante.

7 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

8 For the meaning of 'offer notice' see PARA 1752 ante. As to notices generally, and their service, see PARA 1751 ante.

9 I.e. for the purposes of the Landlord and Tenant Act 1987 s 6 (as substituted): see PARA 1758 ante.

10 Ibid s 8C(2) (as substituted: see note 5 supra).

11 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.

12 I.e. in accordance with the Landlord and Tenant Act 1987 ss 5A, 5B, 5C or 5D (as substituted): see PARAS 1753-1756 ante.

13 I.e. ibid ss 11-17 (as substituted): see PARA 1769 et seq post.

14 Ibid s 8C(3) (as substituted: see note 5 supra). The other specified modifications are that ss 11-17 (as substituted) have effect as if: (1) in s 11A(3) (as substituted) (period for serving notice requiring information etc: see PARA 1770 post), the reference to four months were a reference to 28 days; and (2) in s 12A(2) (as substituted) and s 12B(3) (as substituted) (period for exercise of tenants' rights against purchaser: see PARAS 1771-1772 post) each reference to six months were a reference to two months: ibid s 8C(3)(b), (c) (as so substituted).

15 'The original disposal' means the relevant disposal referred to in ibid s 11(1) (as substituted) (see PARA 1769 post): s 20(1).

16 Ibid s 8C(4) (as substituted: see note 5 supra).

17 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

18 Landlord and Tenant Act 1987 s 8C(5) (as substituted: see note 5 supra). As to the procedure on such an application see PARA 59 et seq ante.

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8C (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1764. Disposal in pursuance of option or right of pre-emption.**

Where the original disposal<sup>1</sup> was the grant of an option or right of pre-emption, and in pursuance of the option or right, the landlord<sup>2</sup> makes another disposal<sup>3</sup> affecting the premises ('the later disposal') before the end of the specified period<sup>4</sup>, the statutory provisions relating to the enforcement of the tenants' rights against the purchaser and subsequent purchasers<sup>5</sup> have effect as if the later disposal, and not the original disposal, were the relevant disposal<sup>6</sup>.

1 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

2 For the meaning of 'the landlord' see PARA 1747 ante.

3 For the meaning of 'disposal' see PARA 1750 note 3 ante.

4 The period referred to in the text is the period of four months beginning with the date by which: (1) notices under the Landlord and Tenant Act 1985 s 3A (as added) (duty of new landlord to inform tenants of rights: see PARA 553 ante) relating to the original disposal; or (2) where that provision does not apply, documents of any other description (a) indicating that the original disposal has taken place; and (b) alerting the tenants to the existence of their rights under the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante, PARA 1765 et seq post) and the time within which any such rights must be exercised, have been served on the requisite majority of qualifying tenants of the constituent flats: s 8D(2) (s 8D substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'qualifying tenant' see PARA 1748 ante; and for the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

5 I.e. the Landlord and Tenant Act 1987 ss 11-17 (as substituted): see PARA 1769 et seq post.

6 Ibid s 8D(1) (as substituted: see note 4 supra). For the meaning of 'relevant disposal' see PARA 1750 ante. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8D (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1765. Covenant etc affecting landlord's power to dispose.**

Where the landlord<sup>1</sup> is obliged to proceed<sup>2</sup> but is precluded by a covenant, condition or other obligation from disposing of the protected interest<sup>3</sup> to the nominated person<sup>4</sup> unless the consent of some other person is obtained:

- 4295 (1) he must use his best endeavours to secure that the consent of that person to that disposal<sup>5</sup> is given; and

- 4296 (2) if it appears to him that that person is obliged not to withhold his consent unreasonably but has nevertheless so withheld it, he must institute proceedings for a declaration to that effect<sup>6</sup>.

These requirements cease to apply if a notice of withdrawal from the transaction is served by either party<sup>7</sup> or if notice is served<sup>8</sup> stating the landlord's offer has lapsed because the premises have ceased to be premises to which the right of first refusal applies<sup>9</sup>.

Where the landlord has discharged any duty imposed on him by heads (1) and (2) above but any such consent as is there mentioned has been withheld, and no such declaration as is there mentioned has been made, the landlord may serve a notice on the nominated person stating that to be the case; and when such a notice has been served, the landlord may, during the period of 12 months beginning with the date of service of the notice, dispose of the protected interest to such person as he thinks fit, but subject to the following restrictions<sup>10</sup>. Where the offer notice<sup>11</sup> was one to which the statutory requirements relating to a sale by auction<sup>12</sup> applied, the restrictions are:

- 4297 (a) that the disposal is made by means of a sale at a public auction; and  
4298 (b) that the other terms correspond to those specified in the offer notice<sup>13</sup>.

In any other case the restrictions are:

- 4299 (i) that the deposit and consideration required are not less than those specified in the offer notice or, if higher, those agreed between the landlord and the nominated person, subject to contract; and  
4300 (ii) that the other terms correspond to those specified in the offer notice<sup>14</sup>.

Where notice is so given, the landlord may recover from the nominated party and the qualifying tenants<sup>15</sup> who served the acceptance notice<sup>16</sup> any costs reasonably incurred by him in connection with the disposal between the end of the first four weeks of the nomination period and the time when that notice is served by him; and any such liability of the nominated person and those tenants is a joint and several liability<sup>17</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 As to when the landlord is obliged to proceed see PARA 1760 ante.

3 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.

4 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

5 For the meaning of 'disposal' see PARA 1750 note 3 ante.

6 Landlord and Tenant Act 1987 s 8E(1) (s 8E substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I).

7 Ie under ibid s 9A or s 9B (each as substituted); see PARAS 1766-1767 post. As to notices generally and their service see PARA 1751 ante.

8 Ie under ibid s 10 (as substituted); see PARA 1768 post.

9 Ibid s 8E(2) (as substituted: see note 6 supra).

10 Ibid s 8E(3) (as substituted: see note 6 supra).

11 For the meaning of 'offer notice' see PARA 1752 ante.

12 Ie the Landlord and Tenant Act 1987 s 5B (as substituted); see PARA 1754 ante.

- 13 Ibid s 8E(4) (as substituted: see note 6 supra).
- 14 Ibid s 8E(5) (as substituted: see note 6 supra).
- 15 For the meaning of 'qualifying tenant' see PARA 1748 ante.
- 16 For the meaning of 'acceptance notice' see PARA 1758 note 7 ante.
- 17 Landlord and Tenant Act 1987 s 8E(6) (as substituted: see note 6 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 8E (as substituted) by regulations see PARA 1752 note 8 ante.

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### ***C. WITHDRAWAL OR LAPSE OF OFFER***

#### **1766. Notice of withdrawal by nominated person.**

Where the landlord<sup>1</sup> is obliged to proceed<sup>2</sup>, the nominated person<sup>3</sup> may serve notice on the landlord (a 'notice of withdrawal') indicating his intention no longer to proceed with the acquisition of the protected interest<sup>4</sup>.

If at any time the nominated person becomes aware that the number of the qualifying tenants<sup>5</sup> of the constituent flats<sup>6</sup> desiring to proceed with the acquisition of the protected interest is less than the requisite majority of qualifying tenants of those flats<sup>7</sup>, he must forthwith serve a notice of withdrawal<sup>8</sup>.

Where notice of withdrawal is given by the nominated person under the above provisions, the landlord may, during the period of 12 months beginning with the date of service of the notice, dispose of the protected interest to such person as he thinks fit, but subject to the following restrictions<sup>9</sup>. Where the offer notice<sup>10</sup> was one to which the statutory requirements relating to a sale by auction<sup>11</sup> applied, the restrictions are:

- 4301 (1) that the disposal<sup>12</sup> is made by means of a sale at a public auction; and
- 4302 (2) that the other terms correspond to those specified in the offer notice<sup>13</sup>.

In any other case the restrictions are:

- 4303 (a) that the deposit and consideration required are not less than those specified in the offer notice or, if higher, those agreed between the landlord and the nominated person, subject to contract; and
- 4304 (b) that the other terms correspond to those specified in the offer notice<sup>14</sup>.

If notice of withdrawal is served under the above provisions before the end of the first four weeks of the nomination period specified in the offer notice, the nominated person and the qualifying tenants who served the acceptance notice<sup>15</sup> are not liable for any costs incurred by the landlord in connection with the disposal<sup>16</sup>. If notice of withdrawal is so served after the end of those four weeks, the landlord may recover from the nominated person and the qualifying tenants who served the acceptance notice any costs reasonably incurred by him in connection with any disposal between the end of those four weeks and the time when the notice of



withdrawal was served on him; and any such liability of the nominated person and those tenants is a joint and several liability<sup>17</sup>.

The above provisions do not apply after a binding contract for the disposal of the protected interest:

- 4305 (i) has been entered into by the landlord and the nominated person; or  
 4306 (ii) has otherwise come into existence between the landlord and the nominated person by virtue of any statutory provision<sup>18</sup> relating to the collective right of first refusal<sup>19</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 As to when the landlord is obliged to proceed see PARA 1760 ante.

3 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

4 Landlord and Tenant Act 1987 s 9A(1) (s 9A substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'the protected interest' see PARA 1758 note 5 ante. As to notices generally and their service see PARA 1751 ante.

5 For the meaning of 'qualifying tenant' see PARA 1748 ante.

6 For the meaning of 'constituent flat' see PARA 1749 note 2 ante.

7 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

8 Landlord and Tenant Act 1987 s 9A(2) (as substituted: see note 4 supra).

9 Ibid s 9A(3) (as substituted: see note 4 supra).

10 For the meaning of 'offer notice' see PARA 1752 ante.

11 Ie the Landlord and Tenant Act 1987 s 5B (as substituted): see PARA 1754 ante.

12 For the meaning of 'disposal' see PARA 1750 note 3 ante.

13 Landlord and Tenant Act 1987 s 9A(4) (as substituted: see note 4 supra).

14 Ibid s 9A(5) (as substituted: see note 4 supra).

15 For the meaning of 'the acceptance notice' see PARA 1758 note 7 ante.

16 Landlord and Tenant Act 1987 s 9A(6) (as substituted: see note 4 supra).

17 Ibid s 9A(7) (as substituted: see note 4 supra).

18 Ie any provision of ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1767 et seq post.

19 Ibid s 9A(8) (as substituted: see note 4 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 9A (as substituted) by regulations see PARA 1752 note 8 ante.

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## **1767. Notice of withdrawal by landlord.**

Where the landlord<sup>1</sup> is obliged to proceed<sup>2</sup>, he may serve notice on the nominated person<sup>3</sup> (a 'notice of withdrawal') indicating his intention no longer to proceed with the disposal<sup>4</sup> of the protected interest<sup>5</sup>. Where a notice of withdrawal is given by the landlord, he is not entitled to dispose of the protected interest during the period of 12 months beginning with the date of service of the notice<sup>6</sup>.

If a notice of withdrawal is served before the end of the first four weeks of the nomination period specified in the offer notice<sup>7</sup>, the landlord is not liable for any costs incurred in connection with the disposal by the nominated person and the qualifying tenants<sup>8</sup> who served the acceptance notice<sup>9</sup>. If a notice of withdrawal is served after the end of those four weeks, the nominated person and the qualifying tenants who served the acceptance notice may recover from the landlord any costs reasonably incurred by them in connection with the disposal between the end of those four weeks and the time when the notice of withdrawal was served<sup>10</sup>.

The above provisions do not apply after a binding contract for the disposal of the protected interest:

- 4307 (1) has been entered into by the landlord and the nominated person; or  
 4308 (2) has otherwise come into existence between the landlord and the nominated person by virtue of any statutory provision<sup>11</sup> relating to the collective right of first refusal<sup>12</sup>.

1 For the meaning of 'the landlord' see PARA 1747 ante.

2 As to when the landlord is obliged to proceed see PARA 1760 ante.

3 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.

4 For the meaning of 'disposal' see PARA 1750 note 3 ante.

5 Landlord and Tenant Act 1987 s 9B(1) (s 9B substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'the protected interest' see PARA 1758 note 5 ante. As to notices generally and their service see PARA 1751 ante.

6 Landlord and Tenant Act 1987 s 9B(2) (as substituted: see note 5 supra).

7 For the meaning of 'offer notice' see PARA 1752 ante.

8 For the meaning of 'qualifying tenant' see PARA 1748 ante.

9 Landlord and Tenant Act 1987 s 9B(3) (as substituted: see note 5 supra). For the meaning of 'the acceptance notice' see PARA 1758 note 7 ante.

10 Ibid s 9B(4) (as substituted: see note 5 supra).

11 In any provision of ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1768 et seq post.

12 Ibid s 9B(5) (as substituted: see note 5 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 9B (as substituted) by regulations see PARA 1752 note 8 ante.

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## **1768. Lapse of landlord's offer.**

If after a landlord<sup>1</sup> has served an offer notice<sup>2</sup> the premises concerned cease to be premises to which the collective right of first refusal applies<sup>3</sup>, the landlord may serve a notice on the qualifying tenants<sup>4</sup> of the constituent flats<sup>5</sup> stating:

- 4309 (1) that the premises have ceased to be premises to which that right applies;  
and  
4310 (2) that the offer notice, and anything done in pursuance of it, is to be treated as not having been served or done;

and on the service of such a notice the statutory provisions relating to the right of first refusal<sup>6</sup> cease to have effect in relation to that disposal<sup>7</sup>. A landlord who has not served such a notice on all of the qualifying tenants of the constituent flats is nevertheless to be treated as having duly served such a notice:

- 4311 (a) if he has served such a notice on not less than 90% of those tenants; or  
4312 (b) where those qualifying tenants number less than ten, if he has served such a notice on all but one of them<sup>8</sup>.

Where the landlord is entitled to serve such a notice but does not do so, the statutory provisions relating to the right of first refusal<sup>9</sup> continue to have effect in relation to the disposal in question as if the premises in question were still premises to which those provisions apply<sup>10</sup>.

The above provisions do not apply after a binding contract for the disposal of the protected interest<sup>11</sup>:

- 4313 (i) has been entered into by the landlord and the nominated person<sup>12</sup>; or  
4314 (ii) has otherwise come into existence between the landlord and the nominated person by virtue of any relevant<sup>13</sup> statutory provision<sup>14</sup>.

Where a binding contract for the disposal of the protected interest has been entered into between the landlord and the nominated person but it has been lawfully rescinded by the landlord, the landlord may, during the period of 12 months beginning with the date of the rescission of the contract, dispose of that interest to such person, and on such terms, as he thinks fit<sup>15</sup>.

1 For the meaning of 'landlord' see PARA 1747 ante.

2 For the meaning of 'offer notice' see PARA 1752 ante.

3 I.e. premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante, PARA 1769 et seq post) applies. As to such premises see PARA 1746 ante.

4 For the meaning of 'qualifying tenant' see PARA 1748 ante.

5 For the meaning of 'constituent flat' see PARA 1749 note 2 ante.

6 I.e. the Landlord and Tenant Act 1987 Pt I (as amended).

7 Ibid s 10(1) (s 10 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt I). For the meaning of 'disposal' see PARA 1750 note 3 ante. As to notices in general and their service see PARA 1751 ante.

8 Landlord and Tenant Act 1987 s 10(2) (as substituted: see note 7 supra).

9 See note 6 supra.

10 Landlord and Tenant Act 1987 s 10(3) (as substituted: see note 7 supra).

- 11 For the meaning of 'the protected interest' see PARA 1758 note 5 ante.
- 12 For the meaning of 'the nominated person' see PARA 1760 note 11 ante.
- 13 I.e. any provision of the Landlord and Tenant Act 1987 Pt I (as amended).
- 14 Ibid s 10(4) (as substituted: see note 7 supra).
- 15 Ibid s 10(5) (as substituted: see note 7 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 10 (as substituted) by regulations see PARA 1752 note 8 ante.

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### **(iii) Enforcement by Tenants of Rights against Purchaser or Subsequent Purchasers**

#### **1769. Circumstances in which tenants' rights enforceable against purchaser.**

The following provisions<sup>1</sup> apply where a landlord<sup>2</sup> has made a relevant disposal<sup>3</sup> affecting premises to which at the time of the disposal the collective right of first refusal<sup>4</sup> applied ('the original disposal'), and either:

- 4315 (1) no offer notice was served<sup>5</sup> by the landlord with respect to that disposal; or
- 4316 (2) the disposal was made in contravention of any relevant statutory provision<sup>6</sup>,

and the premises are still premises to which the right of first refusal<sup>7</sup> applies<sup>8</sup>. In those circumstances the requisite majority of the qualifying tenants<sup>9</sup> of the flats<sup>10</sup> contained in the premises affected by the relevant disposal (the 'constituent flats')<sup>11</sup> have the following statutory rights:

- 4317 (a) the right to information as to the terms of the disposal etc<sup>12</sup>;
- 4318 (b) the right of the qualifying tenants to take the benefit of the contract<sup>13</sup>;
- 4319 (c) the right of the qualifying tenants to compel a sale etc by the purchaser<sup>14</sup>;
- and
- 4320 (d) the right<sup>15</sup> of the qualifying tenants to compel the grant of a new tenancy by the superior landlord<sup>16</sup>.

In the statutory provisions conferring the rights referred to in heads (a) to (d) above, the transferee<sup>17</sup> under the original disposal, or, in the case of the surrender of a tenancy, the superior landlord, is referred to as 'the purchaser'; but this is not to be read as restricting the operation of those provisions to disposals for consideration<sup>18</sup>.

1 I.e. the provisions of the Landlord and Tenant Act 1987 ss 11(2)-20 (as amended): see the text and notes 2-16 infra; and PARA 1770 et seq post.

2 For the meaning of 'landlord' see PARA 1747 ante.

- 3 For the meaning of 'relevant disposal' see PARA 1750 ante.
  - 4 le the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1770 et seq post.
  - 5 le under ibid s 5 (as substituted): see PARA 1752 ante.
  - 6 le in contravention of any provision of ibid ss 6-10 (as substituted): see PARAS 1758-1768 ante.
  - 7 See note 4 supra.
  - 8 Landlord and Tenant Act 1987 s 11(1) (s 11 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). As to such premises see PARA 1746 ante.
  - 9 For the meaning of 'qualifying tenant' see PARA 1748 ante.
  - 10 For the meaning of 'flat' see PARA 1744 note 7 ante.
  - 11 For the meaning of 'the requisite majority of the qualifying tenants of the constituent flats' see PARA 1749 ante.
  - 12 le the right conferred by the Landlord and Tenant Act 1987 s 11A (as substituted): see PARA 1770 post.
  - 13 le the right conferred by ibid s 12A (as substituted): see PARA 1771 post.
  - 14 le the right conferred by ibid s 12B (as substituted): see PARAS 1772-1773 post.
  - 15 le the right conferred by ibid s 12C(as substituted): see PARA 1775 post.
  - 16 Ibid s 11(2) (as substituted: see note 8 supra).
  - 17 For the meaning of 'transferee' see PARA 1750 note 3 ante.
  - 18 Landlord and Tenant Act 1987 s 11(3) (as substituted: see note 8 supra). For the purposes of Pt I (as amended), 'the purchaser' has the meaning given by s 11(3) (as so substituted): s 20(1) (definition substituted by the Housing Act 1996 ss 89(3), 92(1), Sch 6 Pt IV para 3).
- As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 11 (as substituted) by regulations see PARA 1752 note 8 ante.

## UPDATE

### 1769 Circumstances in which tenants' rights enforceable against purchaser

NOTES--Where a landlord enters into a contract to surrender a headlease without first serving a notice on the qualifying tenants, those tenants have the ability to serve a notice on the freeholder requiring him to grant a new lease to their nominee on the same terms as the surrendered lease: *Kensington Heights Commercial Co Ltd v Campden Hill Developments Ltd* [2007] EWCA Civ 245, [2007] 2 All ER 751.

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### 1770. Right to information as to terms of disposal etc.

The requisite majority of qualifying tenants<sup>1</sup> of the constituent flats<sup>2</sup> may serve a notice on the purchaser<sup>3</sup> requiring him:

- 4321 (1) to give particulars of the terms on which the original disposal<sup>4</sup> was made, including the deposit and consideration required, and the date on which it was made; and
- 4322 (2) where the disposal consisted of entering into a contract, to provide a copy of the contract<sup>5</sup>.

The notice must specify the name and address of the person to whom, on behalf of the tenants, the particulars are to be given, or the copy of the contract provided<sup>6</sup>.

Any such notice must be served before the end of the period of four months beginning with the date by which:

- 4323 (a) notices in pursuance of the statutory duty of the new landlord to inform tenants of their rights<sup>7</sup> and relating to the original disposal; or
  - 4324 (b) where that statutory duty does not apply, documents of any other description:
- 299
- 158. (i) indicating that the original disposal has taken place; and
  - 159. (ii) alerting the tenants to the existence of their rights of first refusal<sup>8</sup> and the time within which any such rights must be exercised,
- 300

have been served on the requisite majority of qualifying tenants of the constituent flats<sup>9</sup>.

A person served with a notice under these provisions must comply with it within the period of one month beginning with the date on which it is served on him<sup>10</sup>.

1 For the meaning of 'qualifying tenants' see PARA 1748 ante.

2 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

3 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

4 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

5 Landlord and Tenant Act 1987 s 11A(1) (s 11A substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). As to notices generally and their service see PARA 1751 ante; and as to the information to be given under head (1) in the text see *Staszewski v Maribella Ltd* (1997) 30 HLR 213, [1998] 1 EGLR 34 (decided under the similarly worded provisions of the Landlord and Tenant Act 1987 s 11(3) (as originally enacted)).

6 Ibid s 11A(2) (as substituted: see note 5 supra).

7 I.e. notices under the Landlord and Tenant Act 1985 s 3A (as added): see PARA 553 ante.

8 I.e. their rights under the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1771 et seq post.

9 Ibid s 11A(3) (as substituted: see note 5 supra).

10 Ibid s 11A(4) (as substituted: see note 5 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 11A (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1771. Right of qualifying tenants to take benefit of contract.**

Where the original disposal<sup>1</sup> consisted of entering into a contract, the requisite majority of qualifying tenants<sup>2</sup> of the constituent flats<sup>3</sup> may by notice to the landlord<sup>4</sup> elect that the contract is to have effect as if entered into not with the purchaser<sup>5</sup> but with a person or persons nominated for these purposes<sup>6</sup> by the requisite majority of qualifying tenants of the constituent flats<sup>7</sup>. Any such notice must be served before the end of the period of six months beginning:

- 4325 (1) if a notice was served on the purchaser in exercise of the statutory right to information as to the terms of the disposal etc<sup>8</sup>, with the date on which the purchaser complied with that notice;
- 4326 (2) in any other case, with the date by which documents of any description:
  - 301 160. (a) indicating that the original disposal took place; and
  - 161. (b) alerting the tenants to the existence of their rights of first refusal<sup>9</sup> and the time within which any such rights must be exercised,
  - 302 4327 have been served on the requisite majority of qualifying tenants of the constituent flats<sup>10</sup>.

The notice does not have effect as mentioned above unless the nominated person:

- 4328 (i) fulfils any requirements as to the deposit required on entering into the contract; and
- 4329 (ii) fulfils any other conditions required to be fulfilled by the purchaser on entering into the contract<sup>11</sup>.

Unless otherwise agreed, any time limit in the contract as it has effect by virtue of a notice under these provisions starts to run again on the service of that notice; and nothing in the contract as it has effect by virtue of such a notice is to require the nominated person to complete the purchase before the end of the period of 28 days beginning with the day on which he is deemed to have entered into the contract<sup>12</sup>.

Where the original disposal related to other property in addition to the premises to which the right of first refusal applied<sup>13</sup> at the time of the disposal, a notice under these provisions has effect only in relation to the premises to which that right applied at the time of the original disposal, and the terms of the contract have effect with any necessary modifications<sup>14</sup>. In such a case the notice under these provisions may specify the subject-matter of the disposal, and the terms on which the disposal is to be made, whether doing so expressly or by reference to the original disposal, or may provide for that estate or interest, or any such terms, to be determined by a leasehold valuation tribunal<sup>15</sup>.

1 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

2 For the meaning of 'qualifying tenants' see PARA 1748 ante.

3 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

4 For the meaning of 'the landlord' see PARA 1747 ante.

5 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

6 The person or persons initially nominated for these purposes, or for the purposes of the Landlord and Tenant Act 1987 s 12B or s 12C (each as substituted) (see PARAS 1772-1773, 1775 post) must be nominated in the notice described in the text, or the notice under that provision: see s 12D(1) (ss 12A, 12D substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). A person nominated for those purposes by the requisite majority of qualifying tenants of the constituent flats may be replaced by another person so nominated if, and only if, he has (for any reason) ceased to be able to act as a nominated person: Landlord and Tenant Act 1987 s 12D(2) (as so substituted). Where two or more persons have been nominated and any of them ceases to act without being replaced, the remaining person or persons so nominated may continue to act: s 12D(3) (as so substituted). Where, in the exercise of its power to award costs, the court or the Lands Tribunal makes, in connection with any proceedings arising under or by virtue of Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante, PARA 1772 et seq post), an award of costs against the person or persons so nominated, the liability for those costs is a joint and several liability of that person or those persons together with the qualifying tenants by whom the relevant notice was served: s 12D(4) (as so substituted).

7 Ibid s 12A(1) (as substituted: see note 6 supra). As to notices generally and their service see PARA 1751 ante.

8 Ie under ibid s 11A (as substituted): see PARA 1770 ante.

9 Ie their rights under ibid Pt I (as amended).

10 Ibid s 12A(2) (as substituted: see note 6 supra).

11 Ibid s 12A(3) (as substituted: see note 6 supra).

12 Ibid s 12A(4) (as substituted: see note 6 supra).

13 Ie premises to which ibid Pt I (as amended) applied: see PARA 1746 ante.

14 Ibid s 12A(5) (as substituted: see note 6 supra).

15 See note 14 supra. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 12A (as substituted) by regulations see PARA 1752 note 8 ante.

## UPDATE

### 1771 Right of qualifying tenants to take benefit of contract

NOTE 6--Reference to the Lands Tribunal is now to the Upper Tribunal: Landlord and Tenant Act 1987 s 12D(4) (amended by SI 2009/1307).

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### 1772. Right of qualifying tenants to compel sale etc by purchaser.

The following provisions apply where:

- 4330 (1) the original disposal<sup>1</sup> consisted of entering into a contract and no notice has been served in pursuance of the statutory right of the qualifying tenants<sup>2</sup> to take the benefit of the contract<sup>3</sup>; or
- 4331 (2) the original disposal did not consist of entering into a contract<sup>4</sup>.



The requisite majority of qualifying tenants of the constituent flats<sup>5</sup> may serve a notice (a 'purchase notice') on the purchaser<sup>6</sup> requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made, including those relating to the consideration payable, to a person or persons nominated for these purposes<sup>7</sup> by any such majority of qualifying tenants of those flats<sup>8</sup>. Any such notice must be served before the end of the period of six months beginning:

- 4332 (a) if a notice was served on the purchaser in exercise of the statutory right to information as to the terms of the disposal etc<sup>9</sup>, with the date on which the purchaser complied with that notice;
  - 4333 (b) in any other case, with the date by which:
- 303
- 162. (i) notices in pursuance of the statutory duty of the new landlord to inform tenants of their rights<sup>10</sup> and relating to the original disposal; or
  - 163. (ii) where that statutory duty does not apply, documents of any other description indicating that the original disposal has taken place and alerting the tenants to the existence of their rights of first refusal<sup>11</sup> and the time within which any such rights must be exercised,
- 304
- 4334 have been served on the requisite majority of qualifying tenants of the constituent flats<sup>12</sup>.

Where the original disposal related to other property in addition to premises to which the right of first refusal applied<sup>13</sup> at the time of the disposal, a purchase notice must:

- 4335 (A) require the purchaser only to make a disposal relating to those premises; and
- 4336 (B) require him to do so on the terms referred to above<sup>14</sup> with any necessary modifications;

and in such a case the purchase notice may specify the subject-matter of the disposal, and the terms on which the disposal is to be made, whether doing so expressly or by reference to the original disposal, or may provide for those matters to be determined by a leasehold valuation tribunal<sup>15</sup>.

Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal increased in monetary value owing to any change in circumstances, other than a change in the value of money, the amount of the consideration payable to the purchaser for the disposal by him of the property in pursuance of the purchase notice is to be the amount that might reasonably have been obtained on a corresponding disposal made on the open market at the time of the original disposal if the change in circumstances had already taken place<sup>16</sup>.

1 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

2 For the meaning of 'qualifying tenant' see PARA 1748 ante.

3 If no notice has been served under the Landlord and Tenant Act 1987 s 12A (as substituted): see PARA 1771 ante.

4 Ibid s 12B(1) (s 12B substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II).

5 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

- 6 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.
- 7 As to the nominated person or persons see the Landlord and Tenant Act 1987 s 12D (as substituted), cited in PARA 1771 note 6 ante.
- 8 Ibid s 12B(2) (as substituted: see note 4 supra). As to notices generally and their service see PARA 1751 ante.
- 9 Ie under ibid s 11A (as substituted): see PARA 1770 ante.
- 10 Ie notices under the Landlord and Tenant Act 1985 s 3A (as added): see PARA 553 ante.
- 11 Ie their rights under the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1773 et seq post.
- 12 Ibid s 12B(3) (as substituted: see note 4 supra).
- 13 As to such premises see PARA 1746 ante.
- 14 Ie the terms referred to in the Landlord and Tenant Act 1987 s 12B(2) (as substituted): see the text and notes 5-8 supra.
- 15 Ibid s 12B(4) (as substituted: see note 4 supra).
- 16 Ibid s 12B(7) (as substituted: see note 4 supra); and see *Crompton v Unifox Properties Ltd* [1992] 2 EGLR 82, [1992] 46 EG 105, CA; *Twinsectra Ltd v Jones, Jones v Twinsectra Ltd* [1998] 2 EGLR 129, [1998] 23 EG 134, Lands Tribunal (both decided under the similarly worded provisions of the Landlord and Tenant Act 1987 s 12(6) (as originally enacted)). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 12B (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1773. Discharge of mortgages etc and duty of nominated person to redeem them.**

The following provisions apply where:

- 4337 (1) the original disposal<sup>1</sup> consisted of entering into a contract and no notice has been served in pursuance of the statutory right of the qualifying tenants<sup>2</sup> to take the benefit of the contract<sup>3</sup>; or
- 4338 (2) the original disposal did not consist of entering into a contract<sup>4</sup>.

Where the property which the purchaser<sup>5</sup> is required to dispose of in pursuance of the purchase notice<sup>6</sup> has since the original disposal become subject to any charge or other incumbrance, then, unless the court<sup>7</sup> by order directs otherwise:

- 4339 (a) in the case of a charge to secure the payment of money or the performance of any other obligation by the purchaser or any other person, the instrument by virtue of which the property is disposed of by the purchaser to the person or persons nominated for these purposes<sup>8</sup> operates<sup>9</sup> to discharge the property from that charge<sup>10</sup>; and
- 4340 (b) in the case of any other incumbrance, the property must be so disposed of subject to the incumbrance<sup>11</sup> but with a reduction in the consideration payable to

the purchaser corresponding to the amount by which the existence of the incumbrance reduces the value of the property<sup>12</sup>.

Where, in accordance with head (a) above, an instrument will operate to discharge any property from a charge to secure the payment of money, it is the duty of the nominated person<sup>13</sup> to apply the consideration payable<sup>14</sup>, in the first instance, in or towards the redemption of any such charge and, if more than one, according to their priorities<sup>15</sup>. Where this applies to any charge or charges, then if, and only if, the consideration payable is applied by the nominated person in accordance therewith or paid into court by him<sup>16</sup>, the instrument in question operates to discharge any property from a charge to secure the payment of money notwithstanding that the consideration payable is insufficient to enable the charge or charges to be redeemed in its or their entirety<sup>17</sup>.

For the purpose of determining the amount payable in respect of any such charge, a person entitled to the benefit of such a charge is not permitted to exercise any right to consolidate that charge with a separate charge on other property<sup>18</sup>; and, for the purpose of discharging any property from such a charge, a person may be required to accept three months' or any longer notice of the intention to pay the whole or part of the principal secured by the charge, together with interest to the date of payment, notwithstanding that the terms of the security make other provision or no provision as to the time and manner of payment; but he is entitled, if he so requires, to receive such additional payment as is reasonable in the circumstances in respect of the costs of reinvestment or other incidental costs and expenses and in respect of any reduction in the rate of interest obtainable on reinvestment<sup>19</sup>.

Where any property is discharged by head (a) above from a charge, without the obligations secured by the charge being satisfied by the receipt of the whole or part of the consideration payable, the discharge of that property from the charge does not prejudice any right or remedy for the enforcement of those obligations against other property comprised in the same or any other security, nor prejudice any personal liability as principal or otherwise of the purchaser<sup>20</sup> or any other person<sup>21</sup>.

1 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

2 For the meaning of 'qualifying tenant' see PARA 1748 ante.

3 If no notice has been served under the Landlord and Tenant Act 1987 s 12A (as substituted): see PARA 1771 ante.

4 Ibid s 12B(1) (s 12B substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II).

5 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

6 For the meaning of 'purchase notice' see PARA 1772 ante.

7 'The court' means the High Court or a county court: Landlord and Tenant Act 1987 s 60(1).

8 As to the person or persons so nominated see ibid s 12D (as substituted), cited in PARA 1771 note 6 ante.

9 If subject to the provisions of ibid Sch 1 Pt I (paras 1-5) (as amended): see the text and notes 13-21 infra; and PARA 1774 post.

10 Ibid s 12B(5)(a) (as substituted: see note 4 supra). Section 12B(5)(a) (as so substituted) and Sch 1 Pt I (as amended) apply, with any necessary modifications, to mortgages and liens as they apply to charges; but nothing in those provisions applies to a rentcharge: s 12B(6) (as so substituted).

11 As to whether a lease may be an 'incumbrance' for the purposes of heads (a)-(b) in the text see *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1997] QB 858, [1996] 1 All ER 312, CA (decided on the similarly worded provisions of the Landlord and Tenant Act 1987 s 12(4) (as originally enacted)).

12 Ibid s 12B(5)(b) (as substituted: see note 4 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 12B (as substituted) by regulations see PARA 1752 note 8 ante.

13 For these purposes, 'the nominated person' means the person or persons nominated as mentioned in ibid s 12B(2) (as substituted) (see PARA 1772 ante): s 12B(5), (6) (as substituted), Sch 1 para 1 (Sch 1 paras 1, 2, 5 amended by the Housing Act 1996 s 92(1), Sch 6 Pt IV para 11).

14 'The consideration payable' means the consideration payable to the purchaser for the disposal by him of the property referred to in ibid s 12B(7) (as substituted) (see PARA 1772 ante): Sch 1 para 1 (as amended: see note 12 supra).

15 Ibid Sch 1 para 2(1) (as amended: see note 12 supra). Subject to Sch 1 para 2(4), Sch 1 para 2(1) (as so amended) does not apply to a charge which is a debenture holders' charge, that is to say a charge, whether a floating charge or not, in favour of the holders of a series of debentures issued by a company or other body of persons, or in favour of trustees for such debenture holders; and any such charge must be disregarded in determining priorities for the purposes of Sch 1 para 2(1): Sch 1 para 2(3). Schedule 1 para 2(3) does not have effect, however, in relation to a charge in favour of trustees for debenture holders which at the date of the instrument by virtue of which the property is disposed of by the new landlord is, as regards that property, a specific and not a floating charge: Sch 1 para 2(4).

Nothing in Sch 1 (as amended) is to be construed as preventing a person from joining in the instrument referred to in Sch 1 para 2(1) (as so amended) for the purpose of discharging the property in question from any charge without payment or for a lesser payment than that to which he would otherwise be entitled; and, if he does so, the persons to whom the consideration payable ought to be paid must be determined accordingly: Sch 1 para 5(2).

16 le in accordance with ibid Sch 1 para 4 (as amended): see PARA 1774 post.

17 Ibid Sch 1 para 2(2).

18 Ibid Sch 1 para 3(1).

19 Ibid Sch 1 para 3(2).

20 See note 5 supra.

21 Landlord and Tenant Act 1987 Sch 1 para 5(1) (as amended: see note 13 supra).

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### **1774. Payments into court.**

Where any property is to be discharged from a charge<sup>1</sup> and a person is or may be entitled<sup>2</sup> in respect of the charge to receive the whole or part of the consideration payable<sup>3</sup>, then, if:

4341 (1) for any reason difficulty arises in ascertaining how much is to be payable in respect of the charge; or

4342 (2) for any specified reason<sup>4</sup> difficulty arises in making a payment in respect of the charge,

the nominated person<sup>5</sup> may pay into court on account of the consideration payable the amount, if known, of the payment to be made in respect of the charge or, if that amount is not known, the whole of that consideration or such lesser amount as the nominated person thinks right in order to provide for that payment<sup>6</sup>.

Payment may be made into court in accordance with head (2) above where the difficulty arises for any of the following reasons, namely:

- 4343 (a) because a person who is or may be entitled to receive payment cannot be found or ascertained;
- 4344 (b) because any such person refuses or fails to make out a title, or to accept payment and give a proper discharge, or to take any steps reasonably required of him to enable the sum payable to be ascertained and paid; or
- 4345 (c) because a tender of the sum payable cannot, by reason of complications in the title to it or the want of two or more trustees or for other reasons, be effected, or not without incurring or involving unreasonable cost or delay<sup>7</sup>.

Without prejudice to head (1) above, the whole or part of the consideration payable may be paid into court by the nominated person if, before execution of the instrument<sup>8</sup>, notice is given to him:

- 4346 (i) that the purchaser<sup>9</sup> or a person entitled to the benefit of a charge on the property in question requires him to do so for the purpose of protecting the rights of persons so entitled, or for reasons related to the bankruptcy or winding up of the purchaser; or
- 4347 (ii) that steps have been taken to enforce any charge on the purchaser's interest in that property by the bringing of proceedings in any court, or by the appointment of a receiver or otherwise;

and, where payment into court is to be made by reason only of a notice under this provision, and the notice is given with reference to proceedings in a court specified in the notice other than a county court, payment must be made into the court so specified<sup>10</sup>.

1    Ie under the Landlord and Tenant Act 1987 s 12B(5)(a) (as substituted): see PARA 1773 ante at head (a) in the text.

2    Ie in accordance with *ibid* s 12B(5), (6) (as substituted), Sch 1 para 2(1) (as amended): see PARA 1773 ante.

3    For the meaning of 'the consideration payable' see PARA 1773 note 14 ante.

4    Ie any reason mentioned in the Landlord and Tenant Act 1987 Sch 1 para 4(2): see heads (a)-(c) in the text.

5    For the meaning of 'the nominated person' for these purposes see PARA 1773 note 13 ante.

6    Landlord and Tenant Act 1987 Sch 1 para 4(1) (Sch 1 para 4(1), (3) amended by the Housing Act 1996 s 92(1), Sch 6 Pt IV para 11).

7    Landlord and Tenant Act 1987 Sch 1 para 4(2).

8    Ie the instrument referred to in *ibid* Sch 1 para 2(1) (as amended).

9    For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

10   Landlord and Tenant Act 1987 Sch 1 para 4(3) (as amended: see note 6 *supra*).

Subsequent Purchasers/1775. Right of qualifying tenants to compel grant of new tenancy by superior landlord.

**1775. Right of qualifying tenants to compel grant of new tenancy by superior landlord.**

The following provisions apply where the original disposal<sup>1</sup> consisted of the surrender by the landlord<sup>2</sup> of a tenancy held by him ('the relevant tenancy')<sup>3</sup>.

The requisite majority of qualifying tenants<sup>4</sup> of the constituent flats<sup>5</sup> may serve a notice on the purchaser<sup>6</sup> requiring him to grant a new tenancy of the premises which were subject to the relevant tenancy, on the same terms as those of the relevant tenancy and so as to expire on the same date as that tenancy would have expired, to a person or persons nominated for these purposes<sup>7</sup> by any such majority of qualifying tenants of those flats<sup>8</sup>. Any such notice must be served before the end of the period of six months beginning:

- 4348 (1) if a notice was served on the purchaser in exercise of the statutory right to information as to the terms of the disposal etc<sup>9</sup>, with the date on which the purchaser complied with that notice;
- 4349 (2) in any other case, with the date by which documents of any description indicating that the original disposal has taken place, and alerting the tenants to the existence of their rights of first refusal<sup>10</sup> and the time within which any such rights must be exercised, have been served on the requisite majority of qualifying tenants of the constituent flats<sup>11</sup>.

If the purchaser paid any amount to the landlord as consideration for the surrender by him of that tenancy, the nominated person must pay that amount to the purchaser<sup>12</sup>.

Where the premises subject to the relevant tenancy included premises other than premises to which the right of first refusal applied<sup>13</sup> at the time of the disposal, a notice under these provisions must:

- 4350 (a) require the purchaser only to grant a new tenancy relating to the premises to which that right then applied; and
- 4351 (b) require him to do so on the terms referred to above<sup>14</sup> subject to any necessary modifications<sup>15</sup>.

The purchase notice may specify the subject-matter of the disposal<sup>16</sup>, and the terms on which the disposal is to be made, whether doing so expressly or by reference to the original disposal, or may provide for those matters to be determined by a leasehold valuation tribunal<sup>17</sup>.

1 For the meaning of 'the original disposal' see PARA 1763 note 15 ante.

2 For the meaning of 'the landlord' see PARA 1747 ante.

3 Landlord and Tenant Act 1987 s 12C(1) (s 12C substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II).

4 For the meaning of 'qualifying tenant' see PARA 1748 ante.

5 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

6 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

7 As to the persons so nominated see the Landlord and Tenant Act 1987 s 12D (as substituted), cited in PARA 1771 note 6 ante.

- 8 Ibid s 12C(2) (as substituted: see note 3 supra). As to notices generally and their service see PARA 1751 ante.
- 9 le under ibid s 11A (as substituted): see PARA 1770 ante.
- 10 le their rights under ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1776 et seq post.
- 11 Ibid s 12C(3) (as substituted: see note 3 supra).
- 12 Ibid s 12C(4) (as substituted: see note 3 supra).
- 13 As to such premises see PARA 1746 ante.
- 14 le the terms referred to in the Landlord and Tenant Act 1987 s 12C(2) (as substituted): see the text and notes 4-8 supra.
- 15 Ibid s 12C(5) (as substituted: see note 3 supra).
- 16 For the meaning of 'disposal' see PARA 1750 note 3 ante.
- 17 Landlord and Tenant Act 1987 s 12C(6) (as substituted: see note 3 supra). As to the procedure on applications to a leasehold valuation tribunal see PARA 59 et seq ante, PARA 1776 post. As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 12C (as substituted) by regulations see PARA 1752 note 8 ante.

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### **1776. Determination of questions by leasehold valuation tribunal.**

A leasehold valuation tribunal has jurisdiction to hear and determine:

- 4352 (1) any question arising in relation to any matters specified in a notice of election to take the benefits of a contract<sup>1</sup> or a purchase notice<sup>2</sup>; and
- 4353 (2) any question arising for determination as mentioned<sup>3</sup> in the relevant statutory provisions<sup>4</sup>.

On an application under this provision the interests of the persons by whom the notice referred to in head (1) above was served<sup>5</sup> must be represented by the nominated person<sup>6</sup>; and accordingly the parties to any such application must not include those persons<sup>7</sup>.

As well as the general particulars to be included with an application to a leasehold valuation tribunal<sup>8</sup>, the following documents and particulars must be included with an application under the above provisions:

- 4354 (a) a copy of any notice served in relation to the enfranchisement;
- 4355 (b) the name and address of the freeholder and any intermediate landlord;
- 4356 (c) the name and address of any person having a mortgage or other charge over an interest in the premises the subject of the application held by the freeholder or other landlord;
- 4357 (d) the date on which the landlord acquired the property and the terms of acquisition including the sums paid; and
- 4358 (e) a copy of the lease<sup>9</sup>.

The tribunal may, however, dispense with or relax any of the requirements of heads (a) to (e) above if satisfied that the particulars and documents included with an application are sufficient to enable the application to be determined and that no prejudice will, or is likely to, be caused to any party to the application<sup>10</sup>.

1 le a notice under the Landlord and Tenant Act 1987 s 12A (as substituted): see PARA 1771 ante.

2 le a notice under *ibid* s 12B (as substituted) (see PARA 1772-1773 ante) or s 12C (as substituted) (see PARA 1775 ante).

3 le as mentioned in *ibid* s 8C(4) (as substituted) (see PARA 1763 ante), s 12A(5) (as substituted) (see PARA 1771 ante) or s 12B(4) (as substituted) (see PARA 1772 ante).

4 *Ibid* s 13(1) (s 13 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). The tribunal does not have jurisdiction to hear and determine matters in dispute between the parties which do not fall within heads (1)-(2) in the text: see *134 Shirland Road Management Co Ltd v Lester* [1997] 2 EGLR 207, [1997] 49 EG 141, leasehold valuation tribunal. Whether the premises are one or separate buildings is a matter which should be raised before the county court as it goes to the validity of the purchase notice; it is not a matter for the leasehold valuation tribunal or the Lands Tribunal on appeal: *Saga Properties Ltd v Palmeira Square Nos 2-6 Ltd* [1995] 1 EGLR 199, [1995] 15 EG 109, Lands Tribunal.

5 le served under the Landlord and Tenant Act 1987 s 12A, s 12B or s 12C (as substituted).

6 For the meaning of 'the nominated person' see PARA 1760 note 11 ante. See also *ibid* s 12D (as substituted), cited in PARA 1771 note 6 ante.

7 *Ibid* s 13(2) (as substituted: see note 4 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 13 (as substituted) by regulations see PARA 1752 note 8 ante.

8 See the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(1); the Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(1); and PARA 60 ante.

9 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(b), Sch 2 para 1(1)-(3), (5)-(6) (Sch 2 para 1(6) added by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(b), Sch 2 para 1(1)-(3), (5)-(6) (Sch 2 para 1(6) added by SI 2005/1356).

10 Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(8); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(8).

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### **1777. Withdrawal of nominated person from transaction.**

Where notice has been duly served<sup>1</sup> on the landlord<sup>2</sup> under:

4359 (1) the statutory provision conferring a right on the qualifying tenants<sup>3</sup> to compel a sale etc by the purchaser<sup>4</sup>; or

4360 (2) the statutory provision conferring a right on the qualifying tenants to compel the grant of a new tenancy by the superior landlord<sup>5</sup>,



the nominated person<sup>6</sup> may at any time before a binding contract is entered into in pursuance of the notice, serve notice on the purchaser (a 'notice of withdrawal') indicating an intention no longer to proceed with the disposal<sup>7</sup>.

If at any such time the nominated person becomes aware that the number of qualifying tenants of the constituent flats<sup>8</sup> desiring to proceed with the disposal is less than the requisite majority of those tenants<sup>9</sup>, he must forthwith serve a notice of withdrawal<sup>10</sup>.

If a notice of withdrawal is served under these provisions the purchaser may recover from the nominated person any costs reasonably incurred by him in connection with the disposal down to the time when the notice is served on him<sup>11</sup>. If a notice of withdrawal is served at a time when proceedings arising under or by virtue of the right of first refusal<sup>12</sup> are pending before the court<sup>13</sup> or the Lands Tribunal, the liability of the nominated person for any costs incurred by the purchaser as so mentioned is to be such as may be determined by the court or, as the case may be, by the tribunal<sup>14</sup>. The costs that may be recovered by the purchaser under these provisions do not include any costs incurred by him in connection with an application to a leasehold valuation tribunal<sup>15</sup>.

1 As to the service of notices see PARA 1751 ante.

2 For the meaning of 'the landlord' see PARA 1747 ante.

3 For the meaning of 'qualifying tenant' see PARA 1748 ante.

4 Ie the Landlord and Tenant Act 1987 s 12B (as substituted): see PARAS 1772-1773 ante. For the meaning of 'the purchaser' see PARA 1769 note 18 ante.

5 Ie ibid s 12C (as substituted): see PARA 1775 ante.

6 For the meaning of 'the nominated person' see PARA 1760 note 11 ante. See also ibid s 12D (as substituted), cited in PARA 1771 note 6 ante.

7 Ibid s 14(1) (s 14 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). For the meaning of 'disposal' see PARA 1750 note 3 ante.

8 For the meaning of 'constituent flat' see PARA 1749 note 2 ante.

9 For the meaning of 'the requisite majority of qualifying tenants of the constituent flats' see PARA 1749 ante.

10 Landlord and Tenant Act 1987 s 14(2) (as substituted: see note 7 supra).

11 Ibid s 14(3) (as substituted: see note 7 supra).

12 Ie under or by virtue of ibid Pt I (ss 1-20) (as amended): see PARA 1744 et seq ante, PARA 1778 et seq post.

13 For the meaning of 'the court' see PARA 1773 note 7 ante.

14 Landlord and Tenant Act 1987 s 14(4) (as substituted: see note 7 supra).

15 Ibid s 14(5) (as substituted: see note 7 supra). As to the determination of questions by a leasehold valuation tribunal see PARA 1776 ante. An award of costs against the nominated person or persons is a joint and several liability of that person or those persons together with the qualifying tenants by whom the relevant notice was served: see s 12D(4) (as substituted), cited in PARA 1771 note 6 ante.

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 14 (as substituted) by regulations see PARA 1752 note 8 ante.

## UPDATE

### 1777 Withdrawal of nominated person from transaction

TEXT AND NOTE 14--Reference to the Lands Tribunal is now to the Upper Tribunal:  
Landlord and Tenant Act 1987 s 14(4) (amended by SI 2009/1307).

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### **1778. Right of qualifying tenants against subsequent purchaser.**

The following provisions apply where, at the time when a notice is served<sup>1</sup> on the purchaser<sup>2</sup> under the statutory provision:

- 4361 (1) conferring a right to information as to the terms of a disposal etc<sup>3</sup>;
- 4362 (2) conferring a right on the qualifying tenants<sup>4</sup> to take the benefit of the contract<sup>5</sup>;
- 4363 (3) conferring a right on the qualifying tenants to compel a sale etc by the purchaser<sup>6</sup>; or
- 4364 (4) conferring a right on the qualifying tenants to compel the grant of a new tenancy by the superior landlord<sup>7</sup>,

he no longer holds the estate or interest that was the subject-matter of the original disposal<sup>8</sup>.

In the case of such a notice as is referred to in head (1) above, the purchaser must, within the period for complying with that notice:

- 4365 (a) serve notice on the person specified in the notice as the person to whom particulars are to be provided of the name and address of the person to whom he has disposed of that estate or interest ('the subsequent purchaser'); and
- 4366 (b) serve on the subsequent purchaser a copy of the notice referred to in head (1) above and of the particulars given by him in response to it<sup>9</sup>.

In the case of a notice such as is referred to in head (2), head (3) or head (4) above, the purchaser must forthwith:

- 4367 (i) forward the notice to the subsequent purchaser; and
- 4368 (ii) serve on the nominated person<sup>10</sup> notice of the name and address of the subsequent purchaser<sup>11</sup>.

Once the purchaser serves a notice in accordance with head (a) or head (ii) above, then the statutory provisions described in heads (2) to (4) above<sup>12</sup>, the provisions relating to determination of questions by a leasehold valuation tribunal<sup>13</sup> and the provisions relating to withdrawal of the nominated person from the transaction<sup>14</sup>, instead of applying to the purchaser, apply to the subsequent purchaser as if he were the transferee<sup>15</sup> under the original disposal<sup>16</sup>.

The above provisions have effect, with any necessary modifications, in a case where, instead of disposing of the whole of the estate or interest referred to above to another person, the purchaser has disposed of it in part or in parts to one or more other persons<sup>17</sup>.

- 1 As to the service of notices see PARA 1751 ante.
  - 2 For the meaning of 'the purchaser' see PARA 1769 note 18 ante.
  - 3 Ie under the Landlord and Tenant Act 1987 s 11A (as substituted): see PARA 1770 ante.
  - 4 For the meaning of 'qualifying tenant' see PARA 1748 ante.
  - 5 Ie under the Landlord and Tenant Act 1987 s 12A (as substituted): see PARA 1771 ante.
  - 6 Ie under ibid s 12B (as substituted): see PARAS 1772-1773 ante.
  - 7 Ie under ibid s 12C (as substituted): see PARA 1775 ante.
  - 8 Ibid s 16(1) (s 16 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). For the meaning of 'the original disposal' see PARA 1763 note 15 ante.
  - 9 Landlord and Tenant Act 1987 s 16(2) (as substituted: see note 8 supra).
  - 10 For the meaning of 'the nominated person' see PARA 1760 note 11 ante. See also ibid s 12D (as substituted), cited in PARA 1771 note 6 ante.
  - 11 Ibid s 16(3) (as substituted: see note 8 supra).
  - 12 Ie ibid ss 12A-12C (as substituted), together with s 12D (as substituted): see PARAS 1771-1773, 1775 ante.
  - 13 Ie ibid s 13 (as substituted): see PARA 1776 ante.
  - 14 Ie ibid s 14 (as substituted): see PARA 1777 ante.
  - 15 For the meaning of 'transferee' see PARA 1750 note 3 ante.
  - 16 Landlord and Tenant Act 1987 s 16(4) (as substituted: see note 8 supra).
  - 17 Ibid s 16(5) (as substituted: see note 8 supra). In such a case, ss 12A-14 (as substituted) apply to the purchaser in relation to any part of that estate or interest retained by him, and in relation to any part of that estate or interest disposed of to any other person, apply to that other person instead as if he were (as respects that part) the transferee under the original disposal: s 16(5)(a), (b) (as so substituted). As to the situation where there are two disposals in quick succession see *Tyson v Carlisle Estates Ltd* [1990] 2 EGLR 229, [1990] 36 EG 127, London rent assessment panel (decided under the Landlord and Tenant Act 1987 s 16 as originally enacted). See also *Wilkins v Horowitz* [1990] 2 EGLR 217, Yorkshire rent assessment panel.
- As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 16 (as substituted) by regulations see PARA 1752 note 8 ante.

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#### **(iv) Termination of Rights against Purchasers or Subsequent Purchasers**

##### **1779. Termination of rights against purchasers or subsequent purchasers.**

If, at any time after a notice has been served<sup>1</sup> under the statutory provisions:

- 4369 (1) conferring a right to information as to the terms of a disposal etc<sup>2</sup>;
- 4370 (2) conferring a right on the qualifying tenants<sup>3</sup> to take the benefit of the contract<sup>4</sup>;

- 4371 (3) conferring a right on the qualifying tenants to compel a sale etc by the purchaser<sup>5</sup>; or
- 4372 (4) conferring a right on the qualifying tenants to compel the grant of a new tenancy by the superior landlord<sup>6</sup>,

the premises affected by the original disposal<sup>7</sup> cease to be premises to which the right of first refusal applies<sup>8</sup>, the purchaser<sup>9</sup> may serve a notice on the qualifying tenants of the constituent flats<sup>10</sup> stating that the premises have ceased to be premises to which that right applies, and that any such notice served on him, and anything done in pursuance of it, is to be treated as not having been served or done<sup>11</sup>. A landlord<sup>12</sup> who has not served such a notice on all of the qualifying tenants of the constituent flats is nevertheless to be treated as having duly served such a notice if he has served such a notice on not less than 90% of those tenants, or, where those qualifying tenants number less than ten, if he has served such a notice on all but one of them<sup>13</sup>.

Where a period of three months beginning with the date of service of a notice under the provisions referred to in head (1), head (2) or head (3) above on the purchaser has expired:

- 4373 (a) without any binding contract having been entered into between the purchaser and the nominated person<sup>14</sup>; and
- 4374 (b) without there having been made any application in connection with the notice to the court<sup>15</sup> or to a leasehold valuation tribunal,

the purchaser may serve on the nominated person a notice stating that the notice, and anything done in pursuance of it, is to be treated as not having been served or done<sup>16</sup>.

Where any such application as is mentioned in head (b) above was made within the period of three months there referred to, but:

- 4375 (i) a period of two months beginning with the date of the determination of that application has expired;
- 4376 (ii) no binding contract has been entered into between the purchaser and the nominated person; and
- 4377 (iii) no other such application is pending,

the purchaser may serve on the nominated person a notice stating that any notice served on him under the provisions referred to in head (1), head (2) or head (3) above, and anything done in pursuance of any such notice, is to be treated as not having been served or done<sup>17</sup>.

Where the purchaser serves a notice in accordance with the above provisions, the tenants' right of first refusal<sup>18</sup> ceases to have effect in relation to him in connection with the original disposal<sup>19</sup>. Where a purchaser is entitled to serve a notice stating that the premises have ceased to be premises to which that right applies<sup>20</sup> but does not do so, that right<sup>21</sup> continues to have effect in relation to him in connection with the original disposal as if the premises in question were still premises to which it applies<sup>22</sup>.

1 As to the service of notices see PARA 1751 ante.

2 Ie under the Landlord and Tenant Act 1987 s 11A (as substituted): see PARA 1770 ante.

3 For the meaning of 'qualifying tenant' see PARA 1748 ante.

4 Ie under the Landlord and Tenant Act 1987 s 12A (as substituted): see PARA 1771 ante.

5 Ie under ibid s 12B (as substituted): see PARAS 1772-1773 ante.

- 6    le under *ibid* s 12C (as substituted): see PARA 1775 ante.
- 7    For the meaning of 'the original disposal' see PARA 1763 note 15 ante.
- 8    le premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante, PARAS 1780-1782 post) applies. As to such premises see PARA 1746 ante.
- 9    For these purposes, references to the purchaser include a subsequent purchaser to whom *ibid* ss 12A-14 (as substituted) (see PARAS 1771-1777 ante) apply by virtue of s 16(4) or (5) (as substituted) (see PARA 1778 ante): s 17(7) (s 17 substituted by the Housing Act 1996 s 92(1), Sch 6 Pt II). For the meaning of 'the purchaser' generally see PARA 1769 note 18 ante.
- 10   For the meaning of 'constituent flat' see PARA 1749 note 2 ante.
- 11   Landlord and Tenant Act 1987 s 17(1) (as substituted: see note 9 supra).
- 12   For the meaning of 'landlord' see PARA 1747 ante.
- 13   Landlord and Tenant Act 1987 s 17(2) (as substituted: see note 9 supra).
- 14   For the meaning of 'the nominated person' see PARA 1760 note 11 ante. See also *ibid* s 12D (as substituted), cited in PARA 1771 note 6 ante.
- 15   For the meaning of 'the court' see PARA 1773 note 7 ante.
- 16   Landlord and Tenant Act 1987 s 17(3) (as substituted: see note 9 supra).
- 17   *Ibid* s 17(4) (as substituted: see note 9 supra); and see *Boyle v Hallstate Ltd* [2002] EWHC 972 (Ch), [2002] All ER (D) 180 (May).
- 18   le the Landlord and Tenant Act 1987 Pt I (as amended).
- 19   *Ibid* s 17(5) (as substituted: see note 9 supra).
- 20   le a notice under *ibid* s 17(1) (as substituted): see the text and notes 1-11 supra.
- 21   See note 18 supra.
- 22   Landlord and Tenant Act 1987 s 17(6) (as substituted: see note 9 supra). As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 17 (as substituted) by regulations see PARA 1752 note 8 ante.

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## **(v) Notices Served by Prospective Purchasers**

### **1780. Notices served by prospective purchasers to ensure that rights of first refusal do not arise.**

Where:

- 4378 (1) any disposal<sup>1</sup> of an estate or interest in any premises consisting of the whole or part of a building is proposed to be made by a landlord<sup>2</sup>; and
- 4379 (2) it appears to the person who would be the transferee<sup>3</sup> under that disposal ('the purchaser') that any such disposal would, or might, be a relevant disposal<sup>4</sup> affecting premises to which the right of first refusal applies<sup>5</sup>,

the purchaser may serve notices under this provision on the tenants<sup>6</sup> of the flats<sup>7</sup> contained in the premises referred to in head (1) above ('the flats affected')<sup>8</sup>.

Any such notice must:

- 4380 (a) inform the person on whom it is served of the general nature of the principal terms of the proposed disposal, including in particular:
  - 305 164. (i) the property to which it would relate and the estate or interest in that property proposed to be disposed of by the landlord; and
  - 165. (ii) the consideration required by him for making the disposal;
  - 306 4381 (b) invite that person to serve a notice on the purchaser stating:
    - 307 166. (i) whether the landlord has served on him, or on any predecessor in title of his, an offer notice<sup>9</sup> with respect to the disposal; and
    - 167. (ii) if the landlord has not so served any such notice, whether he is aware of any reason why he is not entitled to be served with any such notice by the landlord; and
    - 168. (iii) if he is not so aware, whether he would wish to avail himself of the right of first refusal conferred by any such notice if it were served; and
    - 308 4382 (c) inform that person of the effect<sup>10</sup> of the following provisions<sup>11</sup>.

Where the purchaser has so served notices on at least 80% of the tenants of the flats affected and:

- 4383 (A) not more than 50% of the tenants on whom those notices have been served by the purchaser have served notices on him in pursuance of head (b) above by the end of the period of two months beginning with the date on which the last of them was served by him with a notice under these provisions; or
- 4384 (B) more than 50% of the tenants on whom those notices have been served by the purchaser have served notices on him in pursuance of head (b) above but the notices in each case indicate that the tenant serving it either does not regard himself as being entitled to be served by the landlord with an offer notice<sup>12</sup> with respect to the disposal or would not wish to avail himself of the right of first refusal conferred by such a notice if it were served,

the premises affected by the disposal are to be treated, in relation to the disposal, as premises to which the right of first refusal does not apply<sup>13</sup>.

1 For the meaning of 'disposal' see PARA 1750 note 3 ante.

2 For the meaning of 'landlord' see PARA 1747 ante.

3 For the meaning of 'the transferee' see PARA 1750 note 3 ante.

4 For the meaning of 'relevant disposal' see PARA 1750 ante.

5 The premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) (see PARA 1744 et seq ante; the text and notes 6-13 infra; and PARAS 1781-1782 post) applies. As to such premises see PARA 1746 ante.

6 For the meaning of 'tenant' see PARA 1744 note 6 ante.

7 For the meaning of 'flat' see PARA 1744 note 7 ante.

8 Landlord and Tenant Act 1987 s 18(1). As to service of notices see PARA 1751 ante; and as to the determination of questions arising under Pt I (ss 1-20) (as amended) by the county court see PARA 53 note 10 ante.

9 Ie a notice under *ibid* s 5 (as substituted): see PARA 1752 ante.

10 Ie the effect of *ibid* s 18(3), (4) (as amended): see the text and notes 12-13 *infra*.

11 *Ibid* s 18(2).

12 See note 9 *supra*.

13 Landlord and Tenant Act 1987 s 18(3) (amended by the Tenants' Rights of First Refusal (Amendment) Regulations 1996, SI 1996/2371, reg 2). For these purposes, each of the flats affected is regarded as having one tenant, who counts towards any of the percentages specified in the Landlord and Tenant Act 1987 s 18(3) (as so amended), whether he is a qualifying tenant of the flat or not: s 18(4).

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 18 (as substituted) by regulations see PARA 1752 note 8 ante.

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## **(vi) Enforcement and Offences**

### **1781. Enforcement of obligations.**

The court<sup>1</sup> may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision relating to the right of first refusal<sup>2</sup> to make good the default within such time as is specified in the order<sup>3</sup>. An application may not, however, be so made unless:

4385 (1) a notice has been previously served on the person in question requiring him to make good the default<sup>4</sup>; and

4386 (2) more than 14 days have elapsed since the date of service of that notice without his having done so<sup>5</sup>.

The statutory restriction on making a relevant disposal<sup>6</sup> may be enforced by an injunction granted by the court<sup>7</sup>.

1 For the meaning of 'the court' see PARA 1773 note 7 ante.

2 Ie imposed on him by any provision of the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended): see PARA 1744 *et seq* ante, PARA 1782 post.

3 *Ibid* s 19(1).

4 A copy of the notice so served must accompany the claim form seeking an order under *ibid* s 19(1): *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 7.1.

5 Landlord and Tenant Act 1987 s 19(2).

6 Ie the restriction imposed by *ibid* s 1(1): see PARA 1744 ante.

7 Ibid s 19(3). As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

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### **1782. Offence of failure to comply with statutory requirements.**

A landlord<sup>1</sup> commits an offence if, without reasonable excuse, he makes a relevant disposal<sup>2</sup> affecting premises to which the right of first refusal applies<sup>3</sup>:

4387 (1) without having first complied with the statutory requirements as regards the service of offer notices<sup>4</sup> on the qualifying tenants<sup>5</sup> of flats<sup>6</sup> contained in the premises; or

4388 (2) in contravention of any prohibition or restriction imposed<sup>7</sup> by the relevant statutory provisions<sup>8</sup>.

Proceedings for such an offence may be brought by a local housing authority<sup>9</sup>; and a person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>10</sup>. Where such an offence committed by a body corporate is proved:

4389 (a) to have been committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate, or a person purporting to act in such a capacity; or

4390 (b) to be due to any neglect on the part of such an officer or person,

he, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly<sup>11</sup>. Where the affairs of a body corporate are managed by its members, the above provision applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate<sup>12</sup>.

Nothing in the above provisions, however, affects the validity of the disposal<sup>13</sup>.

1 For the meaning of 'landlord' see PARA 1747 ante.

2 For the meaning of 'relevant disposal' see PARA 1750 ante.

3 I.e. premises to which the Landlord and Tenant Act 1987 Pt I (ss 1-20) (as amended) applies: see PARA 1744 et seq ante. As to such premises see PARA 1746 ante.

4 I.e. the requirements of ibid s 5 (as substituted): see PARA 1752 ante.

5 For the meaning of 'qualifying tenant' see PARA 1748 ante.

6 For the meaning of 'flat' see PARA 1744 note 7 ante.

7 I.e. imposed by the Landlord and Tenant Act 1987 ss 6-10 (as substituted): see PARAS 1758-1768 ante.

8 Ibid s 10A(1) (s 10A added by the Housing Act 1996 s 91(1)).

9 Landlord and Tenant Act 1987 s 10A(4) (as added: see note 9 supra). For these purposes, 'local housing authority' has the same meaning as in the Housing Act 1985 s 1 (as amended) (see PARA 1311 note 4 ante): Landlord and Tenant Act 1987 s 10A(4) (as so added).



10 Ibid s 10A(2) (as added: see note 9 supra). As to the standard scale see PARA 52 note 6 ante.

11 Ibid s 10A(3) (as added: see note 9 supra).

12 See note 11 supra.

13 Landlord and Tenant Act 1987 s 10A(5) (as added: see note 9 supra). Nor do the provisions of Pt I (as amended) prevent rectification of a transfer: *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71.

As to the Secretary of State's or the National Assembly for Wales's or relevant Welsh minister's power to modify the provisions of s 10A (as added) by regulations see PARA 1752 note 8 ante.

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## **(2) COLLECTIVE COMPULSORY ACQUISITION BY TENANTS OF LANDLORD'S INTEREST**

### **1783. Right to apply for acquisition order and premises to which that right applies.**

The following provisions<sup>1</sup> have effect for the purpose of enabling qualifying tenants<sup>2</sup> of flats<sup>3</sup> contained in any qualifying premises<sup>4</sup> to make an application to the court<sup>5</sup> for an order ('an acquisition order') providing for a person nominated by them to acquire their landlord's<sup>6</sup> interest in the premises without his consent<sup>7</sup> provided the conditions for making an acquisition order are met<sup>8</sup>.

Those provisions apply to premises if:

- 4391 (1) they consist of the whole or part of a building<sup>9</sup>; and
- 4392 (2) they contain two or more flats held by tenants of the landlord who are qualifying tenants<sup>10</sup>; and
- 4393 (3) the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises<sup>11</sup>.

Those provisions do not, however, apply:

- 4394 (a) to any such premises<sup>12</sup> if:
  - 309 169. (i) any part or parts of the premises is or are occupied or intended to be occupied otherwise than for residential purposes; and
  - 170. (ii) the internal floor area of that part or those parts, taken together, exceeds 50%<sup>13</sup> of the internal floor area of the premises, taken as a whole;
  - 310 4395 and, for these purposes, the internal floor area of any common parts<sup>14</sup> is to be disregarded<sup>15</sup>;
  - 4396 (b) to any such premises at a time when:
    - 311 171. (i) the interest of the landlord in the premises is held by an exempt landlord<sup>16</sup> or a resident landlord<sup>17</sup>; or
    - 172. (ii) the premises are included within the functional land<sup>18</sup> of any charity<sup>19</sup>;

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4397 (c) to any premises where the right to manage has been acquired and is exercised by an RTM company<sup>20</sup>.

1    Ie the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended): see the text and notes 2-18 infra; and PARA 1784 et seq post.

2    For the meaning of 'qualifying tenant' see PARA 1784 post; and for the meaning of 'tenant' see PARA 53 note 1 ante.

3    For the meaning of 'flat' see PARA 1744 note 7 ante.

4    Ie any premises to which the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) applies. As to such premises see PARA 1783 ante.

5    For the meaning of 'the court' see PARA 1773 note 7 ante.

6    For the meaning of 'landlord' see PARA 53 note 1 ante.

7    Landlord and Tenant Act 1987 s 25(1).

8    See PARA 1787 post.

9    Landlord and Tenant Act 1987 s 25(2)(a).

10   Ibid s 25(2)(b).

11   Ibid s 25(2)(c) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 85(1), (2)(a)).

12   Ie any premises falling within the Landlord and Tenant Act 1987 s 25(2) (as amended): see heads (1)-(3) in the text.

13   The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order substitute for the percentage for the time being so specified such other percentage as is specified in the order: *ibid* s 25(6). At the date at which this title states the law, no such order had been made specifying a substituted percentage. As to the making of orders generally see PARA 352 note 9 ante. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

14   For the meaning of 'common parts' see PARA 1746 note 7 ante.

15   Landlord and Tenant Act 1987 s 25(4).

16   For the meaning of 'exempt landlord' see PARA 354 ante.

17   For the meaning of 'resident landlord' see PARA 399 note 8 ante.

18   For the meaning of 'functional land' see PARA 399 note 11 ante.

19   Landlord and Tenant Act 1987 s 25(5). For the meaning of 'charity' see PARA 354 note 18 ante.

20   Commonhold and Leasehold Reform Act 2002 s 102(1), Sch 7 para 9. As to RTM companies see PARA 367 et seq ante.

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## **1784. Meaning of 'qualifying tenant'.**

A person is<sup>1</sup> a qualifying tenant of a flat<sup>2</sup> if he is the tenant of the flat under a long lease<sup>3</sup> other than one constituting a tenancy to which Part II of the Landlord and Tenant Act 1954<sup>4</sup> applies<sup>5</sup>.

A person is not, however, to be regarded as being a qualifying tenant of a flat contained in any particular premises consisting of the whole or part of a building if, by virtue of one or more long leases none of which constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies, he is the tenant not only of the flat in question but also of at least two other flats contained in those premises<sup>6</sup>.

A tenant of a flat under a long lease whose landlord is a qualifying tenant of that flat is not to be regarded as being a qualifying tenant of that flat<sup>7</sup>.

1     Ie for the purposes of the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended): see PARA 1783 ante; the text and notes 2-7 infra; and PARA 1785 et seq post.

2     For the meaning of 'flat' see PARA 1744 note 7 ante.

3     For the meaning of 'long lease' see PARA 149 note 1 ante.

4     Ie the Landlord and Tenant Act 1954 Pt II (ss 23-46) (as amended): see PARA 701 et seq ante.

5     Landlord and Tenant Act 1987 s 26(1). Section 26(1) is subject to s 26(2), (3) (as amended) (see the text and notes 6-7 infra): s 26(1).

6     Ibid s 26(2) (amended, and s 26(4) added, by the Housing Act 1988 s 119, Sch 13 para 4(1), (2)). For the purposes of the Landlord and Tenant Act 1987 s 26(2) (as so amended), any tenant of a flat contained in the premises in question who is a body corporate is treated as the tenant of any other flat so contained and let to an associated company as defined in s 20(1) (see PARA 1748 note 8 ante): s 26(4) (as so added).

7     Ibid s 26(3).

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### **1785. Preliminary notice by tenants.**

Before an application for an acquisition order<sup>1</sup> is made in respect of any qualifying premises<sup>2</sup>, a notice must be served<sup>3</sup> on the landlord<sup>4</sup> by qualifying tenants<sup>5</sup> of the flats<sup>6</sup> contained in the premises who, at the date when it is served, constitute the requisite majority<sup>7</sup> of such tenants<sup>8</sup>. Such a notice must:

- 4398 (1) specify the names of the qualifying tenants by whom it is served, the addresses of their flats and the name and the address in England and Wales of a person on whom the landlord may serve notices<sup>9</sup>, including notices in proceedings<sup>10</sup>, instead of serving them on those tenants;
- 4399 (2) state that those tenants intend to make an application for an acquisition order to be made by the court in respect of such qualifying premises as are specified in the notice but, if head (4) below is applicable, that they will not do so if the landlord complies with the requirement specified in pursuance of that head;

- 4400 (3) specify the grounds on which the court<sup>11</sup> would be asked to make such an order and the matters that would be relied on by the tenants for the purpose of establishing those grounds;
- 4401 (4) where those matters are capable of being remedied by the landlord, require the landlord, within such reasonable period as is specified in the notice, to take such steps for the purpose of remedying them as are so specified; and
- 4402 (5) contain such information, if any, as the Secretary of State<sup>12</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>13</sup> may by regulations prescribe<sup>14</sup>.

The court may by order dispense with the requirement so to serve a notice in a case where it is satisfied that it would not be reasonably practicable to serve such a notice on the landlord; but the court may, when doing so, direct that such other notices are served, or such other steps are taken, as it thinks fit<sup>15</sup>.

1 For the meaning of 'an acquisition order' see PARA 1783 ante.

2 I.e. any premises to which the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) (see PARAS 1783-1784 ante; the text and notes 3-14 infra; and PARA 1786 et seq post) applies. As to such premises see PARA 1783 ante.

3 I.e. a notice under *ibid* s 27 (as amended): see the text and notes 4-15 infra.

4 For the meaning of 'landlord' see PARA 53 note 1 ante.

5 For the meaning of 'qualifying tenant' see PARA 1784 ante.

6 For the meaning of 'flat' see PARA 1744 note 7 ante.

7 For these purposes, any reference to the requisite majority of qualifying tenants of the flats contained in any premises is a reference to qualifying tenants of the flats so contained with not less than two-thirds of the available votes; and (1) the total number of available votes must correspond to the total number of those flats for the time being let to qualifying tenants; and (2) there must be one available vote in respect of each of the flats so let which must be attributed to the qualifying tenant to whom it is let: Landlord and Tenant Act 1987 s 27(4) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 85(1), (3)). Nothing in the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) is, however, to be construed as requiring the persons constituting any such majority in any one context to be the same as the persons constituting any such majority in any other context: s 27(5).

8 *Ibid* s 27(1). Section 27(1) is subject to s 27(3) (see the text and note 15 infra); s 27(1). As to the service of notices see PARA 1751 ante.

9 I.e. in connection with *ibid* Pt III (ss 25-34) (as amended).

10 For these purposes, 'notices in proceedings' means notices or other documents served in, or in connection with, any legal proceedings: *ibid* s 60(1).

11 For the meaning of 'the court' see PARA 1773 note 7 ante.

12 As to the Secretary of State see PARA 27 note 3 ante.

13 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

14 Landlord and Tenant Act 1987 s 27(2). At the date at which this title states the law, no such regulations had been made. As to the making of regulations generally see PARA 352 note 9 ante.

15 *Ibid* s 27(3).

PARAS 1386-2000)/26. TENANCIES OF FLATS; OTHER COLLECTIVE RIGHTS/(2) COLLECTIVE COMPULSORY ACQUISITION BY TENANTS OF LANDLORD'S INTEREST/1786. Applications for acquisition orders.

### **1786. Applications for acquisition orders.**

An application for an acquisition order<sup>1</sup> in respect of any qualifying premises<sup>2</sup> must be made by qualifying tenants<sup>3</sup> of the flats<sup>4</sup> contained in the premises who, at the date when it is made, constitute the requisite majority<sup>5</sup> of such tenants<sup>6</sup>. No such application may, however, be made to the court<sup>7</sup> unless:

- 4403 (1) in a case where a preliminary notice has been served<sup>8</sup>, either the specified period<sup>9</sup> has expired without the landlord's<sup>10</sup> having taken the steps that he was required to take<sup>11</sup> or he was not required to take such steps<sup>12</sup>; or
- 4404 (2) in a case where the requirement to serve such a notice has been dispensed with<sup>13</sup>, either any notices required to be served, and any other steps required to be taken, by virtue of the order have been served or, as the case may be, taken, or no direction was given by the court when making the order<sup>14</sup>.

An application for an acquisition order may be made<sup>15</sup> in respect of two or more qualifying premises<sup>16</sup>.

The claim form must:

- 4405 (a) identify the property to which the claim relates and give details to show that the statutory right to apply for an acquisition order<sup>17</sup> applies;
- 4406 (b) give details of the claimants to show that they constitute the requisite majority of qualifying tenants<sup>18</sup>;
- 4407 (c) state the names and addresses of the claimants and of the landlord of the property, or, if the landlord cannot be found or his identity ascertained, the steps taken to find him or ascertain his identity;
- 4408 (d) state the name and address of:
  - 313 173. (i) the person nominated by the claimants for the statutory purposes<sup>19</sup>; and
  - 174. (ii) every person known to the claimants who is likely to be affected by the application, including, but not limited to, the other tenants of flats contained in the property, whether or not they could have made a claim, any mortgagee or superior landlord of the landlord, and any tenants' association<sup>20</sup>; and
  - 314
- 4409 (e) state the grounds of the claim<sup>21</sup>.

A copy of the preliminary notice served on the landlord<sup>22</sup> must accompany the claim form unless the court has dispensed<sup>23</sup> with the requirement to serve a notice<sup>24</sup>. The landlord of the property, and the nominated person, if he is not a claimant, must be defendants<sup>25</sup>.

The general procedure on a landlord and tenant claim has already been discussed<sup>26</sup>.

1 For the meaning of 'an acquisition order' see PARA 1783 ante.

2 I.e. any premises to which the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) (see PARA 1783 et seq ante; the text and notes 3-16 infra; and PARA 1787 et seq post) applies. As to such premises see PARA 1783 ante.

3 For the meaning of 'qualifying tenant' see PARA 1784 ante.

- 4 For the meaning of 'flat' see PARA 1744 note 7 ante.
- 5 For the meaning of references to the requisite majority of qualifying tenants see PARA 1785 note 7 ante.
- 6 Landlord and Tenant Act 1987 s 28(1). Rules of court must make provision (1) for requiring notice of an application for an acquisition order in respect of any premises to be served on such descriptions of persons as may be specified in the rules; and (2) for enabling persons served with any such notice to be joined as parties to the proceedings: s 28(4). See further the text and notes 17-25 infra.
- The Land Charges Act 1972 (see LAND CHARGES) and the Land Registration Act 2002 (see LAND REGISTRATION) apply in relation to an application for an acquisition order as they apply in relation to other pending land actions: Landlord and Tenant Act 1987 s 28(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 20).
- 7 For the meaning of 'the court' see PARA 1773 note 7 ante.
- 8 Ie in a case where a notice has been served under the Landlord and Tenant Act 1987 s 27 (as amended): see PARA 1785 ante.
- 9 Ie the period specified in ibid s 27(2)(d): see PARA 1785 ante at head (4) in the text.
- 10 For the meaning of 'landlord' see PARA 53 note 1 ante.
- 11 Ie in pursuance of the Landlord and Tenant Act 1987 s 27(2)(d).
- 12 Ie where ibid s 27(2)(d) was not applicable in the circumstances of the case.
- 13 Ie under ibid s 27(3): see PARA 1785 ante.
- 14 Ibid s 28(2).
- 15 Ie subject to ibid ss 25-27 (as amended) (see PARAS 1783-1785 ante) and s 28(1), (2) (see the text and notes 1-14 supra).
- 16 Ibid s 28(3).
- 17 Ie ibid s 25 (as amended): see PARA 1783 ante.
- 18 As to requisite majority of qualifying tenants see PARA 1785 note 7 ante.
- 19 Ie for the purposes of the Landlord and Tenant Act 1987 Pt III (as amended).
- 20 Ie within the meaning of the Landlord and Tenant Act 1985 s 29 (as amended): see PARA 327 ante. A copy of the claim form must be served on each of the persons named by the claimant under head (ii) in the text together with a notice that he may apply to be made a party: *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 8.5.
- 21 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 paras 8.1, 8.2.
- 22 Ie under the Landlord and Tenant Act 1987 s 27 (as amended): see PARA 1785 ante.
- 23 Ie under ibid s 27(3): see PARA 1785 ante.
- 24 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 8.3.
- 25 *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 8.4.
- 26 See PARA 57 ante.

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**1787. Conditions for making acquisition orders.**

The court<sup>1</sup> may, on an application for an acquisition order<sup>2</sup>, make such an order in respect of any premises if:

- 4410 (1) the court is satisfied that those premises were, at the date of service on the landlord<sup>3</sup> of the preliminary notice<sup>4</sup>, if any, and on the date when the application was made, qualifying premises<sup>5</sup> and that they have not ceased to be such premises since the date when the application was made; and
- 4411 (2) either of the specified conditions<sup>6</sup> is fulfilled with respect to those premises; and
- 4412 (3) the court considers it appropriate to make the order in the circumstances of the case<sup>7</sup>.

The first of the specified conditions referred to in head (2) above is that the court is satisfied:

- 4413 (a) that the landlord either is in breach of any obligation owed by him to the applicants under their leases<sup>8</sup> and relating to the management of the premises in question<sup>9</sup>, or any part of them, or, in the case of an obligation dependent on notice, would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant<sup>10</sup> to give him the appropriate notice; and
- 4414 (b) that the circumstances by virtue of which he is, or would be, in breach of any such obligation are likely to continue<sup>11</sup>.

The second of those conditions is that, both at the date when the application was made and throughout the period of two years immediately preceding that date, there was in force an appointment<sup>12</sup> of a person to act as manager in relation to the premises in question which was made by reason of an act or omission on the part of the landlord<sup>13</sup>.

An acquisition order may, if the court thinks fit:

- 4415 (i) include any yard, garden, outhouse or appurtenance belonging to, or usually enjoyed with, the premises specified in the application on which the order is made;
- 4416 (ii) exclude any part of the premises so specified<sup>14</sup>.

Where the premises in respect of which an application for an acquisition order is made consist of part only of more extensive premises in which the landlord has an interest and it appears to the court that the landlord's interest in the latter premises is not reasonably capable of being severed, either in the manner contemplated by the application or in any manner authorised by virtue of head (ii) above, then, notwithstanding that heads (1) and (2) above apply, the court may not make an acquisition order on the application<sup>15</sup>.

In a case where an application for an acquisition order was preceded by the service of a preliminary notice<sup>16</sup>, the court may, if it thinks fit, make such an order notwithstanding that any period specified in the notice<sup>17</sup> was not a reasonable period or that the notice failed in any other respect to comply with any statutory requirement<sup>18</sup> or any requirement in any regulations applying<sup>19</sup> to the notice<sup>20</sup>.

Where any premises are qualifying premises at the time when an application for an acquisition order is made in respect of them, they do not cease<sup>21</sup> to be such premises by reason only that:

- 4417 (A) the interest of the landlord in them subsequently becomes held by an exempt landlord<sup>22</sup> or a resident landlord<sup>23</sup>; or

4418 (B) they subsequently become included within the functional land<sup>24</sup> of any charity<sup>25</sup>.

1 For the meaning of 'the court' see PARA 1773 note 7 ante.

2 For the meaning of 'an acquisition order' see PARA 1783 ante.

3 For the meaning of 'landlord' see PARA 53 note 1 ante.

4 Ie under the Landlord and Tenant Act 1987 s 27 (as amended): see PARA 1785 ante.

5 Ie premises to which ibid Pt III (ss 25-34) (as amended) (see PARA 1783 et seq ante; the text and notes 6-15 infra; and PARA 1788 et seq post) applies.

6 Ie the conditions specified in ibid s 29(2), (3) (as amended): see the text and notes 8-13 infra.

7 Ibid s 29(1).

8 For the meaning of 'lease' see PARA 53 note 1 ante.

9 The reference in head (a) in the text to the management of any premises includes a reference to the repair, maintenance, improvement or insurance of those premises: Landlord and Tenant Act 1987 s 29(2A) (added by the Commonhold and Leasehold Reform Act 2002 s 150, Sch 9 para 9(1), (3)). For transitional provisions see the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (England) Order 2003, SI 2003/1986, arts 1(2), 2(c)(i), Sch 2 para 4; the Commonhold and Leasehold Reform Act 2002 (Commencement No 2 and Savings) (Wales) Order 2004, SI 2004/669, art 2(c)(i), Sch 2 para 4.

10 For the meaning of 'tenant' see PARA 53 note 1 ante.

11 Landlord and Tenant Act 1987 s 29(2) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 ss 85(1), (4), 187(2), Sch 22; the Commonhold and Leasehold Reform Act 2002 ss 150, 180, Sch 9 para 9(1), (2), Sch 14; and see note 9 supra). For an example of an order made where the conditions set out in heads (a)-(b) in the text were satisfied see *Gray v Standard Home & Counties Properties Ltd* (1994) 26 HLR 565, [1994] 1 EGLR 119.

12 Ie under the Landlord and Tenant Act 1987 Pt II (ss 21-24) (as amended): see PARA 399 et seq ante.

13 Ibid s 29(3) (amended by the Housing Act 1996 s 88; the Commonhold and Leasehold Reform Act 2002 s 160(1), (5)). For transitional provisions see the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002, SI 2002/1912, arts 1(2), 2(b)(i), Sch 2 para 6; the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (Wales) Order 2002, SI 2002/3012, arts 1(2), 2(b)(i), Sch 2 para 6.

14 Landlord and Tenant Act 1987 s 29(4).

15 Ibid s 29(5).

16 See note 4 supra.

17 Ie in pursuance of the Landlord and Tenant Act 1987 s 27(2)(d): see PARA 1785 ante at head (4) in the text.

18 Ie any requirement contained in ibid s 27(2): see PARA 1785 ante at heads (1)-(5) in the text.

19 Ie applying under ibid s 54(3): see PARA 1751 ante.

20 Ibid s 29(6).

21 Ie for the purposes of ibid ss 29-34 (as amended): see the text and notes 1-20 supra; and PARA 1788 et seq post.

22 For the meaning of 'exempt landlord' see PARA 354 ante.

23 For the meaning of 'resident landlord' see PARA 399 note 8 ante.

24 For the meaning of 'functional land' see PARA 399 note 11 ante.



25 Landlord and Tenant Act 1987 s 29(7). For the meaning of 'charity' see PARA 354 note 18 ante.

## UPDATE

### 1787 Conditions for making acquisition orders

TEXT AND NOTE 25--Landlord and Tenant Act 1987 s 29(7) amended: Housing and Regeneration Act 2008 Sch 8 para 39.

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### 1788. Content of acquisition orders.

Where an acquisition order<sup>1</sup> is made by the court<sup>2</sup>, the order must provide<sup>3</sup> for the nominated person<sup>4</sup> to be entitled to acquire the landlord's<sup>5</sup> interest in the premises specified in the order on such terms as may be determined by agreement between the landlord and the qualifying tenants<sup>6</sup> in whose favour the order was made or, in default of agreement, determined<sup>7</sup> by a leasehold valuation tribunal<sup>8</sup>. An acquisition order may be granted subject to such conditions as the court thinks fit; and in particular its operation may be suspended on terms fixed by the court<sup>9</sup>.

The persons applying for the order must secure that the nominated person is joined as a party to the application; and no further nomination of a person<sup>10</sup> may be made by them after the order is made, whether in addition to, or in substitution for, the existing nominated person, except with the approval of the court<sup>11</sup>.

Where the landlord is, by virtue of any covenant, condition or other obligation, precluded from disposing of his interest in the premises in respect of which an acquisition order has been made unless the consent of some other person is obtained:

- 4419 (1) he must use his best endeavours to secure that the consent of that person to that disposal is obtained and, if it appears to him that that person is obliged not to withhold his consent unreasonably but has nevertheless so withheld it, must institute proceedings for a declaration to that effect; but
- 4420 (2) if the landlord has discharged any duty imposed on him by head (1) above and the consent of that person has been withheld and no such declaration has been made, the order ceases to have effect<sup>12</sup>.

1 For the meaning of 'an acquisition order' see PARA 1783 ante.

2 For the meaning of 'the court' see PARA 1773 note 7 ante.

3 ie except in a case falling within the Landlord and Tenant Act 1987 s 33(1): see PARA 1793 post.

4 For these purposes, references, in relation to an acquisition order, to the nominated person are references to such person or persons as may be nominated for the purposes of *ibid* Pt III (ss 25-34) (as amended) (see PARA 1783 et seq ante; the text and notes 5-12 infra; and PARA 1789 et seq post) by the persons applying for the order: s 30(3). As to the persons by whom an application may be made see PARA 1786 ante.

5 For the meaning of 'landlord' see PARA 53 note 1 ante.

6 For the meaning of 'qualifying tenant' see PARA 1784 ante.

7 le under the Landlord and Tenant Act 1987 s 31 (as amended): see PARA 1789 post.

8 Ibid s 30(1). The statutory wording is 'determined by a rent assessment committee'; but s 31 (as amended) now refers to a 'leasehold valuation tribunal', which is the title given to a rent assessment committee when exercising jurisdiction under that provision. As to leasehold valuation tribunals see generally para 58 et seq ante.

The Land Charges Act 1972 (see LAND CHARGES) and the Land Registration Act 2002 (see LAND REGISTRATION) apply in relation to an acquisition order as they apply in relation to an order affecting land made by the court for the purpose of enforcing a judgment or recognisance: Landlord and Tenant Act 1987 s 30(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 20).

9 Landlord and Tenant Act 1987 s 30(2).

10 le for the purposes of ibid Pt III (ss 25-34) (as amended).

11 Ibid s 30(4).

12 Ibid s 30(5).

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### **1789. Determination of terms by leasehold valuation tribunals.**

A leasehold valuation tribunal<sup>1</sup> has jurisdiction to determine the terms on which the landlord's<sup>2</sup> interest in the premises specified in an acquisition order<sup>3</sup> may be acquired by the nominated person<sup>4</sup> to the extent that those terms have not been determined by agreement between the landlord and either the qualifying tenants<sup>5</sup> in whose favour the order was made or the nominated person; and the tribunal must determine<sup>6</sup> any such terms on the basis on what appears to it to be fair and reasonable<sup>7</sup>.

Where an application is so made for the tribunal to determine the consideration payable for the acquisition of a landlord's interest in any premises, the tribunal must do so by determining an amount equal to the amount which, in its opinion, that interest might be expected to realise if sold on the open market by a willing seller on the appropriate terms<sup>8</sup> and on the assumption that none of the tenants of the landlord of any premises comprised in those premises was buying or seeking to buy that interest<sup>9</sup>.

On any such application the interests of the qualifying tenants in whose favour the acquisition order was made must be represented by the nominated person; and accordingly the parties to any such application may not include those tenants<sup>10</sup>.

1 As to leasehold valuation tribunals and procedure before them generally see PARA 58 et seq ante.

2 For the meaning of 'landlord' see PARA 53 note 1 ante.

3 For the meaning of 'an acquisition order' see PARA 1783 ante.

4 For the meaning of references to the nominated person see PARA 1788 note 4 ante.

5 For the meaning of 'qualifying tenant' see PARA 1784 ante.

6 le subject to the Landlord and Tenant Act 1987 s 31(2) (as amended): see the text and notes 8-9 infra.

7 Ibid s 31(1) (s 31(1), (2), (6) amended by the Housing Act 1996 s 92(1), Sch 6 Pt IV para 5). Nothing in the Landlord and Tenant Act 1987 s 31 (as amended) is to be construed as authorising a leasehold valuation tribunal to determine any terms dealing with matters in relation to which provision is to be made by s 32 (see PARA 1790 post) or s 33 (see PARA 1793 post): s 31(6) (as so amended).

With the exception of particulars of the date on which the landlord acquired the property and the terms of acquisition including the sums paid (see PARA 1776 ante at head (d) in the text), the same documents and particulars must be submitted with the application to the tribunal as must be submitted with an application under s 13 (as substituted) (see PARA 1776 ante): see the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003, SI 2003/2099, reg 3(2), Sch 1 para 1(c), Sch 2 para 1(1)-(3), (6) (Sch 2 para 1(6) added by SI 2004/3098); Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004, SI 2004/681, reg 3(2), Sch 1 para 1(c), Sch 2 para 1(1)-(3), (6) (Sch 2 para 1(6) added by SI 2005/1356).

8 For these purposes, 'the appropriate terms' means all the terms to which the acquisition of the landlord's interest in pursuance of the order is to be subject, whether determined by agreement as mentioned in the Landlord and Tenant Act 1987 s 31(1) (as amended) or on an application under s 31 (as amended), apart from those relating to the consideration payable: s 31(3).

9 Ibid s 31(2) (as amended: see note 7 supra); and see *139 Finborough Road Management Ltd v Mansoor* [1990] 2 EGLR 225, [1990] 32 EG 55, London rent assessment panel (which is stated in the report to have been the first application in London, and probably in England and Wales, under these provisions).

10 Landlord and Tenant Act 1987 s 31(4).

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### **1790. Discharge of existing mortgages.**

Where the landlord's<sup>1</sup> interest in any premises is acquired in pursuance of an acquisition order<sup>2</sup>, the instrument by virtue of which it is so acquired operates<sup>3</sup> to discharge the premises from any charge on that interest to secure the payment of money or the performance of any other obligation by the landlord or any other person, except where:

4421 (1) it has been agreed between the landlord and either the qualifying tenants<sup>4</sup> in whose favour the order was made or the nominated person<sup>5</sup> that the landlord's interest should be acquired subject to the charge; or

4422 (2) the court<sup>6</sup> is satisfied, whether on the application for the order or on an application made by the person entitled to the benefit of the charge, that in the exceptional circumstances of the case it would be fair and reasonable that the landlord's interest should be so acquired, and orders accordingly<sup>7</sup>.

Where any premises are so discharged from a charge, without the obligations secured by the charge being satisfied by the receipt of the whole or part of the consideration payable<sup>8</sup>, the discharge of those premises from the charge does not prejudice any right or remedy for the enforcement of those obligations against other property comprised in the same or any other security, nor prejudice any personal liability as principal or otherwise of the landlord or any other person<sup>9</sup>.

1 For the meaning of 'landlord' see PARA 53 note 1 ante.

2 For the meaning of 'an acquisition order' see PARA 1783 ante.

3 le subject to the Landlord and Tenant Act 1987 s 32(2), (3), Sch 1 Pt II (paras 6-10): see the text and notes 4-9 infra; and PARAS 1791-1792 post.

4 For the meaning of 'qualifying tenant' see PARA 1784 ante.

5 For the meaning of references to the nominated person see PARA 1788 note 4 ante.

6 For the meaning of 'the court' see PARA 1773 note 7 ante.

7 Landlord and Tenant Act 1987 s 32(1), (2). Section 32, Sch 1 Pt II (paras 6-10) apply, with any necessary modifications, to mortgages and liens as they apply to charges; but nothing in s 32, Sch 1 Pt II applies to a rentcharge: s 32(3). For the meaning of 'mortgage' see PARA 400 note 13 ante.

8 For these purpose, 'the consideration payable' means the consideration payable for the acquisition of the landlord's interest referred to in ibid s 32(1): Sch 1 para 6.

9 Ibid Sch 1 para 10(1).

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### **1791. Duty of nominated person to redeem mortgages.**

Where an instrument will operate<sup>1</sup> to discharge any premises from a charge to secure the payment of money, it is the duty of the nominated person<sup>2</sup> to apply the consideration payable<sup>3</sup>, in the first instance, in or towards the redemption of any such charge and, if there are more than one, then according to their priorities<sup>4</sup>.

Where the above provisions apply to any charge or charges, then if, and only if, the consideration payable is applied by the nominated person in accordance therewith or paid into court by him<sup>5</sup>, the instrument in question operates<sup>6</sup> to discharge any premises from a charge to secure the payment of money notwithstanding that the consideration payable is insufficient to enable the charge or charges to be redeemed in its or their entirety<sup>7</sup>.

For the purpose of determining the amount payable in respect of any such charge, a person entitled to the benefit of a charge is not permitted to exercise any right to consolidate that charge with a separate charge on other property<sup>8</sup>; and, for the purpose of discharging any premises from such a charge, a person may be required to accept three months' or any longer notice of the intention to pay the whole or part of the principal secured by the charge, together with interest to the date of payment, notwithstanding that the terms of the security make other provision or no provision as to the time and manner of payment; but he is entitled, if he so requires, to receive such additional payment as is reasonable in the circumstances in respect of the costs of reinvestment or other incidental costs and expenses and in respect of any reduction in the rate of interest obtainable on reinvestment<sup>9</sup>.

1 le in accordance with the Landlord and Tenant Act 1987 s 32(1): see PARA 1790 ante.

2 For these purposes, 'the nominated person' means the person or persons nominated for the purposes of ibid Pt III (ss 25-34) (as amended) (see PARA 1783 et seq ante, PARA 1793 et seq post) by the persons who applied for the acquisition order in question: s 32(1), (3), Sch 1 para 6. For the meaning of 'an acquisition order' see PARA 1783 ante.

3 For the meaning of 'the consideration payable' see PARA 1790 note 8 ante.

4 Landlord and Tenant Act 1987 Sch 1 para 7(1). Subject to Sch 1 para 7(4), Sch 1 para 7(1) does not apply to a charge which is a debenture holders' charge within the meaning of Sch 1 para 2(3) (see PARA 1773 note 15 ante); and any such charge must be disregarded in determining priorities for the purposes of Sch 1 para 7(1): Sch 1 para 7(3). Schedule 1 para 7(3) does not have effect, however, in relation to a charge in favour of trustees for debenture holders which at the date of the instrument by virtue of which the landlord's interest in the premises in question is acquired is, as regards those premises, a specific and not a floating charge: Sch 1 para 7(4).

Nothing in Sch 1 (as amended) is to be construed as preventing a person from joining in the instrument referred to in Sch 1 para 7(1) for the purpose of discharging the premises in question from any charge without payment or for a lesser payment than that to which he would otherwise be entitled; and, if he does so, the persons to whom the consideration payable ought to be paid must be determined accordingly: Sch 1 para 10(2).

5 Ie in accordance with *ibid* Sch 1 para 9: see PARA 1792 post.

6 Ie in accordance with *ibid* Sch 1 para 7(1).

7 *Ibid* Sch 1 para 7(2).

8 *Ibid* Sch 1 para 8(1).

9 *Ibid* Sch 1 para 8(2).

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### **1792. Payments into court.**

Where<sup>1</sup> any premises are to be discharged from a charge and a person is or may be entitled<sup>2</sup> in respect of the charge to receive the whole or part of the consideration payable<sup>3</sup>, then, if:

4423 (1) for any reason difficulty arises in ascertaining how much is to be payable in respect of the charge; or

4424 (2) for any specified reason<sup>4</sup> difficulty arises in making a payment in respect of the charge,

the nominated person<sup>5</sup> may pay into court on account of the consideration payable the amount, if known, of the payment to be made in respect of the charge or, if that amount is not known, the whole of that consideration or such lesser amount as the nominated person thinks right in order to provide for that payment<sup>6</sup>.

Payment may be made into court in accordance with head (2) above where the difficulty arises for any of the following reasons, namely:

4425 (a) because a person who is or may be entitled to receive payment cannot be found or ascertained;

4426 (b) because any such person refuses or fails to make out a title, or to accept payment and give a proper discharge, or to take any steps reasonably required of him to enable the sum payable to be ascertained and paid; or

4427 (c) because a tender of the sum payable cannot, by reason of complications in the title to it or the want of two or more trustees or for other reasons, be effected, or not without incurring or involving unreasonable cost or delay<sup>7</sup>.

Without prejudice to head (1) above, the whole or part of the consideration payable must be paid into court by the nominated person if, before execution of the instrument<sup>8</sup>, notice is given to him:

- 4428 (i) that the landlord<sup>9</sup> or a person entitled to the benefit of a charge on the premises in question requires him to do so for the purpose of protecting the rights of persons so entitled, or for reasons related to the bankruptcy or winding up of the landlord; or
- 4429 (ii) that steps have been taken to enforce any charge on the landlord's interest in those premises by the bringing of proceedings in any court, or by the appointment of a receiver or otherwise;

and, where payment into court is to be made by reason only of a notice under this provision, and the notice is given with reference to proceedings in a court specified in the notice other than a county court, payment must be made into the court so specified<sup>10</sup>.

1    Ie under the Landlord and Tenant Act 1987 s 32: see PARA 1790 ante.

2    Ie in accordance with *ibid* s 32(1), (3), Sch 1 para 7(1): see PARA 1791 ante.

3    For the meaning of 'the consideration payable' see PARA 1790 note 8 ante.

4    Ie any reason mentioned in the Landlord and Tenant Act 1987 Sch 1 para 9(2): see heads (a)-(c) in the text.

5    For the meaning of 'the nominated person' see PARA 1791 note 2 ante.

6    Landlord and Tenant Act 1987 Sch 1 para 9(1).

7    *Ibid* Sch 1 para 9(2).

8    Ie the instrument referred to in *ibid* Sch 1 para 7(1).

9    For the meaning of 'landlord' see PARA 53 note 1 ante.

10   Landlord and Tenant Act 1987 Sch 1 para 9(3).

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### **1793. Acquisition order where landlord cannot be found.**

Where an acquisition order<sup>1</sup> is made by the court<sup>2</sup> in a case where the landlord<sup>3</sup> cannot be found, or his identity cannot be ascertained, the order must provide for the landlord's interest in the premises specified in the order to vest in the nominated person<sup>4</sup> on the following terms, namely:

- 4430 (1) such terms as to payment as are specified below<sup>5</sup>; and
- 4431 (2) such other terms as the court thinks fit, being terms which, in the opinion of the court, correspond so far as possible to those on which the interest might be expected to be transferred if it were being transferred by the landlord<sup>6</sup>.

The terms as to payment referred to in head (1) above are terms requiring the payment into court of:

- 4432 (a) such amount as a surveyor selected by the President of the Lands Tribunal may certify to be in his opinion the amount which the landlord's interest might be expected to realise if sold on the open market by a willing seller on the appropriate terms and on the assumption that none of the tenants of the landlord of any premises comprised in those premises was buying or seeking to buy that interest<sup>7</sup>; and
- 4433 (b) any amounts or estimated amounts remaining due to the landlord from any tenants of his of any premises comprised in the premises in respect of which the order is made, being amounts or estimated amounts determined by the court as being due from those persons under the terms of their leases<sup>8</sup>.

Where any amount or amounts so required to be paid into court are so paid, the landlord's interest vests in the nominated person in accordance with the order<sup>9</sup>.

- 1 For the meaning of 'an acquisition order' see PARA 1783 ante.
- 2 For the meaning of 'the court' see PARA 1773 note 7 ante.
- 3 For the meaning of 'landlord' see PARA 53 note 1 ante.
- 4 For the meaning of references to the nominated person see PARA 1788 note 4 ante.
- 5 I.e. specified in the Landlord and Tenant Act 1987 s 33(2): see heads (a)-(b) in the text.
- 6 Ibid s 33(1).
- 7 I.e. if sold as mentioned in ibid s 31(2) (as amended): see PARA 1789 ante. If the nominated person pays money into court in accordance with an order under s 33(1), he must file a copy of the certificate of the surveyor selected under s 33(2)(a) (see head (a) in the text): *Practice Direction--Landlord and Tenant Claims and Miscellaneous Provisions about Land* PD 56 para 8.6.
- 8 Landlord and Tenant Act 1987 s 33(2).
- 9 Ibid s 33(3).

## UPDATE

### 1793 Acquisition order where landlord cannot be found

TEXT AND NOTE 8--For 'President of the Lands Tribunal' read 'Senior President of Tribunals': Landlord and Tenant Act 1987 s 33(2)(a) (amended by SI 2009/1307).

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### 1794. Discharge of acquisition order; withdrawal by tenants.

If, on an application by a landlord<sup>1</sup> in respect of whose interest an acquisition order<sup>2</sup> has been made, the court<sup>3</sup> is satisfied:

- 4434 (1) that the nominated person<sup>4</sup> has had a reasonable time within which to effect the acquisition of that interest in pursuance of the order but has not done so; or
- 4435 (2) that the number of qualifying tenants<sup>5</sup> of flats<sup>6</sup> contained in the premises in question who desire to proceed with the acquisition of the landlord's interest is less than the requisite majority<sup>7</sup> of qualifying tenants of the flats contained in those premises; or
- 4436 (3) that the premises in question have ceased to be qualifying premises<sup>8</sup>,

the court may discharge the order<sup>9</sup>.

Where:

- 4437 (a) a notice is served on the landlord by the qualifying tenants by whom a preliminary notice has been served<sup>10</sup> or, as the case may be, by whom an application has been made for an acquisition order, or by the person nominated<sup>11</sup> by any such tenants; and
- 4438 (b) the notice indicates an intention no longer to proceed with the acquisition of the landlord's interest in the premises in question,

the landlord may<sup>12</sup> recover under this provision any costs reasonably incurred by him in connection with the disposal by him of that interest down to the time when the notice is served; and, if the notice is served after the making of an acquisition order, the order ceases to have effect<sup>13</sup>.

If, whether before or after the making of an acquisition order, the nominated person becomes aware:

- 4439 (i) that the number of qualifying tenants of flats contained in the premises in question who desire to proceed with the acquisition of the landlord's interest is less than the requisite majority of qualifying tenants of the flats contained in those premises; or
- 4440 (ii) that those premises have ceased to be qualifying premises,

he must forthwith serve on the landlord a notice indicating an intention no longer to proceed with the acquisition of that interest<sup>14</sup>.

If, at any time when any proceedings taken in respect of an acquisition order<sup>15</sup> are pending before the court or the Lands Tribunal:

- 4441 (A) a notice of intention not to proceed<sup>16</sup> is served on the landlord; or
- 4442 (B) the nominated person indicates that he is no longer willing to act in the matter and nobody is nominated<sup>17</sup> in his place; or
- 4443 (C) the number of qualifying tenants of flats contained in the premises in question who desire to proceed with the acquisition of the landlord's interest falls below the requisite majority of qualifying tenants of the flats contained in those premises; or
- 4444 (D) those premises cease to be qualifying premises,



or if the court discharges an acquisition order<sup>18</sup>, the landlord may recover such costs incurred by him in connection with the disposal by him of his interest in those premises as the court or, as the case may be, the tribunal may determine<sup>19</sup>.

Nothing in the above provisions is to be construed as authorising the court to discharge an acquisition order where the landlord's interest has already been acquired in pursuance of the order<sup>20</sup>.

1 For the meaning of 'landlord' see PARA 53 note 1 ante.

2 For the meaning of 'an acquisition order' see PARA 1783 ante.

3 For the meaning of 'the court' see PARA 1773 note 7 ante.

4 For the meaning of references to the nominated person see PARA 1788 note 4 ante.

5 For the meaning of 'qualifying tenant' see PARA 1784 ante.

6 For the meaning of 'flat' see PARA 1744 note 7 ante.

7 For the meaning of references to the requisite majority of qualifying tenants of the flats contained in any premises see PARA 1785 note 7 ante.

8 I.e. premises to which the Landlord and Tenant Act 1987 Pt III (ss 25-34) (as amended) see PARA 1783 et seq ante) applies. As to such premises see PARA 1783 ante.

9 Ibid s 34(1). If (1) an acquisition order is discharged or ceases to have effect, by virtue of any provision of Pt III (ss 25-34) (as amended); and (2) the order has been protected by an entry registered under the Land Charges Act 1972 (see LAND CHARGES) or the Land Registration Act 2002 (see LAND REGISTRATION), the court may by order direct that that entry shall be cancelled: Landlord and Tenant Act 1987 s 34(9) (amended by the Land Registration Act 2002 s 133, Sch 11 para 20).

10 I.e. under the Landlord and Tenant Act 1987 s 27 (as amended): see PARA 1785 ante.

11 I.e. for the purposes of ibid Pt III (ss 25-34) (as amended).

12 I.e. except in a case where ibid s 34(4) applies: see the text and notes 15-19 infra.

13 Ibid s 34(2). As to the service of notices see PARA 1751 ante.

The costs that may be recovered by the landlord under s 34(2) or s 34(4) include costs incurred by him in connection with any proceedings under Pt III (ss 25-34) (as amended) other than proceedings before a rent assessment committee (known for the purposes of s 31 (as amended) as a 'leasehold valuation tribunal': see PARA 1789 ante): s 34(5). Any liability for costs arising under s 34 (as amended) is the joint and several liability of the following persons, namely (1) where the liability arises before the making of an application for an acquisition order, the tenants by whom a notice was served under s 27 (as amended) (see PARA 1785 ante); or (2) where the liability arises after the making of such an application, the tenants by whom the application was made, together with, in either case, any person nominated by those tenants for the purposes of Pt III (as amended): s 34(6). In relation to any time when a tenant falling with head (1) or head (2) supra has ceased to have vested in him the interest under his lease, head (1) or, as the case may be, head (2) supra is to be construed as applying instead to the person who is for the time being the successor in title to that interest: s 34(7). For the meaning of 'lease' see PARA 53 note 1 ante.

14 Ibid s 34(3). Section 34(2) applies accordingly: s 34(3).

15 I.e. proceedings taken under or by virtue of ibid Pt III (as amended).

16 I.e. such a notice as is mentioned in ibid s 34(2) or (3).

17 See note 11 supra.

18 I.e. under the Landlord and Tenant Act 1987 s 34(1).

19 Ibid s 34(4). See also note 13 supra.

20 Ibid s 34(8).

**UPDATE****1794 Discharge of acquisition order; withdrawal by tenants**

TEXT AND NOTE 19--Reference to the Lands Tribunal is now to the Upper Tribunal: Landlord and Tenant Act 1987 s 34(4) (amended by SI 2009/1307).

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**27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY****(1) INTRODUCTION****1795. Tenant's rights; in general.**

Under Part V of the Housing Act 1985<sup>1</sup> a secure tenant<sup>2</sup> has the right, in certain circumstances and subject to certain conditions and exceptions, to acquire the freehold of the dwelling house<sup>3</sup> which he occupies or to be granted a lease<sup>4</sup> of that dwelling house (the 'right to buy')<sup>5</sup>. The Housing Act 1996<sup>6</sup> introduced a right to acquire which extends the right to buy, with modifications, to certain assured tenants<sup>7</sup>.

The statutory right to acquire on rent to mortgage terms is no longer exercisable, except in transitional cases<sup>8</sup>, and the following statutory rights formerly ancillary to the right to buy have been abolished, namely:

- 4445 (1) the right to a mortgage<sup>9</sup>;
- 4446 (2) the right to defer completion<sup>10</sup>; and
- 4447 (3) the right<sup>11</sup> to be granted a shared ownership lease<sup>12</sup>.

The right to buy may be suspended because of anti-social behaviour by the tenant, a member of his family or a visitor to the dwelling house<sup>13</sup>.

1    Ie the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1796 et seq post.

2    References in ibid Pt V (as amended) to a secure tenancy or a secure tenant in relation to a time before 26 August 1984 are to a tenancy which would have been a secure tenancy if the Housing Act 1980 Pt I Ch II (ss 28-50) (repealed) and the Housing and Building Control Act 1984 Pt I (ss 1-38) (repealed) had then been in force or to a person who would then have been a secure tenant: Housing Act 1985 s 185(1). For the purpose of determining whether a person would have been a secure tenant and his tenancy a secure tenancy (1) a predecessor of a local authority is to be deemed to have been such an authority; and (2) a housing association is to be deemed to have been registered if it is or was a registered social landlord at any later time: s 185(2) (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(16)). As to secure tenants see PARA 1300 et seq ante; for the meaning of 'local authority' see PARA 1300 note 8 ante; and as to housing associations and other registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

Where the preserved right to buy (see PARA 1900 et seq post) arises, and the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply, then in the provisions of the Housing Act 1985 Pt V (as amended) for the expressions 'secure tenant' and 'tenant' there is substituted, except in the provisions listed in the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, Sch 1 para 1(2), the expression 'qualifying person': Sch 1 para 1(1). See also note 7 infra.

3 For the meaning of 'dwelling house' see PARA 1796 post.

4 For the meaning of 'lease' see PARA 1300 note 1 ante.

5 See the Housing Act 1985 s 118(1); and PARA 1803 et seq post. The right to buy has been extended to tenants of certain houses where there are interests owned by intermediate landlords: see PARA 1798 post.

6 In the Housing Act 1996 ss 16-17 (as amended): see PARA 1804 et seq post.

7 Where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 post) arises and the Housing (Right to Acquire) Regulations 1997, SI 1997/619 apply, then: (1) in the provisions of the Housing Act 1985 Pt V (as amended) in the expressions 'secure tenant' and 'secure tenancy' the word 'secure' is omitted, except in the provisions listed in the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2(1), Sch 1 para 1; and (2) for the expression 'right to buy' there is substituted the expression 'right to acquire', except in the provisions listed in Sch 1 para 2: Sch 1 paras 1, 2.

8 See PARA 1872 et seq post.

9 In the right conferred by the Housing Act 1985 ss 132-135 (repealed).

10 In the right conferred by ibid s 142 (repealed).

11 In the right conferred by ibid ss 143-151 (as originally enacted).

12 Leasehold Reform, Housing and Urban Development Act 1993 s 107. For transitional provisions and savings see the Leasehold Reform, Housing and Urban Development Act 1993 (Commencement and Transitional Provisions No 1) Order 1993, SI 1993/2134, arts 2, 4(b), Sch 1 para 4.

Local authorities and housing associations may, however, participate on a voluntary basis in the Social HomeBuy scheme (launched on 1 April 2006 by the former Office of the Deputy Prime Minister) and thereby enable certain of their tenants to purchase their homes on a shared equity basis. The details of this extra-statutory scheme are set out on the Department for Communities and Local Government's website, accessible at the date at which this title states the law at [www.communities.gov.uk](http://www.communities.gov.uk).

13 See PARA 1820 post.

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### **1796. Meaning of 'house', 'flat' and 'dwelling house'.**

The following provisions apply to the interpretation of 'house', 'flat' and 'dwelling house' when used in the statutory provisions<sup>1</sup> conferring the right to buy<sup>2</sup>.

A dwelling house is a house if, and only if, it or so much of it as does not consist of land included by virtue of the provisions set out below<sup>3</sup> is a structure reasonably so called; so that:

4448 (1) where a building is divided horizontally, the flats or other units into which it is divided are not houses;

4449 (2) where a building is divided vertically, the units into which it is divided may be houses;

4450 (3) where a building is not structurally detached, it is not a house if a material part of it lies above or below the remainder of the structure<sup>4</sup>.

A dwelling house which is a commonhold unit<sup>5</sup> is, however, to be treated as a house and not as a flat<sup>6</sup>.

A dwelling house which is not a house is a flat<sup>7</sup>.

For the statutory purposes<sup>8</sup>, land let together with a dwelling house is to be treated as part of the dwelling house, unless the land is agricultural land<sup>9</sup> exceeding two acres<sup>10</sup>. There is also to be treated as included in a dwelling house any land which does not satisfy this condition but is or has been used for the purpose of the dwelling house if:

- 4451 (a) the tenant<sup>11</sup>, by a written notice served on the landlord<sup>12</sup> at any time before he exercises the right to buy<sup>13</sup>, requires the land to be included in the dwelling house; and
- 4452 (b) it is reasonable in all the circumstances for the land to be so included<sup>14</sup>.

Such a notice may be withdrawn by a written notice served on the landlord at any time before the tenant exercises the right to buy<sup>15</sup>. Where such a notice is served or withdrawn after the service of the landlord's notice of the purchase price etc<sup>16</sup>, the parties must, as soon as practicable after the service or withdrawal, take all such steps<sup>17</sup> as may be requisite for the purpose of securing that all parties are, as nearly as may be, in the same position as they would have been in if the notice had been served or withdrawn before the service of that landlord's notice<sup>18</sup>.

The above provisions are modified in so far as they apply to:

- 4453 (i) the extended right to buy<sup>19</sup>;
- 4454 (ii) the preserved right to buy<sup>20</sup>; and
- 4455 (iii) the right to acquire conferred by the Housing Act 1996<sup>21</sup>.

1    Ie in the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 ante, PARA 1797 et seq post.

2    Ibid s 183(1). See also PARA 1795 note 7 ante.

3    Ie by virtue of ibid s 184 (as amended): see the text and notes 8-18 infra.

4    Ibid s 183(1).

5    Ie within the meaning of the Commonhold and Leasehold Reform Act 2002: see COMMONHOLD vol 13 (2009) PARA 330.

6    Housing Act 1985 s 118(3) (added by the Commonhold and Leasehold Reform Act 2002 s 68, Sch 5 para 5).

7    Housing Act 1985 s 183(2).

8    Ie for the purposes of ibid Pt V (as amended).

9    Ie as defined in the General Rate Act 1967 s 26(3)(a) (as amended; saved for these purposes): see PARA 867 note 2 ante.

10   Housing Act 1985 s 184(1). Similarly, land owned by the freeholder in fee simple (1) which is let by the freeholder to the landlord or to an intermediate landlord; (2) in respect of which each of the intermediate landlords (if any) is an authority or body specified in the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(2) (see PARA 1798 note 17 post); and (3) which is let to the tenant together with the dwelling house, is to be treated as part of the dwelling house, unless the land is agricultural land defined as mentioned in note 9 supra and exceeding two acres: see the Housing Act 1985 s 184(1) (substituted for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3, Schedule para 63(a)). For the meanings of 'intermediate landlord' and 'freeholder' see PARA 1798 notes 18-19 post.

11   For the meaning of 'tenant' see PARA 1300 note 1 ante. See also PARA 1795 note 2 ante.

12   For the meaning of 'landlord' see PARA 1300 note 1 ante.

13 le or at any time before he exercises the right to acquire on rent to mortgage terms (now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post). As to the right to buy see PARA 1803 et seq post; and as to the right to acquire on rent to mortgage terms see PARA 1872 et seq post.

14 Housing Act 1985 s 184(2) (s 184(2), (3) amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 24).

15 Housing Act 1985 s 184(3). It may also be withdrawn at any time before the tenant exercises the right to acquire on rent to mortgage terms, as to which see note 13 supra: see s 184(3) (as amended: see note 14 supra).

16 le the notice under ibid s 125 (as amended): see PARA 1829 post.

17 le whether by way of amending, withdrawing or re-serving any notice or extending any period or otherwise: ibid s 184(4).

18 Ibid s 184(4).

19 As to the extended right to buy see PARA 1798 post. Where that right arises, and the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies, then the Housing Act 1985 s 184(1) is substituted (see note 10 supra), s 184(2), (3), (4) are amended, and s 184(3A)-(3E) are added, by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 63. A notice under the Housing Act 1985 s 184(2) or (3) (as so modified), if served before the freeholder serves on the tenant a notice under s 124 (as amended) (notice admitting or denying right to buy: see PARA 1828 post), must be served on the landlord and in any other case must be served on the freeholder: s 184(3A) (as so added). On receiving any notice so served by the tenant, the landlord must, as soon as practicable (1) serve a copy of the notice on the authority or body which is its landlord in relation to the dwelling house; and (2) serve on the tenant notice in writing that this has been done and of the name and address of that authority or body: s 184(3B) (as so added). If the authority or body referred to in head (1) supra is an intermediate landlord, it must in turn serve a copy of the notice on the authority or body which is its immediate landlord in relation to the dwelling house (and so on, if that authority or body is also an intermediate landlord): s 184(3C) (as so added). An authority or body which serves a copy of the tenant's notice on another authority or body in accordance with s 184(3C) (as so added) must at the same time notify the landlord and the tenant that this has been done and of the name and address of the authority or body: s 184(3D) (as so added). On receiving a notice served on it by the tenant under s 184 (as amended and as modified for these purposes), the freeholder must, as soon as practicable, serve a copy of the notice on each authority or body which, to its knowledge, has a leasehold interest in the dwelling house and notify the tenant that this has been done: s 184(3E) (as so added).

20 As to the preserved right to buy see PARA 1900 et seq post. Where that right arises, and the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply, the references to the right to acquire on rent to mortgage terms in s 184(2)(a), (3) (as amended) are omitted: see the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2, Sch 1 para 39.

21 As to the right to acquire see PARAS 1804-1807 post. Where that right arises, and the Housing (Right to Acquire) Regulations 1997, SI 1997/619, apply, the references to the right to acquire on rent to mortgage terms in s 184(2)(a), (3) (as amended) are omitted: see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 37.

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### **1797. Provisions restricting right to buy etc of no effect.**

A provision of a lease<sup>1</sup> held by the landlord<sup>2</sup> or a superior landlord, or of an agreement, whenever made, is void in so far as it purports to prohibit or restrict:

- 4456 (1) the grant of a lease in pursuance of the right to buy<sup>3</sup> or the right to acquire on rent to mortgage terms (where that right is still exercisable)<sup>4</sup>; or

4457 (2) the subsequent disposal, whether by way of assignment, sublease or otherwise, of a lease so granted,

or to authorise a forfeiture, or impose on the landlord or superior landlord a penalty or disability, in the event of such a grant or disposal<sup>5</sup>.

Where a dwelling house<sup>6</sup> let on a secure tenancy<sup>7</sup> is land held:

4458 (a) for the purposes of pleasure grounds<sup>8</sup>; or

4459 (b) in accordance with a local authority's duty to maintain open spaces and burial grounds<sup>9</sup>,

the dwelling house is deemed<sup>10</sup> to be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public<sup>11</sup> or, as the case may be, for<sup>12</sup> an open space or burial ground<sup>13</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 As to the right to buy see PARA 1803 et seq post. See also PARA 1795 note 7 ante

4 As to the right to acquire on rent to mortgage terms (now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post) see PARA 1872 et seq post.

5 Ibid s 179(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 22). The Housing Act 1985 s 179(1) (as so amended) is (1) substituted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 post), applies (see art 3(1), Schedule para 60); (2) modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 35(a)); (3) modified where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 33(a)).

6 For the meaning of 'dwelling house' see PARA 1796 ante.

7 For the meaning of 'secure tenancy' and 'secure tenant' for these purposes see PARA 1795 note 2 ante; and see also PARA 1795 note 7 ante. As to secure tenants see PARA 1300 et seq ante.

8 Ie for the purposes of the Public Health Act 1875 s 164: see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 556.

9 Ie in accordance with the Open Spaces Act 1906 s 10: see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 577.

10 Ie for the purposes of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARAS 1795-1796 ante, PARA 1798 et seq post.

11 Ie in accordance with the Public Health Act 1875 s 164.

12 See note 9 supra.

13 Housing Act 1985 s 179(2). Section 179(2) is omitted where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply (see Sch 1 para 35(b)); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619, apply (see Sch 1 para 33(b)).

**1798. Power to extend right to buy etc.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by order provide that, where there are in a dwelling house<sup>3</sup> let on a secure tenancy<sup>4</sup> one or more interests to which these provisions apply, the statutory provisions relating to the right to buy and to the right (where still exercisable) to acquire on rent to mortgage terms<sup>5</sup> and the statutory provisions relating to secure tenancies<sup>6</sup> have effect with such modifications as are specified in the order<sup>7</sup>.

The above provisions apply to an interest held by:

- 4460 (1) a local authority<sup>8</sup>;
- 4461 (2) a new town corporation<sup>9</sup>;
- 4462 (3) a housing action trust<sup>10</sup>;
- 4463 (4) an urban development corporation<sup>11</sup>;
- 4464 (5) the Housing Corporation<sup>12</sup>; or
- 4465 (6) a registered social landlord<sup>13</sup>,

which is immediately superior to the interest of the landlord<sup>14</sup> or to another interest to which these provisions apply<sup>15</sup>.

Such an order:

- 4466 (a) may make different provision with respect to different cases or descriptions of case;
- 4467 (b) may contain such consequential, supplementary or transitional provisions as appear to the Secretary of State or to the Assembly or the relevant Welsh minister to be necessary or expedient; and
- 4468 (c) must be made by statutory instrument<sup>16</sup>.

Where, in pursuance of the statutory provisions relating to the right to buy and to the right (where still exercisable) to acquire on rent to mortgage terms as so modified<sup>17</sup>, a secure tenant serves a notice claiming to exercise the right to buy and the interest of the landlord, an intermediate landlord<sup>18</sup> or the freeholder<sup>19</sup> in the dwelling house passes to a person other than an authority mentioned in heads (1) to (6) above, the freeholder must as soon as practicable serve on the tenant a notice in writing telling him that he is no longer entitled to acquire the freehold of the dwelling house<sup>20</sup>.

The landlord and an intermediate landlord must:

- 4469 (i) on written request give the freeholder such information and assistance as it may reasonably require in order to give effect to the relevant statutory provisions<sup>21</sup>; and
- 4470 (ii) ensure that all deeds and other documents in its possession or under its control to which the tenant is entitled or which he reasonably requires on the conveyance to him of the freehold of the dwelling house<sup>22</sup> are available for this purpose<sup>23</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante.

5 In the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARAS 1795-1797 ante, PARA 1800 et seq post. The right to buy on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post. For the meaning of 'the right to buy' see PARA 1803 post.

6 In ibid Pt IV (ss 79-117) (as amended): see PARA 1300 et seq ante.

7 Ibid s 171(1). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing (Extension of the Right to Buy) Order 1993, SI 1993/2240, which came into force on 11 October 1993 (art 1) and which modifies the provisions of the Housing Act 1985 Pt V (as amended) (see note 17 infra). At the date at which this title states the law, no order under s 171 (as amended) modifying the provisions of Pt IV (as amended) had been made.

Section 171 (as amended) is omitted where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies (see art 3(1), Schedule para 55); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 26); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 26).

8 For the meaning of 'local authority' see PARA 1300 note 8 ante.

9 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.

10 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

11 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

12 As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

13 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

14 For the meaning of 'landlord' see PARA 1300 note 1 ante.

15 Housing Act 1985 s 171(2) (amended by the Housing Act 1988 ss 83(1), (5); the Government of Wales Act 1998 ss 140, 152, 140, Sch 16 para 13, Sch 18 Pt IV; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(15)).

16 Housing Act 1985 s 171(3). In the case of an order made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 171(3).

17 In ibid Pt V (as amended) as modified by the Housing (Extension of the Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule. In this title, those modifications are set out in detail if substantive but are otherwise referred to in the notes to the paragraphs in which the relevant provisions of the Housing Act 1985 Pt V (as amended) are discussed: see eg para 1797 note 5 ante. The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post.

Where there are in a dwelling house let on a secure tenancy one or more interests which are interests to which the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3 applies, and the dwelling house is a house, the Housing Act 1985 Pt V (ss 118-188) (as amended) has effect with the modifications specified in the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule: art 3(1). Article 3(1) applies to an interest held by (1) a local authority; (2) a new town corporation; (3) a housing action trust; (4) an urban development corporation; (5) the Housing Corporation; or (6) a registered housing association other than one excepted from the right to buy by the Housing Act 1985 s 120, Sch 5 para 1 (charities: see PARA 1808 post), Sch 5 para 2 (co-operatives: see PARA 1810 post) or Sch 5 para 3 (as amended) (associations which have not received grant: see PARA 1810 post), which is immediately superior to the interest of the landlord or to another interest to which the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3 applies: see art 3(2). For transitional provisions see art 6.

18 'Intermediate landlord' means the owner of a lease of the dwelling house (other than one created by way of security) which is immediately superior to the lease of the landlord or to the lease of another intermediate landlord: Housing Act 1985 s 187 (definition added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Sch 1 para 64).

19 'Freeholder' means the owner of the freehold of the dwelling house: Housing Act 1985 s 187 (definition as added: see note 18 supra).



20 Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 4.

21 le the Housing Act 1985 Pt V (as amended) as modified by the Housing (Extension of the Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule.

22 le including in the case of registered land the land certificate and any other documents which would be necessary to perfect the tenant's title if the title were not to be registered: Housing Act 1985 s 177A(b) (as added for these purposes: see note 23 infra). However, land certificates are no longer issued although official copies of the register and of the title plan are available as is a 'title information document' explaining why the official copy has been issued and how to obtain further copies: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1129.

23 Housing Act 1985 s 177A (added for these purposes by the Housing (Extension of the Right to Buy) Order 1993, SI 1993/2240, Schedule para 58).

## UPDATE

### 1798 Power to extend right to buy etc

NOTES 12, 17--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 1799. Information to help tenants decide whether to exercise right to buy etc.

Every body which lets dwelling houses<sup>1</sup> under secure tenancies<sup>2</sup> must prepare a document that contains information for its secure tenants<sup>3</sup> about such matters as are specified in an order made by the Secretary of State<sup>4</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>5</sup>. The matters that may be so specified are matters which the Secretary of State or the Assembly or minister considers that it would be desirable for secure tenants to have information about when considering whether to exercise the right to buy or (where still exercisable) the right to acquire on rent to mortgage terms<sup>6</sup>. The information contained in the document must be restricted to information about the specified matters<sup>7</sup>, and the information about those matters:

- 4471 (1) must be such as the body concerned considers appropriate; but
- 4472 (2) must be in a form which the body considers best suited to explaining those matters in simple terms<sup>8</sup>.

Once a body has prepared the document so required, it must revise that document as often as it considers necessary in order to ensure that the information contained in it:

- 4473 (a) is kept up to date so far as is reasonably practicable; and
- 4474 (b) reflects any changes in the matters for the time being specified in an order made under the above provisions<sup>9</sup>.

The following provisions set out when the document so prepared by a body is to be published or otherwise made available<sup>10</sup>. The body must:

- 4475 (i) publish the document, whether in its original or a revised form; and
- 4476 (ii) supply copies of it to the body's secure tenants,

at such times as may be prescribed by, and otherwise in accordance with, an order<sup>11</sup> made by the Secretary of State or the Assembly or the relevant Welsh minister<sup>12</sup>. The body must make copies of the current version<sup>13</sup> of the document available to be supplied, free of charge, to persons requesting them<sup>14</sup>. The copies must be made available for that purpose at the body's principal offices, and at such other places as it considers appropriate, at reasonable hours<sup>15</sup>. The body must take such steps as it considers appropriate to bring to the attention of its secure tenants the fact that copies of the current version of the document can be obtained free of charge from the places where, and at the times when, they are so made available<sup>16</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante. As to secure tenancies see PARA 1300 et seq ante.

3 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante. As to secure tenants see PARA 1300 et seq ante.

4 As to the Secretary of State see PARA 27 note 3 ante.

5 Housing Act 1985 s 121AA(1) (ss 121AA, 121B added by the Housing Act 2004 s 189(1)). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante. An order under the Housing Act 1985 s 121AA or s 121B (as so added) must be made by statutory instrument, subject (if made by the Secretary of State) to annulment in pursuance of a resolution of either House of Parliament: ss 121AA(5), 121B(7) (as so added). In exercise of this power, the Secretary of State has made the Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005, SI 2005/1735, which came into force on 26 July 2005 and applies in relation to England only (art 1); and the Assembly has made the Housing (Right to Buy) (Information to Secure Tenants) (Wales) Order 2005, SI 2005/2681, which came into force on 28 September 2005 and applies in relation to Wales (art 1). See further notes 7, 12 infra.

6 Housing Act 1985 s 121AA(2) (as added: see note 5 supra). For the meaning of 'the right to buy' see PARA 1803 post; and see also PARA 1795 note 7 ante. As to the right to acquire on rent to mortgage terms (now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post) see PARA 1872 et seq post.

7 The specified matters are the matters set out in the Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005, SI 2005/1735, art 3, Schedule, and the Housing (Right to Buy) (Information to Secure Tenants) (Wales) Order 2005, SI 2005/2681, art 3, Schedule, ie the following matters:

- 50 (1) an outline of the effect of the provisions of the Housing Act 1985 Pt V (ss 118-188) (as amended) relating to:
  - 3. (a) the circumstances in which the right to buy can and cannot be exercised;  
3
  - 4. (b) the exceptions to the right to buy set out in Sch 5 (as amended) (see PARA 1808 et seq post);  
4
  - 5. (c) the procedure for claiming to exercise the right to buy (see PARA 1826 et seq post);  
5
  - 6. (d) the price payable for the dwelling house by a tenant exercising the right to buy (see PARA 1836 et seq post) in England or the method of calculation of the price payable for the dwelling house by a tenant exercising the right to buy in Wales; and  
6
  - 7. (e) the delay notice procedures for landlords and tenants set out in ss 140, 141, 153A, 153B (as amended) (see PARAS 1870-1871, 1885-1886 post);  
7

- 51 (2) the fact that initial costs are likely to be incurred by a secure tenant exercising the right to buy; and this reference to initial costs includes costs in respect of stamp duty, legal and survey fees and valuation fees and costs associated with taking out a mortgage;
- 52 (3) the fact that a secure tenant will be likely to have to make regular payments as an owner of a dwelling house; and this reference to regular payments includes payments in respect of:
8. (a) any mortgage or charge on the dwelling house;  
8
9. (b) building insurance, life assurance, and mortgage payment protection insurance;  
9
10. (c) council tax;  
10
11. (d) water, sewerage, gas, electricity, or other utility services;  
11
- 53 (4) the risk of repossession of the dwelling house if regular mortgage payments are not made;
- 54 (5) the fact that in order to keep the property maintained and in good repair an owner of a dwelling house will be likely to have to incur expenditure which may include payment of service charges, in respect of major works in England or both annual and in respect of major works in Wales.
- 8 Housing Act 1985 s 121AA(3) (as added: see note 5 supra).
- 9 Ibid s 121AA(4) (as added: see note 5 supra).
- 10 Ibid s 121B(1) (as added: see note 5 supra).
- 11 See note 5 supra.
- 12 Housing Act 1985 s 121B(2) (as added: see note 5 supra). A landlord was to publish the document within two months of 26 July 2005 in England or within two months of 28 September 2005 in Wales; and, where it revises the document, the landlord must publish the document in its revised form within one month of the revision: Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005, SI 2005/1735, art 4; Housing (Right to Buy) (Information to Secure Tenants) (Wales) Order 2005, SI 2005/2681, art 4.
- Following publication of the document in accordance with these requirements, a landlord must supply a copy of the document (1) as soon as is reasonably practicable to each of its secure tenants at that time; and (2) to each subsequent new secure tenant at the time he signs his tenancy; and a landlord must supply each of its secure tenants with a copy of the current version of the document at least once in every period of five years beginning with the date on which the document was supplied pursuant to head (1) above: Housing (Right to Buy) (Information to Secure Tenants) (England) Order 2005, SI 2005/1735, art 5; Housing (Right to Buy) (Information to Secure Tenants) (Wales) Order 2005, SI 2005/2681, art 5.
- 13 For these purposes, any reference to the current version of the document is to the version of the document that was last published by the body in accordance with the Housing Act 1985 s 121B(2)(a) (as added) (see head (i) in the text): s 121B(6) (as added: see note 5 supra).
- 14 Ibid s 121B(3) (as added: see note 5 supra).
- 15 Ibid s 121B(4) (as added: see note 5 supra).
- 16 Ibid s 121B(5) (as added: see note 5 supra).

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## **1800. Costs.**

An agreement between the landlord<sup>1</sup> and a tenant<sup>2</sup> claiming to exercise:

- 4477 (1) the right to buy<sup>3</sup>;
- 4478 (2) the right to acquire on rent to mortgage terms, where still exercisable<sup>4</sup>; or
- 4479 (3) any right to make a final or interim payment on the redemption of a landlord's share<sup>5</sup>,

is void in so far as it purports to oblige the tenant to bear any part of the costs incurred by the landlord in connection with the tenant's exercise of that right<sup>6</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 As to the right to buy see PARA 1803 et seq post. See also PARA 1795 note 7 ante.

4 As to the right to acquire on rent to mortgage terms see PARA 1872 et seq post. That right is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post

5 Is any such right as is mentioned in ibid s 151A, Sch 6A para 2(1) (as added) (see PARA 1878 post) or Sch 6A para 6(1) (as added) (see PARA 1880 post).

6 Ibid s 178 (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 21). The Housing Act 1985 s 178 (as so substituted) is (1) modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 59); (2) further substituted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 34); (3) further substituted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619, (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 32).

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### **1801. Notices and evidence.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by regulations prescribe the form of any notice under the statutory provisions relating to the right to buy and to the right (where still exercisable) to acquire on rent to mortgage terms<sup>3</sup> and the particulars to be contained in the notice<sup>4</sup>; and such regulations:

- 4480 (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and
- 4481 (2) must be made by statutory instrument<sup>5</sup>.

Where the form of, and the particulars to be contained in, such a notice are so prescribed, a tenant<sup>6</sup> who proposes to claim, or has claimed, to exercise the right to buy may request the landlord<sup>7</sup> to supply him with a form for use in giving such notice; and the landlord must do so within seven days of the request<sup>8</sup>.

A notice may be served by sending it by post<sup>9</sup>.

Where the landlord is a housing association<sup>10</sup>, a notice to be served by the tenant on the landlord may be served by leaving it at, or sending it to, the principal office of the association or the office of the association with which the tenant usually deals<sup>11</sup>.

A notice served by a tenant under the statutory provisions relating to the rights referred to above is not invalidated by an error in, or omission from, the particulars which are required<sup>12</sup> to be contained in the notice<sup>13</sup>. Where as a result of such an error or omission:

- 4482 (a) the landlord has mistakenly admitted or denied the right to buy<sup>14</sup> or the right to acquire on rent to mortgage terms<sup>15</sup>; or
- 4483 (b) the landlord has formed a mistaken opinion as to any matter required to be stated in a notice by any of the specified statutory provisions<sup>16</sup> and has stated that opinion in the notice,

the parties must, as soon as practicable after they become aware of the mistake, take all such steps, whether by way of amending, withdrawing or re-serving any notice or extending any period or otherwise, as may be requisite for the purpose of securing that all parties are, as nearly as may be, in the same position as they would have been if the mistake had not been made<sup>17</sup>.

A landlord or the Secretary of State or the Assembly or the relevant Welsh minister may, if he or it thinks fit, accept a statutory declaration<sup>18</sup> made for the purposes of the statutory provisions relating to the rights referred to above as sufficient evidence of the matters declared in it<sup>19</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 I.e. the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1802 et seq post. The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post.

4 Ibid s 176(1). For examples of the exercise of this power see the Housing (Right to Buy) (Prescribed Forms) Regulations 1986, SI 1986/2194 (as amended); the Housing (Right to Buy Delay Procedure) (Prescribed Forms) Regulations 1989, SI 1989/240 (as amended).

The Housing Act 1985 s 176 is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 56); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 32); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 30).

5 Housing Act 1985 s 176(5); and see note 4 supra.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 For the meaning of 'landlord' see PARA 1300 note 1 ante.

8 Housing Act 1985 s 176(2). See also note 4 supra.

9 Ibid s 176(3).

10 For the meaning of 'housing association' see HOUSING vol 22 (2006 Reissue) PARA 11.

11 Housing Act 1985 s 176(4). See also note 4 supra.

12 I.e. by regulations under ibid s 176.

13 Ibid s 177(1).

14 le under ibid s 124 (as amended): see PARA 1828 post.

15 le under ibid s 146 (as substituted): see PARA 1873 post.

16 The provisions so specified are ibid s 125 (as amended) (see PARA 1829 post) and s 146 (as substituted) (see PARA 1873 post): s 177(3) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), (2), Sch 21 para 20(2), Sch 22).

17 Housing Act 1985 s 177(2) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 20(1), Sch 22). The Housing Act 1985 s 177(2) (as so amended) does not, however, apply where the tenant has exercised the right to which the notice relates before the parties become aware of the mistake: s 177(4). Section 177 (as amended) is (1) modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies (see Schedule para 57); (2) omitted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply (see Sch 1 para 33); (3) omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619, apply (see Sch 1 para 31).

18 As to statutory declarations see CIVIL PROCEDURE vol 11 (2009) PARA 1024.

19 Housing Act 1985 s 180 (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). The Housing Act 1985 s 180 (as so amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies (see Schedule para 61); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply (see Sch 1 para 36); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619, apply (see Sch 1 para 34).

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## **1802. Power to repeal or amend local Acts.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by order repeal or amend a provision of a local Act passed before 8 August 1980 where it appears to him or to the Assembly or minister that the provision is inconsistent with a statutory provision relating to the right to buy<sup>3</sup>. Before making such an order, the Secretary of State or the Assembly or minister must consult any local housing authority<sup>4</sup> appearing to him or to it to be concerned<sup>5</sup>.

An order so made may contain such transitional, incidental or supplementary provisions as the Secretary of State or the Assembly or the relevant Welsh minister considers appropriate<sup>6</sup>; and such an order:

4484 (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and

4485 (2) must be made by statutory instrument<sup>7</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 Housing Act 1985 s 182(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). As to the right to buy see PARA 1803 et seq post.

4 For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

5 Housing Act 1985 s 182(2).

6 Ibid s 182(3).

7 Ibid s 182(4). If made by the Secretary of State, such an instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 182(4). Section 182 (as amended) is omitted where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 38); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 36).

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## **(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE**

### **(i) Secure Tenant's Right to Buy; in general**

#### **1803. Right to acquire freehold or lease.**

A secure tenant<sup>1</sup> has the right to buy, that is to say, the right<sup>2</sup>:

- 4486 (1) if the dwelling house<sup>3</sup> is a house<sup>4</sup> and the landlord<sup>5</sup> owns the freehold, to acquire the freehold of the dwelling house;
- 4487 (2) if the landlord does not own the freehold or if the dwelling house is a flat<sup>6</sup>, whether or not the landlord owns the freehold, to be granted a lease<sup>7</sup> of the dwelling house<sup>8</sup>.

Where a secure tenancy is a joint tenancy, then, whether or not each of the joint tenants occupies the dwelling house as his only or principal home<sup>9</sup>, the right to buy belongs jointly to all of them or to such one or more of them as may be agreed between them; but such an agreement is not valid unless the person or at least one of the persons to whom the right to buy is to belong occupies the dwelling house as his only or principal home<sup>10</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 Ie in the circumstances and subject to the conditions and exceptions stated in the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1808 et seq post.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 For the meaning of 'house' see PARA 1796 ante.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'flat' see PARA 1796 ante.

7 For the meaning of 'lease' see PARA 1300 note 1 ante. As to the circumstances in which a landlord does not have a sufficient interest to grant a lease for these purposes see PARA 1811 post. A lease granted in pursuance of the right to buy is a long lease for the purposes of the Landlord and Tenant Act 1987: see s 59(3)(c) (as amended); and PARA 149 note 1 ante.

8 Housing Act 1985 s 118(1). Section 118(1) is substituted where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 1); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 post), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 3; and see PARA 1805 post).

9 For the meaning of 'only or principal home' see PARA 1300 note 19 ante.

10 Housing Act 1985 s 118(2). Section 118(2) is omitted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 3).

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## **(ii) Tenant of Registered Social Landlord's Right to Acquire Dwelling**

### **1804. Introduction.**

Since the phasing out of secure tenancies after 15 January 1989<sup>1</sup>, most new tenants of social housing have been granted assured tenancies<sup>2</sup>. Prior to the Housing Act 1996, most tenants of registered social landlords<sup>3</sup> did not have a statutory right to buy their homes because of the exclusions contained in Schedule 5 to the Housing Act 1985<sup>4</sup> although a former secure tenant of a local authority whose dwelling is transferred to the private sector as part of a voluntary transfer becomes an assured tenant following transfer but retains the right to buy under what is called a 'preserved right to buy'<sup>5</sup>. Registered social landlords are, however, permitted to offer discounts to the tenants who wish to buy their homes<sup>6</sup>; and the relevant provisions of the Housing Act 1996<sup>7</sup> confer on an assured or secure tenant of a registered social landlord the statutory right to acquire his home, subject to a number of qualifications<sup>8</sup>. The right to buy provisions of the Housing Act 1985<sup>9</sup> are applied for these purposes subject to prescribed exceptions, adaptations and modifications<sup>10</sup>.

1 See the Housing Act 1985 s 80 (as amended); and PARA 1301 ante at head (6) in the text.

2 See the Housing Act 1988 s 35 (as amended); and PARAS 1013, 1301 ante.

3 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

4 See the Housing Act 1985 s 120, Sch 5 (as amended); and PARA 1808 et seq post. The right to buy under the Housing Act 1985 is expressed to be limited to secure tenants: see s 118; and PARA 1803 ante.

5 See *ibid* ss 171A-171H (as added and amended); and PARA 1900 et seq post.

6 See the Social Landlords (Permissible Additional Purposes or Objects) Order 1996, SI 1996/2256, art 3(a). A registered social landlord in England may also dispose of houses on leases (1) granted on a payment of premium calculated by reference to a percentage of the value of the house or the cost of providing it; or (2) under which the tenant (or his personal representatives) will or may be entitled to a sum calculated by reference directly or indirectly to the value of the house: art 3(d) (added by SI 2005/2863). As to the extra-statutory scheme under which local authorities and housing associations may offer a form of shared equity home ownership see PARA 1795 note 12 ante.

7 *Ie* the Housing Act 1996 ss 16-17 (as amended): see PARAS 1805-1806 post.

8 See PARAS 1805-1806 post.

9 *Ie* the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1808 et seq post.

10 See the Housing (Right to Acquire) Regulations 1997, SI 1997/619, made under the Housing Act 1996 s 17(1), (2); and PARA 1806 post.



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### **1805. Right of tenant to acquire dwelling.**

A tenant of a registered social landlord<sup>1</sup> has the right to acquire the dwelling<sup>2</sup> of which he is a tenant if:

- 4488 (1) he is a tenant under an assured tenancy<sup>3</sup>, other than an assured shorthold tenancy<sup>4</sup> or a long tenancy<sup>5</sup>, or under a secure tenancy<sup>6</sup>;
- 4489 (2) the dwelling was provided with public money<sup>7</sup> and has remained in the social rented sector<sup>8</sup>; and
- 4490 (3) he satisfies any further qualifying conditions applicable under the right to buy provisions of the Housing Act 1985<sup>9</sup> as they apply in relation to the right<sup>10</sup> of a tenant to acquire a dwelling<sup>11</sup>.

These provisions also apply with modifications in England, and as from a day to be appointed<sup>12</sup> in Wales, in relation to a dwelling ('a funded dwelling') provided or acquired wholly or in part by means of a grant<sup>13</sup> to a body other than a registered social landlord<sup>14</sup>. For this purpose, the reference in the above provisions to a registered social landlord includes a reference to any person to whom such a grant has been paid<sup>15</sup>.

A tenant of a registered social landlord who satisfies the conditions in heads (1) and (2) above has the right to acquire, that is to say, the right, in the circumstances and subject to the conditions and exceptions stated in the relevant provisions of Part V of the Housing Act 1985<sup>16</sup>:

- 4491 (a) if the dwelling house<sup>17</sup> is a house and the landlord owns the freehold, to acquire the freehold of the dwelling house;
- 4492 (b) if the landlord does not own the freehold or if the dwelling house is a flat, whether or not the landlord owns the freehold, to be granted a lease of the dwelling house<sup>18</sup>.

1 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

2 For these purposes, 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it: Housing Act 1996 s 63(1).

3 For the meaning of 'assured tenancy' see PARA 1018 ante (definition applied by ibid s 230).

4 For the meaning of 'assured shorthold tenancy' see PARAS 1044 et seq, 1051 ante (definition applied by ibid s 230).

5 For the meaning of 'long tenancy' see the Housing Act 1985 s 115 (as amended); and PARA 1303 ante (definition applied by the Housing Act 1996 s 63(1)).

6 For the meaning of 'secure tenancy' see PARA 1300 (definition applied by ibid s 230).

7 For this purpose a dwelling will be regarded as provided with public money if (1) it was provided or acquired wholly or in part by means of a grant under the Housing Act 1996 s 18 (as amended) (social housing grant: see HOUSING vol 22 (2006 Reissue) PARA 66); (2) it was provided or acquired wholly or in part by applying or appropriating sums standing in the disposal proceeds fund of a registered social landlord (see s 25 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 105); or (3) it was acquired by a registered social landlord after 1 April 1997 on a disposal by a public sector landlord at a time when it was capable of being let as a

separate dwelling: s 16(2); Housing Act 1996 (Commencement No 10 and Transitional Provisions) Order 1997, SI 1997/618, art 2(1), Schedule para 1. 'Public sector landlord' means any of the authorities or bodies within the Housing Act 1985 s 80(1) (as amended) (the landlord condition for secure tenancies: see PARA 1301 ante); Housing Act 1996 s 63(1).

A dwelling will be regarded for the purposes of s 16 (as amended) as provided by means of a grant under s 18 (as amended) if, and only if, the relevant authority when making the grant notified the recipient that the dwelling was to be so regarded: s 16(4) (amended by the Government of Wales Act 1998 s 140, Sch 16 paras 81, 82(1)(a)). The relevant authority must before making the grant inform the applicant that it proposes to give such a notice and allow him an opportunity to withdraw his application within a specified time: Housing Act 1996 s 16(4) (as so amended). For the meaning of 'the relevant authority' for these purposes see HOUSING vol 22 (2006 Reissue) PARA 55 note 1.

In relation to England, a notice under s 16(4) (as amended) must be taken to be given to a registered social landlord by the Housing Corporation if it is sent using electronic communications to such number or address as the registered social landlord has for the time being notified to the Housing Corporation for that purpose: s 16(5) (s 16(5)-(7) added by the Housing (Right to Acquire) (Electronic Communications) (England) Order 2001, SI 2001/3257, art 2). The means by which notice is sent must be such as to enable the registered social landlord to reproduce the notice by electronic means in a form which is visible and legible: Housing Act 1996 s 16(6) (as so added). An 'electronic communication' is a communication transmitted, whether from one person to another, from one device to another, or from a person to a device or vice versa, by means of an electronic communications network, or by other means but while in an electronic form: s 16(7) (as so added; amended by the Communications Act 2003 s 406(1), Sch 17 para 136).

References in the Housing Act 1996 Pt I (ss 1-64) (as amended) to the provision of a dwelling or house include the provision of a dwelling or house (a) by erecting the dwelling or house, or converting a building into dwellings or a house; or (b) by altering, enlarging, repairing or improving an existing dwelling or house; and references to a dwelling or house provided by means of a grant or other financial assistance are to its being so provided directly or indirectly: s 63(2).

8 A dwelling will be regarded for the purposes of *ibid* s 16 (as amended) as having remained within the social rented sector if, since it was so provided or acquired (1) the person holding the freehold interest in the dwelling has been either a registered social landlord or a public sector landlord; and (2) any person holding an interest as lessee (otherwise than as mortgagee) in the dwelling has been (a) an individual holding otherwise than under a long tenancy; or (b) a registered social landlord or a public sector landlord: s 16(3). In s 16(3)(a) (see head (1) *supra*) the reference to the freehold interest in the dwelling includes a reference to such an interest in the dwelling as is held by the landlord under a lease granted in pursuance of the Leasehold Reform, Housing and Urban Development Act 1993 Sch 9 para 3 (as amended) (mandatory leaseback to former freeholder on collective enfranchisement: see PARA 1658 ante); Housing Act 1996 s 16(3A) (added by the Housing Act 2004 s 202(1), (2)).

9 *Ie* the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 *et seq* ante, PARA 1803 *et seq* post.

10 *Ie* the right conferred by the Housing Act 1996 s 16 (as amended).

11 *Ibid* s 16(1). For supplementary provisions with respect to the right of a tenant to acquire a dwelling see PARA 1806 post.

12 *Ie* as from a day to be appointed under the Housing Act 2004 s 270(4), (5)(c). At the date at which this title states the law, no such day had been appointed in relation to Wales.

13 *Ie* a grant under the Housing Act 1996 s 27A (as added): see HOUSING vol 22 (2006 Reissue) PARA 34.

14 *Ibid* s 16A(1) (s 16A added by the Housing Act 2004 s 221, partly as from a day to be appointed (see note 12 *supra*)).

15 Housing Act 1996 s 16A(2) (as added: see note 14 *supra*). Further, in s 16(2), (4) (as amended) (see note 7 *supra*) any reference to s 18 (as amended) includes a reference to s 27A (as added) (see HOUSING vol 22 (2006 Reissue) PARA 34): s 16A(3) (as so added). For the purposes of s 16 (as amended) a funded dwelling is to be regarded as having remained within the social rented sector in relation to any relevant time if, since it was acquired or provided, it was used (1) by the recipient of the grant mentioned in s 16A(1) (as added); or (2) if s 27B (as added) applies in relation to the grant (see HOUSING vol 22 (2006 Reissue) PARA 35), by each person to whom the grant was, or is treated as having been, paid, exclusively for the purposes for which the grant was made or any other purposes agreed to by the relevant authority: s 16A(4) (as so added). 'Relevant time' means a time when the dwelling would not be treated as being within the social rented sector by virtue of s 16(3) (see note 8 *supra*): s 16A(5) (as so added).

16 *Ie* the Housing Act 1985 ss 119-188 (as amended): see PARA 1796 *et seq* ante, PARA 1808 *et seq* post.

17 For the meaning of 'dwelling house' see PARA 1796 ante.

18 Housing Act 1985 s 118(1) (substituted for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 3). Accordingly, for these purposes in the provisions in the Housing Act 1985 Pt V (as amended), for the expression 'right to buy' there is substituted the expression 'right to acquire' save for the references to the right to buy in s 122(4) (as added for these purposes: see PARA 1826 post) and s 130(2)(aa) (as added) (see PARA 1840 post): Housing (Right to Acquire) Regulations 1997, SI 1997/619, Sch 1 para 2.

## **UPDATE**

### **1805 Right of tenant to acquire dwelling**

TEXT AND NOTES 7-15--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(ii) Tenant of Registered Social Landlord's Right to Acquire Dwelling/1806. Supplementary provisions.

### **1806. Supplementary provisions.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by order<sup>3</sup>:

- 4493 (1) specify the amount or rate of discount to be given on the exercise of the right of a tenant to acquire a dwelling<sup>4</sup>; and
- 4494 (2) designate rural areas in relation to dwellings in which that right does not arise<sup>5</sup>.

Before making an order which would have the effect that an area ceased to be designated under head (2) above, the Secretary of State or the Assembly or the relevant Welsh minister must consult:

- 4495 (a) the local housing authority<sup>6</sup> or authorities in whose district<sup>7</sup> the area or any part of it is situated or, if the order is general in its effect, local housing authorities in general; and
- 4496 (b) such bodies appearing to him or to the Assembly or minister to be representative of registered social landlords<sup>8</sup> as he or it considers appropriate<sup>9</sup>.

The provisions of Part V of the Housing Act 1985<sup>10</sup> apply in relation to the right of a tenant to acquire a dwelling<sup>11</sup> subject to any such order and subject to such other exceptions, adaptations and other modifications<sup>12</sup> as may be specified by regulations made by the Secretary of State or the Assembly or the relevant Welsh minister<sup>13</sup>. The regulations may provide that:

- 4497 (i) the powers of the Secretary of State or the Assembly or minister to intervene, give directions or assist<sup>14</sup> do not apply;

- 4498 (ii) the statutory exceptions for charities and certain housing associations<sup>15</sup> and the right of appeal to Secretary of State or the Assembly or minister with regard to dwellings for elderly persons<sup>16</sup> do not apply;
- 4499 (iii) the statutory provisions relating to the right to acquire on rent to mortgage terms (where still exercisable)<sup>17</sup> do not apply;
- 4500 (iv) the provisions relating to restrictions on disposals in National Parks etc<sup>18</sup> do not apply; and
- 4501 (v) the provisions relating to the preserved right to buy<sup>19</sup> do not apply;

but nothing in heads (i) to (v) above affects the generality of the power<sup>20</sup> to make such regulations<sup>21</sup>. Such regulations may also:

- 4502 (A) make provision for continuing the effect of a suspension order<sup>21</sup> where the secure tenancy<sup>22</sup> in respect of which the order was made has been replaced by an assured tenancy<sup>23</sup>;
- 4503 (B) make specified provision<sup>24</sup> with regard to the disclosure of information about anti-social behaviour<sup>25</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales, see PARA 27 note 4 ante.

3 An order or regulations under the Housing Act 1996 s 17 (see the text and notes 4-21 infra) may make different provision for different cases or classes of case including different areas, and may contain such incidental, supplementary and transitional provisions as the Secretary of State or the Assembly or the relevant Welsh minister considers appropriate (s 17(5)) and must be made by statutory instrument subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament (s 17(7)).

4 Ie the right conferred by the Housing Act 1996 s 16 (as amended): see PARA 1805 ante. For the meaning of 'dwelling' see PARA 1805 note 2 ante. The relevant authority may make grants to registered social landlords in respect of discounts given by them to persons exercising the right to acquire conferred by s 16 (as amended) (see s 20 (as amended); and PARA 1807 post) and in respect of discounts on disposals by them of dwellings to tenants otherwise than in pursuance of the right conferred by s 16 (as amended) (see s 21 (as amended); and PARA 1807 post). As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5.

In exercise of the power conferred by head (1) in the text, the following orders have been made: (1) the Housing (Right to Acquire) (Discount) (Wales) Order 1997, SI 1997/569 (which extends to dwellings in Wales only (art 1); prescribes the percentage rate of discount to be given on the exercise of the right to acquire as 25% of the open market value of the dwelling subject to a maximum of £16,000 (art 3) and provides that any question arising as to the open market value of a dwelling at the relevant time is to be determined by the district valuer (art 4)); and (2) the Housing (Right to Acquire) (Discount) Order 2002, SI 2002/1091, which prescribes different amounts of discount applicable to dwellings in specified areas in England, subject to a maximum amount of discount of 50% of the value of the dwelling (art 2, Schedule).

5 Housing Act 1996 s 17(1). A number of orders have been made in exercise of the power conferred by head (2) in the text: see eg the Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the West Midlands) Order 1997, SI 1997/620; the Housing (Right to Acquire or Enfranchise) (Designated Rural Areas in the South East) Order 1997, SI 1997/625; the Leasehold Reform and Housing (Excluded Tenancies) (Designated Rural Areas) (Wales) Order 1997, SI 1997/685; the Housing (Right to Acquire and Right to Buy) (Designated Rural Areas and Designated Regions) (Wales) Order 2003, SI 2003/54.

6 For the meaning of 'local housing authority' see PARA 1311 note 4 ante (definition applied by the Housing Act 1996 s 230).

7 For the meaning of 'district' see PARA 1311 note 4 ante (definition applied by ibid s 230).

8 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

9 Housing Act 1996 s 17(6).

10 Ie the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1803 et seq.

11 Ie under the Housing Act 1996 s 16 (as amended).

12 In *ibid* Pt I 'modifications' includes additions, alterations and omissions and cognate expressions must be construed accordingly: s 63(1).

13 *Ibid* s 17(2). The specified exceptions, adaptations and other modifications must take the form of textual amendments of the provisions of the Housing Act 1985 Pt V (as amended) as they apply in relation to the right to buy under that Part; and the first regulations, and any subsequent consolidating regulations, must set out the provisions of Pt V (as amended) as they so apply: Housing Act 1996 s 17(4).

14 *Ie* under the Housing Act 1985 ss 164-170 (as amended): see PARA 1907 *et seq* post.

15 *Ie* *ibid* Sch 5 paras 1, 3 (as amended): see PARAS 1808-1810 post.

16 *Ie* *ibid* Sch 5 para 11 (as amended): see PARA 1815 post.

17 As to the right to acquire on rent to mortgage terms (now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 post) see PARA 1872 *et seq* post.

18 *Ie* the Housing Act 1985 s 157 (as amended): see PARA 1899 post.

19 As to the preserved right to buy see PARA 1900 *et seq* post.

20 *Ie* the power conferred by the Housing Act 1996 s 17(2): see the text and notes 10-13 *supra*.

21 *Ibid* s 17(3). In exercise of the powers so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing (Right to Acquire) Regulations 1997, SI 1997/619, which came into force on 1 April 1997: reg 1. The Housing Act 1985 Pt V (as amended) (see PARA 1795 *et seq* ante, PARA 1803 *et seq* post) has effect for the purposes of the right to acquire under the Housing Act 1996 Pt I (ss 1-64) (as amended) subject to the modifications made by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2(1), Sch 1, and set out in reg 2(2), Sch 2. In this title, those modifications are not all set out in detail but may be referred to in the notes to the paragraphs in which the relevant provisions of the Housing Act 1985 Pt V (as amended) are discussed: see eg para 1802 note 7 ante. See also PARA 1805 ante. For exceptions to the right to acquire see the Housing Act 1985 s 120, Sch 5 (as so modified). See also the Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917; the Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680 (both partly made under the powers so conferred); and PARA 1894 *et seq* post.

21 As to suspension orders see the Housing Act 1985 s 121A (as added); and PARA 1820 post.

22 As to secure tenancies see PARA 1300 *et seq* ante.

23 Housing Act 2004 s 192(3)(b). As to assured tenancies see PARA 1011 *et seq* ante.

24 *Ie* provision corresponding to *ibid* s 194(1)-(3) (see PARA 1341 ante) so far as those subsections relate to the Housing Act 1985 s 138(2B) (as added) (see PARA 1843 post).

25 Housing Act 2004 s 194(4)(b).

## UPDATE

### 1806 Supplementary provisions

NOTE 21--SI 1997/619 Sch 2 amended: SI 2006/680.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(ii) Tenant of Registered Social Landlord's Right to Acquire Dwelling/1807. Purchase grants to registered social landlords.

### 1807. Purchase grants to registered social landlords.

The relevant authority<sup>1</sup> must make grants to registered social landlords<sup>2</sup> in respect of discounts given by them to persons exercising the right to acquire conferred<sup>3</sup> by the Housing Act 1996<sup>4</sup>. The amount of the grant for any year must be the aggregate value of the discounts given in that year<sup>5</sup>; and the relevant authority must specify in relation to such grants:

- 4504 (1) the procedure to be followed in relation to applications for grant;
- 4505 (2) the manner in which, and time or times at which, grant is to be paid<sup>6</sup>.

In making such a grant the relevant authority may provide that the grant is conditional on compliance by the registered social landlord with such conditions as the relevant authority may specify<sup>7</sup>.

The relevant authority may also make grants to registered social landlords in respect of discounts on disposals by them of dwellings to tenants otherwise than in pursuance of the statutory right<sup>8</sup> to acquire<sup>9</sup>. The relevant authority must make such a grant if the tenant<sup>10</sup> was entitled to exercise the right to acquire<sup>11</sup> in relation to another dwelling<sup>12</sup> of the landlord's<sup>13</sup>; but the amount of the grant in such a case must not exceed the amount of the discount to which the tenant would have been entitled in respect of the other dwelling<sup>14</sup>. The relevant authority must specify in relation to such grants:

- 4506 (a) the procedure to be followed in relation to applications for grant;
- 4507 (b) the circumstances in which grant is or is not to be payable;
- 4508 (c) the method for calculating, and any limitations on, the amount of grant;
- and
- 4509 (d) the manner in which, and time or times at which, grant is to be paid<sup>15</sup>.

In making such a grant, the relevant authority may provide that the grant is conditional on compliance by the registered social landlord with such conditions as the relevant authority may specify<sup>16</sup>.

1 As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5.

2 As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

3 I.e. the right conferred by the Housing Act 1996 s 16 (as amended): see PARA 1805 ante.

4 Ibid s 20(1) (ss 20(1), (3)-(4), 21(1)-(4) amended by the Government of Wales Act 1998 s 140, Sch 16 para 82(1)(a)). As to housing grants see generally HOUSING vol 22 (2006 Reissue) PARA 32 et seq.

5 Housing Act 1996 s 20(2).

6 Ibid s 20(3) (as amended (see note 4 supra); further amended by the Housing Act 2004 ss 218, 266, Sch 11 paras 7, 9, Sch 16).

7 Housing Act 1996 s 20(4) (as amended: see note 4 supra).

8 See note 3 supra.

9 Housing Act 1996 s 21(1) (as amended: see note 4 supra).

10 For the meaning of 'tenant' see PARA 1286 note 5 ante.

11 See note 3 supra.

12 For the meaning of 'dwelling' see PARA 1805 note 2 ante.

13 For the meaning of 'landlord' see PARA 1286 note 5 ante.

14 Housing Act 1996 s 21(2) (as amended: see note 4 supra).

15 Ibid s 21(3) (as amended (see note 4 supra); further amended by the Housing Act 2004 Sch 11 paras 7, 10, Sch 16).

16 Housing Act 1996 s 21(4) (as amended: see note 4 supra).

## **UPDATE**

### **1807 Purchase grants to registered social landlords**

TEXT AND NOTES--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1808. Charities.

### **(iii) Exceptions; Suspension of Right**

#### **1808. Charities.**

The right to buy<sup>1</sup> does not arise if the landlord<sup>2</sup> is a housing trust<sup>3</sup> or a housing association<sup>4</sup> and is a charity<sup>5</sup>. This exclusion does not, however, apply where the preserved right to buy<sup>6</sup> arises<sup>7</sup>; but its disapplication is not to be taken to authorise any action on the part of a charity which would conflict with the trusts of the charity<sup>8</sup>.

This exclusion is also disapplied where the right to acquire conferred by the Housing Act 1996<sup>9</sup> arises<sup>10</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 As to housing trusts see HOUSING vol 22 (2006 Reissue) PARA 12.

4 As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 Housing Act 1985 s 120, Sch 5 para 1. For the meaning of 'charity' see PARA 1300 note 16 ante.

6 As to the preserved right to buy see PARA 1900 et seq post.

7 Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2(1), Sch 1 para 41.

8 See the Housing Act 1985 s 171C(5) (as added); and PARA 1902 post.

9 As to the right to acquire see PARAS 1804-1807 ante.

10 Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(a).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO

BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1809. Dwelling houses in designated rural areas.

### **1809. Dwelling houses in designated rural areas.**

The right to acquire conferred by the Housing Act 1996<sup>1</sup> does not arise if the dwelling house<sup>2</sup> is situated in a designated<sup>3</sup> rural area<sup>4</sup>.

1 As to the right to acquire see PARAS 1804-1807 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 Is designated by order of the Secretary of State or, in relation to Wales, of the National Assembly for Wales or the relevant Welsh minister under the Housing Act 1996 s 17(1)(b): see PARA 1806 ante at head (2) in the text. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

4 Housing Act 1985 s 120, Sch 5 para 1A (added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(a)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1810. Certain housing associations.

### **1810. Certain housing associations.**

The right to buy<sup>1</sup> does not arise if the landlord<sup>2</sup> is:

4510 (1) a co-operative housing association<sup>3</sup>;

4511 (2) a housing association<sup>4</sup> which at no time received a grant under specified<sup>5</sup> statutory provisions<sup>6</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 Housing Act 1985 s 120, Sch 5 para 2. For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante.

4 As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

5 Is at no time received a grant under any enactment mentioned in the Housing Associations Act 1985 Sch 1 para 2, the Housing Act 1974 s 31 (repealed), the Housing Associations Act 1985 ss 41, 54 or 55 (all repealed) or s 58 (as substituted), the Housing Act 1988 s 50 (as amended) or s 51 (as amended) or the Housing Act 1996 s 18 (as amended) or s 22: see further HOUSING vol 22 (2006 Reissue) PARAS 11 note 10, 32, 43 note 3, 66.

6 Housing Act 1985 Sch 5 para 3 (amended by the Housing Act 1988 s 140(1), (2), Sch 17 para 66, Sch 18; the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, arts 4(1), 5, Sch 1 Pt I, Sch 2 para 14(33); the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 2, Schedule para 3(4)).

The Housing Act 1985 Sch 5 para 3 (as so amended) is omitted where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 41); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996:



see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(b)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1811. Landlord with insufficient interest in the property.

### **1811. Landlord with insufficient interest in the property.**

The right to buy<sup>1</sup> does not arise unless the landlord<sup>2</sup> owns the freehold or has an interest sufficient to grant a lease<sup>3</sup> for:

- 4512 (1) a term exceeding 21 years, where the dwelling house<sup>4</sup> is a house<sup>5</sup>; or
- 4513 (2) where the dwelling house is a flat<sup>6</sup>, a term of not less than 50 years,

commencing, in either case, with the date on which the tenant's<sup>7</sup> notice claiming to exercise the right to buy is served<sup>8</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 le in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1819 et seq post. For the meaning of 'lease' see PARA 1300 note 1 ante.

4 For the meaning of 'dwelling house' see PARA 1796 ante.

5 For the meaning of 'house' see PARA 1796 ante.

6 For the meaning of 'flat' see PARA 1796 ante.

7 For the meaning of 'tenant' see PARA 1300 note 1 ante.

8 Housing Act 1985 s 120, Sch 5 para 4. Schedule 5 para 4 is disapplied where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 66(a).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1812. Dwelling houses let in connection with employment.

### **1812. Dwelling houses let in connection with employment.**

The right to buy<sup>1</sup> does not arise if the dwelling house<sup>2</sup>:

- 4514 (1) forms part of, or is within the curtilage of, a building which, or so much of it as is held by the landlord<sup>3</sup>, is held mainly for purposes other than housing purposes<sup>4</sup> and consists mainly of accommodation other than housing accommodation, or is situated in a cemetery<sup>5</sup>; and

4515 (2) was let to the tenant<sup>6</sup> or a predecessor in title of his in consequence of the tenant or predecessor being in the employment of the landlord or of a local authority<sup>7</sup>, a new town corporation<sup>8</sup>, a housing action trust<sup>9</sup>, an urban development corporation<sup>10</sup> or the governors of an aided school (now known as a 'voluntary aided school')<sup>11</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For these purposes, 'housing purposes' means the purposes for which dwelling houses are held by local housing authorities under the Housing Act 1985 Pt II (ss 8-57) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 220 et seq) or purposes corresponding to those purposes: s 120, Sch 5 para 5(2). For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

5 For the meaning of 'cemetery' see PARA 1325 note 17 ante.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 For the meaning of 'local authority' see PARA 1300 note 8 ante.

8 For the meaning of 'new town corporation' see PARA 1300 note 9 ante.

9 For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

10 For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

11 Housing Act 1985 Sch 5 para 5(1) (amended by the Housing Act 1988 s 83(1), (6)(d); the Government of Wales Act 1998 s 152, Sch 18 Pt IV). For the meaning of 'voluntary aided school' see EDUCATION vol 15(1) (2006 Reissue) PARA 102. As to the effect on this exception to the right to buy of the disposal and subsequent leaseback of the public sector landlord's interest in the premises under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) see s 37, Sch 10 para 2(4), (5)(a) (as amended); and PARA 1668 ante.

The Housing Act 1985 Sch 5 para 5(1) (as so amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, (see PARA 1798 ante), applies: see art 3(1), Schedule para 66(b).

## UPDATE

### 1812 Dwelling houses let in connection with employment

TEXT AND NOTE 11--Housing Act 1985 Sch 5 para 5(1) further amended: SI 2008/3002.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1813. Dwelling houses for the disabled.

### 1813. Dwelling houses for the disabled.

The right to buy<sup>1</sup> does not arise if:

4516 (1) the dwelling house<sup>2</sup> has features which are substantially different from those of ordinary dwelling houses and are designed to make it suitable for occupation by physically disabled persons<sup>3</sup> and:

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175. (a) it is one of a group of dwelling houses which it is the practice of the landlord<sup>4</sup> to let for occupation by physically disabled persons; and

176. (b) a social service is, or special facilities are, provided in close proximity to the group of dwelling houses wholly or partly for the purpose of assisting those persons<sup>5</sup>;

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4517 (2) the dwelling house is one of a group of dwelling houses which it is the practice of the landlord to let for occupation by persons who are suffering or have suffered from a mental disorder<sup>6</sup> and a social service is, or special facilities are, provided wholly or partly for the purpose of assisting those persons<sup>7</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 A dwelling has features 'designed' to make it suitable for occupation by a disabled person only where the dwelling is built with such features for occupation by a disabled person and not where an ordinary dwelling is merely 'intended', by reason of special features, for occupation by a disabled person: *Freeman v Wansbeck District Council* [1984] 2 All ER 746, (1983) 82 LGR 131, CA.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 Housing Act 1985 s 120, Sch 5 para 7. The Housing Act 1985 Sch 5 para 7 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 66(c).

6 For these purposes, 'mental disorder' has the same meaning as in the Mental Health Act 1983 (see MENTAL HEALTH vol 30(2) (Reissue) PARA 402): Housing Act 1985 Sch 5 para 9(2).

7 Ibid Sch 5 para 9(1). The Housing Act 1985 Sch 5 para 9(1) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 66(c).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1814. Certain dwelling houses for persons with special needs.

### **1814. Certain dwelling houses for persons with special needs.**

The right to acquire conferred by the Housing Act 1996<sup>1</sup> does not arise if the dwelling house<sup>2</sup> is one of a group of dwelling houses which it is the practice of the landlord<sup>3</sup> to let for occupation by persons who have special needs<sup>4</sup> and require intensive housing assistance<sup>5</sup> and such intensive housing assistance is provided, either directly or indirectly, by the landlord<sup>6</sup>.

1 As to the right to acquire see PARAS 1804-1807 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For these purposes, 'persons who have special needs' means persons who are vulnerable as a result of age, physical disability or illness, a mental disorder or impairment of any kind, drug or alcohol addiction, violence or the threat of violence by a member of a person's family, or other special reason: Housing Act 1985 s 120, Sch 5 para 9A(3) (Sch 5 para 9A added by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(c)).

5 For these purposes, 'intensive housing assistance' means the provision by the landlord to persons with special needs of assistance on housing issues which is significantly greater than the assistance which is generally provided by registered social landlords to tenants who do not have special needs: Housing Act 1985 Sch 5 para 9A(2) (as added: see note 4 supra). As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

6 Ibid Sch 5 para 9A(1) (as added: see note 4 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1815. Certain dwelling houses for elderly persons.

### **1815. Certain dwelling houses for elderly persons.**

The right to buy<sup>1</sup> does not arise if:

- 4518 (1) the dwelling house<sup>2</sup> is one of a group of dwelling houses:  
 317  
 177. (a) which are particularly suitable, having regard to their location, size, design, heating systems and other features, for occupation by elderly persons; and  
 178. (b) which it is the practice of the landlord<sup>3</sup> to let for occupation by persons aged 60 or more, or for occupation by such persons and physically disabled persons;  
 318  
 4519 and special facilities<sup>4</sup> are provided wholly or mainly for the purposes of assisting those persons<sup>5</sup>;  
 4520 (2) the dwelling house:  
 319  
 179. (a) is particularly suitable<sup>6</sup>, having regard to its location, size, design, heating system and other features, for occupation by elderly persons; and  
 180. (b) was let to the tenant or a predecessor in title of his for occupation by a person who was aged 60 or more, whether the tenant or predecessor or another person<sup>7</sup>.  
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Head (2) above does not, however, apply unless the dwelling house concerned was first let before 1 January 1990<sup>8</sup>. Nor does it apply to the right to acquire<sup>9</sup> conferred by the Housing Act 1996<sup>10</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 The facilities so referred to are facilities which consist of or include (1) the services of a resident warden; or (2) the services of a non-resident warden, a system for calling him and the use of a common room in close proximity to the group of dwelling houses: Housing Act 1985 s 120, Sch 5 para 10(2).

5 Ibid Sch 5 para 10(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 106(1); for transitional provisions see s 106(3), (4)).

The Housing Act 1985 Sch 5 para 10(1) (as so amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 66(d).

6 In determining whether a dwelling is particularly suitable, no regard is to be had to the presence of any feature provided by the tenant or a predecessor in title of his: Housing Act 1985 Sch 5 para 11(2) (Sch 5 para 11 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 106(2)).

Notwithstanding anything in the Housing Act 1985 s 181 (as amended) (jurisdiction of county court: see PARA 1922 post), any question arising under Sch 5 para 11 (as substituted and amended) is to be determined as follows: (1) if an application for the purpose is made by the tenant to the appropriate tribunal or authority before the end of the period of 56 days beginning with the service of the landlord's notice under s 124 (as amended) (see PARA 1828 post), the question must be determined by the appropriate tribunal or authority; and (2) if no such application is so made, the question is deemed to have been determined in favour of the landlord: Sch 5 para 11(3)-(5) (as so substituted; amended by the Housing Act 2004 s 181(1), (2); at the date at which this title states the law, the latter amendment was in force in relation to England only and in relation to Wales the application was to be made to, and the question determined by, the National Assembly for Wales). For these purposes, 'the appropriate tribunal or authority' means (a) in relation to England, a residential property tribunal; and (b) in relation to Wales, the Assembly; and the Housing Act 2004 s 231 (appeals to the Lands Tribunal: see HOUSING vol 22 (2006 Reissue) PARA 199) does not apply to any decision of a residential property tribunal under this provision: Housing Act 1985 Sch 5 para 11(5A), (5B) (added by the Housing Act 2004 s 181(1), (3), as from 4 July 2005 in relation to England (Housing Act 2004 (Commencement No 4 and Transitional Provisions) (England) Order 2005, SI 2005/1729, art 2(a)) and as from a day to be appointed under the Housing Act 2004 s 270(4), (5)(c) in relation to Wales; at the date at which this title states the law, no such day had been appointed). As to residential property tribunals and their jurisdiction under the Housing Act 2004 see ss 229, 230; and HOUSING vol 22 (2006 Reissue) PARAS 187-188. The following provisions apply to any application under the Housing Act 1985 Sch 5 para 11(4) (as substituted) in respect of a dwelling house in England which was made to the Secretary of State before 4 July 2005 and was not determined by him before that day: Housing Act 2004 s 181(4). If the application was made more than 28 days before that day, it was to be determined by the Secretary of State as if the amendments made by s 181 had not come into force: s 181(5). Otherwise the application is to be determined by a residential property tribunal, and the Secretary of State must make all such arrangements as he considers necessary for the purpose of, or in connection with, enabling it to be so determined: s 181(6). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante. For the meaning of 'tenant' see PARA 1300 note 1 ante.

The Housing Act 1985 Sch 5 para 11(4), (5) (as substituted and amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 66(e).

7 Housing Act 1985 Sch 5 para 11(1) (as substituted: see note 6 supra). As to the effect on this exception to the right to buy of the disposal and subsequent leaseback of the public sector landlord's interest in the premises under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) see s 37, Sch 10 para 2(4), (5)(b) (as amended); and PARA 1668 ante.

8 Housing Act 1985 Sch 5 para 11(6) (as substituted: see note 6 supra).

9 As to the right to acquire see PARAS 1804-1807 ante.

10 Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(d).

## UPDATE

### 1815 Certain dwelling houses for elderly persons

NOTE 6--Housing Act 1985 Sch 5 para 11(5B) amended: Housing and Regeneration Act 2008 s 310(1). See further s 310(2). Reference to the Lands Tribunal is now to the Upper Tribunal: Housing Act 1985 Sch 5 para 11(5B) (amended by SI 2009/1307).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1816. Dwelling houses held on Crown tenancies.

### 1816. Dwelling houses held on Crown tenancies.

The right to buy<sup>1</sup> does not arise if the dwelling house<sup>2</sup> is held by the landlord<sup>3</sup> on a tenancy from the Crown<sup>4</sup> unless:

- 4521 (1) the landlord is entitled to grant a lease<sup>5</sup> without the concurrence of the appropriate authority; or
- 4522 (2) the appropriate authority notifies the landlord that as regards any Crown interest affected the authority will give its consent to the granting of such a lease<sup>6</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For these purposes, 'tenancy from the Crown' means a tenancy of land in which there is a Crown interest superior to the tenancy; and 'Crown interest' and 'appropriate authority' mean respectively (1) an interest comprised in the Crown Estate, and the Crown Estate Commissioners or other government department having the management of the land in question; (2) an interest belonging to Her Majesty in right of the Duchy of Lancaster, and the Chancellor of the Duchy; (3) an interest belonging to the Duchy of Cornwall, and such person as the Duke of Cornwall or the possessor for the time being of the Duchy appoints; (4) any other interest belonging to a government department or held on behalf of Her Majesty for the purposes of a government department, and that department: Housing Act 1985 s 120, Sch 5 para 12(2). For the meaning of 'tenancy' see PARA 1300 note 1 ante. As to the Crown Estate Commissioners see CROWN PROPERTY vol 12(1) (Reissue) PARA 280.

5 In pursuance of ibid Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1819 et seq post. For the meaning of 'lease' see PARA 1300 note 1 ante.

6 Ibid Sch 5 para 12(1). Section 179(1) (as amended) (see PARA 1797 ante) is to be disregarded for the purposes of Sch 5 para 12(1)(a): Sch 5 para 12(3). The Housing Act 1985 Sch 5 para 12 is omitted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 66(f).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1817. Dwelling house due to be demolished within 24 months.

### **1817. Dwelling house due to be demolished within 24 months.**

The right to buy<sup>1</sup> does not arise if a final demolition notice is in force<sup>2</sup> in respect of the dwelling house<sup>3</sup>. A 'final demolition notice' is a notice:

- 4523 (1) stating that the landlord<sup>4</sup> intends to demolish the dwelling house or, as the case may be, the building containing it ('the relevant premises');
- 4524 (2) setting out the reasons why the landlord intends to demolish the relevant premises;
- 4525 (3) specifying the date by which he intends to demolish those premises ('the proposed demolition date') and the date when the notice will cease to be in force, unless extended<sup>5</sup>;
- 4526 (4) stating that one of conditions A to C below is satisfied in relation to the notice, specifying the condition concerned; and
- 4527 (5) stating that the right to buy does not arise in respect of the dwelling house while the notice is in force<sup>6</sup>.

If, at the time when the notice is served<sup>7</sup>, there is an existing claim to exercise the right to buy in respect of the dwelling house, the notice must, instead of complying with head (5) above, state that that claim ceases to be effective on the notice coming into force, but that there is a statutory right to compensation<sup>8</sup> in respect of certain expenditure, and the notice must also give details of that right to compensation and of how it may be exercised<sup>9</sup>.

The proposed demolition date must fall within the period of 24 months beginning with the date of service of the notice on the tenant<sup>10</sup>; and a final demolition notice is in force for these purposes in respect of the dwelling house concerned during the period of 24 months so mentioned, subject to compliance with the relevant statutory conditions in a case to which they apply<sup>11</sup> and to the provisions<sup>12</sup> allowing for an extension of that period<sup>13</sup>.

A final demolition notice may only be served for these purposes if one of conditions A to C is satisfied in relation to the notice<sup>14</sup>. Condition A is that the proposed demolition of the dwelling house does not form part of a scheme<sup>15</sup> involving the demolition of other premises<sup>16</sup>. Condition B is that:

- 4528 (a) the proposed demolition of the dwelling house does form part of a scheme involving the demolition of other premises; but
- 4529 (b) none of those other premises needs to be acquired by the landlord in order for the landlord to be able to demolish them<sup>17</sup>.

Condition C is that:

- 4530 (i) the proposed demolition of the dwelling house does form part of a scheme involving the demolition of other premises; and
- 4531 (ii) one or more of those premises need to be acquired by the landlord in order for the landlord to be able to demolish them; but
- 4532 (iii) in each case arrangements for their acquisition are in place<sup>18</sup>.

The Secretary of State<sup>19</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>20</sup> may, on an application by the landlord, give a direction extending or further extending the period during which a final demolition notice is in force in respect of a dwelling house<sup>21</sup>. Such a direction may provide that any extension of that period is not to have effect unless the landlord complies with such requirements relating to the service of further notices as are specified in the direction<sup>22</sup>; and may only be given at a time when the demolition notice is<sup>23</sup> in force<sup>24</sup>.

If, while a final demolition notice is in force:

- 4533 (A) the landlord decides not to demolish the dwelling house in question, he must, as soon as is reasonably practicable, serve a notice ('a revocation notice') on the tenant which informs him of the landlord's decision and that the demolition notice is revoked as from the date of service of the revocation notice<sup>25</sup>;
- 4534 (B) it appears to the Secretary of State or the Assembly or the relevant Welsh minister that the landlord has no intention of demolishing the dwelling house in question, he or it may serve a notice ('a revocation notice') on the tenant which informs him of the Secretary of State's or the Assembly's or minister's conclusion, and that the demolition notice is revoked as from the date of service of the revocation notice<sup>26</sup>; but the Secretary of State or the Assembly or minister may not serve a revocation notice unless he or it has previously served a notice on the landlord which informs him of the intention to serve the revocation notice<sup>27</sup>.

Where a revocation notice is served under head (A) or head (B) above, the demolition notice ceases to be in force as from the date of service of the revocation notice<sup>28</sup>.

Once a final demolition notice has, for any reason, ceased to be in force in respect of a dwelling house without it being demolished, no further final demolition notice may be served in respect of it during the period of five years following the time when the notice ceases to be in force, unless it is served with the consent of the Secretary of State or the Assembly or the relevant Welsh minister and the notice states that it is so served<sup>29</sup>. Such consent may be given subject to compliance with such conditions as the Secretary of State or the Assembly or minister may specify<sup>30</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 As to when such a notice is in force see the text and notes 11-13 infra.

3 Housing Act 1985 s 120, Sch 5 para 13(1) (Sch 5 paras 13-16 added by the Housing Act 2004 s 182(1); for transitional provisions see s 182(2)).

4 For the purposes of the Housing Act 1985 Sch 5 paras 13-15 (as added), any reference to the landlord, in the context of a reference to an intention or decision on his part to demolish or not to demolish any premises, or of a reference to the acquisition or transfer of any premises, includes a reference to a superior landlord: Sch 5 para 13(9) (as added: see note 3 supra). For the meaning of 'landlord' generally see PARA 1300 note 1 ante.

5 *Ie* under *ibid* Sch 5 para 15 (as added): see the text and notes 19-30 infra.

6 *Ibid* Sch 5 para 13(2) (as added: see note 3 supra).

7 Any notice under *ibid* Sch 5 para 13 or 15 (as added) may be served on a person: (1) by delivering it to him, by leaving it at his proper address or by sending it by post to him at that address; or (2) if the person is a body corporate, by serving it in accordance with head (1) supra on the secretary of the body: Sch 5 para 16(1) (as added: see note 3 supra). For these purposes and the Interpretation Act 1978 s 7 (service of documents by post) the proper address of a person on whom a notice is to be served is (a) in the case of a body corporate or its secretary, that of the registered or principal office of the body; and (b) in any other case, the last known address of that person: Housing Act 1985 Sch 5 para 16(2) (as so added).

8 *Ie* that *ibid* s 138C (as added) confers such a right: see PARA 1850 post.

9 *Ibid* Sch 5 para 13(3) (as added: see note 3 supra).

10 *Ibid* Sch 5 para 13(4) (as added: see note 3 supra). For the meaning of 'tenant' see PARA 1300 note 1 ante.

11 *Ie* subject to compliance with *ibid* Sch 5 para 13(6), (7) (as added: see note 3 supra). If (1) the dwelling house is contained in a building which contains one or more other dwelling houses; and (2) the landlord intends to demolish the whole of the building, the landlord must have served a final demolition notice on the occupier of each of the dwelling houses contained in it (whether addressed to him by name or just as 'the occupier'); but an accidental omission to serve a final demolition notice on one or more occupiers does not prevent this condition from being satisfied: Sch 5 para 13(6) (as so added). A notice stating that the landlord intends to demolish the relevant premises must have appeared: (a) in a local or other newspaper circulating in the locality in which those premises are situated (other than one published by the landlord); and (b) in any newspaper published by the landlord; and (c) on the landlord's website (if he has one): Sch 5 para 13(7) (as so added). The notice so mentioned must contain the following information: (i) sufficient information to enable identification of the premises that the landlord intends to demolish; (ii) the reasons why the landlord intends to demolish those premises; (iii) the proposed demolition date; (iv) the date when any final demolition notice or notices relating to those premises will cease to be in force, unless extended or revoked under Sch 5 para 15 (as added); (v) that the right to buy will not arise in respect of those premises or (as the case may be) in respect of any dwelling house contained in them; (vi) that there may be a right to compensation under s 138C (as added) (see PARA 1850 post) in respect of certain expenditure incurred in respect of any existing claim: Sch 5 para 13(8) (as so added).

12 *Ie* the provisions of *ibid* Sch 5 para 15(1)-(7) (as added): see the text and notes 19-28 infra.

13 *Ibid* Sch 5 para 13(5) (as added: see note 3 supra).

14 *Ibid* Sch 5 para 14(1) (as added: see note 3 supra).



15 For these purposes, 'scheme' includes arrangements of any description: *ibid* Sch 5 para 14(6) (as added: see note 3 *supra*).

16 *Ibid* Sch 5 para 14(2) (as added: see note 3 *supra*). For these purposes, 'premises' means premises of any description: Sch 5 para 14(6) (as so added).

17 *Ibid* Sch 5 para 14(3) (as added: see note 3 *supra*).

18 *Ibid* Sch 5 para 14(4) (as added: see note 3 *supra*). For these purposes, arrangements for the acquisition of any premises are in place if (1) an agreement under which the landlord is entitled to acquire the premises is in force; or (2) a notice to treat has been given in respect of the premises under the Compulsory Purchase Act 1965 s 5 (as amended) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 616); or (3) a vesting declaration has been made in respect of the premises under the Compulsory Purchase (Vesting Declarations) Act 1981 s 4 (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 687); Housing Act 1985 Sch 5 para 14(5) (as so added).

19 As to the Secretary of State see PARA 27 note 3 *ante*.

20 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 *ante*.

21 Housing Act 1985 Sch 5 para 15(1) (as added: see note 3 *supra*).

22 *Ibid* Sch 5 para 15(2) (as added: see note 3 *supra*).

23 *Ie* whether by virtue of *ibid* Sch 5 para 13 (as added) or Sch 5 para 15 (as added).

24 *Ibid* Sch 5 para 15(3) (as added: see note 3 *supra*).

25 *Ibid* Sch 5 para 15(4) (as added: see note 3 *supra*).

26 *Ibid* Sch 5 para 15(5) (as added: see note 3 *supra*). Section 169 (as amended) (see PARA 1910 *post*) applies in relation to the Secretary of State's or the Assembly etc's power under this provision as it applies in relation to his or its powers under the provisions mentioned in s 169: see Sch 5 para 15(5) (as so added).

27 *Ibid* Sch 5 para 15(6) (as added: see note 3 *supra*).

28 *Ibid* Sch 5 para 15(7) (as added: see note 3 *supra*).

29 *Ibid* Sch 5 para 15(8) (as added: see note 3 *supra*). See also PARA 1849 *post*.

30 *Ibid* Sch 5 para 15(9) (as added: see note 3 *supra*).

## UPDATE

### 1817 Dwelling house due to be demolished within 24 months

TEXT AND NOTES--Housing Act 1985 Sch 5 paras 13, 15, 16 amended, Sch 5 para 15A added: Housing and Regeneration Act 2008 Sch 13 paras 1-5, Sch 16. For transitional provision see Sch 13 para 14.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1818. Dwelling houses where the debt is equal to or greater than the purchase price plus the discount.

**1818. Dwelling houses where the debt is equal to or greater than the purchase price plus the discount.**

The right to acquire conferred by the Housing Act 1996<sup>1</sup> does not arise if the net debt<sup>2</sup> or the peak debt<sup>3</sup> attributable to the dwelling house<sup>4</sup> on the date of service of the tenant's notice claiming to exercise the right to acquire<sup>5</sup> is equal to or greater than the purchase price plus the discount<sup>6</sup>.

1 As to the right to acquire see PARAS 1804-1807 ante.

2 For these purposes, the net debt is the amount of the relevant costs, as defined infra, less the amount of public subsidy as defined infra: see the Housing Act 1985 s 120, Sch 5 para 13(2) (Sch 5 para 13 added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 40(e)). 'The relevant costs' means the costs incurred by the landlord in respect of the acquisition of the dwelling house, the construction of the dwelling house (including the costs of development works and the acquisition of land) but does not include the costs of (1) works of repair or maintenance; (2) works to deal with any defect affecting the dwelling house; (3) works of improvement where they are paid for on or after the date of service of the tenant's notice under the Housing Act 1985 s 122 (see PARA 1826 post) unless (a) the landlord has before that date entered into a written contract for the carrying out of the works; or (b) the tenant has agreed in writing to the carrying out of the works and either the works have been carried out no later than the date of service of the landlord's notice under s 125 (as amended) (landlord's notice of purchase price and other matters: see PARA 1829 post) or the works will be carried out under the proposed terms of the conveyance: Sch 5 para 13(4) (as so added). 'Public subsidy' means grant or other financial assistance of any kind used by the landlord in whole or in part in connection with the acquisition, construction (including the costs of development and the acquisition of land), repair, maintenance or improvement of the dwelling house where such grant or assistance is received from (i) the relevant authority under the Housing Act 1996 s 18 (as amended) (social housing grants: see HOUSING vol 22 (2006 Reissue) PARA 66); (ii) the Secretary of State or, in relation to Wales, the National Assembly for Wales under the Housing Grants, Construction and Regeneration Act 1996 s 126 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1504) under the programme designated 'City Challenge' in England and the programmes designated the 'Strategic Development Scheme' and 'Welsh Capital Challenge' in Wales; (iii) a local housing authority where grant is paid pursuant to an application by the landlord under the Local Government and Housing Act 1989 Pt VIII (repealed) or the Housing Grants, Construction and Regeneration Act 1996 Pt I Ch I (ss 1-59) (as amended) (grants etc for renewal of private sector housing: see HOUSING vol 22 (2006 Reissue) PARA 622 et seq); (iv) National Lottery; and (v) a local authority in a case where the local authority has conveyed the freehold or leasehold of land to the landlord at a price which is below the market value of the land at the time of the conveyance: Housing Act 1985 Sch 5 para 13(5) (as so added).

3 For these purposes the peak debt is the amount under a loan agreement, ie the portion of the maximum amount which the landlord may borrow under a loan agreement which is attributable to the dwelling house: *ibid* Sch 5 para 13(3) (as added: see note 2 supra). 'A loan agreement' means an agreement (1) for a loan between a lender and the landlord which is wholly or partly secured by a charge (however created or arising) on the landlord's interest in the dwelling house; (2) which specifies the portion of the maximum amount which the landlord may borrow in any period which is attributable to the dwelling house; and (3) which is for the purpose of the provision of moneys for use in connection with the acquisition of land held for housing purposes and housing stock pursuant to a disposal under s 32 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 305); and where a loan is for such a purpose it may include the construction of dwelling houses (including the costs of development works and the acquisition of land) and works of repair, maintenance or improvement to dwelling houses pursuant to such acquisition: Sch 5 para 13(6) (as so added).

4 For the meaning of 'dwelling house' see PARA 1796 ante.

5 Ie the notice under the Housing Act 1985 s 122: see PARA 1826 post.

6 *Ibid* Sch 5 para 13(1) (as added: see note 2 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iii) Exceptions; Suspension of Right/1819. Circumstances in which the right to buy cannot be exercised.

### **1819. Circumstances in which the right to buy cannot be exercised.**

The right to buy<sup>1</sup> cannot be exercised if:

4535 (1) the tenant<sup>2</sup> is obliged to give up possession of the dwelling house<sup>3</sup> in pursuance of an order of the court or will be so obliged at a date specified in the order<sup>4</sup>;

4536 (2) the person, or one of the persons, to whom the right to buy belongs has a bankruptcy petition<sup>5</sup> pending against him, is an undischarged bankrupt<sup>6</sup> or has made a composition or arrangement with his creditors<sup>7</sup> the terms of which remain to be fulfilled<sup>8</sup>.

The right to buy cannot be exercised at any time during the suspension period under a suspension order<sup>9</sup> made in respect of the secure tenancy<sup>10</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 Housing Act 1985 s 121(1). There is a potential clash of competing claims, namely that of a landlord for possession and that of the tenant to exercise the right to buy. The conflict is not to be resolved by a race to judgment or to execution of judgment: *Bristol City Council v Lovell* [1998] 1 All ER 775, [1998] 1 WLR 446, HL, overruling *Dance v Welwyn Hatfield District Council* [1990] 3 All ER 572, [1990] 1 WLR 1097, CA, and explaining *Taylor v Newham London Borough Council* [1993] 2 All ER 649, [1993] 1 WLR 444. The mere fact that the statutory conditions to exercise a right to buy are fulfilled does not dictate the priority of the competing claims: *Basildon District Council v Wahlen* [2006] EWCA Civ 326, [2006] 1 WLR 2744, [2006] All ER (D) 413 (Mar); and see *Martin v Medina Housing Association Ltd* [2006] EWCA Civ 367, [2006] 15 EG 134 (CS), [2006] All ER (D) 478 (Mar) (where the right to buy had been established but the stage had not been reached at which all matters relating to the grant had been agreed or determined). Where a landlord's application for possession and a tenant's application for the right to buy were scheduled together, it was held that the judge was correct to hear the application for possession first (see *Tandridge District Council v Bickers* (1998) 31 HLR 432, CA) and it has since been held that the cases in which it is right not to hear the claims together will be rare; if each claim is arguable it must be right to investigate the merits as a whole which will involve considering both cases at the same time (*Basildon District Council v Wahlen* supra). For guidance in balancing a sound case by a tenant for further implementation of his right to buy the property in question and, on the other hand, a good case for possession being reasonable on the ground that the accommodation afforded by the dwelling house is more extensive than is reasonable required by the tenant (ie the Housing Act 1985 s 84(2)(c), Sch 2 Pt III, Ground 16 (as amended): see PARA 1375 ante) see *Basildon District Council v Wahlen* supra; *Kensington and Chelsea London Borough Council v Hislop* [2003] EWHC 2944 (Ch), [2004] 1 All ER 1036, [2003] All ER (D) 113 (Dec). If a local authority needs to delay the statutory timetable applicable to the right to buy it is preferable for the authority to obtain the court's ruling on the appropriate order for determination of the rival proceedings but a refusal to process a tenant's notice did not require the court to consider the right to buy claim first: see *Tandridge District Council v Bickers* supra.

5 As to bankruptcy petitions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 124 et seq.

6 As to discharge from bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 629 et seq.

7 As to compositions and arrangements with creditors see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 859 et seq.

8 Housing Act 1985 s 121(2) (amended by the Insolvency Act 1985 s 235(3), Sch 10 Pt III).

9 ie an order made under the Housing Act 1985 s 121A (as added): see PARA 1820 post.

10 Ibid s 121(3) (added by the Housing Act 2004 s 192(1)).

## UPDATE

### 1819 Circumstances in which the right to buy cannot be exercised

TEXT AND NOTE 4--The right to buy cannot be exercised if the tenant is subject to an order of the court for possession of the dwelling house: Housing Act 1985 s 121(1) (substituted by Housing and Regeneration Act 2008 s 304(1)). See further s 304(2).

NOTE 4--The right to buy pursuant to a notice already served under the 1985 Act s 122 is not permanently lost once the tenant is obliged to deliver up possession; otherwise, a secure tenant who has served notice exercising his right to buy will lose the right to rely on the notice, however far advanced the exercise and however blameless he is for the triggering of s 121: *Knowsley Housing Trust v White; Honeygan-Green v Islington LBC; Porter v Shepherds Bush Housing Association* [2008] UKHL 70, [2008] All ER (D) 115 (Dec).

Although s 121(1) destroys a tenant's right to buy a dwelling house made subject to a possession order, it does not preclude the right to buy another dwelling house not subject to a possession order of which he becomes the tenant: *Manchester City Council v Benjamin* [2008] EWCA Civ 189, [2009] 1 All ER 798.

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## **1820. Order suspending right to buy because of anti-social behaviour.**

The court may, on the application of the landlord<sup>1</sup> under a secure tenancy<sup>2</sup>, make a suspension order in respect of the tenancy<sup>3</sup>. A suspension order is an order providing that the right to buy<sup>4</sup> may not be exercised in relation to the dwelling house<sup>5</sup> during such period as is specified in the order ('the suspension period')<sup>6</sup>.

The court will fix a date for the hearing when it issues the claim form<sup>7</sup>. The defendant must be served with the claim form and the particulars of claim not less than 21 days before the hearing date<sup>8</sup>. Where the defendant does not file a defence within the specified time<sup>9</sup> he may take part in any hearing but the court may take his failure to do so into account when deciding what order to make about costs<sup>10</sup>. The landlord may not obtain a default judgment<sup>11</sup>.

At the hearing fixed in accordance with the rules set out above<sup>12</sup> or at any adjournment of that hearing the court may either decide the claim or give case management directions<sup>13</sup>. Where the claim is genuinely disputed on grounds which appear to be substantial, case management directions so given will include the allocation of the claim to a track<sup>14</sup> or directions to enable it to be allocated<sup>15</sup>.

The court must not make a suspension order unless it is satisfied:

- 4537 (1) that the tenant<sup>16</sup>, or a person residing in or visiting the dwelling house, has engaged or threatened to engage in anti-social behaviour or use of premises for unlawful purposes<sup>17</sup>; and
- 4538 (2) that it is reasonable to make the order<sup>18</sup>.

When deciding whether it is reasonable to make the order, the court must consider, in particular:

- 4539 (a) whether it is desirable for the dwelling house to be managed by the landlord during the suspension period; and

- 4540 (b) where the conduct mentioned in head (1) above consists of conduct by a person which is capable of causing nuisance or annoyance, the effect that the conduct, or the threat of it, has had on other persons, or would have if repeated<sup>19</sup>.

Where a suspension order is made, any existing claim to exercise the right to buy in relation to the dwelling house ceases to be effective as from the beginning of the suspension period<sup>20</sup>, and the obligation to complete<sup>21</sup> does not apply to the landlord, in connection with such a claim, at any time after the beginning of that period<sup>22</sup>. The order does not, however, affect the computation<sup>23</sup> of any qualifying period<sup>24</sup>.

The court may, on the application of the landlord, make, on one or more occasions, a further order which extends the suspension period under the suspension order by such period as is specified in the further order<sup>25</sup>. The court must not make such a further order unless it is satisfied:

- 4541 (i) that, since the making of the suspension order, or the last order extending the suspension period<sup>26</sup>, the tenant, or a person residing in or visiting the dwelling house, has engaged or threatened to engage in such conduct as is described in head (1) above; and  
 4542 (ii) that it is reasonable to make the further order<sup>27</sup>.

When deciding whether it is reasonable to make such a further order, the court must consider, in particular:

- 4543 (A) whether it is desirable for the dwelling house to be managed by the landlord during the further period of suspension; and  
 4544 (B) where the conduct mentioned in head (i) above consists of conduct by a person which is capable of causing nuisance or annoyance, the effect that the conduct, or the threat of it, has had on other persons, or would have if repeated<sup>28</sup>.

A suspension order may be claimed in the alternative to a possession order, in which case there are different procedural rules<sup>29</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenancy' see PARA 1300 et seq ante.

3 Housing Act 1985 s 121A(1) (s 121A added by the Housing Act 2004 s 192(2)).

4 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

5 For the meaning of 'dwelling house' see PARA 1796 ante.

6 Housing Act 1985 s 121A(2) (as added: see note 3 supra). Where a suspension claim is, or both a suspension and a demotion claim are, made other than in a possession claim, CPR 65.14-CPR 65.19 apply: CPR 65.13. The claim must be made in the county court for the district in which the property to which the claim relates is situated; and the claim form and form of defence sent with it must be in the forms set out in the relevant practice direction: CPR 65.14(1), (2). The particulars of claim must be filed and served with the claim form: CPR 65.15. As to demotion claims see PARA 1351 ante.

7 CPR 65.16(1). The hearing date will be not less than 28 days from the date of issue of the claim form: CPR 65.16(2). The standard period between the issue of the claim form and the hearing will be not more than eight weeks: CPR 65.16(3). The court may extend or shorten the time for compliance with any rule and may adjourn or bring forward a hearing: see CPR 3.1(2)(a), (b); and CIVIL PROCEDURE VOL 11 (2009) PARAS 247, 249.

The court may use its powers under CPR 3.1(2)(a), (b) to shorten the time periods set out in CPR 65.16(2)-(4): *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 8.1. Particular consideration should be given to the exercise of this power if (1) the defendant, or a person for whom the defendant is responsible, has

assaulted or threatened to assault (a) the claimant; (b) a member of the claimant's staff; or (c) another resident in the locality; (2) there are reasonable grounds for fearing such an assault; or (3) the defendant, or a person for whom the defendant is responsible, has caused serious damage or threatened to cause serious damage to the property or to the home or property of another resident in the locality: para 8.2. Where para 8.2 applies but the case cannot be determined at the first hearing fixed under CPR 65.16, the court will consider what steps are needed to finally determine the case as quickly as reasonably practicable: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 8.3.

8 CPR 65.16(4). The claimant must use the appropriate claim form and particulars of claim form set out in *Practice Direction--Forms* PD 4 Table 1; and the defence must be in form N11D as appropriate: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 6.2. The claimant's evidence should include details of the conduct alleged and any other matters relied upon: para 6.3. An acknowledgement of service is not required and CPR Pt 10 (see CIVIL PROCEDURE vol 11 (2009) PARA 184 et seq) does not apply: CPR 65.17(1). Where the claimant serves the claim form and particulars of claim, he must produce at the hearing a certificate of service of those documents and CPR 6.14(2)(a) (see CIVIL PROCEDURE vol 11 (2009) PARA 151) does not apply: CPR 65.18(5).

In a suspension claim, the particulars of claim must (1) state that the suspension claim is a claim under the Housing Act 1985 s 121A (as added); (2) state which of the bodies the claimant's interest belongs to in order to comply with the landlord condition under s 80 (as amended) (see PARA 1300 ante); (3) identify the property to which the claim relates; (4) state details of the conduct alleged; and (5) explain why it is reasonable to make the order, having regard in particular to the factors set out in s 121A(4) (as added) (see heads (a)-(b) in the text): *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 7.2.

9 le the time specified in CPR 15.4: see CIVIL PROCEDURE vol 11 (2009) PARA 201.

10 CPR 65.17(2).

11 See CPR 65.17(3), disapplying CPR Pt 12 (default judgment: see CIVIL PROCEDURE vol 11 (2009) PARA 506 et seq).

12 le fixed in accordance with CPR 65.16(1): see the text and note 7 supra.

13 CPR 65.18(1). As to case management see generally CIVIL PROCEDURE vol 11 (2009) PARA 246 et seq. Except where the claim is allocated to the fast track or the multi-track, or the court directs otherwise, any fact that needs to be proved by the evidence of witnesses at a hearing referred to in CPR 65.18(1) may be proved by evidence in writing: CPR 65.18(3). All witness statements must be filed and served at least two days before the hearing: CPR 65.18(4). As to the general rule about evidence, which is subject to any provision to the contrary, see CPR 32.2(1), (2); and CIVIL PROCEDURE vol 11 (2009) PARA 979.

Each party should wherever possible include all the evidence he wishes to present in his statement of case, verified by a statement of truth: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 9.1. If (1) the maker of a witness statement does not attend a hearing; and (2) the other party disputes material evidence contained in the statement, the court will normally adjourn the hearing so that oral evidence can be given: para 9.3.

14 When the court decides the track for the claim, the matters to which it must have regard include: (1) the matters set out in CPR 26.8 (see CIVIL PROCEDURE vol 11 (2009) PARA 270); and (2) the nature and extent of the conduct alleged: CPR 65.19.

15 CPR 65.18(2).

16 For these purposes, any reference to the tenant under a secure tenancy is, in relation to a joint tenancy, a reference to any of the joint tenants: Housing Act 1985 s 121A(9) (as added: see note 3 supra). For the meaning of 'tenant' generally see PARA 1300 note 1 ante.

17 le has engaged in conduct to which the Housing Act 1996 s 153A (as added) or s 153B (as added) (injunctions against anti-social behaviour: see HOUSING vol 22 (2006 Reissue) PARA 268 et seq) applies. The claimant's evidence should include details of the conduct to which the Housing Act 1996 s 153A or s 153B (each as added) applies and in respect of which the suspension claim is made: *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 9.2.

18 Housing Act 1985 s 121A(3) (as added: see note 3 supra).

19 Ibid s 121A(4) (as added: see note 3 supra).

20 Ibid s 121A(5)(a) (as added: see note 3 supra).

21 le ibid s 138(1) (as amended): see PARA 1843 post.

- 22 Ibid s 121A(5)(b) (as added: see note 3 supra).
- 23 Ie in accordance with ibid ss 119(1), 129(1), Sch 4 (as amended): see PARA 1821 et seq post.
- 24 Ibid s 121A(5)(c) (as added: see note 3 supra).
- 25 Ibid s 121A(6) (as added: see note 3 supra).
- 26 Ie the last order under ibid s 121A(6) (as added).
- 27 Ibid s 121A(7) (as added: see note 3 supra).
- 28 Ibid s 121A(8) (as added: see note 3 supra). See also the Housing Act 2004 s 192(3), cited in PARA 1806 note 23 ante, PARA 1902 note 15 post.
- 29 See CPR 65.12. In such a case the claimant must use the procedure under CPR Pt 55 (see PARA 656 et seq ante) and CPR Pt 55 s 1 (CPR 55.2-CPR 55.10A) applies, except that the claim must be made in the county court for the district in which the property to which the claim relates is situated: CPR 65.12. If the claim relates to a residential property let on a tenancy and if the claim includes a suspension claim, the particulars of claim must (1) state that the suspension claim is a claim under the Housing Act 1985 s 121A (as added); (2) state which of the bodies the claimant's interest belongs to in order to comply with the landlord condition under s 80 (as amended) (see PARA 1300 ante); (3) state details of the conduct alleged; and (4) explain why it is reasonable to make the suspension order, having regard in particular to the factors set out in s 121A(4) (as added) (see heads (a)-(b) in the text): *Practice Direction--Anti-social Behaviour and Harassment* PD 65 para 5A.1.

## UPDATE

### 1820 Order suspending right to buy because of anti-social behaviour

NOTE 8--CPR 65.18(5) amended: SI 2008/2178.

TEXT AND NOTE 17--For 'conduct ...unlawful purposes' read 'housing-related anti-social conduct, or conduct to which the 1996 Act s 153B applies': 1985 Act s 121A(3) (s 121A(3) amended, s 121A(10) added by the Police and Justice Act 2006 Sch 14 para 13(2), (3)). In the 1985 Act s 121A(3), 'housing-related anti-social conduct' has the same meaning as in the 1996 Act s 153A: 1985 Act s 121A(10) (as so added).

TEXT AND NOTE 27--Ibid s 121(7) amended: 2006 Act Sch 14 para 13(2).

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## (iv) Qualifying Period

### 1821. In general.

The right to buy<sup>1</sup> does not arise unless the period which is to be taken into account<sup>2</sup> is at least five years<sup>3</sup>; but, where the secure tenancy<sup>4</sup> is a joint tenancy<sup>5</sup>, that condition need be satisfied with respect to one only of the joint tenants<sup>6</sup>.

A person exercising the right to buy is entitled to a discount of a percentage calculated by reference to the qualifying period for the right to buy<sup>7</sup>.

The period to be so taken into account for qualification for the right to buy and the right to a discount is the period qualifying, or the aggregate of the periods qualifying, under the provisions<sup>8</sup> set out in the following paragraphs<sup>9</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 In accordance with the Housing Act 1985 s 119(1) (as amended), s 129(1) (as substituted), Sch 4 (as amended) (see PARA 1822 et seq post) for the purposes of s 119 (as amended).

3 Ibid s 119(1) (amended by the Housing Act 2004 s 180(1)). That amendment does not, however, apply in relation to a secure tenancy (1) if the tenancy was entered into before, or in pursuance of an agreement made before, the day on which it came into force (ie 18 January 2005); or (2) if head (1) supra does not apply but the tenant is a public sector tenant on that day and does not cease to be such a tenant at any time before serving a notice in respect of the tenancy under the Housing Act 1985 s 122 (see PARA 1826 post); and for these purposes 'public sector tenant' has the same meaning as in Sch 4 (as amended) (see PARA 1823 post): Housing Act 2004 s 180(5), (6). In such cases, the original time limit of two years applies: see the Housing Act 1985 s 119(1) (as originally enacted).

4 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

5 As to the position where a secure tenancy is a joint tenancy see PARA 1803 ante.

6 Housing Act 1985 s 119(2). Section 119(2) is modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 4.

7 See the Housing Act 1985 s 129(1) (as substituted); and PARA 1839 post.

8 In the provisions of ibid Sch 4 paras 2-10 (as amended): see PARA 1822 et seq post.

9 Ibid Sch 4 para 1. Schedule 4 para 1 is substituted where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises, so as to read 'The period to be taken into account for the purposes of s 119 (qualification for the right to acquire) is the period qualifying, or the aggregate of the periods qualifying, under the following provisions of this Schedule': see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 39(a).

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## **1822. Periods occupying accommodation subject to public sector tenancy.**

A period qualifies for the right to buy<sup>1</sup> and the right to a discount<sup>2</sup> if it is a period during which, before the relevant time<sup>3</sup>, the secure tenant<sup>4</sup> or his spouse or civil partner, if they are living together at the relevant time, or a deceased spouse or deceased civil partner of his, if they were living together at the time of the death, was a public sector tenant<sup>5</sup> or was the spouse or civil partner of a public sector tenant and occupied as his only or principal home the dwelling house<sup>6</sup> of which the spouse or civil partner was such a tenant<sup>7</sup>.

Where the public sector tenant of a dwelling house died or otherwise ceased to be a public sector tenant of the dwelling house and thereupon a child of his<sup>8</sup> who occupied the dwelling house as his only or principal home (the 'new tenant') became the public sector tenant of the dwelling house, whether under the same or another public sector tenancy, then a period during which the new tenant, since reaching the age of 16, occupied as his only or principal home a dwelling house of which a parent of his was a public sector tenant or one of joint tenants under a public sector tenancy, being either:



- 4545 (1) the period at the end of which he became the public sector tenant; or  
 4546 (2) an earlier period ending two years or less before the period mentioned in head (1) above or before another period within this provision,

is treated<sup>9</sup> as a period during which he was a public sector tenant<sup>10</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 As to the right to a discount see PARA 1839 et seq post.

3 For these purposes, 'the relevant time', in relation to the exercise of the right to buy, means the date on which the notice of claim is served on the landlord: Housing Act 1985 s 122(1), (2). See further *Copping v Surrey County Council* [2005] EWCA Civ 1604, [2006] 1 EGLR 42, [2005] All ER (D) 340 (Dec), cited in PARA 1829 note 9 post.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

5 For the meaning of 'public sector tenant' see PARA 1823 post.

6 For the meaning of 'dwelling house' see PARA 1796 ante.

7 Housing Act 1985 s 119(1) (as amended), s 129(1) (as substituted), Sch 4 para 2 (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 34(a), (b)). For these purposes, a person who, as a joint tenant under a public sector tenancy, occupied a dwelling house as his only or principal home is treated as having been the public sector tenant under that tenancy: Sch 4 para 3. For the meaning of 'only or principal home' see PARA 1300 note 19 ante.

8 For these purposes, two persons are treated as parent and child if they would be so treated under *ibid* s 186(2) (as amended) (see PARA 1827 note 3 post): Sch 4 para 4(3).

9 *Ie* for the purposes of *ibid* Sch 4 para 2 (as amended).

10 *Ibid* Sch 4 para 4(1), (2).

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### **1823. Meaning of 'public sector tenant'.**

'Public sector tenant' means<sup>1</sup> a tenant<sup>2</sup> under a public sector tenancy<sup>3</sup>. A tenancy, other than a long tenancy<sup>4</sup>, under which a dwelling house<sup>5</sup> was let as a separate dwelling was a public sector tenancy at a time when the landlord condition<sup>6</sup> and the tenant condition<sup>7</sup> were satisfied<sup>8</sup>.

The landlord condition is<sup>9</sup> that the interest of the landlord belonged to, or to a predecessor of, a local authority<sup>10</sup>, a new town corporation<sup>11</sup>, a housing action trust<sup>12</sup>, the former Development Board for Rural Wales<sup>13</sup>, an urban development corporation<sup>14</sup>, the Housing Corporation<sup>15</sup> or the former Housing for Wales<sup>16</sup>, a registered social landlord<sup>17</sup> which is not a co-operative housing association<sup>18</sup>, the Secretary of State where that interest belonged to him as the result of the exercise by him of functions under Part III of the Housing Associations Act 1985<sup>19</sup> or to, or to a predecessor of, a corresponding authority or body<sup>20</sup> in Scotland and Northern Ireland<sup>21</sup>. The landlord condition is treated as having been satisfied:

- 4547 (1) in the case of a dwelling house comprised in a housing co-operative agreement<sup>22</sup> made, in England and Wales, by a local housing authority<sup>23</sup>, new town

corporation or the former Development Board for Rural Wales if the interest of the landlord belonged to the housing co-operative<sup>24</sup>; and  
 4548 (2) in such circumstances as may be prescribed for these purposes by order of the Secretary of State<sup>25</sup> or, in relation to Wales, by order of the National Assembly for Wales or the relevant Welsh minister<sup>26</sup>, if the interest of the landlord belonged to a person who is so prescribed<sup>27</sup>.

The tenant condition is that the tenant was an individual and occupied the dwelling house as his only or principal home<sup>28</sup> or, where the tenancy was a joint tenancy, that each of the joint tenants was an individual and at least one of them occupied the dwelling house as his only or principal home<sup>29</sup>. The tenant condition is not met during any period when a tenancy is<sup>30</sup> a demoted tenancy<sup>31</sup>.

1    le for the purposes of the Housing Act 1985 ss 119(1), 129(1), Sch 4 (as amended): see PARAS 1821-1822 ante, PARAS 1824-1825 post.

2    For the meaning of 'tenant' see PARA 1300 note 1 ante.

3    Housing Act 1985 Sch 4 para 6(1).

4    For these purposes, 'long tenancy' means a long tenancy within the meaning of *ibid* Pt IV (ss 79-117) (as amended) (see PARA 1303 ante) or a tenancy falling within the Housing (Northern Ireland) Order 1983, SI 1983/1118, Sch 2 para 1; and 'long lease' is to be construed accordingly: Housing Act 1985 s 187 (amended by the Housing (Scotland) Act 1987 s 339(2), (3), Sch 23 para 30(2), Sch 24).

5    For the meaning of 'dwelling house' see PARA 1796 ante.

6    le the condition described as the landlord condition in the Housing Act 1985 Sch 4 para 7 (as amended): see the text and notes 9-21 *infra*.

7    le the condition described as the tenant condition in *ibid* Sch 4 para 9: see the text and notes 28-29 *infra*.

8    *Ibid* Sch 4 para 6(2). The provisions of Sch 4 (as amended) apply in relation to a licence to occupy a dwelling house, whether or not granted for a consideration, as they apply in relation to a tenancy (Sch 4 para 6(3)); but Sch 4 para 6(3) does not apply to a licence granted as a temporary expedient to a person who entered the dwelling house or any other land as a trespasser, whether or not, before the grant of that licence, another licence to occupy that or another dwelling house had been granted to him (Sch 4 para 6(4)).

9    le subject to *ibid* Sch 4 para 7A (as added) and to any order under Sch 4 para 8: see heads (1)-(2) in the text.

10   For the meaning of 'local authority' see PARA 1300 note 8 ante.

11   For the meaning of 'new town corporation' see PARA 1300 note 9 ante.

12   For the meaning of 'housing action trust' see PARA 1300 note 10 ante.

13   As to the abolition of the Development Board for Rural Wales see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1309.

14   For the meaning of 'urban development corporation' see PARA 1300 note 11 ante.

15   As to the Housing Corporation see HOUSING vol 22 (2006 Reissue) PARA 18.

16   As to the abolition of Housing for Wales see HOUSING (2006 Reissue) PARA 5 note 3.

17   As to registered social landlords see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq.

18   For the meaning of 'co-operative housing association' see PARA 1300 note 17 ante. For the purpose of determining whether at any time a tenant of a housing association was a public sector tenant and his tenancy a public sector tenancy, the association is deemed to have been registered at that time, under the Housing Act 1996 Pt I (ss 1-64) (as amended) or the Housing Associations Act 1985 Pt I (ss 1-40 (as amended) or the corresponding Northern Ireland legislation, if it was so registered at any later time: Housing Act 1985 Sch 4 para

10 (amended by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2, PARA 14(32)).

19    Ie functions under the Housing Associations Act 1985 Pt III (ss 74-102) (as amended): see HOUSING vol 22 (2006 Reissue) PARA 18 et seq.

20    Ie an authority or body falling within the Housing Act 1985 Sch 4 para 7(2) or (3) (as amended).

21    Ibid Sch 4 para 7(1) (amended by the Housing and Planning Act 1986 s 24(2), (3), Sch 5 para 40(1), (3) (a), Sch 12 Pt I; the Housing Act 1988 ss 83(1), (7), Sch 17 para 106; the Government of Wales Act 1998 s 140, Sch 16 para 22; and by the Housing Act 1996 (Consequential Provisions) Order 1996, SI 1996/2325, art 5, Sch 2 para 14(32); the Government of Wales Act 1998 (Housing) (Amendments) Order 1999, SI 1999/61, art 2, Schedule para 2).

22    For these purposes, 'housing co-operative agreement' has the same meaning as in the Housing Act 1985 s 27B (as substituted and amended) (see HOUSING vol 22 (2006 Reissue) PARA 259): Sch 4 para 7A(2)(a) (Sch 7 para 7A added by the Housing and Planning Act 1986 Sch 5 para 40(1), (4)).

23    For the meaning of 'local housing authority' see PARA 1311 note 4 ante.

24    Housing Act 1985 Sch 4 para 7A(1)(a) (as added: see note 22 supra). For these purposes, 'housing co-operative' has the same meaning as in s 27B (as substituted and amended): Sch 4 para 7A(2)(a) (as so added).

25    As to the Secretary of State see PARA 27 note 3 ante.

26    As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

27    Housing Act 1985 Sch 4 para 8(1). Such an order (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: Sch 4 para 8(2). In exercise of the power so conferred the Secretary of State made the Housing (Right to Buy) (Prescribed Persons) Order 1992, SI 1992/1703 (as amended), which came into force on 17 August 1992: art 1. For the persons and bodies prescribed for these purposes see art 3, Schedule (which has been extensively amended).

28    For the meaning of 'only or principal home' see PARA 1300 note 19 ante.

29    Housing Act 1985 Sch 4 para 9.

30    Ie by virtue of the Housing Act 1988 s 20B (as added) (see PARA 1050 ante) or the Housing Act 1996 s 143A (as added) (see PARA 1376 ante).

31    Housing Act 1985 Sch 4 para 9A (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 2(1), (5)).

## UPDATE

### 1823 Meaning of 'public sector tenant'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

TEXT AND NOTES 21-24--Housing Act 1985 Sch 4 para 7(1) further amended, Sch 4 para 7B added: SI 2008/3002. See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iv) Qualifying Period/1824. Periods occupying forces accommodation.

## **1824. Periods occupying forces accommodation.**

A period qualifies for the right to buy<sup>1</sup> and the right to a discount<sup>2</sup> if it is a period during which before the relevant time<sup>3</sup> the secure tenant<sup>4</sup> or his spouse or civil partner, if they are living together at the relevant time, or a deceased spouse or deceased civil partner of his, if they were living together at the time of the death, occupied accommodation provided for him as a member of the regular armed forces of the Crown or was the spouse or civil partner of a person occupying accommodation so provided and also occupied that accommodation<sup>5</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 As to the right to a discount see PARA 1839 et seq post.

3 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also 1795 note 2 ante.

5 Housing Act 1985 s 119(1) (as amended), s 129(1) (as substituted), Sch 4 para 5 (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 34(a), (b)).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(iv) Qualifying Period/1825. Periods during which right to buy is preserved.

## **1825. Periods during which right to buy is preserved.**

A period qualifies for the right to buy<sup>1</sup> and the right to a discount<sup>2</sup> if it is a period during which, before the relevant time<sup>3</sup>:

- 4549 (1) the qualifying person<sup>4</sup>; or
- 4550 (2) his spouse or civil partner, if they are living together at the relevant time;
- or
- 4551 (3) a deceased spouse or deceased civil partner of his, if they were living together at the time of the death,

was a qualifying person for the purposes of the preserved right to buy<sup>5</sup> or was the spouse or civil partner of such a person and occupied the qualifying dwelling house<sup>6</sup> as his only or principal home<sup>7</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante.

2 As to the right to a discount see PARA 1839 et seq post.

3 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

4 For the meaning of 'qualifying person' see PARA 1903 note 4 post.

5 As to the cases in which the right to buy is preserved see PARA 1900 post.

6 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 post.

7 Housing Act 1985 s 119(1) (as amended), s 129(1) (as substituted), Sch 4 para 5A (added by the Housing and Planning Act 1986 s 24(2), Sch 5 para 40(1), (2); amended by the Civil Partnership Act 2004 s 81, Sch 8 para 34(a), (b)). For the meaning of 'only or principal home' see PARA 1300 note 19 ante. The Housing Act 1985 Sch 4 para 5A (as so added and amended) is omitted where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises: see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 39(b).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(v) Claim to Exercise the Right to Buy or Right to Acquire/A. TENANT'S NOTICE OF CLAIM/1826. Tenant's notice claiming to exercise right.

## **(v) Claim to Exercise the Right to Buy or Right to Acquire**

### **A. TENANT'S NOTICE OF CLAIM**

#### **1826. Tenant's notice claiming to exercise right.**

A secure tenant<sup>1</sup> claims to exercise the right to buy<sup>2</sup> by written notice to that effect served on the landlord<sup>3</sup>; and the notice may be withdrawn at any time by notice in writing served on the landlord<sup>4</sup>.

Where the extended right to buy arises<sup>5</sup>, the notice may be withdrawn by notice in writing served on the landlord or on the freeholder, depending on whether or not the tenant has received the freeholder's notice admitting or denying that right<sup>6</sup>. In such cases, where a notice claiming to exercise the right to buy is served by the tenant, the landlord must, as soon as practicable:

- 4552 (1) serve a copy of the notice on the authority or body which is its landlord in relation to the dwelling house; and
- 4553 (2) serve on the tenant a notice in writing that this has been done and of the name and address of that authority or body<sup>7</sup>.

If the authority or body referred to in head (1) above is an intermediate landlord, it must in turn serve a copy of the notice on the authority or body which is its immediate landlord in relation to the dwelling house, and so on, if that authority or body is also an intermediate landlord<sup>8</sup>. The landlord and each of the intermediate landlords, if any, must, at the same time as it serves on its landlord the copy of the tenant's notice, notify that authority or body whether to its knowledge there are any reasons for denying the tenant's right to buy and, if there are, state those reasons<sup>9</sup>. When an intermediate landlord so notifies its immediate landlord whether there are any reasons for denying the tenant's right to buy, it must send with that notification the notification or notifications which it has received<sup>10</sup> from the landlord or from any other intermediate landlord or landlords<sup>11</sup>. An authority or body which serves a copy of the tenant's notice on another authority or body<sup>12</sup> must at the same time notify the landlord and the tenant that this has been done and the name and address of the other authority or body<sup>13</sup>.

Where the preserved right to buy arises<sup>14</sup>, then where the qualifying dwelling house<sup>15</sup> is occupied by two or more qualifying persons<sup>16</sup> as joint tenants the right to buy may be exercised by such one or more of them as may be agreed between them<sup>17</sup>.

Where the right to acquire conferred by the Housing Act 1996 arises<sup>18</sup>, then the tenant must not make an application to acquire the dwelling house under that Act at any time when he has made an application to buy under Part V of the Housing Act 1985<sup>19</sup>, as it applies in relation to

the right to buy and the preserved right to buy, which has not been withdrawn by the tenant or denied by the landlord; but nothing in this provision prevents the tenant withdrawing such an application and submitting an application<sup>20</sup> under the 1996 Act right to acquire<sup>21</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3 Housing Act 1985 s 122(1). For the meaning of 'landlord' see PARA 1300 note 1 ante. For the prescribed form of notice claiming the right to buy see the Housing (Right to Buy) (Prescribed Forms) Regulations 1986, SI 1986/2194, reg 2, Sch 1, Form RTB1 (substituted in relation to England by SI 2005/2876); as originally made and extensively amended in relation to Wales. A form substantially to the like effect may be used: see the Housing (Right to Buy) (Prescribed Forms) Regulations 1986, SI 1986/2194, reg 2. For the prescribed form of notice in Welsh which may be used as an alternative see the Housing (Right to Buy) (Prescribed Forms) (Welsh Forms) Regulations 1994, SI 1994/2932, reg 2, Sch 1, Form RTB1. A form substantially to the like effect may be used: see reg 3.

The prescribed form is properly served when it is received by an agent of the authority who is authorised to receive it on the authority's behalf: *Terry v Tower Hamlets London Borough Council* [2005] EWHC 2783 (QB), [2005] All ER (D) 37 (Dec). As to service of notices see generally para 1801 ante.

4 Housing Act 1985 s 122(3). Mere inactivity on the part of the tenant is not sufficient to entitle the landlord to treat the application as withdrawn: see *Hanoman v Southwark London Borough Council* [2004] EWHC 2039 (Ch), [2005] 1 All ER 795, [2004] All ER (D) 243 (Jun) (local housing authority had no power to treat the application to exercise the right to buy as withdrawn because the tenant had failed to provide information requested by the authority in relation to his entitlement within a short period of time under a unilaterally imposed deadline). Where, however, there is not just lengthy inactivity but an express representation to the local authority that the tenant does not intend to proceed with the purchase, this is, in effect, an express release and the authority is entitled to conclude that the claim to buy has been cancelled: see *Martin v Medina Housing Association Ltd* [2006] EWCA Civ 367, [2006] 15 EG 134 (CS), [2006] All ER (D) 478 (Mar). Further, where the tenant does not proceed with the claim for a number of years, the landlord is entitled to interpret his failure to take any further steps as meaning that he has decided not to proceed: see *Copping v Surrey County Council* [2005] EWCA Civ 1604, [2006] 1 EGLR 42, [2005] All ER (D) 340 (Dec), per curiam.

5 See PARA 1798 ante.

6 See PARA 1828 post. The Housing Act 1985 s 122(3) does not apply: see the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 2.

7 Housing Act 1985 s 122A(1) (s 122A added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 3).

8 Housing Act 1985 s 122A(2) (as added: see note 7 supra).

9 Ibid s 122A(3) (as added: see note 7 supra).

10 Ie under ibid s 122A(3) (as added).

11 Ibid s 122A(4) (as added: see note 7 supra).

12 Ie in accordance with ibid s 122A(2) (as added): see the text and note 8 supra).

13 Ibid s 122A(5) (as added: see note 7 supra).

14 See PARA 1900 et seq post.

15 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 post.

16 For the meaning of 'qualifying person' see PARA 1903 note 4 post.

17 Housing Act 1985 s 122(4) (as added for these purposes by the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2(1), Sch 1 para 5).

18 See PARAS 1804-1807 ante.

19 Ie under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1796 et seq ante, PARA 1827 et seq post.

20     le an application under the Housing Act 1996 s 16 (as amended): see PARA 1805 ante.

21     Housing Act 1985 s 122(4) (as added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 4). The provisions of the Housing Act 1985 Pt V (as amended) would then apply with the prescribed modifications: see PARA 1806 ante.

## UPDATE

### 1826 Tenant's notice claiming to exercise right

NOTE 3--SI 1986/2194 Sch 1 Form RTB1 now substituted in relation to England by SI 2007/784.

SI 1986/2194 Sch 1 further amended: SI 2008/2831.

See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 1827. Claim to share right with members of family.

A secure tenant<sup>1</sup> may in his notice claiming to exercise the right to buy<sup>2</sup> require that not more than three members of his family<sup>3</sup> who are not joint tenants but occupy the dwelling house<sup>4</sup> as their only or principal home<sup>5</sup> should share the right to buy with him<sup>6</sup>. He may validly do so in the case of any such member only if:

- 4554 (1) that member is his spouse, is his civil partner or has been residing with him throughout the period of 12 months ending with the giving of the notice; or
- 4555 (2) the landlord<sup>7</sup> consents<sup>8</sup>.

Where, by such a notice, any members of the tenant's family are validly required to share the right to buy with the tenant, the right belongs to the tenant and those members jointly; and he and they are treated<sup>9</sup> as joint tenants<sup>10</sup>.

1     For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2     le his notice under the Housing Act 1985 s 122: see PARA 1826 ante. For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3     For these purposes, a person is a member of another's family if (1) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners; or (2) he is that person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece: *ibid* s 186(1) (s 186(1), (2) amended by the Civil Partnership Act 2004 s 81, Sch 8 para 27(1)-(3)). For the purposes of head (2) *supra*: (a) a relationship by marriage or by civil partnership is treated as a relationship by blood; (b) a relationship of the half-blood is treated as a relationship of the whole blood; (c) the stepchild of a person is treated as his child; and (d) an illegitimate child is treated as the legitimate child of his mother and reputed father: Housing Act 1985 s 186(2) (as so amended).

4     For the meaning of 'dwelling house' see PARA 1796 ante.

5 For the meaning of 'only or principal home' see PARA 1300 note 19 ante.

6 Housing Act 1985 s 123(1). See *Harrow London Borough Council v Tonge* [1993] 1 EGLR 49, (1992) 25 HLR 99, CA (tenant holding secure tenancy qualified to exercise right to buy; written notice claiming the right to buy required that the tenant's daughter should share that right; secure tenant died; daughter deemed to be a secure joint tenant and entitled to exercise the right to buy).

7 For the meaning of 'landlord' see PARA 1300 note 1 ante.

8 Housing Act 1985 s 123(2) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 28). The Housing Act 1985 123(2) (as so amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 4.

9 le for the purposes of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1828 et seq post.

10 Ibid s 123(3). Section 123(3) is substituted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 6.

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## **B. LANDLORD'S NOTICES IN RESPONSE**

### **1828. Landlord's notice admitting or denying right to buy.**

Where a notice claiming to exercise the right to buy<sup>1</sup> has been served by the tenant<sup>2</sup>, the landlord<sup>3</sup> must, unless the notice is withdrawn, serve on the tenant within the specified period<sup>4</sup> a written notice either:

- 4556 (1) admitting his right; or
- 4557 (2) denying it and stating the reasons why, in the opinion of the landlord, the tenant does not have the right to buy<sup>5</sup>.

Where the right to acquire conferred by the Housing Act 1996 arises<sup>6</sup>, and the landlord, in his notice under the above provisions, admits the tenant's right to acquire, he may offer to make a disposal to that tenant of an alternative dwelling house<sup>7</sup>. The tenant may refuse the landlord's offer of an alternative dwelling house<sup>8</sup>; but if he accepts it, the provisions of Part V of the Housing Act 1985<sup>9</sup> apply to the alternative dwelling house<sup>10</sup>.

Where, however, the extended right to buy arises<sup>11</sup>, the following provisions apply in substitution for those set out above. Where the freeholder receives<sup>12</sup> a copy of the secure tenant's notice claiming to exercise right to buy<sup>13</sup>, and the notice has not been withdrawn, the freeholder must serve on the tenant, within the specified period<sup>14</sup>, a written notice either:

- 4558 (a) admitting his right; or
- 4559 (b) denying it and stating why, in the opinion of the freeholder, the tenant does not have the right to buy<sup>15</sup>.

The freeholder must, as soon as practicable, serve on the landlord and on each of the intermediate landlords, if any, a copy of the notice so served on the tenant<sup>16</sup>. If the tenant wishes to withdraw a notice claiming to exercise the right to buy before he has received the



freeholder's notice admitting or denying that right, he may do so by notice in writing served on the landlord<sup>17</sup>. Where the landlord receives the tenant's notice of withdrawal after it has served on its landlord a copy of the tenant's notice claiming to exercise the right to buy, it must, as soon as practicable, serve on its landlord a copy of the notice of withdrawal<sup>18</sup>. An intermediate landlord must, in turn, similarly serve on its immediate landlord a copy of the tenant's notice of withdrawal<sup>19</sup>. If, however, the tenant wishes to withdraw his notice claiming to exercise the right to buy after he has received the freeholder's notice admitting or denying the right, he may do so by a notice in writing served on the freeholder<sup>20</sup>. Where the tenant serves a notice of withdrawal on the freeholder, the freeholder must, as soon as practicable, inform the landlord and the intermediate landlords, if any, of this fact<sup>21</sup>.

1     I.e. a notice under the Housing Act 1985 s 122: see PARA 1826 ante. For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2     For the meaning of 'tenant' see PARA 1300 note 1 ante.

3     For the meaning of 'landlord' see PARA 1300 note 1 ante.

4     The period so specified for serving a notice is four weeks where the requirement of the Housing Act 1985 s 119 (as amended) (see PARA 1821 ante) is satisfied by a period or periods during which the landlord was the landlord on which the tenant's notice under s 122 was served, and eight weeks in any other case: s 124(2).

5     Ibid s 124(1). For the prescribed form of notice in reply to a tenant's right to buy claim see the Housing (Right to Buy) (Prescribed Forms) Regulations 1986, SI 1986/2194, reg 3, Sch 2, Form RTB2 (substituted in relation to England by SI 2005/1736; as originally made and substantially amended in relation to Wales). A form substantially to the like effect may be used: see the Housing (Right to Buy) (Prescribed Forms) Regulations 1986, SI 1986/2194, reg 3. For the prescribed form of notice in Welsh which may be used as an alternative see the Housing (Right to Buy) (Prescribed Forms) (Welsh Forms) Regulations 1994, SI 1994/2932, reg 2, Sch 1, Form RTB2. A form substantially to the like effect may be used: see reg 3.

The duty under the Housing Act 1985 s 124 (as amended) is a continuing duty and there is no duty on the tenant to do anything other than wait for the landlord's decision: see *Hanoman v Southwark London Borough Council* [2004] EWHC 2039 (Ch), [2005] 1 All ER 795, [2004] All ER (D) 243 (Jun) (local housing authority had no power to treat the application to exercise the right to buy as withdrawn because the tenant had failed to provide information requested by the authority in relation to his entitlement within a short period of time under a unilaterally imposed deadline). Cf, however, *Copping v Surrey County Council* [2005] EWCA Civ 1604, [2006] 1 EGLR 42, [2005] All ER (D) 340 (Dec).

6     See PARAS 1804-1807 ante.

7     Housing Act 1985 s 124A(1) (s 124A as added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 5). For the meaning of 'dwelling house' see PARA 1796 ante.

8     Housing Act 1985 s 124A(2) (as added: see note 7 supra).

9     I.e. ibid Pt V (ss 118-188) (as amended and as modified for these purposes): see PARA 1796 et seq ante, PARA 1829 et seq post.

10    Ibid s 124A(3) (as added: see note 7 supra).

11    See PARA 1798 ante.

12    I.e. in pursuance of the Housing Act 1985 s 122A (as added) (tenant's notice to be served on superior landlords): see PARA 1826 ante. For the meaning of 'freeholder' see PARA 1798 note 19 ante.

13    I.e. the notice under ibid s 122: see PARA 1826 ante.

14    The period for serving such a notice is eight weeks beginning on the day after the date of the service on the freeholder of the copy of the tenant's notice claiming to exercise the right to buy: ibid s 124(2) (ss 124 substituted and s 124A added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3, Schedule, PARAS 5, 6).

15    Housing Act 1985 s 124(1) (as substituted: see note 14 supra).

16 Ibid s 124(3) (as substituted: see note 14 supra). For the meaning of 'intermediate landlord' see PARA 1798 note 18 ante.

17 Ibid s 124A(1) (as added: see note 14 supra).

18 Ibid s 124A(2) (as added: see note 14 supra).

19 Ibid s 124A(3) (as added: see note 14 supra).

20 Ibid s 124A(4) (as added: see note 14 supra).

21 Ibid s 124A(5) (as added: see note 14 supra).

## UPDATE

### 1828 Landlord's notice admitting or denying right to buy

NOTE 5--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 1829. Landlord's notice of purchase price and other matters.

Where a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup> and that right has been established, whether by the landlord's<sup>3</sup> admission or otherwise, the landlord must:

- 4560 (1) within eight weeks where the right is to acquire the freehold<sup>4</sup>; and
- 4561 (2) within 12 weeks where the right is to acquire a leasehold interest<sup>5</sup>,

serve on the tenant a notice complying with the following provisions<sup>6</sup>.

The notice must describe the dwelling house<sup>7</sup>, must state the price at which, in the opinion of the landlord, the tenant is entitled to have the freehold conveyed or, as the case may be, the lease<sup>8</sup> granted to him and must, for the purpose of showing how the price has been arrived at, state:

- 4562 (a) the value at the relevant time<sup>9</sup>;
- 4563 (b) the improvements<sup>10</sup> disregarded<sup>11</sup> in determining value; and
- 4564 (c) the discount to which the tenant is entitled, stating the period to be taken into account<sup>12</sup> for the discount and, where applicable, the reduction for previous discount<sup>13</sup> or the limits<sup>14</sup> on the amount of discount<sup>15</sup>.

The notice must state the provisions which, in the opinion of the landlord, should be contained in the conveyance or grant<sup>16</sup>.

Where the notice states provisions which would enable the landlord to recover from the tenant service charges<sup>17</sup> or improvement contributions<sup>18</sup>, the notice must contain the estimates and other information<sup>19</sup> required<sup>20</sup>.

The notice must contain a description of any structural defect<sup>21</sup> known to the landlord affecting the dwelling house or the building in which it is situated or any other building over which the tenant will have rights under the conveyance or lease<sup>22</sup>.

The notice must also inform the tenant of:

- 4565 (i) the effect of the statutory provisions relating to the tenant's notice of intention<sup>23</sup>, the landlord's notice in default<sup>24</sup> and the effect of failure to comply<sup>25</sup>;
- 4566 (ii) his right<sup>26</sup> to have the value of the dwelling house at the relevant time determined or redetermined by the district valuer;
- 4567 (iii) the effect of the statutory provisions relating to a change of tenant<sup>27</sup> after service of the tenant's notice of intention;
- 4568 (iv) the effect of the statutory provisions relating to the landlord's notices to complete<sup>28</sup> and the effect of failure to comply<sup>29</sup>;
- 4569 (v) the effect of the statutory provisions relating to the right to acquire on rent to mortgage terms, where still exercisable<sup>30</sup>; and
- 4570 (vi) the relevant amount and multipliers for the time being declared<sup>31</sup> by the Secretary of State<sup>32</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>33</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 Ie where the right is that mentioned in the Housing Act 1985 s 118(1)(a): see PARA 1803 ante at head (1) in the text.

5 Ie where the right is that mentioned in *ibid* s 118(1)(b): see PARA 1803 ante at head (2) in the text.

6 *Ibid* s 125(1).

7 For the meaning of 'dwelling house' see PARA 1796 ante.

8 For the meaning of 'lease' see PARA 1300 note 1 ante.

9 For the meaning of 'the relevant time' see PARA 1822 note 3 ante. For these purposes, a tenant can only use the date on which his notice claiming the right to buy was served as the valuation date of the property if his right to buy that property is established pursuant to the Housing Act 1985 Pt V (as amended) in connection with that notice: see *Copping v Surrey County Council* [2005] EWCA Civ 1604, [2006] 1 EGLR 42, [2005] All ER (D) 340 (Dec) (relevant date was date of service of notice in 2001, not date of service of earlier notice of claim in 1991 which had not been proceeded with, although it had not been formally withdrawn).

10 For these purposes, 'improvement' means, in relation to a dwelling house, any alteration in, or addition to, the dwelling house and includes (1) any addition to, or alteration in, the landlord's fixtures and fittings and any addition to or alteration connected with the provision of services to the dwelling house; (2) the erection of a wireless or television aerial; and (3) the carrying out of external decoration; and is to be similarly construed in relation to any other building or land: Housing Act 1985 s 187 (amended by the Housing and Planning Act 1986 s 24(2), Sch 5 para 30(1), (2)).

11 Ie in pursuance of the Housing Act 1985 s 127 (as amended): see PARA 1837 post.

12 Ie under *ibid* s 129 (as amended): see PARA 1839 post.

13 Ie the amount mentioned in *ibid* s 130(1): see PARA 1840 post.

14 Ie the limits in *ibid* s 131(1) (as amended) or s 131(2): see PARA 1841 post.

15 *Ibid* s 125(2). It has been held that a local authority owes no common law duty of care to the tenant when stating its opinion as to the purchase price in a notice under s 125 (as amended): see *Blake v Barking and Dagenham London Borough Council* (1996) 30 HLR 963, [1996] EGCS 145.

16 Housing Act 1985 s 125(3).

17 For these purposes, 'service charge' means an amount payable by a purchaser or lessee of premises (1) which is payable, directly or indirectly, for services, repairs, maintenance or insurance or the vendor's or lessor's costs of management; and (2) the whole or part of which varies or may vary according to the relevant costs: *ibid* s 621A(1) (s 621A added by the Housing and Planning Act 1986 s 24(2), Sch 5 para 39). The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the payee or, in the case of a lease, a superior landlord, in connection with the matters for which the service charge is payable: Housing Act 1985 s 621A(2) (as so added). For these purposes, 'costs' includes overheads; and costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period: s 621A(3) (as so added). In relation to a service charge, the 'payee' means the person entitled to enforce payment of the charge; and the 'payer' means the person liable to pay it: s 621A(4) (as so added).

18 For these purposes, 'improvement contribution' means an amount payable by a tenant of a flat in respect of improvements to the flat, the building in which it is situated or any other building or land, other than works carried out in discharge of any such obligations as are referred to in *ibid* s 139(1), s 151(1) (as substituted), Sch 6 para 16A(1) (as added) (see PARA 1861 post): s 187 (definition added by the Housing and Planning Act 1986 s 24(2), Sch 5 para 30(1), (3)). For the meaning of 'flat' see PARA 1796 ante.

19 *Ie* the estimates and other information required by the Housing Act 1985 s 125A (as added) (see PARA 1830 post) or s 125B (as added) (see PARA 1831 post).

20 *Ibid* s 125(4) (substituted by the Housing and Planning Act 1986 s 4(1)).

21 Structural defects are defects affecting the structure which require making good as opposed to ordinary items of repair and maintenance: *Payne and Woodland v Barnet London Borough Council* (1997) 76 P & CR 293, 30 HLR 295, CA.

22 Housing Act 1985 s 125(4A) (added by the Housing and Planning Act 1986 s 24(1)(c), Sch 5 para 3). This provision imposes on the landlord an unqualified obligation to give notice of any relevant structural defect known to him, whether or not he wishes to recover from the tenant any part of the cost of putting it right; but there is otherwise no change in the normal relationship between the parties prior to the grant of a long lease and no wider duty of care imposed on the landlord: see *Payne and Woodland v Barnet London Borough Council* (1997) 76 P & CR 293, 30 HLR 295, CA. Failure to disclose this information is a breach of statutory duty but does not give rise to an additional claim for misrepresentation: *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] HLR 188, [2001] All ER (D) 195 (Mar).

23 *Ie* the effect of the Housing Act 1985 s 125D (as added): see PARA 1832 post.

24 *Ie* the effect of *ibid* s 125E(1) (as added): see PARA 1833 post.

25 *Ie* the effect of *ibid* s 125E(4) (as added): see PARA 1833 post.

26 *Ie* under *ibid* s 128 (as amended): see PARA 1838 post.

27 *Ie* the effect of *ibid* s 136(2) (as substituted): see PARA 1834 post.

28 *Ie* the effect of *ibid* s 140 (as amended) (see PARA 1870 post) and s 141(1), (2) (see PARA 1871 post).

29 *Ie* the effect of *ibid* s 141(4): see PARA 1871 post.

30 *Ie* *ibid* ss 143-153 (as amended): see PARA 1872 et seq post.

31 *Ie* for the purposes of *ibid* s 143B (as substituted): see PARA 1872 post.

32 As to the Secretary of State see PARA 27 note 3 ante.

33 Housing Act 1985 s 125(5) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 104). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

The Housing Act 1985 s 125 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 7); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 7); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply: see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 6).

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### **1830. Estimates and information about service charges.**

A landlord's notice<sup>1</sup> must state<sup>2</sup> as regards service charges<sup>3</sup>:

- 4571 (1) the landlord's estimate of the average annual amount, at current prices, which would be payable in respect of each head of charge in the reference period<sup>4</sup>; and
- 4572 (2) the aggregate of those estimated amounts,

and must contain a statement of the reference period adopted for the purpose of the estimates<sup>5</sup>.

A landlord's notice given in respect of a flat must, however, as regards service charges in respect of repairs, including works for the making good of structural defects, contain:

- 4573 (a) the further estimates required<sup>6</sup>, together with a statement of the reference period adopted for the purpose of the estimates; and
- 4574 (b) a statement of the effect of the statutory restrictions on service charges<sup>7</sup> by reference to the estimates of the amounts payable by the tenant<sup>8</sup> and the statutory right to a loan<sup>9</sup> in respect of certain service charges<sup>10</sup>.

The following further estimates are required for works in respect of which the landlord considers that costs may be incurred in the reference period:

- 4575 (i) for works itemised in the notice, estimates of the amount, at current prices, of the likely cost of, and of the tenant's likely contribution in respect of, each item, and the aggregate amounts of those estimated costs and contributions; and
- 4576 (ii) for works not so itemised, an estimate of the average annual amount, at current prices, which the landlord considers is likely to be payable by the tenant<sup>11</sup>.

<sup>1</sup> ie a notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante. For the meaning of 'landlord' see PARA 1300 note 1 ante.

<sup>2</sup> ie excluding, in the case of a flat, charges to which *ibid* s 125A(2) (as added) applies: see the text and notes 6-10 *infra*. For the meaning of 'flat' see PARA 1796 ante.

<sup>3</sup> For the meaning of 'service charge' see PARA 1829 note 17 ante.

<sup>4</sup> The reference period for the purposes of the estimates required by the Housing Act 1985 s 125A (as added) and s 125B (as added) (see PARA 1831 post) is the period (1) beginning on such date not more than six months after the notice is given as the landlord may reasonably specify as being a date by which the conveyance will have been made or the lease granted; and (2) ending five years after that date or, where the notice states that the conveyance or lease will provide for a service charge or improvement contribution to be calculated by reference to a specified annual period, with the end of the fifth such period beginning after that date: s 125C(1) (ss 125A, 125C added by the Housing and Planning Act 1986 s 4(2)). For the purpose of the estimates it is to be assumed that the conveyance will be made or the lease granted at the beginning of the reference period on the terms stated in the notice: Housing Act 1985 s 125C(2) (as so added). For the meaning of 'lease' see PARA 1300 note 1 ante; and for the meaning of 'improvement contribution' see PARA 1829 note 18

ante. The Housing Act 1985 s 125C (as so added) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 10.

5 Housing Act 1985 s 125A(1) (as added: see note 4 supra). Section 125A (as so added) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies (see Schedule para 8); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 8); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 7).

6 le the estimates required by the Housing Act 1985 s 125A(3) (as added): see the text and note 11 infra.

7 le ibid s 139(1), s 151(1) (as substituted), Sch 6 para 16B (as added and amended): see PARA 1862 post.

8 For the meaning of 'tenant' see PARA 1300 note 1 ante.

9 le the Housing Act 1985 s 450A (as added and amended): see HOUSING vol 22 (2006 Reissue) PARA 701.

10 Ibid s 125A(2) (as added: see note 4 supra). See also note 5 supra.

11 Ibid s 125A(3) (as added: see note 4 supra). See also note 5 supra.

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### **1831. Estimates and information about improvement contributions.**

A landlord's notice<sup>1</sup> given in respect of a flat<sup>2</sup> must, as regards improvement contributions<sup>3</sup>, contain:

- 4577 (1) the estimates required for works in respect of which the landlord considers that costs may be incurred in the reference period<sup>4</sup>, together with a statement of the reference period adopted for the purpose of the estimates; and
- 4578 (2) a statement of the effect of the statutory restrictions on service charges<sup>5</sup> by reference to the estimates of the amounts payable by the tenant<sup>6</sup>.

The works to which the estimates relate must be itemised and the estimates must show:

- 4579 (a) the amount, at current prices, of the likely cost of, and of the tenant's likely contribution in respect of, each item; and
- 4580 (b) the aggregate amounts of those estimated costs and contributions<sup>7</sup>.

1 le a notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante. For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'flat' see PARA 1796 ante.

3 For the meaning of 'improvement contribution' see PARA 1829 note 18 ante.

4 For the meaning of 'the reference period' see PARA 1830 note 4 ante.

5 le the Housing Act 1985 Sch 6 para 16C (as added and amended): see PARA 1865 post.

6 Ibid s 125B(1), (2) (s 125B added by the Housing and Planning Act 1986 s 4(2)). For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 Housing Act 1985 s 125B(3) (as added: see note 6 supra). Section 125B (as so added) is omitted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 9.

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### **C. TENANT'S NOTICE OF INTENTION**

#### **1832. Tenant's notice of intention.**

Where a landlord's notice<sup>1</sup> has been served on a secure tenant<sup>2</sup>, he must within the specified period<sup>3</sup> serve a written notice on the landlord stating either that he intends to pursue his claim to exercise the right to buy<sup>4</sup> or that he withdraws that claim<sup>5</sup>. Prior to 18 July 2005 he might alternatively serve, within the specified period, a notice<sup>6</sup> claiming to exercise his statutory right to acquire on rent to mortgage terms<sup>7</sup>.

1 He a notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante. For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

3 The period so specified is the period of 12 weeks beginning with whichever of the following is the later: (1) the service of the notice under the Housing Act 1985 s 125 (as amended); and (2) where the tenant exercises his right to have the value of the dwelling house determined or redetermined by the district valuer, the service of the notice under s 128(5) stating the effect of the determination or redetermination: s 125D(2) (s 125D added by the Leasehold Reform, Housing and Urban Development Act 1993 s 105(1)). For the meaning of 'district valuer' see PARA 1332 note 22 ante.

4 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

5 Housing Act 1985 s 125D(1)(a) (as added: see note 3 supra).

6 He under ibid s 144 (as substituted): see PARA 1873 post.

7 See ibid s 125D(1)(b) (as added: see note 3 supra); and see also s 142A (as added) (abolition of the right to acquire on rent to mortgage terms, except in pursuance of a notice served before 18 July 2005); and PARA 1872 et seq post.

The Housing Act 1985 s 125D(1) (as so added) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 11); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 9); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 8).

### **UPDATE**

#### **1832 Tenant's notice of intention**

NOTE 3--1985 Act s 125D(2) amended: Housing and Regeneration Act 2008 s 306(3), Sch 16. See further 1985 Act s 125D(3) (added by 2008 Act s 306(4)).

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### **1833. Landlord's notice in default.**

The landlord<sup>1</sup> may, at any time after the end of the specified period<sup>2</sup>, serve on the tenant<sup>3</sup> a written notice:

- 4581 (1) requiring him, if he has failed to serve a notice of intention<sup>4</sup>, to serve that notice within 28 days; and
- 4582 (2) informing him of the effect of these provisions<sup>5</sup> and of the effect of the statutory provisions<sup>6</sup> relating to non-compliance<sup>7</sup>.

At any time before the end of the period mentioned in head (1) above, or that period as previously extended, the landlord may by written notice served on the tenant extend it, or further extend it<sup>8</sup>.

If, at any time before the end of that period, or that period as extended, the circumstances are such that it would not be reasonable to expect the tenant to comply with a notice under these provisions, that period, or that period as so extended, is extended, or further extended, until 28 days after the time when those circumstances no longer obtain<sup>9</sup>.

If the tenant does not comply with a notice under these provisions, the notice claiming to exercise the right to buy<sup>10</sup> is deemed to be withdrawn at the end of that period or, as the case may require, that period as so extended<sup>11</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 Ie the period specified in the Housing Act 1985 s 125D(2) (as added) (see PARA 1832 ante) or, as the case may require, s 136(2) (as substituted) (see PARA 1834 post).

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 Ie the notice required by the Housing Act 1985 s 125D(1) (as added): see PARA 1832 ante.

5 Ie the effect of ibid s 125E(1) (as added: see note 7 infra).

6 Ie the effect of ibid s 125E(4) (as added: see note 7 infra).

7 Ibid s 125E(1) (s 125E added by the Leasehold Reform, Housing and Urban Development Act 1993 s 105(1)). The Housing Act 1985 s 125E(1), (2) (as so added) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798), applies: see art 3(1), Schedule para 12.

8 Housing Act 1985 s 125E(2) (as added: see note 7 supra).

9 Ibid s 125E(3) (as added: see note 7 supra).

10 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

11 Housing Act 1985 s 125E(4) (as added: see note 7 supra).



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## **(vi) Change of Tenant or Landlord**

### **1834. Change of tenant after notice claiming right to buy.**

Where, after a secure tenant<sup>1</sup> ('the former tenant') has given notice claiming his right to buy<sup>2</sup>, another person ('the new tenant'):

- 4583 (1) becomes the secure tenant under the same secure tenancy<sup>3</sup>, otherwise than on an assignment by way of exchange<sup>4</sup>; or
- 4584 (2) becomes the secure tenant under a periodic tenancy arising on the termination of a fixed term<sup>5</sup> on the coming to an end of the secure tenancy,

the new tenant is in the same position as if the notice had been given by him and he had been the secure tenant at the time it was given<sup>6</sup>.

Where the right to acquire conferred by the Housing Act 1996 arises<sup>7</sup>, then where after an assured tenant<sup>8</sup> ('the former tenant') has given a notice claiming the right to acquire, another person ('the new tenant') becomes

- 4585 (a) the assured tenant by succession<sup>9</sup>; or
- 4586 (b) the assured tenant under a statutory tenancy arising on the end of a fixed term tenancy<sup>10</sup>,

the new tenant is in the same position as if the notice had been given by him and he had been the tenant at the time it was given<sup>11</sup>.

If a landlord's notice of the purchase price<sup>12</sup> has been served on the former tenant, then, whether or not the former tenant has served a notice of intention<sup>13</sup>, the new tenant must serve such a notice within the period of 12 weeks beginning with whichever of the following is the later:

- 4587 (i) his becoming the secure tenant (or, in a case in which the right to acquire conferred by the Housing Act 1996 arises, the tenant); and
- 4588 (ii) where the right to have the value of the dwelling house<sup>14</sup> determined or redetermined by the district valuer<sup>15</sup> is or has been exercised by him or the former tenant, the service of the notice<sup>16</sup> stating the effect of the determination or redetermination<sup>17</sup>.

The above provisions do not, however, confer any right on a person required<sup>18</sup> to share the right to buy unless he could have been validly so required had the notice claiming to exercise the right to buy been given by the new tenant<sup>19</sup>.

The above provisions apply with the necessary modifications if there is a further change in the person who is the secure tenant (or, in a case in which the right to acquire conferred by the Housing Act 1996 arises, the tenant)<sup>20</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

- 2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.
- 3 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.
- 4 Is an assignment made by virtue of the Housing Act 1985 s 92 (as amended): see PARA 1324 ante.
- 5 Is a periodic tenancy arising by virtue of *ibid* s 86: see PARA 1302 ante.
- 6 *Ibid* s 136(1). Section 136 (as amended) does not confer a benefit upon the new tenant but provides for a continuous process, starting with the original tenant's notice and ending with completion, so that the new tenant is in the same position as if he had been the secure tenant himself, with all his own qualities and characteristics: *McIntyre v Merthyr Tydfil Borough Council* (1989) 21 HLR 320, CA. The Housing Act 1985 s 136 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798), applies: see art 3(1), Schedule para 18); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 12).
- 7 See PARAS 1804-1807 ante.
- 8 As to the meaning of 'assured tenant' see PARA 1324 note 6 ante.
- 9 Is virtue of the Housing Act 1988 s 17 (as amended): see PARA 1084 ante.
- 10 Is by virtue of *ibid* s 5: see PARAS 1067-1071 ante.
- 11 Housing Act 1985 s 136(1A) (added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 14).
- 12 Is a notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante.
- 13 Is a notice under *ibid* s 125D(1) (as added): see PARA 1832 ante.
- 14 For the meaning of 'dwelling house' see PARA 1796 ante.
- 15 For the meaning of 'district valuer' see PARA 1332 note 22 ante.
- 16 Is under the Housing Act 1985 s 128(5): see PARA 1838 post.
- 17 *Ibid* s 136(2) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 105(2)). See also note 6 supra.
- 18 Is in pursuance of the Housing Act 1985 s 123 (as amended): see PARA 1827 ante.
- 19 *Ibid* s 136(6). See also note 6 supra.
- 20 *Ibid* s 136(7). See also note 6 supra.

## UPDATE

### 1834 Change of tenant after notice claiming right to buy

TEXT AND NOTE 17--1985 Act s 136(2) amended: Housing and Regeneration Act 2008 s 306(8), Sch 16. See further 1985 Act s 136(2A) (added by 2008 Act s 306(9)).

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### 1835. Change of landlord after notice claiming right to buy.

Where the interest of the landlord<sup>1</sup> in the dwelling house<sup>2</sup> passes from the landlord to another body after a secure tenant<sup>3</sup> has given a notice claiming to exercise the right to buy<sup>4</sup>, all parties are<sup>5</sup> in the same position as if the other body had become the landlord before the notice was given and had been given that notice and any further notice given by the tenant to the landlord and had taken all steps which the landlord had taken<sup>6</sup>. Where, however, the extended right to buy arises<sup>7</sup>, and after a secure tenant has given a notice claiming to exercise the right to buy, the interest of the landlord, an intermediate landlord<sup>8</sup> or the freeholder<sup>9</sup> in the dwelling house passes from it to another person, or the interest comes to an end, then in substitution for the above provision heads (1) to (3) below apply as follows:

- 4589 (1) the landlord, intermediate landlord or freeholder, as the case may be, must forthwith notify its tenant of the change and a landlord or intermediate landlord must similarly notify its landlord;
- 4590 (2) an intermediate landlord so notified by its tenant must, in turn, similarly notify its immediate landlord or, if so notified by its landlord, must similarly notify its tenant; and
- 4591 (3) all parties are<sup>10</sup> in the same position as if the change had occurred before the notice claiming to exercise the right to buy was given and all other notices given had been given by or to the appropriate parties and all steps had been taken by them<sup>11</sup>.

If the circumstances after the disposal differ in any material respect, as for example where:

- 4592 (a) the interest of the disponee in the dwelling house after the disposal differs from that of the disponor before the disposal; or
- 4593 (b) any of the exceptions to the right to buy<sup>12</sup> becomes or ceases to be applicable,

all those concerned must, as soon as practicable after the disposal, take all such steps, whether by way of amending or withdrawing and re-serving any notice or extending any period or otherwise, as may be requisite for the purpose of securing that all parties are, as nearly as may be, in the same position as they would have been if those circumstances had obtained before the disposal<sup>13</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

4 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

5 le subject to the Housing Act 1985 s 137(2) (as added and amended): see the text and notes 12-13 infra.

6 Ibid s 137(1) (renumbered by the Housing and Planning Act 1986 s 24(1)(d), Sch 5 Pt I para 4(1), (2); amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). The Housing Act 1985 s 137(1) (as so renumbered and amended) is modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 13).

7 See PARA 1798 ante.

8 For the meaning of 'intermediate landlord' see PARA 1798 note 18 ante.

9 For the meaning of 'freeholder' see PARA 1798 note 19 ante.

10 See note 5 supra.

11 Ibid s 137(1) (substituted for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 19).

12 Ie any of the exceptions in the Housing Act 1985 s 120, Sch 5 (as amended): see PARA 1808 et seq ante.

13 Ibid s 137(2) (added by the Housing and Planning Act 1986 Sch 5 Pt I para 4(1), (3); amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 22).

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## **(vii) Purchase Price**

### **A. IN GENERAL**

#### **1836. Purchase price.**

The price payable for a dwelling house<sup>1</sup> on a conveyance or grant in pursuance of the right to buy<sup>2</sup> is:

- 4594 (1) the amount which is to be taken<sup>3</sup> as its value at the relevant time<sup>4</sup>, less
- 4595 (2) the discount to which the purchaser is<sup>5</sup> entitled<sup>6</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 Ie in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1837 et seq post. See also PARA 1795 note 7 ante.

3 Ie under ibid s 127 (as amended): see PARA 1837 post.

4 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

5 Ie the discount to which the purchaser is entitled under the Housing Act 1985 Pt V (as amended) (see PARA 1839 et seq post) or, in a case in which the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises, the discount to which the purchaser is entitled under an order under s 17 (the right to acquire; supplementary provisions: see PARA 1806 ante). As to the prescribed amount of discount in the latter case see PARA 1806 note 4 ante.

6 Housing Act 1985 s 126(1); Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 9. References in the Housing Act 1985 Pt V (as amended) to the purchase price include references to the consideration for the grant of the lease: s 126(2). Section 126(1) is modified, and s 126(2) is omitted, where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 13.

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#### **1837. Value of dwelling house.**

The value of a dwelling house<sup>1</sup> at the relevant time<sup>2</sup> is to be taken to be the price which at that time it would realise if sold on the open market by a willing vendor:

- 4596 (1) on the stated assumptions<sup>3</sup>;
- 4597 (2) disregarding any improvements<sup>4</sup> made by any specified person<sup>5</sup> and any failure to keep the dwelling house in good internal repair; and
- 4598 (3) on the assumption that any service charges<sup>6</sup> or improvement contributions<sup>7</sup> payable will not be less than the amounts to be expected in accordance with the estimates contained<sup>8</sup> in the landlord's notice<sup>9</sup>.

For a conveyance the assumptions are:

- 4599 (a) that the vendor was selling for an estate in fee simple with vacant possession;
- 4600 (b) that neither the tenant nor a member of his family residing with him wanted to buy; and
- 4601 (c) that the dwelling house was to be conveyed with the same rights and subject to the same burdens as it would be in pursuance of the right to buy<sup>10</sup>.

For the grant of a lease<sup>11</sup> the assumptions are:

- 4602 (i) that the vendor was granting a lease with vacant possession for the appropriate term<sup>12</sup>;
- 4603 (ii) that neither the tenant nor a member of his family residing with him wanted to take the lease;
- 4604 (iii) that the ground rent would not exceed £10 per annum; and
- 4605 (iv) that the grant was to be made with the same rights and subject to the same burdens as it would be in pursuance of the right to buy<sup>13</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

3 The assumptions stated for a conveyance in the Housing Act 1985 s 127(2) and for a grant in s 127(3): see the text and notes 10-13 infra.

4 For the meaning of 'improvement' see PARA 1829 note 10 ante.

5 The persons so specified are (1) the secure tenant; (2) any person who under the same tenancy was a secure tenant or an introductory tenant before him; and (3) any member of his family who, immediately before the secure tenancy was granted (or, where an introductory tenancy has become the secure tenancy, immediately before the introductory tenancy was granted), was a secure tenant or an introductory tenant of the same dwelling house under another tenancy, but do not include, in a case where the secure tenant's tenancy has at any time been assigned by virtue of Housing Act 1985 s 92 (as amended) (assignments by way of exchange: see PARA 1324 ante), a person who under that tenancy was a secure tenant or an introductory tenant before the assignment: s 127(4) (amended, and s 127(5) added, by the Housing Act 1996 (Consequential Amendments) Order 1997, SI 1997/74, art 2, Schedule, PARA 3(j), (k)). For these purposes, 'introductory tenant' and 'introductory tenancy' have the same meanings as in the Housing Act 1996 Pt V Ch I (ss 124-143) (as amended) (see PARA 1286 et seq ante); Housing Act 1985 127(5) (as so added). For the meanings of 'secure tenant' and 'secure tenancy' see PARA 1795 note 2 ante; and for the meaning of 'member of another's family' see PARA 1827 note 3 ante.

Where the right to acquire conferred by the Housing Act 1996 arises (see PARAS 1804-1807 ante) and tenant is an assured tenant, the persons so specified are: (a) the assured tenant; (b) any member of his family who was an assured or secure tenant before him under the same tenancy, or who, immediately before the tenancy was granted, was an assured or secure tenant of the same dwelling house under another tenancy: Housing Act 1985 s 127(4A) (added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 10). For the meaning of 'assured tenancy' see PARA 1018 ante.

- 6 For the meaning of 'service charge' see PARA 1829 note 17 ante.
- 7 For the meaning of 'improvement contribution' see PARA 1829 note 18 ante.
- 8 le contained in the landlord's notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante.
- 9 Ibid s 127(1) (amended by the Housing and Planning Act 1986 ss 4(3), 24(2), (3), Sch 5 para 28, Sch 12 Pt I). As to the tenant's right to have the value of a dwelling house at the relevant time determined by a district valuer see PARA 1838 post.
- The Housing Act 1985 s 127 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3, Schedule para 14); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 10); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, Sch 1 para 10; and see eg note 5 supra).
- 10 Housing Act 1985 s 127(2). See also note 9 supra.
- 11 For the meaning of 'lease' see PARA 1300 note 1 ante.
- 12 le as defined in the Housing Act 1985 s 139(1), s 151(1) (as substituted), Sch 6 para 12, but subject to Sch 6 para 12(3): see PARA 1856 post.
- 13 Ibid s 127(3). See also note 9 supra; and see PARA 1795 note 7 ante.

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### **1838. Determination of value by the district valuer.**

Any question arising<sup>1</sup> as to the value of a dwelling house<sup>2</sup> at the relevant time<sup>3</sup> must be determined by the district valuer<sup>4</sup> in accordance with the following provisions<sup>5</sup>.

A tenant<sup>6</sup> may require that value to be determined, or as the case may be, redetermined, by a notice in writing served on the landlord<sup>7</sup> not later than three months after the service on him of the landlord's notice of the purchase price<sup>8</sup> or, if proceedings are then pending between the landlord and the tenant for the determination of any other question relating to the right to buy, within three months of the final determination of the proceedings<sup>9</sup>.

If such proceedings are begun after a previous determination<sup>10</sup>.

- 4606 (1) the tenant may, by notice in writing served on the landlord within four weeks of the final determination of the proceedings, require the value of the dwelling house at the relevant time to be redetermined; and
- 4607 (2) the landlord may at any time within those four weeks, whether or not a notice under head (1) above is served, require the district valuer to redetermine that value;

and, where the landlord requires a redetermination to be so made, it must serve on the tenant a notice stating that the requirement is being or has been made<sup>11</sup>.

Before so making a determination or redetermination, the district valuer must consider any representation made to him by the landlord or the tenant within four weeks from the service of the tenant's notice or, as the case may be, from the service of the landlord's notice<sup>12</sup>.

As soon as practicable after a determination or redetermination has been so made, the landlord must serve on the tenant a notice stating the effect of the determination or redetermination and the terms<sup>13</sup> for the exercise of the right to buy<sup>14</sup>.

- 1    Ie under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1839 et seq post.
- 2    For the meaning of 'dwelling house' see PARA 1796 ante.
- 3    For the meaning of 'the relevant time' see PARA 1822 note 3 ante.
- 4    For the meaning of 'district valuer' see PARA 1332 note 22 ante.
- 5    Housing Act 1985 s 128(1).
- 6    For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 7    For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 8    Ie a notice under the Housing Act 1985 s 125 (as amended): see PARA 1829 ante.
- 9    Ibid s 128(2). Section 128(2)-(5) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, (see PARA 1798 ante), applies: see art 3(1), Schedule para 15.
- 10   Ie a previous determination under the Housing Act 1985 s 128 (as amended).
- 11   Ibid s 128(3). See also note 9 supra.
- 12   Ibid s 128(4). See also note 9 supra.
- 13   Ie the terms mentioned in ibid s 125(2), (3): see PARA 1829 ante.
- 14   Ibid s 128(5). See also note 9 supra.

## **UPDATE**

### **1838 Determination of value by the district valuer**

TEXT AND NOTES--See also Housing Act 1985 s 128A (determination of value: review notices); and s 128B (review of determination of value) (ss 128A, 128B added by Housing and Regeneration Act 2008 s 306(2)).

TEXT AND NOTES 9, 14--1985 Act s 128(2), (5) amended: 2008 Act s 306(5), (6), Sch 16. See also 1985 Act s 128(5A)-(5C) (added by 2008 Act s 306(7)). See also 2008 Act s 306(12).

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## ***B. DISCOUNT***

### **1839. In general.**

A person exercising the right to buy<sup>1</sup> is entitled<sup>2</sup> to a discount of a percentage calculated by reference<sup>3</sup> to the qualifying period<sup>4</sup>. The discount is<sup>5</sup>:

- 4608 (1) in the case of a house<sup>6</sup>, 35% plus 1% for each complete year by which the qualifying period exceeds five years, up to a maximum of 60%;
- 4609 (2) in the case of a flat<sup>7</sup>, 50% plus 2% for each complete year by which the qualifying period exceeds five years, up to a maximum of 70%<sup>8</sup>.

The Secretary of State<sup>9</sup> may by order made with the consent of the Treasury provide, and in relation to Wales the National Assembly for Wales or the relevant Welsh minister<sup>10</sup> may by order provide, that in such cases as may be specified in the order:

- 4610 (a) the minimum percentage discount;
- 4611 (b) the percentage increase for each complete year of the qualifying period after the first five; or
- 4612 (c) the maximum percentage discount,

shall be such percentage, higher than that specified above, as may be specified in the order<sup>11</sup>.

Where, however, the right to acquire conferred by the Housing Act 1996 arises<sup>12</sup>, instead of a such a discount as is described above a person exercising that right is entitled to a discount of such amount or at such rate as the Secretary of State or, in relation to Wales, the Assembly or the relevant Welsh minister may by order prescribe<sup>13</sup>. Where the tenant has accepted the landlord's offer of an alternative dwelling house<sup>14</sup>, the discount to which the tenant is entitled is the discount prescribed<sup>15</sup> in relation to that alternative dwelling house<sup>16</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante.

2 Ie subject to the Housing Act 1985 s 129(2)-(3) (as amended) (see the text and notes 5-11 infra) and s 130 et seq (as amended) (see PARA 1840 et seq post).

3 Ie by reference to the period which is to be taken into account in accordance with ibid s 129(1), Sch 4 (as amended): see PARA 1821 et seq ante. Where joint tenants exercise the right to buy, Sch 4 (as amended) is to be construed as if for the secure tenant there were substituted that one of the joint tenants whose substitution will produce the largest discount: s 129(3). For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

4 Ibid s 129(1) (s 129(1)-(2B) substituted by the Housing and Planning Act 1986 s 2(1), (2)). As to the reduction of discount where a previous discount is given see PARA 1840 post; as to the limits on the amount of discount see PARA 1841 post; and as to the repayment of discount on early disposal of the freehold or lease see PARA 1889 post.

5 Ie subject to any order under the Housing Act 1985 s 129(2A) (as substituted): see the text and notes 9-11 infra.

6 For the meaning of 'house' see PARA 1796 ante.

7 For the meaning of 'flat' see PARA 1796 ante.

8 Housing Act 1985 s 129(2) (as substituted (see note 4 supra); amended by the Housing Act 2004 s 180(2), (3)). The amendments made by s 180 do not apply in relation to a secure tenancy (1) if the tenancy was entered into before, or in pursuance of an agreement made before, 18 January 2005 (ie the day on which s 180 came into force); or (2) if head (1) supra does not apply but the tenant is a public sector tenant on that day and does not cease to be such a tenant at any time before serving a notice in respect of the tenancy under s 122 (see PARA 1826 ante); and for these purposes 'public sector tenant' has the same meaning as in the Housing Act 1985 Sch 4 (as amended) (see PARA 1823 ante); Housing Act 2004 s 180(5), (6). In such cases, the first percentage specified in head (1) in the text is 32% and the first percentage specified in head (2) in the text is 44%; and the extra discount referred to in those heads accrues for each complete year by which the qualifying period exceeds two years: see the Housing Act 1985 s 129(2) (as so substituted).

The Housing Act 1985 s 129(2) (as so substituted and amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 16. For the modifications to the Housing Act 1985 s 129 (as amended) which have effect where the right to acquire conferred by the Housing Act 1996 arises see the text and notes 12-16 infra.



9 As to the Secretary of State see PARA 27 note 3 ante.

10 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

11 Housing Act 1985 s 129(2A) (as substituted (see note 4 supra); amended by the Housing Act 2004 s 180(4)). For transitional provisions see note 8 supra. Such an order (1) may make different provision with respect to different cases or descriptions of case; (2) may contain such incidental, supplementary or transitional provisions as appear to the Secretary of State or to the Assembly or minister to be necessary or expedient; and (3) must be made by statutory instrument and may not, if made by the Secretary of State, be made unless a draft of it has been laid before and approved by resolution of each House of Parliament: Housing Act 1985 s 129(2B) (as so substituted). At the date at which this title states the law, no such order had been made. See, however, note 13 infra.

12 See PARAS 1804-1807 ante.

13 Housing Act 1985 s 129(1) (substituted for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 11(a)). As to the transfer of functions for these purposes so far as exercisable in relation to Wales para 27 note 4 ante. For the prescribed amount of discount see: (1) the Housing (Right to Acquire) (Discount) (Wales) Order 1997, SI 1997/569 (which extends to dwellings in Wales only (art 1); prescribes the percentage rate of discount to be given on the exercise of the right to acquire as 25% of the open market value of the dwelling subject to a maximum of £16,000 (art 3) and provides that any question arising as to the open market value of a dwelling at the relevant time is to be determined by the district valuer (art 4)); and (2) the Housing (Right to Acquire) (Discount) Order 2002, SI 2002/1091, which prescribes different amounts of discount applicable to dwellings in specified areas in England, subject to a maximum amount of discount of 50% of the value of the dwelling (art 2, Schedule).

14 Ie under the Housing Act 1985 s 124A(3) (as added for these purposes): see PARA 1828 ante.

15 Ie under the Housing Act 1996 s 17: see PARA 1806 ante. As to the discount so prescribed see note 13 supra.

16 Housing Act 1985 s 129(1A) (added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 11(b)).

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#### **1840. Reduction of discount where previous discount given.**

There must be deducted from the discount<sup>1</sup> an amount equal to any previous discount<sup>2</sup> qualifying, or the aggregate of previous discounts qualifying, under the following provisions<sup>3</sup>.

A previous discount qualifies for these purposes if it was given:

- 4613 (1) to the person or one of the persons exercising the right to buy<sup>4</sup>; or
- 4614 (2) to the spouse or civil partner of that person or one of those persons, if they are living together at the relevant time; or
- 4615 (3) to a deceased spouse or deceased civil partner of that person or one of those persons, if they were living together at the time of the death;

and, where a previous discount was given to two or more persons jointly, these provisions have effect as if each one of them had been given an equal proportion of the discount<sup>5</sup>.

Where the whole or part of a previous discount has been recovered by the person by whom it was given, or a successor in title of his:

- 4616 (a) by the receipt of a payment determined by reference to the discount; or  
 4617 (b) by a reduction so determined of any consideration given to that person, or  
 a successor in title of his; or  
 4618 (c) in any other way,

then so much of the discount as has been so recovered must be disregarded for these purposes<sup>6</sup>.

1 As to the discount to which a person exercising the right to buy is entitled see PARA 1839 ante.

2 For these purposes, 'a previous discount' means a discount given before the relevant time: (1) on conveyance of the freehold, or a grant or assignment of a long lease, of a dwelling house by a person within the Housing Act 1985 s 119(1), s 129(1) (as substituted), Sch 4 paras 7 or 7A (as added) (see PARA 1823 ante) or, in such circumstances as may be prescribed by order of the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister, by a person so prescribed; or (2) on conveyance of the freehold, or a grant or assignment of a long lease of a dwelling house by a person against whom the right to buy was exercisable by virtue of s 171A (as added) (see PARA 1900 post) to a person who was a qualifying person for the purposes of the preserved right to buy and in relation to whom that dwelling house was the qualifying dwelling house; or (3) in pursuance of the provision required by s 151A, Sch 6A paras 3-5 (as added) (see PARAS 1877, 1879 post) or Sch 6A para 7 (as added) (see PARA 1880 post); or (4) in pursuance of the provision required by s 151(1), Sch 8 para 1 (repealed) (terms of shared ownership lease; right to acquire additional shares) or any other provision to the like effect; or (5) in pursuance of any provision of, or required by, Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1841 et seq post) as it has effect by virtue of the Housing Act 1996 s 17 (the right to acquire: see PARA 1806 ante): Housing Act 1985 s 130(2) (amended by the Housing and Planning Act 1986 s 24(2), Sch 5 para 29; the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 11; the Housing Act 1996 (Consequential Amendments) (No 2) Order 1997, SI 1997/627, art 2, Schedule, PARA 3(3)). For these purposes, 'dwelling house' includes any yard, garden, outhouses and appurtenances belonging to the dwelling house or usually enjoyed with it: Housing Act 1985 s 130(6). For the normal meaning of 'dwelling house' see PARA 1796 ante; for the meaning of 'the relevant time' see PARA 1822 note 3 ante; and for the meaning of 'long lease' see PARA 1823 note 4 ante. As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

Section 130(2) (as so amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 17); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 12).

An order under the Housing Act 1985 s 130 (as amended) may make different provision with respect to different cases or descriptions of case, including different provision for different areas, and must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see s 130(5). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing (Right to Buy) (Prescribed Persons) Order 1992, SI 1992/1703, which came into force on 17 August 1992: art 1. For the persons and bodies prescribed for these purposes see art 3, Schedule (which has been extensively amended).

3 Housing Act 1985 s 130(1).

4 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

5 Housing Act 1985 s 130(3) (amended by the Civil Partnership Act 2004 s 81, Sch 8 para 29).

6 Housing Act 1985 s 130(4).

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#### **1841. Limits on amount of discount; in general.**

Except where the Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> so determines, the discount to which a person exercising the right to buy is entitled<sup>3</sup> may not reduce the price below the amount which, in accordance with a determination made by him or by it, is to be taken as representing so much of the costs incurred in respect of the dwelling house<sup>4</sup> as, in accordance with the determination:

- 4619 (1) is to be treated as incurred at or after the beginning of that period of account<sup>5</sup> of the landlord in which falls the date which is eight years, or such other period of time as may be specified in an order made by the Secretary of State or the Assembly or minister<sup>6</sup>, earlier than the relevant time<sup>7</sup>; and
- 4620 (2) is to be treated as relevant for these purposes;

and, if the price before discount is below that amount, there is to be no discount<sup>8</sup>. The discount may not in any case reduce the price by more than such sum as the Secretary of State or the Assembly or minister may by order prescribe<sup>9</sup>.

Any such order or determination may make different provision for different cases or descriptions of case, including different provision for different areas<sup>10</sup>; and any such order must be made by statutory instrument<sup>11</sup>.

The above provisions do not apply in relation to the right to acquire<sup>12</sup> conferred by the Housing Act 1996<sup>13</sup>. Where that right is exercised, the limits on the amount of discount are prescribed in orders made under that Act<sup>14</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 As to the discount to which a person exercising the right to buy is entitled see PARA 1839 ante.

4 For the meaning of 'dwelling house' see PARA 1796 ante.

5 For these purposes, 'period of account', in relation to any costs, means the period for which the landlord made up those of its accounts in which account is taken of those costs: Housing Act 1985 s 131(1A) (added by the Housing Act 1988 s 122(1), (3)). For the meaning of 'landlord' see PARA 1300 note 1 ante.

The Housing Act 1985 s 131(1), (1A), (3) (as amended) is modified, and Sch 5A is added and substituted, where the preserved right to buy (see PARA 1900 et seq post) arises: see PARA 1842 post.

6 The period of time for these purposes is ten years instead of the period of eight years: Housing (Right to Buy) (Limits on Discount) Order 1998, SI 1998/2997, art 4; Housing (Right to Buy) (Limits on Discount) (Wales) Order 1999, SI 1999/292, art 4.

7 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

8 Housing Act 1985 s 131(1) (amended by the Housing Act 1988 s 122(1), (2)). See also notes 5-6 supra. As to the reduction of discount where a previous discount is given see PARA 1840 ante; and as to the repayment of discount on early disposal of the freehold or lease see PARA 1889 post.

For a case where these provisions were not applied see *Rushton v Worcester City Council* [2001] EWCA Civ 367, [2002] HLR 188, [2001] All ER (D) 195 (Mar) (the Housing (Right to Buy) (Cost Floor) (England) Determination 1998, made under the Housing Act 1985 s 131(1) (as amended), together with the government circular drawing attention to it, was omitted from the various practitioners' texts and was thus peculiarly within the knowledge of the local authority and ought to have been disclosed prior to trial).

9 Housing Act 1985 s 131(2). In relation to a dwelling house situated in one of the areas specified in the Housing (Right to Buy) (Limits on Discount) Order 1998, SI 1998/2997, Sch 2 col 2 (Sch 2 as added), the prescribed sum for these purposes is £16,000; and 'area' means a county or district in England, a London borough or the City of London: art 3A (art 3 amended, Sch 1 numbered as such, and art 3A, Sch 2 added by SI 2003/498 with effect from 27 March 2003, subject to transitional provisions). Subject to that, in relation to a dwelling house in a region specified in the Housing (Right to Buy) (Limits on Discount) Order 1998, SI

1998/2997, Sch 1 col 1 (as so amended) the sum specified in Sch 1 col 2 (as so amended) is the prescribed sum for these purposes; and a region so specified is the region of that name specified in the Regional Development Agencies Act 1998 Sch 1 (see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 27 note 1; TRADE AND INDUSTRY vol 97 (2010) PARA 988): Housing (Right to Buy) (Limits on Discount) Order 1998, SI 1998/2997, art 3 (as so amended). In relation to a dwelling house in Wales the prescribed sum for these purposes is £16,000: Housing (Right to Buy) (Limits on Discount) (Wales) Order 1999, SI 1999/292, art 3 (amended by SI 2003/803, with effect from 2 April 2003).

10 Housing Act 1985 s 131(3). See also note 5 supra.

11 Ibid s 131(4). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 131(4).

12 See PARAS 1804-1807 ante.

13 Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 13.

14 See PARA 1839 note 13 ante.

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#### **1842. Limits on amount of discount where the preserved right to buy arises.**

Where the preserved right to buy arises<sup>1</sup>, then unless the landlord<sup>2</sup> otherwise agrees:

- 4621 (1) the discount<sup>3</sup> must not reduce the price below the amount which is to be taken<sup>4</sup> as representing the costs incurred by the landlord in respect of the qualifying dwelling house<sup>5</sup> and is to be treated as relevant for these purposes<sup>6</sup>; and
- 4622 (2) if the price before discount is below that amount there is to be no discount<sup>7</sup>.

The discount may not in any case reduce the price by more than such sum as the Secretary of State<sup>8</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>9</sup> may by order prescribe<sup>10</sup>. Any such order may make different provision for different cases or descriptions of case, including different provision for different areas<sup>11</sup> and must be made by statutory instrument<sup>12</sup>.

1 See PARA 1900 et seq post.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 As to the discount to which a person exercising the right to buy is entitled see PARA 1839 ante.

4 Ie in accordance with the Housing Act 1985 Sch 5A (as substituted for these purposes): see note 6 infra.

5 For the meaning of 'qualifying dwelling house' see PARA 1901 post.

6 The cost floor (ie the amount mentioned in head (1) in the text) is an amount equal to the aggregate of the costs which may be treated as relevant costs under the provisions of the Housing Act 1985 Sch 5A para 2 (as substituted for these purposes) or, as the case may be, Sch 5A para 3 (as so substituted), and of Sch 5A para 4 (as so substituted); and an estimate may be made for the purposes of arriving at the cost floor for a qualifying dwelling house where the amount of any relevant costs or payments for them cannot readily be ascertained: Sch 5A paras 1, 5, 6 (Sch 5A added for these purposes by the Housing (Preservation of Right to Buy)

Regulations 1993, SI 1993/2241, reg 2, Sch 1 para 41, Sch 1 Pt II; substituted in relation to England by SI 1999/1213; and substituted, with minor changes in the wording, in relation to Wales by SI 2001/1301).

Except where a case falls within the Housing Act 1985 Sch 5A para 3 (as so substituted for these purposes) and subject to Sch 5A para 4 (as so substituted), the costs which may be treated as relevant costs for the purposes of s 131(1) (as substituted) are the following costs (including VAT) incurred by the landlord: (1) the costs of construction of the dwelling house (including site development works and the acquisition of land); (2) the costs of acquisition of the dwelling house; (3) the costs of works initially required following the acquisition of the dwelling house by the landlord to put it in good repair or to deal with any defect affecting it; (4) where the aggregate of the costs of works of repair or maintenance or works to deal with any defect affecting the dwelling house (except works within head (3) *supra*) exceeds the sum of £5,500, the costs in excess of that amount; and (5) the costs of other works to the dwelling house, except costs of the kind mentioned in head (4) *supra*: Sch 5A paras 1, 2(1) (as so substituted). The following costs are not to be treated as relevant costs for these purposes: (a) any administrative costs; (b) interest; and (c) any costs which are recoverable by the landlord as a service charge or an improvement contribution: Housing Act 1985 Sch 5A para 2(2) (as so substituted). For the meanings of 'service charge' and 'improvement contribution' see PARA 1829 notes 17-18 *ante*.

Subject to Sch 5A para 4 (as so substituted), where the Secretary of State (or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister) consented to the disposal of a qualifying dwelling house under s 32 (as amended) or s 43 (as amended) (see HOUSING vol 22 (2006 Reissue) PARAS 305, 314) and the sale price attributed to the dwelling house on that disposal was nil, the costs which may be treated as relevant costs are the following costs (including VAT) incurred by the landlord: (i) the costs of works initially required following the acquisition of the dwelling house by the landlord to put it in good repair or to deal with any defect affecting it; (ii) the costs of works of repair or maintenance or works to deal with any defect affecting the dwelling house; (iii) the costs of improvement or other works to the dwelling house; (iv) the costs of works to any garage or parking area where the facility benefits the dwelling house; (v) the costs of works to provide or improve any communal facility provided in particular for the benefit of the dwelling house; (vi) professional fees and consultancy fees; and (vii) administrative costs not exceeding the sum of £2,000: Sch 5A para 3(1) (as so substituted). The following costs are not to be treated as relevant costs for these purposes, ie interest and any costs which are recoverable by the landlord as a service charge or an improvement contribution: Sch 5A para 3(2) (as so substituted).

Costs incurred on any relevant works are not to be treated as relevant costs if payment for them was made: (A) in a period of account ending more than 15 years before the date of service of the qualifying person's notice under s 122 (see PARA 1826 *ante*); or (B) on or after the date of service of the qualifying person's notice under s 122 unless: (aa) the landlord has before that date entered into a written contract for the carrying out of works; or (bb) the qualifying person has agreed in writing to the carrying out of works and the works have been carried out not later than the date of service of the landlord's notice under s 125 (as amended) (notice of purchase price: see PARA 1829 *ante*) or the works will be carried out under the proposed terms of the conveyance or grant; or (cc) the qualifying person was served a notice in writing under Sch 3A para 3(2) (as added and amended) (consultation on transfer: see PARA 1347 *ante*) and the costs come within head (3) or head (i) *supra*: Sch 5A para 4 (as so substituted).

In a case where a landlord is a company, references to the landlord in Sch 5A paras 2, 3 and 4 (as so substituted) include references to a connected company; and for this purpose 'connected company' means a subsidiary or holding company within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25): Housing Act 1985 Sch 5A para 7 (as so substituted).

7 Ibid s 131(1) (substituted for these purposes by the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2, Sch 1 para 11(a)).

8 As to the Secretary of State see PARA 27 note 3 *ante*.

9 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 *ante*.

10 Housing Act 1985 s 131(2); and see PARA 1841 note 9 *ante*.

11 Ibid s 131(3) (amended for these purposes by the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2, Sch 1 para 11(c)).

12 Housing Act 1985 s 131(4). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 131(4).

BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/A. IN GENERAL/1843. Duty of landlord to convey freehold or grant lease.

## **(viii) Completion of Purchase**

### **A. IN GENERAL**

#### **1843. Duty of landlord to convey freehold or grant lease.**

Where a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup> and that right has been established, then, as soon as all matters relating to the grant have been agreed or determined, the landlord<sup>3</sup> must make to the tenant<sup>4</sup>:

- 4623 (1) if the dwelling house<sup>5</sup> is a house<sup>6</sup> and the landlord owns the freehold, a grant of the dwelling house for an estate in fee simple absolute; or
- 4624 (2) if the landlord does not own the freehold or if the dwelling house is a flat<sup>7</sup>, whether or not the landlord owns the freehold, a grant of a lease of the dwelling house,

in accordance with<sup>8</sup> the relevant statutory provisions<sup>9</sup>; but there is an implicit requirement that the tenant must remain a secure tenant until the conveyance or grant of the property<sup>10</sup>. The duty so to convey the freehold or to grant a lease<sup>11</sup> is enforceable by injunction<sup>12</sup>.

The landlord is not, however, bound to comply with the above provisions:

- 4625 (a) if the tenant has failed to pay the rent or any other payment due from him as a tenant for a period of four weeks after it has been lawfully demanded from him, while the whole or part of that payment remains outstanding<sup>13</sup>;
- 4626 (b) if an application is pending before any court:
- 321 181. (i) for a demotion order<sup>14</sup> or Ground 2 possession order<sup>15</sup> to be made in respect of the tenant; or
- 182. (ii) for a suspension order<sup>16</sup> to be made in respect of the tenancy,
- 322 4627 until such time, if any, as the application is determined without either a demotion order or an operative Ground 2 possession order<sup>17</sup> being made in respect of the tenant, or a suspension order being made in respect of the tenancy, or the application is withdrawn<sup>18</sup>;
- 4628 (c) where a suspension order is made, at any time after the beginning of the suspension period<sup>19</sup>;
- 4629 (d) while an initial demolition notice<sup>20</sup> is in force<sup>21</sup>;
- 4630 (e) where a final demolition notice<sup>22</sup> is served<sup>23</sup>.

The secure tenancy<sup>24</sup> comes to an end on the grant to the tenant of an estate in fee simple, or of a lease, in pursuance of the right to buy; and, if there is then a subtenancy, the statutory provisions relating to the effect of the extinguishment of the reversion<sup>25</sup> apply as on a merger or surrender<sup>26</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'tenant' see PARA 1300 note 1 ante.

5 For the meaning of 'dwelling house' see PARA 1796 ante.

6 For the meaning of 'house' see PARA 1796 ante.

7 For the meaning of 'flat' see PARA 1796 ante.

8 In accordance with the Housing Act 1985 ss 138(2)-(3), 138A-188 (as amended): see PARA 1844 et seq post.

9 Ibid s 138(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). The Housing Act 1985 s 138(1) (as so amended) is substituted, s 138(2), (3) is modified, and s 138A is added where the extended right to buy (see PARA 1798 ante) arises: see PARA 1844 post.

10 *Bradford Metropolitan City Council v McMahon* [1993] 4 All ER 237, [1994] 1 WLR 52, CA (tenant died after the right to buy had been established and a price had been agreed between the parties but no conveyance had taken place; the right to buy disappeared and did not pass under the tenant's estate). Where, however, the tenant ceases to be a secure tenant because of a disposal to a private sector landlord, the right to buy is preserved: see PARA 1900 et seq post.

11 In the duty imposed by the Housing Act 1985 s 138(1) (as amended): see the text and notes 1-8 supra.

12 Ibid s 138(3); and see *Bristol City Council v Lovell* [1998] 1 All ER 775, [1998] 1 WLR 446, HL; *Taylor v Newham London Borough Council* [1993] 2 All ER 649, [1993] 1 WLR 444, CA. A tenant who has exercised his right to buy may be entitled to an injunction, but is not entitled to have his application heard as soon as he can bring it before the court and the judge is entitled to adjourn the application so that it can be heard together with the local authority's application for a possession order: see *Bristol City Council v Lovell* supra. As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq. See also note 9 supra.

A process in four stages can be identified in the provisions of the Housing Act 1985 Pt V (ss 118-188) (as amended); the first stage is the claim to exercise the right to buy, the fourth and consummating stage that of the grant. Between those stages are the intermediate second and third stages of the establishment of the right and the agreement or determination on, or of, the terms of the grant. A tenant who has ceased to be a secure tenant has no right which he can enforce under s 138(3): *Muir Group Housing Association Ltd v Thornley* (1992) 25 HLR 89, [1993] 1 EGLR 51, CA.

13 Housing Act 1985 s 138(2). See also note 9 supra.

14 For these purposes, 'demotion order' means a demotion order under ibid s 82A (as added) (see PARA 1351 ante); s 138(2C) (s 138(2A)-(2D) added by the Housing Act 2004 s 193(1); for transitional provisions see s 193(2); and the Housing Act 2004 (Commencement No 3) (England) Order 2005, SI 2005/1451, art 2(b); the Housing Act 2004 (Commencement No 2) (Wales) Order 2005, SI 2005/3237, arts 1(2), 2(g)).

15 For these purposes, 'Ground 2 possession order' means an order for possession under the Housing Act 1985 s 84(2)(a), Sch 2 Pt I, Ground 2 (as substituted and amended) (see PARA 1358 ante); s 138(2C) (as added: see note 14 supra).

16 For these purposes, 'suspension order' means a suspension order under ibid s 121A (as added) (see PARA 1820 ante); s 138(2C) (as added: see note 14 supra).

17 For these purposes, 'operative Ground 2 possession order' means an order made under that Ground which requires possession of the dwelling house to be given up on a date specified in the order: ibid s 138(2C) (as added: see note 14 supra).

18 Ibid s 138(2A), (2B) (as added: see note 14 supra). As to the disclosure of information for the purpose of enabling the landlord to decide whether to invoke this exception see the Housing Act 2004 s 194(1)-(3); and PARA 1341 ante.

19 In the Housing Act 1985 s 138(1) (as amended) has effect subject to s 121A(5) (as added) (disapplication where suspension order is made: see PARA 1820 ante); s 138(2D) (as added: see note 14 supra).

20 For the meaning of 'initial demolition notice' see PARA 1845 post.

21 In the Housing Act 1985 s 138(1) (as amended) has effect subject to s 138A(2) (as added) (operation suspended while initial demolition notice is in force: see PARA 1845 post); s 138(2E)(a) (s 138(2E) added by the Housing Act 2004 s 183(1); for transitional provisions see ss 183(4), 270(3)(a)).

22 For the meaning of 'final demolition notice' see PARA 1817 ante.

23 Ie the Housing Act 1985 s 138(1) (as amended) has effect subject to s 138B(2) (as added) (disapplication where final demolition notice is served: see PARA 1849 post): s 138(2E)(b) (as added: see note 21 supra).

24 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante.

25 Ie the Law of Property Act 1925 s 139: see PARA 638 ante.

26 Housing Act 1985 s 139(2). Section 139(2) is (1) substituted where the extended right to buy (see PARA 1798 ante) arises (see PARA 1844 post); (2) modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 14).

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#### **1844. Duty to convey freehold and apportionment of purchase price where the extended right to buy arises.**

Where the extended right to buy arises and the relevant regulations apply<sup>1</sup>, a secure tenant<sup>2</sup> has claimed to exercise the right to buy and that right has been established, then, as soon as all matters relating to the grant and to the amount have been agreed or determined, the freeholder<sup>3</sup> must make to the tenant a grant of the dwelling house<sup>4</sup> for an estate in fee simple absolute, in accordance with the relevant<sup>5</sup> statutory provisions<sup>6</sup>. The duty so to convey the freehold is enforceable by injunction<sup>7</sup>, subject to the statutory exceptions<sup>8</sup> already set out<sup>9</sup>.

On completion the freeholder must pay:

4631 (1) to the landlord<sup>10</sup> and to each intermediate landlord<sup>11</sup>, if any; and

4632 (2) to the rent owner of a rentcharge<sup>12</sup> charged on or issuing out of the lease of the landlord or an intermediate landlord,

an amount calculated in accordance with the prescribed formula<sup>13</sup>. If that amount, as so calculated, is a negative amount, then on completion a landlord or intermediate landlord in relation to which that amount is a negative amount must pay to the freeholder an amount equal to that amount; and that amount is recoverable as a civil debt due to the freeholder by that landlord or intermediate landlord<sup>14</sup>.

The secure tenancy<sup>15</sup>, the lease of the landlord and the lease of each of the intermediate landlords, if any, in so far as any such lease relates to the dwelling house, come to an end and are extinguished on the grant to the tenant of an estate in fee simple in pursuance of the right to buy; and if there is then a subtenancy deriving out of the secure tenancy, the statutory provisions relating to the effect of the extinguishment of the reversion<sup>16</sup> apply as on a merger or surrender<sup>17</sup>.

1 Ie where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see PARA 1798 ante.

2 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

3 For the meaning of 'freeholder' see PARA 1798 note 19 ante.

4 For the meaning of 'dwelling house' see PARA 1796 ante.



5 le in accordance with the Housing Act 1985 ss 138(2)-(3), 138A-188 (as amended and modified for these purposes): see PARA 1845 et seq post.

6 Ibid s 138(1) (substituted for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 20(a)).

7 Housing Act 1985 s 138(3) (modified for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 20(b)).

8 See PARA 1832 ante at heads (a)-(e) in the text.

9 See the Housing Act 1985 s 138(2)-(2E) (as amended; modified for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 20(b)); and PARA 1832 ante.

10 For the meaning of 'the landlord' see PARA 1300 note 1 ante.

11 For the meaning of 'intermediate landlord' see PARA 1798 note 18 ante.

12 For these purposes, 'rent owner' and 'rentcharge' have the same meanings as in the Rentcharges Act 1977 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 774-775): Housing Act 1985 s 138A(6) (s 138A added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 21).

13 See the Housing Act 1985 s 138A(1) (as added for these purposes: see note 12 supra). For the prescribed formula, and as to calculation of the amount under that formula, see s 138A(1), (2), (4), (7) (as so added). No payment is to be made under s 138A(1) (as so added) in relation to a lease of the dwelling house if it is a lease for a term certain and the residue of the term unexpired immediately before completion is a period of less than 12 months or if it is a periodic tenancy: s 138A(5) (as so added).

14 Ibid s 138A(3) (as added for these purposes: see note 12 supra).

15 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante.

16 Ie the Law of Property Act 1925 s 139: see PARA 638 ante.

17 Housing Act 1985 s 139(2) (substituted for these purpose by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 22(c)).

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## ***B. EFFECT OF DEMOLITION NOTICE SERVED BEFORE COMPLETION***

### **(A) INITIAL DEMOLITION NOTICE**

#### **1845. Meaning of 'initial demolition notice'; period of validity.**

An 'initial demolition notice' is<sup>1</sup> a notice served on a secure tenant<sup>2</sup>:

- 4633 (1) stating that the landlord<sup>3</sup> intends to demolish the dwelling house<sup>4</sup> or, as the case may be, the building containing it ('the relevant premises');
- 4634 (2) setting out the reasons why the landlord intends to demolish the relevant premises;
- 4635 (3) specifying the period within which he intends to demolish those premises<sup>5</sup>; and

4636 (4) stating that, while the notice remains in force, he will not be under any obligation to make a grant of an estate in fee simple or of a lease<sup>6</sup> in respect of any claim made by the tenant to exercise the right to buy<sup>7</sup> in respect of the dwelling house<sup>8</sup>.

An initial demolition notice must also state:

4637 (a) that the notice does not prevent:

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183. (i) the making by the tenant of any such claim; or

184. (ii) the taking of steps<sup>9</sup> in connection with any such claim up to the point where the landlord's duty to make a grant<sup>10</sup> would otherwise operate in relation to the claim; or

185. (iii) the operation of that duty in most circumstances where the notice ceases to be in force; but

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4638 (b) that, if the landlord subsequently serves a final demolition notice<sup>11</sup> in respect of the dwelling house, the right to buy will not arise in respect of it while that notice is in force and any existing claim will cease to be effective<sup>12</sup>.

If, at the time when an initial demolition notice is served, there is an existing claim to exercise the right to buy in respect of the dwelling house, the notice must:

4639 (A) state that there is a statutory right to compensation<sup>13</sup> in respect of certain expenditure; and

4640 (B) give details of that right to compensation and of how it may be exercised<sup>14</sup>.

An initial demolition notice comes into force<sup>15</sup> in respect of the dwelling house concerned on the date of service of the notice on the tenant and ceases to be so in force at the end of the period specified in accordance with head (3) above; but this is subject to compliance with the specified statutory conditions with respect to publicity<sup>16</sup> in a case to which they apply<sup>17</sup>.

1    Ie for the purposes of the Housing Act 1985 s 138A, Sch 5A (as added): see the text and notes 2-14 infra; and PARA 1846 et seq post.

2    Ibid Sch 5 para 16 (as added) (service of notices: see PARA 1817 ante) applies in relation to notices under Sch 5A (as added) as it applies in relation to notices under Sch 5 para 13 or Sch 13 para 15 (each as added): Sch 5A para 5 (Sch 5A added by the Housing Act 2004 s 183(3), Sch 9; for transitional provisions see ss 183(4), 270(3)(a)). For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

3    For these purposes, any reference to the landlord, in the context of a reference to the demolition or intended demolition of any premises, includes a reference to a superior landlord; and 'premises' means premises of any description: Housing Act 1985 Sch 5A para 6(1), (2) (as added: see note 2 supra). For the meaning of 'landlord' generally see PARA 1300 note 1 ante.

4    For the meaning of 'dwelling house' see PARA 1796 ante.

5    The period so specified must not: (1) allow the landlord more than what is, in the circumstances, a reasonable period to carry out the proposed demolition of the relevant premises (whether on their own or as part of a scheme involving the demolition of other premises); or (2) in any case expire more than five years after the date of service of the notice on the tenant: Housing Act 1985 Sch 5A para 1(4) (as added: see note 2 supra). 'Scheme' includes arrangements of any description: Sch 5A para 6(2) (as so added).

6    Ie such a grant as is mentioned in ibid s 138(1) (as amended): see PARA 1843 ante.

7    For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

- 8 Housing Act 1985 Sch 5A para 1(1) (as added: see note 2 supra).
- 9 Ie under ibid Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1846 et seq post.
- 10 Ie ibid s 138(1) (as amended): see PARA 1843 ante.
- 11 For the meaning of 'final demolition notice' see PARA 1817 ante.
- 12 Housing Act 1985 Sch 5A para 1(2) (as added: see note 2 supra).
- 13 Ie state that ibid s 138C (as added) (see PARA 1850 post) confers a right to compensation.
- 14 Ibid Sch 5A para 1(3) (as added: see note 2 supra).
- 15 Ie for the purposes of ibid Sch 5A (as added).
- 16 Ie subject to the conditions mentioned in ibid Sch 5A para 2(2) (as added) and also to Sch 5A para 2(3) (as added). The conditions in Sch 5 para 13(6), (7) (as added) (publicity for final demolition notices: see PARA 1817 ante) apply in relation to an initial demolition notice as they apply in relation to a final demolition notice: Sch 5A para 2(2) (as added: see note 2 supra). The notice mentioned in Sch 5 para 13(7) (as added) (as it so applies) must contain the following information (Sch 5A para 2(3) (as so added)), ie:
- 55 (1) sufficient information to enable identification of the premises that the landlord intends to demolish;
  - 56 (2) the reasons why the landlord intends to demolish those premises;
  - 57 (3) the period within which the landlord intends to demolish those premises;
  - 58 (4) the date when any initial demolition notice or notices relating to those premises will cease to be in force, unless revoked or otherwise terminated under or by virtue of Sch 5A para 3 (as added) (see PARA 1847 post);
  - 59 (5) that, during the period of validity of any such notice or notices, the landlord will not be under any obligation to make such a grant as is mentioned in s 138(1) (as amended) in respect of any claim to exercise the right to buy in respect of any dwelling house contained in those premises;
  - 60 (6) that there may be a right to compensation under s 138C (as added) in respect of certain expenditure incurred in respect of any existing claim.
- 17 Ibid Sch 5A para 2(1) (as added: see note 2 supra).

## UPDATE

### 1845 Meaning of 'initial demolition notice'; period of validity

TEXT AND NOTES--Housing Act 1985 Sch 5A amended: Housing and Regeneration Act 2008 s 310(3), Sch 13 paras 6-13. For transitional provision see 2008 Act Sch 13 para 14.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/B. EFFECT OF DEMOLITION NOTICE SERVED BEFORE COMPLETION/(A) Initial Demolition Notice/1846. Effect of initial demolition notice served before completion.

### 1846. Effect of initial demolition notice served before completion.

In a case where:

- 4641 (1) an initial demolition notice<sup>1</sup> is served on a secure tenant<sup>2</sup>; and  
 4642 (2) the notice is served on the tenant before the landlord<sup>3</sup> has made to him a grant of the dwelling house for an estate in fee simple absolute or for a lease<sup>4</sup> in respect of a claim by the tenant to exercise the right to buy<sup>5</sup>,

the landlord is not bound to comply with the duty to make such a grant as is mentioned in head (2) above<sup>6</sup>, in connection with any such claim by the tenant, so long as the initial demolition notice remains<sup>7</sup> in force<sup>8</sup>.

There is a right to compensation<sup>9</sup> in certain cases where the above provisions apply<sup>10</sup>.

- 1 For the meaning of 'initial demolition notice' see PARA 1845 ante.
- 2 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.
- 3 For the meaning of 'the landlord' see PARA 1300 note 1 ante. See also PARA 1845 note 3 ante.
- 4 Ie such a grant as is required by the Housing Act 1985 s 138(1) (as amended): see PARA 1843 ante.
- 5 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.
- 6 Ie he is not bound to comply with the Housing Act 1985 s 138(1) (as amended).
- 7 Ie under ibid Sch 5A (as added): see PARA 1845 ante, PARA 1847 post.
- 8 Ibid s 138A(1), (2) (s 138A added by the Housing Act 2004 s 183(2); for transitional provisions see ss 183(4), 270(3)(a)).
- 9 Ie the Housing Act 1985 s 138C (as added) (see PARA 1850 post) provides such a right.
- 10 Ibid s 138A(3) (as added: see note 8 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/B. EFFECT OF DEMOLITION NOTICE SERVED BEFORE COMPLETION/(A) Initial Demolition Notice/1847. Revocation or termination of initial demolition notices.

### **1847. Revocation or termination of initial demolition notices.**

If, while an initial demolition notice<sup>1</sup> is in force:

- 4643 (1) the landlord<sup>2</sup> decides not to demolish the dwelling house<sup>3</sup> in question, he must, as soon as is reasonably practicable, serve a notice ('a revocation notice') on the tenant which informs him of the landlord's decision, and that the demolition notice is revoked as from the date of service of the revocation notice<sup>4</sup>;  
 4644 (2) it appears to the Secretary of State<sup>5</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>6</sup> that the landlord has no intention of demolishing the dwelling house in question, he or the Assembly or minister may serve a notice ('a revocation notice') on the tenant which informs him of the Secretary of State's or the Assembly's or minister's conclusion and that the demolition notice is revoked as from the date of service of the revocation notice<sup>7</sup>;

but he or the Assembly or the relevant Welsh minister may not serve a revocation notice unless he or it has previously served a notice on the landlord which informs him of the Secretary of State's or the Assembly's or minister's intention to serve the revocation notice<sup>8</sup>.

Where a revocation notice is served under head (1) or head (2) above, the demolition notice ceases to be in force as from the date of service of the revocation notice<sup>9</sup>.

If a compulsory purchase order has been made for the purpose of enabling the landlord to demolish the dwelling house in respect of which he has served an initial demolition notice, whether or not it would enable him to demolish any other premises as well, and:

- 4645 (a) a relevant decision to confirm the order with modifications, or not to confirm the whole or part of the order<sup>10</sup>, becomes effective while the notice is in force<sup>11</sup>; or
- 4646 (b) a relevant decision of the High Court to quash the whole or part of the order<sup>12</sup> becomes final while the notice is in force,

the notice ceases to be in force as from the date when the decision becomes effective<sup>13</sup> or final<sup>14</sup>. Where an initial demolition notice so ceases to be in force, the landlord must, as soon as is reasonably practicable, serve a notice on the tenant which informs him that the notice has ceased to be in force as from the date in question, and of the reason why it has ceased to be in force<sup>15</sup>.

If, while an initial demolition notice is in force in respect of a dwelling house, a final demolition notice<sup>16</sup> comes into force<sup>17</sup> in respect of that dwelling house, the initial demolition notice ceases to be in force as from the date when the final demolition notice comes into force<sup>18</sup>. In such a case the final demolition notice must state that it is replacing the initial demolition notice<sup>19</sup>.

1 For the meaning of 'initial demolition notice' see PARA 1845 ante.

2 For the meaning of 'the landlord' see PARA 1845 note 3 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 Housing Act 1985 Sch 5 para 15(4) (Sch 5 para 15(4)-(7) added by the Housing Act 2004 s 182(1); applied for these purposes by the Housing Act 1985 s 138A(1), Sch 5A para 3(1) (Sch 5A added by the Housing Act 2004 s 183(3), Sch 9)). For transitional provisions see ss 183(4), 270(3)(a).

5 As to the Secretary of State see PARA 27 note 3 ante.

6 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Housing Act 1985 Sch 5 para 15(5) (as added and applied: see note 4 supra). Section 169 (as amended) (see PARA 1910 post) applies in relation to the Secretary of State's or the Assembly's or minister's power under this provision as it applies in relation to his or its powers under the provisions mentioned in s 169(1): Sch 5 para 15(5) (as so added and applied).

8 Ibid Sch 5 para 15(6) (as added and applied: see note 4 supra).

9 Ibid Sch 5 para 15(7) (as added and applied: see note 4 supra).

10 Ie a decision under the Acquisition of Land Act 1981 Pt II (ss 10-15) (as amended) (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 557 et seq) where the effect of the decision is that the landlord will not be able, by virtue of that order, to carry out the demolition of the dwelling house.

11 As to the period of validity of an initial demolition notice see PARA 1845 ante.

12 It is a decision of the High Court under the Acquisition of Land Act 1981 s 24 (see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 614) where the effect of the decision is that the landlord will not be able, by virtue of that order, to carry out the demolition of the dwelling house.

13 A relevant decision within the Housing Act 1985 Sch 5A para 3(3)(a) (as added) (see head (a) in the text) becomes effective (1) at the end of the period of 16 weeks beginning with the date of the decision, if no application for judicial review is made in respect of the decision within that period; or (2) if such an application is so made, at the time when (a) a decision on the application which upholds the relevant decision becomes final; or (b) the application is abandoned or otherwise ceases to have effect: Sch 5A para 3(4) (as added: see note 4 supra). See also note 14 infra.

14 Ibid Sch 5A para 3(2), (3) (as added: see note 4 supra). A relevant decision within Sch 5A para 3(3)(b) (as added) (see head (b) in the text), or a decision within Sch 5A para 4(b) (as added) (see note 13 head (2) supra), becomes final: (1) if not appealed against, at the end of the period for bringing an appeal; or (2) if appealed against, at the time when the appeal (or any further appeal) is disposed of; and for these purposes an appeal is disposed of (a) if it is determined and the period for bringing any further appeal has ended; or (b) if it is abandoned or otherwise ceases to have effect: Sch 5A para 3(5), (6) (as so added).

15 Ibid Sch 5A para 3(7) (as added: see note 4 supra).

16 For the meaning of 'final demolition notice' see PARA 1817 ante.

17 It is under the Housing Act 1985 Sch 5 para 13 (as added): see PARA 1817 ante.

18 Ibid Sch 5A para 3(8) (as added: see note 4 supra).

19 Ibid Sch 5A para 3(9) (as added: see note 4 supra).

## UPDATE

### 1847 Revocation or termination of initial demolition notices

TEXT AND NOTES--Housing Act 1985 Sch 5A amended: Housing and Regeneration Act 2008 Sch 13 paras 6-13. For transitional provision see 2008 Act Sch 13 para 14.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/B. EFFECT OF DEMOLITION NOTICE SERVED BEFORE COMPLETION/(A) Initial Demolition Notice/1848. Restriction on serving further demolition notices.

### 1848. Restriction on serving further demolition notices.

Where an initial demolition notice<sup>1</sup> ('the relevant notice') has, for any reason, ceased to be in force<sup>2</sup> in respect of a dwelling house<sup>3</sup> without it being demolished, the following provisions apply<sup>4</sup>. No further initial demolition notice may be served in respect of the dwelling house during the period of five years following the time when the relevant notice ceases to be in force, unless:

- 4647 (1) it is served with the consent of the Secretary of State<sup>5</sup> or, in relation to Wales, with the consent of the National Assembly for Wales or the relevant Welsh minister<sup>6</sup>; and
- 4648 (2) it states that it is so served<sup>7</sup>.

No final demolition notice<sup>8</sup> may be served in respect of the dwelling house during the period of five years following the time when the relevant notice ceases to be in force, unless it complies

with the conditions set out in heads (1) and (2) above<sup>9</sup>; but this does not apply to a final demolition notice which is served at a time when an initial demolition notice served in accordance with heads (1) and (2) above is in force<sup>10</sup>.

- 1 For the meaning of 'initial demolition notice' see PARA 1845 ante.
- 2 As to the period of validity of an initial demolition notice see PARA 1845 ante; and as to revocation or termination of such a notice see PARA 1847 ante.
- 3 For the meaning of 'dwelling house' see PARA 1796 ante.
- 4 Housing Act 1985 s 138A(1), Sch 5A para 4(1) (added by the Housing Act 2004 s 183(2), (3), Sch 9; for transitional provisions see ss 183(4), 270(3)(a)).
- 5 As to the Secretary of State see PARA 27 note 3 ante.
- 6 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 7 Housing Act 1985 Sch 5A para 4(2) (as added: see note 4 supra). The Secretary of State's or Assembly's or minister's consent under Sch 5A para 4(2) or Sch 5A para 4(3) (as so added) may be given subject to compliance with such conditions as he or it may specify: Sch 5A para 4(5) (as so added).
- 8 For the meaning of 'final demolition notice' see PARA 1817 ante.
- 9 Housing Act 1985 Sch 5A para 4(3) (as added: see note 4 supra); and see note 7 supra.
- 10 Ibid Sch 5A para 4(4) (as added: see note 4 supra).

## UPDATE

### 1848 Restriction on serving further demolition notices

TEXT AND NOTES--Housing Act 1985 Sch 5A amended: Housing and Regeneration Act 2008 Sch 13 paras 6-13. For transitional provision see 2008 Act Sch 13 para 14.

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/B. EFFECT OF DEMOLITION NOTICE SERVED BEFORE COMPLETION/ (B) Final Demolition Notice/1849. Effect of final demolition notice served before completion.

## (B) FINAL DEMOLITION NOTICE

### 1849. Effect of final demolition notice served before completion.

In a case where:

- 4649 (1) a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup>; but
- 4650 (2) before the landlord<sup>3</sup> has made to the tenant a grant of the dwelling house for an estate in fee simple absolute or for a lease<sup>4</sup> in respect of the claim,

a final demolition notice<sup>5</sup> is served on the tenant<sup>6</sup>, the tenant's claim ceases to be effective as from the time when the final demolition notice comes into force<sup>7</sup> and, accordingly, the duty to

make such a grant as is described in head (2) above<sup>8</sup> does not apply to the landlord, in connection with the tenant's claim, at any time after the notice comes into force<sup>9</sup>.

There is a statutory right to compensation<sup>10</sup> in certain cases where the above provisions apply<sup>11</sup>.

- 1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.
- 2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.
- 3 For the meaning of 'the landlord' see PARA 1300 ante. See also PARA 1845 note 3 ante.
- 4 Ie such a grant as is required by the Housing Act 1985 s 138(1) (as amended): see PARA 1843 ante.
- 5 For the meaning of 'final demolition notice' see PARA 1817 ante.
- 6 Ie under the Housing Act 1985 Sch 5 para 13 (as added): see PARA 1817 ante. As to the restrictions on serving further demolition notices in certain cases see PARA 1848 ante.
- 7 Ie comes into force under ibid Sch 5 para 13 (as added): see PARA 1817 ante.
- 8 Ie ibid s 138(1) (as amended).
- 9 Ibid s 138B(1), (2) (s 138B added by the Housing Act 2004 s 183(2); for transitional provisions see ss 183(4), 270(3)(a)).
- 10 Ie ibid s 138C (as added) (see PARA 1850 post) provides such a right.
- 11 Ibid s 138B(3) (as added: see note 9 supra).

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## (C) COMPENSATION

### **1850. Compensation where demolition notice served.**

The following provisions apply where:

- 4651 (1) a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup>;
- 4652 (2) before the landlord<sup>3</sup> has made to the tenant a grant of the dwelling house for an estate in fee simple absolute or for a lease<sup>4</sup> in respect of the claim, either an initial demolition notice<sup>5</sup> is served on the tenant<sup>6</sup> or a final demolition notice<sup>7</sup> is served on him<sup>8</sup>; and
- 4653 (3) the tenant's claim is established before that notice comes into force<sup>9</sup> under the relevant statutory provision<sup>10</sup>.

If, within the period of three months beginning with the date when the notice comes into force ('the operative date'), the tenant serves on the landlord a written notice claiming an amount of compensation in respect of expenditure reasonably incurred by the tenant before the operative date in respect of legal and other fees, and other professional costs and expenses, payable in connection with the exercise by him of the right to buy, the landlord must pay that amount to



the tenant<sup>11</sup>. Such a notice must be accompanied by receipts or other documents showing that the tenant incurred the expenditure in question<sup>12</sup>.

- 1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.
- 2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.
- 3 For the meaning of 'the landlord' see PARA 1300 ante. See also PARA 1845 note 3 ante.
- 4 Ie such a grant as is required by the Housing Act 1985 s 138(1) (as amended): see PARA 1843 ante. For the meaning of 'dwelling house' see PARA 1796 ante; and for the meaning of 'lease' see PARA 1300 note 1 ante.
- 5 For the meaning of 'initial demolition notice' see PARA 1845 ante.
- 6 Ie under the Housing Act 1985 s 138(1), Sch 5A (as added): see PARA 1845 et seq ante.
- 7 For the meaning of 'final demolition notice' see PARA 1817 ante.
- 8 Ie under the Housing Act 1985 Sch 5 para 13 (as added): see PARA 1817 ante.
- 9 Ie under ibid Sch 5A (as added) or Sch 5 para 13 (as added), as the case may be.
- 10 Ibid s 138C(1) (s 138C added by the Housing Act 2004 s 183(2); for transitional provisions see ss 183(4), 270(3)(a)).
- 11 Housing Act 1985 s 138C(2), (3) (as added: see note 10 supra).
- 12 Ibid s 138C(4) (as added: see note 10 supra).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/C. CONTENTS OF CONVEYANCE OR LEASE/(A) Common Provisions/1851. In general.

## ***C. CONTENTS OF CONVEYANCE OR LEASE***

### **(A) COMMON PROVISIONS**

#### **1851. In general.**

The conveyance or grant may not exclude or restrict the general words implied in conveyances<sup>1</sup> unless the tenant<sup>2</sup> consents or the exclusion or restriction is made for the purpose of preserving or recognising an existing interest of the landlord<sup>3</sup> in tenant's incumbrances<sup>4</sup> or an existing right or interest of another person<sup>5</sup>.

A provision of the conveyance or lease<sup>6</sup> is void in so far as it purports to enable the landlord to charge the tenant a sum for or in connection with the giving of a consent or approval<sup>7</sup>.

- 1 Ie under the Law of Property Act 1925 s 62: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236.
- 2 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 3 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 4 For these purposes, 'tenant's incumbrances' means (1) an incumbrance on the secure tenancy which is also an incumbrance on the reversion; and (2) an interest derived, directly or indirectly, out of the secure

tenancy; and 'incumbrances' includes personal liabilities attaching in respect of the ownership of land or an interest in land though not charged on the land or interest: Housing Act 1985 s 139(1), Sch 6 para 7. For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

Section 139(1) and Sch 6 para 7 are modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 22(a), 67(h). Where that Order applies, the freeholder must (1) execute the conveyance on its own behalf and in the names of the landlord and the intermediate landlord or landlords (if any) and it must be binding on those authorities or bodies; and (2) secure that the conveyance states that it is a conveyance to which this provision applies: Housing Act 1985 s 139(1A) (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 22(b)). For the meanings of 'intermediate landlord' and 'freeholder' see PARA 1798 notes 18-19 ante. The Housing Act 1985 Sch 6 para 7 is also modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 43(a)(iii).

5 Housing Act 1985 Sch 6 para 1. Schedule 6 para 1 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 67(a).

6 For the meaning of 'lease' see PARA 1300 note 1 ante.

7 Housing Act 1985 Sch 6 para 6. Schedule 6 para 6 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 67(g).

See also *R v Braintree District Council, ex p Halls* (2000) 80 P & CR 266, [2000] All ER (D) 511, CA (conveyance in pursuance of the right to buy contained restrictive covenant 'to use the property as a single private dwelling house only'; purchaser later obtained planning permission from vendor authority, in its capacity as local planning authority, to erect a further dwelling house within the property's curtilage and sought the authority's consent to the sale of the building plot; held that the authority's offer to release the applicant from the covenant subject to his paying a sum equivalent to 90% of the open market value of the building plot imposed an excessive and unlawful restriction since the ordinary incidents of a sale would not include the reservation of a right in the seller to keep the profits of any enhanced value arising from any potential development).

Halsbury's Laws of England/LANDLORD AND TENANT (VOLUME 27(1) (2006 REISSUE) PARAS 1-700; VOLUME 27(2) (2006 REISSUE) PARAS 701-1385; VOLUME 27(3) (2006 REISSUE) PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(2) THE RIGHT TO BUY AND THE RIGHT TO ACQUIRE/(viii) Completion of Purchase/C. CONTENTS OF CONVEYANCE OR LEASE/(A) Common Provisions/1852. Rights of support, passage of water etc.

## **1852. Rights of support, passage of water etc.**

As regards:

- 4654 (1) rights of support for a building or part of a building;
- 4655 (2) rights to the access of light and air to a building or part of a building;
- 4656 (3) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;
- 4657 (4) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions,

the conveyance or grant has effect:

- 4658 (a) to grant with the dwelling house<sup>1</sup> all such easements and rights over other property, so far as the landlord<sup>2</sup> is capable of granting them, as are necessary to secure to the tenant<sup>3</sup> as nearly as may be the same rights as at the relevant time<sup>4</sup> were available to him under or by virtue of the secure tenancy<sup>5</sup> or an agreement collateral to it, or under or by virtue of a grant, reservation or agreement made on

the severance of the dwelling house from other property then comprised in the same tenancy; and

- 4659 (b) to make the dwelling house subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the secure tenancy or an agreement collateral to it, or under or by virtue of a grant, reservation or agreement made as mentioned in head (a) above<sup>6</sup>.

The above provisions:

- 4660 (i) do not restrict any wider operation which the conveyance or grant may otherwise have; but

- 4661 (ii) are subject to any provision to the contrary that may be included in the conveyance or grant with the consent of the tenant<sup>7</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.

5 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

6 Housing Act 1985 s 139(1), Sch 6 para 2(1), (2). Schedule 6 para 2 is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 67(b)); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 43(a)(i)). See also PARA 1851 note 4 ante.

7 Housing Act 1985 Sch 6 para 2(3). See also note 6 supra.

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### **1853. Rights of way.**

The conveyance or grant must include:

- 4662 (1) such provisions, if any, as the tenant<sup>1</sup> may require for the purpose of securing to him rights of way over land not comprised in the dwelling house<sup>2</sup> so far as the landlord<sup>3</sup> is capable of granting them, being rights of way that are necessary for the reasonable enjoyment of the dwelling house; and
- 4663 (2) such provisions, if any, as the landlord may require for the purpose of making the dwelling house subject to rights of way necessary for the reasonable enjoyment of other property, being property in which at the relevant time the landlord has an interest, or to rights of way granted or agreed to be granted before the relevant time<sup>4</sup> by the landlord or by the person then entitled to the reversion on the tenancy<sup>5</sup>.

- 1 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 2 For the meaning of 'dwelling house' see PARA 1796 ante.
- 3 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 4 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.
- 5 Housing Act 1985 s 139(1), Sch 6 para 3. Schedule 6 para 3 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 67(c). See also PARA 1851 note 4 ante.

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#### **1854. Covenants and conditions.**

The conveyance or grant:

- 4664 (1) must include such provisions, if any, as the landlord<sup>1</sup> may require to secure that the tenant<sup>2</sup> is bound by, or to indemnify the landlord against breaches of, restrictive covenants, that is to say covenants restrictive of the use of any land or premises, which affect the dwelling house<sup>3</sup> otherwise than by virtue of the secure tenancy<sup>4</sup> or an agreement collateral to it and are enforceable for the benefit of other property<sup>5</sup>;
- 4665 (2) must be expressed to be made by the landlord with full title guarantee, thereby implying the specified covenants<sup>6</sup> for title<sup>7</sup>;
- 4666 (3) may include<sup>8</sup> such other covenants and conditions as are reasonable in the circumstances<sup>9</sup>.

- 1 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 2 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 3 For the meaning of 'dwelling house' see PARA 1796 ante.
- 4 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.
- 5 Housing Act 1985 s 139(1), Sch 6 para 4. Schedule 6 para 4 is modified (1) where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 67(d)); (2) where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 43(a)(ii)). See also PARA 1851 note 4 ante.

Where the Order referred to in head (1) *supra* applies, and the freeholder is aware of an obligation relating to the dwelling house breach of which may expose the landlord or an intermediate landlord to liability to another person, the freeholder must include in the conveyance such provision (if any) as may be reasonable in the circumstances to relieve the landlord or intermediate landlord (as the case may be) from, or to indemnify him against, that liability: Housing Act 1985 Sch 6 para 4A (as added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 67(e)). For the meanings of 'intermediate landlord' and 'freeholder' see PARA 1798 notes 18-19 ante.

The concept of using a property as a private dwelling house involves its use, at least in some way, as a home; thus where a right to buy conveyance contained a restrictive covenant not to use the property or permit it to be used for any use other than that of a private dwelling house, its use for short holiday lettings only was in breach of that covenant: see *Caradon District Council v Paton* [2000] 3 EGLR 57, [2000] All ER (D) 637, CA.

6 le the covenants for title specified in the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13) (as amended): see SALE OF LAND vol 42 (Reissue) PARA 349 et seq.

7 Housing Act 1985 Sch 6 para 4A (added by Law of Property (Miscellaneous Provisions) Act 1994 s 21(1), Sch 1 para 9(2)).

8 le subject to the Housing Act 1985 Sch 6 para 6 (see PARA 1851 ante), Sch 6 Pt II (paras 8-9) (see PARA 1855 post) and Sch 6 Pt III (paras 11-19) (as amended) (see PARAS 1856-1866 post).

9 Ibid Sch 6 para 5 (amended by the Law of Property (Miscellaneous Provisions) Act 1994 Sch 1 para 9(3)). The Housing Act 1985 Sch 6 para 5 (as amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 67(f).

A challenge to the reasonableness of the covenant can only be made to the court before the conveyance is executed; after execution, the tenant can only secure his release from the covenant on application to the Secretary of State (or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister) made under ss 167, 168 (as amended) (see PARA 1909 post): *Sheffield City Council v Jackson* [1998] 3 All ER 260 [1998] 1 WLR 1591, CA.

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## (B) CONVEYANCE OF FREEHOLD

### 1855. In general.

The conveyance may not exclude or restrict the implied all estate clause<sup>1</sup> unless the tenant<sup>2</sup> consents or the exclusion or restriction is made for the purpose of preserving or recognising an existing interest of the landlord<sup>3</sup> in tenant's incumbrances<sup>4</sup> or an existing right or interest of another person<sup>5</sup>.

The conveyance must be of an estate in fee simple absolute, subject to:

- 4667 (1) tenant's incumbrances;
- 4668 (2) burdens, other than burdens created by the conveyance, in respect of the upkeep or regulation for the benefit of any locality of any land, building, structure, works, ways or watercourses,

but otherwise free from incumbrances<sup>6</sup>.

1 le the clause implied under the Law of Property Act 1925 s 63: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 240.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'tenant's incumbrances' see PARA 1851 note 4 ante.

5 Housing Act 1985 s 139(1), Sch 6 para 8. Schedule 6 para 8 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 68. See also PARA 1851 note 4 ante.

6 Housing Act 1985 Sch 6 para 9(1). Nothing in Sch 6 para 9(1) is to be taken as affecting the operation of Sch 6 para 5 (as amended) (see PARA 1854 ante); Sch 6 para 9(2). For the meaning of 'incumbrances' see PARA 1851 note 4 ante.

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## (C) LEASES

### **1856. In general.**

A lease<sup>1</sup> must be for the appropriate term<sup>2</sup> and at a rent not exceeding £10 per annum<sup>3</sup>.

If at the time the grant is made the landlord's<sup>4</sup> interest in the dwelling house<sup>5</sup> is not less than a lease for a term of which more than 125 years and five days are unexpired, the appropriate term is a term of not less than 125 years<sup>6</sup>. In any other case the appropriate term is a term expiring five days before the term of the landlord's lease of the dwelling house or, as the case may require, five days before the first date on which the term of any lease under which the landlord holds any part of the dwelling house is to expire<sup>7</sup>.

If the dwelling house is a flat<sup>8</sup> contained in a building which also contains one or more other flats and the landlord has since 8 August 1980 granted a lease of one or more of them for the appropriate term, the lease of the dwelling house may be for a term expiring at the end of the term for which the other lease, or one of the other leases, was granted<sup>9</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 As defined in the Housing Act 1985 s 139(1), Sch 6 para 12 (see the text and notes 4-9 infra) but subject to Sch 6 para 12(3) (see the text and notes 8-9 infra).

3 Ibid Sch 6 para 11. Schedule 6 paras 12-19 (as amended) (see PARA 1857 et seq post) have effect with respect to the other terms of the lease: Sch 6 para 11. Schedule 6 Pt III (paras 11-19) (as amended) is omitted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 69. See also PARA 1851 note 4 ante. The Housing Act 1985 Sch 6 para 11 is modified where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 43(b)(i)); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 41(a)).

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'dwelling house' see PARA 1796 ante.

6 Housing Act 1985 Sch 6 para 12(1).

7 Ibid Sch 6 para 12(2).

8 For the meaning of 'flat' see PARA 1796 ante.

9 Housing Act 1985 Sch 6 para 12(3). Schedule 6 para 12(3) is omitted where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply (see Sch 1 para 43(b)(ii)); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619, apply (see Sch 1 para 41(b)).

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### **1857. Common use of premises and facilities.**

Where the dwelling house<sup>1</sup> is a flat<sup>2</sup> and the tenant<sup>3</sup> enjoyed, during the secure tenancy<sup>4</sup>, the use in common with others of any premises, facilities or services, the lease<sup>5</sup> must include rights to the like enjoyment, so far as the landlord<sup>6</sup> is capable of granting them, unless otherwise agreed between the landlord and the tenant<sup>7</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'flat' see PARA 1796 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'secure tenancy' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

5 For the meaning of 'lease' see PARA 1300 note 1 ante.

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 Housing Act 1985 s 139(1), Sch 6 para 13. Schedule 6 para 13 is modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply: see reg 2(1), Sch 1 para 43(b)(iii). See also PARAS 1851 note 4, 1856 note 3 ante.

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### **1858. Covenants by the landlord in respect of flats.**

Where the dwelling house<sup>1</sup> is a flat<sup>2</sup>, the following provisions apply<sup>3</sup>.

There are implied covenants by the landlord<sup>4</sup>:

- 4669 (1) to keep in repair the structure and exterior of the dwelling house and of the building in which it is situated, including drains, gutters and external pipes, and to make good any defect affecting the structure;
- 4670 (2) to keep in repair any other property over or in respect of which the tenant<sup>5</sup> has rights<sup>6</sup>;
- 4671 (3) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled, whether by himself or in common with others, are maintained at a reasonable level and to keep in repair any installations connected with the provision of those services<sup>7</sup>.

There is an implied covenant that the landlord is to rebuild or reinstate the dwelling house and the building in which it is situated in the case of destruction or damage by fire, tempest, flood or any other cause against the risk of which it is normal practice to insure<sup>8</sup>.

The county court may, by order made with the consent of the parties, authorise the inclusion in the lease<sup>9</sup> or in an agreement collateral to it of provisions excluding or modifying the obligations of the landlord under the covenants implied by the above provisions, if it appears to the court that it is reasonable to do so<sup>10</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'flat' see PARA 1796 ante.

3 Housing Act 1985 s 139(1), Sch 6 para 14(1). See also PARAS 1851 note 4, 1856 note 3 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'tenant' see PARA 1300 note 1 ante.

6 le by virtue of the Housing Act 1985 Sch 6 (as amended): see PARA 1851 et seq ante, PARA 1859 et seq post.

7 Ibid Sch 6 para 14(2) (amended by the Housing and Planning Act 1986 s 24(2), (3), Sch 5 para 41(1), (2), Sch 12 Pt I). The Housing Act 1985 Sch 6 para 14(2) (as so amended) and Sch 6 para 14(3) (as amended) (see the text and note 8 infra) have effect subject to Sch 6 para 15(3) (see PARA 1859 post): Sch 6 para 14(3A) (added by the Housing and Planning Act 1986 Sch 5 para 41(1), (4)).

8 Housing Act 1985 Sch 6 para 14(3) (amended by the Housing and Planning Act 1986 Sch 5 para 41(1), (3)). See also note 7 supra.

9 For the meaning of 'lease' see PARA 1300 note 1 ante.

10 Housing Act 1985 Sch 6 para 14(4).

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### **1859. Covenants by the landlord where landlord's interest is leasehold.**

Where the landlord's<sup>1</sup> interest in the dwelling house<sup>2</sup> is leasehold, the following provisions apply<sup>3</sup>.

There is implied a covenant by the landlord to pay the rent reserved by the landlord's lease<sup>4</sup> and, except in so far as they fall to be discharged by the tenant<sup>5</sup>, to discharge its obligations under the covenants contained in that lease<sup>6</sup>.

A covenant implied where the dwelling house is a flat<sup>7</sup> does not impose on the landlord an obligation which the landlord is not entitled to discharge under the provisions of the landlord's lease or a superior lease<sup>8</sup>. Where the landlord's lease or a superior lease or an agreement collateral to the landlord's lease or a superior lease contains a covenant by a person imposing obligations which would otherwise be imposed by a covenant so implied, there is implied a covenant by the landlord to use its best endeavours to secure that that person's obligations under the first-mentioned covenant are discharged<sup>9</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.



- 3 Housing Act 1985 s 139(1), Sch 6 para 15(1). See also PARAS 1851 note 4, 1856 note 3 ante.
- 4 For the meaning of 'lease' see PARA 1300 note 1 ante.
- 5 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 6 Housing Act 1985 Sch 6 para 15(2).
- 7 le the covenant implied by ibid Sch 6 para 14 (as amended): see PARA 1858 ante.
- 8 Ibid Sch 6 para 15(3).
- 9 Ibid Sch 6 para 15(4).

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### **1860. Covenant by tenant.**

Unless otherwise agreed between the landlord<sup>1</sup> and the tenant<sup>2</sup>, there is implied a covenant by the tenant:

- 4672 (1) where the dwelling house<sup>3</sup> is a house<sup>4</sup>, to keep the dwelling house in good repair, including decorative repair;
- 4673 (2) where the dwelling house is a flat<sup>5</sup>, to keep the interior of the dwelling house in such repair<sup>6</sup>.

- 1 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 2 For the meaning of 'tenant' see PARA 1300 note 1 ante.
- 3 For the meaning of 'dwelling house' see PARA 1796 ante.
- 4 For the meaning of 'house' see PARA 1796 ante.
- 5 For the meaning of 'flat' see PARA 1796 ante.
- 6 Housing Act 1985 s 139(1), Sch 6 para 16. See also PARAS 1851 note 4, 1856 note 3 ante.

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### **1861. Insurance contributions payable by the tenant.**

The lease<sup>1</sup> may require the tenant<sup>2</sup> to bear a reasonable part of the costs incurred by the landlord<sup>3</sup>:

- 4674 (1) in discharging or insuring against the obligations imposed by the implied covenants relating to repairs, making good structural defects, the provision of services etc<sup>4</sup>; or
- 4675 (2) in insuring against the obligations imposed by the implied covenant relating to rebuilding, reinstatement etc<sup>5</sup>;

and, to the extent that<sup>6</sup> such obligations are not imposed on the landlord, to bear a reasonable part of the costs incurred by the landlord in contributing to costs incurred by a superior landlord or other person in discharging or, as the case may be, insuring against obligations to the like effect<sup>7</sup>.

Where the lease requires the tenant to contribute to the costs of insurance, it must provide that the tenant is entitled to inspect the relevant policy at such reasonable times as may be specified in the lease<sup>8</sup>.

Where the landlord does not insure against the obligations imposed by the implied covenant<sup>9</sup> or, as the case may be, the superior landlord or other person does not insure against his obligations to the like effect, the lease may require the tenant to pay a reasonable sum in place of the contribution he could be required to make if there were insurance<sup>10</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 I.e. the covenants implied by the Housing Act 1985 s 139(1), Sch 6 para 14(2) (as amended): see PARA 1858 ante. Where in any case the obligations imposed by the covenants implied by virtue of Sch 6 para 14(2) (as amended) or Sch 6 para 14(3) (as amended) (see PARA 1858 ante) are modified in accordance with Sch 6 para 14(4) (see PARA 1858 ante), the references in Sch 6 para 16A (as added) are to the obligations as so modified: Sch 6 para 16A(4) (Sch 6 para 14A added by the Housing and Planning Act 1986 s 4(4), (6)). See also PARAS 1851 note 4, 1856 note 3 ante.

5 I.e. the covenant implied by the Housing Act 1985 Sch 6 para 14(3) (as amended): see PARA 1858 ante. See also note 4 supra.

6 I.e. by virtue of *ibid* Sch 6 para 15(3): see PARA 1859 ante.

7 *Ibid* Sch 6 para 16A(1) (as added: see note 4 supra). Schedule 6 para 16A (as added) has effect subject to Sch 6 para 16B (as added) (see PARA 1862 post): Sch 6 para 16A(5) (as so added).

8 *Ibid* Sch 6 para 16A(2) (as added: see note 4 supra). See *Coventry City Council v Cole* [1994] 1 All ER 997, (1993) 25 HLR 555, CA (clause in a long lease granted under the right to buy providing for the tenant to pay a service charge of a fixed sum plus a sum calculated in accordance with the building cost information service tender price index held to fall outside the Housing Act 1985 Sch 6 para 16A (as added) and Sch 6 para 18 (as substituted) (see PARA 1866 post)).

9 See note 5 supra.

10 Housing Act 1985 Sch 6 para 16A(3) (as added: see note 4 supra).

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## **1862. Service charges payable by the tenant.**

Where a lease<sup>1</sup> of a flat<sup>2</sup> requires the tenant<sup>3</sup> to pay service charges<sup>4</sup> in respect of repairs, including works for the making good of structural defects, his liability in respect of costs incurred in the initial period of the lease<sup>5</sup> is restricted as follows<sup>6</sup>.

He is not required to pay in respect of works itemised in the estimates contained in the landlord's notice<sup>7</sup> any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance<sup>8</sup>; and he is not required to pay in respect of works not so itemised at a rate exceeding:

4676 (1) as regards parts of the initial period falling within the reference period<sup>9</sup> for the purposes of the estimates contained in the landlord's notice, the estimated annual average amount shown in the estimates;

4677 (2) as regards parts of the initial period not falling within that reference period, the average rate produced by averaging over the reference period all works for which estimates are contained in the notice;

together, in each case, with an inflation allowance<sup>10</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 For the meaning of 'flat' see PARA 1796 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'service charge' see PARA 1829 note 17 ante.

5 For these purposes, the initial period of the lease begins with the grant of the lease and ends five years after the grant, except that (1) if the lease includes provision for service charges to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period; and (2) if the lease provides for service charges to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease: Housing Act 1985 s 139(1), Sch 6 para 16B(4) (Sch 6 paras 16B, 16D added by the Housing and Planning Act 1986 s 4(4), (6); the Housing Act 1985 Sch 6 para 16B(4) amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). See also PARAS 1851 note 4, 1856 note 3 ante.

6 Housing Act 1985 Sch 6 para 16B(1) (as added: see note 5 supra).

7 Ie a notice under *ibid* s 125 (as amended): see PARA 1829 ante.

8 *Ibid* Sch 6 para 16B(2) (as added: see note 5 supra). The Secretary of State or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister may by order prescribe (1) the method by which inflation allowances for the purposes of Sch 6 para 16B (as added and amended) or Sch 6 para 16C (as added and amended) (see PARA 1865 post) are to be calculated by reference to published statistics; and (2) the information to be given to a tenant when he is asked to pay a service charge or improvement contribution to which the provisions of Sch 6 para 16B (as added and amended) or Sch 6 para 16C (as added and amended) are or may be relevant: Sch 6 para 16D(1) (as added: see note 5 supra). Such an order (a) may make different provision for different cases or descriptions of case, including different provision for different areas; (b) may contain such incidental, supplementary or transitional provisions as the Secretary of State or the Assembly or minister thinks appropriate; and (c) must be made by statutory instrument which is subject, if made by the Secretary of State, to annulment in pursuance of a resolution of either House of Parliament: see Sch 6 para 16D(2) (as so added). In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195 (see PARAS 1863-1864 post) which came into operation on 7 January 1987: art 1. For the meaning of 'improvement contribution' see PARA 1829 note 18 ante; as to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions in relation to Wales see PARA 27 note 4 ante.

9 For the meaning of 'reference period' see PARA 1830 note 4 ante.

10 Housing Act 1985 Sch 6 para 16B(3) (as added: see note 5 supra).

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### **1863. Inflation allowances.**

The inflation allowance in respect of itemised works<sup>1</sup> must be calculated by the formula:

$$I = \left( E \times \frac{C}{P} \right) - E$$

where C equals the index figure<sup>2</sup> relating to the last date in the initial period on which costs were incurred in respect of the item, whether or not such costs were the full costs incurred in respect of that item; E equals the amount shown in the estimates<sup>3</sup> as the tenant's estimated contribution in respect of that item; I equals the inflation allowance; and P equals the index figure relating to the date on which the landlord served the notice on the tenant<sup>4</sup>.

The inflation allowance in respect of works not so itemised must be calculated by the formula<sup>5</sup>:

$$I = \left( A \times \frac{C}{P} \right) - A$$

or, as the case may be, by the formula<sup>6</sup>:

$$I = \left( R \times \frac{C}{P} \right) - R$$

where A equals the amount shown in the estimates as the estimated annual average amount; C equals the index figure relating to the date on which the tenant is required to pay the relevant charge<sup>7</sup> for which the inflation allowance is being calculated or, if earlier, the date the initial period ends; I equals the inflation allowance; P equals the index figure relating to the date on which the landlord served the notice on the tenant<sup>8</sup>; and R equals the average rate produced by averaging over the reference period all works for which estimates are contained in the notice<sup>9</sup>.

<sup>1</sup> *I*e for the purposes of the Housing Act 1985 s 139(1), Sch 6 para 16B(2) (as added) (see PARA 1862 ante) and Sch 6 para 16C(3) (as added) (see PARA 1865 post).

<sup>2</sup> For these purposes, 'index figure' means an index figure in the 'Public sector housing Repair and maintenance cost Index' in the 'Housing and Construction Statistics' published from time to time by Her Majesty's Stationery Office, but does not include a provisional index figure: Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195, art 2.

<sup>3</sup> For these purposes, 'the estimates' means the estimates contained in the notice; and 'notice' means a notice under the Housing Act 1985 s 125 (as amended) (see PARA 1829 ante): Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195, art 2.

<sup>4</sup> *Ibid* art 3. No account is, however, to be taken of any steps taken under the Housing Act 1985 s 177 (as amended) (errors and omissions in notices etc: see PARA 1801 ante): Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195, art 3.

<sup>5</sup> *I*e for the purposes of the Housing Act 1985 Sch 6 para 16B(3)(a) (as added): see PARA 1862 ante at head (1) in the text.

<sup>6</sup> *I*e for the purposes of *ibid* Sch 6 para 16B(3)(b) (as added): see PARA 1862 ante at head (2) in the text.

7 For these purposes, 'relevant charge' means a service charge or an improvement contribution to which the provisions of *ibid* Sch 6 para 16B (as added and amended) (see PARA 1862 ante) or Sch 16 para 16C (as added and amended) (see PARA 1865 post) are or may be relevant: Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195, art 2.

8 le taking no account of any steps taken under the Housing Act 1985 s 177 (as amended).

9 Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195, art 4(1), (2).

## UPDATE

### 1863 Inflation allowances

NOTE 2--In relation to England, 'index figure' means an index figure, other than a provisional index figure, in the table of 'BERR Output Deflators for Direct Labour: Public Housing Repairs and Maintenance' in the 'BERR Construction Price and Cost Indices Online' published from time to time by the Department for Business, Enterprise and Regulatory Reform': SI 1986/2195 art 2 (definition substituted, in relation to England, by SI 2008/533).

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### 1864. Information for tenants.

The information which must be given to a tenant when he is asked to pay a relevant charge<sup>1</sup> in respect of works itemised in the estimates<sup>2</sup> is:

- 4678 (1) a description of the works to which the relevant charge relates, together with an identification of the item in the estimates to which the works relate;
- 4679 (2) whether or not further costs will be incurred in respect of such item in the initial period; and, if not, the last date in the initial period on which costs were incurred in respect of the item, whether or not further costs will be incurred after the end of the initial period;
- 4680 (3) the amount of any payment made by a predecessor in title of the tenant in respect of such item; and
- 4681 (4) an explanation in simple terms of the tenant's liability in respect of service charges and improvement contributions during the initial period<sup>3</sup>, to the extent that they are relevant<sup>4</sup>.

The information which must be given to a tenant when he is asked to pay a relevant charge in respect of works not itemised in the estimates is:

- 4682 (a) a description of the works or that part of the works to which the relevant charge relates;
- 4683 (b) the extent to which costs were incurred in respect of such works or part of the works in any part of the initial period falling within the reference period and any part of the initial period not falling within the reference period;
- 4684 (c) the amount of any payment made by a predecessor in title of the tenant which is relevant in relation to such works; and

4685 (d) an explanation in simple terms of the tenant's liability in respect of service charges during the initial period<sup>5</sup>, to the extent that they are relevant<sup>6</sup>.

1 For the meaning of 'relevant charge' see PARA 1863 note 7 ante.

2 For the meaning of 'the estimates' see PARA 1863 note 3 ante.

3 See an explanation of the provisions of the Housing Act 1985 s 139(1), Sch 6 para 16B (as added and amended) (see PARA 1862 ante), Sch 6 para 16C (as added and amended) (see PARA 1865 post) and the Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195 (see the text and notes 4-6 infra; and PARA 1863 ante).

4 Ibid art 5.

5 See an explanation of the provisions of the Housing Act 1985 Sch 6 para 16B (as added and amended) and the Housing (Right to Buy) (Service Charges) Order 1986, SI 1986/2195.

6 Ibid art 6.

## UPDATE

### 1864 Information for tenants

NOTE 5--SI 1986/2195 amended, in relation to England, by SI 2007/384, SI 2008/533.

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### 1865. Improvement contributions payable by the tenant.

Where a lease<sup>1</sup> of a flat<sup>2</sup> requires the tenant<sup>3</sup> to pay improvement contributions<sup>4</sup>, his liability in respect of costs incurred in the initial period of the lease<sup>5</sup> is restricted as follows<sup>6</sup>.

He is not required to make any payment in respect of works for which no estimate was given<sup>7</sup> in the landlord's notice<sup>8</sup>; nor is he required to pay in respect of works for which an estimate was given in that notice any more than the amount shown as his estimated contribution in respect of that item, together with an inflation allowance<sup>9</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 For the meaning of 'flat' see PARA 1796 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'improvement contribution' see PARA 1829 note 18 ante.

5 For these purposes, the initial period of the lease begins with the grant of the lease and ends five years after the grant, except that (1) if the lease includes provision for improvement contributions to be payable in respect of costs incurred in a period before the grant of the lease, the initial period begins with the beginning of that period; and (2) if the lease provides for improvement contributions to be calculated by reference to a specified annual period, the initial period continues until the end of the fifth such period beginning after the grant of the lease: Housing Act 1985 s 139(1), Sch 6 para 16C(4) (Sch 6 para 16C added by the Housing and Planning Act 1986 s 4(4), (6); the Housing Act 1985 Sch 6 para 16C(4) amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). See also PARAS 1851 note 4, 1856 note 3 ante.

6 Housing Act 1985 Sch 6 para 16C(1) (as added: see note 5 supra).

7 le given in the landlord's notice under *ibid* s 125 (as amended): see PARA 1829 ante. For the meaning of 'landlord' see PARA 1300 note 1 ante.

8 *Ibid* Sch 6 para 16C(2) (as added: see note 5 supra).

9 *Ibid* Sch 6 para 16C(3) (as added: see note 5 supra). As to the method by which inflation allowances are to be calculated see PARAS 1862 note 8, 1863 ante.

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### **1866. Avoidance of certain provisions.**

A provision of the lease<sup>1</sup>, or of an agreement collateral to it, is void in so far as it purports to prohibit or restrict the assignment of the lease or the subletting, wholly or in part, of the dwelling house<sup>2</sup>.

Where the dwelling house is a flat<sup>3</sup>, a provision of the lease or of an agreement collateral to it is void in so far as it purports:

- 4686 (1) to authorise the recovery of a contribution in respect of repairs etc<sup>4</sup> otherwise than in accordance with the statutory provisions<sup>5</sup>; or
- 4687 (2) to authorise the recovery of any charge in respect of costs incurred by the landlord<sup>6</sup>;
- 325
- 186. (a) in discharging the obligations imposed by the implied covenant relating to rebuilding, reinstatement etc<sup>7</sup> or those obligations as modified<sup>8</sup>; or
- 187. (b) in contributing to costs incurred by a superior landlord or other person in discharging obligations to the like effect; or
- 326
- 4688 (3) to authorise the recovery of an improvement contribution<sup>9</sup> otherwise than in accordance with<sup>10</sup> the statutory provisions<sup>11</sup>.

A provision of the lease, or of an agreement collateral to it, is void in so far as it purports to authorise a forfeiture, or to impose on the tenant<sup>12</sup> a penalty or disability, in the event of his enforcing or relying on the terms to be included<sup>13</sup> in the lease<sup>14</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 Housing Act 1985 s 139(1), Sch 6 para 17(1). Schedule 6 para 17(1) has effect subject to s 157 (as amended) (restriction on disposal of dwellings in National Parks, etc: see PARA 1899 post): Sch 6 para 17(2). For the meaning of 'dwelling house' see PARA 1796 ante. Schedule 6 para 17(2) is omitted where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises: see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 41(d)). See also PARAS 1851 note 4, 1856 note 3 ante.

3 For the meaning of 'flat' see PARA 1796 ante.

4 le the recovery of such a charge as is mentioned in the Housing Act 1985 Sch 6 para 16A (as added): see PARA 1861 ante.

5 le otherwise than in accordance with *ibid* Sch 6 para 16A (as added) or Sch 6 para 16B (as added and amended) (see PARA 1862 ante).

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 le the covenant implied by the Housing Act 1985 Sch 6 para 14(3) (as amended): see PARA 1858 ante.

8 le as modified by *ibid* Sch 6 para 14(4): see PARA 1858 ante.

9 For the meaning of 'improvement contribution' see PARA 1829 note 18 ante.

10 le otherwise than in accordance with the Housing Act 1985 Sch 6 para 16C (as added and amended): see PARA 1865 ante.

11 *Ibid* Sch 6 para 18 (added by the Housing and Planning Act 1986 s 4(5), (6)). See *Coventry City Council v Cole* [1994] 1 All ER 997, (1993) 25 HLR 555, CA (cited in PARA 1861 note 8 ante).

12 For the meaning of 'tenant' see PARA 1300 note 1 ante.

13 le in the event of his enforcing or relying on the Housing Act 1985 Sch 6 paras 1-18 (as amended): see the text and notes 1-12 supra; and PARA 1851 et seq ante.

14 *Ibid* Sch 6 para 19.

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## (D) CHARGES

### **1867. Conveyance of freehold.**

The following provisions apply to a charge, however created or arising, on the freehold where the freehold is conveyed in pursuance of the right to buy<sup>1</sup>.

If the charge is not a tenant's incumbrance<sup>2</sup> and is not a rentcharge<sup>3</sup>, the conveyance is effective to release the freehold from the charge<sup>4</sup>; but the release does not affect the personal liability of the landlord<sup>5</sup> or any other person in respect of any obligation which the charge was created to secure<sup>6</sup>.

If the charge is a rentcharge, the conveyance must be made subject to the charge; but, if the rentcharge also affects other land:

4689 (1) the conveyance must contain a covenant by the landlord to indemnify the tenant<sup>7</sup> and his successors in title in respect of any liability arising under the rentcharge; and

4690 (2) if the rentcharge is of a kind which may be redeemed<sup>8</sup>, the landlord must immediately after the conveyance take such steps as are necessary to redeem the rentcharge so far as it affects land owned by him<sup>9</sup>.

1 Housing Act 1985 s 139(1), Sch 6 para 21(1). For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

2 For the meaning of 'tenant's incumbrance' see PARA 1851 note 4 ante.



3 For these purposes, 'rentcharge' has the same meaning as in the Rentcharges Act 1977 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 note 1): Housing Act 1985 Sch 6 para 21(4).

4 Where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises, the Housing Act 1985 Sch 6 para 21(2) (see the text and notes 2-3 supra, 5 infra) is modified by the addition, after the words 'from the charge' of the proviso 'Provided that (a) the landlord has complied with the requirements imposed on the landlord by [Sch 6] paragraph 22; or (b) the holder of the charge has agreed in writing with the landlord that paragraph 22 shall not apply': see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 41(f). As to the requirements imposed by the Housing Act 1985 Sch 6 para 22 (as added for these purposes) see PARA 1869 post.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 Housing Act 1985 Sch 6 para 21(2). Schedule 6 para 21(2)-(4) is modified where the extended right to buy (see PARA 1798 ante) arises: see the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 69(b). See also PARA 1851 note 4 ante. Where that right arises, the Housing Act 1985 Sch 6 para 21A (as added for these purposes) applies to a charge (however created or arising) on a lease (including the secure tenancy) extinguished by s 139(2) (terms and effect of conveyance and mortgage: see PARA 1843 ante) when the freehold is conveyed in pursuance of the right to buy: Sch 6 para 21A(1) (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 69(c)). The extinguishment of the lease does not affect the personal liability of the landlord or intermediate landlord (as the case may be) or of any other person in respect of any obligation which the charge was created to secure: Housing Act 1985 Sch 6 para 21A(2) (as so added). For the meaning of 'intermediate landlord' see PARA 1798 note 18 ante.

7 For the meaning of 'tenant' see PARA 1300 note 1 ante.

8 Ie under the Rentcharges Act 1977: see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 900 et seq.

9 Housing Act 1985 Sch 6 para 21(3). For the purposes of Sch 6 para 21(3), land is owned by a person if he is the owner of it within the meaning of the Rentcharges Act 1977 s 13(1) (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 775 note 3); and (2) for the purposes of the Housing Act 1985 Sch 6 para 21(3) and the Rentcharges Act 1977 land which has been conveyed by the landlord in pursuance of the right to buy but subject to the rentcharges is to be treated as if it had not been so conveyed but had continued to be owned by him: Housing Act 1985 Sch 6 para 21(4).

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## **1868. Grant of lease.**

A charge, however created or arising, on the interest of the landlord<sup>1</sup> which is not a tenant's incumbrance<sup>2</sup> does not affect a lease<sup>3</sup> granted in pursuance of the right to buy<sup>4</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'tenant's incumbrance' see PARA 1851 note 4 ante.

3 For the meaning of 'lease' see PARA 1300 note 1 ante.

4 Housing Act 1985 s 139(1), Sch 6 para 20. For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante. Schedule 6 para 20 is omitted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 69(a).

Where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises, the Housing Act 1985 Sch 6 para 20 (see the text and notes 1-4 supra) is modified by the addition at the end of the proviso 'Provided that (a) the landlord has complied with the requirements imposed on the landlord by [Sch 6] paragraph 22; or (b) the holder of the charge has agreed in writing with the landlord that paragraph 22 shall not apply, but the release does not affect the personal liability of the landlord or any other person in respect of any obligation the charge was created to secure.': see the Housing (Right to Acquire) Regulations 1997, SI

1997/619, reg 2, Sch 1 para 41(f). As to the requirements imposed by the Housing Act 1985 Sch 6 para 22 (as added for these purposes) see PARA 1869 post.

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**1869. Notice to lenders and discharge of the charge on the landlord's interest in the dwelling house where the right to acquire is exercised.**

Where the right to acquire conferred by the Housing Act 1996<sup>1</sup> arises, the following provisions apply to a charge, however created or arising, on the interest of the landlord<sup>2</sup> in the dwelling house<sup>3</sup>, unless and until the landlord and the holder of the charge at any time agree otherwise in writing<sup>4</sup>. Within seven days of the landlord receiving the tenant's written notice of intention to pursue his claim to the right to acquire<sup>5</sup>, the landlord must serve on the holder of any charge secured against the dwelling house a written notice stating the purchase price of the dwelling house and the amount of discount and whether the landlord intends to redeem the charge in respect of the dwelling house on the grant of the lease or the conveyance of the freehold to the tenant pursuant to the right to acquire<sup>6</sup>. If the landlord's notice states that he intends to redeem the charge then, on the grant of the lease or the conveyance of the freehold, the sum required to redeem the charge must be paid by the landlord to the charge holder and the charge holder must supply to the landlord the necessary documentation to release the charge in respect of the dwelling house<sup>7</sup>. If the landlord does not intend to redeem the charge on the grant of a lease or the conveyance of the freehold the landlord's notice must, in addition, offer to the holder of the sole charge or the charge having priority the option of either:

- 4691 (1) taking as alternative security<sup>8</sup> a charge on the interest in a property of the landlord which has a value, excluding any amount secured by a charge with priority on the landlord's interest in the property, equal to or greater than the purchase price of the dwelling house plus the discount; or
- 4692 (2) an amount equal to the purchase price of the dwelling house plus the discount<sup>9</sup>.

The landlord is not, however, required to offer a property as alternative security unless the landlord owns a freehold or leasehold interest in a property with a value, excluding any amount secured by a charge on the interest which is being offered in the property, equal to or greater than the purchase price plus discount<sup>10</sup>.

Where head (1) or head (2) above applies, within 14 days of receipt of the landlord's notice the charge holder must serve on the landlord a written notice stating the option exercised by the charge holder<sup>11</sup>.

Where the charge holder exercises the option specified in head (1) above, the landlord must within 14 days of receipt of the charge holder's notice offer the charge holder a specified property in accordance with that head<sup>12</sup>. Where the charge holder accepts the property offered as alternative security the landlord must take all reasonable steps to enable the charge holder to secure a charge against the landlord's interest in the property within whichever is the later of:

- 4693 (a) 21 days of the date on which the landlord receives notification of the charge holder's acceptance of the property as alternative security; or  
 4694 (b) the grant of the lease or the conveyance of the freehold of the dwelling house pursuant to the right to acquire<sup>13</sup>.

If the landlord fails to take all reasonable steps to enable the charge holder to secure a charge against the landlord's interest in accordance with head (a) or head (b) above, the charge holder may require the landlord to pay within seven days an amount equal to the purchase price of the dwelling house plus the discount<sup>14</sup>. Where the charge holder rejects the property offered as alternative security the charge holder may require the landlord to pay an amount equal to the purchase price of the dwelling house plus the discount within whichever is the later of:

- 4695 (i) 21 days of the date on which the landlord receives notification of the charge holder's rejection of the property; or  
 4696 (ii) the grant of the lease or the conveyance of the freehold of the dwelling house pursuant to the right to acquire<sup>15</sup>.

Where the charge holder exercises the option in head (2) above, the landlord must pay the sum specified in that head on the grant of the lease or the conveyance of the freehold of the dwelling house pursuant to the right to acquire<sup>16</sup>.

Where the landlord and the charge holder have agreed in writing that the provisions set out above<sup>17</sup> are not to apply, on the grant of the lease or the conveyance of the freehold pursuant to the right to acquire the landlord must supply to the tenant a certificate confirming the agreement together with a copy of the agreement which is certified as a true copy<sup>18</sup>. Where, however, the provisions set out above apply, then provided that the landlord has complied with the requirements imposed on the landlord by them, any holder of a charge on the landlord's interest in the dwelling house must, on the grant of the lease or the conveyance of the freehold of the dwelling house pursuant to the right to acquire, provide to the landlord such documentation as is necessary to discharge their charge in respect of the dwelling house<sup>19</sup>. Where a charge holder does not so provide the documentation, or where the charge holder has failed to serve a notice stating the option exercised by him<sup>20</sup>, the landlord must, on the grant of the lease or the conveyance of the freehold pursuant to the right to acquire, supply to the tenant a certificate stating that the landlord has complied with the requirements imposed on the landlord by the provisions set out above<sup>21</sup>.

1 As to the right to acquire see PARAS 1804-1807 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 Housing Act 1985 Sch 6 para 22(1) (Sch 6 paras 22, 23 added for these purposes by the Housing (Right to Acquire) Regulations 1997, SI 1997/619, Sch 1 para 41(g)).

5 I.e. under the Housing Act 1985 s 125D (as added): see PARA 1826 ante.

6 Ibid Sch 6 para 22(2) (as added: see note 4 supra).

7 Ibid Sch 6 para 22(3) (as added: see note 4 supra).

8 I.e. subject to Sch 6 para 22(5) (as added): see the text and note 10 infra.

9 Ibid Sch 6 para 22(4) (as added: see note 4 supra).

10 Ibid Sch 6 para 22(5) (as added: see note 4 supra).

11 Ibid Sch 6 para 22(6) (as added: see note 4 supra).

- 12 Ibid Sch 6 para 22(7) (as added: see note 4 supra).
- 13 Ibid Sch 6 para 22(8) (as added: see note 4 supra).
- 14 Ibid Sch 6 para 22(9) (as added: see note 4 supra).
- 15 Ibid Sch 6 para 22(10) (as added: see note 4 supra).
- 16 Ibid Sch 6 para 22(11) (as added: see note 4 supra).
- 17 Ie the provisions of ibid Sch 6 para 22 (as added): see the text and notes 1-16 supra.
- 18 Ibid Sch 6 para 23(1) (as added: see note 4 supra). See also note 21 infra.
- 19 Ibid Sch 6 para 23(2) (as added: see note 4 supra).
- 20 Ie in accordance with ibid Sch 6 para 22(6) (as added): see the text and note 11 supra.
- 21 Ibid Sch 6 para 23(3) (as added: see note 4 supra). A certificate under Sch 6 para 23(1) or (3) (as so added) is effective to release the dwelling house from the charge on the interest of the landlord to which the certificate applies but does not affect the personal liability of the landlord or any other person in respect of any obligation which such a charge was created to secure: Sch 6 para 23(4) (as so added). As to the form of the certificate see Sch 6 para 23(5) (as so added). The Chief Land Registrar must, for the purpose of registration of title, accept such certificate as sufficient evidence of the facts stated in it, but if as a result he has to meet a claim against him under the Land Registration Act 2002 or its predecessor legislation the landlord is liable to indemnify him: see the Housing Act 1985 Sch 6 para 23(6) (as so added).

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## **(ix) Completion Notices**

### **1870. Landlord's first notice to complete.**

The landlord<sup>1</sup> may serve on the tenant<sup>2</sup> at any time a written notice requiring him:

- 4697 (1) if all relevant matters<sup>3</sup> have been agreed or determined, to complete the transaction within a period stated in the notice; or
- 4698 (2) if any relevant matters are outstanding, to serve on the landlord within that period a written notice to that effect specifying the matters,

and informing the tenant of the effect of these provisions<sup>4</sup> and of the statutory provisions<sup>5</sup> relating to a landlord's second notice to complete<sup>6</sup>. The period so stated in a notice must be such period, of at least 56 days, as may be reasonable in the circumstances<sup>7</sup>.

Such a notice may not, however, be served earlier than three months after:

- 4699 (a) the service of the landlord's notice of the purchase price and other matters<sup>8</sup>; or
- 4700 (b) where a notice has been served by the landlord admitting or denying the tenant's right to acquire on rent to mortgage terms, where still exercisable<sup>9</sup>, the service of that notice<sup>10</sup>.

Such a notice may not be served if:

- 4701 (i) a requirement for the determination or redetermination of the value of the dwelling house<sup>11</sup> by the district valuer<sup>12</sup> has not been complied with;
- 4702 (ii) proceedings for the determination of any other relevant matter have not been disposed of; or
- 4703 (iii) any relevant matter stated to be outstanding in a written notice served on the landlord by the tenant has not been agreed in writing or determined<sup>13</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For these purposes, 'relevant matters' means matters relating to the grant: Housing Act 1985 s 140(5) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). A notice by the tenant requesting that the name of a family member who has been nominated as joint purchaser be removed from the application for the right to buy is a relevant outstanding matter if served within the completion period: *Sebanjo v Brent London Borough Council* [2001] 1 WLR 2374, [2001] LGR 339, sub nom *Senbanjo v Brent London Borough Council* (2001) Times, 4 January, [2000] All ER (D) 2393 (tenant's decision to remove the family member's name meant time began to run again and the second notice to complete was invalid).

4 Ie the effect of the Housing Act 1985 s 140 (as amended).

5 Ie the effect of *ibid* s 141(1), (2), (4): see PARA 1871 post.

6 *Ibid* s 140(1). Section 140 (as amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 23.

7 Housing Act 1985 s 140(2). See also note 6 supra.

8 Ie the notice under *ibid* s 125 (as amended): see PARA 1829 ante.

9 Ie a notice under *ibid* s 146 (as substituted): see PARA 1873 post. The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see s 142A (as added); and PARA 1872 post.

10 *Ibid* s 140(3) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 12; amended by the Housing Act 2004 s 184(1), (2); for transitional provisions see ss 184(3), 270(3)(a)).

The Housing Act 1985 s 140(3) (as substituted and amended) is further substituted (1) where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 15); (2) where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 15). See also note 6 supra.

11 For the meaning of 'dwelling house' see PARA 1796 ante.

12 For the meaning of 'district valuer' see PARA 1332 note 22 ante.

13 Housing Act 1985 s 140(4). See also note 6 supra.

## UPDATE

### 1870 Landlord's first notice to complete

TEXT AND NOTE 13--1985 Act s 140(4) amended: Housing and Regeneration Act 2008 s 306(10).

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### **1871. Landlord's second notice to complete.**

If the tenant<sup>1</sup> does not comply with a landlord's first notice to complete<sup>2</sup>, the landlord may<sup>3</sup> serve on him a further written notice:

- 4704 (1) requiring him to complete the transaction within a period stated in the notice; and
- 4705 (2) informing him of the effect of these provisions in the event of his failing to comply<sup>4</sup>.

The period stated in such a notice must be such period, of at least 56 days, as may be reasonable in the circumstances<sup>5</sup>; and at any time before the end of that period, or that period as previously extended, the landlord may by a written notice served on the tenant extend it, or further extend it<sup>6</sup>.

If the tenant does not comply with such a notice, the notice claiming to exercise the right to buy<sup>7</sup> is deemed to be withdrawn at the end of that period or, as the case may require, that period as so extended<sup>8</sup>.

If such a notice has been served on the tenant and, by virtue of the tenant's failure to pay the rent etc<sup>9</sup>, the landlord is not bound to complete, the tenant is deemed not to comply with the notice<sup>10</sup>.

1 For the meaning of 'tenant' see PARA 1300 note 1 ante.

2 I.e. a notice under the Housing Act 1985 s 140 (as amended): see PARA 1870 ante. For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 The power to serve such a notice is discretionary and does not require the first notice to be followed by a second notice at any given time: *Milne-Berry and Madden v Tower Hamlets London Borough Council* (1997) 30 HLR 229, CA.

4 Housing Act 1985 s 141(1). Section 141 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 23.

5 Housing Act 1985 s 141(2).

6 Ibid s 141(3). The requirement that any extension of time must be given in writing (1) is a formality which can be waived by the individual parties; and (2) does not prevent the doctrine of estoppel operating in favour of the tenant when the landlord has given a verbal extension of time: *Milne-Berry and Madden v Tower Hamlets London Borough Council* (1997) 30 HLR 229, CA, applying *Daejan Properties Ltd v Mahoney* (1995) 28 HLR 498, [1995] 2 EGLR 75, CA.

7 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

8 Housing Act 1985 s 141(4). Once s 141(4) has taken effect, the tenant no longer has the protection of the statutory scheme and any extension of time granted by the landlord is at the landlord's discretion: see *R (on the application of Burrell) v Lambeth London Borough Council* [2006] EWHC 394 (Admin), [2006] RVR 230, [2006] All ER (D) 167 (Feb).

9 I.e. by virtue of the Housing Act 1985 s 138(2): see PARA 1843 ante.

10 Ibid s 141(5).

**UPDATE****1871 Landlord's second notice to complete**

NOTE 8--The right to buy is deemed withdrawn even where the landlord's breach of its repairing obligations under the tenancy prevent the tenant from obtaining a mortgage: *Ryan v Islington LBC* [2009] EWCA Civ 578, [2009] All ER (D) 202 (Jun).

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**(3) TRANSITIONAL RIGHT TO ACQUIRE ON RENT TO MORTGAGE TERMS****(i) In general****1872. The former statutory right and the transitional cases in which it may be exercised.**

Where:

- 4706 (1) a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup>; and
- 4707 (2) his right to buy has been established and his notice claiming to exercise it remains in force,

he also has the right<sup>3</sup>, in transitional cases, to acquire on rent to mortgage terms in accordance with the relevant statutory provisions<sup>4</sup>. As from 18 July 2005 ('the termination date')<sup>5</sup>, that right is not exercisable except in pursuance of a notice served<sup>6</sup> before that date<sup>7</sup>.

Where the right to buy belongs to two or more persons jointly, the right to acquire on rent to mortgage terms also belongs to them jointly<sup>8</sup>.

In the cases in which it may still arise, the right to acquire on rent to mortgage terms cannot be exercised if:

- 4708 (a) the exercise of the right to buy is precluded<sup>9</sup> by the existence of the specified circumstances<sup>10</sup>; or
- 4709 (b) either it has been determined that the tenant<sup>11</sup> is or was entitled to housing benefit in respect of any part of the relevant period<sup>12</sup>, or a claim for housing benefit in respect of any part of that period has been made, or is treated as having been made, by or on behalf of the tenant and has not been determined or withdrawn<sup>13</sup>; or
- 4710 (c) the minimum initial payment<sup>14</sup> in respect of the dwelling house exceeds the maximum initial payment<sup>15</sup> in respect of it<sup>16</sup>.

The right is not applicable where the preserved right to buy<sup>17</sup> or the right to acquire conferred by the Housing Act 1996<sup>18</sup> arises<sup>19</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante.

3 le subject to the Housing Act 1985 s 143(2) (as substituted) (see head (a) in the text) and to s 142A (as added (see the text and notes 5-7 infra), s 143A (as substituted) (see head (b) in the text) and s 143B (as substituted) (see head (c) in the text).

4 See ibid s 143(1) (ss 143-143B substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 108; the Housing Act 1985 s 143(1) amended by the Housing Act 2004 s 190(2)).

5 For these purposes, 'the termination date' means the date falling eight months after the date of the passing of the Housing Act 2004: Housing Act 1985 s 142A(2) (s 142A added by the Housing Act 2004 s 190(1)).

6 le served under the Housing Act 1985 s 144 (as substituted): see PARA 1873 post.

7 Ibid s 142A(1) (as added: see note 5 supra).

8 Ibid s 143(3) (as substituted: see note 4 supra).

9 le precluded by ibid s 121 (as amended): see PARA 1819 ante.

10 Ibid s 143(2) (as substituted: see note 4 supra).

11 For the meaning of 'tenant' see PARA 1300 note 1 ante.

12 For these purposes, 'the relevant period' means the period (1) beginning 12 months before the day on which the tenant claims to exercise the right to acquire on rent to mortgage terms; and (2) ending with the day on which the conveyance or grant is executed in pursuance of that right: Housing Act 1985 s 143A(2) (as substituted: see note 4 supra). Section 143A(2) (as so substituted) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 24.

13 Housing Act 1985 s 143A(1) (as substituted: see note 4 supra). As to housing benefit see HOUSING vol 22 (2006 Reissue) PARA 140 et seq.

14 Where, in the case of a dwelling house which is a house, the weekly rent at the relevant time did not exceed the relevant amount, the minimum initial payment is determined by the formula set out in ibid s 143B(3) (as substituted); and where, in the case of a dwelling house which is a house, the weekly rent at the relevant time exceeded the relevant amount, the minimum initial payment is determined by the formula set out in s 143B(4) (as substituted). The minimum initial payment in respect of a dwelling house which is a flat is 80% of the amount which would be the minimum initial payment in respect of the dwelling house if it were a house: s 143B(5) (as substituted: see note 4 supra). For the meanings of 'dwelling house' and 'flat' see PARA 1796 ante.

'Relevant amount' means the amount which at the relevant time was for the time being declared by the Secretary of State or, in relation to Wales, by the National Assembly for Wales for these purposes; 'relevant time' means the time of the service of the landlord's notice under s 146 (as substituted) (landlord's notice admitting or denying right: see PARA 1873 post); and 'rent' means rent payable under the secure tenancy, but excluding any element which is expressed to be payable for services, repairs, maintenance or insurance or the landlord's costs of management: s 143B(8) (as substituted: see note 4 supra). The relevant amount and multipliers for the time being declared for these purposes must be such that, in the case of a dwelling house which is a house, they will produce a minimum initial payment equal to the capital sum which, in the opinion of the Secretary of State or the Assembly, could be raised on a 25 year repayment mortgage in the case of which the net amount of the monthly mortgage payments was equal to the rent at the relevant time calculated on a monthly basis; and the Secretary of State or the Assembly is to assume (1) that the interest rate applicable throughout the 25 year term was the standard national rate for the time being declared by the Secretary of State or the Assembly under Sch 16 para 2 (local authority mortgage interest rates); and (2) that the monthly mortgage payments represented payments of capital and interest only: s 143B(6), (7) (as so substituted).

Section 143B(3), (4), (6), (8) (as substituted) are modified, and s 143B(5) (as substituted) is omitted, where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 25.

15 The maximum initial payment in respect of a dwelling house is 80% per cent of the price which would be payable if the tenant were exercising the right to buy: ibid s 143B(2) (as substituted: see note 4 supra).

16 Ibid s 143B(1) (as substituted: see note 4 supra).

17 As to the preserved right to buy see PARA 1900 et seq post.

18 As to the right to acquire conferred by the Housing Act 1996 see PARAS 1804-1807 ante.



19 See the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2(1), Sch 1 para 16; the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 16.

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### **1873. Tenant's and landlord's notices.**

A secure tenant<sup>1</sup> claims to exercise the right to acquire on rent to mortgage terms<sup>2</sup> by written notice to that effect served on the landlord<sup>3</sup>. The notice must have been served before 18 July 2005<sup>4</sup>. On the service of such a notice, any notice served by the landlord requiring the tenant to complete the purchase in pursuance of the right to buy<sup>5</sup> is deemed to have been withdrawn; and no such notice may be served by the landlord whilst a notice under these provisions remains in force<sup>6</sup>. The notice may be withdrawn at any time by notice in writing served on the landlord<sup>7</sup>; and, where a notice is so withdrawn, the tenant may complete the transaction in accordance with the statutory provisions<sup>8</sup> relating to the right to buy<sup>9</sup>.

Where such a notice has been served by the tenant, the landlord must, unless the notice is withdrawn, serve on the tenant as soon as practicable a written notice either:

- 4711 (1) admitting the tenant's right and informing him of the specified matters<sup>10</sup>; or
- 4712 (2) denying it and stating the reasons why, in the opinion of the landlord, the tenant does not have the right to acquire on rent to mortgage terms<sup>11</sup>.

Where such a landlord's notice has been served on a secure tenant, he must within the specified period<sup>12</sup> serve a written notice on the landlord stating either:

- 4713 (a) that he intends to pursue his claim to exercise the right to acquire on rent to mortgage terms and the amount of the initial payment which he proposes to make<sup>13</sup>; or
- 4714 (b) that he withdraws that claim and intends to pursue his claim to exercise the right to buy<sup>14</sup>; or
- 4715 (c) that he withdraws both of those claims<sup>15</sup>.

The landlord may serve notice in default<sup>16</sup>; and if the tenant does not comply with such a notice in default, the notice claiming to exercise the right to acquire on rent to mortgage terms is deemed to be withdrawn<sup>17</sup>.

Where a secure tenant has served:

- 4716 (i) a notice<sup>18</sup> stating that he intends to pursue his claim to exercise the right to acquire on rent to mortgage terms, and the amount of the initial payment which he proposes to make; or
- 4717 (ii) a notice<sup>19</sup> varying the amount stated in such a notice as is described in head (i) above,

the landlord must, as soon as practicable, serve on the tenant a written notice<sup>20</sup> which must state:

- 4718 (A) the landlord's share on the assumption that the amount of the tenant's initial payment is that stated in the relevant notice<sup>21</sup>; and  
 4719 (B) the amount of the initial discount on that assumption<sup>22</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2 For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

3 Housing Act 1985 s 144(1) (s 144 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 109). For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 See the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

5 Ie any notice served by the landlord under *ibid* s 140 (as amended) (see PARA 1870 ante) or s 141 (see PARA 1871 ante).

6 *Ibid* s 144(3) (as substituted: see note 3 supra).

7 *Ibid* s 144(2) (as substituted: see note 3 supra). Where the extended right to buy arises, and the relevant regulations apply (see PARA 1798 ante), then if the tenant wishes to withdraw his notice claiming to exercise the right to acquire on rent to mortgage terms, he may do so (1) before he has received the freeholder's notice under s 146 (as substituted) (notice admitting or denying right: see the text and notes 10-11 *infra*), by notice in writing served on the landlord; or (2) after he has received the freeholder's notice under s 146 (as substituted), by notice in writing served on the freeholder: s 144A(1) (s 144A added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 27). The landlord must, as soon as practicable, serve a copy of a notice issued under heads (1)-(2) *supra* on the freeholder and each intermediate landlord (if any) and the freeholder must similarly serve a copy of a notice issued under head (2) *supra* on the landlord and any intermediate landlord: Housing Act 1985 s 144A(2) (as so added). Where a notice claiming to exercise the right to acquire on rent to mortgage terms is withdrawn, the tenant may complete the transaction in accordance with the provisions of Pt V (ss 118-188) (as amended and as modified for these purposes) relating to the right to buy: s 144A(3) (as so added). Where, in pursuance of s 144A(3) (as added), the tenant notifies the freeholder that he intends to complete the transaction in accordance with the right to buy provisions, the freeholder must, as soon as practicable, notify this fact in writing to the landlord and to the intermediate landlords (if any): s 144A(4) (as so added). See also notes 9, 11, 15, 22 *infra*. For the meanings of 'intermediate landlord' and 'freeholder' see PARA 1798 notes 18-19 ante.

8 Ie the relevant provisions of *ibid* Pt V (as amended): see PARA 1795 et seq ante, PARA 1884 et seq post.

9 *Ibid* s 144(4) (as substituted: see note 3 supra). The Housing Act 1985 s 144 (as substituted) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 26.

10 Ie the matters mentioned in the Housing Act 1985 s 146(2) (as substituted). The specified matters are: (1) the relevant amount and multipliers for the time being declared by the Secretary of State or, in relation to Wales, by the National Assembly for Wales for the purposes of s 143B (as substituted) (see PARA 1872 ante); (2) the amount of the minimum initial payment (see PARA 1872 ante); (3) the proportion which that amount bears to the price which would be payable if the tenant exercised the right to buy; (4) the landlord's share on the assumption that the tenant makes the minimum initial payment; (5) the amount of the initial discount on that assumption; and (6) the provisions which, in the landlord's opinion, should be contained in the conveyance or grant and the mortgage required by s 151B (as added and amended) (mortgage for securing redemption of landlord's share: see PARA 1883 post): s 146(2) (s 146 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 110).

11 Housing Act 1985 s 146(1) (as substituted: see note 10 supra). Section 146 (as substituted) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 28.

12 The period for serving a notice under the Housing Act 1985 s 146A(1) (as added) is the period of 12 weeks beginning with the service of the notice under s 146 (as substituted): s 146A(2) (ss 146A, 146B added by the Leasehold Reform, Housing and Urban Development Act 1993 s 111).

13 The amount stated in such a notice (1) must not be less than the minimum initial payment and not more than the maximum initial payment; and (2) may be varied at any time by notice in writing served on the landlord: Housing Act 1985 s 146A(3) (as added: see note 12 supra). For the meaning of 'the maximum initial payment' see PARA 1872 ante.

14 For the meaning of 'the right to buy' see PARA 1803 ante.

15 Housing Act 1985 s 146A(1) (as added: see note 12 supra). Sections 146A, 146B (as added) are modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 29.

16 The landlord may, at any time after the end of the period specified in the Housing Act 1985 s 146A(2) (as added) (see note 12 supra), serve on the tenant a written notice (1) requiring him, if he has failed to serve the notice required by s 146A(1) (as added), to serve that notice within 28 days; and (2) informing him of the effect of this provision and of s 146B(4) (as added) (see the text and note 17 infra): s 146B(1) (as added: see note 12 supra). At any time before the end of the period mentioned in head (1) supra, or that period as previously extended, the landlord may by written notice served on the tenant extend it (or further extend it): s 146B(2) (as so added). If at any time before the end of that period (or that period as extended under s 146B(2) (as added)) the circumstances are such that it would not be reasonable to expect the tenant to comply with a notice under s 146B (as added), that period (or that period as so extended) must by virtue of this provision be extended (or further extended) until 28 days after the time when those circumstances no longer obtain: s 146B(3) (as so added). See also note 15 supra.

17 Ibid s 146B(4) (as added: see note 12 supra). The notice claiming to exercise the right is so deemed to be withdrawn at the end of the period mentioned in s 146B(1)(a) (as added) (see note 16 head (1) supra) or, as the case may require, that period as extended under s 146B(2) or (3) (as added) (see note 16 supra): s 146B(4) (as so added).

18 Ie under ibid s 146A(1)(a) (as added): see head (a) in the text.

19 Ie under ibid s 146A(3)(b) (as added): see note 13 head (2) supra.

20 Ie a notice complying with ibid s 147 (as substituted): see heads (A)-(B) in the text.

21 Ie stated in the notice under ibid s 146A(1)(a) (as added) or, as the case may be, under s 146A(3)(b) (as added).

22 Ibid s 147(1), (2) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 112). The landlord's share, the amount of the initial discount and the amount of any previous discount which will be recovered by virtue of the transaction must be determined by the formulae set out in the Housing Act 1985 s 148 (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 113). The Housing Act 1985 ss 147, 148 (as substituted) are modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 30.

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#### **1874. Change of landlord after notice claiming right.**

Where the interest of the landlord<sup>1</sup> in the dwelling house<sup>2</sup> passes from the landlord to another body after a secure tenant<sup>3</sup> has, before 18 July 2005<sup>4</sup>, given a notice claiming to exercise the right to acquire on rent to mortgage terms<sup>5</sup>, all parties are in the same position as if the other body:

- 4720 (1) had become the landlord before the notice was given; and
- 4721 (2) had been given that notice and any further notice given by the tenant to the landlord; and
- 4722 (3) had taken all steps which the landlord had taken<sup>6</sup>.

If, however, the extended right to buy arises and the relevant regulations apply<sup>7</sup>, then instead of the provision set out above the following provision applies. Where, after a secure tenant has given a notice claiming to exercise the right to acquire on rent to mortgage terms, the interest of the landlord, an intermediate landlord<sup>8</sup> or the freeholder<sup>9</sup> in the dwelling house passes from it to another person, or the interest comes to an end:

- 4723 (a) the landlord, intermediate landlord or the freeholder, as the case may be, must forthwith notify its tenant of the change and a landlord or intermediate landlord must similarly notify its landlord;
- 4724 (b) an intermediate landlord so notified by its tenant must, in turn, similarly notify its immediate landlord or, if so notified by its landlord, must similarly notify its tenant; and
- 4725 (c) all parties are in the same position as if the change had occurred before the notice claiming to exercise the right to acquire on rent to mortgage terms was given and all other notices given had been given by or to the appropriate parties and all steps had been taken by them<sup>10</sup>.

If the circumstances after the disposal differ in any material respect, as for example where:

- 4726 (i) the interest of the donee in the dwelling house after the disposal differs from that of the donor before the disposal; or
- 4727 (ii) any of the exceptions to the right to buy<sup>11</sup> becomes or ceases to be applicable,

all those concerned must, as soon as practicable after the disposal, take all such steps, whether by way of amending or withdrawing and re-serving any notice or extending any period or otherwise, as may be requisite for the purpose of securing that all parties are, as nearly as may be, in the same position as they would have been if those circumstances had obtained before the disposal<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

4 See the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

5 For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

6 Housing Act 1985 s 149(1) (s 149 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 114).

7 As to the extended right to buy see PARA 1798 ante.

8 For the meaning of 'intermediate landlord' see PARA 1798 note 18 ante.

9 For the meaning of 'freeholder' see PARA 1798 note 19 ante.

10 Housing Act 1985 s 149(1) (substituted for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3, Schedule para 31).

11 I.e. any of the provisions of the Housing Act 1985 s 120, Sch 5 (as amended): see PARA 1808 et seq ante.

12 Ibid s 149(2) (as substituted: see note 6 supra).

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## (ii) Completion; Redemption of Landlord's Share

### 1875. Duty of landlord to convey freehold or grant lease.

Where a secure tenant<sup>1</sup> has, before 18 July 2005<sup>2</sup>, claimed to exercise the right to acquire on rent to mortgage terms<sup>3</sup> and that right has been established, then, as soon as all matters relating to the grant and to securing the redemption of the landlord's share<sup>4</sup> have been agreed or determined, the landlord<sup>5</sup> must make to the tenant:

- 4728 (1) if the dwelling house<sup>6</sup> is a house<sup>7</sup> and the landlord owns the freehold, a grant of the dwelling house for an estate in fee simple absolute; or  
 4729 (2) if the landlord does not own the freehold or if the dwelling house is a flat<sup>8</sup>, whether or not the landlord owns the freehold, a grant of a lease of the dwelling house,

in accordance with the relevant statutory provisions<sup>9</sup>. If the tenant has failed to pay the rent or any other payment due from him as a tenant for a period of four weeks after it has been lawfully demanded from him, however, the landlord is not bound to comply with the above provisions while the whole or part of that payment remains outstanding<sup>10</sup>.

The duty imposed on the landlord to make a grant for an estate in fee simple absolute or a grant of a lease<sup>11</sup> is enforceable by injunction<sup>12</sup>.

The secure tenancy comes to an end on the grant to the tenant of an estate in fee simple, or of a lease, in pursuance of the right to acquire on rent to mortgage terms; and, if there is then a subtenancy, the statutory provisions relating to the effect of the extinguishment of the reversion<sup>13</sup> apply as on a merger or surrender<sup>14</sup>.

Provision is made for the apportionment, on completion, of the initial payment where the extended right to buy arises and the relevant regulations apply<sup>15</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2 See the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

3 For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

4 As to determination of the amount of the landlord's share see PARA 1873 note 22 ante; and as to the determination of its value see PARA 1877 note 5 post.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'dwelling house' see PARA 1796 ante.

7 For the meaning of 'house' see PARA 1796 ante.

8 For the meaning of 'flat' see PARA 1796 ante.

9 Housing Act 1985 s 150(1) (s 150 substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 115). The relevant statutory provisions are the provisions of the Housing Act 1985 ss 151-188 (as amended): see PARA 1876 et seq post. Section 150(1) is further substituted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3, Schedule para 32(a).

10 Housing Act 1985 s 150(2) (as substituted: see note 9 supra). Section 150(2), (3) (as substituted) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 32(b).

11 ie the duty imposed by the Housing Act 1985 s 150(1) (as substituted).

12 Ibid s 150(3) (as substituted: see note 9 supra).

13 Ie the Law of Property Act 1925 s 139: see PARA 638 ante.

14 Housing Act 1985 s 151(2) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 116(1)). The Housing Act 1985 s 151(2) (as so substituted) is further substituted where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 34(c).

15 See the Housing Act 1985 s 150A (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 33). The Housing Act 1985 s 150A (as so added) may be disapplied by agreement and the parties may make instead such other apportionment as they consider to be fair and reasonable: see s 150B (as so added). In a case to which s 150B (as so added) does not apply, the freeholder, on receiving an interim or final payment, must pay to the authority or body which immediately before completion was the landlord or an intermediate landlord of the dwelling house and to any rent owner of a rentcharge which was then charged on or issued out of the lease of any such authority or body, an amount calculated by multiplying the amount of the payment by the apportionment fraction applicable to that authority, body or person, ascertained in accordance with s 138A (as added for these purposes) (apportionment of purchase price: see PARA 1844 ante); but no payment must be so made in relation to a lease of the dwelling house if it was a lease for a term certain and the residue of the term unexpired immediately before completion was a period of less than 12 months or if it was a periodic tenancy: Sch 6A para 7A(1), (2) (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 70(d)). For these purposes, 'rentcharge' and 'rent owner' have the same meanings as in the Rentcharges Act 1977 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 774-775) and 'apportionment factor' has the meaning given by the Housing Act 1985 s 138A(2) (as added for these purposes): Sch 6A para 7A(3) (as so added).

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### **1876. Terms and effect of conveyance or grant.**

A conveyance of the freehold executed in pursuance of the right to acquire on rent to mortgage terms<sup>1</sup> must conform with the provisions applicable to a conveyance executed in pursuance of the right to buy<sup>2</sup>; and the provisions relating to charges<sup>3</sup> apply to such a conveyance as they apply to a conveyance executed in pursuance of the right to buy<sup>4</sup>.

A grant of a lease<sup>5</sup> executed in pursuance of the right to acquire on rent to mortgage terms must conform with the provisions applicable to a lease granted in pursuance of the right to buy<sup>6</sup>; and the provisions relating to charges<sup>7</sup> apply to such a lease as they apply to a lease executed in pursuance of the right to buy<sup>8</sup>. Where, however, a lease of a flat<sup>9</sup> granted in pursuance of the right to acquire on rent to mortgage terms requires the tenant to pay:

- 4730 (1) service charges<sup>10</sup> in respect of repairs, including works for the making good of structural defects; or
- 4731 (2) improvement contributions<sup>11</sup>,

his liability in respect of costs incurred at any time before the final payment<sup>12</sup> is made is restricted as follows<sup>13</sup>. He is not required to pay any more than the amount determined by the formula:

$$M = P \times \frac{100 - S}{100}$$

where M equals the maximum amount which he is required to pay; P equals the amount which he would otherwise be required to pay; and S equals the landlord's share<sup>14</sup> at the time expressed as a percentage<sup>15</sup>.

1 As to the right to acquire on rent to mortgage terms and the date by which the right was to be claimed see PARA 1872 ante.

2 le must conform with the Housing Act 1985 s 139(1), Sch 6 Pt I (paras 1-7) (as amended) (see PARAS 1851-1854 ante) and Sch 6 Pt II (paras 8-9) (as amended) (see PARA 1855 ante).

3 le ibid Sch 6 Pt IV (paras 20, 21): see PARAS 1867-1868 ante.

4 Ibid s 151(1) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 116(1)).

5 For the meaning of 'lease' see PARA 1300 note 1 ante.

6 le must conform with the Housing Act 1985 Sch 6 Pt I (as amended) and Sch 6 Pt III (paras 11-19) (as amended) (see PARAS 1856-1866 ante).

7 See note 3 supra.

8 Housing Act 1985 s 151(1) (as substituted: see note 4 supra).

9 For the meaning of 'flat' see PARA 1796 ante.

10 For the meaning of 'service charge' see PARA 1829 note 17 ante.

11 For the meaning of 'improvement contribution' see PARA 1829 note 18 ante.

12 For the meaning of 'final payment' see PARA 1877 post.

13 Housing Act 1985 Sch 6 para 16E(1) (Sch 6 para 16E added by the Leasehold Reform, Housing and Urban Development Act 1993 s 116(2)).

14 As to the determination of the amount of the landlord's share see PARA 1873 note 22 ante; and as to the determination of its value see PARA 1877 note 5 post.

15 Housing Act 1985 Sch 6 para 16E(2) (as added: see note 13 supra). Schedule 6 para 16E (as added) is omitted where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante) applies (see art 3(1), Schedule para 69 (cited in PARA 1856 note 3 ante)); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post) apply (see reg 2(1), Sch 1 para 43(b)(iv)); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 41(c)).

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### **1877. Obligation to redeem landlord's share in certain circumstances.**

The conveyance or grant must contain a covenant binding on the secure tenant<sup>1</sup> and his successors in title<sup>2</sup> to make to the landlord<sup>3</sup>, immediately after:

- 4732 (1) the making of a relevant disposal which is not an excluded disposal; or
- 4733 (2) the expiry of the period of one year beginning with a relevant death<sup>4</sup>,

whichever first occurs, a final payment, that is to say, a payment of the amount required to redeem the landlord's share<sup>5</sup>.

A disposal is an excluded disposal for these purposes if:

- 4734 (a) it is a further conveyance of the freehold or an assignment of the lease and the person or each of the persons to whom it is made is, or is the spouse or civil partner of, the person or one of the persons by whom it is made;
- 4735 (b) it is a vesting in a person taking under a will or intestacy; or
- 4736 (c) it is a disposal in pursuance of a property adjustment order or an order for the sale of property made in connection with matrimonial proceedings<sup>6</sup>, an order as to financial provision to be made from an estate<sup>7</sup>, a property adjustment order or an order for the sale of property after an overseas divorce, etc<sup>8</sup>, an order for financial relief against a parent<sup>9</sup> or a property adjustment order or order for the sale of property in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>10</sup>;

and, in any case, an interest to which these provisions apply subsists immediately after the disposal<sup>11</sup>.

1 For these purposes, references to the secure tenant are references to the secure tenant or tenants to whom the conveyance or grant is made; and references to the secure tenant or, as the case may be, one of the secure tenants are to be construed accordingly: Housing Act 1985 s 151A, Sch 6A para 12(5) (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

The Housing Act 1985 s 151A, Sch 6A (as added and amended) are (1) modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule paras 35, 70; and see also PARA 1875 note 16 ante); (2) omitted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 44); (3) omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 42).

2 For these purposes, references to the secure tenant's successors in title do not include references to any person entitled to a legal charge having priority to the mortgage required by the Housing Act 1985 s 151B (as added) (see PARA 1883 post) or any person whose title derives from such a charge: Sch 6A para 12(6) (as added: see note 1 supra).

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For these purposes, 'relevant death' means the death of a person who immediately before his death was the person or, as the case may be, the last remaining person entitled to an interest to which the Housing Act 1985 Sch 6A para 1 (as added) applies: Sch 6A para 1(3) (as added: see note 1 supra). A beneficial interest in the dwelling house is an interest to which Sch 6A para 1 (as added and amended) applies if the person entitled to it is (1) the secure tenant or, as the case may be, one of the secure tenants; or (2) a qualifying person: Sch 6A para 1(4) (as so added).

'Qualifying person' means a qualifying partner or a qualifying resident: Sch 6A para 12(1) (Sch 6A para 12(1)-(3) (as added) amended by the Civil Partnership Act 2004 s 81, Sch 8 para 35(1), (4)). A person is a qualifying partner for these purposes if (1) he is entitled to a beneficial interest in the dwelling house immediately after the time when there ceases to be an interest to which this provision applies; (2) he is occupying the dwelling house as his only or principal home immediately before that time; and (3) he is (a) the spouse, the civil partner, a former spouse, a former civil partner, the surviving spouse, the surviving civil partner, a surviving former spouse or a surviving former civil partner of the person who immediately before that time was entitled to the interest to which this provision applies or, as the case may be, the last remaining such interest; or (b) the surviving spouse, the surviving civil partner, a surviving former spouse or a surviving former civil partner of a person who immediately before his death was entitled to such an interest: Housing Act 1985 Sch 6A para 12(2) (as so amended). A person is a qualifying resident for these purposes if: (i) he is entitled to a beneficial interest in the dwelling house immediately after the time when there ceases to be an interest to which this provision applies; (ii) he is occupying the dwelling house as his only or principal home immediately before that time; (iii) he has resided throughout the period of 12 months ending with that time (A) with the person who immediately before that time was entitled to the interest to which this provision applies or, as the case may be, the last



remaining such interest; or (B) with two or more persons in succession each of whom was throughout the period of residence with him entitled to such an interest; and (iv) he is not a qualifying partner: Sch 6A para 12(3) (as so amended).

5 Ibid Sch 6A para 1(1) (as added: see note 1 supra). As to determination of the amount of the landlord's share see PARA 1873 note 22 ante. Its value must be determined by the formula set out in Sch 6A para 3 (as added: see note 1 supra).

6 Ie in pursuance of an order made under (1) the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante); or (2) s 24A (as added and amended).

7 Ie an order under the Inheritance (Provision for Family and Dependents) Act 1975 s 2 (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 691-692.

8 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17 (as substituted and as prospectively amended: see PARA 1290 note 7 ante).

9 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

10 Ie an order made under the Civil Partnership Act 2004 Sch 5 Pt 2 or Pt 3, or Sch 7 para 9: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

11 Housing Act 1985 Sch 6A para 1(2) (as added (see note 1 supra); amended by the Housing Act 1996 s 222, Sch 18 para 17; the Family Law Act 1996 s 66(1), Sch 8 para 34; the Civil Partnership Act 2004 ss 81, 261(4), Sch 8, PARA 35(1)-(3), Sch 30).

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### **1878. Right to redeem landlord's share at any time.**

The conveyance or grant must include provision entitling the secure tenant<sup>1</sup> and his successors in title<sup>2</sup> to make a final payment<sup>3</sup> at any time<sup>4</sup>.

The right is exercisable by written notice served on the landlord<sup>5</sup> claiming to make a final payment<sup>6</sup>; and the notice may be withdrawn at any time by written notice served on the landlord<sup>7</sup>.

If the final payment is not tendered to the landlord before the end of the period of three months beginning with the time when the value of the dwelling house<sup>8</sup> is agreed or determined<sup>9</sup>, the notice claiming to make a final payment is deemed to have been withdrawn<sup>10</sup>.

1 For the meaning of references to the secure tenant see PARA 1877 note 1 ante.

2 For the meaning of references to the secure tenant's successors in title see PARA 1877 note 2 ante.

3 For the meaning of 'final payment' see PARA 1877 ante.

4 Housing Act 1985 s 151A, Sch 6A para 2(1) (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). For modifications of, or the omission of, the Housing Act 1985 Sch 6A (as added) in certain cases see PARA 1877 note 1 ante.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 Housing Act 1985 Sch 6A para 2(2) (as added: see note 4 supra).

7 Ibid Sch 6A para 2(3) (as added: see note 4 supra).

8 For the meaning of 'dwelling house' see PARA 1796 ante.

9 le in accordance with the Housing Act 1985 Sch 6A para 8 (as added): see PARA 1881 post.

10 Ibid Sch 6A para 2(4) (as added: see note 4 supra).

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### **1879. Final discount.**

Where a final payment<sup>1</sup> is made by, or by two or more persons who include, the secure tenant<sup>2</sup> or, as the case may be, one of the secure tenants or a qualifying person<sup>3</sup>, the person or persons making the payment is or are entitled<sup>4</sup> to a final discount equal to 20% of the value of the landlord's share<sup>5</sup>. The above provisions do not, however, apply if the final payment is made after the end of the protection period, that is to say, the period of two years beginning with the time when there ceases to be an interest to which these provisions apply<sup>6</sup>.

The Secretary of State<sup>7</sup> may by order made with the consent of the Treasury provide, or in relation to Wales the National Assembly for Wales or the relevant Welsh minister<sup>8</sup> may by order provide, that the percentage discount shall be such percentage as may be specified in the order<sup>9</sup>; and such an order:

- 4737 (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas;
- 4738 (2) may contain such incidental, supplementary or transitional provisions as appear to the Secretary of State or the Assembly or minister necessary or expedient; and
- 4739 (3) must be made by statutory instrument<sup>10</sup>.

Except where the Secretary of State or the Assembly or the relevant Welsh minister so determines, however, a final discount may not reduce the total purchase price<sup>11</sup>, that is to say, the aggregate of the initial payment<sup>12</sup>, the final payment and any interim payments<sup>13</sup>, below the amount which would be applicable<sup>14</sup> in respect of the dwelling house<sup>15</sup> if the relevant time<sup>16</sup> were the time when the value of the dwelling house is agreed or determined<sup>17</sup>.

The total discount, that is to say, the aggregate of the initial discount, the final discount and any interim discounts, may not in any case reduce the total purchase price by more than the sum prescribed<sup>18</sup> at the time when the value of the dwelling house is agreed or determined<sup>19</sup>.

If a final payment is made after the end of the first 12 months of the protection period, there must be deducted from any final discount given<sup>20</sup> an amount equal to 50% of that discount<sup>21</sup>.

There must be deducted from any final discount given<sup>22</sup> an amount equal to any previous discount qualifying, or the aggregate of any previous discounts qualifying, under the statutory provisions<sup>23</sup> relating to the reduction of discount where a previous discount is given<sup>24</sup>.

A determination under these provisions may make different provision for different cases or descriptions of case, including different provision for different areas<sup>25</sup>.

1 For the meaning of 'final payment' see PARA 1877 ante.

- 2 For the meaning of references to the secure tenant see PARA 1877 note 1 ante.
- 3 For the meaning of 'qualifying person' see PARA 1877 note 4 ante.
- 4 Ie subject to the Housing Act 1985 s 151A, Sch 6A paras 4(2)-(5), 5 (as added): see the text and notes 5-25 *infra*.
- 5 Ibid Sch 6A para 4(1) (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). As to determination of the amount of the landlord's share see PARA 1873 note 22 ante; and as to the determination of its value see PARA 1877 note 5 ante.  
For modifications of, or the omission of, the Housing Act 1985 Sch 6A (as added and amended) in certain cases see PARA 1877 note 1 ante.
- 6 Ibid Sch 6A paras 4(2), 12(1) (as added: see note 5 *supra*). A beneficial interest in the dwelling house is an interest to which Sch 6A para 4(2) (as so added) applies if the person entitled to it is (1) the secure tenant or, as the case may be, one of the secure tenants; or (2) a qualifying partner: Sch 6A para 4(3) (as so added; amended by the Civil Partnership Act 2004 s 81, Sch 8 para 35(1), (4)). For the meaning of 'dwelling house' see PARA 1796 ante; and for the meaning of 'qualifying partner' see PARA 1877 note 4 ante.
- 7 As to the Secretary of State see PARA 27 note 3 ante.
- 8 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 9 Housing Act 1985 Sch 6A para 4(4).
- 10 Ibid Sch 6A para 4(5) (as added: see note 5 *supra*). In the case of an order made by the Secretary of State, the instrument may not be made unless a draft of the order has been laid before and approved by resolution of each House of Parliament: see Sch 6A para 4(5) (as so added).
- 11 For the meaning of references to the purchase price see PARA 1836 note 6 ante.
- 12 For the meaning of 'initial payment' see PARA 1872 ante.
- 13 For the meaning of 'interim payment' see PARA 1880 post.
- 14 Ie under the Housing Act 1985 s 131(1) (as amended): see PARA 1841 ante.
- 15 For the meaning of 'dwelling house' see PARA 1796 ante.
- 16 For the meaning of 'the relevant time' see PARA 1822 note 3 ante.
- 17 Housing Act 1985 Sch 6A para 5(1) (as added: see note 5 *supra*).
- 18 Ie the sum prescribed for the purposes of *ibid* s 131(2): see PARA 1841 ante.
- 19 Ibid Sch 6A para 5(2) (as added: see note 5 *supra*).
- 20 Ie under *ibid* Sch 6A paras 4, 5(1)-(2) (as added).
- 21 Ibid Sch 6A para 5(3) (as added: see note 5 *supra*).
- 22 Ie given by the Housing Act 1985 Sch 6A paras 4, 5(1)-(3) (as added).
- 23 Ie *ibid* s 130 (as amended): see PARA 1840 ante.
- 24 Ibid Sch 6A para 5(4) (as added: see note 5 *supra*).
- 25 Ibid Sch 6A para 5(5) (as added: see note 5 *supra*).

RIGHT TO ACQUIRE ON RENT TO MORTGAGE TERMS/(ii) Completion; Redemption of Landlord's Share/1880. Right to make interim payment at any time.

### **1880. Right to make interim payment at any time.**

The conveyance or grant must include provision entitling the secure tenant<sup>1</sup> and his successors in title<sup>2</sup> at any time to make to the landlord<sup>3</sup> an interim payment, that is to say, a payment which:

- 4740 (1) is less than the amount required to redeem the landlord's share<sup>4</sup>; but  
 4741 (2) is not less than 10% of the value<sup>5</sup> of the dwelling house<sup>6</sup> agreed or determined<sup>7</sup>.

The right is exercisable by written notice served on the landlord, claiming to make an interim payment and stating the amount of the interim payment proposed to be made<sup>8</sup>; and the notice may be withdrawn at any time by written notice served on the landlord<sup>9</sup>.

If the interim payment is not tendered to the landlord before the end of the period of three months beginning with the time when the value of the dwelling house is agreed or determined, the notice claiming to make an interim payment is deemed to have been withdrawn<sup>10</sup>.

1 For the meaning of references to the secure tenant see PARA 1877 note 1 ante.

2 For the meaning of references to the secure tenant's successors in title see PARA 1877 note 2 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 As to determination of the amount of the landlord's share see PARA 1873 note 22 ante. The landlord's share after the making of an interim payment must be determined by the formula set out in the Housing Act 1985 Sch 6A para 7 (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). For modifications of, or the omission of, the Housing Act 1985 Sch 6A (as added and amended) in certain cases see PARA 1877 note 1 ante.

5 The value agreed or determined under *ibid* Sch 6A para 8 (as added): see PARA 1881 post.

6 For the meaning of 'dwelling house' see PARA 1796 ante.

7 Housing Act 1985 Sch 6A para 6(1) (as added: see note 4 supra).

8 *Ibid* Sch 6A para 6(2) (as added: see note 4 supra).

9 *Ibid* Sch 6A para 6(3) (as added: see note 4 supra).

10 *Ibid* Sch 6A para 6(4) (as added: see note 4 supra).

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### **1881. Value of dwelling house.**

For the purposes of the final payment<sup>1</sup> or any interim payment<sup>2</sup>, the value of a dwelling house<sup>3</sup> is the amount which for those purposes is agreed at any time between the parties or, in default

of such agreement, is determined at any time by an independent valuer<sup>4</sup>, as the amount which, in accordance with these provisions, is to be taken as its value at that time<sup>5</sup>.

That value is to be taken<sup>6</sup> to be the price which the interest of the secure tenant<sup>7</sup> in the dwelling house would realise if sold on the open market by a willing vendor:

- 4742 (1) on the assumption that the specified liabilities<sup>8</sup> would be discharged by the vendor; and
- 4743 (2) disregarding the specified<sup>9</sup> matters<sup>10</sup>.

The liabilities referred to in head (1) above are:

- 4744 (a) any mortgages of the interest of the secure tenant;
- 4745 (b) the liability under the covenant to pay the amount required to redeem the landlord's share<sup>11</sup>; and
- 4746 (c) any liability under the covenant required<sup>12</sup> by the statutory provisions relating to the repayment of discount on early disposal<sup>13</sup>.

The matters to be disregarded in pursuance of head (2) above are:

- 4747 (i) any interests or rights created over the dwelling house by the secure tenant;
- 4748 (ii) any improvements made by the secure tenant or certain predecessors as secure tenant<sup>14</sup>; and
- 4749 (iii) any failure by the secure tenant or any of those persons, where the dwelling house is a house<sup>15</sup>, to keep the dwelling house in good repair, including decorative repair and, where the dwelling house is a flat<sup>16</sup>, to keep the interior of the dwelling house in such repair<sup>17</sup>.

Where, at the time when the value of the dwelling house is agreed or determined, the dwelling house has been destroyed or damaged by fire, tempest, flood or any other cause against the risk of which it is normal practice to insure, and has not been fully rebuilt or reinstated, that value is to be taken to include the value of such of the following as are applicable, namely:

- 4750 (A) any sums paid or falling to be paid to the secure tenant under a relevant policy<sup>18</sup> in so far as they exceed the cost of any rebuilding or reinstatement which has been carried out;
- 4751 (B) any rights of the secure tenant under the implied covenant to rebuild or reinstate<sup>19</sup>; and
- 4752 (C) any rights of the secure tenant under the implied covenant by the landlord<sup>20</sup> to use its best endeavours to secure rebuilding or reinstatement<sup>21</sup>.

1 For the meaning of 'final payment' see PARA 1877 ante.

2 For the meaning of 'interim payment' see PARA 1880 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 For these purposes, 'independent valuer' means an independent valuer appointed in pursuance of provisions in that behalf contained in the conveyance or grant: Housing Act 1985 s 151A, Sch 6A para 12(1) (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). The conveyance or grant must include provision requiring any sums falling to be paid to an independent valuer, whether by way of fees or expenses or otherwise, to be paid by the secure tenant or his successors in title: Housing Act 1985 Sch 6A para 9 (as so added). For the meaning of references to the secure tenant's successors

in title see PARA 1877 note 2 ante. For modifications of, or the omission of, the Housing Act 1985 Sch 6A (as added and amended) in certain cases see PARA 1877 note 1 ante.

5 Ibid Sch 6A para 8(1) (as added: see note 4 supra).

6 Ie subject to ibid Sch 6A para 8(6) (as added): see heads (A)-(C) in the text.

7 For these purposes, references to the secure tenant include references to his successors in title: ibid Sch 6A para 8(8) (as added: see note 4 supra).

8 Ie the liabilities mentioned in ibid Sch 6A para 8(3) (as added): see heads (a)-(c) in the text.

9 Ie the matters specified in ibid Sch 6A para 8(4) (as added): see heads (i)-(iii) in the text.

10 Ibid Sch 6A para 8(2) (as added: see note 4 supra).

11 Ie the covenant required by ibid Sch 6A para 1 (as added and amended): see PARA 1877 ante.

12 Ie the covenant required by ibid s 155(3) (as substituted): see PARA 1889 post.

13 Ibid Sch 6A para 8(3) (as added: see note 4 supra).

14 Ie any of the persons mentioned in ibid s 127(4) (as amended): see PARA 1837 note 5 ante.

15 For the meaning of 'house' see PARA 1796 ante.

16 For the meaning of 'flat' see PARA 1796 ante.

17 Housing Act 1985 Sch 6A para 8(4) (as added: see note 4 supra).

18 For these purposes, 'relevant policy' means a policy insuring the secure tenant against the risk of fire, tempest or flood or any other risk against which it is normal practice to insure: ibid Sch 6A para 8(7) (as added: see note 4 supra).

19 Ie the covenant implied by ibid Sch 6 para 14(3) (as amended): see PARA 1858 ante.

20 Ie the covenant implied by ibid Sch 6 para 15(4): see PARA 1859 ante.

21 Ibid Sch 6A para 8(5), (6) (as added: see note 4 supra).

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## **1882. Miscellaneous provisions.**

A provision of the conveyance or grant is void in so far as it purports to enable the landlord<sup>1</sup> to charge the tenant<sup>2</sup> or his successors in title<sup>3</sup> a sum in respect of or in connection with the making of a final<sup>4</sup> or interim<sup>5</sup> payment<sup>6</sup>.

The conveyance or grant may include<sup>7</sup> such covenants and provisions as are reasonable in the circumstances<sup>8</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'tenant' see PARA 1300 note 1 ante.

3 For the meaning of references to the secure tenant's successors in title see PARA 1877 note 2 ante.

4 For the meaning of 'final payment' see PARA 1877 ante.

5 For the meaning of 'interim payment' see PARA 1880 ante.

6 Housing Act 1985 s 151A, Sch 6A para 10 (s 151A, Sch 6A added by the Leasehold Reform, Housing and Urban Development Act 1993 s 117(1), (2), Sch 16). For modifications of, or the omission of, the Housing Act 1985 Sch 6A (as added) in certain cases see PARA 1877 note 1 ante.

7 le subject to the provisions of ibid Sch 6A (as added and amended): see the text and notes 1-6 supra; and PARA 1877 et seq ante.

8 Ibid Sch 6A para 11 (as added: see note 6 supra).

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### **1883. Mortgage for securing redemption of landlord's share.**

The liability that may arise under the covenant for the redemption of the landlord's share<sup>1</sup> must be secured by a mortgage<sup>2</sup>.

The mortgage has priority<sup>3</sup> immediately after any legal charge securing an amount advanced to the secure tenant<sup>4</sup> by an approved lending institution<sup>5</sup> for the purpose of enabling him to exercise the right to acquire on rent to mortgage terms<sup>6</sup> where he has claimed that right before 18 July 2005<sup>7</sup>.

The following, namely:

- 4753 (1) any advance which is made otherwise than for the purpose of enabling him to exercise the right to acquire on rent to mortgage terms and is secured by a legal charge having priority to the mortgage; and
- 4754 (2) any further advance which is so secured,

rank in priority to the mortgage if, and only if, the landlord<sup>8</sup> by written notice served on the institution concerned gives its consent; and the landlord must so give its consent if the purpose of the advance or further advance is an approved purpose<sup>9</sup>.

The landlord may at any time by written notice served on an approved lending institution postpone the mortgage to any advance or further advance which:

- 4755 (a) is made to the tenant by that institution; and
- 4756 (b) is secured by a legal charge not having priority to the mortgage;

and the landlord must serve such a notice if the purpose of the advance or further advance is an approved purpose<sup>10</sup>.

Where different parts of an advance or further advance are made for different purposes, each of those parts is to be regarded as a separate advance or further advance for these purposes<sup>11</sup>.

The Secretary of State<sup>12</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>13</sup> may by order prescribe matters for which the deed by which the mortgage is effected must make provision, and terms which must, or must not, be contained in that deed; but only in relation to deeds executed after the order comes into force<sup>14</sup>. Such an order may

make different provision with respect to different cases or descriptions of case, including different provision for different areas, and must be made by statutory instrument<sup>15</sup>.

The deed by which the mortgage is effected may contain such other provisions as may be:

- 4757 (i) agreed between the mortgagor and the mortgagee; or
- 4758 (ii) determined by the county court to be reasonably required by the mortgagor or the mortgagee<sup>16</sup>.

1 le the covenant required by the Housing Act 1985 s 151A, Sch 6A para 1 (as added): see PARA 1877 ante.

2 Ibid s 151B(1) (s 151B added by the Leasehold Reform, Housing and Urban Development Act 1993 s 118). The Housing Act 1985 s 151B (as added) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 36. See also PARA 1872 the text and notes 17-19 ante.

3 le subject to the Housing Act 1985 s 151B(3), (4) (as added): see the text and notes 8-10 infra.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

5 For these purposes, the approved lending institutions are: the relevant authority, an authorised deposit taker, an authorised insurer and any body specified, or of a class or description specified, in an order made under the Housing Act 1985 s 156 (as amended) (see PARA 1892 post): Housing Act 1985 s 151B(5) (as added (see note 2 supra); amended by the Government of Wales Act 1998 s 140, Sch 16 para 5; and by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 299(1), (3)). As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5. 'Authorised deposit taker' means (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to accept deposits; or (2) an EEA firm of the kind mentioned in Sch 3 para 5(b) (as substituted) who has permission under Sch 3 para 15 (as amended) (as a result of qualifying for authorisation under Sch 3 para 12(1)) to accept deposits; and 'authorised insurer' means: (a) a person who has permission under the Financial Services and Markets Act 2000 Pt IV to effect or carry out contracts of insurance; or (b) an EEA firm of the kind mentioned in Sch 3 para 5(b) (as substituted) who has permission under Sch 3 para 15 (as amended) (as a result of qualifying for authorisation under Sch 3 para 12(1)) to effect or carry out contracts of insurance: Housing Act 1985 s 624(1) (numbered as such, and definitions added, by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 300(1), (2), (4)). These definitions of 'authorised deposit taker' and 'authorised insurer' must be read with (i) the Financial Services and Markets Act 2000 s 22; (ii) any relevant order under s 22; and (iii) Sch 2 (as amended): Housing Act 1985 s 624(2) (added by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 300(1), (5)). See further FINANCIAL SERVICES AND INSTITUTIONS.

6 Housing Act 1985 s 151B(2) (as added: see note 2 supra). For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

7 See the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

8 For the meaning of 'landlord' see PARA 1300 note 1 ante.

9 Housing Act 1985 s 151B(3) (as added: see note 2 supra). For these purposes, the approved purposes are: (1) to enable the tenant to make an interim or final payment; (2) to enable the tenant to defray, or to defray on his behalf, any of the following: (a) the cost of any works to the dwelling house; (b) any service charge payable in respect of the dwelling house for works, whether or not to the dwelling house; and (c) any service charge or other amount payable in respect of the dwelling house for insurance, whether or not of the dwelling house; and (3) to enable the tenant to discharge, or to discharge on his behalf, any of the following: (a) so much as is still outstanding of any advance or further advance which ranks in priority to the mortgage; (b) any arrears of interest on such an advance or further advance; and (c) any costs and expenses incurred in enforcing payment of any such interest, or repayment, in whole or in part, of any such advance or further advance: s 151B(6) (as so added). For the meaning of 'interim payment' see PARA 1880 ante; for the meaning of 'final payment' see PARA 1877 ante; for the meaning of 'dwelling house' see PARA 1796 ante; and for the meaning of 'service charge' see PARA 1829 note 17 ante.

10 Ibid s 151B(4) (as added: see note 2 supra).

11 Ibid s 151B(7) (as added: see note 2 supra).

12 As to the Secretary of State see PARA 27 note 3 ante.



13 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

14 Housing Act 1985 s 151B(8) (as added: see note 2 supra).

15 Ibid s 151B(10) (as added: see note 2 supra). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 151B(10) (as so added).

16 Ibid s 151B(9) (as added: see note 2 supra).

## UPDATE

### 1883 Mortgage for securing redemption of landlord's share

TEXT AND NOTES--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

NOTE 5--1985 Act s 151B(5) further amended: Housing and Regeneration Act 2008 s 307(5).

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### 1884. Completion notices.

The landlord<sup>1</sup> may<sup>2</sup> serve on the tenant<sup>3</sup> at any time a written notice requiring him:

4759 (1) if all relevant matters<sup>4</sup> have been agreed or determined, to complete the transaction within a period stated in the notice; or

4760 (2) if any relevant matters are outstanding, to serve on the landlord within that period a written statement to that effect specifying the matters,

and informing the tenant of the effect of these provisions<sup>5</sup> and of the effect of the statutory provisions<sup>6</sup> relating to a landlord's second notice and failure to complete<sup>7</sup>.

The period stated in such a notice must be such period, of at least 56 days, as may be reasonable in the circumstances<sup>8</sup>.

Such a notice may not be served earlier than 12 months after the service of the landlord's notice<sup>9</sup> admitting or denying the tenant's right to acquire on rent to mortgage terms<sup>10</sup> and may not be served if:

4761 (a) a requirement for the determination or redetermination of the value of the dwelling house<sup>11</sup> by the district valuer<sup>12</sup> has not been complied with;

4762 (b) proceedings for the determination of any other relevant matter have not been disposed of; or

4763 (c) any relevant matter stated to be outstanding in a written notice served on the landlord by the tenant has not been agreed in writing or determined<sup>13</sup>.

If the tenant does not comply with a landlord's first notice to complete, the landlord may serve on him a further written notice:

- 4764 (i) requiring him to complete the transaction within a period stated in the notice; and
- 4765 (ii) informing him of the effect of these provisions<sup>14</sup> in the event of his failing to comply<sup>15</sup>.

The period stated in such a notice must be such period, of at least 56 days, as may be reasonable in the circumstances<sup>16</sup>; and at any time before the end of that period, or that period as previously extended, the landlord may by a written notice served on the tenant extend it, or further extend it<sup>17</sup>. If the tenant does not comply with such a notice, the notice claiming to exercise the right to acquire on rent to mortgage terms<sup>18</sup> and the notice claiming to exercise the right to buy<sup>19</sup> are deemed to have been withdrawn at the end of that period or, as the case may require, that period as so extended<sup>20</sup>. If such a notice has been served on the tenant and, by virtue of the tenant's failure to pay rent etc<sup>21</sup>, the landlord is not bound to complete, the tenant is deemed not to comply with the notice<sup>22</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 Ie subject to the provisions of the Housing Act 1985 s 152 (as amended): see the text and notes 3-13 infra.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For these purposes, 'relevant matters' means matters relating to the grant and to securing the redemption of the landlord's share: Housing Act 1985 s 152(5) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 119(2)). As to determination of the amount of the landlord's share see PARA 1873 note 22 ante; and as to the determination of its value see PARA 1877 note 5 ante. As to the reduced share after making an interim payment see PARA 1880 ante.

5 Ie the effect of the Housing Act 1985 s 152 (as amended).

6 Ie the effect of *ibid* s 153(1), (2), (4) (as amended): see the text and notes 14-16, 18-20 infra.

7 *Ibid* s 152(1). Sections 152, 153 (as amended) are modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3, Schedule para 37. See also PARA 1872 the text and notes 17-19 ante.

8 Housing Act 1985 s 152(2).

9 Ie the notice under *ibid* s 146 (as substituted): see PARA 1873 ante.

10 *Ibid* s 152(3) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 119(1)). For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

11 For the meaning of 'dwelling house' see PARA 1796 ante.

12 For the meaning of 'district valuer' see PARA 1332 note 22 ante.

13 Housing Act 1985 s 152(4).

14 Ie the effect of *ibid* s 153 (as amended): see the text and notes 15-22 infra.

15 *Ibid* s 153(1); and see note 7 supra.

16 *Ibid* s 153(2).

17 *Ibid* s 153(3).

18 That notice must have been served before 18 July 2005: see PARA 1872 ante.

19 For the meaning of 'the right to buy' see PARA 1803 ante.

20 Housing Act 1985 s 153(4) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 119(3)).

21 le by virtue of the Housing Act 1985 s 150(2) (as substituted): see PARA 1875 ante.

22 Ibid s 153(5).

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#### **(4) TENANT'S SANCTIONS FOR LANDLORD'S DELAYS**

##### **1885. Tenant's notices of delay.**

Where a secure tenant<sup>1</sup> has claimed to exercise the right to buy<sup>2</sup>, he may serve on his landlord<sup>3</sup> a notice (an 'initial notice of delay') in any of the following cases, namely:

- 4766 (1) where the landlord has failed to serve a notice<sup>4</sup> within the appropriate period<sup>5</sup>;
- 4767 (2) where the tenant's right to buy has been established and the landlord has failed to serve a notice<sup>6</sup> within the appropriate period<sup>7</sup>;
- 4768 (3) where the tenant considers that delays on the part of the landlord are preventing him from exercising expeditiously his right to buy or his right to acquire on rent to mortgage terms<sup>8</sup> (if he has claimed the latter right before 18 July 2005<sup>9</sup>).

An initial notice of delay:

- 4769 (a) must specify the most recent action of which the tenant is aware which has been taken by the landlord<sup>10</sup>; and
- 4770 (b) must specify a period ('the response period'), not being less than one month, beginning on the date of service of the notice, within which the service by the landlord of a counter-notice will have the effect of cancelling the initial notice of delay<sup>11</sup>.

Within the response period specified in an initial notice of delay or at any time thereafter, the landlord may serve on the tenant a counter-notice in either of the following circumstances:

- 4771 (i) if the initial notice specifies either of the cases in heads (1) and (2) above and the landlord has served, or is serving together with the counter-notice, the required notice<sup>12</sup>; or
- 4772 (ii) if the initial notice specifies the case in head (3) above and there is no action<sup>13</sup> which, at the beginning of the response period, it was for the landlord to take in order to allow the tenant expeditiously to exercise his right to acquire on rent to mortgage terms and which remains to be taken at the time of service of the counter-notice<sup>14</sup>.

Such a counter-notice must specify the circumstances by virtue of which it is served<sup>15</sup>.

At any time when the response period specified in an initial notice of delay has expired and the landlord has not so served a counter-notice, the tenant may serve on the landlord a notice (an 'operative notice of delay') which must state that the statutory provisions relating to payments of rent attributable to the purchase price<sup>16</sup> will apply to payments of rent made by the tenant

on or after the default date or, if the initial notice of delay specified the case in head (3) above, the date of service of the notice<sup>17</sup>.

If, after a tenant has served an initial notice of delay, a counter-notice has been so served, then, whether or not the tenant has also served an operative notice of delay, if any of the cases in heads (1) to (3) above again arises, the tenant may serve a further initial notice of delay and the above provisions apply again accordingly<sup>18</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante; and for the meaning of 'tenant' see PARA 1300 note 1 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 I.e. a notice under the Housing Act 1985 s 124 (as amended): see PARA 1828 ante.

5 I.e. within the period appropriate under *ibid* s 124(2): see PARA 1828 ante.

6 I.e. a notice under *ibid* s 125 (as amended): see PARA 1829 ante.

7 I.e. the period appropriate under *ibid* s 125(1): see PARA 1829 ante.

8 *Ibid* s 153A(1) (s 153A added by the Housing Act 1988 s 124; the Housing Act 1985 s 153A(1) amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), (2), Sch 21 para 13(2), Sch 22). For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

Where an initial notice of delay specifies either of the cases in the Housing Act 1985 s 153A(1)(a), (b) (as so added) (see heads (1)-(2) in the text), any reference in s 153A (as added and amended) or s 153B (as added and amended) (see PARA 1886 post) to the default date is a reference to the end of the period referred to in s 153A(1)(a) (as so added) or, as the case may be s 153A(1)(b) (as so added) or, if it is later, 10 March 1989: s 153A(1) (as so added and amended). For the prescribed form of an initial notice of delay see the Housing (Right to Buy Delay Procedure) (Prescribed Forms) Regulations 1989, SI 1989/240, reg 2(a), Schedule, Form RTB6 (amended by SI 1993/2245). A form substantially to the like effect may be used: see reg 2 (as so amended).

9 See the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

10 I.e. pursuant to *ibid* Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1886 et seq post.

11 *Ibid* s 153A(2) (as added: see note 8 supra).

12 I.e. the required notice under the Housing Act 1985 s 124 (as amended) or s 125 (as amended).

13 I.e. under *ibid* Pt V (as amended).

14 *Ibid* s 153A(3) (as added (see note 8 supra); amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 13(3)). For the prescribed form of counter-notice see the Housing (Right to Buy Delay Procedure) (Prescribed Forms) Regulations 1989, SI 1989/240, reg 2(b), Schedule, Form RTB7 (amended by SI 1993/2245). A form substantially to the like effect may be used: see reg 2 (as so amended).

15 Housing Act 1985 s 153A(4) (as added: see note 8 supra).

16 I.e. *ibid* s 153B (as added and amended): see PARA 1886 post. For the meaning of references to the purchase price see PARA 1836 note 6 ante.

17 *Ibid* s 153A(5) (as added: see note 8 supra). For the prescribed form of notice of operative delay see the Housing (Right to Buy Delay Procedure) (Prescribed Forms) Regulations 1989, SI 1989/240, reg 2(c), Schedule, Form RTB8 (amended by SI 1993/2245). A form substantially to the like effect may be used: see reg 2 (as so amended).

18 Housing Act 1985 s 153A(6) (as added: see note 8 supra). The Housing Act 1985 s 153A (as added and amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 38); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 17); and is omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire under the Housing Act 1996: (see

PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 17).

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### **1886. Payments of rent attributable to purchase price etc.**

Where a secure tenant<sup>1</sup> has served on his landlord<sup>2</sup> an operative notice of delay<sup>3</sup>, the following provisions apply to any payment of rent which is made on or after the default date<sup>4</sup> or, as the case may be, the date of service of the notice and before the occurrence of any of the following events and, if more than one event occurs, before the earliest to occur:

- 4773 (1) the service by the landlord of a counter-notice<sup>5</sup>;
- 4774 (2) the date on which the landlord makes to the tenant the required grant<sup>6</sup>;
- 4775 (3) the date on which the tenant withdraws or is deemed to have withdrawn the notice claiming to exercise the right to buy<sup>7</sup> or, as the case may be, the notice claiming the right to acquire on rent to mortgage terms<sup>8</sup>; and
- 4776 (4) the date on which the tenant ceases to be entitled to exercise the right to buy<sup>9</sup>.

Except where these provisions cease to apply on a date determined under head (3) or head (4) above, so much of any payment of rent to which these provisions apply as does not consist of a sum due on account of rates, council tax or a service charge<sup>10</sup> is treated not only as a payment of rent but also a payment on account by the tenant which is to be taken<sup>11</sup> into account<sup>12</sup>; and, in such a case, the amount which would otherwise be the purchase price<sup>13</sup> or, as the case may be, the tenant's initial payment<sup>14</sup> must be reduced by an amount equal to the aggregate of:

- 4777 (a) the total of any payments on account treated as having been so paid by the tenant; and
- 4778 (b) if those payments on account are derived from payments of rent referable to a period of more than 12 months, a sum equal to the appropriate percentage<sup>15</sup> of the total referred to in head (a) above<sup>16</sup>.

1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

2 For the meaning of 'landlord' see PARA 1300 note 1 ante.

3 For the meaning of 'operative notice of delay' see PARA 1885 ante.

4 For the meaning of references to the default date see PARA 1885 note 8 ante.

5 I.e. under the Housing Act 1985 s 153A(3) (as added and amended): see PARA 1885 ante.

6 I.e. the grant required by ibid s 138 (as amended) (see PARA 1843 ante) or, as the case may be, s 150 (as substituted) (see PARA 1875 ante).

7 For the meaning of 'the right to buy' see PARA 1803 ante.

8 For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante. That right is only exercisable if claimed before 18 July 2005: see PARA 1872 ante.

9 Housing Act 1985 s 153B(1) (s 153B added by the Housing Act 1988 s 124; the Housing Act 1985 s 153B(1) amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), (2), Sch 21 para 14(1), Sch 22).

10 le as defined in the Housing Act 1985 s 621A (as added and amended): see PARA 1829 note 17 ante.

11 le taken into account in accordance with *ibid* s 153B(3) (as added and amended): see the text and notes 13-16 *infra*.

12 *Ibid* s 153B(2) (as added (see note 9 *supra*); amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 14(2); the Local Government Finance (Housing) (Consequential Amendments) Order 1993, SI 1993/651, art 2(1), Sch 1 para 14).

13 For the meaning of references to the purchase price see PARA 1836 note 6 ante.

14 For the meaning of 'initial payment' see PARA 1872 ante.

15 For these purposes, 'the appropriate percentage' means 50% or such other percentage as may be prescribed: Housing Act 1985 s 153B(4) (as added: see note 9 *supra*).

16 *Ibid* s 153B(3) (as added (see note 9 *supra*); amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 14(3)). The Housing Act 1985 s 153B (as added and amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 39); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 *et seq post*), apply (see reg 2(1), Sch 1 para 18); and is omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire under the Housing Act 1996 (see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 17).

## UPDATE

### 1886 Payments of rent attributable to purchase price etc

NOTE 16--Rent paid by way of housing benefit counts towards the purchase price: *Hanoman v Southwark LBC* [2009] UKHL 29, [2009] 1 WLR 1367, [2009] All ER (D) 80 (Jun).

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## (5) FUTURE DISPOSALS

### (i) Relevant and Exempted Disposals

#### 1887. Meaning of 'relevant disposal'.

A disposal, whether of the whole or part of the dwelling house<sup>1</sup>, is a relevant disposal<sup>2</sup> if it is:

- 4779 (1) a further conveyance of the freehold or an assignment of the lease<sup>3</sup>; or
- 4780 (2) the grant of a lease, other than a mortgage term, for a term of more than 21 years otherwise than at a rack rent<sup>4</sup>.

For the purposes of head (2) above, it is to be assumed:

- 4781 (a) that any option to renew or extend a lease or sublease, whether or not forming part of a series of options, is exercised; and  
 4782 (b) that any option to terminate a lease or sublease is not exercised<sup>5</sup>.

The grant of an option enabling a person to call for a relevant disposal which is not an exempted disposal<sup>6</sup> is treated as such a disposal made to him<sup>7</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 le for the purposes of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1888 et seq post.

3 For the meaning of 'lease' see PARA 1300 note 1 ante.

4 Housing Act 1985 s 159(1). 'Rack rent' means a rent of or near the full annual value of the property, determined as at the date of the grant: *Re Sawyer and Withall* [1919] 2 Ch 333; *London Corpn v Cusack-Smith* [1955] AC 337, [1955] 1 All ER 302, HL.

5 Housing Act 1985 s 159(2). Section 159 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 46.

6 For the meaning of 'exempted disposal' see PARA 1888 post.

7 Housing Act 1985 s 163(1). For the purposes of s 157(2) (as amended) (see PARA 1899 post), a consent to such a grant is treated as a consent to a disposal in pursuance of the option: s 163(2). Section 163(2) is omitted where the right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante) arises: see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 24.

As to the treatment of deferred resale agreements see PARA 1891 post.

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### **1888. Meaning of 'exempted disposal'.**

A disposal is an exempted disposal<sup>1</sup> if:

- 4783 (1) it is a disposal of the whole of the dwelling house<sup>2</sup> and a further conveyance of the freehold or an assignment of the lease<sup>3</sup> and the person or each of the persons to whom it is made is a qualifying person<sup>4</sup>;  
 4784 (2) it is a vesting of the whole of the dwelling house in a person taking under a will or on an intestacy;  
 4785 (3) it is a disposal of the whole of the dwelling house in pursuance of a property adjustment order or an order for the sale of property made in connection with matrimonial proceedings<sup>5</sup>, an order as to financial provision to be made from an estate<sup>6</sup>, a property adjustment order or an order for the sale of property after an overseas divorce, etc<sup>7</sup>, an order for financial relief against a parent<sup>8</sup> or a property adjustment order or order for the sale of property in connection with civil partnership proceedings or after overseas dissolution of a civil partnership<sup>9</sup>;  
 4786 (4) it is a compulsory disposal<sup>10</sup>;  
 4787 (5) it is a disposal of property consisting of land included in the dwelling house<sup>11</sup>, being land let with or used for the purposes of the dwelling house<sup>12</sup>.

For the purposes of head (1) above, a person is a qualifying person in relation to a disposal if:

- 4788 (a) he is the person, or one of the persons, by whom the disposal is made;
- 4789 (b) he is the spouse or a former spouse, or the civil partner or a former civil partner, of that person or one of those persons; or
- 4790 (c) he is a member of the family<sup>13</sup> of that person, or of one of those persons, and has resided with him throughout the period of 12 months ending with the disposal<sup>14</sup>.

Where there is a relevant disposal which is an exempted disposal by virtue of head (4) or head (5) above:

- 4791 (i) the covenant for repayment of discount on early disposal<sup>15</sup> is not binding on the person to whom the disposal is made or any successor in title of his, and that covenant and the charge<sup>16</sup> on the premises cease to apply in relation to the property disposed of;
- 4792 (ii) the covenant required with regard to the right of first refusal for the landlord etc<sup>17</sup> is not binding on the person to whom the disposal is made or any successor in title of his, and that covenant ceases to apply in relation to the property disposed of; and
- 4793 (iii) any covenant restricting disposals of dwelling houses in National Parks etc<sup>18</sup> ceases to apply in relation to the property disposed of<sup>19</sup>.

1    Ie for the purposes of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1892 et seq post.

2    For the meaning of 'dwelling house' see PARA 1796 ante.

3    For the meaning of 'lease' see PARA 1300 note 1 ante.

4    Ie as defined in the Housing Act 1985 s 160(2) (as amended): see heads (a)-(c) in the text.

5    Ie in pursuance of an order made under (1) the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante); or (2) s 24A (as added and amended).

6    Ie an order under the Inheritance (Provision for Family and Dependants) Act 1975 s 2 (as amended): see EXECUTORS AND ADMINISTRATORS vol 17(2) (Reissue) PARAS 691-692.

7    Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17 (as amended: see PARA 1290 note 7 ante).

8    Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.

9    Ie an order made under the Civil Partnership Act 2004 Sch 5 Pt 2 or Pt 3, or Sch 7 para 9: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.

10   For these purposes, a 'compulsory disposal' means a disposal of property which is acquired compulsorily, or is acquired by a person who has made or would have made, or for whom another person has made or would have made, a compulsory purchase order authorising its compulsory purchase for the purposes for which it is acquired: Housing Act 1985 s 161.

11   Ie land included in the dwelling house by virtue of ibid s 184 (as amended): see PARA 1796 ante.

12   Ibid s 160(1) (amended by the Housing Act 1996 s 222, Sch 18 para 15(2)); Housing Act 1985 s 160(3) (added by the Housing Act 1996 Sch 18 para 15(3); amended by the Family Law Act 1996 s 66(1), Sch 8 para 34; the Civil Partnership Act 2004 ss 81, 261(4), Sch 8 para 30, Sch 30).

13   For the meaning of 'member of a person's family' see PARA 1827 note 3 ante.



14 Housing Act 1985 s 160(2) (amended by the Civil Partnership Act 2004 Sch 8 para 18). Section 160 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante) applies: see art 3(1), Schedule para 46.

15 Ie the covenant required by the Housing Act 1985 s 155 (as amended): see PARA 1889 post.

16 Ie the covenant and charge taking effect by virtue of *ibid* s 156 (as amended): see PARA 1892 post.

17 Ie the covenant required by *ibid* s 156A (as added): see PARA 1893 post.

18 Ie any such covenant as is mentioned in *ibid* s 157 (as amended): see PARA 1899 post.

19 *Ibid* s 162 (amended by the Housing Act 2004 s 188(4); for transitional provisions see s 188(5), (6), cited in PARA 1893 note 5 post). The Housing Act 1985 162 (as amended) is modified where (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 24); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire under the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 23).

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## **(ii) Repayment of Discount**

### **1889. Repayment of discount on early disposal.**

A conveyance of the freehold or the grant of a lease<sup>1</sup> in pursuance of the right to buy<sup>2</sup> or the right to acquire on rent to mortgage terms<sup>3</sup> must, unless in the case of a conveyance or grant in pursuance of the right to buy there is no discount, contain a covenant binding on the secure tenant<sup>4</sup> and his successors in title to the following effect<sup>5</sup>.

In the case of a conveyance or grant in pursuance of the right to buy, the covenant must be to pay the landlord<sup>6</sup> such sum, if any, as the landlord may demand<sup>7</sup> on the occasion of the first relevant disposal<sup>8</sup>, other than an exempted disposal<sup>9</sup>, which takes place within the period of five years beginning with the conveyance or grant<sup>10</sup>. Where, however, a secure tenant has served on his landlord an operative notice of delay<sup>11</sup>, the five years referred to above begin from a date which precedes the date of the conveyance of the freehold or grant of the lease by a period equal to the time, or, if there is more than one such notice, the aggregate of the times, during which any payment of rent falls<sup>12</sup> to be taken<sup>13</sup> into account<sup>14</sup>.

In the case of a conveyance or grant in pursuance of the right to acquire on rent to mortgage terms, the covenant must be to pay the landlord such sum, if any, as the landlord may demand<sup>15</sup> on the occasion of the first relevant disposal, other than an exempted disposal, which takes place within the period of five years beginning with the making of the initial payment<sup>16</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

3 For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante. That right is only exercisable if the notice of claim was served before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

5 Housing Act 1985 s 155(1).

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 Ie in accordance with the Housing Act 1985 s 155A (as added): see PARA 1890 post.

8 For the meaning of 'relevant disposal' see PARA 1887 ante.

9 For the meaning of 'exempted disposal' see PARA 1888 ante.

10 Housing Act 1985 s 155(2) (s 155(2), (3) substituted by the Housing Act 2004 s 185(1), (2)).

The amendments made by s 185 do not apply in any case where the tenant's notice under the Housing Act 1985 s 122 (notice claiming to exercise right to buy: see PARA 1826 ante) was served before 18 January 2005 (ie the day on which the Housing Act 2004 s 185 came into force: see s 270(3)(a)): s 185(5). Section 185(7), however, applies in any such case if the first relevant disposal to which the covenant for repayment of discount applies takes place on or after 18 January 2005: s 185(6). In the following provisions, ie (1) the Housing Act 1985 s 155(2) (as amended by the Housing and Planning Act 1986 s 2(3)) and the Housing Act 1985 s 155(3) (as substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 120(1)) as they have effect without the amendments made by the Housing Act 2004 s 185; and (2) any covenant for repayment of discount, any reference (however expressed) to a person being liable to pay an amount to the landlord on demand is to be read as a reference to his being liable to pay to the landlord so much of that amount (if any) as the landlord may demand: s 185(7). In s 185(6), (7), 'covenant for repayment of discount' means the covenant contained in a conveyance or grant in accordance with the Housing Act 1985 s 155 (as amended): Housing Act 2004 s 185(8).

11 Ie as defined in the Housing Act 1985 s 153A (as added and amended): see PARA 1885 ante.

12 Ie by virtue of ibid s 153B (as added and amended): see PARA 1886 ante.

13 Ie in accordance with ibid s 153B(3) (as added and amended): see PARA 1886 ante.

14 Ibid s 155(3A)(a) (added by the Housing Act 1988 s 140(1), Sch 17 para 41; amended by the Housing Act 2004 s 185(1), (3); for transitional provisions see note 10 supra).

15 Ie in accordance with the Housing Act 1985 s 155B (as added): see PARA 1890 post.

16 Ibid s 155(3) (as substituted: see note 10 supra). For the meaning of 'initial payment' see PARA 1872 ante. Where a secure tenant has served on his landlord an operative notice of delay, as defined in s 153A (as added and amended), any reference in s 155(3) (as substituted) to the making of the initial payment is to be construed as a reference to the date which precedes that payment by the period referred to in s 155(3A)(a) (as added and amended) (see the text and notes 11-14 supra): s 155(3A)(b) (substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 120(2)).

The Housing Act 1985 s 155 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 41); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 20); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996 (see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 19).

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### **1890. Amount of discount which may be demanded by landlord.**

For the purposes of the covenant to repay discount on an early disposal in the case of a conveyance or grant in pursuance of the right to buy<sup>1</sup>, the landlord<sup>2</sup> may demand such sum as he considers appropriate, up to and including the maximum amount specified for these purposes<sup>3</sup>. The maximum amount which may be demanded by the landlord is a percentage of the price or premium paid for the first relevant disposal<sup>4</sup> which is equal to the discount to which

the secure tenant<sup>5</sup> was entitled, where the discount is expressed as a percentage of the value which was taken<sup>6</sup> as the value of the dwelling house<sup>7</sup> at the relevant time<sup>8</sup>. For each complete year which has elapsed after the conveyance or grant and before the disposal, however, the maximum amount which may be demanded by the landlord is reduced by one-fifth<sup>9</sup>.

In calculating the maximum amount which may be so demanded by the landlord, such amount, if any, of the price or premium paid for the disposal which is attributable to improvements made to the dwelling house:

- 4794 (1) by the person by whom the disposal is, or is to be, made; and
- 4795 (2) after the conveyance or grant and before the disposal,

must be disregarded<sup>10</sup>. The amount to be disregarded under this provision is such amount as may be agreed between the parties or determined by the district valuer<sup>11</sup>; but the district valuer is not required<sup>12</sup> to make a determination for these purposes unless:

- 4796 (a) it is reasonably practicable for him to do so; and
- 4797 (b) his reasonable costs in making the determination are paid by the person by whom the disposal is, or is to be, made<sup>13</sup>.

If the district valuer does not make a determination for these purposes, and in default of an agreement, no amount is required to be disregarded under this provision<sup>14</sup>.

For the purposes of the covenant to repay discount on an early disposal in the case of a conveyance or grant in pursuance of the right to acquire on rent to mortgage terms, where that right is still exercisable<sup>15</sup>, the landlord may demand such sum as he considers appropriate, up to and including the maximum amount specified for these purposes<sup>16</sup>. The maximum amount which may be demanded by the landlord is the discount, if any, to which the tenant was entitled on the making of:

- 4798 (i) the initial payment<sup>17</sup>;
- 4799 (ii) any interim payment<sup>18</sup> made before the disposal; or
- 4800 (iii) the final payment<sup>19</sup> if so made,

reduced, in each case, by one-fifth for each complete year which has elapsed after the making of the initial payment and before the disposal<sup>20</sup>.

1    le the covenant mentioned in the Housing Act 1985 s 155(2) (as substituted): see PARA 1889 ante.

2    For the meaning of 'landlord' see PARA 1300 note 1 ante.

3    Housing Act 1985 s 155A(1) (ss 155A, 155B added by the Housing Act 2004 s 185(1), (4)). For transitional provisions see PARA 1889 note 10 ante. The Housing Act 1985 s 155A (as so added) is subject to s 155C (as added (see the text and notes 10-14 infra): s 155A(4) (as so added).

4    For the meaning of 'relevant disposal' see PARA 1887 ante.

5    For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

6    le under the Housing Act 1985 s 127 (as amended): see PARA 1837 ante.

7    For the meaning of 'dwelling house' see PARA 1796 ante.

8    Housing Act 1985 s 155A(2) (as added: see note 3 supra).

9    Ibid s 155A(3) (as added: see note 3 supra).

- 10 Ibid s 155C(1) (s 155C added by the Housing Act 2004 s 186(1)).
- 11 Housing Act 1985 s 155C(2) (as added: see note 10 supra). For the meaning of 'district valuer' see PARA 1332 note 22 ante.
- 12 Ie by virtue of ibid s 155C (as added).
- 13 Ibid s 155C(3) (as added: see note 10 supra).
- 14 Ibid s 155C(4) (as added: see note 10 supra).
- 15 Ie the covenant mentioned in ibid s 155(3) (as substituted): see PARA 1889 ante.
- 16 Ibid s 155B(1) (as added: see note 3 supra).
- 17 For the meaning of 'initial payment' see PARA 1872 ante.
- 18 For the meaning of 'interim payment' see PARA 1880 ante.
- 19 As to the final payment see PARA 1877 ante.
- 20 Housing Act 1985 s 155B(2) (as added: see note 3 supra).

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### **1891. Treatment of deferred resale agreements.**

If a secure tenant<sup>1</sup> or his successor in title enters into an agreement<sup>2</sup> to which this provision applies<sup>3</sup>, any liability arising under the required covenant to repay discount on an early disposal<sup>4</sup> must be determined as if a relevant disposal<sup>5</sup> which is not an exempted disposal<sup>6</sup> had occurred at the appropriate time<sup>7</sup>; and for these purposes 'the appropriate time' means:

- 4801 (1) the time when the agreement is entered into; or
- 4802 (2) if it was made before the beginning of the discount repayment period<sup>8</sup>, immediately after the beginning of that period<sup>9</sup>.

An agreement is one to which these provisions apply if it is an agreement between the secure tenant or his successor in title and any other person:

- 4803 (a) which is made, expressly or impliedly, in contemplation of, or in connection with, the tenant exercising, or having exercised, the right to buy<sup>10</sup>,
- 4804 (b) which is made before the end of the discount repayment period; and
- 4805 (c) under which a relevant disposal, other than an exempted disposal, is or may be required to be made to any person after the end of that period<sup>11</sup>.

Such an agreement is within heads (a) to (c) above whether or not the date on which the disposal is to take place is specified in the agreement, and whether or not any requirement to make the disposal is or may be made subject to the fulfilment of any condition<sup>12</sup>.

The Secretary of State<sup>13</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>14</sup> may by order provide:

- 4806 (i) for the above provisions<sup>15</sup> to apply to agreements of any description specified in the order in addition to those within heads (a) to (c) above;
- 4807 (ii) for the above provisions<sup>16</sup> not to apply to agreements of any description so specified to which they would otherwise apply<sup>17</sup>.

Such an order may make different provision with respect to different cases or descriptions of case and must be made by statutory instrument<sup>18</sup>.

- 1 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.
- 2 For these purposes, 'agreement' includes arrangement: Housing Act 1985 s 163A(7) (s 163A added by the Housing Act 2004 s 187(1); for transitional provisions see ss 187(2), 270(3)(a)).
- 3 Is an agreement within the Housing Act 1985 s 163A(3) (as added): see heads (a)-(c) in the text.
- 4 Is the covenant required by *ibid* s 155 (as amended): see PARA 1889 ante.
- 5 For the meaning of 'relevant disposal' see PARA 1887 ante.
- 6 For the meaning of 'exempted disposal' see PARA 1888 ante.
- 7 Housing Act 1985 s 163A(1) (as added: see note 2 supra).
- 8 For these purposes 'the discount repayment period' means the period of three or five years that applies for the purposes of *ibid* s 155(2) (either as amended or as substituted) or s 155(3) (as substituted), depending on whether the tenant's notice under s 122 (see PARA 1826 ante) was given before, or on or after, the date of the coming into force of the Housing Act 2004 s 185 (see PARA 1889 note 10 ante): Housing Act 1985 s 163A(7) (as added: see note 2 supra).
- 9 *Ibid* s 163A(2) (as added: see note 2 supra).
- 10 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.
- 11 Housing Act 1985 s 163A(3) (as added: see note 2 supra).
- 12 *Ibid* s 163A(4) (as added: see note 2 supra).
- 13 As to the Secretary of State see PARA 27 note 3 ante.
- 14 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 15 Is the Housing Act 1985 s 163A(1) (as added): see the text and notes 1-7 supra.
- 16 See note 15 supra.
- 17 Housing Act 1985 s 163A(5) (as added: see note 2 supra).
- 18 *Ibid* s 163A(6) (as added: see note 2 supra). In the case of an order made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 163A(6) (as so added). At the date at which this title states the law, no such order had been made.

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## **1892. Liability to repay is a charge on the premises.**

The liability that may arise under the covenant to repay discount on an early disposal<sup>1</sup> is a charge on the dwelling house<sup>2</sup>, taking effect as if it had been created by deed expressed to be by way of legal mortgage<sup>3</sup>.

The charge has priority<sup>4</sup> as follows:

- 4808 (1) if it secures the liability that may arise under the covenant to repay discount on an early disposal in the case of a conveyance or grant in pursuance of the right to buy<sup>5</sup>, immediately after any legal charge securing an amount advanced to the secure tenant<sup>6</sup> by an approved lending institution<sup>7</sup> for the purpose of enabling him to exercise the right to buy;
- 4809 (2) if it secures the liability that may arise under the covenant to repay discount on an early disposal in the case of a conveyance or grant in pursuance of the right to acquire on rent to mortgage terms, where that right is still exercisable<sup>8</sup>, immediately after the mortgage which is required<sup>9</sup> for securing the redemption of the landlord's share, and which has priority<sup>10</sup> immediately after any legal charge securing an amount advanced to the secure tenant by an approved lending institution for the purpose of enabling him to exercise the right to acquire on rent to mortgage terms<sup>11</sup>.

The following, namely:

- 4810 (a) any advance which is made otherwise than for the purpose mentioned in head (1) or head (2) above and is secured by a legal charge having priority to the charge taking effect by virtue of these provisions; and
- 4811 (b) any further advance which is so secured,

rank in priority to that charge if, and only if, the landlord<sup>12</sup> by written notice served on the institution concerned gives its consent; and the landlord must so give its consent if the purpose of the advance or further advance is an approved purpose<sup>13</sup>.

The landlord may at any time by written notice served on an approved lending institution postpone the charge taking effect by virtue of these provisions to any advance or further advance which is made to the tenant by that institution and is secured by a legal charge not having priority to that charge; and the landlord must serve such a notice if the purpose of the advance or further advance is an approved purpose<sup>14</sup>.

Provision is made for the apportionment of discount so recovered where the liability arises under the extended right to buy<sup>15</sup>.

1 The covenant required by the Housing Act 1985 s 155 (as amended): see PARA 1889 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 Housing Act 1985 s 156(1). The covenant required by s 155 (as amended) (see PARA 1889 ante) does not, by virtue of its binding successors in title of the tenant, bind a person exercising rights under a charge having priority over the charge taking effect by virtue of s 156 (as amended) (see the text and notes 4-14 infra), or a person deriving title under him; and a provision of the conveyance or grant, or of a collateral agreement, is void in so far as it purports to authorise a forfeiture, or to impose a penalty or disability, in the event of any such person failing to comply with that covenant: s 156(3A) (added by the Housing and Planning Act 1986 s 24(1)(a), Sch 5 para 1(2), (5)). For the meaning of 'tenant' see PARA 1300 note 1 ante.

The Housing Act 1985 s 156 (as amended) is modified (1) where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 42); (2) where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 21); (3) where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 20).

4 le subject to the Housing Act 1985 s 156(2A), (2B) (as added): see the text and notes 13-14 infra.

5 le the covenant required by ibid s 155(2) (as substituted): see PARA 1889 ante. For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

6 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

7 For these purposes, the approved lending institutions are (1) the relevant authority; (2) an authorised deposit taker; (3) an authorised insurer; and (4) any body specified, or of a class or description specified, in an order made by the Secretary of State or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister: Housing Act 1985 s 156(4) (amended by the Housing Act 1996 ss 222, 227, Sch 18 para 22(1)(c), Sch 19 Pt XIII; the Government of Wales Act 1998 s 140, Sch 16 para 5; the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 299(1), (4)). As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5; and for the meanings of 'authorised deposit taker' and 'authorised insurer' see PARA 1883 note 5 ante. Any such order must be made by statutory instrument and may make different provision with respect to different cases or descriptions of case, including different provision for different areas: Housing Act 1985 s 156(5). Before making an order varying or revoking a previous order, the Secretary of State or the Assembly or minister must give an opportunity for representations to be made on behalf of any body which, if the order were made, would cease to be an approved lending institution for these purposes: s 156(6). As to the Secretary of State see PARA 27 note 3 ante; and as to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

By virtue of the Housing (Consequential Provisions) Act 1985 s 2(2), the Housing (Right to Buy) (Priority of Charges) Order 1984, SI 1984/1554 (as amended), and the Housing (Right to Buy) (Priority of Charges) Order 1985, SI 1985/1979 (as amended) have effect as if so made. The power conferred by the Housing Act 1985 s 156(4) (as amended) has been exercised by the Secretary of State and (following the transfer of functions in relation to Wales, by the Assembly) to make numerous orders: for recent examples see the Housing (Right to Buy) (Priority of Charges) (England) Order 2005, SI 2005/92; the Housing (Right to Buy) (Priority of Charges) (England) (No 2) Order 2005, SI 2005/407; the Housing (Right to Buy) (Priority of Charges) (England) Order 2006, SI 2006/1263; the Housing (Right to Buy) (Priority of Charges) (England) (No 2) Order 2006, SI 2006/2563; the Housing (Right to Buy) (Priority of Charges) (Wales) Order 2005, SI 2005/1351; the Housing (Right to Buy) (Priority of Charges) (Wales) Order 2006, SI 2006/950.

8 le the covenant required by the Housing Act 1985 s 155(3) (as substituted): see PARA 1889 ante. For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante. That right is only exercisable where it has been claimed before 18 July 2005: see s 142A (as added); and PARA 1872 ante.

9 le by ibid s 151B (as added): see PARA 1883 ante.

10 le by virtue of ibid s 151B(2) (as added).

11 Ibid s 156(2) (s 156(2)-(2B) substituted by the Leasehold Reform, Housing and Urban Development Act 1993 s 120(3)).

12 For the meaning of 'landlord' see PARA 1300 note 1 ante.

13 Housing Act 1985 s 156(2A) (as substituted: see note 11 supra). The approved purposes are (1) to enable the tenant to make an interim or final payment; (2) to enable the tenant to defray, or to defray on his behalf, any of the following: (a) the cost of any works to the dwelling house; (b) any service charge payable in respect of the dwelling house for works, whether or not to the dwelling house; and (c) any service charge or other amount payable in respect of the dwelling house for insurance, whether or not of the dwelling house, and (3) to enable the tenant to discharge, or to discharge on his behalf, any of the following: (a) so much as is still outstanding of any advance or further advance which ranks in priority to the charge taking effect by virtue of the Housing Act 1985 s 156 (as amended); (b) any arrears of interest on such an advance or further advance; and (c) any costs and expenses incurred in enforcing payment of any such interest, or repayment, in whole or in part, of any such advance or further advance: s 156(4A) (s 156(4A), (4B) added by the Leasehold Reform, Housing and Urban Development Act 1993 s 120(4)). For the meaning of 'interim payment' see PARA 1880 ante; for the meaning of 'final payment' see PARA 1877 ante; and for the meaning of 'service charge' see PARA 1829 note 17 ante.

Where different parts of an advance or further advance are made for different purposes, each of those parts is to be regarded as a separate advance or further advance for these purposes: Housing Act 1985 s 156(4B) (as so added).

14 Ibid s 156(2B) (as substituted: see note 11 supra).

15 Subject in cases of acquisition on rent to mortgage terms to ibid s 150B (as added for these purposes) (power to agree final apportionment: see PARA 1875 note 15 ante), where the whole or any part of any discount

obtained by the tenant is recovered by the freeholder (whether by the receipt of a payment determined by reference to the discount or by a reduction so determined of any consideration given by the freeholder or in any other way), the freeholder must pay: (1) to the authority or body which immediately before completion was the landlord or an intermediate landlord; and (2) to the rent owner of any rentcharge which was then charged on or issued out of the lease of any such authority or body, a sum calculated by multiplying the amount of the discount recovered by the freeholder by the apportionment fraction applicable to that authority, body or person (ascertained in accordance with s 138A (as added for these purposes: see PARA 1844 ante); but no such payment must be made in relation to a lease if it is a lease for a term certain and the residue of the term unexpired immediately before completion was a period of less than 12 months or if it was a periodic tenancy: s 156A(1), (2) (as added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3, Schedule para 43). For these purposes, 'apportionment fraction' has the meaning given by the Housing Act 1985 s 138A(2) (as added for these purposes) (apportionment of purchase price: see PARA 1844 ante); and 'rentcharge' and 'rent owner' have the same meanings as in the Rentcharges Act 1977 (see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 774-775): Housing Act 1985 s 156A(3) (as so added for these purposes).

## UPDATE

### 1892 Liability to repay is a charge on the premises

TEXT AND NOTES--See Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

NOTE 7--1985 Act s 156(4) further amended, s 156(5), (6) repealed: Housing and Regeneration Act 2008 s 307(1), Sch 16.

See also the Housing (Right to Buy) (Priority of Charges) (Wales) Order 2008, SI 2008/371.

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### (iii) Landlord's Right of First Refusal

#### 1893. Right of first refusal for landlord etc.

A conveyance of the freehold or grant of a lease<sup>1</sup> in pursuance of the right to buy<sup>2</sup> must<sup>3</sup> contain the following covenant, which is binding on the secure tenant<sup>4</sup> and his successors in title<sup>5</sup>. The covenant must be to the effect that, until the end of the period of ten years beginning with the conveyance or grant, there will be no relevant disposal<sup>6</sup> which is not an exempted disposal<sup>7</sup>, unless the prescribed conditions<sup>8</sup> have been satisfied in relation to that or a previous such disposal<sup>9</sup>. The limitation imposed by such a covenant<sup>10</sup> is a local land charge<sup>11</sup> and the Chief Land Registrar must enter in the register of title<sup>12</sup> a restriction reflecting the limitation imposed by any such covenant<sup>13</sup>.

In a case to which the statutory restriction on the disposal of dwelling houses situated in a National Park, an area of outstanding natural beauty or a designated rural area<sup>14</sup> applies, the conveyance or grant may contain a covenant such as is mentioned above instead of a covenant such as is mentioned in the provisions<sup>15</sup> imposing that restriction<sup>16</sup>. The conveyance or grant may, however, do so only if either:

4812 (1) the Secretary of State<sup>17</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>18</sup>; or

4813 (2) where the conveyance or grant is executed by a housing association<sup>19</sup>, the relevant authority<sup>20</sup>,



consents<sup>21</sup>. Consent may be given in relation to a particular disposal, or disposals by a particular landlord or disposals by landlords generally, and may, in any case, be given subject to conditions<sup>22</sup>.

1 For the meaning of 'lease' see PARA 1300 note 1 ante.

2 Ie in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1894 et seq post.

3 Ie subject to ibid s 156A(8) (as added): see the text and notes 14-21 infra.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante. See also PARA 1795 note 7 ante.

5 Housing Act 1985 s 156A(1) (s 156A added by the Housing Act 2004 s 188(1)). The amendments made by s 188 do not apply in relation to a conveyance of the freehold or grant of a lease in pursuance of the Housing Act 1985 Pt V (as amended) if the notice under s 122 (tenant's notice claiming to exercise right to buy: see PARA 1826 ante) was served before 18 January 2005 (ie the day on which the Housing Act 2004 came into force: see s 270(3)(a): s 188(5)). Accordingly, nothing in s 188 affects (1) the operation of a limitation contained in such a conveyance or grant in accordance with the Housing Act 1985 s 157(4) (repealed subject to transitional provisions); or (2) the operation, in relation to such a limitation, of s 157(6) (as amended) (so far as it renders a disposal in breach of covenant void) or s 158 (as amended) (consideration payable: see PARA 1898 post): Housing Act 2004 s 188(6).

6 For the meaning of 'relevant disposal' see PARA 1887 ante.

7 For the meaning of 'exempted disposal' see PARA 1888 ante.

8 'The prescribed conditions' means such conditions as are prescribed by regulations under the Housing Act 1985 s 156A (as added) at the time when the conveyance or grant is made: s 156A(3) (as added: see note 5 supra). As to the power to prescribe conditions see PARA 1894 post.

9 Ibid s 156A(2) (as added: see note 5 supra).

10 Ie a covenant within ibid s 156A(2) (as added), whether the covenant is imposed in pursuance of s 156A(1) (as added) (see the text and notes 1-5 supra) or s 156A(8) (as added) (see the text and notes 14-21 infra).

11 Ibid s 156A(11) (as added: see note 5 supra). As to local land charges see LAND CHARGES vol 26 (2004 Reissue) PARA 622 et seq.

12 As to the register of title see LAND REGISTRATION vol 26 (2004 Reissue) PARA 810 et seq.

13 Housing Act 1985 s 156A(12) (as added: see note 5 supra).

14 Ie the restriction imposed by ibid s 157(1) (as amended): see PARA 1899 post.

15 Ie as is mentioned in ibid s 157(1) (as amended).

16 Ibid s 156A(8)(a) (as added: see note 5 supra).

17 As to the Secretary of State see PARA 27 note 3 ante.

18 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

19 Ie a housing association within the Housing Act 1985 s 6A(3) or (4) (as added and amended): see HOUSING vol 22 (2006 Reissue) PARA 5.

20 As to the relevant authority see HOUSING vol 22 (2006 Reissue) PARA 5.

21 Housing Act 1985 s 156A(8)(b) (as added: see note 5 supra).

22 Ibid s 156A(9) (as added: see note 5 supra).

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#### **1894. Power to prescribe conditions.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may by regulations prescribe such conditions as he or it considers appropriate for and in connection with conferring on:

- 4814 (1) a landlord<sup>3</sup> who has conveyed a freehold or granted a lease<sup>4</sup> to a person ('the former tenant') in pursuance of the right to buy<sup>5</sup>; or
- 4815 (2) such other person as is determined in accordance with the regulations,

a right of first refusal to have a disposal within head (a) or head (b) below, namely:

- 4816 (a) a reconveyance or conveyance of the dwelling house; or
- 4817 (b) a surrender or assignment of the lease,

made to him for the specified<sup>6</sup> consideration<sup>7</sup>. Such regulations may, in particular, make provision:

- 4818 (i) for the former tenant<sup>8</sup> to offer to make such a disposal to such person or persons as may be prescribed<sup>9</sup>;
- 4819 (ii) for a prescribed recipient of such an offer to be able either to accept the offer or to nominate some other person as the person by whom the offer may be accepted<sup>10</sup>;
- 4820 (iii) for the person who may be so nominated to be either a person of a prescribed description or a person whom the prescribed recipient considers, having regard to any prescribed matters, to be a more appropriate person to accept the offer<sup>11</sup>;
- 4821 (iv) for a prescribed recipient making such a nomination to give a notification of the nomination to the person nominated, the former tenant and any other prescribed person<sup>12</sup>;
- 4822 (v) for authorising a nominated person to accept the offer and for determining which acceptance is to be effective where the offer is accepted by more than one person<sup>13</sup>;
- 4823 (vi) for the period within which the offer may be accepted or within which any other prescribed step is to be, or may be, taken<sup>14</sup>;
- 4824 (vii) for the circumstances in which the right of first refusal lapses, whether following the service of a notice to complete or otherwise, with the result that the former tenant is able to make a disposal on the open market<sup>15</sup>;
- 4825 (viii) for the manner in which any offer, acceptance or notification is to be communicated<sup>16</sup>.

Such regulations may make different provision with respect to different cases or descriptions of case and must be made by statutory instrument<sup>17</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'landlord' see PARA 1300 note 1 ante.

4 For the meaning of 'lease' see PARA 1300 note 1 ante.

5 le in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1898 et seq post.

6 le for such consideration as is mentioned in ibid s 158 (as amended): see PARA 1898 post.

7 Ibid s 156A(4), (5) (s 156A added by the Housing Act 2004 s 188(1); for transitional provisions see PARA 1893 note 5 ante).

8 In ibid s 156A(6) (as added) (see heads (i)-(viii) in the text), any reference to the former tenant is a reference to the former tenant or his successor in title: s 156A(7) (as added: see note 7 supra).

9 Ibid s 156A(6)(a) (as added: see note 7 supra).

10 Ibid s 156A(6)(b) (as added: see note 7 supra).

11 Ibid s 156A(6)(c) (as added: see note 7 supra).

12 Ibid s 156A(6)(d) (as added: see note 7 supra).

13 Ibid s 156A(6)(e) (as added: see note 7 supra).

14 Ibid s 156A(6)(f) (as added: see note 7 supra).

15 Ibid s 156A(6)(g) (as added: see note 7 supra).

16 Ibid s 156A(6)(h) (as added: see note 7 supra). See further PARAS 1895-1897 post. Nothing in s 156A (as so added) affects the generality of s 156A(4) (as added): s 156A(7) (as so added).

17 Ibid s 156A(10) (as added: see note 7 supra). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 156A(10) (as so added). In exercise of the power so conferred, the Secretary of State has made the Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, which came into force on 10 August 2005 (reg 1(1)); and the Assembly has made the Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, which came into force on 28 September 2005 (reg 1(1)). Those regulations apply where (1) a right of first refusal covenant has been imposed in relation to a dwelling house situated in England or in Wales respectively; and (2) there is to be a relevant disposal, other than an exempted disposal, of the owner's interest in the property: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, regs 1(3), 2(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, regs 1(3), 2(1). For the meanings of 'relevant disposal' and 'exempted disposal' see PARAS 1887-1888 ante. 'Owner' means the person who is the freehold or leasehold owner of a property and who is bound by a right of first refusal covenant imposed under the Housing Act 1985 s 156A (as added) (see PARA 1893 ante); and 'property' means a property which is subject to a right of first refusal covenant so imposed: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 1(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 1(2).

With prescribed exceptions, those regulations also apply if there is to be a relevant disposal, other than an exempted disposal, of the owner's interest in a property (a) acquired in exercise of the right conferred by the Housing Act 1985 171A (as added) (preserved right to buy: see PARA 1900 et seq post); (b) acquired in exercise of the right conferred by the Housing Act 1996 s 16 (as amended) (right to acquire: see PARAS 1804-1807 ante); (c) acquired at a discount from a local authority using its power to dispose of land in the Housing Act 1985 s 32 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 305); (d) acquired at a discount from a registered social landlord using its power to dispose of land in the Housing Act 1996 s 9 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 106); or (e) acquired in England at a discount from a housing action trust using its power to dispose of land in the Housing Act 1988 s 79 (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 350), but subject in cases falling under heads (c)-(e) supra to prescribed modifications: see the Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, regs 14-18; the Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, regs 14-17.

PARAS 1386-2000)/27. PUBLIC OR SOCIAL HOUSING SECTOR RIGHT TO BUY/(5) FUTURE DISPOSALS/(iii) Landlord's Right of First Refusal/1895. Offer notices.

### **1895. Offer notices.**

Where the owner<sup>1</sup> has a leasehold interest, he must serve an offer notice<sup>2</sup> on:

- 4826 (1) the former landlord<sup>3</sup>, if it is still the landlord; or
- 4827 (2) if the former landlord is not still the landlord, the person in which the reversionary interest is currently vested<sup>4</sup>.

Where the owner has a freehold interest, he must serve an offer notice on:

- 4828 (a) the former landlord, if that person is still in existence; or
- 4829 (b) if the former landlord is not still in existence, the local housing authority<sup>5</sup> for the area in which the property<sup>6</sup> is situated<sup>7</sup>.

An offer notice must:

- 4830 (i) be in writing;
- 4831 (ii) state that the owner wishes to dispose of the property, giving its full postal address;
- 4832 (iii) state that there is a covenant requiring him to first offer the property to the recipient of the notice;
- 4833 (iv) in relation to the property to which the notice relates:  
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  - 188. (A) specify whether the property is a house, a flat or a maisonette;
  - 189. (B) specify the number of bedrooms;
  - 190. (C) give details of the heating system;
  - 191. (D) specify any improvements or structural changes which have been made since the purchase; and
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  - 4834 (v) state the address at which the recipient can serve notices upon the owner<sup>8</sup>.

The recipient of an offer notice must send an acknowledgment of receipt to the owner as soon as reasonably practicable, which must specify the date of receipt of the offer notice and explain the effect of the provisions relating to acceptance and rejection of the offer<sup>9</sup> in simple terms<sup>10</sup>.

<sup>1</sup> For the meaning of 'owner' see PARA 1894 note 17 ante.

<sup>2</sup> ie a notice which complies with heads (i)-(v) in the text. Notices under the relevant regulations may be served either by personal delivery, or by post: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 13; Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 13.

<sup>3</sup> 'Former landlord' means the landlord which disposed of the property under the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1898 et seq post): Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 1(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 1(2).

<sup>4</sup> Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, regs 2(2), 3; Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, regs 2(2), 3.

<sup>5</sup> For these purposes, 'local housing authority' means, in England, a district council, a London borough council, the Common Council of the City of London or the Council of the Isles of Scilly; or, in Wales, a county

council or county borough council: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 1(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 1(2).

6 For the meaning of 'property' see PARA 1894 note 17 ante.

7 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, regs 2(3), 4; Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, regs 2(3), 4.

8 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 12(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 12(1).

9 le the effect of regs 6-10 of the relevant regulations: see PARAS 1896-1897 post.

10 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 5(1), (2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 5(1), (2).

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### **1896. Acceptance of the offer.**

Where the recipient of an offer notice<sup>1</sup> wishes to accept the offer, it must do so within the period of eight weeks<sup>2</sup> beginning with the date of receipt of the notice<sup>3</sup>. Acceptance of an offer must be by acceptance notice<sup>4</sup>, in which the recipient of the offer notice must either itself accept the offer or nominate another person<sup>5</sup> to accept the offer<sup>6</sup>.

An acceptance notice must:

- 4835 (1) be in writing;
- 4836 (2) indicate clearly whether the person giving the notice is:
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- 192. (a) accepting the offer; or
- 193. (b) nominating another person to accept the offer; and
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- 4837 (3) provide the full postal address and telephone number of any nominee<sup>7</sup>.

The service of an acceptance notice by any person entitled to do so does not confer any right on the owner of the property<sup>8</sup> to require that person to purchase the property unless and until that person enters into a binding contract for sale as described below<sup>9</sup>.

A person who accepts an offer must enter into a binding contract with the owner for the purchase of the property:

- 4838 (i) not later than 12 weeks after the date on which the acceptance notice is served on the owner; or
- 4839 (ii) not later than four weeks after the date of receipt of written notification from the owner that he is ready to complete;

whichever is later<sup>10</sup>; and if this time limit is not complied with, the owner may dispose of the property as he sees fit<sup>11</sup>.

1 For the meaning of 'offer notice' see PARA 1895 ante.

2 In calculating a period for any purpose of the relevant regulations, with the exception of the 12 month period referred to in PARA 1897 post, Christmas Day, Good Friday, or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday, must be excluded: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 11; Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 11.

3 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 6(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 6(1).

4 le a notice which complies with heads (1)-(3) in the text. As to the service of notices see PARA 1895 note 2 ante.

5 The recipient of an offer notice may nominate another person to accept the offer, but the only persons who can be nominated to accept an offer are those who either (1) are registered as a social landlord under the Housing Act 1996 Pt I (ss 1-64) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 66 et seq); or (2) fulfil the landlord condition in the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante): Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 8(1), (2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 8(1), (2). Before a person can be nominated to accept a particular offer, that person must have given an unequivocal indication in writing to the recipient of the offer notice that it wishes to be nominated to accept the offer; and for these purposes, 'in writing' includes a document transmitted by facsimile or other electronic means: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 8(3), (4); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 8(3), (4).

6 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 6(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 6(2).

7 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 12(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 12(2).

8 For the meanings of 'owner' and 'property' see PARA 1894 note 17 ante.

9 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 6(3); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 6(3).

10 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 10(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 10(1).

If either or both of the parties request that the district valuer determine the value of the property in accordance with the Housing Act 1985 s 158 (as amended) (see PARA 1898 post), the time from the date that the request is received by the district valuer until the date that the determined value is notified to the parties must be excluded from the calculation of the period in heads (i)-(ii) in the text: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 10(3); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 10(3). For the meaning of 'district valuer' see PARA 1332 note 22 ante.

11 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 10(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 10(2). The relevant regulations do not apply to any subsequent disposal of the property by him: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 10(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 10(2).

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### **1897. Rejection of the offer.**

The recipient of an offer notice<sup>1</sup> must serve a rejection notice<sup>2</sup> as soon as it has decided that it does not wish to either:

- 4840 (1) accept the offer itself; or
- 4841 (2) nominate another person<sup>3</sup> to accept the offer<sup>4</sup>.

The rejection notice must be served within eight weeks<sup>5</sup> from the date of receipt of the offer notice<sup>6</sup>. It must be in writing and must state that the person is rejecting the offer to purchase the property<sup>7</sup>.

Where an owner<sup>8</sup> has served an offer notice and the recipient:

- 4842 (a) has not served either an acceptance notice or a rejection notice within eight weeks from the date of receipt of the offer notice; or
- 4843 (b) has served a rejection notice,

then the owner may<sup>9</sup> dispose of the property as he sees fit<sup>10</sup>; but if after the expiry of the period of 12 months<sup>11</sup> the owner retains his interest in the property, the relevant regulations apply<sup>12</sup> if there is to be a relevant disposal<sup>13</sup>, other than an exempted disposal<sup>14</sup>, of the owner's interest in the property<sup>15</sup>.

1 For the meaning of 'offer notice' see PARA 1895 ante.

2 I.e. a notice complying with the text to note 7 infra. As to service of notices see PARA 1895 note 2 ante.

3 As to such nomination see PARA 1896 note 5 ante.

4 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 7(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 7(1).

5 As to the computation of this period see PARA 1896 note 2 ante.

6 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 7(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 7(2).

7 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 12(3); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 12(3). For the meaning of 'property' see PARA 1894 note 17 ante.

8 For the meaning of 'owner' see PARA 1894 note 17 ante.

9 I.e. subject to the provisions set out in the text to notes 11-15 infra.

10 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 9(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 9(1). The relevant regulations do not apply to any subsequent disposal of the property by him: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 9(1); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 9(1); but see note 9 supra.

In the circumstances referred to in head (a) in the text, the 12 month period begins the day after the expiry of the eight week period; and in the circumstances referred to in head (b) in the text, the 12 month period begins the day after that on which the rejection notice is served: Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 9(3), (4); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 9(3), (4).

12 As to the application of those regulations see PARA 1894 note 17 ante.

13 For the meaning of 'relevant disposal' see PARA 1887 ante.

14 For the meaning of 'exempted disposal' see PARA 1888 ante.

15 Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, regs 2(1), 9(2); Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, regs 2(1), 9(2).

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### **1898. Consideration for disposal.**

The consideration for a disposal in pursuance of the right of first refusal<sup>1</sup> must be such amount as may be agreed between the parties, or determined by the district valuer<sup>2</sup>, as being the amount which is to be taken to be the value of the dwelling house<sup>3</sup> at the time when the offer is made<sup>4</sup>. That value is to be taken to be the price which, at that time, the interest to be reconveyed, conveyed, surrendered or assigned would realise if sold on the open market by a willing vendor, on the assumption that any liability under:

- 4844 (1) the covenant to repay discount on early disposal<sup>5</sup>; and
- 4845 (2) any covenant to redeem the landlord's share where a conveyance or grant is executed in pursuance of the right to acquire on rent to mortgage terms<sup>6</sup>; and
- 4846 (3) any covenant to pay for the outstanding share on the disposal of a dwelling house subject to a shared ownership lease<sup>7</sup>,

would be discharged by the vendor<sup>8</sup>.

If the offer is accepted<sup>9</sup>, no payment may be required in pursuance of any such covenant as is mentioned in heads (1) to (3) above; but the consideration must be reduced<sup>10</sup> by such amount, if any, as, on a disposal made at the time the offer was made, being a relevant disposal<sup>11</sup> which is not an exempted disposal<sup>12</sup>, would fall to be paid under that covenant<sup>13</sup>. Where, however, there is a charge on the dwelling house having priority over the charge to secure payment of the sum due under the covenant mentioned in heads (1) to (3) above, the consideration may not be so reduced below the amount necessary<sup>14</sup> to discharge the outstanding sum secured by the first-mentioned charge at the date of the offer<sup>15</sup>.

1    Ie such a disposal as is mentioned in the Housing Act 1985 s 156A(4) (as added): see PARA 1894 ante.

2    Ie as determined in accordance with regulations under *ibid* s 156A (as added): see PARA 1896 note 10 ante. For the meaning of 'district valuer' see PARA 1332 note 22 ante.

3    For the meaning of 'dwelling house' see PARA 1796 ante.

4    Housing Act 1985 s 158(1) (substituted by the Housing Act 2004 s 188(3)(b); for transitional provisions see PARA 1893 note 5 ante).

5    Ie the covenant required by the Housing Act 1985 s 155 (as amended): see PARA 1889 ante.

6    Ie any covenant required by *ibid* s 151A, Sch 6A para 1 (as added): see PARA 1877 ante. For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante. That right is now exercisable only where it was claimed before 18 July 2005: see s 142A (as added); and PARA 1872 ante.

7    Ie any covenant required by *ibid* Sch 8 para 6 (repealed).

8    *Ibid* s 158(2) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 15; the Housing Act 2004 s 188(3)(c)).

9    Ie in accordance with regulations under *ibid* s 156A (as added): see PARA 1896 ante.

10   Ie subject to *ibid* s 158(4) (as amended): see the text and notes 14-15 *infra*.

11   For the meaning of 'relevant disposal' see PARA 1887 ante.

12   For the meaning of 'exempted disposal' see PARA 1888 ante.



13 Housing Act 1985 s 158(3) (amended by the Housing and Planning Act 1986 s 24(1)(a), Sch 5 para 1(3), (5); the Housing Act 2004 s 188(3)(d)).

14 le as determined in accordance with regulations under the Housing Act 1985 s 156A (as added): see PARA 1896 ante.

15 Ibid s 158(4) (added by the Housing and Planning Act 1986 Sch 5 para 1(3), (5); amended by the Housing Act 2004 s 188(3)(e)). The Housing Act 1985 s 158 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante) applies (see art 3(1), Schedule para 45); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 23); and is omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 22).

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#### **(iv) Other Restrictions on Disposal**

##### **1899. Restrictions on disposal of dwelling houses in National Parks etc.**

Where a conveyance or grant is executed<sup>1</sup> by a local authority<sup>2</sup> or a housing association<sup>3</sup> ('the landlord') of a dwelling house<sup>4</sup> situated in a National Park, an area designated<sup>5</sup> as an area of outstanding natural beauty or an area designated by order of the Secretary of State<sup>6</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>7</sup> as a rural area<sup>8</sup>, the conveyance or grant may<sup>9</sup> contain a covenant limiting the freedom of the tenant<sup>10</sup>, including any successor in title of his and any person deriving title under him or such a successor, to dispose of the dwelling house in the following manner<sup>11</sup>. The limitation is that until such time, if any, as may be notified in writing by the landlord to the tenant or a successor in title of his:

4847 (1) there will be no relevant disposal<sup>12</sup> which is not an exempted disposal<sup>13</sup> without the written consent of the landlord, but that consent may not be withheld if the disposal is to a person satisfying the specified condition<sup>14</sup>; and

4848 (2) there will be no disposal by way of tenancy<sup>15</sup> or licence<sup>16</sup> without the written consent of the landlord unless the disposal is to a person satisfying that condition or by a person whose only or principal home<sup>17</sup> is, and throughout the duration of the tenancy or licence remains, the dwelling house<sup>18</sup>.

The condition is that the person to whom the disposal is made or, if it is made to more than one person, at least one of them, has throughout the period of three years immediately preceding the application for consent or, in the case of a disposal by way of tenancy or licence, preceding the disposal:

4849 (a) had his place of work in a region designated by order of the Secretary of State or the Assembly or the relevant Welsh minister which, or part of which, is comprised in the National Park or area; or

4850 (b) had his only or principal home in such a region;

or has had the one in part or parts of that period and the other in the remainder; but the region need not have been the same throughout the period<sup>19</sup>.

A disposal in breach of such a covenant is void and, so far as it relates to disposals by way of tenancy or licence, such a covenant may be enforced by the landlord as if:

- 4851 (i) the landlord were possessed of land adjacent to the house concerned; and
- 4852 (ii) the covenant were expressed to be made for the benefit of such adjacent land<sup>20</sup>.

Instead of the covenant described above, and subject to the required consent<sup>21</sup>, the conveyance or grant may contain a covenant conferring a right of first refusal<sup>22</sup> on the landlord or other prescribed person<sup>23</sup>.

1     Ie in pursuance of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1900 et seq post.

2     For the meaning of 'local authority' see PARA 1300 note 8 ante.

3     As to housing associations see HOUSING vol 22 (2006 Reissue) PARA 11.

4     For the meaning of 'dwelling house' see PARA 1796 ante.

5     Ie designated under the Countryside and Rights of Way Act 2000 s 82: see OPEN SPACES AND COUNTRYSIDE vol 78 (2010) PARA 658.

6     As to the Secretary of State see PARA 27 note 3 ante.

7     As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

8     Any such order (1) may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and (2) must be made by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: Housing Act 1985 s 157(8). By virtue of the Housing (Consequential Provisions) Act 1985 s 2(2), a number of orders have effect as if made under these provisions: see eg the Housing (Right to Buy) (Designated Regions) Order 1980, SI 1980/1345. Additionally, the Secretary of State and the Assembly have exercised these powers to make a number of orders: for recent examples see the Housing (Right to Buy) (Designated Rural Areas and Designated Regions) (England) Order 2005, SI 2005/1995; the Housing (Right to Buy) (Designated Rural Areas and Designated Region) (England) Order 2006, SI 2006/1948; the Housing (Right to Acquire and Right to Buy) (Designated Rural Areas and Designated Regions) (Wales) Order 2003, SI 2003/54 (as amended).

9     Ie subject to the Housing Act 1985 s 156A(8) (as added): see PARA 1893 ante.

10    For the meaning of 'tenant' see PARA 1300 note 1 ante.

11    Housing Act 1985 s 157(1) (amended by the Government of Wales Act 1998 s 152, Sch 18 Pt IV; the Countryside and Rights of Way Act 2000 s 93, Sch 15 Pt I para 9; the Housing Act 2004 s 188(2)(a); for transitional provisions see PARA 1893 note 5 ante).

12    For the meaning of 'relevant disposal' see PARA 1887 ante.

13    For the meaning of 'exempted disposal' see PARA 1888 ante.

14    Ie the condition stated in the Housing Act 1985 s 157(3) (as amended): see the text and note 19 infra.

15    For the meaning of 'tenancy' see PARA 1300 note 1 ante.

16    For these purposes, any reference to a disposal by way of tenancy or licence does not include a reference to a relevant disposal or an exempted disposal: Housing Act 1985 s 157(6A) (added by the Housing Act 1988 s 126(1), (5)).

17    For the meaning of 'only or principal home' see PARA 1300 note 19 ante.

18 Housing Act 1985 s 157(2) (amended by the Housing Act 1988 s 126(1), (2)). Where such a covenant imposes the limitation specified in the Housing Act 1985 s 157(2) (as so amended), the limitation is a local land charge; and the Chief Land Registrar must enter a restriction in the register of title reflecting the limitation: Housing Act 1985 s 157(7) (amended by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (4)). As to local land charges see LAND CHARGES vol 26 (2004 Reissue) PARA 622 et seq; and as to the register of title see LAND REGISTRATION vol 26 (2004 Reissue) PARA 810 et seq.

19 Housing Act 1985 s 157(3) (amended by the Housing Act 1988 s 126(1), (3)).

20 Housing Act 1985 s 157(6) (amended by the Housing Act 1988 s 126(1), (4)). The Housing Act 1985 s 157 (as amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 44); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq post), apply (see reg 2(1), Sch 1 para 22); and is omitted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 21).

21 See the Housing Act 1985 s 156A(9) (as added); and PARA 1893 ante.

22 Ie a covenant such as is described in ibid s 156A (as added): see PARAS 1893-1894 ante.

23 See ibid s 156A(8) (as added); and PARA 1893 ante.

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## **(6) PRESERVATION OF RIGHT TO BUY ON DISPOSAL TO PRIVATE SECTOR LANDLORD**

### **1900. Cases in which right to buy is preserved.**

The right to buy<sup>1</sup> and the right to acquire on rent to mortgage terms<sup>2</sup> in the cases where the latter right is still exercisable<sup>3</sup> continue to apply where a person ceases to be a secure tenant<sup>4</sup> of a dwelling house<sup>5</sup> by reason of the disposal by the landlord<sup>6</sup> of an interest in the dwelling house to a person who is not an authority or body fulfilling the landlord condition<sup>7</sup> for secure tenancies<sup>8</sup>.

The above provisions do not, however, apply:

4853 (1) where the former landlord<sup>9</sup> was a person against whom the right to buy could not be exercised by virtue of its being a charity or a certain type of housing association<sup>10</sup>; or

4854 (2) in such other cases as may be excepted from the operation of these provisions by order of the Secretary of State<sup>11</sup> or, in relation to Wales, by order of the National Assembly for Wales or the relevant Welsh minister<sup>12</sup>.

Orders made under head (2) above:

4855 (a) may relate to particular disposals and may make different provision with respect to different cases or descriptions of case, including different provision for different areas; and

4856 (b) must be made by statutory instrument<sup>13</sup>.

The preserved right to buy<sup>14</sup> does not apply where the extended right to buy<sup>15</sup>, or the right to acquire conferred by the Housing Act 1996<sup>16</sup>, arises and the relevant regulations<sup>17</sup> apply<sup>18</sup>.

1 For the meaning of 'the right to buy' see PARA 1803 ante.

2 For the meaning of 'the right to buy on rent to mortgage terms' see PARA 1872 ante.

3 The right to buy on rent to mortgage terms is now exercisable only where it was claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

4 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

5 For the meaning of 'dwelling house' see PARA 1796 ante.

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 I.e. a person who is not an authority or body within the Housing Act 1985 s 80 (as amended): see PARA 1300 ante.

8 Ibid s 171A(1) (s 171A added by the Housing and Planning Act 1986 s 8(1)).

9 For these purposes, the 'former landlord' is the person mentioned in the Housing Act 1985 s 171A(1) (as added) (see the text and notes 1-8 supra): s 171A(2)(c) (as added: see note 2 supra). Section s 171A(2) (as added) is modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1902 note 3 post), apply: see reg 2(1), Sch 1 para 27.

10 I.e. by virtue of the Housing Act 1985 Sch 5 paras 1, 2 or 3 (as amended): see PARAS 1808-1810 ante.

11 As to the Secretary of State see PARA 27 note 3 ante.

12 Housing Act 1985 s 171A(3) (as added: see note 8 supra). Sections 171A-171H (as added and amended) are omitted where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 55); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 27).

As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

13 Housing Act 1985 s 171A(4) (as added: see note 8 supra). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 171A(4) (as so added).

14 I.e. ibid ss 171A-171H (as added and amended): see the text and notes 1-13 supra; and PARA 1901 et seq post.

15 As to the extended right to buy see PARA 1798 ante.

16 As to the right to acquire see PARAS 1804-1807 ante.

17 I.e. (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240; or (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619, as the case may be.

18 See note 12 supra.

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#### **1901. Extent of preserved right; qualifying persons and dwelling houses.**

Any of the following persons, namely:

- 4857 (1) the former secure tenant<sup>1</sup>, or in the case of a joint tenancy, each of them;
- 4858 (2) a qualifying successor<sup>2</sup>; and
- 4859 (3) a person to whom a tenancy<sup>3</sup> of a dwelling house<sup>4</sup> is granted jointly with a person who has the preserved right to buy<sup>5</sup> in relation to that dwelling house,

has the preserved right to buy so long as he occupies the relevant dwelling house as his only or principal home<sup>6</sup>, subject to the following provisions<sup>7</sup>. Such a person ceases, however, to have the preserved right to buy if the tenancy of a relevant dwelling house becomes a demoted tenancy<sup>8</sup> by virtue of a demotion order<sup>9</sup>.

The following are qualifying successors for these purposes:

- 4860 (a) where the former secure tenancy was not a joint tenancy and, immediately before his death, the former secure tenant was tenant under an assured tenancy<sup>10</sup> of a dwelling house in relation to which he had the preserved right to buy, a member of the former secure tenant's family<sup>11</sup> who acquired that assured tenancy under the will or intestacy of the former secure tenant or in whom that assured tenancy vested<sup>12</sup> by way of a statutory succession to the assured tenancy;
- 4861 (b) where the former secure tenancy was not a joint tenancy, a member of the former secure tenant's family to whom the former secure tenant assigned his assured tenancy of a dwelling house in relation to which, immediately before the assignment, he had the preserved right to buy;
- 4862 (c) a person who becomes the tenant of a dwelling house, in place of the person who had the preserved right to buy in relation to that dwelling house, in pursuance of a property adjustment order made in connection with matrimonial proceedings<sup>13</sup>, an order transferring the tenancy on divorce, separation etc<sup>14</sup>, a property adjustment order after an overseas divorce, etc<sup>15</sup>, an order for financial relief against a parent<sup>16</sup> or a property adjustment order in connection with civil partnership proceedings<sup>17</sup> or after overseas dissolution of a civil partnership<sup>18</sup>.

The relevant dwelling house is in the first instance:

- 4863 (i) in relation to a person within head (1) above, the dwelling house which was the subject of the qualifying disposal<sup>19</sup>;
- 4864 (ii) in relation to a person within head (2) above, the dwelling house of which he became the statutory tenant or tenant as mentioned in heads (a) to (c) above;
- 4865 (iii) in relation to a person within head (3) above, the dwelling house of which he became a joint tenant as mentioned in that head<sup>20</sup>.

If a person having the preserved right to buy becomes the tenant of another dwelling house in place of the relevant dwelling house, whether the new dwelling house is entirely different or partly or substantially the same as the previous dwelling house, and the landlord is the same person as the landlord of the previous dwelling house or, where that landlord was a company, is a connected company<sup>21</sup>, the new dwelling house becomes the relevant dwelling house for the purposes of the preserved right to buy<sup>22</sup>.

1 For these purposes, the 'former secure tenant' is the person mentioned in the Housing Act 1985 s 171A(1) (as added) (see PARA 1900 ante): s 171A(2)(c) (ss 171A, 171B added by the Housing and Planning Act 1986 s 8(1)).

2 ie as defined in the Housing Act 1985 s 171B(4) (as added): see heads (a)-(c) in the text.

- 3 For the meaning of 'tenancy' see PARA 1300 note 1 ante.
- 4 For the meaning of 'dwelling house' see PARA 1796 ante.
- 5 For these purposes, references to the preservation of the right to buy and to a person having the preserved right to buy are to the continued application of the provisions of the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1902 et seq post) by virtue of s 171A (as added) (see PARA 1900 ante) and to a person in relation to whom those provisions so apply: s 171A(2)(a) (as added: see note 1 supra).
- 6 For the meaning of 'only or principal home' see PARA 1300 note 19 ante.
- 7 Housing Act 1985 s 171B(1), (3) (as added: see note 1 supra).
- 8 Ie by virtue of a demotion order under the Housing Act 1988 s 6A (as added): see PARA 1066 ante.
- 9 Housing Act 1985 s 171B(1A) (added by the Anti-social Behaviour Act 2003 s 14(5), Sch 1 para 2(1), (3)).
- 10 Ie an assured tenancy under the Housing Act 1988 Pt I (ss 1-45) (as amended): see PARA 1012 et seq ante.
- 11 For the meaning of 'member of a person's family' see PARA 1827 note 3 ante.
- 12 Ie under the Housing Act 1988 s 17 (as amended): see PARA 1084 ante.
- 13 Ie in pursuance of an order made under the Matrimonial Causes Act 1973 s 24 (as amended and as prospectively substituted: see PARA 1290 note 7 ante).
- 14 Ie in pursuance of an order under the Matrimonial Homes Act 1983 Sch 1 (repealed) or the Family Law Act 1996 Sch 7 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 310 et seq.
- 15 Ie in pursuance of an order made under the Matrimonial and Family Proceedings Act 1984 s 17(1) (as substituted and as prospectively amended: see PARA 1290 note 7 ante).
- 16 Ie in pursuance of an order made under the Children Act 1989 s 15(1), Sch 1 para 1 (as amended): see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 539.
- 17 Ie an order under the Civil Partnership Act 2004 Sch 5 Pt 2, or Sch 7 para 9(2) or (3): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 498 et seq, 531.
- 18 Housing Act 1985 s 171B(4) (as added (see note 1 supra); amended by the Housing Act 1988 s 127(1); the Housing Act 1996 s 222, Sch 18 paras 16, 26(1)(a); the Family Law Act 1996 s 66(1), Sch 8 paras 34, 56; the Civil Partnership Act 2004 s 81, Sch 8 para 31).
- 19 For these purposes, 'qualifying disposal' means a disposal in relation to which the Housing Act 1985 s 171A (as added) (see PARA 1900 ante) applies: s 171A(2)(b) (as added: see note 1 supra).
- 20 Ibid s 171B(5) (as added (see note 1 supra); amended by the Housing Act 1996 Sch 18 para 26(1)(b)). The Housing Act 1985 171B(5) (as so added and amended) is modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1902 note 3 post), apply: see reg 2(1), Sch 1 para 28. See also PARA 1900 note 12 ante.
- 21 For these purposes, 'connected company' means a subsidiary or holding company within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25): Housing Act 1985 s 171B(6) (as added: see note 1 supra).
- 22 Ibid s 171B(6) (as added: see note 15 supra).

## UPDATE

### 1901 Extent of preserved right; qualifying persons and dwelling houses

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTES 21, 22--Definition of 'connected company' amended: SI 2009/1941.

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## **1902. Modification of statutory provisions.**

Where the right to buy is preserved<sup>1</sup>, the statutory provisions relating to that right<sup>2</sup> have effect subject to such exceptions, adaptations and other modifications as may be prescribed by regulations made by the Secretary of State<sup>3</sup> or, in relation to Wales, by the National Assembly for Wales or the relevant Welsh minister<sup>4</sup>.

The regulations may in particular provide:

- 4866 (1) that certain of the exceptions to the right to buy<sup>5</sup> do not apply;
- 4867 (2) that the statutory provisions relating to the right to acquire on rent to mortgage terms<sup>6</sup>, where that right is still exercisable<sup>7</sup>, do not apply; and
- 4868 (3) that the landlord<sup>8</sup> is not required to but may include a covenant for the repayment of discount, provided its terms are no more onerous than those of the covenant to be included<sup>9</sup> under the statutory provisions with regard to early disposal<sup>10</sup>.

The prescribed exceptions, adaptations and other modifications must take the form of textual amendments of the statutory provisions relating to the right to buy as they apply in cases where the right to buy is preserved; and the first regulations, and any subsequent consolidating regulations, must set out the statutory provisions relating to the right to buy as they so apply<sup>11</sup>. The regulations:

- 4869 (a) may make different provision for different cases or descriptions of case, including different provision for different areas;
- 4870 (b) may contain such incidental, supplementary and transitional provisions as the Secretary of State or the Assembly or the relevant Welsh minister considers appropriate; and
- 4871 (c) must be made by statutory instrument<sup>12</sup>.

Such regulations may also:

- 4872 (i) make provision for continuing the effect of a suspension order<sup>13</sup> where the secure tenancy<sup>14</sup> in respect of which the order was made has been replaced by an assured tenancy<sup>15</sup>;
- 4873 (ii) make specified provision<sup>16</sup> with regard to the disclosure of information about anti-social behaviour<sup>17</sup>.

1 As to the cases in which the right to buy is preserved see PARA 1900 ante.

2 I.e. the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1903 et seq post.

3 As to the Secretary of State see PARA 27 note 3 ante.

4 Housing Act 1985 s 171C(1) (s 171C added by the Housing and Planning Act 1986 s 8(1)). As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

In exercise of the power so conferred, and prior to the transfer of functions in relation to Wales, the Secretary of State made the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, which came into force on 11 October 1993: see reg 1(1). For transitional provisions see regs 1(2), 3, Schs 3, 4. Subject to reg 3, the Housing Act 1985 Pt V (as amended), as it applies in the circumstances described in s 171A(1) (as added) (cases in which right to buy is preserved: see PARA 1900 ante) has effect subject to the exceptions, adaptations and other modifications specified in the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, Sch 1; and is set out, as it so applies, in Sch 2: reg 2(1), (2). For general modifications to terminology see Sch 1 paras 1, 2. The specific modifications made by Sch 1, and set out in Sch 2, are set out in the text and notes to the appropriate paragraph of this title if they are substantive, but are otherwise merely referred to in the notes to the appropriate paragraph where relevant. See eg para 1899 note 20 ante. As to the exercise of that power by the Secretary of State and the Assembly see also (1) the Housing (Preservation of Right to Buy) (Amendment) Regulations 1999, SI 1999/1213; the Housing (Preservation of Right to Buy) (Amendment) (Wales) Regulations 2001, SI 2001/1301, cited in PARA 1842 ante; (2) the Housing (Right of First Refusal) (England) Regulations 2005, SI 2005/1917, reg 14; the Housing (Right of First Refusal) (Wales) Regulations 2005, SI 2005/2680, reg 14, cited in PARA 1894 note 17 ante.

See also the Local Government Reorganisation (Preservation of Right to Buy) Order 1986, SI 1986/2092, made under the Local Government Act 1985 s 101 (as amended), which (1) came into operation on 11 December 1986 (Local Government Reorganisation (Preservation of Right to Buy) Order 1986, SI 1986/2092, art 1); (2) makes provision for preserving the right to buy in certain cases where a landlord which is a successor authority within the meaning of that Order disposes of an interest in the dwelling house to a person which does not fulfil the landlord condition in the Housing Act 1985 s 80 (as amended) (see PARA 1300 ante) (see the Local Government Reorganisation (Preservation of Right to Buy) Order 1986, SI 1986/2092, arts 2-5 (as amended)); and (3) modifies the provisions of the Housing Act 1985 Pt V (as amended) accordingly (see the Local Government Reorganisation (Preservation of Right to Buy) Order 1986, SI 1986/2092, arts 6-12, Schs 1, 2 (as amended)). That Order is not set out in detail in this work.

The Housing Act 1985 s 171C (as added and amended) is omitted where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply: see reg 2(1), Sch 1 para 29. See also PARA 1900 note 12 ante.

5 Ie the exceptions in the Housing Act 1985 s 120, Sch 5 paras 1, 3, 5-11 (as amended): see PARAS 1808-1810, 1812-1815 ante. The disaplication by the regulations of Sch 5 para 1 is not to be taken to authorise any action on the part of a charity which would conflict with the trusts of the charity: s 171C(5) (added by the Housing Act 1988 s 127(3)). For the meaning of 'charity' see PARA 1300 note 16 ante. The Housing Act 1985 Sch 5 paras 1, 3 (as amended) are disapplied where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, apply: see Sch 1 para 41.

6 Ie the Housing Act 1985 ss 143-153 (as amended): see PARA 1872 et seq ante. For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

7 The right to acquire on rent to mortgage terms is now exercisable only where it was claimed before 18 July 2005: see ibid s 142A (as added); and PARA 1872 ante.

8 For the meaning of 'landlord' see PARA 1300 note 1 ante.

9 Ie the covenant provided for in the Housing Act 1985 s 155 (as amended): see PARA 1889 ante.

10 Ibid s 171C(2) (as added (see note 4 supra); amended by the Housing Act 1988 s 127(2), (3); the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), (2), Sch 21 para 19, Sch 22).

11 Housing Act 1985 s 171C(3) (as added: see note 4 supra).

12 Ibid s 171C(4) (as added: see note 4 supra). If made by the Secretary of State, the instrument is subject to annulment in pursuance of a resolution of either House of Parliament: see s 171C(4) (as so added).

13 As to suspension orders see the Housing Act 1985 s 121A (as added); and PARA 1820 ante.

14 As to secure tenancies see PARA 1300 et seq ante.

15 Housing Act 2004 s 192(3)(a). As to assured tenancies see PARA 1011 et seq ante.

16 Ie provision corresponding to ibid s 194(1)-(3) (see PARA 1341 ante) so far as those subsections relate to the Housing Act 1985 s 138(2B) (as added) (see PARA 1843 ante).

17 Housing Act 2004 s 194(4)(a).



**UPDATE****1902 Modification of statutory provisions**

NOTE 4--SI 1993/2241 Sch 2 amended: SI 2006/680.

SI 1986/2092 further amended: SI 2008/2831.

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**1903. Disposal of landlord's interest in qualifying dwelling house.**

The disposal by the landlord<sup>1</sup> of a interest in the qualifying dwelling house<sup>2</sup>, whether his whole interest or a lesser interest, does not affect the preserved right to buy, unless:

- 4874 (1) as a result of the disposal a specified authority or body<sup>3</sup> becomes the landlord of the qualifying person<sup>4</sup> or persons; or
- 4875 (2) the statutory provisions relating to the effect of failure to register an entry protecting a preserved right to buy<sup>5</sup> apply,

in which case the right to buy ceases to be preserved<sup>6</sup>.

The disposal by the landlord of a qualifying dwelling house of less than his whole interest as landlord of the dwelling house, or in part of it, requires the consent of the Secretary of State<sup>7</sup> or, in relation to Wales, the consent of the National Assembly for Wales or the relevant Welsh minister<sup>8</sup>, unless the disposal is to the qualifying person or persons<sup>9</sup>. Consent may be given in relation to a particular disposal or generally in relation to disposals of a particular description and may, in either case, be given subject to conditions<sup>10</sup>.

A disposal made without the consent so required is void, except in a case where, by reason of a failure to make the entries on the land register or land charges register<sup>11</sup>, the preserved right to buy does not bind the person to whom the disposal is made<sup>12</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For these purposes, references to a qualifying dwelling house, in relation to the preserved right to buy, are to a dwelling house in relation to which a person has that right: Housing Act 1985 s 171B(2) (ss 171B, 171D added by the Housing and Planning Act 1986 s 8(1)). For the meaning of 'dwelling house' see PARA 1796 ante.

As to the cases in which the right to buy is preserved see PARA 1900 ante.

3 Ie an authority or body within the Housing Act 1985 s 80(1) (as amended): see PARA 1300 ante.

4 For these purposes, references to a qualifying person, in relation to the preserved right to buy, are to a person who has that right: *ibid* s 171B(2) (as added: see note 2 *supra*). The rights of a qualifying person under Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1904 et seq post) in relation to the qualifying dwelling house are not to be regarded as falling within the Land Registration Act 2002 Sch 3 (specified interests overriding registered dispositions: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 962) (and so are liable to be postponed under s 29 (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 935), unless protected by means of a notice in the register): Housing Act 1985 s 171G, Sch 9A para 6(1) (substituted by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (10)). For the meaning of references to a person having the preserved right to buy see PARA 1901 note 5 ante.

- 5 le the Housing Act 1985 Sch 9A para 6 (as added and amended): see note 4 supra; and PARA 1915 post.
- 6 Ibid s 171D(1) (as added: see note 2 supra).
- 7 As to the Secretary of State see PARA 27 note 3 ante.
- 8 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
- 9 Housing Act 1985 s 171D(2) (as added: see note 2 supra).
- 10 Ibid s 171D(3) (as added: see note 2 supra).
- 11 le the entries required by ibid Sch 9A (as added and amended): see PARA 1913 et seq post.
- 12 Ibid s 171D(4) (as added: see note 2 supra). See also PARA 1900 note 12 ante.

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#### **1904. Termination of landlord's interest in qualifying dwelling house.**

On the termination of the landlord's<sup>1</sup> interest in the qualifying dwelling house<sup>2</sup>:

- 4876 (1) on the occurrence of an event determining his estate or interest, or by re-entry on a breach of condition or forfeiture; or
- 4877 (2) where the interest is a leasehold interest, by notice given by him or a superior landlord, on the expiry or surrender of the term, or otherwise<sup>3</sup>,

the right to buy<sup>4</sup> ceases to be preserved<sup>5</sup>.

The termination of the landlord's interest by merger on his acquiring a superior interest, or on the acquisition by another person of the landlord's interest together with a superior interest, does not affect the preserved right to buy, unless:

- 4878 (a) as a result of the acquisition a specified authority or body<sup>6</sup> becomes the landlord of the qualifying person<sup>7</sup> or persons; or
- 4879 (b) the statutory provisions relating to the effect of failure to register an entry protecting a preserved right to buy<sup>8</sup> apply,

in which case the right to buy ceases to be preserved<sup>9</sup>.

Where the termination of the landlord's interest<sup>10</sup> is caused by the act or omission of the landlord, a qualifying person who is thereby deprived of the preserved right to buy is entitled to be compensated by him<sup>11</sup>.

- 1 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 2 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 ante.
- 3 le subject to the Housing Act 1985 s 171E(2) (as added): see the text and notes 4-11 infra.
- 4 For the meaning of 'the right to buy' see PARA 1803 ante.

5 Housing Act 1985 s 171E(1) (s 171E added by the Housing and Planning Act 1986 s 8(1)). As to the cases in which the right to buy is preserved see PARA 1900 ante.

6 Ie an authority or body within the Housing Act 1985 s 80(1) (as amended): see PARA 1300 ante.

7 For the meaning of 'qualifying person' see PARA 1903 note 4 ante.

8 Ie the Housing Act 1985 s 171G, Sch 9A para 6 (as added and amended): see PARA 1903 note 4 ante, PARA 1915 post.

9 Ibid s 171E(2) (as added: see note 5 supra).

10 Ie as mentioned in ibid s 171E(1) (as added): see the text and notes 1-5 supra.

11 Ibid s 171E(3) (as added: see note 5 supra). See also PARA 1900 note 12 ante.

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### **1905. Transfer of qualifying person to alternative accommodation.**

The court may not order a qualifying person<sup>1</sup> to give up possession of the qualifying dwelling house<sup>2</sup> on the grounds that suitable alternative accommodation is available<sup>3</sup> unless the court is satisfied:

4880 (1) that the preserved right to buy<sup>4</sup> will continue<sup>5</sup> to be exercisable in relation to the dwelling house offered by way of alternative accommodation and that the interest of the landlord<sup>6</sup> in the new dwelling house will be:

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194. (a) where the new dwelling house is a house<sup>7</sup>, not less than the interest of the landlord in the existing dwelling house; or

195. (b) where the new dwelling house is a flat<sup>8</sup>, not less than the interest of the landlord in the existing dwelling house or a term of years of which 80 years or more remain unexpired, whichever is the less; or

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4881 (2) that the landlord of the new dwelling house will be a specified<sup>9</sup> authority or body<sup>10</sup>.

1 For the meaning of 'qualifying person' see PARA 1903 note 4 ante.

2 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 ante; and for the meaning of 'dwelling house' see PARA 1796 ante.

3 Ie in pursuance of the Rent Act 1977 s 98(1)(a) (see PARAS 942, 947 ante) or the Housing Act 1988 s 7(2), Sch 2 Pt II, Ground 9 (see PARA 1118 ante).

4 As to the cases in which the right to buy is preserved see PARA 1900 ante.

5 Ie by virtue of the Housing Act 1985 s 171B(6) (as added): see PARA 1901 ante.

6 For the meaning of 'landlord' see PARA 1300 note 1 ante.

7 For the meaning of 'house' see PARA 1796 ante.

8 For the meaning of 'flat' see PARA 1796 ante.

9 le an authority or body within the Housing Act 1985 s 80(1) (as amended): see PARA 1300 ante.

10 Ibid s 171F (added by the Housing and Planning Act 1986 s 8(1); amended by the Housing Act 1988 s 140(1), Sch 17 para 42). See also PARA 1900 note 12 ante.

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### **1906. Disposal after notice claiming to exercise right to buy etc.**

Where notice has been given in respect of a dwelling house<sup>1</sup> claiming to exercise the right to buy<sup>2</sup> and before completion of the exercise of that right the dwelling house is the subject of:

- 4882 (1) a qualifying disposal<sup>3</sup>; or
- 4883 (2) a disposal to an authority or body satisfying the landlord condition for secure tenancies<sup>4</sup>,

all parties are in the same position as if the disponee had become the landlord<sup>5</sup> before the notice was given and had been given that notice and any further notice given by the tenant<sup>6</sup> to the landlord and had taken all steps which the landlord had taken<sup>7</sup>.

If, however, the circumstances after the disposal differ in any material respect, as for example where:

- 4884 (a) the interest of the disponee in the dwelling house after the disposal differs from that of the disponor before the disposal; or
- 4885 (b) any of the exceptions to the right to buy<sup>8</sup> becomes or ceases to be applicable,

all those concerned must, as soon as practicable, take all such steps, whether by way of amending or withdrawing and re-serving any notice or extending any period or otherwise, as may be requisite for the purpose of securing that all parties are, as nearly as may be, in the same position as they would have been if those circumstances had obtained before the disposal<sup>9</sup>.

1 For the meaning of 'dwelling house' see PARA 1796 ante.

2 For the meaning of 'the right to buy' see PARA 1803 ante.

3 For the meaning of 'qualifying disposal' see PARA 1901 note 19 ante.

4 le a disposal to which the Housing Act 1985 s 171D(1)(a) (as added) (see PARA 1903 ante at head (1) in the text) or s 171E(2)(a) (as added) (see PARA 1904 ante at head (a) in the text) applies.

5 For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 For the meaning of 'tenant' see PARA 1300 note 1 ante.

7 Housing Act 1985 s 171H(1) (s 171H added by the Housing and Planning Act 1986 s 8(1); amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22).

8 le any of the provisions of the Housing Act 1985 s 120, Sch 5 (as amended): see PARA 1808 et seq ante.

9 Ibid s 171H(2) (as added and amended: see note 7 supra). See also PARA 1900 note 12 ante.

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## **(7) POWERS OF THE SECRETARY OF STATE ETC**

### **1907. General powers to intervene.**

The Secretary of State<sup>1</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> may use his or its powers under the provisions set out below where it appears to him or to the Assembly or minister that tenants<sup>3</sup> generally, a tenant or tenants of a particular landlord<sup>4</sup>, or tenants of a description of landlords, have or may have difficulty in exercising effectively and expeditiously the right to buy<sup>5</sup> or the right to acquire on rent to mortgage terms<sup>6</sup> where the latter right is still exercisable<sup>7</sup>. These powers may, however, be exercised only after the Secretary of State or the Assembly or the relevant Welsh minister has given the landlord or landlords notice in writing of his or its intention to do so and while the notice is in force<sup>8</sup>. Such a notice is deemed to be given 72 hours after it has been sent<sup>9</sup>.

Where a notice has been so given to a landlord or landlords, no step taken by the landlord or any of the landlords while the notice is in force or before it was given has any effect in relation to the exercise by a secure tenant<sup>10</sup> of the right to buy or the right to acquire on rent to mortgage terms except in so far as the notice otherwise provides<sup>11</sup>.

While such a notice is in force, the Secretary of State or the Assembly or the relevant Welsh minister may do all such things as appear to him or to it necessary or expedient to enable secure tenants of the landlord or landlords to which the notice was given to exercise the right to buy and the right to acquire on rent to mortgage terms; and he or the Assembly is not bound to take the steps which the landlord would have been bound<sup>12</sup> to take<sup>13</sup>.

Such a notice may be withdrawn by a further notice in writing, either completely or in relation to a particular landlord or a particular case or description of case<sup>14</sup>. The further notice may give such directions as the Secretary of State or the Assembly or the relevant Welsh minister may think fit for the completion of a transaction begun before the further notice was given; and such directions are binding on the landlord, and may require the taking of steps different from those which the landlord would have been required to take if the Secretary of State's or the Assembly's or minister's powers to intervene<sup>15</sup> had not been used<sup>16</sup>.

Where, in consequence of the exercise of his or its powers to intervene, the Secretary of State or the Assembly or the relevant Welsh minister receives sums due to a landlord, he or it may retain them while a notice is in force in relation to the landlord and is not bound to account to the landlord for interest accruing on them<sup>17</sup>.

Where the Secretary of State or the Assembly or the relevant Welsh minister exercises his or its powers to intervene with respect to secure tenants of a landlord, he or the Assembly may:

- 4886 (1) calculate, in such manner and on such assumptions as he or it may determine, the costs incurred by him or by it in doing so; and
- 4887 (2) certify a sum as representing those costs;

and a sum so certified is a debt from the landlord to the Secretary of State or to the Assembly or minister payable on a date specified in the certificate, together with interest from that date at a rate so specified<sup>18</sup>. Sums so payable may, without prejudice to any other method of recovery, be recovered from the landlord by the withholding of sums due from the Secretary of State or from the Assembly or the relevant Welsh minister, including sums payable to the landlord and received by the Secretary of State or the Assembly or minister in consequence of his or its exercise of his or its powers to intervene<sup>19</sup>.

The powers set out above, and the various powers described in the following paragraphs<sup>20</sup>, do not apply:

- 4888 (a) where the preserved right to buy arises<sup>21</sup>; or
- 4889 (b) where the right to acquire conferred by the Housing Act 1996 arises<sup>22</sup>,

and the relevant regulations<sup>23</sup> apply<sup>24</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'the right to buy' see PARA 1803 ante. See also PARA 1795 note 7 ante.

6 Housing Act 1985 s 164(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 16(1)). For the meaning of 'the right to acquire on rent to mortgage terms' see PARA 1872 ante.

7 The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

8 Ibid s 164(2).

9 Ibid s 164(3).

10 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

11 Housing Act 1985 s 164(4) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 16(2)).

12 Ie under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1908 et seq post.

13 Ibid s 164(5) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 Sch 21 para 16(3)). Where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies, and where it appears to the Secretary of State or the Assembly or the relevant Welsh minister that the difficulty a tenant or tenants have or may have in exercising effectively and expeditiously the right to buy or the right to acquire on rent to mortgage terms is due to a particular intermediate landlord or a description of intermediate landlords or a particular freeholder or a description of freeholders, the Housing Act 1985 s 164 (as amended) applies with the necessary modifications as it applies to a particular landlord or a description of landlords: see s 164(5A) (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, art 3(1), Schedule para 47). For the meaning of 'intermediate landlord' and 'freeholder' see PARA 1798 notes 18-19 ante.

14 Housing Act 1985 s 166(1).

15 Ie the powers under ibid s 164 (as amended): see the text and notes 1-13 supra.

16 Ibid s 166(2).

17 Ibid s 166(3).

18 Ibid s 166(4).

19 Ibid s 166(5). The Housing Act 1985 s 166 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 49. Where that Order applies, the Secretary of State or the Assembly or the relevant Welsh minister, on giving to a freeholder, intermediate landlord or landlord (1) a notice under the Housing Act 1985 s 164 (as amended) (notice of intention to intervene); or (2) a further notice under s 166 (as amended) (notice withdrawing previous notice), must, as soon as practicable, send a copy of the notice to any other authority or body which is, to his or the Assembly's knowledge, a freeholder, intermediate landlord or landlord of any dwelling house affected by the notice: see s 166A (added for these purposes by the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, Schedule para 50).

20 Ie the Housing Act 1985 ss 164-170 (as amended): see the text and notes 1-19 supra; and PARAS 1908-1911 post.

21 As to the preserved right to buy see PARA 1900 et seq ante.

22 As to the right to acquire conferred by the Housing Act 1996 see PARAS 1804-1807 ante.

23 Ie either (1) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq ante); or (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (see PARAS 1804-1807 ante), as the case may be.

24 See the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241, reg 2(1), Sch 1 para 25; the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 3, Sch 1 para 25).

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### **1908. Vesting orders.**

For the purpose of conveying a freehold or granting a lease<sup>1</sup> in the exercise of his or its general powers to intervene<sup>2</sup>, the Secretary of State<sup>3</sup> or, in relation to Wales, the National Assembly for Wales or the relevant Welsh minister<sup>4</sup> may execute a document ('a vesting order'), containing such provisions as he or the Assembly or minister may determine<sup>5</sup>.

A vesting order has the like effect, except in so far as it otherwise provides, as a conveyance or grant duly executed in pursuance of the statutory provisions relating to the right to buy or (where still exercisable<sup>6</sup>) the right to acquire on rent to mortgage terms<sup>7</sup>, and, in particular, binds both the landlord and its successors in title and the tenant<sup>8</sup> and his successors in title, including any person deriving title under him or them, to the same extent as if the covenants contained in it and expressed to be made on their behalf had been entered into by them<sup>9</sup>.

If the landlord's title to the dwelling house<sup>10</sup> in respect of which a vesting order is made is not registered, the vesting order must contain a certificate stating that the freehold conveyed or grant made by it is subject only to such incumbrances, rights and interests as are stated elsewhere in the vesting order or summarised in the certificate<sup>11</sup>.

On a vesting order being presented to the Chief Land Registrar, he must register the tenant as proprietor of the title concerned; and, if the title has not previously been registered:

4890 (1) he must so register him with an absolute title or, as the case may require, a good leasehold title; and

4891 (2) he must, for the purpose of registration, accept the certificate in the vesting order as sufficient evidence of the facts stated in it<sup>12</sup>.

- 1 For the meaning of 'lease' see PARA 1300 note 1 ante.
  - 2 le in exercise of his or its powers under the Housing Act 1985 s 164 (as amended): see PARA 1907 ante.
  - 3 As to the Secretary of State see PARA 27 note 3 ante.
  - 4 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.
  - 5 Housing Act 1985 s 165(1). For the purposes of stamp duty, the vesting order is to be treated as a document executed by the landlord (s 165(1)) but such a vesting order cannot now be subject to stamp duty (see the Finance Act 2003 s 125(1)). For the meaning of 'landlord' see PARA 1300 note 1 ante.
  - 6 The right to acquire on rent to mortgage terms is now only exercisable where claimed before 18 July 2005: see *ibid* s 142A (as added); and PARA 1872 ante.
  - 7 le *ibid* Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1909 et seq post. See also PARA 1795 note 7 ante.
  - 8 For the meaning of 'tenant' see PARA 1300 note 1 ante.
  - 9 Housing Act 1985 s 165(2).
  - 10 For the meaning of 'dwelling house' see PARA 1796 ante.
  - 11 Housing Act 1985 s 165(3).
  - 12 *Ibid* s 165(4). If a person suffers loss in consequence of a registration under s 165 (as amended) in circumstances in which he would have been entitled to be indemnified under the Land Registration Act 2002 Sch 8 (see LAND REGISTRATION vol 26 (2004 Reissue) PARA 983 et seq) by the Chief Land Registrar had the registration of the tenant as proprietor of the title been effected otherwise than under the Housing Act 1985 s 165 (as amended), he is instead entitled to be indemnified by the Secretary of State or the Assembly or the relevant Welsh minister and s 166(4) (see PARA 1907 ante) applies accordingly: s 165(6) (amended by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (5)).
- The Housing Act 1985 s 165 (as amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 48. See also PARA 1907 the text and notes 20-24 ante.

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### **1909. Power to give directions as to covenants and conditions.**

Where it appears to the Secretary of State<sup>1</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> that, if covenants or conditions of any kind were included in conveyances or grants of dwelling houses<sup>3</sup> of any description executed in pursuance of the statutory provisions relating to the right to buy or the right (where still exercisable<sup>4</sup>) to acquire on rent to mortgage terms<sup>5</sup>:

- 4892 (1) the conveyances would not conform with the provisions to be included in conveyances of freeholds<sup>6</sup>;
- 4893 (2) the grants would not conform with the provisions to be included in grants of leases<sup>7</sup>; or
- 4894 (3) in the case of conveyances or grants executed in pursuance of the right to acquire on rent to mortgage terms, the conveyances or grants would not conform with the provisions relating to redemption of the landlord's share<sup>8</sup>,



he or the Assembly or minister may direct landlords<sup>9</sup> generally, landlords of a particular description or particular landlords not to include covenants or conditions of that kind in such conveyances or grants executed on or after a date specified in the direction<sup>10</sup>.

Such a direction may be varied or withdrawn by a subsequent direction<sup>11</sup>.

If a direction so given so provides, the following provisions apply in relation to a covenant or condition which:

- 4895 (a) was included in a conveyance or grant executed before the date specified in the direction; and
- 4896 (b) could not have been so included if the conveyance or grant had been executed on or after that date<sup>12</sup>.

The covenant or condition is discharged or, if the direction so provides, modified, as from the specified date, to such extent or in such manner as may be provided by the direction; and the discharge or modification is binding on all person entitled or capable of becoming entitled to the benefit of the covenant or condition<sup>13</sup>.

The landlord by whom the conveyance or grant was executed must, within such period as may be specified in the direction:

- 4897 (i) serve on the person registered as the proprietor of the dwelling house, and on any person registered as the proprietor of a charge affecting the dwelling house, a written notice informing him of the discharge or modification; and
- 4898 (ii) on behalf of the person registered as the proprietor of the dwelling house, apply to the Chief Land Registrar, and pay the appropriate fee, for notice of the discharge or modification to be entered in the register<sup>14</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

5 *Ibid* Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1910 et seq post.

6 *Ibid* would not conform with *ibid* Sch 6 Pt I (paras 1-7) (as amended) (see PARAS 1851-1854 ante) and Sch 6 Pt II (paras 8-9) (see PARA 1855 ante).

7 *Ibid* would not conform with *ibid* Sch 6 Pt I (paras 1-7) (as amended) and Sch 6 Pt III (paras 11-19) (as amended) (see PARAS 1856-1866 ante).

8 *Ibid* would not conform with *ibid* s 151A, Sch 6A (as added and amended): see PARA 1877 et seq ante.

9 For the meaning of 'landlord' see PARA 1300 note 1 ante.

10 Housing Act 1985 s 167(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 17). The Housing Act 1985 s 167(1) (as so amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 51. See also PARA 1907 the text and notes 20-24 ante.

11 Housing Act 1985 s 167(2).

12 *Ibid* s 168(1). Section 168(1), (3) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240, applies: see Schedule para 52.

13 Housing Act 1985 s 168(2).

14 Ibid s 168(3).

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### **1910. Power to obtain information etc.**

Where it appears to the Secretary of State<sup>1</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>2</sup> necessary or expedient for the purpose of determining whether his or its general powers to intervene<sup>3</sup> or his or its power to give directions as to covenants and conditions<sup>4</sup> is or are exercisable, or for or in connection with the exercise of those powers, the Secretary of State or the Assembly or minister may by notice in writing to a landlord<sup>5</sup> require it:

- 4899 (1) at such time and at such place as may be specified in the notice, to produce any document; or
- 4900 (2) within such period as may be so specified or such longer period as the Secretary of State or the Assembly or minister may allow, to furnish a copy of any document or supply any information<sup>6</sup>.

Any officer of the landlord designated in the notice for that purpose or having custody or control of the document or in a position to give that information must, without instructions from the landlord, take all reasonable steps to ensure that the notice is complied with<sup>7</sup>.

1 As to the Secretary of State see PARA 27 note 3 ante.

2 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

3 I.e. his or its powers under the Housing Act 1985 s 164 (as amended) or s 166 (as amended): see PARA 1907 ante.

4 I.e. his or its power under ibid s 167 (as amended) or s 168 (as amended): see PARA 1909 ante.

5 For these purposes, references to a landlord include a landlord by whom a conveyance or grant was executed in pursuance of ibid Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1911 et seq post): s 169(3) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(2), Sch 22). For the meaning of 'landlord' see PARA 1300 note 1 ante.

6 Housing Act 1985 s 169(1). Section 169 is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 53. See also PARA 1907 the text and notes 20-24 ante.

7 Housing Act 1985 s 169(2). See also note 6 supra.

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### **1911. Power to give assistance in connection with legal proceedings.**

The following provisions apply to:

- 4901 (1) proceedings under, or to determine a question arising under or in connection with, the right to buy or the right (where still exercisable<sup>1</sup>) to acquire on rent to mortgage terms<sup>2</sup>;
- 4902 (2) proceedings to determine a question arising under or in connection with a conveyance or grant executed in pursuance of those rights, other than proceedings to determine a question as to the value of a dwelling house<sup>3</sup> or part of a dwelling house<sup>4</sup>.

A party or prospective party to such proceedings or prospective proceedings who has claimed to exercise or has exercised the right to buy or the right to acquire on rent to mortgage terms or is a successor in title of a person who has exercised either of those rights may apply to the Secretary of State<sup>5</sup> or, in relation to Wales, to the National Assembly for Wales or the relevant Welsh minister<sup>6</sup> for assistance under these provisions<sup>7</sup>. The Secretary of State or the Assembly or minister may grant the application, if he or it thinks fit to do so on the ground:

- 4903 (a) that the case raises a question of principle; or
- 4904 (b) that it is unreasonable, having regard to the complexity of the case, or to any other matter, to expect the applicant to deal with it without such assistance,

or by reason of any other special consideration<sup>8</sup>.

Such assistance by the Secretary of State or the Assembly or the relevant Welsh minister may include:

- 4905 (i) giving advice;
- 4906 (ii) procuring or attempting to procure the settlement of the matter in dispute;
- 4907 (iii) arranging for the giving of advice or assistance by a solicitor<sup>9</sup> or counsel;
- 4908 (iv) arranging for representation by a solicitor or counsel, including such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings, or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings; and
- 4909 (v) any other form of assistance which the Secretary of State or the Assembly or minister may consider appropriate;

but head (iv) above does not affect the law and practice regulating the descriptions of persons who may appear in, conduct, defend and address the court in any proceedings<sup>10</sup>.

In so far as expenses are incurred by the Secretary of State or the Assembly or the relevant Welsh minister in providing the applicant with assistance under these provisions, the recovery of those expenses, as taxed or assessed in such manner as may be prescribed by rules of court, constitute a first charge for the benefit of the Secretary of State or the Assembly or minister:

- 4910 (A) on any costs which, whether by virtue of a judgment or order of a court or an agreement or otherwise, are payable to the applicant by any other person in respect of the matter in connection with which the assistance was given; and
- 4911 (B) so far as relates to any costs, on his rights under any compromise or settlement arrived at in connection with that matter to avoid or bring to an end any proceedings;

but subject to any charge imposed by the Access to Justice Act 1999<sup>11</sup> and any provision in, or made under, Part I of that Act<sup>12</sup> for the payment of any sum to the Legal Services Commission<sup>13</sup>.

1 The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see the Housing Act 1985 s 142A (as added); and PARA 1872 ante.

2 le under ibid Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1912 et seq post.

3 For the meaning of 'dwelling house' see PARA 1796 ante.

4 Housing Act 1985 s 170(1). Section 170(1) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3(1), Schedule para 54. See also PARA 1907 the text and notes 20-24 ante.

5 As to the Secretary of State see PARA 27 note 3 ante.

6 As to the transfer of functions so far as exercisable in relation to Wales see PARA 27 note 4 ante.

7 Housing Act 1985 s 170(2) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 para 18).

8 Housing Act 1985 s 170(3).

9 For these purposes, references to a solicitor include the Treasury Solicitor (ibid s 170(6)); and references to a solicitor include also references to a body corporate recognised by the Council of the Law Society under the Administration of Justice Act 1985 s 9 (as amended) (see LEGAL PROFESSIONS vol 65 (2008) PARA 687 et seq) (Solicitors' Incorporated Practices Order 1991, SI 1991/2684, arts 2(1), 3, 4(a), Sch 1).

10 Housing Act 1985 s 170(4).

11 le under the Access to Justice Act 1999 s 10(7): see LEGAL AID vol 65 (2008) PARA 97.

12 le ibid Pt I (ss 1-26) (as amended): see LEGAL AID vol 65 (2008) PARA 17 et seq.

13 Housing Act 1985 s 170(5) (amended by the Access to Justice Act 1999 s 24, Sch 4, PARA 37). As to the Legal Services Commission see LEGAL AID vol 65 (2008) PARA 17 et seq.

## **UPDATE**

### **1911 Power to give assistance in connection with legal proceedings**

NOTE 9--SI 1991/2684 renamed the Solicitors' Recognised Bodies Order 1991: SI 2009/500. SI 1991/2684 art 3 amended: SI 2009/500. See also SI 1991/2684 art 5.

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## **(8) REGISTRATION OF TITLE**

### **(i) Right to Buy**

#### **1912. Registration of title.**

Where the landlord's<sup>1</sup> title to the dwelling house<sup>2</sup> is not registered, the landlord must give the tenant<sup>3</sup> a certificate stating that the landlord is entitled to convey the freehold or make the grant subject only to such incumbrances, rights and interests as are stated in the conveyance or grant or summarised in the certificate<sup>4</sup>.

Where the landlord's interest in the dwelling house is a lease<sup>5</sup>, the certificate must also state particulars of that lease and, with respect to each superior title:

- 4912 (1) where it is registered, the title number;
- 4913 (2) where it is not registered, whether it was investigated in the usual way on the grant of the landlord's lease<sup>6</sup>.

The Chief Land Registrar must, for the purpose of the registration of title, accept such a certificate as sufficient evidence of the facts stated in it; but, if as a result he has to meet a claim against him<sup>7</sup>, the landlord is liable to indemnify him<sup>8</sup>.

1 For the meaning of 'landlord' see PARA 1300 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'tenant' see PARA 1300 note 1 ante.

4 Housing Act 1985 s 154(2). A certificate under s 154(2) must be in a form approved by the Chief Land Registrar and must be signed by such officer of the landlord or such other person as may be approved by the Chief Land Registrar: s 154(4).

5 For the meaning of 'lease' see PARA 1300 note 1 ante.

6 Housing Act 1985 s 154(3).

7 ie under the Land Registration Act 2002: see LAND REGISTRATION.

8 Housing Act 1985 s 154(5) (amended by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (3)).

The Housing Act 1985 s 154 (as amended) is modified where the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: see art 3, Schedule para 40. The Housing Act 1985 s 154(1) (now repealed) is stated to be (1) modified where the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq ante), apply (see reg 2, Sch 1 para 19); (2) substituted where the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 18); but it is apprehended that these provisions have now lapsed with the repeal of the Housing Act 1985 s 154(1).

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## **(ii) Preserved Right to Buy**

### **1913. Statement to be contained in instrument effecting qualifying disposal.**

On a qualifying disposal<sup>1</sup>, the disponent must secure that the instrument effecting the disposal:

4914 (1) states that the disposal is, so far as it relates to dwelling houses<sup>2</sup> occupied by secure tenants<sup>3</sup>, a disposal in a case where the right to buy is preserved on a disposal to a private landlord<sup>4</sup>; and

4915 (2) lists, to the best of the disponor's knowledge and belief, the dwelling houses to which the disposal relates which are occupied by secure tenants<sup>5</sup>.

1 For the meaning of 'qualifying disposal' see PARA 1901 note 19 ante. For these purposes, references to a disposal or to the instrument effecting a disposal are to the conveyance, transfer, grant or assignment, as the case may be: Housing Act 1985 s 171G, Sch 9A para 10 (Sch 9A added by the Housing and Planning Act 1986 s 8(2), Sch 2). See also PARA 1900 note 12 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 For the meaning of 'secure tenant' see PARA 1795 note 2 ante.

4 Is a disposal to which the Housing Act 1985 s 171A (as added) applies: see PARA 1900 ante.

5 Ibid Sch 9A para 1 (as added: see note 1 supra). The Housing Act 1985 Sch 9A (as added and amended) is omitted where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies (see art 3(1), Schedule para 71); (2) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 42).

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### **1914. Registration of title on qualifying disposal.**

Where on a qualifying disposal<sup>1</sup> the disponor's title to the dwelling house<sup>2</sup> is not registered, the disponor must give the disponee a certificate stating that the disponor is entitled to effect the disposal subject only to such incumbrances, rights and interests as are stated in the instrument effecting the disposal or summarised in the certificate<sup>3</sup>. Where the disponor's interest in the dwelling house is a lease<sup>4</sup>, the certificate must also state particulars of the lease and, with respect to each superior title:

4916 (1) where it is registered, the title number;

4917 (2) where it is not registered, whether it was investigated in the usual way on the grant of the disponor's lease<sup>5</sup>.

The certificate must be in a form approved by the Chief Land Registrar and must be signed by such officer of the disponor or such other person as may be approved by the Chief Land Registrar; and the Chief Land Registrar must, for the purpose of registration of title, accept the certificate as sufficient evidence of the facts stated in it<sup>6</sup>.

Where the Chief Land Registrar approves an application for registration of a disposition of registered land or, as the case may be, of the disponee's title under a disposition of unregistered land, and the instrument effecting the disposal contains the required statement described above, he must enter in the register:

4918 (a) a notice in respect of the rights of qualifying persons<sup>7</sup> in relation to dwelling houses comprised in the disposal; and

4919 (b) a restriction reflecting the statutory limitation<sup>8</sup> on subsequent disposal<sup>9</sup>.

Where the registered title to land contains an entry made by virtue of the preserved right to buy<sup>10</sup>, the Chief Land Registrar must, for the purpose of removing or amending the entry, accept as sufficient evidence of the facts stated in it a certificate by the registered proprietor that the whole or a specified part of the land is not subject to any right of a qualifying person under the right to buy<sup>11</sup>.

1 For the meaning of 'qualifying disposal' see PARA 1901 note 19 ante; and for the meaning of references to a disposal see PARA 1913 note 1 ante.

2 For the meaning of 'dwelling house' see PARA 1796 ante.

3 Housing Act 1985 s 171G, Sch 9A para 2(2) (Sch 9A added by the Housing and Planning Act 1986 Sch 2; the Housing Act 1985 Sch 9A para 2(2) amended by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (6)).

4 For the meaning of 'lease' see PARA 1300 note 1 ante.

5 Housing Act 1985 Sch 9A para 2(3) (as added: see note 3 supra).

6 Ibid Sch 9A para 2(4) (as added: see note 3 supra).

7 Ie under ibid Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1915 et seq post. For the meaning of 'qualifying person' see PARA 1903 note 4 ante.

8 Ie under ibid s 171D(2) (as added): see PARA 1903 ante.

9 Ibid Sch 9A para 4 (substituted by the Land Registration Act 2002 Sch 11 para 18(1), (7)).

10 As to when the preserved right to buy arises see PARA 1900 ante.

11 Housing Act 1985 Sch 9A para 8 (as added: see note 3 supra). As to the circumstances in which Sch 9A (as added and amended) is omitted see PARA 1913 note 5 ante.

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### **1915. Change of qualifying dwelling house.**

The following provisions apply where a new dwelling house<sup>1</sup> becomes<sup>2</sup> the qualifying dwelling house<sup>3</sup> which is entirely different from the previous qualifying dwelling house or includes new land, and apply to the new dwelling house or the new land, as the case may be<sup>4</sup>.

If the landlord's<sup>5</sup> title is registered, the landlord must apply for the entry in the register of:

- 4920 (1) a notice in respect of the rights of the qualifying person<sup>6</sup> or persons<sup>7</sup>; and
- 4921 (2) a restriction reflecting the statutory limitation<sup>8</sup> on subsequent disposal<sup>9</sup>.

If the landlord's title is not registered, the rights of the qualifying person or persons are registrable under the Land Charges Act 1972 in the same way as an estate contract<sup>10</sup> and the landlord must, and a qualifying person may, apply for such registration<sup>11</sup>.

- 1 For the meaning of 'dwelling house' see PARA 1796 ante.
- 2 Ie by virtue of the Housing Act 1985 s 171B(6) (as added): see PARA 1901 ante.
- 3 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 ante.
- 4 Housing Act 1985 s 171G, Sch 9A para 5(1) (Sch 9A added by the Housing and Planning Act 1986 s 8(2), Sch 2). See also PARA 1900 note 12 ante.
- 5 For the meaning of 'landlord' see PARA 1300 note 1 ante.
- 6 For the meaning of 'qualifying person' see PARA 1903 note 4 ante.
- 7 Ie under the provisions of the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1916 et seq post.
- 8 Ie under ibid s 171D(2) (as added): see PARA 1903 ante.
- 9 Ibid Sch 9A para 5(2) (substituted by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (8)).
- 10 See LAND CHARGES vol 26 (2004 Reissue) PARA 628 et seq.
- 11 Housing Act 1985 Sch 9A para 5(4) (as added: see note 4 supra). Where, by virtue of Sch 9A para 5(4) (as so added), the rights of a qualifying person under Pt V (as amended) in relation to the qualifying dwelling house are registrable under the Land Charges Act 1972 in the same way as an estate contract, s 4(6) (as amended) (circumstances in which such a contract may be void against a purchaser: see LAND CHARGES vol 26 para 643) applies accordingly, with the substitution for the reference to the contract being void of a reference to the right to buy ceasing to be preserved: Housing Act 1985 Sch 9A para 6(2) (as so added). As to the circumstances in which Sch 9A (as added and amended) is omitted see PARA 1913 note 5 ante.

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### **1916. Statement required on certain disposals on which right to buy ceases to be preserved.**

A conveyance of the freehold or grant of a lease<sup>1</sup> of the qualifying dwelling house<sup>2</sup> to a qualifying person<sup>3</sup> in pursuance of the right to buy<sup>4</sup> must state that it is made in pursuance of the statutory right to buy<sup>5</sup> as that right applies by virtue of the statutory preservation<sup>6</sup> of that right<sup>7</sup>.

Where on a conveyance of the freehold or grant of a lease of the qualifying dwelling house to a qualifying person otherwise than in pursuance of the right to buy the dwelling house ceases to be subject to any rights arising under the statutory provisions relating to the right to buy, the conveyance or grant must contain a statement to that effect<sup>8</sup>.

Where on a disposal<sup>9</sup> of an interest in a qualifying dwelling house the dwelling house ceases to be subject to the rights of a qualifying person by virtue of that person's becoming the tenant of an authority or body satisfying the landlord condition for secure tenancies<sup>10</sup>, the instrument by which the disposal is effected must state that the dwelling house ceases as a result of the disposal to be subject to any rights arising by virtue of the statutory preservation of the right to buy<sup>11</sup>.

- 1 For the meaning of 'lease' see PARA 1300 note 1 ante.
- 2 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 ante.



- 3 For the meaning of 'qualifying person' see PARA 1903 note 4 ante.
- 4 For the meaning of 'the right to buy' see PARA 1803 ante.
- 5 le the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARAS 1917, 1922 post.
- 6 le by virtue of ibid s 171A (as added): see PARA 1900 ante.
- 7 Ibid s 171G, Sch 9A para 7(1) (Sch 9A added by the Housing and Planning Act 1986 s 8(2), Sch 2). See also PARA 1900 note 12 ante.
- 8 Housing Act 1985 Sch 9A para 7(2) (as added: see note 7 supra).
- 9 For the meaning of references to a disposal see PARA 1913 note 1 ante.
- 10 le by virtue of the Housing Act 1985 s 171D(1)(a) (as added) (see PARA 1903 ante at head (1) in the text) or s 171E(2)(a) (as added) (see PARA 1904 ante).
- 11 Ibid Sch 9A para 7(3) (as added: see note 7 supra). As to the circumstances in which Sch 9A (as added and amended) is omitted see PARA 1913 note 5 ante.

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### **1917. Liability to compensate or indemnify.**

A claim for breach of statutory duty<sup>1</sup> lies where:

- 4922 (1) the disponor on a qualifying disposal<sup>2</sup> fails to comply with his duty to secure the inclusion of the required statement in the instrument effecting the disposal<sup>3</sup>; or
- 4923 (2) the landlord<sup>4</sup> on a change of the qualifying dwelling house<sup>5</sup> fails to comply with his duty to apply for registration to protect the preserved right to buy<sup>6</sup>,

and a qualifying person<sup>7</sup> is deprived of the preserved right to buy by reason of the non-registration of the matters which would have been registered if that duty had been complied with<sup>8</sup>.

If the Chief Land Registrar has to meet a claim<sup>9</sup> as a result of acting upon:

- 4924 (a) a certificate of title on first registration<sup>10</sup>;
- 4925 (b) a statement required on a disposal on which the right to buy ceases to be preserved<sup>11</sup>; or
- 4926 (c) a certificate that the dwelling house has ceased to be subject to the right to buy<sup>12</sup>,

the person who gave the certificate or made the statement must indemnify him<sup>13</sup>.

1 As to claims for breach of statutory duty see generally TORT. The statutory wording is 'an action for breach of statutory duty', but an action is now generally referred to as a 'claim': see CIVIL PROCEDURE vol 11 (2009) PARA 18.

2 For the meaning of 'qualifying disposal' see PARA 1901 note 19 ante; and for the meaning of references to a disposal see PARA 1913 note 1 ante.

3 He fails to comply with the Housing Act 1985 s 171G, Sch 9A para 1 (as added and amended): see PARA 1913 ante.

4 For the meaning of 'landlord' see PARA 1300 note 1 ante.

5 For the meaning of 'qualifying dwelling house' see PARA 1903 note 2 ante.

6 He fails to comply with the Housing Act 1985 Sch 9A para 5(2) (as substituted) or Sch 9A para 5(4) (as added): see PARA 1915 ante.

7 For the meaning of 'qualifying person' see PARA 1903 note 4 ante.

8 Housing Act 1985 Sch 9A para 9(1) (Sch 9A added by the Housing and Planning Act 1986 s 8(2), Sch 2).

9 He under the Land Registration Act 2002: see LAND REGISTRATION.

10 He a certificate given in pursuance of the Housing Act 1985 Sch 9A para 2 (as added and amended): see PARA 1914 ante.

11 He a statement made in pursuance of ibid Sch 9A para 7 (as added): see PARA 1916 ante.

12 He a certificate given in pursuance of ibid Sch 9A para 8 (as added): see PARA 1914 ante.

13 Ibid Sch 9A para 9(2) (as added (see note 8 supra); amended by the Land Registration Act 2002 s 133, Sch 11 para 18(1), (11)). As to the circumstances in which Sch 9A (as added and amended) is omitted see PARA 1913 note 5 ante.

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## **(9) CHARGE TO STAMP DUTY LAND TAX**

### **1918. Introduction.**

The circumstances in which stamp duty land tax is chargeable on the grant of a lease have already been discussed<sup>1</sup>. That tax is dealt with in detail elsewhere in this work<sup>2</sup>; but the Finance Act 2003 makes particular provision with regard to:

- 4927 (1) right to buy transactions<sup>3</sup>;
- 4928 (2) shared ownership leases<sup>4</sup>, including those granted under the preserved right to buy<sup>5</sup>; and
- 4929 (3) rent to mortgage transactions<sup>6</sup>;

and those provisions are discussed below<sup>7</sup>.

1 See PARA 124 ante.

2 See generally STAMP DUTIES AND STAMP DUTY RESERVE TAX.

3 For the meaning of 'right to buy transaction' for these purposes see PARA 1919 post.

4 For the meaning of 'shared ownership lease' for these purposes see PARA 1920 post. There is now no statutory right to be granted such a lease: see PARA 1795 ante.

5 As to the preserved right to buy see PARA 1900 et seq ante.

6 For the meaning of 'rent to mortgage transaction' for these purposes see PARA 1921 post. The right to acquire on rent to mortgage terms under the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1872 et seq ante) is now only exercisable if claimed before 18 July 2005: see s 142A (as added); and PARA 1872 ante.

7 See the Finance Act 2003 s 70, Sch 9 (as amended); and PARAS 1919-1921 post.

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### **1919. Right to buy transactions.**

Where the whole or part of the chargeable consideration<sup>1</sup> for a transaction is contingent<sup>2</sup>, the amount or value of the consideration must normally be determined for the purposes of the charge to stamp duty land tax<sup>3</sup> on the assumption that the outcome of the contingency will be such that the consideration is payable or, as the case may be, does not cease to be payable<sup>4</sup>. In the case of a right to buy transaction, however, that requirement does not apply<sup>5</sup> and any consideration that would be payable only if a contingency were to occur, or that is payable only because a contingency has occurred, does not count as chargeable consideration<sup>6</sup>.

A 'right to buy transaction' means, for these purposes:

- 4930 (1) the sale of a dwelling at a discount, or the grant of a lease of a dwelling at a discount, by a relevant public sector body<sup>7</sup>; or
- 4931 (2) the sale of a dwelling, or the grant of a lease of a dwelling, in pursuance of the preserved right to buy<sup>8</sup>.

1 For the meaning of 'chargeable consideration' see the Finance Act 2003 s 50, Sch 4 (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX. A grant under the Housing Act 1996 s 20 (as amended) or s 21 (as amended) (purchase grants in respect of disposals at a discount by registered social landlords: see PARA 1807 ante) does not count as part of the chargeable consideration for a right to buy transaction in relation to which the vendor is a registered social landlord: Finance Act 2003 s 70, Sch 9 para 1(5).

2 For these purposes, 'contingent', in relation to consideration, means (1) that it is to be paid or provided only if some uncertain future event occurs; or (2) that it is to cease to be paid or provided if some uncertain future event occurs: *ibid* s 51(3).

3 *Ie* for the purposes of *ibid* Pt 4 (ss 42-124) (as amended): see PARA 124 ante; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

4 See *ibid* s 51(1); and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

5 *Ibid* Sch 9 para 1(1)(a).

6 *Ibid* Sch 9 para 1(1)(b).

7 The following are relevant public sector bodies for these purposes (*ibid* Sch 9 para 1(3) (amended by the Welsh Development Agency (Transfer of Functions to the National Assembly for Wales and Abolition) Order 2005, SI 2005/3226, art 7(1)(b), Sch 2 Pt 1 para 14), *ie*:

61 (1) government: a Minister of the Crown; Northern Ireland department;

- 62 (2) local government: a local housing authority within the meaning of the Housing Act 1985 (see PARA 1311 note 4 ante); a county council in England; a district council within the meaning of the Local Government Act (Northern Ireland) 1972;
- 63 (3) social housing: the Housing Corporation (see HOUSING vol 22 (2006 Reissue) PARA 18); the Northern Ireland Housing Executive; a registered social landlord (see HOUSING vol 22 (2006 Reissue) PARAS 11, 66 et seq); a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq);
- 64 (4) new towns and development corporations: the Commission for the New Towns (now part of English Partnerships: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq); a development corporation established by an order made, or having effect as if made, under the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq); a new town commission established under the New Towns Act (Northern Ireland) 1965 s 7; an urban development corporation established by an order made under the Local Government, Planning and Land Act 1980 s 135 (as amended) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq);
- 65 (5) police: a police authority within the meaning of the Police Act 1996 s 101(1) (as amended); the Northern Ireland Policing Board;
- 66 (6) miscellaneous: an Education and Libraries Board within the meaning of the Education and Libraries (Northern Ireland) Order 1986, SI 1986/594; the United Kingdom Atomic Energy Authority; and a body prescribed for these purposes by Treasury order.

Heads (1)-(6) supra omit the statutory references to public sector bodies in Scotland.

8 Finance Act 2003 Sch 9 para 1(2). For the purposes of head (2) in the text, the transfer of a dwelling, or the grant of a lease of a dwelling, is made in pursuance of the preserved right to buy if (1) the vendor is, in England and Wales, a person against whom the right to buy under the Housing Act 1985 Pt V (ss 118-188) (as amended) (see PARA 1795 et seq ante, PARA 1922 post) is exercisable by virtue of s 171A (as added) (see PARA 1900 ante); (2) the purchaser is the qualifying person for the purposes of the preserved right to buy (see PARA 1901 ante); and (3) the dwelling is the qualifying dwelling house in relation to the purchaser (see PARA 1901 ante): Finance Act 2003 Sch 9 para 1(4).

## UPDATE

### 1919 Right to buy transactions

NOTE 7--Finance Act 2003 Sch 9 para 1(3) further amended: Housing and Regeneration Act 2008 Sch 8 para 80(2). See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

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### 1920. Shared ownership leases.

Where a shared ownership lease<sup>1</sup> is granted by a qualifying body<sup>2</sup>, or in pursuance of the preserved right to buy<sup>3</sup>, and the statutory conditions are met<sup>4</sup>, the purchaser may elect for stamp duty land tax<sup>5</sup> to be charged either:

- 4932 (1) in accordance with the provisions allowing election for market value treatment<sup>6</sup>; or
- 4933 (2) in accordance with the provisions<sup>7</sup> allowing for staircasing<sup>8</sup>.

Where the purchaser elects for tax to be charged in accordance with head (1) above, an election for tax to be so charged must be included in the land transaction return<sup>9</sup> made in respect of the grant of the lease, or in an amendment of that return, and is irrevocable, so that the return may not be amended so as to withdraw the election<sup>10</sup>. The transfer of the reversion to the lessee or lessees under the terms of a lease to which head (1) above applies is exempt from charge if an election was made for tax to be charged in accordance with the above provisions, and any tax chargeable in respect of the grant of the lease has been paid<sup>11</sup>.

Similarly, where the purchaser elects for tax to be charged in accordance with head (2) above, an election for tax to be so charged must be included in the land transaction return made in respect of the grant of the lease, or in an amendment of that return, and is irrevocable, so that the return may not be amended so as to withdraw the election<sup>12</sup>.

Where under a shared ownership lease<sup>13</sup>:

- 4934 (a) the lessee or lessees have the right, on the payment of a sum, to require the terms of the lease to be altered so that the rent payable under it is reduced; and
- 4935 (b) by exercising that right the lessee or lessees acquire an interest, additional to one already held, calculated by reference to the market value of the dwelling<sup>14</sup> and expressed as a percentage of the dwelling or its value (a 'share of the dwelling'),

such an acquisition is exempt from charge if:

- 4936 (i) an election was made for stamp duty land tax to be charged in accordance with head (1) or, as the case may be, head (2) above and any tax chargeable in respect of the grant of the lease has been paid; or
- 4937 (ii) immediately after the acquisition the total share of the dwelling held by the lessee or lessees does not exceed 80 per cent<sup>15</sup>.

1    Ie a lease which satisfies the conditions set out in note 4 infra.

2    For these purposes, a 'qualifying body' means (1) a local housing authority within the meaning of the Housing Act 1985 (see PARA 1311 note 4 ante); (2) a housing association within the meaning of the Housing Associations Act 1985 or the corresponding Northern Ireland legislation; (3) a housing action trust established under the Housing Act 1988 Pt III (ss 60-92) (as amended) (see HOUSING vol 22 (2006 Reissue) PARA 319 et seq); (4) the Northern Ireland Housing Executive; (5) the Commission for the New Towns (now part of English Partnerships: see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1383 et seq); (6) a development corporation established by an order made, or having effect as if made, under the New Towns Act 1981 (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1322 et seq); Finance Act 2003 s 70, Sch 9 para 5(1), (2) (Sch 9 para 5(1) amended by the Finance Act 2004 s 303(2)).

3    For these purposes, a lease is granted 'in pursuance of the preserved right to buy' if: (1) the vendor is a person against whom the right to buy under the Housing Act 1985 Pt V (ss 118-188) (as amended) is exercisable by virtue of s 171A (as added) (preservation of right to buy on disposal to private sector landlord: see PARA 1900 ante); (2) the lessee is, or lessees are, the qualifying person for the purposes of the preserved right to buy (see PARA 1901 ante); and (3) the lease is of a dwelling that is the qualifying dwelling house in relation to the purchaser (see PARA 1901 ante): Finance Act 2003 Sch 9 para 5(1), (3) (as amended: see note 2 supra).

4    The statutory conditions are as follows: see *ibid* Sch 9 paras 2(2), 4(2). In case to which head (1) in the text applies (ie a case falling within Sch 9 para 2(2)):

- 67   (1) the lease must be of a dwelling;
- 68   (2) the lease must give the lessee or lessees exclusive use of the dwelling;
- 69   (3) the lease must provide for the lessee or lessees to acquire the reversion;

70 (4) the lease must be granted partly in consideration of rent and partly in consideration of a premium calculated by reference to (a) the market value of the dwelling; or (b) a sum calculated by reference to that value;

71 (5) the lease must contain a statement of (a) the market value of the dwelling; or (b) the sum calculated by reference to that value, by reference to which the premium is calculated.

Section 118 (meaning of 'market value': see STAMP DUTIES AND STAMP DUTY RESERVE TAX) does not apply in relation to the reference in head (5) supra to the market value of the dwelling: Sch 9 para 2(5).

In a case to which head (2) in the text applies (ie a case falling within Sch 9 para 4(2)):

72 (i) the lease must be of a dwelling;

73 (ii) the lease must give the lessee or lessees exclusive use of the dwelling;

74 (iii) the lease must provide that the lessee or lessees may, on the payment of a sum, require the terms of the lease to be altered so that the rent payable under it is reduced;

75 (iv) the lease must be granted partly in consideration of rent and partly in consideration of a premium calculated by reference to (A) the premium obtainable on the open market for the grant of a lease containing the same terms as the lease but with the substitution of the minimum rent for the rent payable under the lease; or (B) a sum calculated by reference to that premium;

76 (v) the lease must contain a statement of the minimum rent and of (A) the premium obtainable on the open market; or (B) the sum calculated by reference to that premium, by reference to which the premium is calculated.

For these purposes, the 'minimum rent' means the lowest rent which could become payable under the lease if it were altered as mentioned in head (iii) supra at the date when the lease is granted: Sch 9 para 4(5).

5 As to stamp duty land tax see PARA 124 ante; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

6 Ie in accordance with the Finance Act 2003 Sch 9 para 2.

7 Ie in accordance with ibid Sch 9 para 4.

8 See ibid Sch 9 paras 2(1), 4(1).

9 As to the land transaction return see ibid s 76; and STAMP DUTIES AND STAMP DUTY RESERVE TAX.

10 Ibid Sch 9 para 2(3). Where Sch 9 para 2 applies, the chargeable consideration for the grant of the lease is to be taken to be the amount stated in the lease in accordance with Sch 9 para 2(2)(e)(i) or (ii) (see note 4 head (5)(a), (b) supra): Sch 9 para 2(4).

11 Ibid Sch 9 para 3.

12 Ibid Sch 9 para 4(3). Where Sch 9 para 4 applies, the rent in consideration of which the lease is granted is to be taken to be the minimum rent stated in the lease in accordance with Sch 9 para 4(2)(e) (see note 4 head (v) supra), and the chargeable consideration for the grant other than rent is to be taken to be the amount stated in the lease in accordance with Sch 9 para 4(2)(e)(i) or (ii) (see note 4 head (v)(A), (B) supra): Sch 9 para 4(4).

13 For these purposes, 'shared ownership lease' means a lease granted (1) by a qualifying body (see note 2 supra); or (2) in pursuance of the preserved right to buy (see note 3 supra), in relation to which the conditions in ibid Sch 9 para 2(2) or Sch 9 para 4(2) (see note 4 supra) are met: Sch 9 para 4A(3) (Sch 9 para 4A added by the Finance Act 2004 s 303(1)).

14 The Finance Act 2003 s 118 (meaning of 'market value') does not apply in relation to the references in Sch 9 para 4A (as added) to the market value of the dwelling: Sch 9 para 4A(4) (as added: see note 13 supra).

15 Ibid Sch 9 para 4A(1), (2) (as added: see note 13 supra).

## UPDATE

### 1920 Shared ownership leases

NOTE 2--Finance Act 2003 Sch 9 para 5(2) amended: Housing and Regeneration Act 2008 Sch 8 para 80(3).

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### **1921. Rent to mortgage transactions.**

The chargeable consideration<sup>1</sup> for a rent to mortgage transaction is determined in accordance with the following provisions<sup>2</sup>; and for these purposes a 'rent to mortgage transaction' means:

- 4938 (1) the transfer of a dwelling to a person; or
- 4939 (2) the grant of a lease of a dwelling to a person,

pursuant to the exercise by that person of the right<sup>3</sup> (where still exercisable<sup>4</sup>) to acquire on rent to mortgage terms<sup>5</sup>.

The chargeable consideration for such a transaction is equal to the price that would be payable<sup>6</sup> for:

- 4940 (a) a transfer of the dwelling to the person, where the rent to mortgage transaction is a transfer; or
- 4941 (b) the grant of a lease of the dwelling to the person, where the rent to mortgage transaction is the grant of a lease,

if the person were exercising the right<sup>7</sup> to buy<sup>8</sup>.

1 For the meaning of 'chargeable consideration' see the Finance Act 2003 s 50, Sch 4 (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX. See also PARA 1919 note 1 ante.

2 Ibid s 70, Sch 9 para 6(1).

3 Ie under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante, PARA 1922 post.

4 The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see ibid s 142A (as added); and PARA 1872 ante.

5 Finance Act 2003 Sch 9 para 6(2).

6 Ie by virtue of the Housing Act 1985 s 126: see PARA 1836 ante.

7 See note 3 supra.

8 Finance Act 2003 Sch 9 para 6(3). For the meaning of 'the right to buy' see PARA 1803 ante.

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## **(10) JURISDICTION**

### **1922-2000. Jurisdiction of the county court.**

A county court has jurisdiction:

- 4942 (1) to entertain any proceedings brought under the statutory provisions relating to the right to buy and the right to acquire on rent to mortgage terms<sup>1</sup>; and
- 4943 (2) to determine any question arising under the right to buy or under a conveyance or grant executed in pursuance of the right to acquire on rent to mortgage terms,

but subject to the power of the district valuer<sup>2</sup> to determine matters of valuation<sup>3</sup>.

The jurisdiction so conferred includes jurisdiction to entertain proceedings on any such question as is mentioned in head (2) above notwithstanding that no other relief is sought than a declaration<sup>4</sup>.

1    le any proceedings brought under the Housing Act 1985 Pt V (ss 118-188) (as amended): see PARA 1795 et seq ante. See also PARA 1795 note 7 ante. The right to acquire on rent to mortgage terms is now only exercisable if claimed before 18 July 2005: see s 142A (as added); and PARA 1872 ante.

2    le under ibid s 128 (as amended) (see PARA 1838 ante), s 155C (as added) (see PARA 1890 ante) and s 158 (as amended) (see PARA 1898 ante).

3    Ibid s 181(1) (amended by the Leasehold Reform, Housing and Urban Development Act 1993 s 187(1), Sch 21 paras 22, 23; the Housing Act 2004 s 186(2)).

The Housing Act 1985 s 181(1) (as so amended) is modified where (1) the Housing (Extension of Right to Buy) Order 1993, SI 1993/2240 (see PARA 1798 ante), applies: (see art 3(1), Schedule para 62); (2) the Housing (Preservation of Right to Buy) Regulations 1993, SI 1993/2241 (see PARA 1900 et seq ante), apply (see reg 2(1), Sch 1 para 37); (3) the Housing (Right to Acquire) Regulations 1997, SI 1997/619 (right to acquire conferred by the Housing Act 1996: see PARAS 1804-1807 ante), apply (see the Housing (Right to Acquire) Regulations 1997, SI 1997/619, reg 2, Sch 1 para 35).

4    Housing Act 1985 s 181(2). If a person takes proceedings in the High Court which he could, by virtue of the Housing Act 1985 s 181 (as amended), have taken in the county court, he is not entitled to recover any costs: s 181(3) (prospectively repealed by the Courts and Legal Services Act 1990 s 125(7), Sch 20, as from a day to be appointed; at the date at which this title states the law, that repeal was not in force). See also *Gregory v Tower Hamlets London Borough Council* [2006] All ER (D) 65 (Jul), CA (where proceedings begun in the county court are transferred to the Queen's Bench Division of the High Court under CPR 54.20, which provides that 'the court may order a claim to continue as if it had not been started under this section' and enables claims brought by judicial review to continue as ordinary civil claims under CPR Pt 7, that does not necessarily lead to the conclusion that the proceedings could have been brought in the county court and are solely proceedings under the Housing Act 1985 Pt V (as amended), and s 181(3) does not deprive the court of jurisdiction to make a costs order in favour of the claimant).

### **UPDATE**

#### **1922-2000 Jurisdiction of the county court**

TEXT AND NOTE 3--1985 Act s 181(1) further amended: Housing and Regeneration Act 2008 s 306(11).